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# Judicial Cases

concerning

# American Slavery and the Negro

EDITED BY  
HELEN TUNNICLIFF CATTERALL  
(MRS. RALPH C. H. CATTERALL)

VOLUME I

Cases from the Courts of  
England, Virginia, West Virginia, and Kentucky



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PAPERS OF THE DEPARTMENT OF HISTORICAL RESEARCH  
J. FRANKLIN JAMESON, EDITOR

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## PREFACE.

That the history of American slavery and of the American negro forms a most important chapter in the history of the United States no one will deny. An institution that for two centuries formed a principal basis of economic and social life throughout large parts of the country, a portentous growth in the body politic, whose removal called for the sharp surgery of civil war, a residual mass of difficult problems in the relations of races, the historical development of a tenth of our present population—such elements as these invest the theme with an interest and importance that will not be questioned. Anyone however who is solicitous for the secure and orderly progress of American historical studies will readily perceive that this chapter of American history is very insufficiently documented. Of the hundreds of volumes of historical materials which the federal and state governments and our numerous historical societies have poured forth, almost none concerns the history of the American negro and of American slavery. Political and other reasons make it unlikely that in the immediate future—apart from the excellent work which is being done, with limited means, by the Association for the Study of Negro Life and History—such organizations, governmental or private, will do much toward illuminating by documentary publications this large and momentous chapter in our history.

It is true that a multitude of books were written in former times, and are still available, on those aspects of slavery, moral or Biblical or constitutional, which were involved in the question of its abolition. Students of the present day have little need of additional material for the understanding of that ancient debate. Now that the agitations of the 'fifties and 'sixties have receded a long way into the past, and the contest over slavery has taken its place in perspective as an episode, though a gigantic and fateful episode, in the history of the continent, students of history are more concerned to learn what they can of American slavery as an actual institution, of its character and implications in social and economic life. Here they find themselves very inadequately supplied with trustworthy materials. Often they must rely on the observations of travellers. How insecure is this reliance, we may judge from what we sometimes read in 1926 in the books of travellers who do us the honor to inspect us under the easy conditions of twentieth-century travel; and the travellers who visited the regions of slavery in the earlier part of the nineteenth century had a much more restricted range, and were apt to base their observations on plantations belonging to that special class of persons to whom European ladies and gentlemen were given introductions. Statistical material on the economics or the social character of American slavery is not on the whole copious, nor beyond a certain point illuminating. If there

are other classes of sources which can be drawn upon for increase of our knowledge, there is a real need that they should be exploited.

Under such conditions of demand and of probable (or improbable) supply, the Department of Historical Research in the Carnegie Institution of Washington has felt itself to be distinctly called upon to turn some of its endeavors in this direction. More than one project of publication of sources for negro history has been framed, but the work which is farthest advanced at the present time is that of which the first volume is herewith presented, a series of volumes into which shall be drawn off the historical materials concerning American slavery and the negro that are to be found imbedded in the published volumes of judicial reports.

Constituted as American society is, all large aspects of American economic or social life are certain to find ample representation in these reports—save only that cases of the lowest grade of importance are not so likely to find their way up to those high tribunals whose decisions are preserved in printed volumes. Thousands of cases concerning slavery and the negro appear in them. The total mass of the decisions which they record exhibits fully and in detail the development of American law respecting slavery and the negro, in so far as that law was the product of judicial determination. A similar value attaches to the English decisions. Even more valuable to the historian is the mass of factual data which the reports offer, either in the narrative portions by which reporter or judge or counsel explains the origin or nature of the litigation or in the quotations from documents—wills, deeds, bills of sale, contracts, and what not—which are imbedded in the official explanations of the case.

First and last, these reports, in their thousands of negro cases, may be said to afford, in almost unlimited variety, instances of every sort of complication or situation that could arise from the institution of slavery in such a country as the United States. They show us the complications that might arise from the presence of negro, white, and Indian blood in varying proportions, those that in early days arose from christening or baptism, the incidents of the slave trade, of importations into this or that state, of the migration of free negroes from one state to another having different laws respecting their residence, of the relations of slave husbands to slave wives, of free negro husbands to wives whom they owned or to wives owned by others, and of white fathers to their slave children. They present a multitude of instances of manumission, with every variety of provision for the future of the manumitted, in America or in Liberia, and for that of their existing or future offspring. They give us many glimpses of sales and prices, and of the deceptions that might be practised in respect to the physical condition or usefulness of slaves sold. In the numerous cases turning on the distribution of the estates of persons dying intestate, on dowry, and on wills, they reveal the varying dispositions of masters and mistresses toward their human property, the opportunities for influence of favorite slaves, and the difficulties produced by ambigu-

ties in the law as to whether slaves were real or personal property. They show us in divers forms the practice of giving little negroes to children, of hiring out adults, and of letting them hire themselves out and lay up money. They show us runaways, cases of kidnapping, and the withdrawal of slaves by the retiring British forces in 1814. Escapes to Canada or Ohio, and the effects of permitted temporary residence of slaves in the Northwest Territory or the states formed from it, or in other free states, figure largely in them, especially in the later years. They exhibit many instances of crimes and punishments, of imprisonments and escapes and executions, negro church cases, railroad and steamboat cases, cases of accidents in mines and brawls in taverns. Most of all they lay before our eyes the incidents of plantation and farm life in the South. In the final years there are, in each state, cases showing the local effects of war, of the Proclamation of Emancipation, and of the Thirteenth Amendment. Other aspects of economic or social life which they illustrate are indicated in the introductions prefixed to the cases derived from the law reports of individual states.

The varieties of incident are, indeed, far too numerous to be described or indicated in a preface. And they are not varieties of incident that *might* have presented themselves or could be imagined; they are records of actual happenings, and can be relied upon to exhibit "the very form and pressure of the time"—the time when slavery prevailed in something like half of the United States.

A constant difficulty in documenting any portion of economic or social history lies in the fact that most commonly the mass of available material is so great and so various that a selection must be made, and selection may often be (or, what is almost equally injurious, may be suspected of being) a biassed selection, consciously or unconsciously influenced by the selector's desire that one or another view should be sustained by the evidence published. It is submitted that a compilation like the present may be held exempt from this suspicion, since it is not based on any process of selection, biassed or unbiased, but except for repetitious matter, presents the apposite portions of *all* the cases relating to slavery and the negro which have been found.

This excepting of repetitious matter should perhaps be stated in more precise terms. Mrs. Catterall has, to wit, omitted repetition of cases (hundreds in number under each variety) where all that concerns slavery is that a slave is a gift from a father to a son or a daughter, that a slave is willed to a member of the owner's family, that a slave is levied on as a horse would be, or that an unsound slave has been sold without mention of his disease or disability. Narrations have also been omitted where there is repetition of the same happenings, as in the instance of a new trial or of a case carried to a higher court on appeal or writ of error.

The plan of the series, and of the present volume, is to draw off from each reported case all those narrations, statements of fact, or quoted docu-



ments which concern American slavery or the negro, and, as far as is possible, to present them in the words of the original printed report, but to effect the economies of space necessary in dealing with so many thousands of pages by omitting whatever is extraneous to the purpose of the volumes, whatever contributes nothing to the illustration of slavery as an institution and to the history of the American negro. Rigid compression has therefore been exercised, but only in verbiage and other non-essentials, not by the omission of anything relevant. Thus a case which in the reports occupies many pages may here be found reduced, without loss for our purposes, to the few lines of narrative or document which are all it contains that has to do with slavery or the negro.

This abbreviated quotation of the facts is followed by an abbreviated version of the judicial opinion, if the judge or judges rendered any that concerned the law of slavery or the legal position of the negro. Sometimes the editor has for this purpose made use of the reporter's summary which, commonly in smaller print, is prefixed to his full report of the decision. Most often, however, she has with great care and exactness made her own condensed summary of the law pronounced by the court, using when practicable its own words but studying brevity.

In addition to the cases embraced in the regular volumes of the reporters, those also have been included which appear in collected form in the historical publications of states or the volumes put forth by historical societies—for instance, in such works as the *Maryland Archives* (Provincial Court series) or Dr. McIlwaine's *Minutes of the Council and General Court of Colonial Virginia*. Such records, as a rule, pertain to the earliest colonial periods, while the law reports of most of the states begin at comparatively late dates, well subsequent to independence. For this reason, large gaps in the chronological sequence will be seen in the case of some states, since the series is dependent for its material on the reports which in various jurisdictions happen to have been put into print.

Under each state, the cases are set in chronological order, cases in the federal courts arising in that state being incorporated in the places where their dates would bring them. The compilation has been brought to a close, in each state, at the end of the year 1875, ten years after the ending of slavery in the United States. By that time the immediate consequences of abolition had been worked into the law. After it, some cases with retrospective interest occur, but neither their number nor their novelty is such as to repay the labor of searching for them in the increasingly voluminous reports of the last fifty years.

The present volume contains the English cases, naturally placed in the first volume of the series, and those heard and determined in the highest courts of Virginia, oldest of the colonies, of West Virginia, and of Kentucky, whose jurisprudence for obvious historical reasons followed somewhat closely that of Virginia. Other states, Southern, Northern, and Western, and the few Canadian and Jamaican cases, will occupy the sub-

sequent volumes, the Carolinas receiving, probably, the first place in the second volume. That the English cases are continued beyond 1783, to the same date of 1875 as the American cases, will be understood to be due in part to the close connection of some of them with the determinations in earlier cases like that of *Somerset*, and in part to their relation to the later slave trade to America.

As to matters of form, the citations to reports, in the headings of the cases, are expressed with the abbreviations which seem to be most used, except that when a given report or reporter is sufficiently indicated by a single surname, that name has been printed in full, without abbreviation. All the abbreviations or other designations of books laid under contribution, or cited, are explained in a list which follows the table of contents. Cases in United States courts are cited by reference to the volumes of *Federal Cases*, from which for convenience they have been taken, but references to the original volumes follow in parentheses.

Explanatory or supplementary words inserted by the editor in quoted passages, and page-numbers indicating change or turn of page in quoted passages, are set in square brackets. The punctuation of quotations has been preserved with a rigid exactness that will perhaps seem to some readers a Chinese fidelity; but the occasional ending of quotations with commas and semicolons, under the systematic compression adopted in the book, seemed a lesser evil than to mislead the reader by imposing a re-formed punctuation that in many cases might alter or obscure the meaning of the original text.

In quoted passages the spelling and capitalization of the books quoted has been followed, except that, in quotations from early records, the use of *u* and *v*, and of *i* and *j* has been modernized, *and* has been printed instead of the manuscript symbol &, the abbreviations for *which* and *with* and a few similar abbreviations have been expanded, and, as a matter of course, *th* in *the* and *that* and *then* has been printed *th*, and not *y*! Where quoted texts are accompanied in the original volumes by annotations which it is deemed expedient to preserve, they have for the most part been transferred as they stood, without attempt to regularize the forms in which they have cited statute-books and the like.

In the introductions, the editor has with much learning and perspicuity explained the development of the law and of judicial opinion in regard to various matters incident to slavery which come up in the cases presented from the English courts or those of the respective states. It is believed that these will be found to be valuable contributions to the history of that field of jurisprudence in which these volumes have their place.

The index has been prepared by Mr. David M. Matteson, of Cambridge, Massachusetts.

J. FRANKLIN JAMESON.

WASHINGTON, AUGUST 26, 1926.





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## LIST OF ABBREVIATIONS.

- Acton = Thomas H. Acton, *Reports of Cases argued and determined before the Lords Commissioners of Appeals in Prize Causes.*
- A. K. Marsh. = Alexander K. Marshall, *Decisions of the Court of Appeals of Kentucky.*
- Ambler = Charles Ambler, *Reports of Cases argued and determined in the High Court of Chancery.*
- Amer. Law Reg. N. S. = *American Law Register*, new series (Philadelphia).
- Bac. Ab. = Matthew Bacon, *A New Abridgment of the Law.*
- B. and Ald. = Richard V. Barnewall and Sir Edward H. Alderson, *Reports of Cases argued and determined in the Court of King's Bench.*
- B. and C. = Richard V. Barnewall and Sir Cresswell Cresswell, *Reports of Cases argued and determined in the Court of King's Bench.*
- Barradall = *Virginia Colonial Decisions: the Reports by Sir John Randolph and by Edward Barradall of Decisions of the General Court of Virginia*, vol. II.
- Barton = Robert T. Barton, *Virginia Colonial Decisions.*
- Bos. and Pul. = Sir John B. Bosanquet and Sir Christopher Puller, *Reports of Cases argued and determined in the Courts of Common Pleas.*
- Bibb = George M. Bibb, *Reports of Cases at Common Law and in Chancery, argued and decided in the Court of Appeals of the Commonwealth of Kentucky.*
- B. Mon. = Ben Monroe, *Reports of Cases at Common Law and in Equity, decided in the Court of Appeals of Kentucky.*
- Bott P. L. Const = Edmund Bott, *A Collection of Decisions of the Court of King's Bench upon the Poor Laws*, ed. Francis Const.
- Bro. and Lush. = Ernst Browning and Vernon Lushington, *Reports of Cases decided in the High Court of Admiralty.*
- Brockenbrough = John W. Brockenbrough, *Reports of Cases decided by the Honourable John Marshall, late Chief Justice of the United States, in the Circuit Court of the United States for the District of Virginia and North Carolina.*
- Bush = W. P. D. Bush, *Reports of Selected Civil and Criminal Cases decided in the Court of Appeals of Kentucky.*
- Call = Daniel Call, *Reports of Cases argued and adjudged in the Court of Appeals of Virginia.*
- Campbell = John, lord Campbell, *Reports of Cases determined at Nisi Prius.*
- Car. and Kir. = Frederick A. Carrington and Andrew V. Kirwan, *Reports of Cases argued and ruled at Nisi Prius.*
- Carthew = Thomas Carthew, *Reports of Cases adjudged in the Court of King's Bench.*
- Causes Célèbres = [François Gayot de Pitaval], *Causes Célèbres et Intéressantes.*
- C. B. (N. S.) = John Scott, *Common Bench Reports, New Series.*
- Chr. Rob. = Sir Christopher Robinson, *Reports of Cases argued and determined in the High Court of Admiralty.*
- Cl. and Fin. = Charles Clark and William Finnelly, *House of Lords Cases.*
- Co. Lit. = "Coke upon Littleton" = Sir Edward Coke, *The First Part of the Institutes of the Laws of England.*
- Dallas = Alexander J. Dallas, *Reports of Cases ruled and adjudged in the Several Courts of the United States and of Pennsylvania held at the Seat of the Federal Government.*
- Dallas Laws = Alexander J. Dallas, *Laws of the Commonwealth of Pennsylvania.*
- Dana = James G. Dana, *Reports of Select Cases decided in the Court of Appeals of Kentucky.*
- Dict. of Dec. = William M. Morison, *Decisions of the Court of Session.*
- Dig. (in Kentucky Cases) or Dig. L. K. (See Litt. L. K., Myers Sup., and Stanton Dig.)
- Dig. = Justinian's *Digest.*
- Dodson = Sir John Dodson, *Reports of Cases argued and determined in the High Court of Admiralty.*

- Douglas = Sylvester Douglas, baron Glenbervie, *Reports of Cases argued and determined in the Court of King's Bench.*
- Duvall = Alvin Duvall, *Reports of Selected Civil and Criminal Cases decided in the Court of Appeals of Kentucky.*
- Eden = Robert H. Eden, baron Henley, *Reports of Cases argued and determined in the High Court of Chancery.*
- El. and Bl. = Thomas F. Ellis and Colin Blackburn, *Reports of Cases argued and determined in the Court of Queen's Bench and the Court of Exchequer Chamber.*
- Espinasse = Isaac Espinasse, *Reports of Cases argued and ruled at Nisi Prius.*
- Exch. = *Reports of Cases argued and determined in the Courts of Exchequer and Exchequer Chamber.*
- Fed. Cas. = *The Federal Cases, comprising Cases argued and determined in the Circuit and District Courts of the United States.*
- Gilmer = Francis W. Gilmer, *Reports of Cases decided in the Court of Appeals of Virginia.*
- Grattan = Peachy R. Grattan, *Reports of Cases decided in the Supreme Court of Appeals, and in the General Court of Virginia.*
- Hagg. Adm. = John Haggard, *Reports of Cases argued and determined in the High Court of Admiralty.*
- Har. and McH. = Thomas Harris, jr., and John M'Henry, *Maryland Reports.*
- Hardin = Martin D. Hardin, *Reports of Cases argued and adjudged in the Court of Appeals of Kentucky.*
- Harr. Del. = Samuel M. Harrington, *Reports of Cases argued and adjudged in the Superior Court and Court of Errors and Appeals of the State of Delaware.*
- H. Bl. = Henry Blackstone, *Reports of Cases argued and determined in the Courts of Common Pleas and Exchequer Chamber.*
- Hen. and M. = William W. Hening and William Munford, *Reports of Cases argued and determined in the Supreme Court of Appeals of Virginia.*
- Hening = William W. Hening, *The Statutes at Large of Virginia.*
- Howard = Benjamin C. Howard, *Reports of Cases argued and adjudged in the Supreme Court of the United States.*
- Howell St. Tr. = Thomas B. and Thomas J. Howell, *State Trials.*
- Hughes C. C. = Robert W. Hughes, *Reports of Cases decided in the Circuit Courts of the United States for the Fourth Circuit.*
- Hughes Ky. = James Hughes, *A Report of the Causes determined by the Late Supreme Court for the District of Kentucky, and by the Court of Appeals, in which Titles to Land were in Dispute.*
- Inst. = Sir Edward Coke, *Institutes of the Laws of England.*
- Jefferson = Thomas Jefferson, *Reports of Cases determined in the General Court of Virginia.*
- J. J. Marsh. = J. J. Marshall, *Reports of Cases at Law and in Equity, argued and decided in the Court of Appeals of the Commonwealth of Kentucky.*
- John. N. Y. = William Johnson, *Reports of Cases argued and determined in the Supreme Court of Judicature . . . New York.*
- Keble = Joseph Keble, *Reports in the Court of King's Bench.*
- Knapp = Jerome W. Knapp, *Reports of Cases argued and determined before the Committees of the Privy Council.*
- Ky. Dec. = *Decisions of the Court of Appeals of the State of Kentucky.*
- Ky. Op. = *Kentucky Opinions, containing the Unreported Opinions of the Court of Appeals.*
- Ld. Raym. = Robert, lord Raymond, *Reports of Cases argued and adjudged in the Courts of King's Bench and Common Pleas.*
- Leigh = Benjamin W. Leigh, *Reports of Cases argued and determined in the Court of Appeals and in the General Court of Virginia.*
- Levinz = *The Reports of Sir Creswell Levinz, Knt. (King's Bench).*
- Littell = William Littell, *Reports of Cases at Common Law and in Chancery, decided by the Court of Appeals of the Commonwealth of Kentucky.*
- Litt. L. = William Littell, *The Statute Law of Kentucky.*

- Litt. L. K. = William Littell and Jacob Swigert, *A Digest of the Statute Law of Kentucky*.
- Litt. Sel. Cases = William Littell, *Cases Selected from the Decisions of the Court of Appeals of Kentucky, not heretofore Reported*.
- Lofft = Capell Lofft, *Reports of Cases adjudged in the Court of King's Bench*.
- Marsden = Reginald G. Marsden, *Reports of Cases determined by the High Court of Admiralty*.
- Mass. = *Reports of Cases argued and determined in the Supreme Judicial Court of the Commonwealth of Massachusetts*.
- McIlw. = Henry R. McIlwaine, *Minutes of the Council and General Court of Colonial Virginia*.
- Md. Arch. = *Archives of Maryland*.
- Met. Ky. = James P. Metcalfe, *Reports of Selected Civil and Criminal Cases decided in the Court of Appeals of Kentucky*.
- Mo. = *Reports of Cases argued and decided in the Supreme Court of the State of Missouri*.
- Mod. = *Modern Reports; or, Select Cases adjudged in the Courts of King's Bench, Chancery, Common Pleas, and Exchequer*.
- Mont. and Ayr. = Basil Montagu and Scrope Ayrton, *Reports of Cases in Bankruptcy decided by the Lord Chancellor Brougham*.
- Moore P. C. = Edmund F. Moore, *Reports of Cases heard and determined by the Judicial Committee of the Privy Council*.
- Munford = William Munford, *Reports of Cases argued and determined in the Supreme Court of Appeals of Virginia*.
- Myers Sup. = Harvey Myers, *A Digest of the General Laws of Kentucky*. [Supplementing Stanton.]
- Patt. and H. = John M. Patton, jr., and Roscoe B. Heath, *Reports of Cases decided in the Special Court of Appeals of Virginia*.
- Peters = Richard Peters, *Reports of Cases argued and adjudged in the Supreme Court of the United States*.
- Q. B. = John L. Adolphus and Thomas F. Ellis, *Queen's Bench Reports, New Series*.
- Quart. Law J. = *Quarterly Law Journal* (Richmond, Va., 1856-1859).
- Randolph = Peyton Randolph, *Reports of Cases argued and determined in the Court of Appeals of Virginia*.
- Rand. Sir J. = *Virginia Colonial Decisions: the Reports by Sir John Randolph and by Edward Barradall of Decisions of the General Court of Virginia*, vol. I.
- R. C. or Rev. Code = *Revised Code of the Laws of Virginia*, eds. of 1785, 1794, 1803-1808, 1812, 1819, or 1849.
- Rev. St. (Ky.) or R. S. = C. A. Wickliffe, S. Turner, and S. S. Nicholas, *The Revised Statutes of Kentucky*.
- Rob. Va. = Conway Robinson, *Reports of Cases decided in the Supreme Court of Appeals, and in the General Court of Virginia*.
- R. S. = Rev. St. (Ky.), *supra*.
- Rushworth = John Rushworth, *Historical Collections*.
- Salkeld = William Salkeld, *Reports of Cases adjudged in the Court of King's Bench*.
- Shower = Sir Bartholomew Shower, *Reports of Cases adjudged in the Court of King's Bench*.
- Simons = Nicholas Simons, *Reports of Cases decided in the High Court of Chancery*.
- Stanton Dig. = Richard H. Stanton, *A New Digest of the Decisions of the Court of Appeals of Kentucky*.
- Stanton R. S. = Richard H. Stanton, *The Revised Statutes of Kentucky*.
- Stat. = *The Statutes at Large of the United States of America*.
- St. L. (Ky.) = C. S. Morehead and Mason Brown, *A Digest of the Statute Laws of Kentucky*.
- Swabey = M. C. Merttins Swabey, *Reports of Cases decided in the High Court of Admiralty*.
- T. B. Mon. = Thomas B. Monroe, *Reports of Cases at Common Law and in Equity, argued and decided in the Court of Appeals of the Commonwealth of Kentucky*.
- Term R. = Charles Durnford and Edward H. East, *Term Reports in the Court of King's Bench*.

Tucker = St. George Tucker, edition of Blackstone's *Commentaries*.

Va. Ca. = William Brockenbrough and Hugh Holmes, *A Collection of Cases decided by the General Court of Virginia*.

Va. Mag. Hist. = *Virginia Magazine of History and Biography*.

Vernon = Thomas Vernon, *Cases argued and adjudged in the High Court of Chancery*.

Wallace = John W. Wallace, *Cases argued and adjudged in the Supreme Court of the United States*.

Wash. Va. = Bushrod Washington, *Reports of Cases argued and determined in the Court of Appeals of Virginia*.

Wheaton = Henry Wheaton, *Reports of Cases argued and adjudged in the Supreme Court of the United States*.

W. Rob. = William Robinson, *Reports of Cases argued and determined in the High Court of Admiralty*.

W. Va. = *Reports of Cases decided in the Supreme Court of Appeals of West Virginia*.

Wythe = George Wythe, *Decisions of Cases in Virginia by the High Court of Chancery*.



# JUDICIAL CASES CONCERNING SLAVERY.

## ENGLAND.

### INTRODUCTION.

Since the days of Solomon and before, short pithy sayings—proverbs or maxims—have crystallized popular sentiment or belief, or given an epitome of race experience. The law abounds in such succinct phrases; they emblazon the pages of equity jurisprudence. In the law of slavery three such maxims have become famous, and have influenced the history of that institution and the judicial decisions concerning it. The first occurs in a case reported by Rushworth:<sup>1</sup> “In the Eleventh of Elizabeth, one Cartwright brought a Slave from Russia, and would scourge him, for which he was questioned; and it was resolved, That England was too pure an Air for Slaves to breath in.” The case is cited by Hargrave, counsel for the negro, in the Somerset Case.<sup>2</sup> Wallace, on the opposite side, maintained that “slaves could breathe in England: For villains were in this country, and were mere slaves, in Elizabeth.”<sup>3</sup> Dunning, on the same side, is willing to admit the truth of the maxim as applied to Russian slaves: “Russian slavery . . . is not here to be tolerated.”<sup>4</sup> “’Tis not absurd in the idea, as quoted, nor improbable as matter of fact; the expression has a kind of absurdity.” (Its poetical value does not appeal to him.) He does not admit that it has any bearing on African slavery: “neither the air of England is too pure for a slave to breathe in, nor the laws of England have rejected servitude.” Serjeant Davy replies: “For the air of England; I think, however, it has been gradually purifying ever since the reign of Elizabeth. Mr. Dunning seems to have discovered so much, as he finds it changes a slave into a servant; tho’ unhappily, he does not think it of efficacy enough to prevent that pestilent disease reviving, the instant the poor man is obliged to quit (voluntarily quits, and legally, it seems we ought to say,) this happy country. However, it has been asserted, and is now repeated by me, this air is too pure for a slave to breathe in; I trust, I shall not quit this court without certain conviction of the truth of that assertion.”

Lord Stowell in his judgment in the case of the Slave Grace,<sup>5</sup> in 1827, thus comments: “The arguments of counsel in that decisive case of

<sup>1</sup> 2 Historical Collections 468.

<sup>2</sup> 20 How. St. Tr. 1 (51), called “The Case of James Sommersett, a Negro.” An earlier report is found in Lofft 1, where the case is entitled *Somerset v. Stewart*. This report is used by the editor except for the statement of facts and for Hargrave’s argument, which is obviously not reported altogether correctly by Lofft, but, in the Howell collection, is copied from Hargrave’s manuscript.

<sup>3</sup> Lofft 1 (8).

<sup>4</sup> Lofft 1 (11).

<sup>5</sup> 2 Hagg. Adm. 94.

Sommersett, do not go further than to the extinction of slavery in England as unsuitable to the genius of the country and to the modes of enforcement: they look no further than to the peculiar nature, as it were, of our own soil; the air of our island is too pure for slavery to breathe in. How far this air was useful for the common purposes of respiration, during the many centuries in which the two systems of villenage maintained their sway in this country, history has not recorded."

Lord Stowell's rather scoffing reference<sup>6</sup> to "the peculiar nature, as it were, of our own soil" aims at another time-hallowed maxim, popularly supposed to be the kernel of the judgment in the Somerset case,<sup>7</sup> that, as soon as a slave sets foot on English soil, he is free. This maxim which has been the pride of generations of Englishmen did not originate in England. It was invoked by the Dutch from an early day: "adeo quidem ut servi, qui aliunde huc adducuntur, simul ac imperii nostri fines intrârunt, invitis ipsorum dominis ad libertatem proclamare possint: id quod et aliarum Christianarum gentium moribus receptum est."<sup>8</sup> France is one "aliarum Christianarum gentium," among which this custom prevailed: "Les maximes si précieuses du droit François accordent à la seule entrée dans ce royaume, au seul air qu'on y respire, le droit de la liberté."<sup>9</sup>

The maxim occurs in English judicial decisions first in the case of *Smith v. Brown and Cooper*.<sup>10</sup> The plaintiff had sold the defendant a negro "in parochia beatae Mariae de Arcubus in warda de Cheape," for twenty pounds, and brought suit for that sum. The verdict was for the plaintiff, but a motion was made in arrest of judgment, whereupon "Holt, C.J. held, that as soon as a negro comes into England, he becomes free. One may be a villein in England, but not a slave." He directed the plaintiff to amend his declaration, by averring "that the said negro at the time of sale was in Virginia, and that negroes, by the laws and statutes of Virginia,

<sup>6</sup> Attorney General Martin of Maryland likewise scoffed at the maxims in 1799: "The British air is supposed to electrify the flesh—putting a foot on the island, the nature is instantly changed, and if a slave before, becomes thereby free." *Mahony v. Ashton*, 4 Har. and McH. 295 (324).

<sup>7</sup> Lord Mansfield himself declared, in 1785, in *Rex v. Thames Ditton* [4 Doug. 300]: [301] "The determinations go no further than that the master cannot by force compel him [the negro] to go out of the kingdom. . . In the case relating to villeins, it was held that the lord could not by force take them out of the country. . . The case of *Somerset* . . is the only one on this subject."

<sup>8</sup> S. van Groenewegen van der Made, *Tractatus de Legibus Abrogatis in Hollandia*, p. 5.

<sup>9</sup> 13 Causes Célèbres 492 (495 *et seq.*), ed. of 1747.

<sup>10</sup> 2 Salkeld 666. This case is undated, but is printed just before the case of *Smith v. Gould*, 2 Salkeld 666, Pasch. 1706, and on the same page. The plaintiff may have been the same in both cases, and the date probably the same. The latter is the "case in Salk. 666" cited by Lord Chancellor Hardwicke in 1749 in *Pearne v. Lisle* (*infra*), but Lord Chief Justice Holt's famous saying occurs only in the former. His name is not even mentioned in the latter, as reported by Salkeld. Both cases in Salkeld have the same subreference, "2 Ld. Raym. 1274," which is between the parties, *Smith and Gould*. Lord Raymond reports that "the writ of inquiry of damages was executed before the lord chief justice Holt at Guildhall in London" but quotes none of his words, giving only the decision "per totam curiam," wherein there is no mention of the soil of England.



are saleable as chattels. Then the attorney-general coming in, said, they were inheritances, and transferrable by deed, and not without: And nothing was done." "Lord Holt's opinion is a mere dictum,"<sup>11</sup> as Wallace truly says in the Somerset case,<sup>12</sup> "a decision unsupported by precedent."

In 1729 a petition was presented to "Sir Philip York[e], then Attorney-General, and Mr. Talbot, Solicitor-General,"<sup>13</sup> "in Lincoln's Inn Hall, after dinner; . . . on the earnest solicitation of many merchants"<sup>14</sup> and "British planters,"<sup>15</sup> . . . [for] a notion had prevailed, if a negro came over, or became a christian, he was emancipated."<sup>16</sup> They "pledged themselves to the British planters, for all the legal consequences of slaves coming over to this Kingdom or being baptized." "We are of opinion, that a slave, by coming from the West Indies, either with or without his master, to Great Britain or Ireland, doth not become free; and that his master's property or right in him is not thereby determined or varied; and baptism doth not bestow freedom on him, nor make any alteration in his temporal condition in these kingdoms. We are also of opinion, that the master may legally compel him to return to the plantations."<sup>17</sup> This opinion was affirmed by Sir Philip in 1749, when he had become Lord Chancellor Hardwicke, in the case of *Pearne v. Lisle*.<sup>18</sup> He comments on the "case in Salk. 666":<sup>19</sup> "The reason said at the bar to have been given by Lord Chief Justice Holt, in that case, as the cause of his doubt, viz. That the moment a slave sets foot in England he becomes free, has no weight with it, nor can any reason be found, why they should not be

<sup>11</sup> The tensivity of public opinion concerning slavery is reflected in the tendency of great jurists to go out of their way to make pronouncements in that field, which are therefore only *dicta*. Lord Mansfield's assertion as to slavery, "It's so odious, that nothing can be suffered to support it but positive law," is called by Lord Stowell an "*obiter dictum* that fell from that great man." 2 Hagg. Adm. 94 (107). And the Dred Scott decision is generally held, in spite of Judge Taney's disclaimer (60 U. S. 393 [427]), to consist of nothing but *dicta*, aside from the question of the jurisdiction of the court.

<sup>12</sup> Lofft 1 (8).

<sup>13</sup> 33 Dict. of Dec. 14547.

<sup>14</sup> Lord Mansfield, in the Somerset case, Lofft 1 (8). "The personal traffic in slaves resident in England had been as public and as authorized in London as in any of our West India islands. They were sold on the exchange and other places of public resort by parties themselves resident in London, and with as little reserve as they would have been in any of our West India possessions. Such a state of things continued without impeachment from a very early period up to nearly the end of the last century." Lord Stowell in the Slave Grace, 2 Hagg. Adm. 94 [105], 1827. "'T is necessary the masters should bring them over; for they cannot trust the whites, either with the stores or the navigating the vessel." Wallace, in arguing the Somerset case, Lofft 1 (8). "Every family almost brings over a great number." Dunning, *ibid.*, 10.

<sup>15</sup> *Ibid.*, 19. Lord Mansfield's further references, in the Somerset case, to the opinion of Yorke and Talbot.

<sup>16</sup> The planters in Virginia had done all that in them lay to avoid such a consequence, for the general assembly, in the code of 1705, provided "That a slave's being in England, shall not be sufficient to discharge him of his slavery, without other proof of his being manumitted there." 3 Hening 448. And an act of 1667 provided "that the conferring of baptisme doth not alter the condition of the person as to his bondage or freedome."

<sup>2</sup> Hening 260.

<sup>17</sup> 33 Dict. of Dec. 14547.

<sup>18</sup> Ambler 75.

<sup>19</sup> See note 10, p. 2, *supra*.

equally so when they set foot in Jamaica, or any other English plantation. All our colonies are subject to the laws of England, although as to some purposes they have laws of their own." But Lord Chancellor Henley, in 1762, in *Shanley v. Harvey*,<sup>20</sup> begins his brief opinion in favor of the negro Harvey: "As soon as a man sets foot on English ground he is free."<sup>21</sup> Then comes the famous Somerset case<sup>22</sup> in 1771-1772.<sup>23</sup> James Somerset was a negro of Africa who had been brought to Jamaica (according to Lord Mansfield) or to Virginia (according to the return to the writ of *habeas corpus*),<sup>24</sup> "to be there sold; and afterwards . . . was sold in Virginia aforesaid to one Charles Steuart, esq. who was then an inhabitant of Virginia," and was brought by his master, in 1769, to London, "that is to say, in the parish of St. Mary-le-Bow, in the ward of Cheap." On October 1, 1771, before Stewart had finished transacting the business which brought him to London, Somerset quitted his service, and "absolutely refused" to return and serve his master. On November 26, 1771, Stewart delivered the negro to Captain Knowles to be securely kept on board his "vessel called the *Ann and Mary*, then and still lying in the river Thames, . . . and . . . bound upon a voyage for Jamaica," "to be kept till he should set sail, and then to be taken with him to Jamaica, and there sold as a slave."

While Somerset was "confined in irons on board" the ship, an application was made to Lord Mansfield for a writ of *habeas corpus*, supported by the affidavits of Thomas Walklin, Elizabeth Cade, and John Marlow. The writ was allowed, "directed to Mr. Knowles, and requiring him to return the body of Sommersett before his lordship, with the cause of detainer. Mr. Knowles on the 9th of December produced the body of Sommersett before lord Mansfield," and the return to the writ of *habeas corpus* was the ground of the determination of the court, pronounced by Lord Mansfield on June 22, 1772:

We pay all due attention to the opinion of Sir Philip Yorke, and Lord Chief Justice Talbot<sup>25</sup> . . . recognized by Lord Hardwicke, sitting as Chancellor . . . We are so well agreed, that we think there is no occasion of

<sup>20</sup> 2 Eden 126.

<sup>21</sup> "Lord Northington [Lord Henley in 1762], as I am informed by a friend who was present at the hearing of the cause, disallowed the master's claim with great warmth, and gave costs to the negro." Hargrave's argument in the Somerset case, 20 How. St. Tr. 1 (55).

<sup>22</sup> Lofft 1; 20 How. St. Tr. 1.

<sup>23</sup> "'Tis now about fifty years since the opinion given by two of the greatest men of their own or any other times, (since which no contract has been brought to trial between the masters and slaves;)" Lord Mansfield in the Somerset case, Lofft 1 (17).

<sup>24</sup> Quoted in full, in 20 How. St. Tr. 1 (17). Charles Stewart, who in 1762 resided in Virginia, was surveyor general of customs for the northern (Quebec) and eastern middle districts 1765-1767, cashier and paymaster of customs 1767-1779. He took Somerset to England from Boston. There is a full account of the Boston aspects of the case in 7 Mass. Hist. Soc. Proc. 322-326.

<sup>25</sup> Lord Mansfield observed earlier in the trial that this opinion was given "after dinner; probably, therefore, might not, as he believes the contrary is not [un]usual at that hour, be taken with much accuracy." Lofft 1 (8).

having it argued . . . before all the judges, as is usual . . . on a return to a *habeas corpus*. The only question before us is, whether the cause on the return is sufficient? . . . the return states, that the slave departed and refused to serve; whereupon he was kept, to be sold abroad. So high an act of dominion must be recognized by the law of the country where it is used. . . . The state of slavery . . . is so odious, that nothing can be suffered to support it, but positive law. Whatever inconveniences, therefore, may follow from a decision, I cannot say this case is allowed or approved by the law of England; and therefore the black must be discharged.<sup>26</sup>

Thus fell, after only two-and- twenty years, in which decisions of great authority had been delivered by lawyers of the greatest ability in this country, a system, confirmed by a practice which had obtained without exception ever since the institution of slavery in the colonies, and had likewise been supported by the general practice of this nation and by the public establishment of its government, and it fell without any apparent opposition on the part of the public.<sup>27</sup>

This decision was followed in Scotland in 1778, in the case of Joseph Knight, a Negro *v.* Wedderburn,<sup>28</sup> It was held that "the defender had no right to the Negro's service for any space of time, nor to send him out of the country against his consent: That the Negro was likewise protected under the act 1701, c. 6. from being sent out of the country against his consent."

The case of Williams *v.* Brown<sup>29</sup> in 1802 is a landmark on the way to the restriction of the maxim by Lord Stowell, in the case of the Slave Grace. Williams, a runaway slave from the island of Grenada, in 1797 "entered at London on board the *Holderness* bound for Grenada, as an ordinary seaman out and home." On the ship's arrival at Grenada his master claimed him, and thereupon an agreement was entered into by Brown, the master of the ship, by the master of the slave, and by the slave himself, that the slave should be manumitted on the payment of "30 joes" to his master by Brown, "which was accordingly done by a regular instrument of manumission," and Williams on the same day covenanted to serve Brown as a sailor for three years at wages lower than the current rate. But when the ship got back to London, the negro commenced "the present action," upon a *quantum meruit*, for his wages on the voyage thither,

<sup>26</sup> *Ibid.*, 19.

<sup>27</sup> Lord Stowell, 2 Hagg. Adm. 94 (106). The attitude of the public, however, is indicated by the apologetic remarks of Mr. Dunning, counsel for Captain Knowles in the Somerset case, early in his argument: "'Tis my misfortune to address an audience, the greater part of which, I fear, are prejudiced the other way. . . . For myself, I would not be understood to intimate a wish in favor of slavery, by any means;" and at the close: "I would say, before I conclude, not for the sake of the court, [but] of the audience; the matter now in question, interests the zeal for freedom of no person, if truly considered; . . . I hope, therefore, I shall not suffer in the opinion of those whose honest passions are fired at the name of slavery. I hope I have not transgressed my duty to humanity; nor doubt I your lordships discharge of yours to justice." Lofft 1 (10, 14).

<sup>28</sup> 33 Dict. of Dec. 14545; also in 20 How. St. Tr. 1 (2 n.).

<sup>29</sup> 3 Bos. and Pul. 69.

claiming that there was no consideration for his agreement to serve for less, in that he was already free, having once set foot in England. The judges held a different opinion. To be sure, he was, as Lord Chief Justice Alvanley states, "as free as any of us while in England," but in Grenada he "was a runaway slave."<sup>30</sup>

Therefore Lord Stowell, in 1827, in his judgment in the case of the *Slave Grace*,<sup>31</sup> says of *Williams v. Brown*: "I do think it approaches so near as to possess the authority of a direct decision upon the immediate subject." Williams "had become a free man by landing in England, in the opinion of all the judges; and it is only by virtue of his pre-existing state of slavery, that he became subject to be returned into it again, until his manumission. The four judges all concur in this—that he was a slave in Grenada, though a free man in England; and he would have continued a freeman in all other parts of the world excepting Grenada."

The "immediate subject" was the case of the *Slave Grace*.<sup>32</sup> "In 1822, Mrs. Allan of Antigua came to England, bringing with her a female attendant, by birth and servitude a domestic slave, named Grace. She resided with her mistress in this country [England] until 1823, and accompanied her voluntarily on her return to Antigua. . . . She continued with Mrs. Allan, in the capacity of a domestic slave, till August 8th, 1825, when she was seized by the waiter of the customs at Antigua 'as forfeited to the King, on suggestion of having been illegally imported in 1823': "she being a free subject of his Majesty was unlawfully imported as a slave from Great Britain into Antigua, and there illegally held and detained in slavery." "On August 5, 1826, the judge of the Vice-Admiralty Court of Antigua decreed, after argument, 'that the woman Grace be restored to the claimant [Mr. Allan], with costs and damages for her detention.' From this sentence an appeal was prosecuted on the part of the crown, and the principal question made, was—whether, under the circumstances, slavery was so divested by landing in England that it would not revive on a return to the place of birth and servitude?"

Lord Stowell, in affirming the sentence of the vice-admiralty court, maintained that slavery was not so divested, and that it would revive on a return: "The temporary freedom thus acquired has ever been superseded upon the return of the slave; and slaves never have been deemed and considered as free persons on their return to Antigua, or the other colonies." Lord Stowell cites the judgment pronounced in 1749 by Lord Chancellor Hardwicke in *Pearne v. Lisle*,<sup>33</sup> affirming the opinion given by him and Solicitor General Talbot in 1729:<sup>34</sup>

<sup>30</sup> See pp. 23-24, *infra*.

<sup>31</sup> 2 Hagg. Adm. 94 (122).

<sup>32</sup> *Ibid*.

<sup>33</sup> *Supra*, p. 3, and *infra*, p. 12.

<sup>34</sup> *Supra*, p. 3, and *infra*, p. 12.



that a slave coming from the West Indies, either with or without his master, to Great Britain, doth not become free, and that his master's property or right in him is not thereby determined or varied; and they were also of opinion that the master might legally compel him to return to the plantations; . . . This judgment, so pronounced in full confidence, and without a doubt upon a practice which had endured universally in the colonies, and (as it appears by those opinions) in Great Britain, was, in no more than twenty-two years afterwards, reversed by Lord Mansfield. . . . The real and sole question which the case of *Sommersett* brought before Lord Mansfield, . . . was, whether a slave could be taken from this country in irons and carried back to the West Indies, to be restored to the dominion of his master? . . . Black seamen have navigated West India ships to this island, but we have not heard of other *Sommersetts*. . . . The fact certainly is, that it never has happened that the slavery of an African, returned from England, has been interrupted in the colonies in consequence of this sort of limited liberation conferred upon him in England. . . . he goes back to a place where slavery awaits him, and where experience has taught him that slavery is not to be avoided.

The third maxim, "Once free for an hour, free for ever!", is also disposed of by Lord Stowell:

It has been said that, in the decline of the ancient villenage, it became a maxim of very popular and legal use, 'Once free for an hour, free for ever!'<sup>35</sup> and this has been applied as a maxim that ought to govern in the case of negro slavery. Now, if this negro slavery was an exact transcript of the ancient villenage, it might not be improperly so contended; but . . . this system of villenage was confined to this kingdom. . . . and it [the maxim] has never once been applied, since the case of *Sommersett*, to overrule the authority of the transmarine law. . . . This cry of 'Once free for an hour, free for ever!' it is to be observed, is mentioned as a peculiar cry of Englishmen as against those two species of slavery [villeins in gross and villeins regardant]. It could interest none but the people of this country: and of these only the masters, for no one else had any interest in the duties or services of their villeins. This cry has not, as far as we know, attended the state of slavery in any other country, though that has been a state so prevalent in every other part of the world, and has existed at all times.

In closing, Lord Stowell says:

These are the conclusions to which I have arrived, after a very full and mature consideration of the subject. I can truly say, that I have arrived at those conclusions with a mind free from any prepossession upon the subject, and with the determination to attend to nothing but the fair result of the evidence which applies to it. I am sensible that other opinions may be formed upon the question; but, in affirming the sentence of the Judge of the Court below, I am conscious only of following that result which the facts not only authorise but compel me to adopt.

<sup>35</sup> Note in Haggard: [114 n.] "Herein," says Lord Coke, "the common law differeth from the civil law; for *Libertinum ingratum leges civiles in pristinam redigunt servitutem, sed leges Angliae semel manumissum semper liberum judicant, gratum et ingratum.*" 1 Inst. lib. II., sect. 204.

Suggestions for parliamentary action were made both by Lord Mansfield <sup>36</sup> and by Lord Stowell.<sup>37</sup> These bore fruit in 1833, in the act of 3 and 4 William IV., emancipating the slaves in the British colonies.<sup>38</sup> Lord Stowell's judgment was the Dred Scott decision <sup>39</sup> of England.

Of the nineteenth-century cases presented in the pages which follow, some arose from this legislation, but the greater number arose out of the efforts of Great Britain to suppress the African slave trade.

<sup>36</sup> "An application to parliament, if the merchants think the question of great commercial concern, is the best, and perhaps the only method of settling the point for the future." Lofft 1 (18).

<sup>37</sup> 2 Hagg. Adm. 94 (111, 133, 134).

<sup>38</sup> "An Act for the Abolition of Slavery throughout the British Colonies; for promoting the Industry of the manumitted Slaves; and for compensating the Persons hitherto entitled to the Services of such Slaves. [28th August 1833.]" Section LXIV. provides, "That nothing in this Act contained doth or shall extend to any of the Territories in the Possession of the East India Company, or to the Island of Ceylon, or to the Island of Saint Helena." Act 3 and 4 William IV. c. 73.

<sup>39</sup> See correspondence between Lord Stowell and Judge Story, quoted, pp. 36-39, *infra*.

## ENGLISH CASES.

*Cartwright's Case*, 2 Rushworth<sup>1</sup> 468, 1569. "In the Eleventh of Elizabeth, one Cartwright brought a Slave from Russia, and would scourge him, for which he was questioned; and it was resolved, That England was too pure an Air for Slaves to breath in."

*Butts v. Penny*, 2 Levinz 201, Trin. 1677.<sup>2</sup> "Trover for 100<sup>3</sup> Negroes, and upon *Non Culp.* it was found by special Verdict, that the Negroes were Infidels, and the Subjects of an Infidel Prince, and are usually bought and sold in America as Merchandise, by the Custom of Merchants, and that the Plaintiff bought these, and was in possession of them until the Defendant took them. And Thompson argued, there could be no Property in the Person of a Man sufficient to maintain Trover, and cited Co. Lit. 116. That no Property could be in Villains but by Compact or Conquest. But the Court held, that Negroes being usually bought and sold among Merchants, so Merchandise, and also being Infidels, there might be a Property in them sufficient to maintain Trover, and gave Judgment for the Plaintiff, *nisi Causa*, this Term;"

*Same v. same*, 3 Keble 785, June 1677. "Special Verdict in Trover of 10 Negroes and a half<sup>4</sup> find them usually bought and sold in India, and if this were sufficient property, or Conversion, was the question. And Thomson, on 1 Inst. 116. for the Defendant, said here could be no property in the Plaintiff more than in Villains; but *per Curiam*, they are by usage *tanquam bona*, and go to Administrator untill they become Christians; and thereby they are Infranchised: And Judgment for the Plaintiff, *Nisi*,"

*Noel v. Robinson*, 1 Vernon 90, November 1682. "Sir Martin Noel . . . being possessed . . . of a moiety of a plantation beyond sea [in Barbados], made his will, 23 September, 1665, . . . and devised his said moiety of the plantation and of the negroes . . . [92] the assets . . . afterwards became deficient by the breaking of two eminent Spanish merchants, that dealt in negroes, and broke for the value of 200,000 l."

*Sir Thomas Grantham's Case*, 3 Mod. 120, January 1687. "He bought a monster in the Indies, . . . a man of that country, . . . This man he . . . exposed to the sight of the people for profit. The Indian turned Christian and was baptized, and was detained from his master. The master brought

<sup>1</sup> John Rushworth, *Historical Collections*. See Hargrave, in *Somerset v. Stewart*, p. 16, *infra*.

<sup>2</sup> Reported also, with variations, in 3 Keble 785 (*infra*).

<sup>3</sup> "According to Levinz, the action was for 200 negroes; but it is a mistake, the record only mentioning 10." Note to the *Sommersett Case*, 20 Howell St. Tr. 51.

<sup>4</sup> "Two tenants in common . . . one may bring an action . . . for half a negro, and so it has been allowed." *Wedgewood v. Bayly*, 2 Shower 177.

a *homine replegiando*. The sheriff returned, that he had replevied the body, but did not say, the body in which Sir Thomas claimed a property; whereupon he was ordered to amend his return."

*Noel v. Robinson*, 1 Vernon 453, April 1687. "Mr. Sergeant Maynard's case was cited, who recovered a debt contracted here against the executor of an owner of a plantation in Barbadoes, and by his advice an action of trover was brought, and judgment obtained for the fourth part of a negro."

*Gelly v. Cleve*, cited in 1 Ld. Raym. 147, ("Hill.<sup>1</sup> 5 Will. and Mar.") 1694. "adjudged that trover will lie for a Negro boy;<sup>2</sup> for they are heathens, and therefore a man may have property in them, and that the court, without averment made, will take notice that they are heathens."

*Chamberline v. Harvey*, 3 Ld. Raym. 129, 1696/7. "Robert [Harvey, esq.] on the first day of September . . . 1695, . . . took . . . from" "Willoughby Chamberline, esq. . . one negro . . . of the price of 100 l. . . at London . . . in the parish of the Blessed Mary of the Arches in the ward of Cheape, . . . and kept possession of the negro aforesaid" [5 Mod. 186] "before the trespass committed, one Edward Chamberline was seized in fee of a plantation in Barbadoes, and of certain negro slaves thereunto belonging; that the negro now taken was born within the said island of negro parents, being slaves belonging to the said plantation; that an ordinance was made . . . in said island, that the negro slaves there shall be real estates, . . . that Edward Chamberline died . . . after whose death one third of the plantation and negro slaves (whereof this negro was one) came to Mary his widow . . . as her dowry, and the reversion . . . to the plaintiff, as son and heir of Edward Chamberline; that the said Mary afterwards married Sir John Witham," who brought "this very negro into England, where he continued in the service of the said Sir John Witham several years; that he was baptized<sup>3</sup> here, but without the privity or consent of the plaintiff; that after the death of the said Mary, Sir John Witham turned this negro out of his service, who afterwards served several other masters here, and at the time when the trespass was supposed to be committed, was in the service of the defendant, and had for his wages six pounds by the year." "A case like this never happened before."

Judgment for the defendant. [191] "the Court were of opinion, that no action of Trespass would lie for the taking away a man generally, but that there might be a special action of trespass for taking his servant, *per quod servitium amisit*." Also, in 1 Ld. Raym. 146: [147] "And *per*

<sup>1</sup> Hargrave says "Michaelmas term." 20 How. St. Tr. 53.

<sup>2</sup> Hargrave, *ibid.*: "On examination of the Roll, Trin. 5 W. and M. C. B. Roll, No. 407, I find that the action was brought for various articles of merchandize as well as the negro; and I suspect, that in this case, as well as the former one of Butts and Penny, the action was for a negro in America;"

<sup>3</sup> "If baptism should be accounted a manumission, it would very much endanger the trade of the plantations, which cannot be carried on without the help and labour of these slaves; for the parsons are bound to baptize them as soon as they can give a reasonable account of the christian faith; and if that would make them free, then few would be slaves." Argument against manumission by baptism, 5 Mod. 186 (188).



Holt chief justice, trover will not lie for a Negro, *contra* to 3 Keb. 785, 2 Lev. 201, Butts *v.* Penny." Also, in Carthew 397: "An action of trespass will not lie, because a negro cannot be demanded as a chattel, neither can his price be recovered in damages in an action of trespass, as in case of a chattel; for he is no other than a slavish servant, and the master can maintain no other action of trespass for taking his servant, but only such which concludes *per quod servitium amisit*, in which the master shall recover for the loss of his service, and not for the value, or for any damages done to the servant."

*Smith v. Brown and Cooper*, 2 Salkeld 666, (no date). "The plaintiff declared in an *indebitatus assumpsit* for 20 *l.* for a negro sold by the plaintiff to the defendant, *viz. in parochia beatae Mariae de Arcubus in warda de Cheape*, and verdict for the plaintiff; and, on motion in arrest of judgment, Holt, C. J. held, that as soon as a negro comes into England, he becomes free: One may be a villein in England, but not a slave. *Et per* Powell, J. . . the law took no notice of a negro. Holt, C. J. You should have averred in the declaration, that the sale was in Virginia, and, by the laws of that country, negroes are saleable; for the laws of England do not extend to Virginia, being a conquered country their law is what the King pleases; and we cannot take notice of it but as set forth; therefore he directed that the plaintiff should amend, and the declaration should be made, that the defendant was indebted to the plaintiff for a negro sold here at London, but that the said negro at the time of sale was in Virginia, and that negroes, by the laws and statutes of Virginia, are saleable as chattels. Then the attorney-general coming in, said, they were inheritances, and transferrable by deed, and not without: And nothing was done."

*Smith v. Gould*, 2 Salkeld 666, Pasch. 1706. "Trover for several things, and among the rest *de uno Aethiope vocat.* a negro; and, on not guilty pleaded, verdict was for the plaintiff, and several damages; and as to the negro 30 *l.* And it was moved in arrest of judgment, that trover lay not for a negro, for that the owner had not an absolute property in him; he could not kill him as he could an ox."

Held: "Men may be the owners, and therefore cannot be the subject of property. . . the Court seemed to think that in trespass *quare captivum suum cepit*, the plaintiff might give in evidence that the party was his negro, and he bought him."

*Id.*, 2 Ld. Raym. 1274. "In an action of trover for a negro, and several goods, the defendant let judgment go by default and the writ of inquiry of damages was executed before the lord chief justice Holt at Guildhall in London. Upon which the jury gave several damages, as to the goods, and the negro; and a motion as to the negro was made in arrest of judgment, that trover could not lie for it, because one could not have such a property in another as to maintain this action. . . *per totam curiam* this action does not lie for a negro, no more than for any other man; for the common law takes no notice of negroes being different from other men. By the common law no man can have a property in another, but in special

cases, as in a villain, but even in him not to kill him: so in captives took in war, but the taker cannot kill them, but may sell them to ransom them: there is no such thing as a slave by the law of England. And if a man's servant is took from him, the master cannot maintain an action for taking him, unless it is laid *per quod servitium amisit*. . . And the court denied the opinion in the case of Butts and Penny, and therefore judgment was given for the plaintiff, for all but the negro, and as to the damages for him, *quod querens nil capiat per billam*."

"*Opinion of Sir Philip York[e], then Attorney-General, and Mr. Talbot, Solicitor-General,*" 33 Dict. of Dec. 14547, 1729. "We are of opinion, that a slave, by coming from the West Indies, either with or without his master, to Great Britain or Ireland, doth not become free; and that his master's property or right in him is not thereby determined or varied; and baptism doth not bestow freedom on him, nor make any alteration in his temporal condition in these kingdoms. We are also of opinion, that the master may legally compel him to return to the plantations."<sup>1</sup>

*Pearne v. Lisle*, Ambler 75, October 1749. Order for *Ne exeat regno*. Affidavit: "plaintiff was entitled to fourteen Negroes at Antigua; that his agent let them to defendant for hire, at a yearly rent which amounted to 100 *l.* Antigua money; that the defendant refuses to pay for two years service, which is of the value of 100 *l.* sterling, and also refuses to deliver the Negroes to plaintiff's agent: that defendant has declared he intends to leave England soon and go to Antigua:"

Lord Hardwicke, Ch.: [76] "I will discharge the order. 1st, As to the nature of the demand. It is for the use of Negroes. A man may hire the servant of another, whether he be a slave or not, and will be bound to satisfy the master for the use of them. I have no doubt but trover will lie for a Negro slave; it is as much property as any other thing. The case in [2] Salk. 666 [*Smith v. Gould*]<sup>2</sup> was determined on the want of proper description. It was trover *pro uno Æthiope vocat*. Negro, without saying slave; and the being Negro did not necessarily imply slave.<sup>3</sup> The reason said at the bar to have been given by Lord Chief Justice Holt, in that case, as to the cause of his doubt, *viz.* That the moment a slave sets foot in England he becomes free, has no weight with it, nor can any reason be found, why they should not be equally so when they set foot in Jamaica, or any other English plantation. All our colonies are subject to the laws of England, although as to some purposes they have laws of their own. There was once a doubt, whether, if they were christened, they would not become free by that act, and there were precautions taken in the Colonies,<sup>4</sup> to prevent their being baptised, till the opinion of Lord Talbot and myself,

<sup>1</sup> See *Somerset v. Stewart*, pp. 14-18, *infra*.

<sup>2</sup> *Smith v. Brown and Cooper* is on the same page. Lord Hardwicke seems to mix the two cases; for, according to Salkeld, Holt quotes the maxim, "as soon as a negro comes into England, he becomes free," only in *Smith v. Brown and Cooper*.

<sup>3</sup> Holt uses "negro" as synonymous with "slave" in *Smith v. Brown and Cooper*, p. 11, *supra*.

<sup>4</sup> See Lord Mansfield, in *Somerset v. Stewart*, pp. 14-15, *infra*.

then Attorney [77] and Solicitor-General, was taken on that point.<sup>1</sup> We were both of opinion, that it did not at all alter their state. There were formerly villains or slaves in England, . . . and although tenures are taken away, there are no laws that have destroyed servitude absolutely. Trover might have been brought for a villain. . . . As to the merits, a specific delivery of the Negroes is prayed; but that is not necessary, others are as good; indeed in the case of a cherry-stone, very finely engraved, and likewise of an extraordinary wrought piece of plate, for the delivery of which bills were brought in this Court, they could not be satisfied any other way; . . . The Negroes cannot be delivered in the plight in which they were at the time of the demand, for they wear out with labour, as cattle or other things; nor could they be delivered on demand, for they are like stock on a farm, the occupier could not do without them, but would be obliged, in case of a sudden delivery to quit the plantation. The person of the defendant is amenable, for he is a native of Antigua; he is going to Antigua: his effects, and likewise the Negroes, are there, and have been used in that place. It is a colony subject to England, and the plaintiff may have justice done him in the Courts there."

*Sheddan v. a Negro*, 33 Dict. of Dec. 14545 (Scottish case), July 1757. "A Negro, who had been bought in Virginia, and brought to Britain to be taught a trade, and who had been baptized in Britain, having claimed his liberty, against his master Robert Sheddan, who had put him on board a ship, to carry him back to Virginia, the Lords appointed counsel for the Negro, and ordered memorials, and afterwards a hearing in presence, upon the respective claims of liberty and servitude by the master and the negro. But, during the hearing in presence, the Negro died; so the point was not determined."

Also in 20 How. St. Tr. 1 n.

*Shanley v. Harvey* [*Nalvey*], 2 Eden 126, March 1762. "This was a bill brought by Edward Shanley, Esquire, as administrator of Margaret Hamilton, deceased, against Joseph Harvey, a negro, and . . . his trustees, . . . The plaintiff had twelve years before brought over the defendant, Harvey, as his slave, then only eight or nine years old, and presented him to his niece, Margaret Hamilton, who had him baptized, and changed his name. On the 9th of July 1752, being then very ill, she, about an hour before her death, directed Harvey to take out a purse, which was in her dressing-case drawer, and delivered it to him, saying, 'Here, take this, there is £700 or £800 in bank notes, and some more in money, but I cannot directly tell what, but it is all for you, to make you happy: make haste, put it in your pocket, tell nobody, and pay the butcher's bill.' He then knelt down and thanked her. She said, 'God bless you, make a good use of it.' . . . The Lord Chancellor [Henley]. As soon as a man sets foot on English ground he is free: a negro may maintain an action against his master for ill usage, and may have a *Habeas Corpus* if restrained of his liberty. Bill dismissed with costs."

<sup>1</sup> See Opinion of Sir Philip Yorke, *supra*.

*The Africa*, Marsden 228, July 1762. "A British ship sailed from New London in North America to Barbados, with a cargo of provisions and lumber, which she there unladed and took on board 10 negro slaves . . . cleared for Guadaloupe, but sailed to Monte Christi, where she arrived in February, 1760, and in her return was taken by an English man-of-war."

*The St. Croix*, Marsden 228, March 1763. "The *St. Croix*, laden with sugar, was taken on her voyage from Monte Christi by an English privateer, and carried into New Providence. . . The witnesses examined said . . . [229] that they brought about 180 negroes from *St. Croix*; about 10 were sold at Monte Christi, the rest were sent to Cape Francois . . . that Bodkin [one of the owners] went with the slaves and cargo to Cape Francois and there employed a Frenchman to dispose of them, to whom he paid 7 per. cent. on the sale whilst the ship lay at Monte Christi."

*Somerset v. Stewart*, Lofft 1 [20 How. St. Tr. 1], June 1772. [20 How. 1] "On the 3d of December 1771, affidavits were made by Thomas Walklin, Elizabeth Cade, and John Marlow, that James Sommersett, a negro, was confined in irons on board a Ship called the *Ann and Mary*, John Knowles commander, lying in the Thames, and bound for Jamaica; and lord Mansfield, on an application supported by these affidavits, allowed a writ of *Habeas Corpus*, directed to Mr. Knowles, and requiring him to return the body of Sommersett before his lordship, with the cause of detainer. Mr. Knowles on the 9th of December produced the body of Sommersett before lord Mansfield, and returned for cause of detainer, that Sommersett was the negro slave . . . [23] on account of the importance of the case, the Court postponed hearing the objections against the return, till the 7th of February, and the recognizance for the negro's appearance was continued accordingly. On that day Mr. Serj. Davy and Mr. Serj. Glynn argued against the return, and the farther argument was postponed till Easter term, when Mr. Mansfield, Mr. Alleyne, and Mr. Hargrave, were also heard on the same side. Afterwards Mr. Wallace and Mr. Dunning argued in support of the return, and Mr. Serjeant Davy was heard in reply to them. The determination of the Court was suspended till the following Trinity term; and then the Court was unanimously of opinion against the return, and ordered that Sommersett should be discharged."

[Lofft 18] "Trinity Term, June 22, 1772. Lord Mansfield—On the part of Somerset, . . . the court now proceeds to give its opinion. I shall recite the return to the writ of *habeas corpus*, as the ground of our determination; omitting only words of form. The captain of the ship on board of which the negro was taken, makes his return to the writ in terms signifying that there have been, and still are, slaves to a great number in Africa; and that the trade in them is authorized by the laws and opinions of Virginia and Jamaica; that they are goods and chattels; and, as such, saleable and sold. That James Somerset, is a negro of Africa, and long before the return of the king's writ was brought to be sold, and was sold to Charles Stewart, Esq. then in Jamaica, and has not been manumitted since; that Mr. Stewart, having occasion to transact business, came over



hither [in 1769], with an intention to return; and brought Somerset, to attend and abide with him, and to carry him back as soon as the business should be transacted. That such intention has been, and still continues; and that the negro did remain till the time of his [Somerset's] departure [October 1, 1771], in the service of his master Mr. Stewart, and quitted it without his consent; and thereupon [November 26, 1771], before the return of the king's writ, the said Charles Stewart did commit the slave on board the *Ann and Mary*, to save [safe] custody, to be kept till he [Knowles] should set sail, and then to be taken with him to Jamaica, and there sold as a slave. And this is the cause why he, Captain Knowles, who was then and now is, commander of the above vessel, then and now lying in the river of [19] Thames, did the said negro, committed to his custody, detain; and on which he now renders him to the orders of the court. We pay all due attention to the opinion of Sir Philip Yorke,<sup>1</sup> and Lord Chief Justice Talbot, whereby they pledged themselves to the British planters, for all the legal consequences of slaves coming over to this kingdom or being baptized, recognized by Lord Hardwicke,<sup>2</sup> sitting as Chancellor on the 19th of October 1749, that trover would lie: That a notion had prevailed, if a negro came over, or became a christian, he was emancipated, but no ground in law; that he and Lord Talbot, when Attorney and Solicitor-General, were of opinion, that no such claim for freedom was valid; that tho' the Statute of Tenures had abolished villains regardant to a manor, yet he did not conceive but that a man might still become a villain in gross, by confessing himself such in open court. We are so well agreed, that we think there is no occasion of having it argued (as I intimated an intention at first), before all the judges, as is usual, for obvious reasons, on a return to a *habeas corpus*; the only question before us is, whether the cause on the return is sufficient? If it is, the negro must be remanded; if it is not, he must be discharged. Accordingly, the return states, that the slave departed and refused to serve; whereupon he was kept, to be sold abroad. So high an act of dominion must be recognized by the law of the country where it is used. The power of a master over his slave has been extremely different, in different countries. The state of slavery is of such a nature, that it is incapable of being introduced on any reasons, moral or political; but only [by] positive law, which preserves its force long after the reasons, occasion, and time itself from whence it was created, is erased from memory: It's so odious, that nothing can be suffered to support it, but positive law. Whatever inconveniences, therefore, may follow from a decision, I cannot say this case is allowed or approved by the law of England; and therefore the black must be discharged."<sup>3</sup>

Extracts from the arguments:

[20 How. St. Tr. 1] Hargrave, for the negro: [48] "The law of England only knows slavery by birth; it requires prescription in making

<sup>1</sup> See *supra*, Opinion of Sir Philip Yorke, p. 12.

<sup>2</sup> See *Pearne v. Lisle*, p. 12, *supra*.

<sup>3</sup> See comments by Lord Stowell in the case of the *Slave Grace*, pp. 36-37, *infra*.

title to a slave. . . Therefore the law of England is not applicable to the slavery of our American colonies, or of other countries.—If the law of England would permit the introduction of a slavery commencing out of England, the rules it prescribes for trying the title to a slave would be applicable to such a slavery; but they are not so; and from thence it is evident that the introduction of such a slavery is not permitted by the law of England.—The law of England then excludes every slavery not commencing in England, every slavery though commencing there not being antient and immemorial. Villenage is the only slavery which can possibly answer to such a description, and that has long expired by the deaths and emancipations of all those who were once the objects of it. . . [51] The first case on the subject is one mentioned in Mr. Rushworth's *Historical Collections*; [see p. 9, *supra*] . . In order to judge what degree of credit is due to the representation of this case, it will be proper to state from whom Mr. Rushworth reports it. In 1637, there was a proceeding by information in the Star-Chamber against the famous John Lilburne, for printing and publishing a libel; and for his contempt in refusing to answer interrogations, he was by order of the Court imprisoned till he should answer, and also whipped, pilloried, and fined. His imprisonment continued till 1640, when the Long Parliament began. He was then released, and the House of Commons impeached the judges of the Star-Chamber for their proceedings against Lilburne. In speaking to this impeachment, the managers of the Commons cited the case of the Russian slave. Therefore the truth of the case . . rests upon the credit due to the managers of the Commons. When this is considered, and that the year of the reign in which the case happened is mentioned, with the name of the person who brought the slave into England; that not above 72 or 73 years had intervened between the fact and the relation of it; . . I see no great objection to a belief of the case. If the account of it is true, the plain inference from it is, that the slave was become free by his arrival in England."

[Lofft 8] Mr. Wallace, in support of the return: "As to England, not permitting slavery, there is no law against it; . . Villenage itself has all but the name. Though the dissolution of monasteries, amongst other material alterations, did occasion the decay of that tenure, slaves could breathe in England: For villains were in this country, and were mere slaves, in Elizabeth. Sheppard's *Abridgment*, afterwards, says they were worn out in his time. [Lord Mansfield mentions an assertion, but does not recollect the author, that two only were in England in the time of Charles II. at the time of the abolition of tenures.] . . 'Tis necessary the masters should bring them over; for they cannot trust the whites, either with the stores or the navigating the vessel. . . The court must consider the great detriment to proprietors, there being so great a number in the ports of this kingdom, that many thousands of pounds would be lost to the owners, by setting them free. (A gentleman observed, no great danger; for in a whole fleet, usually, there would not be six slaves.)"

[9] Mr. Dunning, in support of the return: "'Tis my misfortune to address an audience, the greater part of which, I fear, are prejudiced the

other way. . . Many alarming apprehensions have been entertained of the consequence of the decision, either way. About 14,000 slaves, from the most exact intelligence I am able to procure, are at present here; and some little time past, 166,914 in Jamaica: there are a number of wild negroes in the woods. The computed value of a negro in those parts 50 *l.* a head. In the other islands I cannot state with the same accuracy, but on the whole they are about as many. The means of conveyance, I am told, are manifold; every family almost brings over a great number; and will, be the decision on which side it may. Most negroes who have money . . . make interest with the common sailors to be carried hitherto."

Observations of Lord Mansfield in the course of the arguments: [8] "The case alluded to<sup>1</sup> was upon a petition in Lincoln's Inn Hall, after dinner; probably, therefore, might not, as he believes the contrary is not [un]usual<sup>2</sup> at that hour, be taken with much accuracy. The principal matter was then, on the earnest solicitation of many merchants, to know, whether a slave was freed by being made a Christian? And it was resolved, not. 'Tis remarkable, tho' the English took infinite pains before to prevent their slaves being made Christians, that they might not be freed, the French suggested they must bring their's into France, (when the edict of 1706 was petitioned for,) to make them Christians. He said, the distinction was difficult as to slavery, which could not be resumed after emancipation, and yet the condition of slavery, in its full extent, could not be tolerated here. Much consideration was necessary, to define how far the point should be carried."

[16] "the last confession of villenage extant, is in the 19th of Henry the 6th."

[17] "The question is, if the owner had a right to detain the slave, for the sending of him over to be sold in Jamaica. In five or six cases of this nature, I have known it to be accommodated by agreement between the parties: On its first coming before me, I strongly recommended it here. But if the parties will have it decided, we must give our opinion. . . Contract for sale of a slave is good here; the sale is a matter to which the law properly and readily attaches, and will maintain the price according to the agreement. But here the person of the slave himself is immediately the object of enquiry; which makes a very material difference. The now question is, whether any dominion, authority or coercion can be exercised in this country, on a slave according to the American laws? The difficulty of adopting the relation, without adopting it in all its consequences, is indeed extreme; and yet, many of those consequences are absolutely contrary to the municipal law of England. We have no authority to regulate the conditions in which law shall operate. On the other hand should we think the coercive power cannot be exercised: 'Tis now about fifty years since the opinion given by two of the greatest men of their own or any times,<sup>3</sup> (since which no contract has been brought to trial, between the masters and slaves;) the service performed by the slaves without wages,

<sup>1</sup> "Lord Hardwicke, and the afterwards Lord Chief Justice Talbot, then Attorney and Solicitor-General, pronounced a slave not free by coming into England." [Wallace's argument.] See *supra*, Opinion of Sir Philip Yorke, p. 12.

<sup>2</sup> 20 How. St. Tr. 1 (70).

<sup>3</sup> See Opinion of Sir Philip Yorke and Mr. Talbot, p. 12, *supra*.



is a clear indication they did not think themselves free by coming hither. The setting 14,000 or 15,000 men at once free loose by a solemn opinion, is much disagreeable in the effects it threatens. . . Mr. Stewart advances no claim on contract; he rests his whole demand on a right to the negro as a slave, and mentions the purpose of detainure to be the sending of him over to be sold in Jamaica. If the parties will have judgment, *fiat justitia, ruat coelum*, let justice be done whatever be the consequence. 50 *l.* a head may not be a high price; then a loss follows to the proprietors of above 700,000 *l.* sterling. . . [18] Mr. Stewart may end the question, by discharging or giving freedom to the negro. . . If the parties chuse to refer it to the Common Pleas, they can give them that satisfaction whenever they think fit. An application to parliament, if the merchants think the question of great commercial concern, is the best, and perhaps the only method of settling the point for the future. . . I think it right the matter should stand over; and if we are called on for a decision, proper notice shall be given."

*Joseph Knight (a negro) v. Wedderburn*, 33 Dict. of Dec. 14545 (Scottish case), January 1778. "The commander of a vessel, in the African trade, having imported a cargo of Negroes into Jamaica, sold Joseph Knight, one of them, as a slave, to Mr. Wedderburn. Knight was then a boy, seemingly about twelve or thirteen years of age. Some time after, Mr. Wedderburn came over to Scotland, and brought this Negro along with him, as a personal servant. The Negro continued to serve him for several years, without murmuring, and married in the country. But, afterwards, prompted to assert his freedom, he took the resolution of leaving Mr. Wedderburn's Service, who, being informed of it, got him apprehended, on a warrant of the justices of peace. Knight, on his examination, acknowledged his purpose. The justices found 'The petitioner entitled to Knight's services, and that he must continue as before.' Knight then applied to the sheriff of the county, (Perthshire), by petition, setting forth, 'That Mr. Wedderburn insisted on his continuing a personal servant with him,' and prayed the Sheriff to find, 'That he cannot be continued in a state of slavery, or compelled to perpetual service; and to discharge Mr. Wedderburn from sending the petitioner abroad.' After some procedure in this process, the sheriff found, 'That the state of slavery is not recognized by the laws of this kingdom, and is inconsistent with the principles thereof; that the regulations in Jamaica, concerning slaves, do not extend to this kingdom; and repelled the defender's claim to a perpetual service.' Mr. Wedderburn having reclaimed, the sheriff found, 'That perpetual service, without wages, is slavery; and therefore adhered.' The defender removed the cause into the Court by advocacy. The Lord Ordinary took it to report, upon informations. Being a question of general importance, the Court ordered a hearing in presence, . . [14549] The Court were of opinion, that the dominion assumed over this Negro, under the law of Jamaica, being unjust, could not be supported in this country to any extent: That, therefore, the defender had no right to the Negro's service for any space of time, nor to send him out of the country against his consent: That the Negro was likewise protected under the act 1701,



C. 6, from being sent out of the country against his consent.—The judgments of the Sheriff were approved of, and the Court ‘remitted the cause *simpliciter.*’ ”

Also in 20 How. St. Tr. 1 (2 n.).

*Jones v. Schmoll*, 1 Term R. 130 n., 1785. “an action on a policy of assurance, ‘At and from Bristol to the coast of Africa, during her stay and trade there, and from thence to her port or ports of discharge in the West Indies.’ There was a memorandum on the policy, that, ‘The assurers are not to pay any loss that may happen in boats during the voyage (mortality of negroes by natural death excepted); and not to pay for mortality by mutiny, unless the same amount to 10 *l.* per cent. to be computed upon the first cost of the ship, outfit, and cargo, valuing negroes so lost as 35 *l.* per head.’ The demand upon the policy was the loss of a great many slaves by mutiny. The evidence of the captain was, that he had shipped 225 prime slaves on board: That on the 3d of May, before he sailed from the coast of Africa, an insurrection was attempted. That the women seized him on the quarter deck, and attempted to throw him overboard. That he was rescued by the crew. That the women and some men threw themselves down the hatchway, and were much bruised. That he sent the ring-leader on shore. That twelve men and a woman afterwards died of those bruises, and from abstinence. That on the 22d of May, there was a general insurrection, the crew were forced to fire upon the slaves and attack them with weapons. It was a case of imminent necessity. Several slaves took to the ship’s sides, and hung down in the water by the chains and ropes, some for about a quarter of an hour: three were killed by firing, and three were drowned; the rest were taken in, but they were too far gone to be recovered; many of them were desperately bruised; many died in consequence of the wounds they had received from the firing during the mutiny; some from swallowing salt water; some from chagrin at their disappointment, and from abstinence; several of fluxes and fevers; in all to the amount of 55, who died during the course of the voyage. The underwriters had paid at the rate of 15 per cent. for 19, who were either killed during the mutiny, or had afterwards died of their wounds. Bearcroft, for the plaintiff, contended, that though the rest did not actually die in the mutiny, or from any wounds received at that time, yet they had all died *in consequence* of the mutiny; for if there had been no mutiny, nothing of the kind would have happened, and that on this ground the underwriter ought to be liable. He stated another consequential loss, which was, that the very circumstance of there having been a mutiny amongst the remaining slaves had so far lessened their value in the estimation of the planters, that they were sold at 17 *l.* a-head less than they would otherwise have done; that on this circumstance also he had no doubt but the plaintiff was entitled, in point of law, to recover against the underwriter. Lord Mansfield, Ch. J. I think not . . . that is a *remote* consequence, and not within any peril insured against by the policy . . . [131] Another class is, I think, as clearly not within the policy; Such as, being baffled in their attempts, in despair chose a mode of death, by fasting, or died through despondency. That is not a mortality by mutiny, but the reverse; for it is by failure of mutiny. . . . The great class are such as received some hurt by the mutiny,

but not mortal, and died afterwards of other causes, as those who swallowed water, jumped overboard, etc. etc. This is the great point. Verdict. That all the slaves who were killed in the mutiny, or died of their wounds, were to be paid for. That all those who died of their bruises, which they received in the mutiny, though accompanied with other causes, were to be paid for. That all who had swallowed salt water, or leaped into the sea, and hung upon the sides of the ship without being otherwise bruised, or died of chagrin, were not to be paid for."

*King v. Inhabitants of Thames Ditton*, 4 Douglas 300, April 1785. "Charlotte Howe was removed under an order of two justices, from the parish of Thames Ditton, in Surry, to the parish of St. Luke's, Chelsea, in Middlesex. Upon an appeal to the Court of Quarter Sessions for Surry, the order was quashed, and the following facts stated: The pauper was bought in America by Captain Howe as a negro slave, and by him brought to England in 1781. In November 1781, Captain Howe went to live in the parish of Thames Ditton, and took the pauper with him, and she continued with him there in his service, till the 7th of June, 1783, when he died, soon after which the pauper was baptized at Thames Ditton, and she continued to live with his widow and executrix, who soon afterwards removed to the parish of St. Luke's, Chelsea. There the pauper continued to live with her as before for five or six months, when she left her." [2 Bott P. L. Const 186] "during the whole of this time she was childless and unmarried." [4 Doug. 300] "The ground of the order of removal was that the pauper had served the last forty days at the parish of St. Luke's, Chelsea." Counsel, contra: [301] "The court has never decided that a negro brought to England is there under an obligation to serve. [Lord Mansfield.—The determinations go no further than that the master cannot by force compel him to go out of the kingdom.] . . This kind of service imports a particular hiring much more strongly than a bare service for a year. [Lord Mansfield.—The case of Somerset is the only one on this subject. Where slaves have been brought here, and have commenced actions for their wages, I have always nonsuited the plaintiff.]" [2 Bott P. L. Const 187] "Lord Mansfield: The case of Somerset, the negro slave, goes no farther than to determine that the master of such a servant shall not have it in his power to take him out of the kingdom against his will; . . To give this pauper a settlement, she must come within the description of a positive law. Her being black or a slave is no objection, but the statute requires a hiring: there is none here, and therefore the case is not within the statute."

*Robertson v. Ewer*, 1 Term R. 127, February 1786. [128] "That the ship sailed [from London] . . to the coast of Africa, at which place she took in a cargo of slaves, and proceeded from thence to the island of Barbadoes, where she arrived . . December, 1781. . . That on the 22d [of January 1782] . . the small-pox broke out amongst the slaves, who were all obliged to be put on shore. In consequence of which, and for want of mariners . . she was detained . . above two months after the embargo was taken off [*i. e.*, after January 7, 1782]. . . then sailed to Jamaica, which was her last port of discharge."

*Keane v. Boycott*, 2 H. Bl. 511, May 1795. "This was an action on the case, for enticing the Plaintiff's servant to leave his service. . . The facts were, that a negro boy called Toney a slave in the island of St. Vincent about 16 or 17 years old, there executed an indenture [on the 21st of April, 1794], by which he bound himself to serve the Plaintiff, who was coming to Europe, as a servant for five years, and the Plaintiff covenanted to find him food, lodging and clothing, and medical assistance in case of sickness. The plaintiff soon after arrived in this country with the boy as his servant, and went to Cheltenham, where the Defendant, who was a captain in the army on a recruiting party, meeting the boy in the street with his livery on, asked him if he would enlist, to which he assented; the Defendant then asked him whether he was an indented servant, to which he answered that he was bound to the Plaintiff for five years. After this the boy went to the Defendant's lodgings, where the Defendant gave him two shillings, and told him to go to Gloucester to the regiment; to which place he accordingly went. Upon this, the Plaintiff procured a warrant from a magistrate, under which the boy was taken and brought back to his service; after which, the Defendant sent two serjeants to take the boy again, and bring him back to the regiment, which they did; but it did not appear that the boy went with them unwillingly or by compulsion. On this evidence, the jury found a general verdict for the Plaintiff."

Heath, J., suggested [512] "that as slavery was differently modified in different parts of the West Indies, perhaps the effect of the master entering into a contract with his slave might be to enfranchise him, by analogy to the old law respecting villeins in England, to whom, if the lord entered into an obligation, it operated as a manumission;<sup>1</sup> and if the effect were an emancipation from slavery, it was evidently a contract for the benefit of the infant, and if not binding on him, at least only voidable by him, . . ." Lord Chief Justice Eyre: [515] "The Defendant in this case had no concern in the relation between the Plaintiff and his servant; he dissolved it officiously, and to speak of his conduct in the mildest terms, he was carried too far by his zeal for the recruiting service. If he had given himself time to reflect upon what his own feelings would have been, if he had been in the situation of the master, I am persuaded that he not only would not have solicited this negro boy to leave his master, but would not have accepted him if he had voluntarily offered to enlist at the drum head. Upon the whole, therefore, we are of opinion that the verdict is right, and that there ought not to be a new trial."

<sup>1</sup> "With the greatest deference to the high authority which started, as well as to that [Lord Chief Justice Eyre] which pursued this ingenious conjecture; it is to be observed that it is inconsistent both with the general policy, and local institutions of the British islands in the West Indies, to suppose that a slave can be *manumitted* by *implication*. The histories of those islands and their statute books shew that *manumission* can only be effected by some act of the master, done *expressly* for that purpose, and accompanied with the *settlement of an annual provision* on the slave so manumitted. On this subject the law of the island of St. Vincent is particularly strict. . . This being so, the foundation of the argument, namely that the effect of the master entering into a contract with the slave might be to enfranchise him in the island of St. Vincent where it was made, evidently fails. The question, whether such would be the effect of the contract *in this country*, could not arise, because as soon as a slave arrives here, the yoke of slavery is dissolved by operation of law, whether he has previously entered into any contract or not, and whatever may be his situation with respect to the service of his master." (Note of the reporter, Henry Blackstone.)

*Webster v. De Tastet*, 7 Term R. 157, February 1797. "The plaintiff, having been hired to go as a mate in a ship from the coast of Africa to the Havannah, for which he was to receive wages at the rate of 5 *l.* per month, and three privilege slaves free of expense on the ship's arriving at the port of sale, directed the defendant, who was his agent at Liverpool, to get an insurance of his privilege; and for the defendant's neglect the plaintiff brought this action on the case against him. It appeared at the trial . . . that the ship was lost on her voyage, and that the plaintiff thereby sustained a loss of 150 *l.* reckoning 39 *l.* 5 *s.* for his chest and clothes, and the rest for the value of the slaves. It was objected . . . that the plaintiff could not recover the value of the slaves, because they were not the legal subject of insurance, they being in the nature of seamen's wages. . . . The Court were clearly of opinion that the slaves were not the subject of insurance,"

*Farmer v. Legg*, 7 Term. R. 186, May 1797. "an action on a policy of insurance on 'the *Cadiz Dispatch*,' an African ship engaged in the slave trade, 'at and from London to the coast of Africa, during her stay there, and from thence to her port of discharge in the West Indies.' The loss happened in consequence of an insurrection of the slaves. The principal question was whether the ship had been navigated in the manner prescribed by the 31 Geo. 3. c. 54.<sup>1</sup> . . . [187] the captain had made oath that he had been two voyages as chief mate in the ship *Sally* engaged in the slave trade, and the present plaintiff (the owner in the voyage insured) had certified that that was true to the best of his knowledge and belief," Nonsuit: [191] "It was undoubtedly the intention of the Legislature to put a check to the mischievous and improvident manner of carrying the slaves to the West Indies: it was intended that the slaves should have as much indulgence as their situation would permit, and . . . [192] it was . . . enacted that the captain of every slave ship should have a certain qualification gained by his experience in the trade, of which the captain is to make oath, . . . to be corroborated by the certificate of the owners. . . . It is . . . a more rational construction of this act of parliament that the owners of the respective ships in which the captain has gained this qualification, should certify . . . than that the owners of the ship in which he is about to be engaged should certify a fact, the truth of which they cannot know." [Ashhurst, J.]

*The Thomas*, 1 Chr. Rob. 322, April 1799. "This was a British slave ship seized by the slaves on board, and afterwards retaken by an English frigate, . . . She was carried to St. Domingo,"

*Alfred v. Marquis of Fitzjames*, 3 Espinasse 3, May 1799. "Assumpsit for servants wages. . . . The Plaintiff . . . relied on a *quantum meruit* for the time he had served. . . . It appeared in evidence, that the Plaintiff came over from Martinique with the Duchess of Fitzjames, then Mademoiselle Le Brun. His father and mother had been slaves on an estate belonging to her in that island. He had entered into her service in Martinique, and continued to serve her after marriage; and the Duke found him

<sup>1</sup> *Ibid.*, n.: "This was one of the statutes passed on this subject; . . . but the act cited in Court was the 32 Geo. 3. c. 52."



with necessaries of every description. There was no contract for any hiring for wages; but a witness said, that the Marquis had been heard to promise to pay him wages. . . Lord Kenyon said, he was prepared to give a decided opinion: That up to the time of the promise to pay wages, which the witness had said the Defendant had made, the Plaintiff had no title to recover, as there was no original contract of service for wages."

*The Isabella*, 2 Chr. Rob. 241, November 1799. Petition "to recover a sum of money due [the chief mate] for wages, on a voyage from the port of London to the coast of Africa, . . and from thence to the West Indies. The demand was for 26 *l.*, at the rate of 4 *l.* per month under agreement; and beyond that, for 70 *l.*, as the value of a privilege of one slave,<sup>1</sup> . . due under the ordinary practice of that trade, according to average price at the port of delivery."

*The Phoenix*, 3 Chr. Rob. 186, October 1800. Susini bought the vessel at St. Thomas, [189] "went to Cuba, sold his cargo, and bought another, with which he went . . to Baltimore, from thence to Angola, in Africa, where he took a cargo of slaves, and sold them at St. Thomas;"

*Williams v. Brown*, 3 Bos. and Pul. 69, February 1802. "The Plaintiff, who was a negro, in November 1797, entered at London on board the *Holderness* [of which the defendant was master], bound for Grenada, as an ordinary seaman out and home: on the arrival of the *Holderness* at Grenada the Plaintiff was claimed as a runaway slave by Mr. Hardman his former master, and delivered to him; and thereupon the Plaintiff, the Defendant, and Mr. Hardman, met and agreed, that on payment of 30 joes by the Defendant to Mr. Hardman, the latter should manumit the Plaintiff, which was accordingly done by a regular instrument of manumission; and the Plaintiff on the same day entered into an indenture, in which, describing himself as 'a free black man of the island of Grenada,' he covenanted with the Defendant, . . to . . go on board . . and during the term of three years faithfully serve in the capacity of a sailor . . [70] [receiving] for the first year 15 *l.*, for the second 20 *l.*, and for the third 25 *l.*, by quarterly payments." The negro "served as a sailor on the voyage home, and for his wages in that voyage the present action was commenced [upon a *quantum meruit*], the wages for the outward bound voyage having been paid, as well as the money stipulated for by the indenture."

Held: he is estopped by his covenant from claiming more than the sum stipulated. [70] "the contract could not be considered as valid in England if the stipulation had been that the Plaintiff should serve the Defendant for life. The Plaintiff in [71] the present case being as free as any one of us while in England . . When the Plaintiff was claimed in Grenada as a runaway slave, he was not only liable to be remanded to slavery, but by the laws of the island he was amenable to severe punishment for his desertion." [Lord Alvanley, C. J.] "When this Plaintiff was [72] claimed in Grenada" he was "liable to severe punishment for having run away from his master: and he was a slave for life. . . I

<sup>1</sup> *Ibid.*, n.: "with the benefit of a slave, when the cargo was taken completely on board, in Africa,"



consider the whole as one transaction. The Defendant [the master of the ship] was to advance the money for the Plaintiff's freedom, in consideration of which the master [of the slave] was to manumit the Plaintiff, and the Plaintiff thus manumitted was to enter into a new contract to serve the Defendant for three years, . . . This was an agreement for the advantage of the Plaintiff: he was to be relieved from punishment; he was to become a free man; . . . In all countries where slavery is tolerated, agreements between the master and the slave respecting the manumission of the latter are enforced by the law. . . . He is competent to enter into a contract for the purpose of his manumission, and therefore such contract may be put in force against him. . . . considering the contract as having been beneficial to the Plaintiff, I think that he ought to be bound by his own agreement." [Heath, J.]

"though he might enter into a contract to go to any other place but to Grenada, yet he could not engage to go there without danger of being detained. . . . The consequence was, that on his arrival at Grenada" he was "taken as a runaway [73] slave, he became liable to punishment, and the forfeiture to his master in Grenada of all the wages which he had earned during the outward voyage.<sup>1</sup> . . . I cannot but think the contract entered into in Grenada advantageous to the Plaintiff. If indeed the man had been free he might perhaps have made a more advantageous bargain for himself. But being a slave he could not enter into any contract without the leave of his master; and so being a slave, and liable to the terrible consequences of desertion, it is agreed that he shall be set free, he receives his wages for the outward bound voyage, and on the other hand he engages to serve the Defendant for three years at certain wages on board such ship, and at such places as the Defendant shall have occasion for his services." [Rooke, J.]

"Here indeed at the time of entering into the contract he was in the situation of a slave. But I do not know that a slave is precluded from entering into a contract. He may do so provided his contract does not affect the rights of his master. Though he cannot deprive his master of his services, yet with the consent of his master he may engage to do service for another. . . . [74] It is supposed that he has been driven to an unreasonable and unconscientious bargain: but I cannot say that it so appears to me. What was his condition at Grenada? Being claimed as a runaway slave he was considered as a criminal, he was liable to very severe punishment, he was incapable of recovering for his own benefit the money which he had earned upon the outward bound voyage, and he was unable to fulfil his contract with the Defendant. . . . It is true that by the articles he had contracted with the Defendant for a greater rate of wages; but from that contract he could derive no benefit, for his master was entitled to all the wages he might earn. . . . By rescinding such a contract as this I think we should be guilty of great inhumanity; for unless such a contract can be enforced, no master of a slave would agree to his manumission, nor any person be willing to pay the price of his freedom; the consequence of which

<sup>1</sup> Was not the slave on English soil till he stepped off the ship at Grenada? If so, his wages were earned while he was a free man. Ed.

would be that the present Plaintiff and all others in similar situations must remain in perpetual slavery." [Chambre, J.]

This case is quoted at considerable length by Lord Stowell in his decision as to the *Slave Grace* [2 Hagg. Adm. 94 (119-122), 1827], *infra*: [122] "I do think it approaches so near as to possess the authority of a direct decision upon the immediate subject," "he had become a free man by landing in England, in the opinion of all the Judges; and it is only by virtue of his pre-existing state of slavery, that he became subject to be returned into it again, until his manumission. The four Judges all concur in this—that he was a slave in Grenada, though a freeman in England; and he would have continued a freeman in all other parts of the world excepting Grenada."

*The Trelawney*, 4 Chr. Rob. 223, March 1802. [225] "The affidavit of Mr. Kendal, the master of the *Lord Nelson* [slave-ship] states,—'That he arrived at Cabenda, on the coast of Angola, in May 1799; that during his stay there, the *Trelawney* arrived, and was employed in taking in her complement of slaves, when, on the 2d of August, about six o'clock in the morning, those already on board, in number about 85, rose upon the captain and crew, seized the arms, wounded two of the crew, and got complete possession of the ship in about five minutes; that the captain and all the crew, except the two men who were wounded, got through the cabin windows into two boats, belonging to the *Trelawney*, and rowed away to the *Lord Nelson*.' " Kendal "conceiving that not a moment was to be lost, commenced a heavy fire from his great guns and small arms, into the *Trelawney*, which was lying about half a cable's length from the *Lord Nelson*. That the captain and surgeon of the *Trelawney*, and a boy, got on board his ship, but he prevented the rest of the crew from quitting their boats. That about this time, thirty of this appearer's men, whom he had previously dispatched in two of his boats for that purpose, had boarded the *Trelawney*, and were engaged with the negroes about an hour and a half, and after a severe conflict, in which two of his crew were severely [226] wounded, succeeded in quelling the insurrection. That about a quarter of an hour before the slaves were completely subdued, this appearer went on board the *Trelawney* with the boat's crew, whom he compelled to return, by threatening to fire into their boat; that he remained on board the *Trelawney* till between nine and ten o'clock, when perfect order was restored, and this appearer returned to his ship, leaving his surgeon and surgeon's mate to take care of the ship, and give the necessary relief to the wounded." The ultimate value of the slaves [223] "in the West Indies, after the contingencies of a long voyage" was "stated to be about 10,000 *l*."

*The Anne*, 5 Chr. Rob. 100, February 1804. "This was a case of salvage, brought by the owners and master of the *Elizabeth*, a slave ship, for salvage services . . . on the coast of Africa. . . the *Anne* had been in considerable distress from an insurrection of her slaves, but that this insurrection had, in fact, been quelled by her own crew, . . . [101] A second insurrection is also alledged of the Butlers and Linguisters, who are officers of the nations of the coast, with whom they were carrying on their traffic; but this is not in any manner proved."

*The Abby*, 5 Chr. Rob. 251, July 1804. "Mr. Dawson, a British subject," [252] "fitted out this vessel for a voyage to Africa, there to barter her cargo for slaves, and then to carry them to the island [*sic*] of Demarara, at that time a Dutch colony. The vessel sailed [from Liverpool] on the 11th of September 1795. . . [253] The vessel sailed from the coast of Africa, in May 1796, and was taken off the island of Demarara, after the surrender of that island to the British forces, and carried to Martinique." See 255 n. for acts regulating the slave trade.

*The Richmond*, 5 Chr. Rob. 325, December 1804. The *Richmond*, an American vessel, "sailed on a destination to St. Helena, from thence to Mozambique, on the coast of Africa, with a design of proceeding afterwards with a cargo of slaves to the Havannah,"

*The Vanguard*, 6 Chr. Rob. 207, November 1805. "This was a case on petition for the recovery of wages and the privilege of three slaves, alleged to be due to W. Taylor, for his services . . . in the capacity of mate during a voyage from Liverpool to the West Indies, and back to Liverpool, under contract of the 2d September, 1802." Taylor agreed to act as ostensible master until the ship sailed, as the character of the real master [210] "for cruelty was so well known that he would not have been able to have procured men." Violation of the act of 30 Geo. III. c. 33, regulating the slave trade.

*L'Éole*, 6 Chr. Rob. 220, December 1805. "This was a French vessel, which had been captured by three privateers on the coast of Africa, with a cargo of European goods and a few [fourteen] slaves on board." [223] These "were taken out, and put on board another vessel; that the remainder of the cargo was bartered away on the coast [for 200 slaves] . . . who were shipped on board this vessel, and sent to Barbadoes to be condemned as prize." Held: this was an importation "in total violation of the regulations which the legislature has imposed." ["Acts, 12th Ch. 2d, 7th and 8th W. 3d, and the 26th and 39th of his present Majesty."]

*La Dame Cécile*, 6 Chr. Rob. 257, February 1806. The garrison of Goree seized the ship and cargo of slaves [260], "the property of Sundry persons of Hamburgh," [257] "took the usual examinations, and forwarded them, with the ship papers, to the High Court of Admiralty . . . where the ship and cargo were condemned. They were in the mean time sold to a British merchant, who sent them to the island of Barbadoes for sale. On their arrival . . . a seizure was made . . . as imported . . . in violation of the 26th [c. 60] and 29th [c. 80] Geo. 3. and a sentence pronounced against them." Property restored to the claimants. [260 n.] "The ship and cargo of 33 slaves was claimed for Mr. Powel, of Liverpool, and six slaves for an officer of the garrison at Goree."

*The Horatio*, 6 Chr. Rob. 320, December 1806. "re-capture of a British slave ship, that had been taken on the coast of Africa, by three French privateers,"

*Edmiston v. Wright*, 1 Campbell 88, Mich. 1807. "The defendant had a gang of negroes let out in Jamaica. . . . In 1803 the defendant wished

to transfer them to his estates in Georgia, and for that purpose his agent at the latter place dispatched the ship *Mary*, captain Beck, to Jamaica. The negroes were put on board by the plaintiff at Port Maria, and carried to Port Antonio; but as the captain had not got a permit to receiving them, they were there seized as forfeited, together with the ship and the rest of her cargo. To release them, the plaintiff paid as a composition 1200 l."

*Fisher v. Ogle*, 1 Campbell 418, Trinity 1808. "it resulted evidently from the papers on board, that the expedition of the said ship *Juno*, her cargo, and the operations of her captain on the coast of Africa,<sup>1</sup> were for account of the Brothers Geddes, merchants of London, who had, to masque the English property of this outfit, borrowed the American flag and passport of the said ship *Juno*, and taken for their agent and partner in this expedition, Captain Fisher, furnished with a certificate of citizen of the United States." "The *Juno* was captured by a French privateer, carried into Martinique, and there condemned in the vice-admiralty court."

Held: "there is no proof that the property is not American,"

*The Amedie*, 1 Acton 240, March 1810. "The *Amedie* and another vessel, the *Semiramis*, belonging to the same owner (Mr. Groves of Charlestown) sailed in company together" in September 1807, for the coast of Africa. "The return cargo [from Bonny] consisted of 105 slaves, . . the former master . . had received from his owner instructions to make all possible expedition so as to reach Charlestown before the 1st day of January 1808, as the American Government had prohibited the African slave trade after the expiration of the year 1807; if he found it impossible to return 'within the time limited by the laws of his country,' he was directed 'to proceed by way of the old straits of Bahama to Matanzaz, where he would find further instructions.' . . on the 22d, he thinks, of December, [the present master] . . considering it impossible from his bearing to make the voyage within the limited time,<sup>2</sup> altered the ship's course and bore away for Cuba. . . [243] this vessel [was] taken the very day the master asserts he had altered his intention of going to Charlestown in the intricate and difficult navigation of the West India islands. This was not the natural and usual routine of such a voyage." [249] "Judgment.—Sir Wm. Grant.—In the case of the *Amedie* it must be considered. . . that she was employed in carrying slaves from the coast of Africa to a Spanish colony. . . [250] The slave trade has . . been totally abolished in this country, and . . [251] we are now entitled . . to hold that *prima facie* the trade is altogether illegal, and thus to throw on a claimant the whole burden of proof, in order to shew that by the particular law of his own country he is entitled to carry on this traffic. . . In the present case the claimant does not bring himself within the protection of the law of his own country; he appears to have been acting in direct violation of that law [act of 1794] which admits of no right of property such as he claims:" Sentence of the court below affirmed,

<sup>1</sup> "and from thence to her port or ports of discharge in the West Indies,"

<sup>2</sup> Before January 1, 1808. But the act of Congress, 1794, prohibited a trade in slaves by Americans to foreign settlements. The vessel "fell between two stools." Ed.



condemning the cargo of slaves to the sole use of his Majesty (which were afterwards set at liberty) and the ship as lawful prize to the captor.

*The Africa*, 2 Acton 1, November 1810. The *Africa*, an American vessel, sailed from the coast of Africa December 16, 1807, with a large cargo of slaves, and was captured January 30, 1808. "The instructions in the present case pointed out a direct return voyage to Charlestown, or 'if unable, from contrary winds, to reach Charlestown prior to the 1st of January 1808, [2] to make the first American port which the master could fetch before that day, and report the ship at the nearest custom-house as bound there, but put in by stress of weather, and by so doing the prohibitory act would not attach to the *Africa*.' . . The instructions were punctually observed; but from a great competition amongst the slave-ships on the coast, and the negroes having been attacked by the small-pox, the vessel was unable to make any American port in time, and therefore continued her course for Charlestown." The former master, "when overlooking the ship's papers in [3] company with the lieutenant of the capturing vessel, had said, 'This is the chart I have to carry me to New Providence,' " Ship and cargo condemned.

*The Nancy*, 2 Acton 4, November 1810. "the return voyage from Senegal commenced the 30th September 1807, . . through the sickness of her crew, . . and the apprehensions entertained from the tumultuous disposition of the slaves, who had thrice risen upon the crew, and had been with difficulty subdued, the master was induced to alter his intended destination to Charlestown, and bear away for the nearest port in the West Indies. On the 30th October he discovered the high lands of Spanish Town, and considering St. Thomas's most convenient, in the attempt to make that island was captured." King's Advocate: [5] "It was remarkable that the master, in making for St. Thomas, must have crossed the trade winds, and passed the latitude of St. Bartholomew and Barbadoes. This was evidently a voyage undertaken to procure the best market he could. In the preparatory examination the master fraudulently had stated the whole cargo to belong to his American owners, but the day after, apprehensive of detection, he corrected himself by admitting that ten slaves had been shipped on freight by a Frenchman. Further proof could not therefore be now admitted to distinguish these from the remainder, but the whole property should be considered liable to confiscation." Ship and cargo condemned.

*The Anne*, 2 Acton 6, November 1810. The *Anne*, an American ship, sailed in 1806 with a cargo of slaves "from the coast of Africa (where she had touched at several settlements of different European nations, for the purpose of obtaining slaves) to Monte Video in South America." She was captured [7] "in sight of port, on the 7th January 1807. By these dates it will appear that she had returned nearly a year prior to the operation of the general restrictive law of America, which did not take place until 1808, and nearly three months before the British law (passed 25th March 1807, prohibiting the African slave trade from the 1st of May 1807 [47 Geo. III., sess. 1, c. 36]) for abolishing the slave trade.



The question, therefore, for the decision of the Court will be, whether the principle recognized by the judgment delivered in the case of the *Amedie* (vol. I, p. 240) is to be construed as having a retrospective effect, or in other words, will a British Court of Prize, acting upon this principle, compel a neutral claimant, whose property has been captured previous to the abolition of the slave trade by the British legislature, to shew that he acted under the sanction or protection of the laws of his own country." [Dallas for the claimant.] Ship and cargo condemned.<sup>1</sup>

*The Fortuna*, 1 Dodson 81, March 1811. "This vessel [(88) with a cargo well assorted for the African market] sailed from New York, under American colours, in the month of July 1810, being then named the *William and Mary*, and arrived at Madeira in September. The ostensible owner . . . was an American citizen . . . Trenholm, who also acted as master. . . he landed a part of his cargo; and about a week before his departure . . . he executed a bill of sale for the ship to a native of Madeira," a clerk of the consignees of the *William and Mary*. No consideration was in fact given for the vessel, which was renamed the *Fortuna*, sailed under Portuguese papers, and flew the Portuguese flag. A Portuguese was appointed master, and Trenholm [82] "was now converted into a super-cargo; and the whole conduct and entire controul of the ship and adventure were committed to him," [90] "The construction and furniture of the ship had all the accommodations necessary for the conduct of [the slave] trade, and of that trade only. She had platforms ready constructed; she had timbers fit for the construction of more; she had iron shackles and bolts, and running chains and collars—all adapted for the purposes of conveying slaves—and the quantity and species of provision and medicine which such purposes require," This vessel sailed from Madeira October 6, and was captured by an English ship "seven or eight miles distant from the harbour of Funchall," Vessel and cargo condemned: [87] "no doubt can be entertained that she is an American vessel . . . only colourably transferred to a Portuguese for purposes of deception." The recent decision in the case of the *Amedie* is followed: [85] "any trade contrary to the general law of nations, although not tending to or accompanied with any infraction of the belligerent rights of that country, whose tribunals are called upon to consider it, may subject the vessel employed in that trade to confiscation. . . this country, since its own abandonment of " the slave trade, "has deemed [it] repugnant to the law of nations, to justice and humanity, though without presuming so to consider and treat it, where it occurs in the practice of the subjects of a state which continues to tolerate and protect it by its own municipal regulations; but it puts upon the parties who are found in the occupations

<sup>1</sup> Sir William Grant forgets that he said in the case of the *Amedie* [1 Acton 240 (250)]: "So far as respected the transportation of slaves to the colonies of foreign nations, this trade had been prohibited by the laws of America [1794] only; . . . our law sanctioned the trade . . . this Court could not take any cognizance [of the prohibitory law of America], and of course could not be called upon to enforce [it] . . . But by the alteration which has since taken place in our law, the question stands now upon very different grounds." Ed.

of that trade the burthen of shewing that it was so tolerated and protected; and on failure of producing such proof, proceeds to condemnation," [Sir William Scott, J.]

*The Donna Marianna*, 1 Dodson 91, June 1812. "an appeal from the Vice-Admiralty Court at Sierra Leone; in which court the ship had been condemned, . . as being a British vessel engaged in the slave trade;" [93] "The ship [originally an American vessel] comes to England, and is there purchased by Macdowall and Co. of Liverpool, from whence she is [in 1809] dispatched on her outward voyage with fetters on board; which, as it appears to me, were put on board at Liverpool; the double stanchions were admitted to have been taken on board there; . . [94] the ship proceeded to Madeira; and it was not till her arrival at Pernambuco [where she was said to have been sold to a Portuguese merchant] that the Portuguese flag was assumed: from Pernambuco she sailed to Bahia," [92] "and having there taken on board a variety of goods assorted for the slave trade, she proceeded to Cape Coast, where she was proceeding to engage in the slave trade, and was seized at anchor." Sentence as to the ship affirmed. [94] "Judgment as to the cargo. . . I consider the whole interest of the adventure to reside in the British merchants, . . Therefore I see no reason why the cargo should not follow the fate of the ship, with which it is involved in one common fraud." [Sir William Scott, J.]

*The Diana*, 1 Dodson 95, May 1813. "This vessel, under Swedish colours, took on board at Gustavia, in the island of St. Bartholomew's, a cargo of rum, sugar, tobacco, iron, dry goods, and powder, which she carried to Cape Mount, on the coast of Africa, where the same were exchanged for 120 slaves; and the vessel having received a number of these slaves on board at Cape Mount, was, on the 11th of September 1810, seized by His Majesty's ship *Crocodile*, . . and carried to Sierra Leone," where the ship and cargo of slaves were condemned as prize. Sentence reversed: [96] "nothing arises to warrant a suspicion that the ship was going elsewhere than to the Swedish island of St. Bartholomew, and on Swedish account. . . [101] The question then is, whether the slave trade is permitted by the law of Sweden.<sup>1</sup> . . The endorsement upon the pass signed by the Swedish Governor, that this vessel was 'bound to the Coast of Guinea, for slaves,' raises a presumption of the legality of the trade, and shifts the burthen of proof from the claimant to the captor. . . [102] The only remaining point is, respecting these few Portuguese slaves, which were found on board this ship. It appears, that they belong to the master of a Portuguese schooner, which had been lying at Cape Mount, but was driven to sea by stress of weather, whilst he was on shore, and that himself and his slaves had been taken on board this ship out of charity. . . I shall not presume that he had been acting in opposition to the laws of his own country," [Sir W. Scott, J.]

*Demarara*, 1 Dodson 263, May 1813. Certain slaves "were taken at Demarara, on the 21st of September 1803, when that colony . . sur-

<sup>1</sup> [98 n.] By a treaty "signed at Stockholm on the 3d of March 1813," which "has been made public since the date of this judgement," the king of Sweden engages "not to permit Swedish subjects to engage in the slave trade."

rendered" [264] "The slaves are in number three hundred and ninety-nine, of whom, two hundred are no longer the subject of contest, but are now admitted to have belonged to the estate on which they were employed as *glebae ascriptitii*: they were attached to the soil as part and parcel of the realty, . . . the one hundred and ninety-nine slaves, who were employed by the Dutch government upon the public works in the military arsenals of the settlement," are "good and lawful prize to the captors." [Sir W. Scott, J.]

*Le Louis*, 2 Dodson 210, December 1817. "This is the case of a French vessel which sailed from Martinique on the 30th of January 1816, destined on a voyage to the coast of Africa and back, and . . . [236] was taken off Cape Mesurada, on the coast of Africa, on the 11th of March 1816, by an English colonial armed vessel, after a severe engagement [in which eight of the English crew were killed and twelve others wounded], which followed an attempt to escape. . . . [238] The number of iron manacles on board, the construction of the platforms, the magnitude of the coppers, the quantity and quality of the provisions in store [(213) consisting principally of beans], the negotiations with the natives at Mesurada [(210) the vessel had bargained for twelve slaves at Mesurada, and was prevented by the capture alone from taking them on board], the mysterious passages which occur in the correspondence between the owners, all tend one way, to shew a contingent, or rather a predominant intention" of trading in slaves. [211] "The ship was condemned to His Majesty in the Vice-admiralty Court at Sierra Leone,"

Judgment reversed: [246] "this vessel cannot be deemed a pirate. . . . She is the property not of sea rovers, but of French acknowledged domiciled subjects." And there was no actual abolition of the slave trade by the French law when this seizure took place.

*The Dolores*, 2 Dodson 413, December 1819. "This ship, with a number of slaves on board, was captured on the 4th of April 1816, after a short action, by his Majesty's sloop of war *Ferret*, . . . and carried to Sierra Leone; where the ship itself, and about 250 African slaves, men, women, and children, were condemned . . . as English and American property, and as good and lawful forfeiture. The *Ferret* was one of the squadron which . . . conducted Bonaparte to St. Helena" and was on her way back to Spithead. The abolition act, "instead of giving the slaves to the seizors, gives them to the Crown; the Crown giving the captors a certain stated value, commonly called . . . a bounty."

*Madrazo v. Willes*, 3 B. and Ald. 353, January 1820. The plaintiff was a Spanish merchant engaged in the slave trade between the coast of Africa and Havana, Cuba. On January 16, 1818, the defendant, a captain in the Royal Navy, seized the plaintiff's ship "off Cape St. Paul's, on the coast of Africa . . . together with . . . 300 slaves, . . . The jury found a verdict for the plaintiff, damages . . . for the supposed profit of the cargo of slaves 18,180 l."

Held: "ships, which belong to countries that have prohibited the slave-trade, are liable to capture and condemnation, if found employed in such

trade; but that the subjects of countries which permit the prosecution of this trade, cannot be interrupted while carrying it on. . . the slave-trade is not condemned by the general law of nations. The subjects of Spain have only to look to the municipal laws of their own country, and cannot be affected by any laws made by our Government." [Best, J.]

*The Woodbridge*, 1 Hagg. Adm. 63, July 1822. "The *Woodbridge* arrived at the Mauritius in the month of January 1819; and was seized by Captain Purvis, of H. M. S. *Magicienne*, upon information that eight blacks, who had been taken into the employment of the ship at Madagascar, were slaves." [65] "The men were taken on board from necessity; for there had been so much sickness among the crew . . . that the number was reduced from 61 to 10 men," The captain [67] "thereupon consulted the masters of two other merchantmen then lying at Tamatavie, who were unable to afford him the assistance he required, but recommended him to apply to the Sultan of Tamatavie; and the result of this application was that eight men were sent on board the *Woodbridge*. How or in what manner they were [68] procured does not appear; but there certainly was no contract with them for wages, or otherwise, on the part of " the captain. [65] "these extra hands were taken on board as sailors, with an obligation upon the master to return them to their own port. These men were woolly-headed blacks; and they were employed and used in the same manner as Lascars." The Instance Court of Vice-Admiralty, at the Isle of France, restored the ship, leaving each party to pay his own costs.

*Forbes v. Cochrane*, 2 B. and C. 448, January 1824. Forbes, a British merchant, owned a cotton plantation on the St. John's River, in East Florida, a Spanish province. On the night of the twenty-third of February, 1815, sixty-two of his negroes, out of about one hundred, [451] "deserted from the plaintiff's plantation, (together with four others belonging to Lindsay Tod his manager,) of whom he had found thirty-four, namely, eighteen men, eight women, and twelve young children of both sexes, together with the aforesaid four negroes belonging to Mr. Tod on board of His Majesty's Ship *Terror*, . . . the said slaves refused to return to their duty, under pretence that they were then free, in consequence of having come to this island in possession of His Britannic Majesty." [Cumberland Island, Georgia, was occupied and garrisoned by the British forces. [449] "The *Albion*, *Terror* Bomb, and others . . . formed a squadron under Sir George Cockburn's immediate command off that island, where the head quarters of the expedition were."] The plaintiff prayed that Cockburn would order the slaves to be delivered to him [452] "together with the boat which they had piratically stolen from his plantation. . . Sir G. Cockburn told him he might see his slaves, and use any arguments and persuasions he chose to induce them to return. . . but they refused to go." On March 6 they were transferred to the *Albion*, and carried to Bermuda by order of Vice-Admiral Cochrane, [453] "to be forth coming, should it be decided that they are to be returned to East Florida." ["such slaves as belonged to American subjects, and were in the possession of the defendants, were not taken away in consequence of the wording of the treaty of peace."] On March 29 the slaves in question were transferred "into His



Majesty's ship the *Ruby*, at Bermuda, and after being on board that ship about twelve months, were landed in that island, and many of them employed in the King's dock-yard there. The slaves . . . belonging to the plaintiff, were worth to him 3800 *l.*"

[473] Judgment for the defendants: [464] "the fugitives . . . went on board an English ship (which for this purpose may be considered a floating island), and in that ship they became subject to the English laws alone." [Holroyd, J.] [467] "were these persons slaves at the time when Sir G. Cockburn refused to do the act which he was desired to do? . . . The moment they put their feet on board of a British man of war, not lying within the waters of East Florida, . . . those persons who before had been slaves, were free. . . [470] There is no statute recognizing slavery which operates in the part of the British empire in which we are now called upon to administer justice. It is a relation which has always in British Courts been held inconsistent with the constitution of the country. It is matter of pride to me to recollect that, whilst economists and politicians were recommending to the Legislature the protection of this traffic, and senators were framing statutes for its promotion, and declaring it a benefit to the country, the Judges of the land, above the age in which they lived, standing upon the high ground of natural right, and disdaining to bend to the lower doctrine of expediency, declared that slavery was inconsistent with the genius of the English constitution, and that human beings could not be the subject matter of property.<sup>1</sup> As a lawyer I speak of that early determination, when a different doctrine was prevailing in the senate, with a considerable degree of professional pride." [Best, J.]

*San Juan Nepomuceno*, 1 Hagg. Adm. 265, July 1824. "The above-named ship, having on board about 269 slaves [135 men, 53 women, and 81 children (p. 399)] and no other cargo, while sailing under the Spanish flag, documented with Spanish papers, and the property of a Spanish subject, was, on her return (ostensibly) to the island of Porto Rico, from the coast of Africa, seized, about thirty miles to the westward of Cape Mesurada, on 7th December 1817, by Lieutenant Hagan of the colonial vessel of war, *Prince Regent*, and detained; and on 12th February 1818, was finally condemned at Sierra Leone," Restitution decreed.

*The Aviso*, 2 Hagg. Adm. 31, June 1826. "This ship, under Brazilian colours, and laden with four hundred slaves, was captured on the 26th of September 1824, by H. M. S. *Maidstone*, Capt. Bullen, in company with H. M. S. *Bann*, Capt. Courtenay, and was condemned at Sierra Leone" [33] "H. M. S. the *Maidstone* . . . was sent, under orders from the Admiralty, to cruise on the coast of Africa, . . . for the express purpose of capturing all vessels carrying on the slave trade, in breach of the treaties subsisting between his Majesty and foreign powers, and thereby subjecting themselves to British capture and confiscation. . . [34] Capt. Courtenay had examined a Portuguese ship, which was suspected of carrying on that trade, but which, at the time of the inquiry, had no slaves on board; he is

<sup>1</sup> Referred to in Mr. Justice Holmes's edition of Kent's *Commentaries*, II. 248, note b. Ed.



afterwards sent off on a slave-capturing expedition by Capt. Bullen to examine the coast for that purpose, from Cape Coast Roads to the river Cameron, with orders to return and join, after examining the cruising ground off St. Thomas. . . at day-break she discovered a strange ship . . to which she gave chase," The *Maidstone* "outstript her consort, and . . captured the . . slave ship, containing four hundred slaves; the *Bann* soon after came up, and recognized her as the very same vessel which she had examined a few days before, when she was empty of any cargo."

*The Orestes*, 2 Hagg. Adm. 38 n., March 1827. A Spanish brigantine was captured in March 1826, with 265 slaves on board, and "taken into the Havannah . . where the Court of mixed Commission condemned the brigantine, and decreed the slaves to be emancipated."

*The Slave Grace*, 2 Hagg. Adm. 94, November 1827. "In 1822, Mrs. Allan of Antigua came to England, bringing with her a female attendant, by birth and servitude a domestic slave, named Grace. She resided with her mistress in this country until 1823, and accompanied her voluntarily on her return to Antigua. . . She continued with Mrs. Allan . . till August 8th, 1825, when she was seized by the waiter of the customs at Antigua 'as forfeited to the King, on the suggestion of having been illegally imported in 1823.' . . [95] On August 5, 1826, the judge of the Vice-Admiralty Court of Antigua decreed . . 'that the woman Grace be restored to the claimant [Allan], with costs and damages for her detention.' From this sentence an appeal was prosecuted on the part of the crown, and the principal question made, was—whether, under the circumstances, slavery was so divested by landing in England that it would not revive on a return to the place of birth and servitude?"

Judgment affirmed: [100] "she was not a free person; . . If she depends upon such a freedom, conveyed by a mere residence in England, she complains of a violation of right which she possessed no longer [101] than whilst she resided in England, but which had totally expired when that residence ceased and she was imported into Antigua; . . [104] upon a question addressed to Lord Talbot and to Mr. Yorke, whilst Attorney and Solicitor General.<sup>1</sup> They gave it as their opinion, that a slave coming from the West Indies, either with or without his master, to Great Britain, doth not become free, and that his master's property or right in him is not thereby [105] determined or varied; and they were also of opinion that the master might legally compel him to return to the plantations; . . a similar judgment [was] pronounced in 1749 by Sir Philip Yorke, then become Lord Chancellor Hardwicke, . . This judgment . . was . . reversed by Lord Mansfield. The personal traffic in slaves resident in England had been as public and as authorised in London as in any of our West India islands. They were sold on the Exchange and other places of public resort by parties themselves resident in London, and with as little reserve as they would have been in any of our West India possessions. . . Lord Mansfield was extremely desirous of avoiding the necessity of determining the question: he struggled hard to induce the parties

<sup>1</sup> See Opinion of Sir Philip Yorke, p. 12, *supra*.

to a compromise, . . but . . [106] was at last compelled after a delay of three terms to pronounce a sentence, which . . discharged this negro; . . The real and sole question<sup>1</sup> which the case of *Sommersett* brought before Lord Mansfield, . . was, whether a slave could be taken from this country in irons and carried back to the West Indies, to be restored to the dominion of his master? . . [109] The arguments of counsel in that decisive case of *Sommersett*, do not go further than to the extinction of slavery in England as unsuitable to the genius of the country and to the modes of enforcement: they look no further than to the peculiar nature, as it were, of our own soil; the air of our island is too pure for slavery to breathe in. How far this air was useful for the common purposes of respiration, during the many centuries in which the two systems of villenage maintained their sway in this country, history has not recorded. . . [111] Persons, though possessed of independence and affluence acquired in the mother-country, have upon a return to the colony been held and treated as slaves; and the unfortunate descendants of those persons, if born within the colony, have come slaves into the world, and in some instances have suffered all the consequences of real slavery; . . [112] It appears to me to be a strong presumption in favour of the parties charged with violating the law, that neither the parties so charged, nor those who had an interest in preventing it, have within the space of fifty years that have elapsed, even in one instance, called the attention of English justice towards it. Black seamen have navigated West India ships to this island, but we have not heard of other *Sommersetts*, . . The fact certainly is, that it never has happened that the slavery of an African, returned from England, has [113] been interrupted in the colonies in consequence of this sort of limited liberation conferred upon him in England. . . he goes back to a place where slavery awaits him, and where experience has taught him that slavery is not to be avoided. . . [114] The domestic slave may, in that character, accompany his master or mistress to any part of the world, but that privilege exists no longer than his character of domestic slave attaches to him; for should the owner deprive him of the character of being a domestic slave by employing him as a field slave, he would be deprived of the right of accompanying his master out of the colony. . . And what excuse is to be offered for Lord Mansfield, who long survived the change of law he had made, and yet never interposed in the slightest manner to correct the total misapprehension, if it is so to be considered, of the law which he himself had introduced? It has been said that, in the decline of the ancient villenage, it became a maxim of very popular and legal use, 'Once free for an hour, free for ever!'<sup>2</sup> And this has been applied as a maxim [115] that ought to govern in the case of negro slavery. . . it has never been once applied, since the case of *Sommersett*, to overrule the authority of the transmarine law. . . This cry has not,

<sup>1</sup> So Lord Mansfield says in 1785, in *King v. Thames Ditton*, p. 20, *supra*.

<sup>2</sup> Note: "Herein," says Lord Coke, "the common law differeth from the civil law; for *Libertinum ingratum leges civiles in pristinam redigunt servitutem, sed leges Angliæ semel manumissum semper liberum judicant, gratum et ingratum.*" 1 Inst. lib. ii, sect. 204. (Note in Haggard.)

as far as we know, attended the state of slavery in any other country, though that has been a state so prevalent in every other part of the world,”

Review of the English decisions on the subject of slavery [116-123], relying especially on *Williams v. Brown*, pp. 23-25, *supra*. [124] “slaves never have been deemed and considered as free persons on their return to Antigua, or the other colonies. . . [125] it is the constant practice of persons, who intend giving freedom to slaves on their return to the colonies, to execute instruments of manumission previous to their quitting this country for the colonies. . . [127] slavery was a very favoured introduction into the colonies: it was deemed a great source of the mercantile interest of the country; and was, on that account, largely considered by the mother country as a great source of its wealth and strength. Treaties were made on that account and the colonies compelled to submit to those treaties by the [128] authority of this country. . . Instead of being condemned as *malus usus*, it was regarded as a most eminent source of its riches and power. . . [134] in affirming the sentence of the Judge of the Court below, I am conscious only of following that result which the facts not only authorise but compel me to adopt.” [Lord Stowell.]

On January 9, 1828, Lord Stowell writes Judge Story: [Here we may quote from the correspondence between Lord Stowell and Justice Story, printed in W. W. Story's *Life* of his father, I. 552 *et seq.*] “I have been, at this late hour of my time, very much engaged in an undertaking perfectly novel to me, and which has occasioned me great trouble and anxiety, and that was the examination of a new question, namely—whether the emancipation of a slave, brought to England, insured a complete emancipation to him upon his return to his own country, or whether it only operated as a suspension of slavery in this country, and his original character devolved upon him again, upon his return to his native Island. This question had never been examined since an end was put to slavery in England, fifty years ago; but the practice has regularly been, that in his return to his country the slave resumed his original character of slave. . . A case of that kind was brought up by appeal from the Vice-Admiralty Court of Antigua, and has occasioned a good deal of attention and noise in England, and the adjudication of it was referred to me by the Secretary of State, Lord Bathurst. It has attracted much attention and observation in this country, and I have had to consider this new question (as it was to me) with very laborious research through the many Acts of Parliament respecting the Slave Trade—Acts not very carefully compiled and digested. There were, in fact, five cases to be determined, and they have cost me a great deal of trouble and anxiety.”

Lord Stowell writes further on May 17: “I desire to be understood as not at all deciding the question upon the lawfulness of the slave-trade, upon which I am rather a stern Abolitionist, but merely this narrow question, whether the Court of King's Bench, in the case of *Sommersett*, meant to declare that our non-execution of the slave code in England was a new [mere?] suspension of it as respected England, but left it in full operation with respect to the colonies—which some of our Abolitionists here and some of our Judges there resolutely contend for. My clear opinion is for its limited effect. The execution of the Code laws is suspended in

England, as being thought inconsistent with the nature as well as the institutions of this country. So far as it goes, but no farther, it does not at all derogate from the law of the colonies upon the return of the person so far liberated in England, but left exposed to the severity of the law in the colonies, upon the return of the party so partially liberated here; this is the whole of the question which I had occasion to consider, and is a question which has nothing to do with the general legality of the slave trade in the colonies. How the laws in respect of that trade made in England and enforced by our courts of law, the King's Privy Council, and the Court of Chancery, to their utmost extent, can consist with any notion of its entire abolition here, is, in my view of it, an utter impossibility.

"I am a friend to abolition generally, but I wish it to be effected with justice to individuals. Our Parliaments have long recognized it and have not only invited, but actually compelled our colonists to adopt it, and how, under such circumstances, it is to be broken up at the sole expense of the colonist, I cannot see consistent with either common reason or common justice; it must be done at the common expense of both countries; and upon that part of the case very great difficulties exist. Our zealots are for leaping over them all, but in that disposition I cannot hold them to be within the wise or the just part of this nation."

Judge Story replies on September 22: "I have read with great attention your judgment in the Slave Case from the Vice-Admiralty Court of Antigua. Upon the fullest consideration, which I have been able to give the subject, I entirely concur in your views. If I had been called upon to pronounce a judgment in a like case, I should certainly have arrived at the same result, though I might not have been able to present the reasons which lead to it in such a striking and convincing manner. It appears to me that the decision is impregnable.

"In my native state, (Massachusetts,) the state of slavery is not recognized as legal; and yet, if a slave should come hither, and afterwards return to his own home, we should certainly think that the local law would re-attach upon him, and that his servile character would be reintegrated. I have had occasion to know that your judgment has been extensively read in America, (where questions of this nature are not of unfrequent discussion,) and I never have heard any other opinion but that of approbation of it expressed among the profession of the law."

*The Malta*, 2 Hagg. Adm. 158, April 1828. The mate [159] "had entered into the service of the ship at Liverpool in March 1825, for a voyage to the coast of Africa and back to this country; . . . she was seized and brought to adjudication at Sierra Leone for alleged trading in slaves. On those proceedings the vessel was condemned, and that sentence is now the subject of an appeal in this court.<sup>1</sup> The master [160] has also been

<sup>1</sup> Note: "The question, arising on the appeal . . . related to the real character of the alleged trading. The evidence showed, that it was the common practice of the native merchants to pledge their wives and children for the delivery of goods contracted for in barter with the trading ships; and that such pawns or pledges were, in some instances, not redeemed, but carried into slavery, as the absolute condition of such contracts, agreeably to



indicted on the same charge . . but acquitted; . . [172] the master, in his defence, admitted the transfer of the women to the master of a Spanish slaving vessel, and there was evidence of money passing between them. He rested his defence only on his explanation of that act, that the Spanish master had agreed to put them on shore, in their own country, about a hundred miles further on the coast; and that he was empowered to receive the money for which they had been held in pledge. I will not say more of this transaction at present, than that it was highly imprudent and culpable; and that it was very fit to be made the subject of enquiry before the tribunals of the country." [Sir Christopher Robinson.]

*Two Slaves*, 2 Hagg. Adm. 273, December 1828. "This was an appeal from the Vice-Admiralty court of St. Christopher's. Two slaves, Betsey Johnston and Emma Dowdy, were alleged to have been seized in the port of Basseterre by the searcher of H. M. customs, and were proceeded against under the provisions of the 5 G. 4. c. 113. s. 2. as forfeited by reason of an unlawful importation into that island, in a schooner called the *Selina*. In an affidavit of William Baker, the master of the schooner, it was stated, 'that on the evening of the day following that on which he sailed from Roseau, in the island of Dominica, to which port the schooner belonged, bound for Wilmington in North Carolina, he was informed by one of his crew that there were two women concealed in the fore-castle; that he immediately sent for them, and discovered that they were slaves belonging to Dominica; that he then endeavoured to reach the island of Montserrat, but without effect, as the wind was contrary; and he worked into St. Kitt's, being the nearest British port he could make, [274] where he brought the slaves before a magistrate who committed them to gaol.' This affidavit and two certificates of registration, transmitted from Dominica, for the purpose of identifying the slaves, were allowed to be filed, and received in lieu of a regular claim being interposed. The judge of the Vice-Admiralty Court having declined to pronounce the slaves forfeited, an appeal was prosecuted to this Court: and, after the usual proceedings, *in poenam*, for want of an appearance on the part of the owners, the King's Advocate prayed that the sentence should be reversed."

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the general practice of the natives in their dealings with each other, . . [160 n.] Adverting . . to the extreme jealousy with which the abolition laws have prohibited every approach to the offence of holding persons as slaves, in the intercourse of British subjects with the coast of Africa, the Court remarked—"such a practice could not be consistent with the provisions of the abolition acts, and it strongly behoves British subjects trading on the coast of Africa to discontinue the practice, as likely to involve them in a criminal violation of the law." The offence alleged in this information was 'the transferring the individuals so held as pawns to a Spanish slave ship, for the purpose of being transported as slaves beyond the seas.' . . the transfer was not that of absolute and intentional sale of these persons to the Spanish captain; the number of the persons was small, being only two or three women—others having been redeemed and restored at different times. They were women belonging to the principal traders, and had come from that part of the coast to which the Spanish captain was going; and some of their relations were actually on board—who were not transferred—but went away in their own boats. The transfer to the Spanish captain arose incidentally out of a barter for other articles,—and the character of it is not perfectly clear. Some evidence has since been supplied to show that these persons were actually restored to their friends;" Condemnation reversed.



Held: "the case is not brought within the provisions of the act. The Court, therefore, declines to disturb the sentence, notwithstanding the appeal is undefended on the part of the owners." [Sir Christopher Robinson.]

*The Adelaide*, 2 Hagg. Adm. 230, February 1829. "on the 22d of January 1827, Capt. Jones of H. M. ship *Orestes*, seized the brig *Adelaide*, of 107 tons, as she was lying at anchor near to the dock-yard at Ireland Island in the Bermudas, . . . having cleared out for Trinidad, and preparing to weigh anchor." [231] "The claim was given with reference to the Consolidated Slave Act, 5 G. 4. c. 113, and with an explanation of the means used by the claimants to comply with its provisions, and particularly those contained in the 17th section." Mr. M'Alister [234] "is a British subject resident at Trinidad: that he arrived at Bermuda on the 5th of December 1826, . . . that he found it necessary, for the comfort of himself and family, that he should have at least two additional servants as domestics; . . . that in a family of negroes consisting of a mother [(238) Hannah, a woman of forty years of age, described formerly as a laundress, and four children, of eleven, nine, seven, and three years of age] . . . which were publicly advertised for sale, on or about the 29th of December, he found such domestics, as he thought would answer his purpose; that the distress manifested by the female slave Hannah, the mother, at the idea of being separated from any of her children, induced him to consult the collector of the customs as to the number of domestic slaves which he might legally take with him to Trinidad; the collector gave his opinion that he might take two for each member of his family, consisting of himself, his wife, and infant child, viz. six of such domestic slaves; . . . [235] Hannah was willing to go to Trinidad," as "she had already a son in that island. That in consequence he did . . . purchase the family, and on the same day by bill of sale caused Hannah and Sue to be conveyed to his wife; Daniel and Wellington to himself; and the female slave, Allen, to his infant daughter." [240] "The claim of Mr. Wainwright relates to two slaves, Bob and Belinda, of the ages of seven and twelve . . . within the same objection as to their actual service and occupation." The slaves were forfeited.

*The Slave Fanny Ford*, 2 Hagg. Adm. 271, July 1829. "This was an appeal from the Vice-Admiralty court of St. Christopher's brought by Harriett Gardiner, a British subject resident in that island, claimant of the slave 'Fanny Ford,' the sole property of the infant daughter of Mrs. Gardiner. The slave had been seized in the town of Basseterre, by a waiter of H. M. customs for that port. The libel or information pleaded the illegal exportation of a female slave, called Fanny Ford, from St. Christopher's to the island of Saba; and it appeared from the evidence that the slave had belonged to Mrs. Ford, who had connections in business in Saba, and among them, with an old Creole woman, to whose care this 'unmanageable' child was consigned; that between 1814 and 1818 the child passed from one island to the other several times; and in 1818, finally returned to St. Christopher's. She was sold on the death of Mrs. [272] Ford;

and transferred by the purchaser to the present possessor. In 1827 she was seized and condemned, with costs, under the 5 G. 4 c. 113. s. 47." Judgment reversed.

*The Zepherina*, 2 Hagg. Adm. 317, March 1830. "This was a slave trader captured on the 14th of September 1828, after a joint chase by H. M. S. *Primrose*, and H. M. armed brig *Black Joke*, attached to and acting as tender to H. M. S. *Sybille*."

*Stewart v. Garnett*, 3 Simons 398, March 1830. Will of James Stewart, "late of Jamaica:" "I give, devise and bequeath one moiety of the rents, issues and profits of my estate, named Islington and Cove's Pen, . . . to be divided equally amongst. . ." At the time of his death, March 25, 1824, the testator was [399] "seised of a real estate called Islington . . . in Jamaica, containing 700 acres of land, with buildings and machinery for carrying on the manufacture of sugar and rum, and also of a pen called Cove's Pen, being an appendage of the Islington estate, also in the same parish, containing 300 acres, and that the testator was also at his decease possessed of or entitled to 246 negroes on his estate called Islington, and 25 negroes on Cove's Pen"

Opinion of the attorney general of Jamaica: [401 n.] "By such a devise he must necessarily have contemplated, not merely the lands composing part of that estate, but the means attached to them, by which alone they could produce rents, issues and profits. These means are the negroes and live stock."

Held: [401] "the real estate of the testator, at the [402] time of his death, consisted of the estates called Islington and Cove's Pen, and also of the said several negroes, horned stock, mules, sheep and other cattle then being thereon respectively," The Vice-Chancellor [Sir L. Shadwell]: [404] "Now I understand the pen to be that part of a West India estate which is used for the purpose of supporting the cattle employed on the plantation. . . those words would pass everything that was necessary to the enjoyment of the estate;"

*The Vecua*, 2 Hagg. Adm. 346, March 1831. "The *Vecua*, with her cargo and 300 slaves, and the *Ycanam*, with 380 slaves, having been condemned at Sierra Leone, upon the joint capture of H. M. S. *Iphigenia*, . . . and the *Myrmidon*, . . . the usual warrants for the bounty money for the slaves were made out . . . and in October 1825, were received . . . The warrant for the slaves on board the *Vecua* was for 3000 l.; and the warrant on account of the *Iphigenia*, for 3800 l."

*The Donna Barbara*, 2 Hagg. Adm. 366, July 1831. "His Majesty's ship *Sybille*, commanded by Sir F. A. Collyer, one of a squadron of which he was commodore, was stationed off the coast of Africa for the prevention of the slave-trade, and on the 10th of January 1829, being at the island of Fernando Po, the commodore dispatched one of the boats of the *Sybille*, under the first lieutenant (Harvey), with written instructions to seize and detain all vessels trafficking in slaves contrary to certain treaties. On the boat reaching Sierra Leone on the 21st, the crew, to protect

themselves from the climate, went on board the *Paul Pry*, a former slave-ship, which had been there condemned and purchased by the commodore. On the 15th of March the *Adorinta*, a Brazilian brig, captured by the *Sybille*, appeared off the entrance of the Sierra Leone river, in charge of Mr. Browne, a prize-master from the *Sybille*. She had in company the *Donna Barbara*, a Brazilian schooner, with a cargo of 367 slaves, shipped in violation of the treaty between this country and the Brazils. This vessel and cargo had been seized by Browne on his course to Sierra Leone. Lieut. Harvey [367] went off to these ships in the boat of the *Sybille*, and upon his informing Browne that he was not authorized to effect the seizure, and desiring him to release her, the latter returned the papers to the master of the schooner, whereupon she was seized by the boat under Lieut. H.'s command, carried into S. L., and there condemned by the mixed commission, 'as having been taken and seized by the *Paul Pry*, a tender of the *Sybille*.' It was alleged for the *Sybille*, that this description, as a tender, was owing to some error in the institution of the proceedings; for that at the time of the seizure the *Paul Pry* remained moored a considerable distance up the river; and that the seizure being effected by a boat of the *Sybille*, detached therefrom under the command of an officer of the rank required by the treaties, and the vessel having been afterwards condemned by the commissioners appointed in virtue thereof, the commander, officers, and crew of the *Sybille* were legally entitled to one moiety of the proceeds of the schooner, and also to the bounty-money for the slaves on board."<sup>1</sup>

Held: the seizure by an open boat (the crew of which was borne on the books of the *Sybille*), commanded by an officer of the rank required to make the search, but actually putting off from an unauthorized tender, and at a distance of 1500 miles from the *Sybille*, did not entitle the *Sybille* to the moiety of the proceeds or to the bounties. The instructions annexed to the convention with Portugal, embodied in 5 G. IV. c. 113, imply that the seizures of Portuguese slave ships are to be made under the personal direction of the commander of a ship of war. [3 Hagg. Adm. 446.] "From the rejection of the claim, . . . Sir F. A. Collier . . . appealed to the delegates, . . . [449] and on the 9th of January, 1834, . . . it being held that, independently of the merits, the sentence of the Mixed Commission Court was conclusive as to the legality of the capture, the decree, appealed from, was reversed."

*Three Slaves*, 2 Hagg. Adm. 412, July 1832. An information under the Slave Abolition Act (5 G. IV. c. 113) "for an illegal removal of two female slaves, and a male infant, from Watling's Island to New Providence, without licence from the governor, and without a certificate of registration. The seizure took place in June 1831;" Slaves condemned.

<sup>1</sup> "The said Commissary Judge and Commissioner of Arbitration . . . [449] pronounced the said slaves, natives of Africa, to be emancipated from slavery, and to be employed as servants or free labourers; . . . at the time of passing the said sentence, 86 men, 129 women, 76 boys, and 60 girls, children under fourteen years of age, did compose the whole of the slaves so decreed to be emancipated from slavery; . . . 357 slaves were seized and found on board of the said schooner . . . and that six of the said slaves had died between the time of the capture and of the condemnation of the said schooner."  
3 Hagg. Adm., Appendix C, 448.

*The Slave Duncan*, 2 Hagg. Adm. 427, December 1832. "After the vessel had sailed [June 16, 1831], the searcher of the customs discovered that the slave Duncan had been put on board on the 15th, and had been relanded on the 16th; and on that ground a seizure was made of the slave at the public workhouse, which seems to be a place of deposit for slaves, and where this slave had been placed by Mr. Lightbourn. . . [432] It appears that the slave was a considerable part of the year in the workhouse as a runaway, and, therefore, might be known as Lightbourn's slave;" The slave had been sold to Taylor of Ragged Island, where he [428] "possessed an estate . . . and plantation and a manufactory of salt;"<sup>1</sup> "Taylor had required Lightbourn to send the slave to Ragged Island; that Lightbourn, having on the 14th of June, executed a bill of sale, addressed an application to the governor for a licence to ship the slave to Ragged Island, to Taylor, . . . that the slave was carried on board on the 15th, Lightbourn expecting to receive the licence, . . . [429] that the master becoming impatient to proceed on his voyage, and the licence not being obtained [it was received later that day], the slave was relanded from the vessel and taken to the public workhouse, and it was only some time after the slave was lodged there, and the ship had sailed, that the seizure was made." The sentence restoring the slave affirmed.

*Gumbes's Case*, 2 Knapp 369, June 1834. Colonel Gumbes [378] "was the proprietor of two sugar plantations, Cripplegate and Grand Caze, and a small estate called Hoppe's, on which there was a large house, and which was partly used as a cotton, and partly as a stock plantation. The French government seized them on the 24th and 25th of April 1795, together with the slaves, stock, and personal property on them, and they remained in possession of them until the month of March 1801." He had 132 slaves.

Held: in estimating the compensation due for the loss of his estates, of the actual produce of which, during the time of sequestration, there is no evidence, the allowance of £10 per annum for each negro on the estate is not a right principle to proceed upon.

*Case of the Compensation Commissioners under the Act for the Abolition of Slavery*, 3 Knapp 155, February 1835. "One of these appeals from the rules of the Commissioners appointed under the Act for the abolition of slavery in the British dominions, 3 and 4 Will. IV. c. 73, was by the agent for Jamaica, in his public capacity, on behalf of all the planters in the island; the other was by the private proprietors of a plantation in Demerara. . . [217] On the 1st day of August 1834, there were 270 slaves, or thereabouts, belonging to the Bonne Intention Estate [in Demerara], the value of which, in the year 1829, was £43,200 at the least, and the value of the entirety of the said plantation and slaves

<sup>1</sup> [434 n.] "the raking and manufactory of salt is a laborious, but a lawful employment for slaves; and as section 13 [of 5 G. IV. c. 113] does not define in what work slaves shall be engaged when so bought and sold, I think the act will allow of the slave's removal to his new purchaser's plantation, although he may be occasionally employed in the manufactory of salt." (Letter of attorney general of the Bahama Islands to the governor.)



together was then £60,000. It was calculated that the compensation monies to be allotted in respect of the slaves on the plantation, under the Abolition of Slavery Act, would not, according to the highest estimate, exceed the sum of £13,500." A few alterations in the rules were made by the lords of the Privy Council. [246] "The following General Rules were issued by the Commissioners of Compensation, in consequence of this decision of the Privy Council, on the 10th of March 1835, applicable to all the colonies included in the Abolition of Slavery Act, except the Mauritius and Cape of Good Hope, and have been confirmed by His Majesty in Council, and enrolled in the Court of Chancery: "

*The Marianna*, 3 Hagg. Adm. 206, May 1835. The *Marianna*, a Brazilian schooner fitted out for the slave-trade, was recaptured from pirates on August 30, 1828.

*Ex parte Borrodaile*, 2 Mont. and Ayr. 398, July 1835. Held: slaves in Antigua could not be equitably mortgaged by a deposit of a registered title-deed, containing a schedule of slaves, if the memorandum accompanying the deposit, which is registered, do not contain a list of the slaves.

*Gordon v. Bruce*, 2 Moore P. C. 261, February 1838. "Sir Michael Bruce, of Stenhouse, in North Britain, was, in the year 1831, the proprietor of two Sugar Plantations, called Shirvan and Telescope, in the Island of Tobago, with the slaves upon and employed in the cultivation thereof." In August 1831 he leased them to Gordon [262] "for fourteen years, determinable at the option of the Appellant [Gordon] at the expiration of seven years, . . . The Appellant covenanted . . . to receive over, feed, clothe, and care for properly, in every respect, according to the laws and customs of the Island of Tobago, all the slaves then being on the said estates." It was also provided, that "if the power and authority of the master over the slave should be further abridged, by Act of Parliament, or any Regulation of the Colonial Legislature, so as to lessen the labour to be obtained from the slave, or otherwise to diminish the returns of the Lessees, then the loss thereby sustained should be referred to arbiters, mutually chosen." After the act 3 and 4 Wm. IV. c. 73 (passed August 28, 1833), the lessor [263] "preferred a claim as owner in fee simple to the whole of the compensation-money payable in respect of " the three hundred and one slaves then "domiciled on the above-mentioned estates."

Held: [267] "the second rule [of the General Rules issued by the Commissioners of Compensation, March 10, 1835] made in pursuance of [the 47th sect. of the act] . . . declares that the compensation-money 'shall be deemed to be of the same nature, and impressed with the same characters, for all the purposes whatsoever, so far as the same can be so taken or applied, as the slave, or slaves, in respect of whom such monies shall be allotted.' . . . [268] though the Lessor may have an ultimate interest in the corpus, so to speak of the fund, or so much as shall not fairly represent the labour of the slaves lost to the Lessee by their emancipation, yet the Lessee is, in the first instance, entitled, [269] and his claim ought first to be satisfied. It may be that the interest of the fund will sufficiently represent the labour: " The clause of the lease respecting a decision by arbiters



was not framed to meet a case of total emancipation; the case is one entirely for the commissioners appointed by the act.

*Stewart v. Gibson*, 7 Cl. and Fin. 707, August 1840. "in the year 1806, James Broadfoot, merchant in Charleston, South Carolina, . . made a purchase of the American ship *Washington* (which had shortly before arrived in that port with a cargo of slaves from the river Congo in Africa), in contemplation of fitting her out on another voyage to Africa, for the purpose of trafficking in slaves:" The vessel was sent to Liverpool and there fitted out. [712] "In order to facilitate the purchase of the *Washington's* cargo of slaves, the pursuer had shipped by a British vessel, named the *Croydon*, from London for the river Congo, a quantity of muskets and gunpowder, . . [713] for the sole purpose of bartering for slaves." [712] "The reason why the muskets and powder were shipped by the *Croydon* from London, was, that by the existing orders in Council, no foreign ship was allowed to carry these articles under certain penalties. After coming to anchor in the river Congo, the defender applied for, and received from the commander of the *Croydon*, delivery of the muskets and powder; but instead of carrying them ashore as he ought to have done, he very improperly carried them on board the *Washington*. This transaction was witnessed by a British letter of marque privateer, . . the commander of which immediately went on board the *Washington*, and took possession of her as a prize," [713] "information given by a mutinous American sailor."

*The Eagle*, 1 W. Rob. 236, June 1841. "The *Eagle*, equipped for the slave trade, and navigated under American colors, and with an American pass and master on board, whilst at anchor in Lagos Roads, on the 31st December, 1838, was boarded from her Majesty's Ship *Buzzard*, (Lieutenant Fitzgerald, commander,) but was not detained. In January, 1839, the commander of her Majesty's ship *Lily*, . . finding the *Eagle* still lying at anchor, took possession of her, and sent her . . to Sierra Leone for adjudication. The Court of Mixed Commission . . refused to adjudicate, upon the ground that the vessel was ostensibly American property, and that the right of searching American vessels had not been conceded to British cruisers by the American government." Later Lieutenant Fitzgerald, learning of these proceedings, "boarded the *Eagle*, and having threatened the master to send him with the vessel to New York to be dealt with by the law of the United States, the master confessed the property [237] in the vessel to belong to Spanish owners; and that he was only the ostensible master for colorable purposes, and that he surrendered to the *Buzzard*. . . Lieutenant Fitzgerald subsequently proceeded in the *Buzzard* with the *Eagle*, and another vessel detained under similar circumstances, to New York . . ; but the American authorities being of opinion that the papers under which the *Eagle* had been sailing were fictitious, . . declined to interfere. Lieutenant Fitzgerald then resolved to send the *Eagle* to Sierra Leone for adjudication as Spanish property, engaged and fitted for the slave trade; . . In the progress of the voyage, the *Eagle*, having sprung a leak, foundered;"

*The Sociedade Feliz*, 1 W. Rob. 303, 2 *id.* 155, January 1842. Joint capture, off Cape Palmas, in November 1839, of a Brazilian vessel engaged in the slave trade. Held: in order to sustain the claim of the vessel asserting an interest in the joint capture, it must be pleaded, 1st. That there was an association and coöperation with the capturing vessel. 2d. That the vessel claiming was seen by the captured slaves at the time the capture was effected.

*Guimaraens v. Preston*, [Thirteenth of June], 4 Moore P. C. 167, July 1842. [174] "The *Treze de Junho* left the port of Rio de Janeiro on the 28th of March 1840, under Portuguese colours, . . bound to the port of Benguella, on the coast of Africa. . . [175] on the 30th of March . . the *Curaçoa* fell in with the said brigantine . . and Captain Preston sent a boat . . to examine her, . . there were on board of her a considerable quantity of farinha, stowed in bulk, not on the manifest, and in a much greater proportion than would be required for the use of her crew: that buried in the farinha were found several new water-suckers, two pumps, also a slave whip, and a rattle: that in her fore-hold were four leaguers and four hogs-heads: on deck, two pipes, seven half-pipes, and five quarter-pipes, all water-casks: the casks in the hold, one of which was nearly empty, were stowed underneath part of her cargo, and could not be required for the use of the crew on the voyage: that in the after-part of her hold, near the helm, were found four shackles, and in every part of the hold were considerable quantities of firewood, much more than requisite for her consumption on the voyage: that the main hatchway was of unusual dimensions for a vessel employed in fair mercantile traffic: that the long boat was needlessly large for a coast trader, besides a large canoe, and a jolly boat: the cook house, also, was of large dimensions, and the cabin had every appearance of having been used for slaves on a former occasion: whereupon the said Captain Preston seized the said brigantine as liable to forfeiture to Her Majesty."

Letters of instructions found among the ship's papers: [177] "St. John's Bar, 7th Dec. 1839. Sir,—By the brigantine *Umbellina*, . . I was favoured with yours of the 2nd November, ultimo, accompanied with 31 volumes (slaves), . . which I sold . . at six months' credit, the nett proceeds being reis 6365| dollars 680, . . [178] Your people (slaves) arrived in very good order, and on account I obtained higher prices than have been obtained for any others, hoping that you will be satisfied and continue your favours; the cargo of the brigantine *Umbellina* brought various prices, yours being the highest, and the lowest 255 dollars,"

[179] "Rio Janeiro, 27th March 1840. I have given to your command the brigantine *Thirteenth of June*, . . you will sail direct for the port of Benguella with great caution, . . with this I accompany a public form of writing which proves . . the said vessel made four voyages from Benguella to this port, always laden with wax, honey, oil, and urzella, which is proved by the certificates of manifests . . which documents you must show in the event of your being boarded by any Portuguese or English cruizer. . . Your wages will be 700 dollars on your safe arrival; the mate 100 dollars; the boatswain 100 dollars; five seamen at 45 dollars;

and seven slaves belonging to the vessel, with whom you must be very cautious, in order that they may not escape." The crew consisted of fifteen persons, "among them the cook was entered as José, a native of Africa, and in lieu of wages, 'gratis' was written: and under the title of 'Lads' there were six additional names entered, and their condition described as 'slaves of Francisco Fernandez Guimaraens.'" The vessel was seized and despatched to Rio de Janeiro. There [174] "a strict and careful survey was made," and she was "navigated to the Island of Barbadoes, in charge of the mate and an English crew (her master and commander, José da Lomba, being on board), to be proceeded against in the Vice-Admiralty Court of that Island." Condemnation under 2 and 3 Vict., c. 73, affirmed.

*Mittelholzer v. Fullarton*, 6 Q. B. 989, Trin. vac. 1842. "by agreement made . . . 1834 . . . in consideration of 7800 l., plaintiff did sell . . . all his right . . . to the services and labour of 153 apprenticed labourers formerly slaves,"

*The Florida*, 2 W. Rob. 97, April 1843. "the Portuguese schooner the *Florida* was seized and taken, with a cargo of 283 slaves on board, by her Majesty's brig of war *Harpy* and carried to the Island of Grenada, where, in consequence of the vessel being unseaworthy, the slaves were landed and delivered over to the collector and controller of Her Majesty's customs at that island."

*Regina v. Zulueta*, 1 Car. and Kir. 215, October 1843. [221] "In the month of June, 1839, a vessel called the *Golupchick* was seized off the coast of Africa, as a vessel engaged in the slave trade, at which time Bernardos, one of the persons named in the indictment, was the captain. The Court at Sierra Leone refused to interfere with her, as from her paper and colours she appeared to be a Russian vessel, and she was accordingly sent to England and given up to the Russian authorities. . . . In June, 1840, the *Golupchick* was sold to a person named Emanuels, who afterwards agreed to sell it to Jennings, the other person named in the indictment, for £650. Jennings, who had been in the employ as a captain of Martinez and Co., of the Havannah, wrote to the house of Zulueta and Co., in London, who were the correspondents and agents of that house on the subject. . . . [222] on the 29th August, 1840, Zulueta and Co. drew a check on their bankers for £650, which was cashed . . . and . . . paid to Emanuels, at Portsmouth, for the vessel, by Jennings and Bernardos in company together. The name of the vessel was changed . . . to the *Augusta*;" she [223] "cleared out for Gallinas on the 9th of November, 1840, having in the meantime taken on board" as her cargo, [216] "29 hogsheads of tobacco, 6 cases of arms, 1 case of looking-glasses, 10 casks of copper ware, 134 bales of merchandize, 1600 iron pots, and 2370 kegs of gunpowder," [224] "To shew the nature of the trade carried on at Gallinas," Captain Denman, of the Royal Navy, said, "that there was no trade carried on but the slave trade: he said also, 'At most places on the coast there is both a lawful trade carried on and the slave trade: the Gallinas is an exception, the only exception I know indeed; I know that



from my own personal presence on the spot.' " Another witness, Lieutenant-Colonel Nicholl, said: " The general course is to barter British manufactured goods for slaves, who are brought from the interior of Africa to places where the trade is carried on; slaves are usually brought to the Gallinas for the purpose of being sold or bartered for the goods which they meet with there; it is notoriously the most infamous slave-dealing port on the whole coast of Africa; there is a continual drain of slaves from all parts of the interior contiguous to it, continually coming down to the Gallinas; there is nothing going on there but the slave trade." Several letters, " nine in number, which were found on board the *Augusta* at the time she was seized, were tendered in evidence. . . [225] Capt. Hill said, that, when he seized the vessel, it was not fitted up as a slave vessel, but added that the slave fittings could be obtained at Gallinas, and that three or four hours would be sufficient to put them in." Two letters from Zulueta and Co., found on board the vessel, were not admitted in evidence against the prisoner as they were not traced in any way to his knowledge. He had " admitted [before the Committee of the House of Commons] that he had managed the whole of the business relating to the *Augusta*, but denied that he had any knowledge that the vessel or goods were to be used for the slave trade. His explanation of the transaction . . . was, that the firm of Zulueta and Co., as agents for Martinez and Co., purchased the *Augusta* for Captain Jennings, with money belonging to Martinez and Co., in their hands, . . . [226] that Zulueta and Co. had no interest in the result of the adventure, and had nothing further to do with the transaction. He admitted that their house had had transactions with the coast of Africa to the amount, in twenty years, of about £400,000; about £20,000 or £22,000 of which might be connected with the Gallinas."

Kelly, for the prisoner, contended that the statute 5 Geo. IV. c. 113 " did not apply to a trading in slaves in foreign parts, but only to slave trading in England or English colonies." Maule, J., in declining to reserve the point, said that their lordships did not entertain any doubt on the subject [227] " that the legislature had the intention, among other things, of preventing Englishmen from dealing in slaves on the coast of Africa." He " left it to the jury to say whether there was in fact a slave adventure, and, if there was, whether the prisoner, who managed the transaction, was or was not aware of the purpose for which the vessel was intended to be used. Verdict—Not guilty."

*Buron v. Denman*, 2 Exch. 167, February 1848. [173] " The plaintiff was a Spaniard, who carried on the slave trade at the Gallinas, on the western coast of Africa, north of the Equator. He possessed barracoons or factories at Kamasura, Chicore, Dombocorro, Eтаро, and other places in the Gallinas. The defendant held the rank of commander in the Royal Navy, and in March, 1840, had been placed, as senior officer, in charge of a part of the coast of Africa lying between Capes Verde and Palmas, with instructions to suppress the slave trade. Whilst so engaged, he received a letter dated the 30th of October, 1840, from Colonel Sir Richard Doherty, the then Governor of Sierra Leone, requesting him to take measures for the immediate liberation of a negro woman named Fry Norman, and her child, British subjects belonging to Sierra Leone, who

were detained [174] as slaves at the Gallinas by Prince Manna, the eldest son of King Siacca, the negro Sovereign of that country. This letter contained the following passage: 'But should it be found impossible to effect this object without resorting to force, you will employ force as far as may be necessary, and as your orders and the rules of your service may permit. Should circumstances require it, I shall be prepared to assist you, to the extent of my ability, with a military party from this garrison, or in such other manner as may appear to you advisable.' Accordingly, on the 19th of November, 1840, the defendant, having previously issued a 'general order' respecting the expedition, entered the Gallinas river with the British vessels *Wanderer*, *Rolla*, and *Saracen*, and an armed force of about 120 men. Observing that the Spaniards were carrying off in their canoes a number of slaves, the defendant chased them, and succeeded in capturing about ninety, amongst whom were two British subjects, named John Fraser and John Parker. The defendant landed at Dombocorro, and, having taken possession of the plaintiff's barracoons, spiked the guns and placed sentinels at the doors. At this time the Government of the Gallinas consisted of King Siacca, his eldest son Prince Manna, and three chiefs of the name of Rogers. The defendant wrote to King Siacca, demanding the liberation of Fry Norman and her child, and complaining of the conduct of the Spaniards in carrying on the slave trade. Several letters having passed, the woman, Fry Norman, and her child were delivered up; and on the 21st of November, 1840, the following treaty was concluded and signed by the defendant, and Prince Manna on behalf of King Siacca (who was bedridden from old age), and the chiefs of the country:

" ' In consequence of the white slave-dealers settled in the river Gallinas having prevented the boats of her Britannic [175] Majesty's ships from receiving the common rights of humanity when in distress and seeking refuge in King Siacca's waters, in violation of his dignity and of his rights, thus exposing him to differences with the Queen of England; and also in consequence of a Sierra Leone boy having been made a slave of by these men at the river Gallinas, who was discovered and released by Commander Denman on the 19th inst. 1st. King Siacca engages totally to destroy the factories belonging to these white men without delay. 2nd. King Siacca engages to give up to Commander Denman all the slaves who were in the barracoons of the white slave-dealers when he entered the river, and have been carried off into the bush. 3rd. King Siacca engages to send these bad white men out of his country by the first opportunity, and within one month from this date. 4th. King Siacca binds himself in the most solemn manner that no white men shall ever for the future settle in his country for the purpose of slave trading. 5th. Commander Denman, upon the part of her Britannic Majesty, promises never to molest any of the legitimate commerce of the Gallinas; but that, on the contrary, her ships shall afford every assistance to King Siacca's subjects, and take every opportunity of promoting his commerce. 6th. The Governor of Sierra Leone will use his influence to get the Sierra Leone people to open the trade with King Siacca's country. 7th. No white men from Sierra Leone shall settle down in King Siacca's country without his full permission and consent. 8th. All complaints that King Siacca may have to



make hereafter concerning any of her Majesty's ships, he is requested to forward at once to Sierra Leone; and a full investigation, and such redress as the occasion may require, [176] is solemnly promised by Commander Denman on the part of her Britannic Majesty. Done at Dombocorro, in the river Gallinas, this 21st day of November, 1840. Prince Manna X (mark). Licomi Rogers X (mark). John Siliphi Rogers X (mark). Signed, Jos. Denman, Commander and Senior Officer on the Sierra Leone Station.'

"On the 23rd of November, the defendant, in the execution of this treaty, commenced burning the plaintiff's barracoons. On one occasion, at the request of Prince Manna, the defendant with his own hand fired two rockets, which burnt the barracoons at Kamasura. The defendant also set fire to the village of Chicore, by which the plaintiff's barracoons in that place were destroyed. Before the expedition landed, there were about 300 slaves in these barracoons, besides great quantities of cotton and woollen goods, gunpowder, spirits, and goods of various descriptions adapted for slave traffic. On the approach of the expedition, the slave-dealers deserted the factories, and let loose the slaves, who were driven up the country. Great numbers of these slaves were afterwards taken by the defendant and carried to Sierra Leone where they were emancipated. The goods were claimed by King Siacca, as forfeited in consequence of the owner having acted in defiance of his law, and were delivered up to him; the gunpowder was thrown into the river; and the casks of spirits were broken in, and the spirits allowed to flow away on the sand, it being suggested that they were poisoned. The defendant continued to fire the barracoons until the 26th, (that at Dombocorro being the last destroyed), when he re-embarked and proceeded to Sierra Leone, having succeeded in liberating 841 slaves."

These proceedings were communicated to the Lords of the Admiralty, and the Secretaries of State for the foreign and colonial departments, and they respectively, by letter, adopted and ratified the act of Denman. [182] "The correspondence relating to these proceedings was laid before Parliament, and by the 10 and 11 Vict. c. 107, a sum of £7500 was appropriated for the suppression of the slave trade on the coast of Africa, £4000 of which was voted to the defendant and his men for their services at the Gallinas. The present action was commenced in the year 1842."

Held: first, that the plaintiff had a property in his slaves, and might maintain trespass for their seizure, the slave trade not being piratical by the law of nations, and it not appearing that Spain had passed any law abolishing the slave trade pursuant to the treaty embodied in the 6 and 7 Will. IV. c. 6. Secondly, that the ratification of the defendant's act by the ministers of state was equivalent to a prior command, and rendered it an act of state, for which the Crown was alone responsible, (Parke, B., *dubitante*): and that such defense was open under the general issue.

*The Felicidade, otherwise Virginia*, 3 W. Rob. 45, April 1848. "On the 6th of March, 1845, her Majesty's sloop *Star*, whilst cruising on the coast of Africa, descried a schooner in latitude 3° 10' north, and longitude 3° 43' east, whereupon sail was made in chase, and at 3.30 a. m.,

the *Star* having com[e] up with the schooner, Captain Dunlop, the commander, boarded her, and found her fitted and equipped for the slave trade. Captain D. observing that several of the crew of the said schooner wore bandages on their heads, directed the surgeon of the *Star* to examine them, and a report being made that the men appeared to be cut and wounded on their heads with cutlasses, Captain D. caused the crew to be put in irons, and shortly after such order was made, one of the said crew stated that the schooner had been captured by her Majesty's sloop *Wasp*; that the crew of the *Felicidade* had killed the prize crew belonging to the *Wasp*, and that the wounds which were observed were inflicted at the time when the crew of the schooner killed the prize crew, and retook possession of their vessel. Upon this confession Captain D. ordered the second lieutenant of the *Star* to take charge of the schooner, and proceed with her to Sierra Leone for adjudication. In the progress of the voyage the *Felicidade* capsized in a white squall, and was totally lost." The allegation in behalf of the officers and crew of the *Wasp* pleaded, [46] "1st. That on or about the 27th day of February, 1845, her Majesty's said sloop *Wasp*, whilst cruising on the coast of Africa for the prevention of the slave trade, etc., fell in with and seized the *Felicidade*, a Brazilian vessel, then equipped for the slave trade, but without any slaves actually on board, and manned with a crew of thirty persons, including the master. That the whole of the crew, except the master and one other person, were removed on board the *Wasp*, and Lieutenant Stupart and Mr. Palmer, a midshipman, with sixteen seamen belonging to the *Wasp*, were put on board, with orders to convey her to Sierra Leone for adjudication. 2nd. That the two vessels having parted company, the *Felicidade*, on the 2nd of March, 1845, fell in with and seized another Brazilian vessel called the *Echo*, with 431 slaves on board, whereupon Lieutenant Stupart, with seven of his men, went on board the *Echo*, leaving Mr. Palmer in charge of the *Felicidade* with the remaining nine men belonging to the *Wasp*, the two persons of her own crew, and twenty of the crew of the brigantine the *Echo*. That the two vessels remained in company during the [47] night, but on the following day the Brazilian people on board the *Felicidade* rose upon the said Mr. Palmer and his men, slew the whole of them, with the exception of two blacks, who jumped overboard, and swam ashore, and took possession of the vessel, and after making an ineffectual attempt to recapture the *Echo*, sailed away and stood out to sea, chased by the *Echo*, which being a bad sailor soon lost sight of her. 3rd. That the *Felicidade*, having outsailed the *Echo*, stood to the southward towards the Isle of Princes, and whilst so standing during the night of the 4th of March was fallen in with and captured by her Majesty's sloop *Star*."

Held: [48] "the original seizors never completed their possession."

*Richards v. Attorney General of Jamaica*, 6 Moore P. C. 381, July 1848. [383] "James Clayton White was owner in fee of two plantations, and the slaves thereon [172 in number], in the Island of Jamaica." His will, dated June 13, 1834, on which day he died: "I give, devise, and bequeath, share and share alike, unto Rosanna Richards, and her four daughters, together with each of my natural and reputed sons of colour,

the children of Rosanna Richards aforesaid, namely, George White, and Edward White, all my right, title, and claim for compensation, such as may be awarded to me as my portion of the compensation-fund for the emancipation of such slaves as may belong to me, and be living on the 1st day of August, in the present year of our Lord 1834." The will was attested by two witnesses only, and was, therefore, void as to the devise of real estate. By the law of Jamaica, slaves could only be directly devised as real estate. [387] "The compensation-money in respect of the slaves of White, amounting to the sum of £3242 7 s. 3 d., was, by an order made in the cause, dated the 28th of July, 1837, paid to the Receiver-General of the Island. . . [388] In the course of the suit [in the Court of Chancery of Jamaica] . . payments [were] . . made out of the compensation fund, the aggregate of which amounted to £2582 10 s.; leaving out of the compensation money the sum of £890 only, in the hands of the Receiver-General, to the credit of the cause."

Held: (treating the slaves as real estate) the legislature became purchasers, under the 3 and 4 Will. IV. c. 73, from the date of the act (August 28, 1833), giving a limited interest in the slaves for a term of years to the vendor, and the money to be received under the compulsory sale of the slaves was converted into personal estate, and passed to Rosanna and her children, as specific legatees under the will.

*Edward v. Trevellick*, 4 El. and Bl. 59, June 1854. The plaintiff, [62] "an African and a negro . . was serving as . . seaman on board the *Candace* . . and before he deserted the said ship, the captain . . threatened to sell plaintiff as a slave . . on the arrival of the ship at San Francisco," Held, on demurrer, a bad replication, as not showing that California was a state in which the plaintiff could be sold as a slave. *Dubitante* Crompton, J.

*The Newport*, 11 Moore P. C. 155 and Swabey 317, February 1858. [179] "at a period antecedent to the date of the present transactions, both Flores and Garrido were largely engaged in the Slave trade, and that for several years before 1851 they were employed in the regular purchase and transmission of slaves from [180] the west coast of Africa to a company of merchants at Rio de Janiera. In 1851, however, strenuous efforts were made by the Brazilian Government to put down the traffic . . with great success. . . In the year 1853, there seems to have been some increase of the Slave Trade both north and south of Loanda, . . but in February, 1855," the Commissioners "reported that such increase had been only momentary, and had entirely ceased." After 1851 "Flores, and Garrido as his agent, were . . engaged in adventures of sending slaves to Cuba." The British authorities addressed urgent remonstrances "to the Portuguese Government against permitting Flores to remain in their territory in Africa, and . . an order for his removal . . was served upon him in June, 1854."

*Santos v. Illidge*, 8 C. B. (N. S.) 861, July 1860. Facts in the case:<sup>1</sup> "The plaintiff is a Brazilian: . . The defendants [British subjects resi-

<sup>1</sup> Same *v.* same, 6 C. B. (N. S.) 841 (844).

dent and domiciled in Great Britain] are the directors of a company called the Brazilian Mining Association, formed for the working of mines in the Brazils,—an English company. The company being in course of winding up in the court of Chancery, an order was made . . . for the sale of their property . . . including a number of slaves [employed in working their mines in Brazil] . . . and one of the directors proceeded to the Brazils for the purpose of effecting a sale. On his arrival at Rio de Janiero, the director contracted for the sale of the slaves to the plaintiff [for the sum of 32,000 *l.*], but was prevented by the interposition of the British consul there from carrying it into effect. For this breach of contract the present action is brought:” Some of the slaves had been purchased by the defendants in Brazil after the passing of the 5 G. IV. c. 113, but before the passing of the 6 and 7 Vict. c. 98; the rest of the slaves were the offspring of those first mentioned, and were in the possession of the defendants before the passing of the last-mentioned act.

Held, by Bramwell, B., Hill, J., Channell, B., and Blackburn, J., reversing the judgment of the Court of Common Pleas: the contract [872] “was one which the defendants could lawfully enter into, and which must be enforced here. . . if the 5 G. 4, c. 113, did prohibit the purchase of these slaves, the contract for their sale is lawful. The 6 and 7 Vict. c. 98, s. 5, permits the sale wherever the ‘holding’ is not prohibited. Now, the holding of slaves by a British subject in the Brazils . . . is nowhere prohibited. But it is said that this holding was prohibited, because there can be no lawful holding where there was an unlawful acquisition. No doubt it is a strong thing to say a man could acquire a property by an act in itself a felony. But it is not a property which our laws deal with; it is a Brazilian right the defendants are selling. It cannot be said that in fact the defendants do not hold these slaves. They do: and it is not in terms made unlawful by any law of this country. I think the true construction of the 5th section is, to say it applies to cases where the holding is unlawful, whatever be its origin.” [Bramwell, B.] Pollock, C. B., and Wightman, J., held that the contract was illegal and void—the 5 G. IV. c. 113, prohibiting the buying or selling of slaves by British subjects everywhere, and there being nothing in the subsequent statute to remove that prohibition.

*Brig, name unknown*, Bro. and Lush. 370, December 1864. [374] “Both vessels left Loando in company on the 10th July [1862], but with different objects in view. The *Dart* was on a cruise for the suppression of the slave trade. The *Falcon* was bound to the Isle of Ascension, on her way to England, but she was, as well as the *Dart*, duly authorized to capture vessels engaged in the slave trade.” The *Dart* captured a vessel engaged in the slave trade, in sight of the *Falcon*. The captain of the *Falcon*, deeming the *Dart* sufficient for the purpose, did not get up steam, but continued his course. The chase lasted a few hours only.

Held: the *Falcon* is entitled to share as joint captor. Proof that the alleged joint captor was seen by those on board the prize before capture is important, but is not absolutely required as in cases of prize of war.



## VIRGINIA.

### INTRODUCTION.

#### I.

The most interesting matter contained in the earlier part of the following body of extracts is found in those cases which have to do with the beginnings of negro slavery and the end of Indian slavery. Those cases are so scanty, are involved in such obscurity, and are connected with such a maze of statutes, that they require illumination before they can furnish it. The text needs a commentary; and since these cases come early in the chronological order of arrangement, the first part of this introduction is of that nature.

To write the history of slavery in Virginia in the seventeenth century is like putting together a picture puzzle when many of the pieces are missing, like reconstructing a Greek vase from a few shards. Others may fit the fragments in a different fashion.

The servant<sup>1</sup> problem, or rather, the problem of service, in the early colonial days defied solution, but necessity caused nine or ten varieties of servitor to be evolved in Virginia, most of them existing in the other colonies also. These varieties, arranged approximately in order<sup>2</sup> of social precedence, were: the white indentured servants; the white servants without indentures (of whom there were two classes, those who came voluntarily, and those who came involuntarily, of which latter class were the men, women, and children who were "spirited" away, those who left their country for their country's good, and probably the "*Duty boyes*");<sup>3</sup> the Christian negro servants;<sup>4</sup> Indian servants; mulatto servants (whose servitude was the penalty for having a white mother and an Indian, negro

<sup>1</sup> The term "servant" was used to designate anyone who rendered service—the laborer as well as the household servant.

<sup>2</sup> See the case of Hannah Warwick, for a reversal of this order. *Minutes of the Council*, ed. McIlwaine, 513.

<sup>3</sup> "Whereas there remaine [in October 1627] certaine of the *Duty boyes*, whose first seaven yeares of service as apprentices expired in May last past, and were from that time to begin to serve other seaven yeares as Tenants too halves;" *ibid.*, 154. They belonged to that band of "50 boyes, which were by our late dread soveraigne Kinge James commanded to bee sent over hither, and arrived here in the *Dutye* 1619." *Ibid.*, 117. Such an importation was suggested ten years earlier by Hugh Lee, writing to Thomas Wilson from Lisbon: "Five caracks sailed . . . for the East Indies, . . . carrying in the place of soldiers, children and youths from the age of ten upwards, to the number of 1,500; in a few years they say these children will be able to do good service, their bodies being well acquainted with the climate of those countries; thinks it were no evil course to follow in England for planting inhabitants in Virginia; it is forced by necessity in Lisbon." Brown, *Genesis of the United States*, p. 249.

<sup>4</sup> Usually without indentures; but see p. 57, *infra*.

or mulatto father,<sup>5</sup> or, after 1723, for being descended in the maternal line from such a combination of ancestors);<sup>6</sup> Indian slaves; negro slaves.

Most of these varieties existed side by side in Virginia in the seventeenth century (let us hope, for the sake of the owners, that no one plantation held them all); but the last possessed the germinal potentiality of a certain mustard seed, outstripped the rest, and "waxed a great tree," while the others, like saplings, perished in its shade.<sup>7</sup>

In what order did these varieties emerge?

An ancient "blue law" of the colony of Virginia runs thus: "Every person to go to Church Sundays and Holy days or lye neck and heels on the Corps du Guard the night following and be a Slave the week following, Second Offence a Month, third a Year and a Day. 10th May 1618."<sup>8</sup> The penalty sounds certain, severe, and calculated to deter truancy in a community acquainted with slavery, but meaningless to one which knows it not. The word "slave" is not defined. It is taken for granted that its connotation is obvious to the colonists. Yet where could they have learned in 1618 what service it implied (for they were Englishmen), if slaves were a novelty to them on that August day in 1619 when, as "Master John Rolfe"<sup>9</sup> relates, "came in a dutch man of warre that sold us

<sup>5</sup> 3 Hening 87. Re-enacted in 1705.

<sup>6</sup> 4 Hening 133. "These servants bear greater resemblance to apprentices than to slaves." Jefferson's argument in *Howell v. Netherland*, Jefferson 90 (91), 1770.

<sup>7</sup> The reason for this was, that the African was transplanted far from home and along isothermic lines. Neither the Indian nor the English servant satisfied both these requirements for successful service in the climate and on the soil of Virginia. A third ground for the survival of negro slavery, the African's supposed innate docility, is not supported by the facts. See act of the Virginia assembly of October 20, 1669, 2 Hen. 270, "about the casuall killing of slaves. Whereas . . . the obstinacy of many of them by other than violent means [cannot be] supprest," and the notable case of Overzee's slave Tony, 41 Md. Arch. 190 (1658).

The changing proportions of negroes and white servants in Virginia in the seventeenth century are indicated by the following extracts from the Northampton County records: "the first negro is mentioned [in 1636] who was brought by John Wilkins along with twenty five servants," 4 Va. Mag. Hist. 402; inventory of Burdett's estate, in 1644, "8 servants with various times to serve and 2 negros," *ibid.*, 406; inventory of Walker's estate, in 1655, "4 white servants with certain times to serve and 3 negros," 5 Va. Mag. Hist. 40.

In 1671 the answer to one of the "Enquiries to the Governor of Virginia" states that, at that time, "there are two thousand *black* slaves, six thousand christian servants, for a short time." "Yearly, we suppose there comes in, of servants, about fifteen hundred, of which, most are English, few Scotch, and fewer Irish, and not above two or three ships of negroes in seven years." 1 Hening 515.

In 1678 there is a "Proceeding [in the General Court] for bringing more negroes from Africa than ought to have been brought under contract." McIlwaine 519.

In 1698 Governor Nicholson writes from Maryland to the Board of Trade: "There hath been imported this summer about four hundred and seventy odd Negros, vizt 396 in one ship directly from Guiny, 50 from Virginy, which came thither in a ship from Guiny, 20 from Pensylvania, which came thither from Barbadoes: . . . Number of Servants imported . . . may be about 6 or 700, whereof most part are Irish. . . Both in Virginy and here . . . the major part of the Negros speak English: and most people have some of them as their domestick servants: and the better sort may have 6 or 7 in those circumstances: and may be not above one English." 23 Md. Arch. 498.

<sup>8</sup> Randolph MS., 15 Va. Mag. Hist. 405.

<sup>9</sup> "A member of the council, and our first secretary, who was on the spot." Jefferson's *Reports*, 119n. Dr. Brown, *Genesis*, and Dr. Ballagh, *Slavery in Va.*, disagree as to the share the famous *Treasurer* had in bringing the first negroes.

twenty Negars.”<sup>10</sup> Even then the Virginia colonists did not learn the ways of slavery from those twenty,<sup>11</sup> for, though they had been slaves among the Spaniards, their capture by the Dutch frigate, cruising piratically among the West Indies,<sup>12</sup> had changed their status to something indeterminate and transitory, which “faded out” or merged automatically (and, as it were, cinematically) into servitude analogous to that of the indentured white servants,<sup>13</sup> when they touched Virginia soil. The Dutch ship had been a Godsend to them.

But why this step upward? Why did not the status of slave persist? The most convincing answer, and one which the few known facts support, is that some or all of these negroes had been baptized by the Spaniards; and by the law of England, which governed Virginia, a slave who had been christened or baptized became “infranchised.”<sup>14</sup> We have only the scant testimony of their names.<sup>15</sup>

Of the original twenty negroes brought in, in 1619, we know perhaps the names of eleven.<sup>16</sup> One of them, a negro woman, owned by John Rolfe’s father-in-law (not Powhatan, but Captain William Pierce, father of his third wife),<sup>17</sup> was called “Angelo” [*sic*], a name uncommon in England and unknown in Africa. Others were Anthony and Isabella, whose master was Captain William Tucker of Elizabeth City. Their child William is not listed in the census of 1623, as he was probably not yet born, but he appears in Captain Tucker’s Muster in 1625.<sup>18</sup> It is significant that his baptism is recorded, as is that of another William, an Indian owned by Captain Tucker, while no mention is made of the baptism of Anthony and Isabella. This is undoubtedly because they had

<sup>10</sup> Relation of J. Rolfe, incorporated in John Smith’s *Generall Historie of Virginia*, Arber ed., p. 541.

<sup>11</sup> See p. 59, *infra*.

<sup>12</sup> For a description of a similar cruise in 1625, made by the *Black Bess*, a Dutch man-of-war, whose captain (Powell) commanded the “dutch man of warre” in 1619 (24 Va. Mag. Hist. 56, n. 1), see McIlwaine 66-68. The captain and crew were English, as was also the name of the Dutch ship.

<sup>13</sup> See Ballagh, *White Servitude in Virginia*.

<sup>14</sup> *Butts v. Penny*, 3 Keble 785, in 1677, is the first reported English case which enunciates this doctrine, but it was not new. In Maryland, in 1664, the lower house desired the upper house “to draw up an Act obligeing negros to serve *durante vita* . . . for the prevention of the damage Masters of such Slaves may susteyne by such Slaves pretending to be Christned And soe pleade the lawe of England.” 1 Md. Arch. 526. Such “lawe of England” must have been in force in 1612, for “John Phillip A negro,” who was “sworn and exam” in the General Court of Virginia in 1624, was qualified as a free man and Christian to give testimony, because he had been “Christened in England 12 years since.” McIlwaine 33.

<sup>15</sup> If the argument from the names seems weak because of the meagre evidence, we can explain the higher status which the Spanish negroes attained on reaching Virginia only on the ground of expediency. White servitude in Virginia had crystallized into a definite system by 1619, the year of the first negro importation, and it was easier to incorporate the negroes into that system than to put them in a class apart. See Ballagh, *Slavery in Virginia*, pp. 31, 32.

<sup>16</sup> See “Lists of the Livinge and Dead in Virginia, Feb. 16th, 1623,” in *Colonial Records of Virginia, 1619-1680*, and in Hotten, *Original Lists of Emigrants, 1600-1700*; also “Musters of the Inhabitants of Virginia,” in Hotten.

<sup>17</sup> Hotten, p. 224; Brown, *Genesis*, p. 987.

<sup>18</sup> Hotten, p. 244.

already been baptized under Spanish auspices, as their names indicate; for it was and is a rule of Christianity to administer the rite but once to each neophyte. There were also two other Anthonys, two Johns, and William, Frances, Edward, and Margaret,<sup>19</sup> whose names may or may not have been anglicizations of Antonio, Juan, Guillen, Francisca, Eduardo, and Margarita.

The names of the negroes who trickled in singly in the next few years after the first wholesale importation in 1619 indicate antecedent Spanish baptism also. Antonio<sup>20</sup> came in 1621, in the *James*; Mary,<sup>21</sup> in 1622, in the *Margrett and John*; John Pedro<sup>22</sup> in 1623, in the *Swan*. The name Mary, if not an anglicized form of Maria, might have been bestowed either in England<sup>23</sup> or in Virginia. No doubt attaches to the origin of Antonio and John Pedro.

By the same testimony of nomenclature, "Brase," who came to Virginia in 1625 (with Captain Jones, commander of the *Mayflower* in 1620),<sup>24</sup> had not been baptized, unless "Brase" was a corruption of "Blas" or "Blaise,"<sup>25</sup> or a shortened form of Ambrosio. However that may be, the precedent of negro servitude, as distinguished from slavery, had, by that time, become established, and Brase was assigned first to Lady Yeardley till further order, at a monthly wage of "forty waight of good merchantable tobacco,"<sup>26</sup> and finally to Sir Francis Wyatt, governor, as his servant.<sup>27</sup>

The difference in names between the second generation of negroes and their elders is shown, even more strikingly than in the case of William, the son of Anthony and Isabella, in an inventory of 1644:<sup>28</sup> "one negroe man called Anthonio . . . One negroe woman called Mitchaell [Michaela] . . . One negroe woman, Couchaxello . . . One negroe woman, Palassa . . . One negroe girle Mary 4 yeares old . . . One negroe called Eliz: 3 yeares old." The only explanation seems to be that Anthonio, Mitchaell, Couchaxello, and Palassa received their names before leaving the Spanish dominions, while the children were born in Virginia and consequently received the English names of Mary and Elizabeth. But these negroes in

<sup>19</sup> This result is obtained by comparing the "Lists" of 1623 with the "Musters" of 1625. See Hotten.

<sup>20</sup> Hotten, p. 241.

<sup>21</sup> *Ibid.* They were both servants of Edward Bennett in 1625; and they may have been the "Anthony Johnson, negro, and Mary his wife" who were, in 1653, exempted by the Northampton County court from paying taxes, having "been Inhabitants of the county above thirty years, and having the great misfortune to lose by a fire after great service and etc." 5 Va. Mag. Hist. 36. To be sure there were other Anthonys in the colony in 1623, and no doubt other Marys.

<sup>22</sup> Hotten, p. 258.

<sup>23</sup> As in the case of John Philip, p. 55, *supra*.

<sup>24</sup> 24 Va. Mag. Hist. 56, n. 1.

<sup>25</sup> He was accompanied by "a Frenchman . . . and a Portugall," all three having been received from a "Spanish frigott." McIlwaine 68.

<sup>26</sup> *Ibid.*, 72.

<sup>27</sup> *Ibid.*, 73.

<sup>28</sup> York County Records, 17 Va. Mag. Hist. 211.



the inventory of 1644, though they bore Christian names, seem to have been, not servants as the early negroes were, but slaves; for by 1644<sup>29</sup> times had changed.<sup>30</sup>

The early theory that the enslavement of infidels was justifiable in order to make Christians of them, had for a corollary that, when the purpose of enslavement had been achieved by their conversion, their slavery ceased and they became free. This corollary had become difficult of application. If freedom was a reward of baptism, could any slave resist it, no matter how rudimentary his theology, or could many masters welcome it? And even if slaves had not been baptized, they could easily pretend to have been—a danger recognized by the Maryland legislators in 1664.<sup>31</sup> It became expedient to require a more “visible” and more permanent “sign” than the water of baptism to differentiate the slave from the free, and a quietus was put on baptism as a method of emancipation, by statutes in the various colonies. The Virginia act was passed in 1667:

“Whereas some doubts have risen whether children that are slaves by birth, and by the charity and piety of their owners made pertakers of the blessed sacrament of baptisme, should by vertue of their baptisme be made free; It is enacted . . . that the conferring of baptisme doth not alter the condition of the person as to his bondage or freedome; that diverse masters, freed from this doubt, may more carefully endeavour the propagation of christianity by permitting children, though slaves, or those of greater growth if capable, to be admitted to that sacrament.”<sup>32</sup>

Thenceforth baptism ceased to be the test of freedom and color became the “sign” of slavery: black or graduated shades thereof. A negro was presumed to be a slave.<sup>33</sup>

There are two cases which illuminate the transition period in Virginia. In 1641<sup>34</sup> “John Graweere being a negro servant unto William Evans” who permitted him “to keep hogs and make the best benefit thereof to himself provided that the said Evans might have half the increase, which was accordingly rendered unto him by the said negro and the other half reserved for his own benefit” and “having a young child of a negro

<sup>29</sup> In 1642 “John Skinner mariner, . . . covenanted and bargained to deliver unto . . . Leonard Calvert [of Maryland], fourteen negro men-slaves, and three women slaves, of between 16. and 26. yeare old able and sound in body and limbs, at some time before the first of march come twelve-month, at St Maries, if he bring so many within the Capes, . . . within the said yeare.” 4 Md. Arch. 189. “This seems to be the first reference to the importation of negroes into the Province. In this particular case it seems that the slaves were not furnished.” Note by Dr. W. H. Browne, *ibid.*, vii.

<sup>30</sup> This may have been partly due to the policy adopted, 1637-1639, for Providence Island. Company of Providence Island to the governor and council, June 7, 1639: “if the number [of negroes] be too great to be managed, they may be sold and sent to New England or Virginia.” *Calendar of State Papers, Colonial*, I. 296. Also pp. 249, 277, 278.

<sup>31</sup> See note 14.

<sup>32</sup> 2 Hening 260.

<sup>33</sup> Wheeler, *Law of Slavery*, p. 5.

<sup>34</sup> 11 Va. Mag. Hist. 281; McIlwaine 477.

woman<sup>35</sup> belonging to Lieut. Robert Sheppard which he desired should be made a christian and be brought up in the fear of God and in the knowledge of religion taught and exercised in the church of England," bought the child's freedom, and the court "ordered that the child shall be free from the said Evans or his assigns and to remain at the disposing and education of the said Graweere and the child's godfather, who undertaketh to see it brought up in the christian religion as aforesaid." It is significant that Graweere had to buy the child's freedom before christianizing it. Freedom preceded baptism in 1641, instead of resulting from it as in the earlier time. Moreover, if Graweere had been a white servant, no such proceedings in court would have been required to confirm his right to purchased property and to disaffirm any right of his master to it; but such precaution seemed necessary in the case of the negro servant, for his master Evans helped him to procure the order of the court by a deposition in his behalf. Evidently the status of the negro servant was beginning, in 1641, to sink to that of slave. It is also significant that the earliest will (we know of) emancipating negroes<sup>36</sup> is dated 1645. By it one Vaughan "freed his negroes at certain ages; some of them he taught to read and make their own clothes. He left them land."<sup>37</sup> They may have been slaves originally, or they may have fallen to that condition.

The other important transition case<sup>38</sup> is that of "A Mulata named Manuel" whom "Mr. Thomas Bushrod . . . bought . . . as a Slave for Ever but in September 1644 the said Servant was by the Assembly adjudged no Slave and but to serve as other Christian servants do and was freed in September 1665." But "other Christian servants" did not serve apprenticeships of twenty-one years.<sup>39</sup> Furthermore, though Manuel's status as a Christian servant was admitted in 1644 and continued till 1665, he would not have been classed as such in 1670. By an act of that year,<sup>40</sup> the term<sup>41</sup> is reserved for white servants, in

<sup>35</sup> Beside the ground of religion, there was a special and urgent moral reason for the purchase of the child, and its separation from its mother, if she was the same "negro woman servant belonging unto Lieutenant Shepard," whom "Robert Sweat hath begotten with child" and whom the court, in October, 1640, ordered to "be whipt at the whipping post and the said Sweat shall tomorrow in the forenoon do public penance for his offence at James city church in the time of devine service according to the laws of England in that case provided." *Ibid.*

<sup>36</sup> That is, in the printed records at present available.

<sup>37</sup> Northampton County Records, 5 Va. Mag. Hist. 40.

<sup>38</sup> Randolph MS., 17 Va. Mag. Hist. 232.

<sup>39</sup> The usual term was five years, but in 1671 the court ordered that the child of an English woman servant should serve "four and twenty yeares." McIlwaine 248.

<sup>40</sup> "Whereas it hath beene questioned whither Indians or negroes manumitted, or otherwise free, could be capable of purchasing christian servants, It is enacted that noe negroe or Indian though baptised and enjoyned [enjoying] their owne freedom shall be capable of any such purchase of christians, but yet not debarred from buying any of their owne nation." 3 Hen. 280.

<sup>41</sup> The terminology in the middle of the seventeenth century was in a state of flux. Though negroes are listed indiscriminately with white servants in 1623 and in 1625 (see Hotten), they are classified apart in an inventory of 1644,\* and "servant," standing alone,

\* Inventory of the Burdett estate: "8 servants with various times to serve and 2 negros." Northampton County Records, 4 Va. Mag. Hist. 406.

spite of the fact that colored servants of the Christian faith had not become extinct.<sup>42</sup>

During these transition years the negro servant of the old class which enjoyed approximate, though not complete,<sup>43</sup> equality with white servants, survived in some instances. In 1647 "Francis Potts has two negro children bound to him for a term of years, and he binds himself to furnish them sufficient meat and drink and apparel and lodging, and to use his best endeavours to bring them up in the fear of God . . . The name of the negro from whom he bought them was Immanuel Driggus or Driggs—he was a servant to Francis Potts."<sup>44</sup> So late as 1669 Hannah Warwick's case before the General Court was "extenuated because she was overseen by a negro overseer."<sup>45</sup> His authority over a white servant was evidently felt, in 1669, to be somewhat *outré*.

In 1661 occurs the first reference,<sup>46</sup> in the statutes of Virginia, to negroes in their quality of slaves, though they are not so denominated till the following year, when a more comprehensive act on the same subject is passed. The latter act<sup>47</sup> provides that

in case any English servant shall run away in company of any negroes who are incapable of making satisfaction by addition of a time: . . . the English soe running away in the company with them shall at the time of service to their owne masters expired, serve the masters of the said negroes for their absence soe long as they should have done by this Act if they had not beene slaves, every christian in company serving his proportion; and if the negroes be lost or dye in such time of their being run away, the christian servants in company with them shall by proportion among them, either pay fower thousand five hundred pounds of tobacco and caske or fower yeares service for every negroe so lost or dead.

had generally become synonymous with "white servant," and "negro" with "negro slave;"<sup>†</sup> but "servant" is used in its broadest sense in the act of 1670, for the "runaways," for whose apprehension it provides a reward "to the taker of them up," include "every servant of what quality soever;" though "the servant not being slave (who are also comprehended in this act)" must repay "the publique" for the amount expended for his capture, by an additional term of service to "any person he shalbe assigned to" "after the expiration of his full tyme due to his master." 2 Hen. 277. That the runaway servant was, in the eyes of the colonists, primarily a white servant is shown by another section of this act which provides "that every master having a servant that hath runaway twice shalbe . . . commanded to keepe his haire close cutt," a requirement which had been more particularly defined in the act of March 7, 1659, entitled "How to know a Runaway Servant." 1 Hen. 517.

<sup>42</sup> The status of mulatto servants for a term of years was created by act of April 1691. 3 Hen. 87.

<sup>43</sup> "It is declared," in the act of Sept. 23, 1667, "that negro women, though permitted to enjoy their freedom yet ought not in all respects to be admitted to a full fruition of the exemptions and impunities [immunities] of the English, and are still lyable to payment of taxes." 2 Hen. 267.

<sup>44</sup> Northampton County Records, 4 Va. Mag. Hist. 407. See also McIlwaine 316 (1672), 354 (1673), 372 (1674), *infra*.

<sup>45</sup> McIlwaine 513. According to Beverly, "An Overseer is a Man, that having served his time, has acquired the Skill and Character of an experienced Planter, and is therefore intrusted with the Direction of the Servants and Slaves." *History of Virginia* (ed. 1722), p. 236.

<sup>46</sup> Act of Mar. 32 [12], 1661, 2 Hen. 26.

<sup>47</sup> 2 Hen. 117. See McIlwaine 382 (1674), p. 80, *infra*.

<sup>†</sup> The usage in Maryland is shown by the title of the act of September 1664, "Concerning Negroes and other Slaves." 1 Md. Arch. 533. In the act of September, 1681, "other" precedes "Slaves" in the text, though not in the title. 7 Md. Arch. 203.

The clause, "who are incapable of making satisfaction by addition of a time," is not necessarily a description of all negroes,<sup>48</sup> but might simply distinguish negro slaves, as they are denominated further down, from negro servants, who, like the English servants, *were* capable "of making satisfaction by addition of a time," and it might be argued that the law-makers, in substituting the word "christian" for "English," later in the text, felt that the latter was too narrow a term. That may be true, but it is likely that the broader term was chosen for the sake of including the Irish and other white servants, regardless of negro or Indian servants who were probably so few in comparison as to be negligible. The act of 1670,<sup>49</sup> in which the term "christian servants" is used as a synonym of "white servants," supports this view.<sup>50</sup> Another act of 1670,<sup>51</sup> in regulating the status of "all servants not being christians" who shall thenceforth be imported, divides them into two classes: those "imported into this colony by shipping," who "shall be slaves for their lives," and "what shall come by land," who "shall serve, if boys or girles, untill thirty yeares of age, if men or women twelve yeares and no longer." This act favored the Indian, who usually came by land,<sup>52</sup> and fixed the status of slave on the non-Christian African, who usually was "imported into this colony by shipping," but the African coming by sea might still keep his status of servant for years if he had become a Christian before landing. Such an one must have been the "Spanish Mullatto, by name Anthonio,"<sup>53</sup> sold by John Indicott [Endicott] of Boston in 1678 to Richard Medlicott, to serve "But for Tenn yeares"<sup>54</sup> from the day that he shall Disimbarke In Virginia, and at the expiration of the said Tenn yeares the s'd Mullato, Anthony, to be a free man to goe wherever he pleaseth." For Endicott's intention that he should not be a slave for life would have been defeated, if he had been imported "not being Christian."

Such also was the case of another Antonio, sold two months later by "John Saffin, of Boston . . . Merch't, . . . in consideration of the sune of Twenty pounds Sterling by me Rec'd of Ralph Wormeley, of the County of Midd'x, in Virg'r, Esqr., . . . to serve . . . during the terme of Tenn yeare . . . and noe longer, But then the said serv't to be free and wholly at his own dispose (Mortalaty always excepted)."<sup>55</sup>

<sup>48</sup> The Maryland act of October 1663 is more definite: "Whereas divers English Serv'ts Runn away in Company with Negroes and other Slaves, who are incapeable of making Stis faccion by Addicion of Tyme." 1 Md. Arch. 489.

<sup>49</sup> 2 Hen. 280.

<sup>50</sup> As to terminology, see note 41, *supra*.

<sup>51</sup> Act of Oct. 3, 1670. 2 Hen. 283.

<sup>52</sup> See the exceptional case of the Carib Indians, in 1627. McIlwaine 155, *infra*, pp. 76-77.

<sup>53</sup> The name shows Spanish baptism, as in the case of the Antonio and Anthonys of the first importations. See pp. 55-57, *supra*.

<sup>54</sup> "I having full power to sell him for his life time, But at the request of William Taylor, I doe sell him But for Tenn yeares." Deed, Mar. 5, 1677/8, in Middlesex (Va.) Records, 8 Va. Mag. Hist. 187.

<sup>55</sup> Deed, May 18, 1678. *Ibid*.



Four years later, no such restriction of length of service could have been made in the case of imported "negroes, moors, mulattoes or Indians,"<sup>56</sup> who and whose Parents and native country were not christians at the time of the first purchase of such servants by some christian, although afterwards and before such their importation, . . . they shall be converted to the christian faith." All such are "adjudged" by the act of November 10, 1682<sup>57</sup> (which repeals the act of 1670),<sup>58</sup> "to be slaves to all intents and purposes, any law, usage or custome to the contrary notwithstanding." Nothing could be more explicit.

This act of 1682 became notable in the late eighteenth and early nineteenth centuries, inasmuch as the courts of that time deemed it the earliest act which legalized Indian slavery.<sup>59</sup> One of Bacon's laws, however, dated June 5, 1676, provided "that all Indians taken in warr be held and accounted slaves dureing life,"<sup>60</sup> and, though it was repealed in February 1677 (after his fall), the restored government ordered "that all such souldiers who either already have taken<sup>61</sup> or hereafter shall take prisoners any of our Indian enemies, . . . and at the tyme of taking . . . were or shall hereafter be under a lawfull comand . . . retheyne and keep all such Indian slaves . . . to their owne proper use."<sup>62</sup> The act of April 25, 1679,<sup>63</sup> substantially re-enacted Bacon's law by providing, "for the better encouragement . . . of the souldiers, that what Indian prisoners . . . shall be taken in warre, shalbe free purchase to the souldier taking the same."

However, the acts of 1676, 1679, and 1682, instead of forging new chains of slavery for the captured Indian, simply re-welded the old which had been struck off for a brief respite by the act of 1670.<sup>64</sup> No

<sup>56</sup> Only Indians of hostile tribes, for the preamble of the act of 1670 (which the act of 1682 repeals) shows that the Indians who are the subject of its enactment are those "taken in warr by any other nation, and by that nation . . . sold to the English." Ch. 12, 2 Hen. 283.

<sup>57</sup> 2 Hening 490.

<sup>58</sup> *Ibid.*, 283.

<sup>59</sup> The existence of Indian slavery was recognized by an act of 1670 (ch. 5, 2 Hen. 280), which prohibits Indians, though manumitted, from purchasing Christian servants. St. George Tucker observes: "From this act it is evident that *Indians* had *before* that time been made slaves." *Dissertation on Slavery, with a Proposal for the Gradual Abolition of it, in the State of Virginia*, p. 34. An act of 1672 (2 Hen. 299) provides that "if any negroe, molatto, Indian slave, or servant for life, runaway . . . it shall . . . be lawfull . . . upon the resistance of such . . . to kill or wound him;" for the act of 1670, chapter 12 (2 Hen. 283) was not an act for Indian emancipation. It was not retroactive. Indians who were slaves before its passage, remained such.

<sup>60</sup> 1 Hen. 346.

<sup>61</sup> Hening notes that it "appears from the . . . resolution of the assembly [in 1677], that the practice of making *slaves* of Indian prisoners . . . had existed much earlier" than 1679. *Ibid.*, 404n.

<sup>62</sup> *Ibid.*, 404.

<sup>63</sup> *Ibid.*, 440.

<sup>64</sup> Which favored the Indian "taken in warr by any other nation, and by that nation . . . sold to the English," by providing that "servants not being christians" who "shall come by land shall serve" only for a term of years, while those imported "by shipping shalbe slaves for their lives." 2 Hen. 283. Though Indians usually came by land, they were occasionally imported by shipping. Mary and Bess, who were brought in a ship before 1682, were legally slaves, but this status of theirs under the act of 1670 was lost sight of in 1792 and their descendants were adjudged free. *Jenkins v. Tom*, p. 99, *infra*.

written law was needed in the early colonial days to define his status. Throughout the ancient world, and in some parts of the modern world, the captive was a slave,<sup>65</sup> and this ancient axiom of international law was the law of nature to the Indian. His captive, whether white or red, was his to kill or to torture, to adopt or to sell. He did not hesitate to reduce to slavery the early settlers who fell into his hands,<sup>66</sup> and they reciprocated. Such a doubt as assailed the legislators of 1670, who disputed "whither Indians taken in warr by any other nation, and by that nation . . . sold to the English, are servants for life or terme of yeares,"<sup>67</sup> never troubled the minds of the early colonists. John Smith, who had himself been a slave among the Turks, had no such compunction, not limiting the traffic to those of Indian blood. Henry Spelman relates that, a few weeks after his arrival in Virginia in 1609, "I was caried by Capt Smith our President to the Fales, to the litell Powhatan<sup>68</sup> wher unknowne to me he sould me to him for a towne caled Powhatan."<sup>69</sup>

The early settlers not only bought Indians from other Indians, but from other Englishmen. A Maryland colonist deposes in June 1648, that "Mr. Sowth<sup>70</sup> [of Virginia] . . . desyred him to sell him an Indian. This Dep't answered him, he had none to sell. And then he desyred this Dep't to goe with him up to Wicocomoco, and gett him an Indian [girle],<sup>71</sup> and hee would give him content. And upon these speeches they went with the Sloope."<sup>72</sup>

Conversely, "Coll Francis Yardley<sup>73</sup> and Nathaniel Batt both of Virginia for a good and valuable consideracion to them in hand payed . . . became bownd [in 1653<sup>74</sup> or 1654<sup>75</sup>] unto . . . Thomas Cornwaleys [of Maryland] . . . in the penalty of five thousand weight of Tob, with cask, for the delivery of Two Indian yowths."<sup>76</sup>

<sup>65</sup> Even in England, so late as the reign of Anne, the court, in the case of *Smith v. Gould*, "seemed to think that in trespass *quare captivum suum cepit*, the plaintiff might give in evidence that the party was his negro, and he bought him." 2 Salk. 666.

<sup>66</sup> Letter of Argall to Hawes, June 1613: "an Indian was . . . dispatched to Powhatan, to let him know that I had taken his Daughter [Pokohuntis]: and if he would send home the Englishmen (whom he detained in slaverie, . . . that then he should have his daughter restored, otherwise not: . . . towards whose ransome within few days, this king sent home seven of our men, who seemed to be very joyfull for that they were freed from the slavery and fear of cruell murther, which they daily before lived in." Brown, *Genesis*, p. 643.

<sup>67</sup> Preamble to chapter 12 of the act of 1670, entitled "What tyme Indians to serve." 2 Hen. 283.

<sup>68</sup> "Litell Powhatan" was what the Maryland colonists called a "friend pagan." There was no traffic with "enemy pagans."

<sup>69</sup> Spelman's *Relation*. Smith (Arber ed.), p. cii.

<sup>70</sup> Evidently "Leif't Will'm Sowth of Kecoughtan in Virginia," who, the next month [July 1648], gave a bond, with Richard Torney of Virginia, "that they 'shall not within these five next ensuing yeares . . . attempt to take, or carry away any Indian or Indians, out of the precincts of this province, without leave of the Gov'r thereof.'" 4 Md. Arch. 399.

<sup>71</sup> Lancelett's deposition. *Ibid.*, 392.

<sup>72</sup> Duke's deposition. *Ibid.*

<sup>73</sup> 41 Md. Arch. 82.

<sup>74</sup> *Ibid.*, 254.

<sup>75</sup> *Ibid.*, 186.

<sup>76</sup> "Two Indian Slaves." *Ibid.*, 186, 254.

However, the colonists did not depend on traffic or kidnapping for their supply of Indian slaves, but took the "enemy pagan" by their own prowess in war, and enslaved him long before the passage of the Virginia acts of 1676 and 1679. When forces were being raised in Maryland, in 1652, "for a march against . . . the Easterne Shore Indians, . . . Such Indian prisoners as Shall happen to be taken" are declared the spoil of those who financed the expedition.<sup>77</sup> Indians were also reduced to slavery in punishment for crime.<sup>78</sup>

Thus we have shown that the first slaves in the colony of Virginia were Indians, not negroes, and that the laws of the colony sanctioned Indian slavery except (as regards prospective importations by land) for a few years after the passage of the act of 1670. The practice of the colonists, in accordance with their laws, is illustrated by cases in the courts of Virginia and Maryland<sup>79</sup> from 1627 to 1831. In 1627 some "Indians of the Carib Ilands . . . were . . . brought into the country [Virginia] by Capt. Sampson," but the experiment was too disastrous to warrant repetition, at least on a wholesale scale.<sup>80</sup>

Besides the traffic in Indian slaves between Virginia and Maryland colonists, mentioned above,<sup>81</sup> the Maryland court records contain other instances of Indian slavery. "Paul Simpson Marriner," in 1648, complains that Captain Edward Hill had not delivered to him two Indian boys whom he had covenanted to deliver, "whereby the Compl't is damnified to the valew of 2000 l. Tob. and cask" (though he "sould the said Bill to George Manners" for only "500 l. of Tob in Caske"). In Maryland, in 1656, there belonged to the household of one Overzee a negro, a white woman servant, and an Indian slave. In 1661 one citizen of Maryland "demands an Indian . . . promist him in Sattisfaccion of another Indian belonging to the plt. sould by order of the deft. unto the Queene of Portoback."<sup>82</sup> Sometime in the 1670's, the Indians Mary and Bess (the ancestresses<sup>83</sup> of Tom and others who brought action in 1792 to recover

<sup>77</sup> "Every Seventh man throughout the province is to be pressed for this Service . . . that every the Sixe persons through out the Province are to furnish out the Seventh man Soe pressed . . . [283] with . . . Victualls . . . Arms and Amunition . . . likewise ordered that for all Such Indian prisoners as Shall happen to be taken, and brought in when this March is ended they Shall be divided according to their Valuation . . . [284] throughout the Province amongst every the Six that are at the Charge of Setting forth the Seventh . . . unless the Provinciaall Court shall think fitt to dispose of any of them otherwise." 3 Md. Arch. 282.

<sup>78</sup> See case of Naughnongis, 41 Md. Arch. 186 (1658).

<sup>79</sup> 4 Md. Arch. 392, 399, 444, 512; 41 Md. Arch. 82, 186, 230, 254.

<sup>80</sup> See p. 76, *infra*.

<sup>81</sup> P. 62, *supra*.

<sup>82</sup> 4 Md. Arch. 444, 512; 41 Md. Arch. 190, 471.

<sup>83</sup> In the later history of Indian slavery in Virginia, it is the female Indian slave who is prominent—as the ancestress of slaves petitioning for freedom, for if she had been enslaved unlawfully, her descendants in the female line were free, in accordance with the axiom of the civil law, *partus sequitur ventrem*, which was accepted generally, except in Maryland for a few years (1664-1681).

their freedom)<sup>84</sup> must have been brought as slaves to Virginia, for a witness testified that "he heard a certain other person now dead, say in the year 1701, that when he was a lad about 12 years old, those women were brought to this colony in a ship." By the acts of 1676, 1679, and 1682, slavery closed in again, first on Indians captured in war by the soldiers, and finally on all Indians "sold by our neighbouring Indians, or any other trafficking with us as for slaves."<sup>85</sup>

That Indians were brought in and held in slavery for many years subsequent to 1682,<sup>86</sup> is indicated by the evidence of witnesses and the assertions of counsel in cases brought from ninety to one hundred and fifty years later, and by acts passed in the eighteenth century. Robin and others who brought actions in 1772<sup>87</sup> "to try their titles to freedom . . . were descendants of Indian women brought into this country by traders, at several times, between the years 1682 and 1748, and by them sold as slaves under an act of Assembly made in 1682." Mason, counsel for the plaintiffs, asserts that "hundreds of the descendants of Indians" brought in between 1682 and 1684 "have obtained their freedom, on actions brought in this court." In the case of Henry,<sup>88</sup> in June 1772,<sup>89</sup> "the court . . . gave judgment against many descendants of indians introduced and held as slaves between 1682 and 1705."<sup>90</sup> That many Indians were reduced to slavery between 1691 and 1705 is shown by Henning's assertion that "thousands of their descendants" were "deprived of their liberty"<sup>91</sup> when they sued for it later on.

In the revisal of the laws in 1705, "An act<sup>92</sup> concerning Servants and Slaves" re-enacts chapter I of the act of 1682 in substance, but omits the word "Indian," and the special clauses respecting Indian slaves.<sup>93</sup>

<sup>84</sup> *Jenkins v. Tom*, pp. 99-100, *infra*. They were adjudged to have been free, for the court seems to have overlooked the fact that their importation between 1670 and 1682 rendered them subject to the provision of the act of 1670 that "all servants not being christians imported . . . by shipping shalbe slaves." 2 Hen. 283.

<sup>85</sup> 1 Hen. 346, 440, 490.

<sup>86</sup> The council, however, in 1683, in its "report to the governor [Culpeper] of the state of the country for three years," propose that no Indian should be a slave. The ambiguity caused by the omission, from the acts of 1705, chapter 49, and of 1753, chapter 7 (6 Hen. 356), of the Indian clauses of the act of 1682, was cured only in 1778, by "An act for preventing the farther importation of Slaves . . . by sea or land." 9 Hen. 471.

<sup>87</sup> *Robin v. Hardaway*, Jefferson 109; p. 91, *infra*.

<sup>88</sup> Cited in *Gregory v. Baugh*, 2 Leigh 665 (685).

<sup>89</sup> Judge Green, in 1831, refers to "the multitude of cases upon that subject [Indian slavery] decided in the general court in June 1772, in which parol evidence was given reaching back to the close of the century before the last." *Ibid.*, 683.

<sup>90</sup> "The sources for the supply of indian slaves, natives of the continent of America, between 1682 and 1705, must have been very scanty, adverting to the state of things with respect to our neighbouring indians during that period; and there never was any source of a supply from abroad, except such as might be kidnapped in the West Indies, for there slaves were more valuable than here." Judge Green, in *Gregory v. Baugh*, p. 165, *infra*.

<sup>91</sup> "Unjustly deprived;" 1 Hen. vii. Judge St. George Tucker, in *Hudgins v. Wrights*, 1 Hen. and M. 134, agrees with Henning; but all depends on whether the act of 1691 has any bearing on slavery. I agree with Colonel Bland and the court, in *Robin v. Hardaway* (Jefferson 109), that it has not. *Ed.*

<sup>92</sup> Ch. 49. 3 Hen. 447.

<sup>93</sup> Colonel Bland, counsel for Hardaway, declares them "tautologous." Jefferson 109 (121).



Its last section repeals "all and every other act and acts, . . . heretofore made, . . . as relates to servants and slaves, . . . as if the same had never been made."<sup>94</sup> Another act of the same session provides "That there be a free and open trade for all persons, at all times, and at all places, with all Indians whatsoever"<sup>95</sup>—a re-enactment of a law passed in 1691.<sup>96</sup>

In 1772 the court expressly held, in *Robin v. Hardaway*,<sup>97</sup> that the act of 1682,<sup>98</sup> authorizing the enslavement of Indians "sold by our neighbouring Indians, or any other trafiqueing with us as for slaves," was repealed by the act of 1705,<sup>99</sup> but that it was not repealed by the free trade enactment of 1691, being convinced by Colonel Bland's argument that the acts "relative to slavery, and those relative to trade" are "totally independent of, and unconnected with one another," that the act of 1691 "has no relation to those made on the subject of slavery,"<sup>100</sup> it was not made with any eye to them, and should not, therefore, have any effect on them. If the legislature had meant by this to repeal the act of 1682, they would have done it in express terms, and not merely by a side wind, the effect of which would at least occasion dispute."

The "side wind," as predicted, occasioned dispute twenty-one years later, between two eminent members of the Virginia bar, John Marshall and John Wickham. They were not acquainted with the act of 1691 or with the decision of the court concerning it, in *Robin v. Hardaway*, or with Mason's and Bland's arguments, for Jefferson's *Reports of Cases determined in the General Court of Virginia* was not published till 1829;<sup>101</sup> but they perceived that the act of 1705 contained not only the chapter "concerning Servants and Slaves," but, in a subsequent chapter, an enactment for "a free . . . trade . . . with all Indians whatsoever." The arguments of Marshall and Wickham appear in quotations on later pages.<sup>102</sup> The court evidently thought that trading or treating with Indian nations, though it might be incompatible with enslaving individual members of those nations thereafter, was not incompatible with retaining

<sup>94</sup> 3 Hen. 462.

<sup>95</sup> Ch. 52, sect. 12. 3 Hen. 468.

<sup>96</sup> 3 Hen. 69.

<sup>97</sup> Jefferson 109 (122).

<sup>98</sup> 2 Hen. 490.

<sup>99</sup> By "act of 1705" they meant the chapter entitled "An act concerning Servants and Slaves" (ch. 49, 3 Hen. 447), overlooking the fact that the free trade law of 1691 reappears as section 12 of a succeeding chapter (52, *ibid.*, p. 468)—"the treaty law," as Wickham calls it (*Coleman v. Dick and Pat*, 1 Wash. Va. 237), dealing with Indians as nations, tributary and foreign.

<sup>100</sup> Jefferson notes that the act of 1680 (2 Hen. 480—among the acts relating to trade, cited by Colonel Bland) "says, there shall be a free trade with our 'friendly' Indians; that of 1691, with 'all' Indians. . . . The acts of 1670 and 1679 . . . related to hostile Indians alone. Therefore, in 1680, the legislature, that their act opening a trade might not repeal these laws, expressly give the license of coming to trade to 'friendly' Indians only. But in 1691, when a general peace was now established, they extend their license to 'all' Indians, because they meant that all should be now on a footing." The act of 1691 "should seem to favor the plaintiffs." Jefferson 121 n.

<sup>101</sup> In 1831, Judge Carr cites with approval the decision in *Robin v. Hardaway*, "that the act of 1691 did not repeal the indian slave laws." Gregory v. Baugh, p. 164, *infra*.

<sup>102</sup> *Coleman v. Dick and Pat* (1793), pp. 101-102, *infra*.

in slavery such as were already in that condition—that the free trade act was no act of emancipation; but held, that since its passage “no American Indian can be reduced into a state of slavery.”

In 1806<sup>103</sup> the descendants of “an old Indian called Butterwood Nan,” who were about to be sent out of the state by their master, Hudgins, obtained “a writ of *ne exeat* . . . on the ground that they were entitled to freedom.” Unfortunately their ancestress had come in before 1705, for she “was 60 years, or upwards, in 1755.” Chancellor Wythe cut the Gordian knot by decreeing that “the appellees . . . were entitled to their freedom . . . on the ground that freedom is the birth-right of every human being, which sentiment is strongly inculcated by the first article of our ‘political catechism,’ the bill of rights.” Hudgins appealed, and the higher court affirmed Wythe’s decree, but had to base its decision on another ground, “not approving of the Chancellor’s principles and reasoning . . . except so far as the same relates to white persons and native American Indians, but entirely disapproving thereof, so far as the same relates to native Africans and their descendants, who have been and are now held as slaves by the citizens of this state.” The ground which secured freedom for the Wrights was that the section of the act of 1705 which granted “a free . . . trade . . . with all Indians whatsoever”<sup>104</sup> was discovered by Judge St. George Tucker to be no new law, but a mere repetition and re-enactment of the act of 1691, chapter 9. Therefore he carried the period after which Indians could not be enslaved further back than 1705, namely, to 1691. Thus that part of the decision of the court, in *Robin v. Hardaway*, which denied that the act of 1682 was repealed by the free trade act of 1691, was overruled by implication in 1793, and expressly in 1806. The decision in *Hudgins v. Wrights* was followed in *Pallas v. Hill*<sup>105</sup> two years later. “The Court took time . . . in order to obtain from the library at Monticello, the copy of a similar act, which was understood to be in the collection of the President of the United States.” Another copy was obtained from Northumberland County.<sup>106</sup> Therefore Judge Tucker declared that the “only question in these causes, is, whether the act of Assembly cited and relied on by me in *Hudgins v. Wrights*, as having passed in the year 1691, is to be regarded as the law of the land, or not.” All the judges agreed that it was.

The case of *Gregory v. Baugh*, 1827 and 1831,<sup>107</sup> involves the status of “Indian Sybil.” The date of her arrival is not precisely given. She died soon after October 1772, when the General Court made an order allowing her to sue her master *in forma pauperis* and assigned “Mr.

<sup>103</sup> *Hudgins v. Wrights*, 1 Hen. and M. 134; p. 112, *infra*.

<sup>104</sup> 3 Hen. 468.

<sup>105</sup> “*Pallas*, Bridget, James, Tabb, Hannah, Sam and others” were descended from “Indian Bess” who “was brought into Virginia in or about 1703.” P. 116, *infra*.

<sup>106</sup> The last two manuscript copies were in the possession of W. W. Hening in 1809. 1 Hen. vii.

<sup>107</sup> Pp. 147, 163, *infra*.

Jefferson . . her counsel to prosecute the said suit: . . this order must have been founded on Mr. Jefferson's professional certificate, that he was of opinion she was justly entitled to her freedom, and stating the grounds of that opinion." Sybil's suit was abated on her death, and her grandson, James Baugh, son of her daughter Biddy, brought suit for his freedom fifty-five years later. By that time it was questioned whether such hearsay evidence as that of an aged man, that he had heard his mother say "that Sybill's mother was an indian,<sup>108</sup> and that Sybill herself was one, and was entitled to her freedom" ought to be admitted. Judge Carr, while "exceedingly reluctant to unsettle what is at rest," declares that "all who have examined the earlier cases in our books, must admit, that our judges (from the purest motives, I am sure) did, *in favorem libertatis*, sometimes relax, rather too much, the rules of law, and particularly the law of evidence. Of this, the court in later times has been so sensible, that it has felt the propriety of gradually returning to the legal standard,<sup>109</sup> and of treating these precisely like any other questions of property." The court was divided on this question, and also on the question whether, if a person claiming freedom on the ground of Indian descent in the maternal line, prove his descent from a native American Indian ancestress, the *onus probandi* lies on the defendant to prove that such ancestress was brought into the country at a time and under such circumstances that such Indian might lawfully be enslaved, or on the plaintiff, to prove that such his ancestress was brought in at a time and under such circumstances that she could not lawfully be enslaved. The facts disclosed in these cases show that Indians continued to be brought in as slaves during the early part of the eighteenth century, and an act of assembly, 1723,<sup>110</sup> indicates that the legislature of that time did not consider that Indian slavery was extinguished by the act of 1705. It was enacted "That no negro, mullato, or indian slaves, shall be set free . . except for some meritorious services." As the child of an Indian was deemed a mulatto,<sup>111</sup> there would have been no Indian slaves on which the act could operate, except those brought in before 1705, if that act forbade enslavement of Indians thereafter. The actual practice, as shown by the cases which came before the courts, proves that the act of 1705 was not regarded as the palladium of Indian liberty till some sixty-five or seventy-five years after its passage.

It must, of course, be kept in mind that the Indian ancestresses on whom the suits for freedom were based, in all these cases, had been, theoretically and perhaps actually, members of hostile tribes.<sup>112</sup> The friendly Indian

<sup>108</sup> If Sybil's mother was the Indian the date of whose importation was vital, she might easily have been brought in before 1691; and if also after 1682, she and her descendants were legally slaves.

<sup>109</sup> To receive hearsay testimony as to pedigree, but not as to race or status.

<sup>110</sup> 4 Hen. 132.

<sup>111</sup> 3 Hen. 252.

<sup>112</sup> In the early colonial days, hostile Indians were all who were not "friendly." By 1682, the "friendly Indians" are called "neighbouring Indians, confederates or tributaries." The distance of the hostile Indian from the settlement is an important element

was on an altogether different plane. The colonists made his temporal and spiritual welfare the subject of their paternalistic legislation and beneficence. The "friend pagans"<sup>113</sup> as they were called in Maryland (in distinction from "enemy pagans") might come to the colonists as hostages in exchange for English hostages,<sup>114</sup> might be employed as servants, the male Indians being particularly useful in eking out the food supply by hunting and fishing,<sup>115</sup> or might be brought in as children by their parents to be instructed in the Christian religion.<sup>116</sup> In 1618, an unknown person in England gave "£550 in gold for bringing up children of the Infidels."<sup>117</sup> Out of 1216 persons, white servants sent to Virginia in 1619, there were "fifty . . . whose labours were to bring up thirty of the infidels children,"<sup>118</sup> "in true religion and civility."<sup>119</sup> Smith tells us that also in 1619, "Master Nicholas Farrar deceased, hath by his Will given three hundred pounds to the College, to be paid when there shall be ten young Salvages placed in it, in the meane time foure and twenty pound yearly to bee distributed unto three discreet and godly young men in the Colony, to

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of his hostility. His "foreign" quality is emphasized, and he is definitely located outside the North American continent, by the court in *Coleman v. Pat* (1 Wash. Va. 233), in 1793, which held that though no American Indian could be reduced to slavery since the act of 1705, "Foreign Indians coming within the description of that act, might be made slaves" [down to 1778]. But the term is used in the act of 1705, chapter 52, sect. 11, to designate non-tributary American Indians who are approachable by land, for the tributary Indians are required to "march, with the English, in pursuit of foreign Indians" (3 Hen. 468) and the act of 1755 offers a reward "of ten pounds . . . for every male Indian enemy, above the age of twelve years . . . destroyed within the limits of this colony." 6 Hen. 564. See also *Butt v. Rachel*, 4 Munford 209 (210, 211), and *Gregory v. Baugh*, 4 Randolph 611 (633), pp. 125, 147, *infra*.

<sup>113</sup> "Infidel" was the general term for Indian in Virginia.

<sup>114</sup> Argall to Hawes, June 1613: "all the Indians that were my very great friends, . . . having concluded a peace . . . and likewise given and taken Hostages." Brown, *Genesis*, p. 641.

<sup>115</sup> "The Salvages hath beene . . . imployed in hunting and fowling with our fowling peeces; and our men rooting in the ground about Tobacco like Swine." Smith, *History of Virginia* (Arber ed.), p. 563. "Orders permitting persons to keep indians to hunt," October 1657. McIlwaine 505. "David Mansell allowed to keep 2 indians to work and hunt for him." September 1668. *Ibid.*, 511.

<sup>116</sup> In October 1642, permission was given "to keep an indian boy, instructing him in Christian religion." *Ibid.*, 500.

<sup>117</sup> *Cal. St. Pap. Col.*, I, 23.

<sup>118</sup> Smith (Arber ed.), p. 453. A disproportionate number of nurses or tutors, it seems, especially at a time when all hands were needed to provide the necessities of life. It shows that the domestication of friendly Indians even was no easy task. In 1626 the General Court allows William Claybourne to enjoy for "three years next ensuing . . . all the benefitt use and profit" of his invention "for safe keepinge of any Indyans, which he shall undertake to keep for guides allways ready to be ymployed, and . . . hopeth to make . . . serviceable for many other services for the good of the whole Colony . . . and further whereas there is one Indyan lately come in unto us, We doe give and sett over unto the saide Claybourne the saide Indyan, for his better experience and tryall of his invention." McIlwaine 111.

In the case of Indian slaves, the "wages of superintendence" reduced their economic worth far below that of negro slaves. The act of 1672 "for the apprehension . . . of runaweyes" provides that if a "negroe, molatto, Indian slave, or servant for life doe dye of any wound in such their resistance received the master . . . shall receive satisfaction from the publique . . . negroes . . . shalbe valued at foure thousand five hundred pounds of tobacco and caske a peece, and Indians at three thousand pounds of tobacco and caske a peice." 2 Hen. 299.

<sup>119</sup> Abstract from Eng. Pub. Rec. Office, by W. N. Sainsbury, 6 Va. Mag. Hist. 231.



bring up three wilde young infidels in some good course of life.”<sup>120</sup> As the college failed to materialize, “Mr. George Menifye Esqr.” was allowed an annual income of one-third of this sum on presenting to the General Court, in 1640, “an indian boy . . christened and for the time of ten years brought up amongst the english ” by himself and “Captain William Perry deceased . . the indian was examined and found to have been well instructed in the principles of religion, taught to read, instructed to writing: . . the governor and council approving and commending the care that hath been used towards this youth, . . recommend . . his [Menifye’s] suit for the allowance of 8 pounds per annum . . towards the maintenance of the said youth.”<sup>121</sup>

The act of March 1655<sup>122</sup> provides that “all Indian children by leave of their parents shall be taken as servants for such terme as shall be agreed on by the said parent and master,” and the act of March 10, 1656, provides that “If the Indians shall bring in any children as gages . . then the parents . . shall choose the persons to whom the care of such children shall be intrusted and the countrey . . do engage that wee will not use them as slaves, but do their best to bring them up in Christianity, civility and the knowledge of necessary trades; And on the report of the commissioners of each respective county that those under whose tuition they are, do really intend the bettering of the children in these particulars then a salary shall be allowed to such man as shall deserve and require it.”<sup>123</sup>

Two acts were passed in 1658 for the protection of friendly Indians. By one “It is enacted that in case any Indian do dispose of his childe to any person . . either for education or instruction in Christian religion, or for learning the English tongue or for what cause soever, those persons to whom such childe shall be disposed shall not assigne or transferre such Indian child to any other whatsoever, upon any pretence whatsoever of right to him or any time of service due from him, And . . such Indian childe shall be free and at his owne disposall at the age of twenty five yeares.”<sup>124</sup> By another act of the same session,<sup>125</sup> after a preamble, “Whereas divers informations have been given . . of sundry persons who . . have corrupted some of the Indians to steale and convey away some of the children of other Indians, and of others who pretending to have bought . . Indians of their parents, or some of their great men, have violently and fraudently forced them awaie . . rendring religion contemptible, and the name of Englishmen odious,” it is enacted “that noe person . . shall dare . . to buy any Indian . . from . . the English, and

<sup>120</sup> Smith (Arber ed.), p. 543.

<sup>121</sup> McIlwaine 477.

<sup>122</sup> 1 Hen. 410.

<sup>123</sup> *Ibid.*, 396.

<sup>124</sup> Act of Mar. 13, 1658, ch. 48, 1 Hen. 455.

<sup>125</sup> Act of Mar. 13, 1658, ch. 111, 1 Hen. 481. An act of Maryland of October 1654 provides that “Whatsoever person . . shall steale any friend Indian or Indians whatsoever or be accessory in Stealing them and shall sell him or them or transport them out of the County shall be punished with death.” 1 Md. Arch. 346.

in case of complaint made, that any person hath transgressed this act the truth thereof being proved such person shall return such Indian . . within ten days to the place from whence he was taken."

In March 1662<sup>126</sup> it is enacted "that what Englishman, trader, or other shall bring in any Indians as servants and shall assigne them over to any other, shall not sell them as slaves, nor for any longer time than English of the like ages should serve by act of assembly." This act of 1662 definitely fixes the status of Indians brought in as servants.<sup>127</sup> They are to be no worse off than the indentured English servants "of the like ages." The class of Indian servants received an accession to their ranks by the act of 1670<sup>128</sup> which provided that Indian captives, "sold to the English by that nation that taketh them," should also be servants for a term, though a much longer term than the Indian servants from friendly tribes. Though the acts of 1676, 1679, and 1682 consigned such captives thereafter to slavery, the supply of servants of Indian blood was continued in a steady stream, by acts of 1691 and of 1723. By the former the bastard child of a white mother and an Indian father is to be "bound out as a servant . . untill he . . shall attaine the age of thirty yeares."<sup>129</sup> By the latter the bastard child of a white woman and an Indian (or a negro or mulatto) had not only to pay for the sins of its parents by serving thirty years, but the sins were visited on the next generation: "Where any female mullatto,<sup>130</sup> or indian, by law obliged to serve till the age of thirty or thirty-one years, shall during the time of her servitude, have any child born of her body, every such child shall serve the master . . of such mullatto or indian, until it shall attain the same age the mother of such child was obliged by law to serve unto."<sup>131</sup>

The act of 1705<sup>132</sup> provided that "if any woman servant shall have a bastard child by a negro, or mulatto,"<sup>133</sup> "she shall for every such offence, serve her . . master . . one whole year after her time . . shall be ex-

<sup>126</sup> Act of Mar. 23, 1662, 2 Hen. 143. In the same month the assembly orders that "the Indian boy detained by . . Johnson either to be continued according to his desire among the English or to return to the Indians," and that "Matappin a Powhatan Indian being sold for life time to one Elizabeth Short by the king of Wainoake Indians who had no power to sell him being of another nation, it is ordered that the said Indian be free, he speaking perfectly the English tongue and desiring baptism." 2 Hen. 155.

<sup>127</sup> Jefferson notes "that the Indians brought in by our traders, and sold as servants under the act of 1662, are still out of that of 1682, whose basis is purely those of 1670 and 1679; . . The act of 1662, had never been touched." Robin v. Hardaway, Jefferson 109 (115 n.). The preamble of the act of 1670 shows that the chief object of the act of 1670 was to improve the lot of Indians ("taken in war by any other nation, and by that nation . . sold to the English") who would otherwise have been slaves. It has nothing to do with Indians who were not in that category.

<sup>128</sup> Act of Oct. 3, 1670, ch. 12, 2 Hen. 283.

<sup>129</sup> 3 Hen. 87. The act also applies to the bastard child of a white woman and a negro or mulatto.

<sup>130</sup> "The child of an Indian and the child, grand child, or great grand child, of a negro shall be deemed . . to be a mulatto." 3 Hen. 251.

<sup>131</sup> 4 Hen. 133.

<sup>132</sup> Ch. 49, sect. 18, 3 Hen. 453.

<sup>133</sup> 3 Hen. 251.

pired, or pay her said master . . . one thousand pounds of tobacco." The observations made on this subject by Judge Green, in 1831, in *Gregory v. Baugh*, will be found in the record of that case on a later page.<sup>134</sup>

But not only was servitude for thirty years imposed by law (as a punishment for "abominable mixture" of blood), but it was voluntarily contracted for. In 1722 a complaint was made to the council, in Maryland, against one Andrews "for having sold or otherwise disposed of an Indian Boy a Son of one of our Friend Indians."<sup>135</sup> Andrews

confesses that an Indian Boy named James did in Consideration of five Pounds in hand paid a Horse Bridle and Saddle and two Suits of Cloaths, indent to live with him the said Andrews as a Servant for the term of thirty years and that he sold the said James to a Gentleman in Philadelphia . . . for the sum of fifteen pounds, the said Andrews further says that it is a Customary thing in Ackamack . . . in Virginia for the Indians to work among the Inhabitants and to indent with them for a Time or Term of years, and that he had indented with the said James in Virginia not in Maryland.

The friendly or tributary Indian was always exempt from slavery within the confines of Virginia, but the act of May 9, 1722,<sup>136</sup> provided, in one contingency, for his enslavement elsewhere: "if any Indian . . . tributary to this government, shall . . . presume to pass to the northward of Potowmack river, or to the westward of the great ridge of mountains, . . . every Indian . . . so offending, and . . . convicted, shall suffer death, or be transported to the West-Indies, there to be sold as slaves."

## II.

To the student of the history and law of slavery those Virginia cases are doubtless of greatest interest which deal with the evolution of negro servitude and slavery, and with the rise and fall of Indian slavery; and to the student of philanthropy those same cases make a special appeal because they contain the opinions of judges<sup>137</sup> who, in a long line of decisions, often stretched the laws of evidence and the interpretation of statutes to relax the bonds of slavery. But there are other benefactors of the African race, to whose philanthropy the Virginia reports bear witness—the multitude of her citizens, high and low, from Chancellor Wythe<sup>138</sup> and John Randolph of Roanoke<sup>139</sup> to those who were too illiterate to sign their names,<sup>140</sup> who, by the provision of their wills, sought to

<sup>134</sup> P. 165, *infra*.

<sup>135</sup> 25 Md. Arch. 390.

<sup>136</sup> 4 Hen. 104.

<sup>137</sup> And the arguments of counsel on which those opinions were generally based, especially in the eighteenth century. "As the General Court delivered no written opinions, and generally gave no reasons at all for their conclusions, there was nothing of a case to be reported except the statement of it, and the arguments of counsel." R. T. Barton, in his introduction to *Virginia Colonial Decisions*, I. 236.

<sup>138</sup> Wythe xxxvii.

<sup>139</sup> *Coalter v. Bryan*, 1 Grattan 18; p. 204, *infra*.

<sup>140</sup> *Walthall v. Robertson*, 2 Leigh 189; p. 161, *infra*.

ensure the comfort or freedom of their servitors. Such wills, which form a large part of the following excerpts, need little comment.

An act of 1691<sup>141</sup> had provided "That no negro . . . be . . . set free by any person . . . unless such person . . . pay for the transportation of such negro . . . out of the countrey within six moneths after." In 1710 the assembly freed the slave Will for "his fidelity" "in discovering a conspiracy of diverse Negros . . . for levying war in this colony,"<sup>142</sup> and in 1723 an act was passed,<sup>143</sup> providing "That no negro, mullato, or indian slaves, shall be set free, upon any pretence whatsoever, except for some meritorious services, to be adjudged and allowed by the governor and council, for the time being, and a licence thereupon first had and obtained."<sup>144</sup> Emancipation by the assembly was reverted to in 1777, the first year of the Commonwealth, to free the slave of John Barr, as "the consent of the governour and council could not be procured, as required by the laws then and still in force, occasioned by lord Dunmore (the then governour) withdrawing from his government."<sup>145</sup> Other slaves were emancipated by the assembly in 1779<sup>146</sup> and in 1780;<sup>147</sup> but a more liberal policy in regard to emancipation was called for, and in May 1782 "An act to authorize the manumission of slaves" was passed.<sup>148</sup> "The quakers had long been petitioning the legislature to pass"<sup>149</sup> such an act, and for

<sup>141</sup> Ch. 16, 3 Hen. 87.

<sup>142</sup> Act of October 1710, ch. 16, 3 Hen. 537.

<sup>143</sup> Ch. 4, sect. 17, 4 Hen. 132.

<sup>144</sup> In 1741, "Judith Butts Wid'w . . . in her last Will . . . enjoined her Execut'rs to apply . . . for Leave to sett free a female Slave named Lilly, aged Nineteen Years, . . . on account of several very acceptable Services done by her for Said Judith; . . . Ordered, That Leave be granted to manumitt and Sett free the Said female Slave." Extract from Virginia Council Journal, 15 Va. Mag. Hist. 130. Other permits were given in 1761 (16 Va. Mag. Hist. 140), and in 1766 (*id.*, 153).

<sup>145</sup> 9 Hen. 320.

<sup>146</sup> Kitt, for meritorious service "in making the first information . . . against several persons concerned in counterfeiting money," 10 Hen. 115. Three other slaves were emancipated by the legislature a few months later, without mention of any meritorious services rendered. *Id.* 211.

<sup>147</sup> *Id.* 372.

<sup>148</sup> Ch. 21, 11 Hen. 39. "That act was passed at the close of the revolutionary war, when our councils were guided by some of our best and wisest men, men who looked upon the existence of slavery among us not as a blessing but as a national misfortune, and whose benevolence taught them to consider the slave not as property only, but as man." [H. St. G. Tucker, president of the court.] *Manns v. Givens*, 7 Leigh 689 (709), 1836.

The legislature continued to emancipate, even after emancipation by the owners of slaves was authorized. In 1783 an act was passed which provided "That each . . . slave, who by the . . . direction of his owner, hath enlisted in any regiment or corps raised within this state, . . . and hath been received as a substitute for any free person . . . and hath served faithfully . . . or hath been discharged . . . shall . . . be . . . compleatly emancipated," "whereas it appears just and reasonable that all persons enlisted" in this manner "who . . . have thereby of course contributed towards the establishment of American liberty and independence, should enjoy the blessings of freedom as a reward for their toils and labours." 11 Hen. 308. In 1786, "as full freedom as if he had been born free" was conferred on the slave James, who in 1781 "did with the permission of his master . . . enter into the service of the Marquis la Fayette, and at the peril of his life found means to frequent the British camp, and thereby faithfully executed important commissions entrusted to him by the marquis." 12 Hen. 380. In 1787 the general assembly carried out "the benevolent intentions" of Charles Moorman, who made his will in 1778 (12 Hen. 613), and of Joseph Mayo, who made his will in 1780 (*id.*, 611).

<sup>149</sup> *Charles v. Hunnicutt*, 5 Call 311 (1804); p. 109, *infra*.



more than a decade before its enactment alternative provisions are made in the wills of testators desiring to free their slaves, looking to the possibility of such legislative action.<sup>150</sup>

In 1805 an act was passed which prohibited the emancipation of negroes unless they left the state,<sup>151</sup> for the presence of free negroes was plainly a menace to the peace of the community. Many wills thereafter, accordingly, offer negroes the choice of remaining slaves or of leaving the state;<sup>152</sup> and later when the project of colonizing free negroes in Liberia met with favor, the choice is offered between Liberia and slavery.<sup>153</sup>

Herbert Elder (who died in 1826) willed that his negroes be given "to Gabriel Dissosway, in trust to be sent to Africa to the colony at Liberia, provided the expense of sending them will be defrayed by the colonization society . . . Those of them who prefer staying, shall be given . . . to my brother John."<sup>154</sup> One of the slaves refused to accept his freedom on the terms proposed, but all the rest declared that they preferred to accept their freedom and go to Liberia, and the American Colonization Society accepted the slaves on the terms proposed in the will.

It was not till 1858 that the principle of the slave's incapacity to influence his own destiny by making a choice between freedom and slavery was enforced for the first time in Virginia. The will of John L. Poindexter,<sup>155</sup> who died in 1835, gave his negroes, after the death of his wife, "their choice of being emancipated or sold publicly." The circuit court held, in 1855, "that the negroes . . . were absolutely free at the death of the life tenant, and that it was not proper or necessary to put said slaves to their election." But the Court of Appeals, by a majority of three to two, reversed the judgment: "the provisions of the will respecting the manumission of the slaves, are not such as are authorized by law and are void." Judge Moncure, in his dissenting opinion, exclaims: "A master may emancipate his slaves against their consent. Why may he not make such consent the condition of emancipation? . . . It is as competent for a slave emancipated on condition that he elects to be free, to make such election, as it is for a slave absolutely emancipated to propound the deed or will for probate, appeal from the sentence, or sue for his freedom."

<sup>150</sup> See the wills (1771, 1776) in *Pleasants v. Pleasants*, p. 105, *infra*, that of Joseph Mayo (1780) in *Mayo v. Carrington*, p. 98, and that of Gloister Hunnicutt (1781) in *Charles v. Hunnicutt*, p. 109. See also Judge St. George Tucker's pamphlet, *Dissertation on Slavery, with a Proposal for its Gradual Abolition in Virginia* (Philadelphia, 1796), reprinted as Note H. in the appendix to vol. II. of his ed. of Blackstone.

<sup>151</sup> 1 Rev. Code, ch. III, sects. 53, 61, 62. Even before the passage of this act, John Payton, by his will in 1801, emancipated his slaves, at various ages, and "devised 1000 acres of land in the western country" for their use. Of course he may have intended this land to produce income for them, not that they should migrate to it. *Nicholas v. Burruss*, p. 172, *infra*.

<sup>152</sup> Savage's will (1836) in *Forward v. Thamer*, p. 225, *infra*, Vass's will (1831) in *Young v. Vass*, p. 233.

<sup>153</sup> See Maund's will (1829) in *Maund v. McPhail*, p. 193, *infra*, Dawson's will (1833) in *Dawson v. Dawson*, p. 196, and Binford's will, in *Binford v. Robin*, p. 206.

<sup>154</sup> *Elder v. Elder*, p. 171, *infra*.

<sup>155</sup> *Bailey v. Poindexter*, p. 243, *infra*.

At the May term of the same year, Judge Moncure was again in the minority. Mrs. Hannah H. Coalter<sup>156</sup> had willed (1857) that her negroes "be manumitted on the 1st day of January, 1858 . . . my executors to ascertain what fund will be sufficient to provide the usual outfit for, and to remove, said negroes to Liberia, . . . and to use the said fund in removing and settling my said servants in Liberia, or any other free state or country in which they may elect to live, the adults selecting for themselves, and the parents for the infant children; and . . . if any . . . prefer to remain in Virginia, . . . it is my desire that they shall be permitted . . . to select among my relations their respective owners." Her estate "was ample to carry out the provisions of her will in regard to the removal and settlement of her [ninety-three] negroes in Liberia or a free state." The lower court held that the negroes "were emancipated by the will, unless they . . . chose to remain slaves; And that this condition of freedom was independent altogether of the removal of said negroes from Virginia, said removal being a condition subsequent to said emancipation." The decree was reversed, in accordance with the decision in *Bailey v. Poindexter*. But Judge Moncure contended that "the negroes in this case are entitled to their freedom, even conceding that" the former case "was rightly decided. . . I still think it was not rightly decided; and I would now be willing to overrule it, if it were like this case."

These cases were overruled in 1896, by *Jones v. Jones*.<sup>157</sup> The will of Philip H. Jones, who died in 1856, provided that his negro man Bob "shall have the privilege of accepting his freedom at any period of his life, but to remain with my brother and to labor as a slave as long as he stays in the State." The Court of Appeals held "that the testator . . . did emancipate his slave Bob, and that the subsequent provisions of his will, by which he sought to create for him a condition intermediate between freedom and slavery, if he refused to accept his freedom, were void, and in no wise affected the bequest of freedom."

A knotty question of vast importance in the law of slavery was settled in 1824 in the leading case of *Maria v. Surbaugh*,<sup>158</sup> which was henceforth followed in all the slaveholding states.<sup>159</sup> In 1790 William Holliday "bequeaths his slave Mary to his son William, with a declaration, that she shall be free as soon as she arrives at the age of thirty-one years." She passed by sale to various persons, finally coming with her infant child Maria under the ownership of Surbaugh. She had three other children before she reached the age of thirty-one, and after she reached that age, Mary brought an action for freedom, *in forma pauperis*, for herself and in behalf of her four children. The lower court gave judgment for Mary,

<sup>156</sup> *Williamson v. Coalter*, p. 246, *infra*.

<sup>157</sup> 92 Va. 590.

<sup>158</sup> P. 138, *infra*.

<sup>159</sup> Followed in Delaware in 1833, in *Jones v. Wooten* (1 Harr. Del. 77), but overruled in 1849, in *Elliott v. Twilley* (5 Harr. 192).

but held that the children were not entitled to their freedom. The Court of Appeals affirmed the judgment.<sup>160</sup>

One of the Virginia wills offers a maternity prize. John Guthrie provides in 1761: "if Jeany brings ten live children that she shall be at her one [*sic*] liberty."<sup>161</sup> Another Jenny received such a prize by the deed of B. Talbert in 1803, thus fulfilling his promise to her, when he bought her, "that when she should have a child for every one of his, (he then having five) he would set her free."<sup>162</sup>

### III.

The Virginian courts before which the following cases were tried were the General Court, the Court of Chancery, and the Court of Appeals. During the colonial period the General Court consisted of the governor and council, meeting quarterly in judicial session. It was the highest distinctively judicial body in the province, but for some years in the earliest period the general assembly had jurisdiction concurrent with that of this quarterly court and criminal cases involving life or member were tried in whichever convened first. In 1641 the civil jurisdiction of the assembly was limited mainly to appellate cases; after 1682 appeals to the assembly were discontinued by royal order.

By the constitution of 1776 the two houses of the assembly were empowered to appoint judges for the Supreme Court of Appeals, the General Court, and judges in chancery and admiralty. Admiralty judges had already been appointed in 1775, but their jurisdiction of course ceased in 1789, vesting thenceforward in the federal courts. Acts of 1777 organized the General Court, of five judges, and the High Court of Chancery, of three, and an act of 1778 provided for the Court of Appeals, which was to consist of three judges peculiar to that court, together with, in different cases, the judges of the General Court or of the courts of chancery or admiralty. The General Court and the High Court of Chancery continued to exist till the adoption of the constitution of 1830.

That constitution vested the judicial power of the state in a Supreme Court of Appeals and such superior courts as the legislature might establish (circuit and district courts). The constitution of 1850 made similar provisions. The Supreme Court of Appeals was to consist of five judges, and to have appellate jurisdiction only, except in cases of *habeas corpus*, *mandamus*, and prohibition. By the constitution of 1864 the number of its judges was to be three, that of 1870 restored it to five. Though a few of the cases which follow were tried in federal courts, nearly all of those subsequent in date to 1830 were cases before the Court of Appeals.

<sup>160</sup> The Virginia Code of 1849, however, provides: "The increase of any female so emancipated by deed or will hereafter made, born between the death of the testator, or the record of the deed, and the time when her right to the enjoyment of her freedom arrives, shall also be free at that time, unless the will or deed otherwise provides." Ch. 103, sect. 10, p. 458.

<sup>161</sup> Fairclaim v. Guthrie, p. 103, *infra*.

<sup>162</sup> Talbert v. Jenny, 6 Randolph 159 (1828); p. 151, *infra*.

## VIRGINIA CASES.

*Re Tuchinge*, Minutes of the Council, ed. McIlwaine, 33. November 1624. "John Phillip A negro Christened in England 12 yeers since, sworne and exam.<sup>1</sup> sayeth, that beinge in a ship with Sir Henry Maneringe, they tooke A spanish shipp aboute Cape Sct Mary, and Caryed her to mamora."

*Re Negro Brase*, McIlwaine 66, July 1625. "William Barnes . . sayth, that Capt. John Powell<sup>2</sup> shipped him at the Ile of Wight in the good Shipp called the *black Bess* of Flushing . . A man of warr, . . they coasted to and againe about the west Inges to meete with some pryse. And . . they took A Friggett . . divers of the Compeny . . [67] resolved for to shipp themselves in the Frygett . . And they desired Capt. Jonnes<sup>3</sup> to goe with them to be theire Capt. and m'r . . at last mett with this Friggett uppon the coaste of Cooba . . And . . tooke that friggett alongge with them." Andrew Poe<sup>4</sup> testified that they [68] "afterwards lighted uppon a Spanish frigott . . and they gave them their first frygott taking out of her [the Spanish frigate] some Raw hides and some Tobacco and a negro and a Frenchman who were desirous to goe alonge with them, and a Portugall to be theire Pilott . . came directly for Virginia, where they Arrived . . the Eleventh of July 1625."

[71] "A Courte held the XIXth daye of September 1625 . . ordered that Capt. Bass shall deliver some Cloaths to the Portugall owt of Capt. Jonnes his chest . . which is to be satisfied owt of the negroes labour. . . [72] that the negro that cam in with Capt. Jones shall remaine with the La: Yardley till further order be taken for him and that he shalbe allowed by the Lady Yardley monthly for his labor forty pownd waight of good marchantable tobacco for his labor and service so longe as he remayneth with her." "A Courte held the thirde daye of October 1625, . . [73] Yt is ordered the negro caled by the name of brase<sup>5</sup> shall belong to Sir Francis Wyatt Governor etc., As his servant, Notwithstandinge any sale by Capt. Jonnes to Capt Bass, or any other chaleng by the ships company."

*Re Carib Indians*, McIlwaine 155, October 1627. "The Court having taken into their consideration the danger which might ensw to the Colony by those Indians of the Carib Ilands which were lately brought into the Country by Capt. Sampson, and having admonished the said

<sup>1</sup> Testimony of a negro in the trial of a white man.

<sup>2</sup> "Capt. Powell had commanded one of the ships which brought the first negroes to Virginia . . 'a Dutch man-of-war.'" 24 Va. Mag. Hist. 56, n. 1.

<sup>3</sup> "Capt. Jones had commanded the *Mayflower* in its famous voyage to Plymouth." *Ibid.*

<sup>4</sup> "Of Holte in Northfolke . . shipt in Flushing." McIlw. 68.

<sup>5</sup> "Brass was taken in at the West Indies, by one Captain Jones, to assist in working his vessel hither." Jefferson 119 n.



Capt. Sampson to consider with himselfe what profit he could make by the said Indians, and to devise with himselfe soe to dispose of them, as they may prove noe discommoditie to the Colonie, . . . Sampson hath returned his answere—that he knoweth noe way . . . to dispose of those Indians but deliverethe them wholly upp into our hands . . . and being . . . given to understand . . . that the said Indians have runn away and hid themselves in the woods attempting to goe to the Indians of this Country as some of them have revealed and confessed, And for that they have stollen away divers goods, and attempted to kill some of our people . . . And for that especially they may hereafter be a means to overthrow the whole Colony, have adjudged them to be presently taken and hanged till they be dead.”

*Re Indian*, McIlwaine 116, October 1626. “At this Court there was a Weanoke Indian presented by Captaine William Epps which was taken the last springe at Sherley-Hundred and hath since been with him and the Court hath ordered that Capt. Epps doe enter into bonds of 500 l. of tobacco that the said Indian shall not runne away; . . . that Capt. Epps upon his return to James Citty . . . bring the Indian along with him to the Governor to be imployed uppon any service: And the Court . . . graunt that Capt. Epps at his goeing for England the next spring, may carry the said Indian with him, otherwise to deliver him upp to the Governor.”

*Re Davis*, McIlwaine 479, September 1630. “Hugh Davis to be soundly whipt before an assembly of negroes and others for abusing himself to the dishonor of God and shame of Christianity by defiling his body in lying with a negro, which fault he is to actk. next sabbath day.”

*Re Negro John Punch*, McIlwaine 466, July 1640. “Whereas Hugh Gwyn hath . . . Brought back from Maryland three servants formerly run away . . . the court doth therefore order that the said three servants shall receive the punishment of whipping and to have thirty stripes apiece one called Victor, a dutchman, the other a Scotchman called James Gregory, shall first serve out their times with their master according to their Indentures, and one whole year apiece after the time of their service is Expired . . . and after that service . . . to serve the colony for three whole years apiece, and that the third being a negro named John Punch shall serve his said master or his assigns for the time of his natural Life here or elsewhere.”

*Re Negro Emanuel*, McIlwaine 467, July 1640. “complaint . . . by Capt. Wm. Pierce, Esqr. that six of his servants and a negro of Mr. Reginalds has plotted to run away unto the Dutch plantation . . . and did assay to put the same in Execution.” They “had . . . taken the skiff of . . . Pierce . . . and corn, powder and shot and guns, . . . which said persons sailed down . . . to Elizabeth river where they were taken . . . order that . . . Emanuel the Negro to receive thirty stripes and to be burnt in the cheek with the letter R, and to work in shakle one year or more as his master shall see cause.”<sup>1</sup>

<sup>1</sup> Such also was the penalty inflicted on “Miller a dutchman (a prime agent in the business),” plus seven years’ service to the colony after the expiration of his service due his master. Somewhat lighter penalties were inflicted on the others.

*Re Sweat*, McIlwaine 477,<sup>1</sup> October 1640. "Whereas Robert Sweat hath begotten with child a negro woman servant belonging unto Lieutenant Sheppard, the court hath therefore ordered that the said negro woman shall be whipt at the whipping post and the said Sweat shall tomorrow in the forenoon do public penance for his offence at James city church in the time of devine service according to the laws of England in that case provided."

*Re Graweere*,<sup>2</sup> McIlwaine 477, March 1641. "Whereas it appeareth to the court that John Graweere [?] being a negro servant unto William Evans was permitted by his said master to keep hogs and make the best benefit thereof to himself provided that the said Evans might have half the increase which was accordingly rendered unto him by the said negro and the other half reserved for his own benefit: And whereas the said negro having a young child of a negro woman belonging to Lieut. Robert Sheppard which he desired should be made a christian and be [brought up in the fear of God and in the knowledge of religion]<sup>3</sup> taught and exercised in the church of England, by reason whereof he the said negro did for his said child purchase its freedom of Lieut. [Robert] Sheppard with the good liking and consent of Tho: Gooman's<sup>4</sup> overseer, as by the deposition of the said Sheppard and Evans appeareth, the court hath therefore ordered that the child shall be free from the said Evans or his assigns and to be and remain at the disposing and education of the said Graweere and the child's godfather, who undertaketh to see it brought up in the christian religion as aforesaid."

*Re Mulatto*, McIlwaine 504, March 1656. "Mulatto held to be a slave and appeal taken."

*Re Warwick*, McIlwaine 513, April 1669. "Hannah Warwick's case extenuated because she was overseen by a negro overseer."

*Re Gowin*, McIlwaine 233, October 1670. "It is ordered that Gowin an Indian Servt. to Mr. Tho. Bushrod Serve his said master six years longer and then to be free."

*Jordan v. Scarburgh*, McIlwaine 239, October 1670. "Judgmt. . . agt. Mr. Edmond Scarburgh for paym't of two able men Servants to have each of them foure yeares at least to Serve or the custome of the Country . . . and Scarburgh to Enjoy the Negro man this being the full consideration of Scarburgs obligation for foure Servants with costs *als* exec."

*Hunt v. Monger*, McIlwaine 240, October 1670. "orders obteyned by Mr. Thomas Hunt . . . for five Thousand pounds of Tob'o and Caske paid . . . to . . . Adams for a Negroe called Malack who was afterwards Set free by the said Adams by will." Reversed, September 1671.<sup>5</sup>

*Bacon v. Swan*, McIlwaine 276, September 1671. "Coll. Nath Bacon Guardian . . . Sueing . . . for fourteene Cropps of Corne and Tob'o made

<sup>1</sup> See also *ibid.*, 483.

<sup>2</sup> "Geaween" in 11 Va. Mag. Hist. 281.

<sup>3</sup> *Ibid.*

<sup>4</sup> Jno: Graweere's?

<sup>5</sup> McIlw. 277.

by the said orphans [English<sup>1</sup>] Servants and a negroe weoman." The [277] "negro weoman was confest . . to be produced out of<sup>2</sup> part of the Said Cropps. It is ordered that the said Exec'rs forthwith deliver the said negroe weoman . . with her Cropps." Confirmed, November 1671.

*Negro Mozingo v. Stone*, McIlwaine 316, October 1672. "Whereas it Appeareth by Divers Witnesses . . that Edward Mozingo a Negro man had been and was an apprentice by Indenture to Coll. Jno. Walker and that by Computation his term of Servitude for Twenty Eight yeares is now Expired, The Court after a full heareing of the Matter In difference Betweene the Said Edw: Mozingo and Doctor Stone who married Coll. Walkers Widdow, It is Adjudged . . that the said Edw: Mozingo be and Remayne free to all Intents and purposes."

*Re Negro Will*, McIlwaine 346, June 1673. "Whereas Will a Runaway Negroe Suspected to have Lett out of Prison a Negroe Condemned the last Court and Confesseth that he did See the Negroe breake Loose out of irons and did Attempt to breake out of the fore Doore of the Prison and that he see a Negroe Breake Open the back doore and Lett the said Negroe out of Prison and further that he hath beene Twice in the Condemned Negroes Company, . . ordered . . that the said Negroe be Comitted to the Common Prison of James Citty till further order and if the sherriffe thinke fitt to take the said Negroe Will along with him for the better Discovery for finding the said Condemned Negroe." Ordered, July 1673, [347] "that Will a Negroe Slave to Mr. Robt. Bryan of Gloster County . . Discharge his prison and have to morrow morning A Good and well laid on whipping, and putt into the Constables hands of James Citty who is to convey him to the Next Constable<sup>3</sup> and Soe from Constable to Constable till he be Delivered to his said master . . And it is further ordered that the said Bryan pay unto . . high Sherriff of this County One Thousand pound of tobacco and Caske for Charges and fees."<sup>4</sup>

*Moore v. Light*, McIlwaine 354, October 1673. "Whereas Andrew Moore A Servant Negro to Mr. Geo: Light Doth in Court make Appeare by Severall othes that he Come into this County [Country] but for five yeare, . . ordered that the Said Moore bee free from his said master, and that the Said Mr. Light pay him Corne and Clothes According to the custome of the Country and Four hundred Pounds tob'o and Caske for his service Done him Since he was free, and pay Costs."

*Re Negro Will*, McIlwaine 367,<sup>5</sup> April 1674. "ordered that the order . . Kirkman High Sherriffe of James Citty County had Against Mr. Robt. Brian for payment of one Thousand pound of tobo and Caske for Charges and fees about his Negroe be taken off, And it is the opinion of this Court, that he the Said Mr. Kirkman ought to be paid by the publique."

<sup>1</sup> McIlw. 289.

<sup>2</sup> "To have produced"?

<sup>3</sup> Act of October 1670. 2 Hening 277.

<sup>4</sup> See McIlw. 367 (1674), *infra*.

<sup>5</sup> See *ibid.*, 346 (1673), *supra*.

*West v. Negro Mary*, McIlwaine 372, April 1674. "Upon the Petition of Capt. John West . . . Concerning A negro woman called black mary purchased by the Said Administrators from Coll. John Vassall, It is ordered that the Said negroe woman returne to her Service, And that the Administrators . . . [373] with the first opportunity take Care to write to Coll. Vassall to know whether the Said negroe woman was A Slave or free, and if Appeare she was noe slave when bought, then they to pay her for her Service what this Court shall Adjudge."

*West v. Wilson*, McIlwaine 372, April 1674. "Lt. Coll. Jno West hath Judgment Against the personall Estate of . . . Arnall In the hands of the [said] Wilson for payment of Two Thousand one hundred Sixty Six pound of tobacco and Caske Nine hundred pound of Muscavado Sugar and one able man Negro." In September 1674, [382] "Execution Issued and the Sherriff . . . haveing Seized Three negroes Claimed by the Said Wilson to be his, this Court Doth Adjudge the Seizure to be Good, uppon the offer of the Said . . . West . . . that the Said Three negroes be Returned . . . uppon payment of what they are Appraized at with Costs."

*Re Negro John*, McIlwaine 382, September 1674. "Whereas [six English] . . . Servants . . . and Jno. a negroe Servant . . . hath Run away and Absented themselves from their . . . masters Two months It is ordered that the Sherriffe . . . take Care that all of them be whipped . . . and Each of them have thirty nine lashes well layed on And the Englishmen Serve According to Act<sup>1</sup> for their Runing away, And that Amongst [them] they Serve the Honorable Governor Two yeares for Ja:—(who was his Honors Servt) which they Lost."<sup>2</sup>

*Major v. Marsh*, McIlwaine 401, March 1675. "Claime . . . Against the Estate of Clement Marsh Deceased for Sixteene pounds Tenn shilling and Six pence, for which the said Marsh bound over Certaine Negroes."

*Negro Phillip Gowen v. Lucas*, McIlwaine 411, June 1675. "Phillip Gowen negro Suing Mr Jno Lucas . . . for his freedome It is Ordered that the said Phill Gowen be free from the Said Mr Lucas his Service and that the Indenture Acknowledg'd in Warwick County be Invallid and that the said Mr Lucas pay unto the [said] Gowen three Barrels of Corne att the Cropp According to the Will of Mrs Amye Boazlye deceased with Costs."

*Negro Angell v. Mathews*, McIlwaine 413, June 1675. "Angell a negro Servant to Capt Mathews deced Petitioning to this Court that her Said master promised that when he died shee should be free which being Examined, It is ordered that she Returne to her Service."

<sup>1</sup> Act of March 1662. <sup>2</sup> Hening 116.

<sup>2</sup> The act provides that "in case any English servant shall run away in company of any negroes who are incapable of making satisfaction by addition of a time, . . . if the negroes be lost . . . the christian servants in company with them shall by proportion among them, either pay fower thousand five hundred pounds of tobacco and caske or fower yeares service for every negroe soe lost." As, in the foregoing case, the English servants are to serve only two years for "Ja: . . . (who was his Honors Servt)" and as "Ja: . . ." evidently had a surname, which "Jno a negroe Servant" lacked, "Ja: . . ." was probably an English servant, for whose loss, though unprovided for by the act, the court ordered additional service by his fellow runaways.



*Shapleigh v. Neale*, McIlwaine 416, June 1675. "Ordered that . . . Shapleigh Enjoy the Land till the Cropp be finished, as alsoe the negroes till the Cropp be finished, at which time . . . Neale is to have Possession of the Said Land and negroes mentioned in that Deed and that County Court to Allow . . . Neale Satisfaction for his Negroes Worke from the date of their Judgment."

*Indian Benjamin v. Dunn*, McIlwaine 425, October 1675. "Ordered that Benj: the Indian Returne to his Service and that Cha: Dunn his master Appeare at Next Gennll Court to Answer to Said Indians Complaint."

*Negro Bowze v. Bennett*, McIlwaine 437, March 1676. "Tony Bowze Negro late Servt to Major Gennll Bennett Deceased Petitioning to this Court for his freedom, and producing a note under his said Masters hand wherein it Appeareing that he is to pay 800 *li.* of tobacco yearely and be at Liberty . . . Ordered . . . that the Said Negro Give Security for payment of 800 *lb.* per Annum dureing his life from his masters decease and that he yearely give Security and payment of the same."

*Re Negroes*, McIlwaine 519, September 1678. "Proceeding for bringing more negroes from Africa than ought to have been brought under contract."<sup>1</sup>

*Re Negro*, McIlwaine 520, November 1678. "Master having declared before his death that negro should be free, freedom declared."

*Opinion of John Holloway*, Barradall 29, March 1718. "1. A. makes a Will and gives a Mulatto Wench thus. I will that my Mulatto Girl Sue remain with my Wife B. during her natural Life and after her Decease I give her to my Son C. and appoints B. and C. Ex'rs and makes them Residuary Legatees. B. lives a long Time and Sue during her Life had 8 Children which B. by her Will has disposed of. Q'r 1st. Whether C. has any Right to the Mulatto Girl seeing no pres't Interest in him?"

Opinion [27] "I am of Opinion C. has good Right to the Mulatto Girl by this Devise."

"2d. Whether B. had a Right to the Issue of Sue or any Part of them?"

Opinion: "I am of Opinion (the Son not having the immediate Property in the Mulatto Girl tho' I think a future Interest vested in him by Way of Executory Devise) that the Property of the Children as they were severally born did vest in the Wife and Son jointly as Coex'rs and Residuary Legatees because it must immediately vest in somebody, It not being disposed of by the Testor. Then I think as joint'ts and no division made, the Survivor hath by Virg'a Law 1705 Right to 'em all. If they did not vest in them both as coex'rs and Residuary Legatees I think they must vest in the Son there being in my Opinion no Colour for the Testor's Intent or the Law by Implication or other Rule to vest them in the Wife except as Coex'r etc."

<sup>1</sup> [521] "Genl Court Bonds etc 1677 to 1682." [494] "Showing the importation of negroes under contract with the Royal african Company dated the 4th of Octo 1678." Also McIlw. 521.

*Abbot v. Abbot*, Rand. Sir J. 21, October 1729. "Trover for several negroes."

*Churchill v. Blackburn*, Rand. Sir J. 26, April 1730. "Thomas Machen a teller under this Act [of General Assembly . . . begun and held on the 9th of May 1723<sup>1</sup>] Exhibits an Information against Mr. Churchill for 500wt of Tobacco forfeited by the first Branch of the Act for Listing Doll as a Tithable when she was under 16. And upon that Information has obtained a Verd't and Judgm't in the County Court.<sup>2</sup> Blackburn the Plt. Exhibits another Information upon the last Clause for 24000wt of Tob'o being 500wt of Tob'o for every Person above 10 years upon the Defend't's Plantation in that year for Listing the same Negr. Doll as a Tithable when she was under 16, and upon that Information has obtained a Verd't and Judgment in the County Court for 6500wt Tobacco. This Judgment Mr. Churchill has appealed from and surely it shall be reversed. The only Question is Whether the Deft. shall be Subject to the Penalty of 500wts of Tobacco upon the Information of Machen and to this much greater Penalty of 500wts of Tobacco for 48 Persons above 10 years old Employed that year upon his Plantation upon the Information of the Plt. for the same offence viz. Listing Negro Doll as a Tithable. . . [27] The plain meaning of the two Clauses taken together is this, If a Master List any Person a Tithable that is under 16, or one above 10, that is not so, or a Labourer in the Crop who is not Employed in it he forfeits 500wt. of Tob'o. And if he gives an Account of Persons as employed upon his Plantation in making Tob'o that are not employed at all upon that Plantation or perhaps are not in being, then he is Subjected to the great Penalty of 500wt of Tobacco for every Person above 10 years old Employed in making Tob'o that year upon such Plantation. . . [29] This Judgment is absurd and against Common Sense, and can't possibly be affirmed in this Court, and I pray that it may be reversed.<sup>3</sup> And it was reversed by the whole Court except one."

*Churchill v. Machen*, Rand. Sir J. 30, April 1730. "The Deft. has likewise Appealed from Judgment given upon the Information of Machen upon the Act of Assembly ment'd in the Case above. The Information Charges That the Deft. being Master of a Family and a House-keeper, When he gave in his List of Tithables *Anno* 1725 did List with Roger Jones the Justice appointed to take the List of Tithables in that year one Female Negro called Doll, being under the age of 16 years as a Tithable ag't the Form of a certain Act of General Assembly . . . of May 1723. . . But the Judgm't was affirmed."

*Marston v. Parrish*, Rand. Sir J. 35,<sup>4</sup> April 1730. "John Williams was possessed of two Negro Boys Arther and Bill and two Negro Women

<sup>1</sup> Rand. Sir J. 30.

<sup>2</sup> Affirmed. *Churchill v. Machen*, *infra*.

<sup>3</sup> "As the General Court delivered no written opinions, and generally gave no reasons at all for their conclusions, there was nothing of a case to be reported except the statement of it, and the arguments of counsel. . . In the cases reported by Randolph he gives his own arguments in full, and only occasionally a statement of the points made by his adversary." 1 Barton 236.

<sup>4</sup> Jefferson 1.

Dinah and Nanny and made his last Will 22d April 1713. Willed his Negroes and all other Goods and Chattels to be valued and Appraised and equally divided between his Wife and 3 Children, and that his Wife shou'd keep his Childrens Estates till they came of age and died soon after making his Will. After his death the Negro Woman Nanny had two Children, Obey and James, and the Negro Woman Dinah had a Child named Essex. Anthany the Widow married John Marston who supposing his Wife to be with Child, by his Will dated the first day of December 1719 Devised these Negroes viz, Arther, Will, Nancey, Essex, Obey and James to the Child his Wife was ensient of, and gave all the residue of his Estate Real and Personal to his Wife and her Heirs for ever, paying his Debts and the Orphans Estates in his Hands and died soon afterwards, but his Wife did not prove with Child and the Widow is married to her 3d Husband Parrish the Deft. and none of Williams Children are of age. And the Plt. as Heir at Law to Marston the 2d Husband hath brought an Action of Detinue for Arthur, Will, Essex, Obey and James which are properly Williams's Estate and for Nancey which was Marston's proper Estate."

Held: [36] "the Plt. had no Right to recover the five Negroes that were Williams's, And, that the Plt. shou'd recover the Negro that was Marstons as his Heir at Law."

*Edmonds v. Hughs*, Rand. Sir J. 36,<sup>1</sup> April 1730. "Richard Alderson was possessed of several Negroes in the Decl. mentioned and made his last Will and Testam't in these words (dated 16th Sep'r 1695) 'My Will that Margaret my Wife shall be Sole possessor and disposer of all and every part of what Estate it hath pleased Almighty God to endue me withal, during her Life, providing she keep herself unmarried, or in Case she do marry again, that she nor her Husband, or any Person or Persons in their behalf by any means or Instrum'ts to Imbezel or make waste of the s'd Estate to any Indemnity to my Children.' Then by another Clause he gives his whole Estate Chatel and Chatels to his Son Richard, please God he lives etc. Margaret after her Husbands death married the Plt. who left her and carried off several of the Slaves and as it is say'd marryed one of them and has several Children by her. Margaret died and Richard Alderson the Son took the Negro's in the Decl. mentioned and sold them to the Defend't. And the Question will be Whether the Rem'r of Negroes which are at the time of the Testors death Chattels (first given to Margaret for Life) be a good Rem'r to Richard . . [39] Adjudged for the Deft."

*Tucker v. Sweney*, Rand. Sir J. 39,<sup>2</sup> April 1730. "Mr. Dandridge recovered Judgm't against the Ex'rs of Nicholas Curle for 507*l*. Curle died possessed of several Slaves and of these Slaves after his death there was a considerable Increase. Mr. Dandridge took out a *Fi. Fa.* which was served upon several of the Slaves which Curle died possessed of and likewise upon several of the Negroes born after his death And the Question

<sup>1</sup> Also Jefferson 2.

<sup>2</sup> Jefferson 5.

is Whether the Increase of the Negroes may be taken to satisfy this Judgment."

Held: "Negroes notwithstanding the Act making them Real Estate remain in the Hands of the Ex'ors by that Act as Chatels and as such do vest in them for payment of Debts So that in this Case they are considered no otherwise than Horses or Cattle, And there is no doubt but the Increase of any living Creature after the death of the Testor, are looked upon as part of his Estate, and are liable to be taken for his Debts."

*Waddy v. Sturman*, Rand. Sir J. 61,<sup>1</sup> October 1731. "John Jordan being possessed of a very Considerable personal Estate sufficient to pay all his Debts with an overplus by his last Will and Testament in writing bearing date the 6th Day of February in the Year 1693, gives several Legacies to his Sons in Law John Spence and Thomas Spence (who were Brothers) in this manner, 'I give to my Son John Spence 25£ Ste'g to be laid out in Negroes to be delivered to him upon the Day of his Marriage also 4 cows etc. Item I give to my Son Thomas Spence Two Negroes Mingo and Peggy to be delivered at the Day of Marriage and ten Head of Cattle etc. But my Will is, that if the s'd John or Thomas shou'd die without Issue, that then whatsoever is Bequeathed to them the Survivor shall have to him and his Heirs and Assigns.' The two Negroes were delivered to Thomas by Dorcas Jordan the Testors Wife and Exec'x, and he possessed them during his Life and died with't Issue in the Life time of John who had the Negroes in possession and died leaving only one Child (the Compl't Waddys Wife). After John Spences death Dorcas Jordan brought an Action of Trespass in the General Court ag't Laurence Pope and his Wife, who was the widow of John Spence, for recovering Mingo and Peggy and a Child that was born of her And obtained a Judgm't Accordingly the 23 October, 1700, ag't the Defts. The Compl't Jane being at that time ab't 2 Years old. After the Judgm't the Negroes were taken by Execution and Sold or disposed of by Dorcas Jordan and are now with their Increase in the Possession of a Person in Maryland. And the Compl'ts have exhibited their Bill ag't the Defts. Ex'ors of the last Will and Testam't of John Spence and the Surviving Ex'or of Dorcas Jordan, And the End of the Bill is to recover the value of these Negroes with Interest out of the Estate of Dorcas which came to the Hands of the Defts. Testor."

Held: [62] "The Rem'r was good and vested in John when he Survived Thomas."

*Barret v. Gibson*, Rand. Sir J. 70, October 1731. "the Deft. was keeper of a Rolling-house . . and did receive 4 Hhds Tob'o of the Plt. and that the Rolling-house was maliciously burnt by a Negro Woman of the Defts. whereof she was Convicted . . and Executed for it . . [72] the Court gave Judgm't for the Deft. because the Master is not Chargeable for the wilful wrong of his Servant."

*Waughop v. Tate*, Rand. Sir J. 76, October 1731. "John Contancean an Infant by Deed dated the 17th Dec'r 1718, Conveyed several Negroes to Richard Ball . . The Heir at Law of John possessed herself of the Negroes and under Waughop Claims "

<sup>1</sup> Jefferson 5.



Held: "the Deed of J. C." is not "a good Deed in Law . . . [77] But it may be objected from the late Explanatory Law of the Negro Act *An'o* 1705. that because it is declared that Infants may at the age of 18 by Will dispose of their Negroes, Therefore by the Equity of that Act this Deed may be construed a good Deed to pass the property of the Negroes . . . Answer, It is a Settled point that the Statutes of Explanation must be Construed strictly and not with any Equity or Intendment."

*Goddin v. Morris*, Rand. Sir J. 80, April 1732. The inventory of Goddin's estate in October, 1710, "consisted of Cattle and Household Goods Appraised to 38. 10. 9. and 3 Negroes, a Man Appraised at 25£. a Woman Appraised at 25£. and a Child at 5£. . . Goddin . . . in his Lifetime was Indebted to Keiling £. 7. 1. 3. stg. . . Keiling June 14, 1711, obtains a Judgm't . . . for his Debt and Costs. . . an Ex'on issued and by Virtue thereof that Negro Woman and her Child Appraised at 30£. were taken to Satisfy the Judgment; Stannup [who married Goddin's widow] then pays the Money and takes the two Negroes again thinking the Property by these methods was legally vested in him . . . [81] this Scheme of Stannups . . . is a very vain . . . one . . . [82] If this may be done, the Policy of the Law of this Country in preserving Slaves for the Benefit of Heirs will be in great measure frustrated, . . . Mr. Stannup . . . had Sufficient of the Personal Estate in his Hands to reimburse the Money, . . .

[83] "the Court Decreed . . . That Stannup had gained no property in the Negroes, but the same . . . remained in the Plt. [the son of Goddin]."

*Lightfoot v. Lightfoot*, Rand. Sir J. 84, April 1732. "Francis Lightfoot . . . was possessed [in 1727] of a great Estate, in Lands, Neg'rs, Goods and Chattels . . . and made his Will Whereby . . . he gives the Deft. a Negro, he giving another in lieu of him to his Heirs"

*McCarty v. Fitzhugh*, Rand. Sir J. 112,<sup>1</sup> October 1733. "to his Daughter Fitzhugh he gives 2 Negroes of 40£ value Sterling"

*The King v. Moore*, Barradall 38,<sup>2</sup> October 1733. "An Information was brought against the Deft. upon the Act of 5 and 6 Geo. 2. laying a duty upon Slaves for not transmitting to the Collector of the duty's a List of the Slaves by him sold imported in the ship A. . . the Master and Steward of the Ship" had "Slaves of their own aboard . . . the Act was passed 1 July 1732 about four in the Afternoon and the Ship came to an Anchor off Back River the said 1 July about two leagues from the Shore Came into the Capes about twelve and came to Anchor between seven and eight and could have got up to York if they had had a Pilot. On the second of July the Ship got into the mouth of York on the third to York Town and enter'd the fifth. . . Hopkins for Deft. . . insisted the day of passing the Act was excluded . . . which seemed to be in point. As to the 2d [whether this was an importation] Insisted for the King that the Place where the Ship Anchored 1 July was not within any port and so no

<sup>1</sup> Barradall 34. *McCarty v. McCarty's Ex'tors*.

<sup>2</sup> Jefferson 8.

Importation To which it was answered There are no ports laid out here as in England And that coming within the Capes with an Intent to come strait to Virginia is an Importation. Judgm't for Deft."

*Ishbell v. Butler*, Barradall 43,<sup>1</sup> April 1734. "In this case a Question was made whether a slave given by an Intestate in his Life time to a younger Child should be given at the Value he was when given or the Value at Testor's Death. *Et per tot. Cur.* at the Value when given *Et recte ut Opinor* tho' Rand. and Hopk. con."

*Waddill v. Chamberlayne*, Barradall 45,<sup>2</sup> April 1735. "The Plt. declares that the Deft. fraudulently and deceitfully Sold to him a Slave for a great Price 25£. knowing the said Slave at the Time and for a long Time before laboured under an incurable Disease not discovered by the Plt. and was of no value." Verdict for plaintiff. Barradall moved in arrest of judgment because "this action will not lie without a warranty . . [49] It frequently happens that there are Distempers among their Slaves but the Seller does not think himself obliged to publish this to the World Nor is it thought criminal even to use arts to conceal it. Numbers of these distempered slaves have been sold and the consequences sometimes very fatal." Judgment for the plaintiff.

*Jones v. Langhorn*, Rand. Sir J. 109,<sup>3</sup> October 1736. "Detinue for negroes Fr Deft. The Case. Mary Godwin being possessed of several Negroes by her Will disposed of them in this manner, 'My Will is that after my Debts and Legacies paid my Daughter Mary Rice shall have the use of my whole Estate . . during her natural Life,' . . She married Myres, and Myres and she by Deed Mortgaged the Negroes to the Plt. [for 99 years] and had Issue 4 Children, and she is now married to the Deft. Langhorn and has four Children by him."

Held: "the Deed made by Husband and Wife, is the Deed of the Wife only during Coverture and shall not bind her after the death of her Husband, and I think the Negroes here, of which the Wife had only the use, cou'd only be sold for the Life of the Husband and after his death the Wife shall be restored to the use of them."

*Taylor v. Graves*, Barradall 56,<sup>4</sup> October 1736. "R. P. poss'd of the Slaves in Question by his Will dated in 1712, devises to his daughter Mary the Use Labour and Service of them during her Life and after her Decease the said Slaves and their Increase to fall to her Heirs of her Body lawfully begotten forever. Mary had issue a Daughter living at the Time of the Devise and the Death of the Testator but died before the Mother who is also dead and the Plt. claims as Heir to the Testator. Mr. Atty. Gen. fr Plt. By the Act of 1705, Slaves are made a real estate tho' the Law is now altered by the Act of 1727 with respect to Gifts and Devises of Slaves that they can only be given and devised as Chattels personal. There is however a Proviso in this last Act that where Slaves have

<sup>1</sup> Jefferson 10.

<sup>2</sup> *Ibid.*

<sup>3</sup> Barradall 52; Jefferson 37.

<sup>4</sup> Jefferson 40.

been before given for Life and the Remainder thereupon limited to another that such Remainders shall be good in Law to transfer the absolute Property to the Remainder man. The testator here has given only an Estate for Life to his Daughter with a Contingent Remainder to the Heirs of her Body and there being [no] such when the Contingency happened viz. at her Death, the Remainder is void and the Plt. as Heir at Law to the Testator is entitled to these Slaves . . . Judgment fr Deft."

*Winston v. Henry*, Barradall 213, October 1736. "John Geddes . . . by his Will May 18, 1719, devises to his Wife 3 Slaves during her Life and the absolute Property of six more And gave her during Life a Plantation called Totero fort . . . And gave his Wife the Use of most of his Plate . . . during Life"

*Spicer v. Pope*, Barradall 232,<sup>1</sup> October 1736. "John Stone by his Will Apr. 27, 1695, devises his Plantation and the Profits of his Slaves and personal Estate to his Wife during Life And declares his Will to be 'that his Son R'd Metcalf and Daughter Ann his Wife live upon the said Plantation after her Death during their Lives and also keep and employ the Negroes upon the s'd Plantation making Use as they shall see Cause of all the Profits of his said Land and clear produce of his s'd Negros Stock and Plantation Except the Increase of his s'd Negros there-after given away.' Then devises to Mary and Eliz. two Daughters of R'd and Ann Metcalf a Negro a piece by Name and to John their Son a Negro Child the next that should be born. Then foll. this Clause 'I give unto my Daughter Ann's Children that she shall bear hereafter one Negro Child apiece as it shall please God the Negro Women shall bear them.'"

Barradall: [236] "I never yet read that a Thing not *in esse* could be bequeathed . . . Cases in Point cannot be expected there being no Slaves in England." [239] "In this Case it was agreed that . . . the Devise of the Negro Children not *in Esse* at the Testors Death was void."<sup>2</sup>

*Robinson v. Armistead*, Barradall 223, April 1737. "John Armistead and Robt. Beverley dece'd jointly purchased 100 A. of Land in Com. Glouc. which was conveyed to them by Deed Jan. 17, 1680, for the Cons. of 50£. . . [224] Armistead the great Grandfather [of the defendant] gave the Plts. Mother a Slave which she declared she thought the full Value of any Right she might have to the said Land."

*Slaughter v. Whitelock*, Barradall 251, April 1737. "Martin Slaughter by his Will Aug. 23, 1732, devises four negroes to his Son George (the Plt.) and the lawful Issue of his body for ever and four negroes to his daughter Judith and the lawful Issue of her body for ever but if either my son or daughter shall die without such Issue the survivor to have and enjoy the said Slaves and their Increase. Judith was possessed of the Slaves devised to her, married the Deft. and died without Issue." George survived. [256] "Judgment for the Deft."

*Haywood v. Chrisman*, Barradall 67,<sup>3</sup> October 1737. "Henry Haywood possessed of divers Slaves and other Estate by his Will *inter al.*

<sup>1</sup> Jefferson 43.

<sup>2</sup> Dandridge v. Lyon, Wythe 123 (1791), *contra*; p. 97, *infra*.

<sup>3</sup> "Hayward," Jefferson 52.

devised the Guard's'p of his Children to his Wife and left five Slaves to work and maintain his Wife and Children besides the profits of the Estate he had left them and died without making any other Disposition of these five Slaves having Henry his eldest son who dying before his Mother devised the Slaves to the Defts. who after the Mother's Death recovered them in an Action at Law and now a Bill is brought by the younger Children of the first Testator for a share of the Value of the said Slaves."

Held: "these Slaves were intended by the Testator in Lieu of the Widow's Dower and therefore not to be divided" [among the younger children].

*Giles v. Mallicote*, Barradall 71,<sup>1</sup> April 1738. "The Plts. Father Thomas Mallicote by his Will devised 'to his son John Quashey a Negro Man to his son Thomas the Child his Negro Woman Betty then went with and Tomboy a negro Man' and gives Slaves to his other Children and declares his Will 'That his Wife should have the Work of his Sons Negroes till they came of age.' . . John and Thomas are dead and would not be 21 if now living." The case was compromised.

*Nance v. Roy*, Barradall 279, April 1739. John Nance "by his Will dat. Feb. 2, 1731, gives to his Wife Mary 'All his Estate . . during her natural life' And makes her sole Ex'trix."

Held: "the absolute Property of the Testors Slaves vested in her."

*Coleman v. Dickenson*, Barradall 119,<sup>2</sup> October 1740. "Ja's Alderson and Ann his wife by Deed dated 10 July 1712 reciting that Ann at her Marr. was pos'sed of 3 Slaves And that by the Law they were real Estate barg. and sold the Slaves to one Hunter for 60 years if the said Ja's and the Negro's sho'd so long live In trust And to the use of the said Ja's and Ann for their lives and to the use of the Surv'r if the Negro's sho'd so long live With this proviso that if Ann sho'd die before Ja's it sho'd be lawful for her by Will to dispose of the Negro's after his death And with this further proviso that if the Negro's had any Increase during the term that they sho'd be taken care of till they were fit to be removed from their parents."

Held: [123] "the wife surviving was well intitled to the Slaves mentioned in the Deed And that the property of the Increase must follow that of the Parents."

*Buckner v. Chew*, Barradall 123, October 1740. [126] "Johnston says upon a treaty of Marr. with the Grantors Dau'ter in 1723 he promised him as a portion 1000 a's of Land and a Negro boy worth £150."

*Opinion of Edward Barradall*, Barradall 31, March 1741. Allaman "died Intestate leaving Issue by his first Wife Judith . . and by his second Wife . . William. . . William lived to be of age . . and being also possessed of some slaves and personal Estate died Intestate in 1732 leaving a wife . . and a Daughter Sara. . . Sara died lately being abt. 12 years old. Her mother is now living. . . there are Heirs on the Part of the Mother The Question is who is intitled to the . . Slaves . . of Sara."

<sup>1</sup> Jefferson 52.

<sup>2</sup> Jefferson 67



Opinion: "I am of Opinion that the Heir on the Part of the mother cannot take these Slaves by Descent any more than he can the Lands which came from the Father . . . [32] Slaves . . . cannot escheat but by a Proviso in the af'd Act [declaring Slaves a real Estate] are in such Case to be taken as Chattels And consequently they must go to the Administratrix. This seems mighty clear to me. . . I am of Opinion that the Aunt of the half Blood is not intitled to distribution as to these Slaves tho' they be personal Estate . . . the Mother alone is intitled to the Administration and in that Right to all the Slaves "

*Custis v. Fitzhugh*, Jefferson 72, (no date). "In this case it was adjudged, that slaves as well as lands might be conveyed to uses, and were within the statute of uses. 27. H. 8. 2. . . Reported by Mr. Hopkins."

*Brent v. Porter*, Jefferson 72, October 1768. "Detinue for slaves. A right to slaves descended to two sisters, coparceners, and femes sole; but they were in the possession of another who claimed a right to them. One coparcener marries and dies, the slaves having never been reduced to possession. The surviving coparcener brings this action for her moiety. . . The court adjudged for the plaintiff."

*Blackwell v. Wilkinson*, Jefferson 73, October 1768. "Slaves had been entailed between the years 1705 and 1727, without being annexed to lands," [78] "by will dated 1718. The donee in tail devised them, in 1755, to the defendant; against whom we bring this action as issue in tail:" [73] "the question was, whether the entail was good?"

[85] "Blair, W. Nelson, T. Nelson, Corbin, Lee, Tayloe, Fairfax and Page, were of opinion for the defendant, that slaves could never be entailed unless annexed to lands. Byrd, Carter and Burwell were of a different opinion."

*Allen v. Allen*, Jefferson 86, April 1769. "whether, where a father entitled to a reversion in slaves dies, and afterwards the particular estate (which here was for life) falls in, the heir at law shall be obliged to account to his brothers and sisters for a proportion of their value? And the court determined he should. It was also insisted that some children by a second wife, (whose mother had by a marriage contract reserved a right of appointing her own slaves at her death as she pleased), should bring into hotchpot whatever they should get under such appointment, or not be entitled to take with the children of the first marriage, a proportional part of the value of the father's proper slaves. But the court determined that the right of hotchpot, does not take place in dividing the value of slaves."

*Gwinn v. Bugg*, Jefferson 87, October 1769. "A Christian white woman between the years 1723 and 1765, had a daughter, Betty Bugg, by a negro man. This daughter was by deed indented, bound by the churchwardens to serve till thirty-one. Before the expiration of her servitude, she was delivered of the defendant Bugg, who never was bound by the churchwardens, and was sold by his master to the plaintiff. Being now twenty-six years of age, and having cause of complaint against the plaintiff, as being illy provided with clothes and diet, he brought an action in the court below to recover his liberty, founding his claim on three

points. 1st, That himself having never been bound by the churchwardens, the master of his mother had no right to his service. 2nd, That if he had, yet he had forfeited it by selling him to the plaintiff. 3rd, That if both the points were against him, yet the plaintiff had forfeited his right by his failure to provide him with necessaries. The fact of ill treatment was, I suppose, proved in the court below, for this as well as the defendant not having been bound, was set forth in the record as the grounds of the judgment; from this judgment Gwinn appealed, . . . Pendleton, for the plaintiff. . . [88] The defendant's mother then was properly reduced to servitude by an actual binding under the act of 1705; himself is put into that condition without a binding by the act of 1723. Nor is he relieved by the act of 1764, because he is not the child of a white woman, and because he is not the son of a mulatto born after the passing of that act. . . [89] it might be questioned . . . whether this act [of 1705, re-enacted in 1753, c. 2, s. 5, 6, 'ordaining that servants, by act of Parliament, indenture or custom, shall be comfortably provided with necessaries and humanely treated'] was intended to extend to the children of mulattoes, who are bound . . . by act of Assembly. The humanity of courts, however, has extended this act to their relief, and I shall not draw it now into question. . . emancipation is not the remedy provided by the act of Assembly in case of ill treatment." Here the servant is taken from the master, "and no equivalent returned. This judgment then . . . is substantially different from that prescribed by the act of Assembly, and is therefore erroneous. Mason, for the defendant, relied principally on the second point; that the former master of the defendant could not transfer it; and so the plaintiff had no right. He insisted that there was a trust in the master coupled with his interest, that, though he was entitled to service, he was also bound to maintain comfortably. That where ever there was a trust it could not be transferred, and instanced the case of an apprentice, . . .

"Yet judgment reversed, and *quaere*, if the great clearness of the first and third points, which alone were assigned in the record as the grounds of the judgment, might not prevent the court from attending minutely to the second, which seems to be in favor of the pauper."

*Howell v. Netherland*, Jefferson 90, April 1770. "the plaintiff's grandmother was a mulatto, begotten on a white woman by a negro man, after the year 1705, and bound by the churchwardens, under the law of that date, to serve to the age of thirty-one. That after the year 1723, but during her servitude, she was delivered of the plaintiff's mother, who, during her servitude, to wit, in 1742, was delivered of the plaintiff, and he again was sold by the person to whom his grandmother was bound, to the defendant, who now claims his service till he shall be thirty-one years of age. On behalf of the plaintiff<sup>1</sup> it was insisted, 1st, that if he could be detained in servitude by his first master, he yet could not be aliened. But, 2nd, that he could not be detained in servitude . . . the purpose of the act

<sup>1</sup> Jefferson was counsel for the plaintiff. "This and [one other] . . . are the only legal arguments of his, while still a practicing lawyer, that are extant." Jefferson's *Writings* (ed. Ford), I. 373 n.

was to punish and deter women from that confusion of species, which the legislature seems to have considered an evil, and not to oppress their innocent offspring. . . [91] These servants bear greater resemblance to apprentices than to slaves. . . [96] the act of 1705 makes servants of the first mulatto, that of 1723 extends it to her children, but that it remains for some future legislature, if any shall be found wicked enough, to extend it to the grand-children and other issue more remote, to the '*nati natorum et qui nascentur ab illis!*' Wythe, for the defendant, was about to answer, but the court interrupted him and gave judgment in favor of his client."

*Godwin v. Lunan*, Jefferson 96, October 1771. Lunan was a minister "regularly ordained, according to the rites of the church of England;" It was charged among other things that he "solicited negro and other women to fornication and adultery with him;"

*Robin v. Hardaway*, Jefferson 109, April, 1772. "These, were several actions of trespass, assault and battery, brought by the plaintiffs against persons who held them in slavery, to try their titles to freedom. They were descendants of Indian women brought into this country by traders, at several times, between the years 1682 and 1748, and by them sold as slaves under an act of Assembly made in 1682."<sup>1</sup> Mason, for the plaintiffs: [116] "it is notorious that it was the universal opinion in this country, that the law of 1682, was repealed in 1684.<sup>2</sup> . . and under that persuasion hundreds of the descendants of Indians have obtained their freedom, on actions brought in this court. Nor was ever the propriety of these decisions called into question till within these four years. The gentleman (Colonel Bland) . . started the doubt at the bar, on no other foundation, as I conceive, than the want of an express repeal. But it is hoped the virtual repeal will answer the same end, and that we shall again be permitted to return into our wonted channel of adjudication. But if it was not repealed by the act of 1684, then it was by the act of 1691,<sup>3</sup> which repealed 'all former clauses of former acts of Assembly, limiting, *restraining*,<sup>4</sup> and prohibiting trade with Indians.' By this it was made lawful for the Indians to come into this country, at any time, for the purpose of trade. But can we suppose, that as soon as they came, they should be picked up and sold as slaves? If so, this fair faced act was but a trap to catch them, an imputation which would do indignity to any legislature." If the act "of 1682 . . *restrained* their trade . . it was repealed by this of 1691, . . it was repealed in 1705,<sup>5</sup> if it was then subsisting." Colonel Bland, for the defendants, contended that the act of 1684, in repealing the act of 1679,<sup>6</sup> withdrew from the operation of the act of 1682 (chapter 1) only "what Indian prisoners . . shall be taken in warre," by our soldiers; that "the law of 1691 was no repeal

<sup>1</sup> "Chapter 1. Purvis 282." <sup>2</sup> Hening 490.

<sup>2</sup> "Chapter 7. Rolls of House of Burgesses." <sup>3</sup> Hening 17. The act of 1684, ch. 7, repealed chapter 7 of the acts of 1682, not chapter 1. Ed.

<sup>3</sup> "Chapter 9. Rolls of the House of Burgesses." <sup>3</sup> Hening 69.

<sup>4</sup> Italics are presumably Mason's.

<sup>5</sup> "Chapter 49." <sup>3</sup> Hening 447.

<sup>6</sup> "Chapter 1. Purvis 229." <sup>1</sup> Hening 440.

of that of 1682 " for the acts " relative to slavery and those relative to trade " are " totally independent of, and unconnected with one another."

[122] " The court adjudged that neither of the acts of 1684 or 1691 <sup>1</sup> repealed that of 1682, but that it was repealed by the act of 1705." <sup>2</sup>

*Carter v. Webb*, Jefferson 123, May 1772. " The late Secretary Carter . . . devised to his wife the use of certain lands, slaves and stocks, during her life, with remainder to his son Charles Carter, the plaintiff. Mrs. Carter intermarried with Mr. Cocke, and many years after, died in the month of June 1771. Mr. Cocke died also in the month of August of the same year. Though he had freely used of the stock, both by consuming and selling, yet he left it improved and increased to a very great degree. His executor, Mr. Webb, permitted Mr. Carter, the remainder man, to enter on such parts of the land as were not then under culture, and to employ the slaves (whenever they were not engaged in finishing the crop then growing) in making preparations for a succeeding crop; under this agreement, however, that Mr. Carter should pay a stipulated hire for such services of the slaves, if the General court should decree the defendant entitled thereto." Randolph, attorney general, [131] " said that the use of the stocks and of the slaves were given to her by the same clause and words of the will; and that she might as well demand the issue of the slaves as of the stocks.

" The court determined that the slaves should be continued on the plantation till the 25th of December, but that this was solely for the purpose of finishing the crop, and therefore, that Mr. Carter should not pay hire for the services of the slaves at leisure times. And they decreed Mr. Carter entitled to the increased value of the stock."

*Henry v. Attorney* (cited in *Gregory v. Baugh*, 2 Leigh 665 (685)), June 1772. " the . . . court . . . decided upon a special verdict, that the act of 1682 continued in force until 1705, and gave judgement against many descendants of indians introduced and held as slaves between 1682 and 1705." [Green, J.] Green, J. also refers [683] to " the multitude of cases upon that subject [Indian slaves], decided in the general court in June 1772, in which parol evidence was given reaching back to the close of the century before the last, part of which now exist in the form of depositions filed in those cases. These were the depositions of persons at that time very old. I have examined them." (1831.)

*Smith v. Griffin*, Jefferson 132, October 1772. The testator had bequeathed to his wife " 'one fourth part of his personal estate.' The persons to whom the other three fourths were given, of whom the heir at law was one, had divided with the widow the slaves as well as personal estate, and had signed the deed of partition. Afterwards, the widow dying, the heir at law brought his bill for the slaves allotted her, insisting that by the devise of personal estate, slaves did not pass. But the court dismissed the bill; two of the judges, the Secretary T. Nelson and Page,

<sup>1</sup> Overruled in *Hudgins v. Wrights*, p. 112, *infra*, and in *Pallas v. Hill*, p. 116, *infra*.

<sup>2</sup> They overlooked the fact that the free-trade enactment of 1691 reappears in the act of 1705, chapter 52, section 12. Ed.



declaring their opinions in favor of the defendant, were founded on the partition made between the heir and widow, and that, had the question been simply, whether slaves would pass by a devise of personal estate, they would have determined it in the negative: in which they were not contradicted by the other judges."

*Henndon [Herndon] v. Carr*, Jefferson 132, October 1772. "William Carr . . . by will, dated August 2, 1760, . . . bequeathed the residuum of his estate . . . both real and personal, to be equally divided between" his wife and children. A few days later his uncle died intestate, and Carr became entitled to a moiety of his slaves. [133] "William Carr, the testator, had notice of this accession to his estate, and died soon after without having altered or republished his will. And the question was, whether the slaves which descended to him, after making the will, should pass by the will or not?" Pendleton, for the defendants: slaves [135] "are not the subject of perpetual transfer from hand to hand, but live in families with us, are born and die on our lands, and, by their representatives, may continue with us as long as the lands themselves. Again in their value they are distinguished as lands, the slave being worth as much as the ground he cultivates. For this reason our laws have put them on a footing with lands. . .

[136] "It was decreed the new acquired slaves did not pass under the will, by the opinions of Lee, Burwell, Fairfax, Page and Wormley, against the Secretary T. Nelson, and Byrd. The Governor gave no opinion."

*Moorman's Will* (cited in *Pleasants v. Pleasants*, 2 Call 353), September 1778. Charles Moorman "devised certain slaves by name; to each of the different legatees to enjoy their labor; the males to twenty-one, the females to eighteen, and then all to be free; except some devised to his wife, which she was to have for life, and then they were to be free; and except another parcel, who were to be immediately free." The full text of the will is given in Hening.<sup>1</sup> The testator provides, [614] "In case the laws of the land will not admit of such freedom,<sup>2</sup> that then the last mentioned slaves and their increase be equally divided among my other legatees, . . . it is . . . [615] my particular instruction to my executors . . . to make application of the general assembly . . . for an act to confirm the freedom hereby intended . . . and in case such an act cannot be obtained, that then my legatees keep possession . . . Reserving . . . a right for all the above-mentioned slaves to claim the benefit of this my last will . . . if ever hereafter it should be lawful for them so to do." The general assembly, in 1787,<sup>3</sup> carried out "the benevolent intentions of the said Charles Moorman." An act was passed, providing that those slaves who were between twenty-one and forty-five, and those devised to the wife, then dead, "were to be immediately free, as if born so; and their increase were also to be free. All under twenty-one and eighteen were to be free when they at-

<sup>1</sup> 12 Hening 613.

<sup>2</sup> They did not "admit of such freedom" in 1778. See introduction, p. 67.

<sup>3</sup> 12 Hening 613.

tained those ages, and the increase of those to be free at a future period, were to be free with the parents.<sup>1</sup> Those above forty-five to be free when Johnson, the executor, or any other, should enter into bonds, with approved security, to the County Court, with condition that they should not become chargeable to the public. This was, in spirit, pursued by a majority of the Court" (in *Pleasants v. Pleasants*).<sup>2</sup>

*Thomas Sorrell's Case*, 1 Va. Ca. 253, April 1786. "The prisoner was examined before the County Court of Westmoreland, for the murder of a slave [whom he had hired], the property of one Ebenezer Moore. The court adjudged him guilty of manslaughter, and sent him on for further trial. . . The grand jury found the bill against him for murder."

Held: Where the examining court [257] "are of opinion, that a homicide has actually been committed, they must remand the prisoner for further trial except in the case of the owner of a slave. . . The prisoner was immediately put on his trial, and acquitted, as I thought (says Mr. Tucker)<sup>3</sup> directly contrary to evidence."

*Noel v. Garnett*, 4 Call 92, October 1786. Held: if a widow does not relinquish the will within the prescribed period, she is barred from dower in the undevisees.

*Drummond v. Sneed*, 2 Call 491, November 1786. William Burton devised to his daughter Agness, married to John West, several slaves for life, with a remainder to all her children in equal divisions. One of these children, [492] "Catharine, intermarried with one Edmund Chambers, and died in the life-time of her mother and husband." Chambers administered on her estate. On the division of the said slaves, "a slave named Lazer was assigned as the share of the said Catharine, . . Chambers possessed himself of the said slave, and sold and delivered him" to Sneed. The eldest son of Catharine later sold the slave to Drummond.

Held: the sale by Chambers was good, and Sneed is entitled to the slave.

*Taylor v. Wallace*, 4 Call 92, November 1786. "Whether a verbal gift of slaves to an unmarried woman, to whose husband the slaves, upon his marriage, were delivered, and in whose possession the same remained until his death, four years after the marriage, be within the statutes for preventing fraudulent gifts of slaves?"

Held: the gift was void.

*Hannah and other Indians v. Davis*, 2 Tucker,<sup>4</sup> App. 47, April 1787. "On the authority of the act of 1705, authorizing a free and open trade for all persons, at all times, and at all places, with all Indians whatsoever] . . the general court . . decided that no Indians brought into

<sup>1</sup> "The increase of such . . as are . . to be emancipated at any future period, shall have . . all the benefits of freedom from the time that the emancipation of their parents shall take place." 12 Hening 616.

<sup>2</sup> See p. 105, *infra*.

<sup>3</sup> St. George Tucker, reporting the case.

<sup>4</sup> Tucker's Blackstone (1803), II., note H, "On the Law of Slavery in Virginia," reprinting his *Dissertation on Slavery, with a Proposal for the Gradual Abolition of it, in the State of Virginia* (1796).

Virginia since the passing thereof, nor their descendants, can be slaves in this commonwealth.”<sup>1</sup> As cited by Judge Tucker, in 1806, in *Hudgins v. Wrights*,<sup>2</sup> there is a difference in the date probably due to a misprint,<sup>3</sup> and the decision is confined to American Indians: “By an adjudication of the General Court, in the case of Hannah . . . against Davis, April term, 1777, all American Indians brought into this country since the year 1705, and their descendants in the maternal line, are free. . . [139] The General Court held . . . that the passing of the act authorising a free and open trade . . . with *all Indians* whatsoever, did repeal the acts of 1679 and 1682.”

*Farrar v. Jackson*, Wythe 1, May 1788. “Thomas Farrar, tenant in tail of lands, to which slaves were annexed, sold, for his life, two of them, a woman and a boy her child, to James Waddill, who sold them to John Pruett, from whom the defendant, supposing them to be the property of John Pruett, purchased them for 75 pounds . . . [2] the defendant, after having notice of the plaintiff’s title, which notice probably was in the life time of Thomas Farrar, proposed to sell the slaves to one who might carry them to some remote parts, perhaps with design to prevent a recovery of them by the plaintiff.”

*Ross v. Pynes*, Wythe 69, October 1789. Letter dated December 7, 1767: [70] “I expect mr. Temple, the sheriff of King and queen, will be over with 11 negroes belonging to Benjamin Pynes . . . [71] i saw them when down the country, and offered him 330 pounds for the whole. there were four fellows, two wenches, and five boys and girls. . . i imagine Pynes will send the same negroes that i saw, viz. Tom, and his wife and daughter; Adam, his wife, and four children, and two other fellows, Sauny and . . . however one of them has a sore on his chin, and the other is a little old and a cooper. if you think the negroes look well, you neet not stand on five or ten pounds more:”

*Hearne v. Roane*, Wythe 90, October 1790. “The plaintiff Anne was the widow of William Roane, the testator of the defendants. before their intermarriage, . . . 1782, they had executed an agreement, . . . she shall, immediately after his death, possess twenty good negroes, including a full proportion of house servants, such as she may choose, and, if the

<sup>1</sup> Note by St. George Tucker: “Since this adjudication, I have met with a manuscript act of assembly made in 1691, c. 9, entituled, ‘An Act for a free trade with Indians,’ the enacting clause of which is in the very words of the act of 1705, c. 52. . . If this manuscript be authentic\* (which there is some reason to presume, it being copied in some blank leaves at the end of Purvis’s edition,† and apparently written about the time of the passage of the act), it would seem that no Indians brought into Virginia for more than a century, nor any of their descendants, can be retained in slavery in this commonwealth.”

<sup>2</sup> 1 Hen. and M. 134 (137).

<sup>3</sup> “1777,” the date given in *Hudgins v. Wrights*, is shown by internal evidence to be a misprint, for Judge Tucker speaks of the General Court which decided *Hannah v. Davis*, as “consisting nearly of the same judges” as “this Court”—the Court of Appeals of 1806. No such identity of persons existed as to the court of 1777.

\* See *Hudgins v. Wrights*, 1 Hen. and M. 134 (138), and *Pallas v. Hill*, 2 Hen. and M. 149 *et seq.*

† The act of 1691 is so copied in the “Purvis” which is in the New York Public Library. Ed.

twenty negroes should not amount in value to a full third part of the negroes whereof he shall die possessed, then she shall have as many more as will amount to a full third part of all the negroes, which are to be in lieu of dower of his slaves, . . . thirdly, if she survive him, and have no child living at the time of his or her death, that the negroes, which should come into his estate by the intermarriage, with their increase, shall be vested in her in such absolute manner that she may dispose of them, or otherwise they shall descend to her heirs . . . [91] Roane died . . . 1785, without a child by the plaintiff Anne, . . . In obedience to an order of Essex county court, . . . 1786," [49]<sup>1</sup> "the commissioners at first allotted to the widow ten of the negroes originally belonging to William Roane, which, with those that came into the estate by his intermarriage with her, made the number twenty. But afterwards, finding that one of the negroes, which had belonged to the widow before marriage, had died since the death of William Roane, they allotted the widow only nine of the negroes properly belonging to his estate, but equal in value to the ten first mentioned;"

Held: [92]<sup>2</sup> "in the slaves, to the possession of which the plaintiff Anne, by the marriage contract . . . was intitled, in lieu of dower, those which were her property, at the time of her intermarriage, ought not to have been included."

Decree: [93] "That of the surviving slaves . . . of Roane, . . . exclusive of the unprofitable from old age and infirmity, and also exclusive as well of the plaintiffs . . . proper slaves, and the nine formerly received by the plaintiff Anne, . . . eleven, or so many more as, with those nine, will be equal to one third part, be assigned to the plaintiffs." "This decree . . . was affirmed in november, 1791."<sup>3</sup>

*Hinde v. Pendleton*, Wythe 354, March 1791. "A negro woman slave and her four children had been in possession of the plaintiff and his wife, the parent many years, and the others from their respective births, . . . After the woman slave was discovered to have been, by the father of the plaintiffs wife, . . . conveyed long before to John Robinson, the testator of the defendants, the five slaves . . . were sold at auction. The plaintiff, at the time and place appointed for the sale, attended with his wife, who manifested a tender affection for the slaves, and such anxiety to retain them, which was increased by a reciprocal abhorrence in them from a separation, that she seemed resolved to buy them at any price. The defendants were not at the sale. one of them, suspecting that some people, disposed to favour the plaintiffs wife, might decline bidding against her, instructed the agent who managed the sale not to let them be sold under a reasonable value. The agent employeth a by-bidder, not being particularly instructed so to do by the defendants; the slaves are exposed to sale, in four lots, for tobacco; the plaintiff is the highest bidder for all; the sum of the prices bidden is somewhat more than 52000 pounds of tobacco, confessed to be enormous" By the court: [357] "The sale ought not

<sup>1</sup> *Roane v. Hern*, 1 Wash. Va. 47 (1791).

<sup>2</sup> *Hearne v. Roane*, Wythe 90.

<sup>3</sup> *Roane v. Hern*, 1 Wash. Va. 47.



to be set aside intirely, . . but the sale ought to be effectual upon payment of so much tobacco as is equal to the value of the slaves at the time of the sale."

*Ross v. Norvell*, 1 Wash. Va. 14, Spring 1791. "The appellee on the 5th of April 1779, filed his bill . . praying to redeem certain negroes which he states he had mortgaged to the appellant in the year 1765, to secure the payment of a debt due to him. The slaves were conveyed by an absolute bill of sale, bearing date the 18th of June 1765, with a warranty, and a receipt for the consideration stated in the deed, was endorsed thereon. The bill states, that the conveyance, though absolute in form, was intended as a security," [17] "Norvell was suffered to remain in possession of the slaves, two years . . "

[15] "the Chancellor decreed the defendant [Ross], to deliver the slaves, and their increase to the plaintiff, and to pay the profits of them," Decree [19] "affirmed, and remitted to the Court of Chancery to have the account of the profits taken, wherein a liberal allowance will no doubt be made, for the expences incurred in improving the slaves, which certainly ought to be done."

*Dade v. Alexander*, 1 Wash. Va. 30, Spring 1791. "In this case, the following points were resolved by the court, 1st, That money, directed by will to be laid out in the purchase of slaves, and to be annexed to lands devised in tail by the same will, are to be considered as slaves, and will pass with the land in tail. 2d, A feme sole, being entitled to slaves in remainder or reversion, and afterwards marrying, and dying before the determination of the particular estate, the right vests in the husband.—The president [Pendleton] stated, that this was the constant decision of the old General Court from the year 1753 to the revolution, and has since been confirmed in this Court in the cases of *Sneed vs. Drummond*, and *Hord vs. Upshaw*, that it had become a fixed and settled rule of property."

*Commonwealth v. Williams*, 1 Va. Ca. 14, October 1791. Indictment for the larceny of a slave.

*Dandridge v. Lyon*,<sup>1</sup> Wythe 123, October 1791. "Thomas Lyon, owner of . . Hannah, whose progeny are the subject of the present controversy, . . after bequeathing to his wife . . his whole estate, during her life, bequeathed the three first children which Hannah should bring forth to three of his children severally,"

[125] "this court . . hath formerly sustained such a bequest, for these reasons; 1. The power to appoint an owner not in existence, at the time of appointment, . . is tolerated by law; but this cannot be less exceptionable than the power to bequeath a thing not in existence at the testators death. . . [126] 4. No danger of a negro child's perishing by the cruelty of the mother's owner, in not allowing her time to nurse and cherish it, for the benefit of another, is to be apprehended in the cases where such bequests occur. the most frequent case is, where the testator, owning one woman slave only, and wishing to provide in the best manner he can for a needy family of children, would distribute among them the offspring which she,

<sup>1</sup> See note by William Green, Wythe 438.

with kind treatment, may rear, left in the hands of his childrens mother, as in this instance, or of some friend, in whose goodness to supply the place of a parent he confides. if negro children do perish, by cruelty of those with whom their mothers live, as is supposed, it is believed to be in cases where they are hired out, or are under the direction of overseers at places far distant from the habitations of their owners."

*Woodson v. Woodson*, Wythe 129, October 1791. "By writing, which the parties signed, the 17th day of april 1782, the plaintiff agreed to let the defendent have a negro man slave named Jacob, for the consideration of 13000 pounds of nett tobacco, to continue in the service of the defendent, as his own, until that quantity of tobacco should be paid; and the plaintiff also agreed, if Jacob should die, or by any other accident be rendered unfit for service, to sustain the loss, and either put a negro of like value in his stead, or pay the 13000 pounds of tobacco, when demanded, and not to force the defendent, in the begining or middle of his crop, to receive the tobacco, so as that the plaintiff might recover his negro again."

*Mayo v. Carrington*, 4 Call 472, November 1791. Will of Joseph Mayo, dated May 27, 1780: "It is my most earnest request, that the gentlemen who shall be named and appointed executors of this my last will, petition the general assembly for leave to set free all and every one of the slaves of which I may die possessed, on account of their services to me whilst alive, and I entreat my said executors to leave nothing undone which may be requisite for obtaining the manumission of the said slaves . . . But provided it shall not be in the power of my said executors to get this act of humanity effected, (*i. e.* to get the slaves of which I may die possessed set at liberty,) on that condition and no other, I give and bequeath to John Tabb . . . my two mulattoe women called Maria and Suckey, and my mulattoe waiting boy Bob." The testator died in 1785 and the administrators *cum testamento annexo* [474] "hired the slaves, and applied the profits to pay the unsatisfied creditors, and to maintain such of them as were helpless and infirm, leaving a surplus. That, in October 1787, the administrators procured an act of assembly<sup>1</sup> for emancipating the slaves; which was carried into effect by a decree of the high court of chancery in November 1789."

*Seekright v. Carrington*, 1 Wash. Va. 45, Fall 1791. See *Mayo v. Carrington*, *supra*.

*Roane v. Hern*, 1 Wash. Va. 47, Fall 1791. See *Hearne v. Roane*, p. 95, *supra*.

*Shelton v. Shelton*, 1 Wash. Va. 53, Fall 1791. Joseph Shelton, "a rich old batchelor," by his will executed in 1770, devised five plantations by name; and "all my negroes, young and old, at all my plantations above named, to be equally divided between my three brothers" The testator [54] "lived till September 1784, and in the mean time purchased another tract of land, called Williamsons, and 8 or 9 slaves, three only of whom were at Williamsons at his death. The others were at the plantations devised, from whence others were removed to Williamsons, and two were out at nurse for their maintenance."

<sup>1</sup> 12 Hening 611.

Decreed: [60] "The after-purchased slaves are not to be distinguished from the others. 1st, The testator, as to lands, speaks from the date of the will; as to personals, at his death. And slaves from their nature, (from their being purchased without a conveyance recorded, and from the act of assembly where they are devised,) are to be ranked in the personal class. 2d, restriction and devise, is not of negroes by name but by the plantations: they were upon them, and those found there at his death will pass, whenever acquired. Upon this point therefore the court decide the devise to be confined to the slaves in the devised plantations at the time of the testator's death, in exclusion of those at Williamsons; but are of opinion that their settled habitations as fixed by the testator ought to give the rule, and not any casual absence therefrom at his death, . . . [61] All the working slaves from Williamson's were at work at the home-house, Horse-Shoe, the instant of the testator's death. . . . The young negroes sent from the devised plantations to assist poor people, to remain there at will, or exchanged as Sampson was for Tom, furnish no proof of an intention to change their residence or to affect the devise. Such too is the case of the girl Rachel [the spinner], and the boy Cudjo sent to Williamsons to work for a short time (not to reside there,) just before his death; so the negro Mark, sent from Williamsons in like manner to assist a poor family, is to be excluded from the above devise."

*Wood v. Davis*, 1 Wash. Va. 69, Spring 1792. "Rodes deputy sheriff . . . hath this day levied an execution on Fanny etc. negroes, . . . taken at a suit of J. Davis by a judgment . . . for the sum of 16,164 lb of Tobacco."

*Hoomes v. Kuhn*, 4 Call 274, April 1792. "Kuhn suspecting that a slave belonging to Hoomes had robbed his store [of a guinea and certificate], at the Bowling Green, whipt him very severely. Hoomes, . . . upon hearing of the whipping, went to the Bowling Green; and, after a short altercation with Kuhn, struck him: the latter returned the blow, and a fight ensued, in which Kuhn was much worsted. Kuhn brought an action of assault and battery against Hoomes . . . and prosecuted the slave for the supposed theft, but he was acquitted. Hoomes brought an action against Kuhn for whipping the slave, and recovered £17."

*Jenkins v. Tom*, 1 Wash. Va. 123, Fall 1792. "This was an action of trespass, assault and battery, and false imprisonment, brought by the appellees to recover their freedom. . . . the plaintiffs had offered in evidence sundry depositions of antient people to prove, that certain women named Mary and Bess, when they came first into this country, were called Indians; and had a tawny complexion, with long straight black hair; to strengthen this testimony, the plaintiffs produced a witness to prove, that he heard a certain other person now dead, say in the year 1701, that when he was a lad about 12 years old, these women<sup>1</sup> were brought to this colony in a ship, and were called Indians; that they had the appearance of Indians, and that the former of them was called the grandmother of the latter. To the admission of this testimony, the defendant objected, but was

<sup>1</sup> They were apparently imported before 1682, and since they came by sea, they were slaves, by the act of 1670. 2 Hening 283.

over-ruled by the court. The jury found a verdict for the plaintiffs. In the record there is a certificate of the judges, stating: That the defendant's counsel, in his argument, insisted much upon a clause of an act of Assembly, . . . 'for the better government of servants and slaves,' passed in the year 1753,<sup>1</sup> . . . and argued from thence, that all Indians . . . not particularly excepted in that clause, might be sold as slaves: that the court informed the counsel, that he mistated [*sic*] the law; that there was a time at some period in the last century, when a law was in existence, which declared Indians at war with the people of this country, slaves, when taken prisoners:<sup>2</sup> that under that law, many Indians were made slaves, and their descendants continue slaves to this day:—but that this law was some time after repealed;<sup>3</sup> from which period, no American Indian could be sold as a slave, and that all such as had been brought into this country since that time, and had sued for their freedom, had uniformly recovered it. That the same counsel still insisted upon his former argument, and considering the court's address to the bar, as a misdirection to the jury, had prayed this certificate to be entered at the foot of the judgment. From this judgment the defendant appealed. After argument the Court affirmed the judgment."

*Turner v. Turner*, 1 Wash. Va. 139, Fall 1792. Action of detinue, brought in 1783 for the recovery of two slaves. Held: "the judgment of the County Court is erroneous, in admitting . . . evidence of a parol gift of the slaves in dispute, . . . it being subsequent to the year 1758, no estate in the slaves passed . . . for want of a deed, or will in writing, according to the act of Assembly, passed in the year 1758, intituled, 'an act to prevent the fraudulent gifts of slaves.'"

*Nance v. Woodward*, Wythe 180, March 1793. Will of Timothy Vaughan, 1759: "to my wife . . . all my . . . negros . . . during her natural life." Held: [182] "the wife could make no disposition of the . . . negros which would be effectual after her death," but they, "with the increase of the females, descended to the heir at law, of the testator."

*Cary v. Buxton*, Wythe 183, March, 1793. [184] "of the slaves bequeathed [in 1751] . . . the remainder who had eloped to the british enemy, never returned."

*Aylett v. Minnis*, Wythe 219, May 1793. William Aylett [220] "devised 1200 acres . . . to four daughters severally, . . . annexing slaves to every parcel, and, in two of those devises, declaring that the slaves so annexed should *descend* pass and go, as part of the *freehold*."

<sup>1</sup> 6 Hening 355. The basis of this act is the act of 1682, ch. 1 (2 Hening 490). The act of 1682 applies to future importations of servants, and specifically mentions "Indians that are taken in warre or otherwise by our neighbouring Indians, confederates or tributaries . . . and . . . sold . . . here as slaves." The act of 1705 (3 Hening 447) is less definite: "all servants imported and brought" may, perhaps, include past importations. Indians cease to be mentioned specifically. The act of 1753 definitely includes past as well as future importations, and uses the word "persons" instead of "servants."

<sup>2</sup> Acts of 1676, 1679, 1682. 1 Hening 346, 404, 440; 2 Hening 490.

<sup>3</sup> Held, in 1772 (in *Robin v. Hardaway*, Jefferson 109), to have been repealed in 1705; held in 1806 (in *Hudgins v. Wrights*, 1 Hen. and M. 134) to have been repealed in 1691. See introduction, p. 65.



*Kennon v. M'Roberts*, 1 Wash. Va. 96, Fall 1793. Will of Robert Mumford, dated September 8, 1743: "Item: I will and bequeath to my son Robert Mumford (his heir at law) all my lands at the Ochaneachy island, also all my lands of Finny wood, with six negroes (by name) and ten horses and mares. Item: I will and bequeath to my son Theodorick all my lands at Cargills on Roanoke River, containing 690 acres, with two negroes; Sam at Roanoke, and Jack at Rowanty, also ten horses and mares. Item: to my well beloved wife and only daughter Elizabeth, I will and bequeath all the rest of my estate real and personal saving one negro girl to my son Theodorick."

*Hooe v. Pierce*, 1 Wash. Va. 212, Fall 1793. "action of detinue for a negro, called Jack Robinson, alias Taliver, . . . [213] the slave . . . was once the property of [Pierce] the testator of the defendant, known by the name of Taliver, and so continued, until the year 1777, when he ran off from his master, and got on board a British vessel." In July, 1779, [212] "the *Bishop*, an enemy's vessel, was taken on the high seas by the *General Washington*, an American vessel, . . . the slave . . . was on board the *Bishop* at the time of her capture, and was then known . . . by the name of Jack Robinson. That the vessel and cargo, together with the slave, was brought into Virginia, and condemned as lawful prize, and purchased . . . [213] by the plaintiff. . . the slave . . . was taken from the possession of the plaintiff in September 1783, by the defendant, in pursuance of a warrant, granted under an act of . . . Assembly passed in 1782,<sup>1</sup> entitled, 'An act for the recovery of slaves, horses and other property, lost during the war,' and that he still detains him."

Judgment for the defendant, affirmed: [216] "The condemnation in the court of admiralty, could not bind the intestate [Pierce], who was no party to the suit. . . [217] The sale therefore . . . could not divest the right of the original proprietor."

*Beckwith v. Butler*, 1 Wash. Va. 224, Fall 1793. Held: "where a child is advanced with money, or negroes, he need not bring into hotchpot the increase of the one, or account for the interest upon the other."

*Coleman v. Dick and Pat*, 1 Wash. Va. 233, Fall 1793. Action of assault and battery, and false imprisonment, brought by the appellees.<sup>2</sup> The jury found [234] "that the plaintiffs are lineally descended by the maternal line from Judith; that Judith was an Indian, or the descendant

<sup>1</sup> Rev. Laws, 157.

<sup>2</sup> [235] "in personal torts, two or more cannot join as plaintiffs in the action, because the injury done to one is not an injury to the other." But [239] "actions like the present, are merely fictitious, and were very properly . . . likened to actions of ejectment. For if many persons may unite as plaintiffs, to try a joint right to land, . . . no good reason can be given why they may not unite, to try a joint right to freedom . . . Although suits for freedom may be instituted without the leave of the court, yet it is usual to petition for such leave. The court, generally require the opinion of the counsel\* upon the plaintiff's right; and if it appear, that the plaintiff has probable cause for suing, the court will make special orders for the purpose of protecting the plaintiff from the master's resentment, or ill treatment on that account, and for allowing him reasonable time to prepare for his trial."

\* See *Gregory v. Baugh*, p. 163, *infra*, with reference to Thomas Jefferson as such counsel for a slave.

of an Indian. That she was brought into this state by a certain Francis Coleman, sometime after the year 1705, and was held as a slave, to the day of her death." Marshall, for the appellees: [236] "the act of 1705 . . . not only repeals in express terms,<sup>1</sup> all former laws upon the subject, but establishes an intercourse with the Indian nations, as with freemen—it authorizes a free commerce with them.<sup>2</sup> Is it usual for freemen to treat, or to trade with nations as free, the individuals of which, if caught, become slaves?" [237] "Wickham in reply. The Act of 1705,<sup>3</sup> (which I call the treaty law,) could only relate to Indians within our territory. . . . This law is intended to regulate trade with Indians, considered in a national point of view, which is by no means incompatible, with the right, or the policy of purchasing the individuals of those nations for slaves."

Judgment for the plaintiffs (Dick and Pat), affirmed: [239] "the court are of opinion that the act of 1705, is a compleat repeal of all former laws on the subject, and that since that period, no *American* Indian, can be reduced into a state of slavery. *Foreign Indians* coming within the description of that act, might be made slaves.<sup>4</sup> . . . Two judges think, that finding Judith to be an Indian, *brought in* by Coleman, without saying from whence, whether by sea,<sup>5</sup> or by land, is insufficient to warrant the judgment [for the plaintiffs, Dick and Pat]. . . . On the other hand, two judges, presuming in favor of liberty, think that the verdict is sufficient. The judgment therefore must be affirmed."

*Keene v. Lee*, 1 Wash. Va. 239, Fall 1793. Newton Keene, "by his will made in 1770, devised to his executors" his lands and slaves "to sell for payment of debts; and if there remained more slaves than were necessary for this purpose, he devised them equally among his children."

*Hubbard v. Taylor*, 1 Wash. Va. 259, Spring 1794. Bond for the delivery, on the day of sale appointed by the sheriff, of three negroes "taken under execution . . . to satisfy . . . the sum of £151:6:11¼."

*Cole v. Clayborn*, 1 Wash. Va. 262, Spring 1794. Action of detinue to recover a number of slaves. Will of William Cole, 1729: "I give to my wife, for ever, two negroes named Will and Sarah, above and besides her dower in my lands and negroes; . . . all the rest and residue of my negroes . . . to my children for ever, . . . My will also is, that my executors shall work all my negroes, (except those particularly bequeathed) on my lands, until my son William shall come of age, and the profits of the said lands and slaves, to be equally divided amongst my children." The

<sup>1</sup> 3 Hening 462.

<sup>2</sup> *Ibid.*, 468.

<sup>3</sup> Chapter 52. *Ibid.*, 464.

<sup>4</sup> Down to 1778. 9 Hening 471.

<sup>5</sup> "Foreign Indians" are, in the opinion of the judges, those who come "by sea," for they accept Wickham's assertion that the act of 1705, ch. 52 (though granting "a free . . . trade . . . with all Indians whatsoever") [237] "could only relate to Indians within our territory;" but in section 11 of that chapter the term is used to designate non-tributary American Indians who are approachable by land, for the tributary Indians are required to "march, with the English, in pursuit of foreign Indians." 3 Hening 468. Ed.

slaves mentioned in the declaration are "the descendants of a female slave allotted to Mary Cole, the widow, as part of her dower."

Held: the dower slaves, after the death of the widow, passed under the residuary clause of the will.

*Applebury v. Anthony*, 1 Wash. Va. 287, Fall 1794. A marriage contract whereby Anthony agreed to give a slave, Lucy, to his daughter on her marriage with Applebury. After the marriage Anthony refused to deliver the slave, and Applebury brought a suit to recover her. Finding that the suit, which "was referred to arbitration," would be decided against him, Anthony, in May, 1769, executed a deed for the slave, who was delivered to Applebury. [289] "The next day an agreement was made between the same parties to substitute" for Lucy and her children [287] "a slave called Dinah, and two notes of hand for £60 which were delivered," and Lucy was redelivered, [289] "this, not with any fraudulent view, but upon the laudable motive of gratifying the wishes of the slave."

*Lee v. Cooke*, 1 Wash. Va. 306, Fall 1794. "This is a covenant to warrant the title of a slave, and in all conveyances of such property, whether by deed, or by will, they are considered as personal, and not real estate." They are [308] "only considered as real estate in the case of descents."

*Walden v. Payne*, 2 Wash. Va. 1, Fall 1794. Held: [7] "Slaves from their nature are chattels. They were originally so, and the law made them real estate only in particular cases, such as in descents etc. But in most other instances, and especially in the payment of debts, they were declared to be personal estate. It is true, the law has protected slaves from distress, or sale, where there is a sufficiency of other personal estate to pay debts or levies, and in this respect they differ from other chattels; but this qualified exemption does not change their nature, or give to them the qualities of real property." [Lyons, J.]

*Shelton v. Barbour*, 2 Wash. Va. 64, Spring 1795. Action of "trespass, assault and battery and false imprisonment, brought by the appellee, who had been held by the appellant as a slave, in order to try his right to freedom. . . the master, offered in evidence a transcript of a verdict and judgment in the former General Court, between the mother of the appellee and Robert Harris, under whom the appellant claims, by which verdict it was found, 'that the plaintiff was the slave of the defendant.' The appellant's counsel offered this as conclusive evidence of his title, but the court being divided in opinion sent the verdict to the jury as circumstantial evidence only." The jury found a verdict for the slave.

Held: [67] "The judgment must be reversed for error in the court's not admitting the record as conclusive evidence, to prove the plaintiff a slave. The cause is to be sent back for a new trial with a direction to this effect, unless the plaintiff can shew that he or his mother were manumitted subsequent to the first verdict."

*Fairclaim v. Guthrie*, 1 Call 7, April 1797. Will of John Guthrie, dated October 17, 1761: "my will is that my son Richard should have his

choyes of my 2 whences [wenches] Geany or Dice and if he chuses upon Jeany and she should bring ever so many children she shall nurce them till they are fourteen months old an then shall return them to James Guthrie or his ears [heirs], but if he chuses upon Dice he shall have her and her ears . . . [8] my will is that all Jeaney's children that is now living (viz.) I give unto James Guthrie and his ears forever, Harry, Daffenny, Frank and Samson, my will is if Richard Guthrie makes choyes of Jeany he shall have no other part of estate, my will is that Richard Guthrie should have Dice and London and her increase and to his ears forever, my will is that Jeany and all her increase shall be James Guthrie's and his ears forever moreover my will is that if Jeany brings ten live children that she shall be at her one [own] liberty from him or his ears only living with James Guthrie or his ears her lifetime."

*Fowler v. Saunders*, Wythe 322, March 1798. "a delivery of slaves, in consideration or for cause of marriage, . . . [323] by the father of a wife to her husband," without a deed. [327] "the husband, during all his life time retained possession of the slaves, employing them in his service, and enjoying the fruits of their labour. . . the statutes [of 1758 and 1787] apply to the case of a *donor remaining* in possession,—” Decreed: "that the plaintiffs [Fowler and Susanna his wife] do discover the names of the slaves which were delivered by the defendant's grandfather to her father [Saunders] on his marriage [to Susanna], and of their increase, and render an account of the profits of the said slaves since the death of her father, and deliver such of the slaves as survive, and pay the said profits, to the defendant's guardian, for her use, . . . [328] saving to the plaintiff Susanna [defendant's mother] her rights, if any she have, derived from her former husband [Saunders]." Plaintiffs appealed. "decreed . . . that the appellants' bill be dismissed," 4 Call 363.

*Chapman v. Turner*, 1 Call 280, May 1798. [281] "I this day received of Mr. John Turner, the sum of thirty pounds, and put a negro woman named Hannah, in his hands as security, and if the 30 *l.* is not paid at or before next July Hanover Court, the said Turner is to have the said negro for the said 30 *l.* Witness my hand this 20th May, 1786. Richard Chapman. *Teste*, James Parsons." [280] "The answer of John Turner states, . . . That the slave had had four children prior to the purchase, three of which she had overlain, and that upon discovering these facts he had offered to annul the contract, but Chapman refused." None of the witnesses [282] "made her value to exceed the sum actually paid more than 10 or 15 pounds; and several represented her to have been under a bad character."

Held: it was a conditional sale, which became absolute on the failure of Chapman to pay the 30 *l.* on the day specified in the instrument.

*Dunn v. Bray*, 1 Call 338, October 1798. Held: in order to annex slaves to lands,<sup>1</sup> it is necessary that co-extensive estates should be given in both.

*Fowler v. Saunders*, 4 Call 361, October 1798. See same *v.* same, *supra*.

<sup>1</sup> Under the act of February 1727. 4 Hen. 225.



*Commonwealth v. Hays*, 1 Va. Ca. 122, November 1798. The prisoner was found guilty of stealing "a negro slave named Tom, of the value of 100 l. . . while the said slave was a runaway;" Held: "not an offence at common law."

*Pleasants v. Pleasants*, 2 Call 319, May 1799. Will of John Pleasants, dated August 11, 1771: [334] "My further desire is respecting my poor slaves, all of them as I shall die possessed with, shall be free if they chuse it, when they arrive to 30 years of age, and the laws of the land will admit them to be free, without their being transported out of the country, I say all my slaves now born, or hereafter to be born, whilst their mothers are in the service of me or my heirs, to be free at the age of 30 years as above mentioned, to be adjudged of by my trustees their age." He then gives his son Robert, the plaintiff, eight negroes, "On condition he allows them to be free at the age of 30 years, if the laws of the land will admit of it." He then "devises the residue of the slaves to various persons," under similar conditions. Will of Jonathan Pleasants " (who was a legatee under the will of John Pleasants of one third of his negroes on the same condition) dated May 5, 1776: " [321] "And first believing that all mankind have an undoubted right to freedom and commiserating the situation of the negroes which by law I am invested with the property of, and being willing and desirous that they may in a good degree partake of and enjoy that inestimable blessing, do order and direct, as the most likely means to fit them for freedom, that they be instructed to read, at least the young ones as they come of suitable age, and that each individual of them that now are or may hereafter arrive to the age of thirty years may enjoy the full benefit of their labor in a manner the most likely to answer the intention of relieving from bondage. And whenever the laws of the country will admit absolute freedom to them, it is my will and desire that all the slaves I am now possessed of, together with their increase, shall immediately on their coming to the age of thirty years as aforesaid become free, or at least such as will accept thereof, or that my trustees . . . may think so fitted for freedom, as that the enjoyment thereof will conduce to their happiness, which I desire they may enjoy in as full and ample a manner as if they had never been in bondage, and on these express conditions and no other do I make the following bequests of them." [353] "In the present case, the devisees, the legal proprietors, oppose the manumission,"

Held: [354] "That to apply the rule respecting the limitation of the remainder of a chattel upon too remote a contingency, with all its consequences, to the present case, would be too rigid, but, that a reasonable principle ought to be adopted to suit its peculiar circumstances; which is this, that if the event happens whilst the slaves remain in the possession of the family, without change by the intervention of creditors or purchasers, since the contending parties would be those whose interest had been contemplated by the testators, the bequest ought to take place; . . . [355] that the limited manumission, according to the modifications in the wills of the testators, can alone take place and be decreed, and that the

terms for securing the public against the maintenance of the aged or infirm, cannot be equitably imposed upon the devisees. It is, therefore, further decreed and ordered, that all the slaves of which the testators were possessed, as their property, at the time of their respective deaths, not subjected to the claims of the creditors or purchasers before stated, and who are now above the age of forty-five years, and their increase born after their respective mothers had attained the age of thirty years, (so soon as Robert Pleasants, the executor . . . shall . . . enter into bonds . . . with condition that the said slaves shall not become chargeable to the public, . . . ) and all such as are now above thirty, and under the age of forty-five years, immediately shall be emancipated and set free, to all intents and purposes, in like manner as if they had been born free, and that all who are now under the age of thirty, and whose mothers had not attained that age at their birth; and all their future descendants, born whilst their mothers are in such service, do serve their several owners until they shall respectively attain the age of thirty years,<sup>1</sup> and then be in like manner free;<sup>2</sup> and when their freedom shall severally take effect according to this decree, there shall be delivered to each of them, by their respective masters and mistresses, a certificate, written or printed, attesting their freedom, in such form as shall be directed by the said High Court of Chancery. That no account ought to be taken of profits, it being unusual in such cases, and less reasonable in this very difficult one." [Pendleton, P.]

*Selden v. King*, 2 Call 72, October 1799. Will of Joseph Achilly, dated March 11, 1699/1700: [74] "it is my further will and desire that none of my negroes be removed or carried away from the plantation whereon I now live but that they shall live and be together,"

*Eppes v. Randolph*, 2 Call 125, November 1799. Letter of Richard Randolph, the father, to his son, David Meade Randolph, August 8, 1780: [131] "I am very willing, in consequence of your marriage . . . to give you a fee simple estate . . . together with all the slaves and stocks thereon . . . with two negro carpenters, mulatto Peter and Mingo;" Letter of Richard Randolph, the father, to Robert Beverley, July 20, 1785: [138] "Sir, the connection my son Richard is about to form, with your amiable daughter Maria, is perfectly agreeable to all his friends upon James river; . . . The place where I now live, known by the name of Curles, . . . is what I

<sup>1</sup> Judge Roane differs from President Pendleton and Judge Carrington on this point: [338] "As to all the slaves, then [1782\*] *in esse*, but under thirty years of age, their right to freedom was complete, but they were postponed as to the time of enjoyment. . . [339] What then, after the passing of the act, is the condition of the children born of mothers, so postponed in the enjoyment of their freedom? Are they, at their birth, entitled to freedom? Or, are they too, to be postponed, until the age of thirty? The condition of the mothers of such children, is that of free persons, held to service, for a term of years: such children are not the children of slaves. . . The conditions of the will then, as applicable to such children, . . . is void, as being contrary to law: it being an attempt to detain in slavery, persons that are born free."

<sup>2</sup> An act passed in 1787 (12 Hen. 613) in regard to Moorman's will (1778) was, [354] "in spirit, pursued by a majority of the Court." But the act of 1787 provided that "the increase of those to be free at a future period, were to be free with the parents."

\* The act of May 1782, ch. 21, authorized manumission of slaves. 11 Hen. 39.

intend for him, at the death of his mother and myself, with forty slaves; that is to say, eight men, six women, six plough-boys and twenty children;"

*Nanny v. Mayes* (cited in *Pegram v. Isabell*, 2 Hen. and M. 193),<sup>1</sup> 1799. [194] "it was deposed by a witness . . . a very old man . . . that the said Nanny was descended according to general reputation, in the maternal line, from an Indian ancestor, who was imported into this state, since the year, 1705;" Nanny "recovered her freedom."

*Robertson v. Campbell*, 2 Call 421, October 1800. "the plaintiffs delivered the defendants two slaves (shoemakers by trade) as a security; and the defendants were to have the profits of them, for the use of the tobacco lent. That their profits were 20 s. per week . . . [423] or 52 l. per annum." The plaintiff sold [431] "a valuable blacksmith."

*Wallace v. Taliaferro*, 2 Call 447, November 1800. Held: [490] "the interest of the slaves, devised by the will of William Rowley [who died before September 25, 1774] to Lettice Wishart, vested in her husband John Wishart, in the same manner as if they had been chattels, . . . That the said John Wishart, during his lifetime, had none other possession of the said slaves, than as co-executor . . . , they being, with the other slaves of the testator, continued on his plantations, under the direction of the executors, for finishing the crops, according to the directions of the act of Assembly, until after the death of the said Wishart [before December 25, 1774]; and no act appears to have been done by him, testifying his election to hold the said slaves, in right of his wife, and not as executor; and, therefore, that the right survived to the said Lettice;" [Pendleton, P.]

*Morris v. Owen*, 2 Call 520, April 1801. Will of Henry Simmons devised to his wife, during her widowhood, his plantation and slaves with their future increase, "to dispose of among my children as she thinks proper:" that she "shall enjoy the labor of the slaves given during widowhood, may be during her life, with their future increase, and then to be divided, at her discretion, amongst my children." A witness [522] "says, that, in 1774, she was called by Mrs. Susanna Simmons to take notice, that she gave Joan (who was then present,) and her increase, to her daughter Susanna Edwards; reserving her own life therein. That, some time afterwards, Susanna Edwards wished to carry the slave home, but Mrs. Simmons refused, saying that she would never give them, out of her own possession, during her life."

Held to be a good execution of the power as to Joan and her increase.

*Fitzhugh v. Foote*, 3 Call 13, April 1801. Held: [17] "That an equal division of slaves, in number or value, is not always possible, and sometimes improper, when it cannot be exactly done without separating infant children from their mothers, which humanity forbids, and will not be countenanced in a Court of Equity: so, that a compensation for excess must, in such cases, be made and received in money:"

<sup>1</sup> Also in 1 Hen. and M. 387 (1807).

*Chisholm v. Starke*, 3 Call 25, April 1801. Will of James Underwood who died in 1773: "I tend to my loving wife Ann, the use, labour and profits of one third of my slaves, during her natural life;" The wife, Ann, "took possession of a third part of the slaves, which have greatly increased; but, through the severity of her, and her second husband, William Richardson . . . they are reduced to three: . . . and that . . . he empowered Burnett to sell one, . . . That Burnett sold her to Chisholm, who lives at a great distance up the country, for 50 l. the estimated value of the full property of such a slave."

*Bradley v. Mosby*, 3 Call 50, October 1801. By deed in 1758 Thomas Walton conveyed to his daughter Patty, wife of Edward Mosby, "the use of two negro slaves, during her natural life, . . . and after her death, . . . to the heirs of her body," The plaintiff is the eldest son of Edward Mosby; the defendant married one of the daughters of Edward Mosby, and together with the rest of the children divided the female slave and her eight children among all the children of the said Patty.

Judgment for the plaintiff, affirmed: "the appellee [Mosby] had at the time of his birth, a vested remainder in these slaves: . . . he is entitled to recover." [Roane, J.] [62] "I am . . . of opinion, that the daughter took the absolute property; and that the judgment of the District Court ought to be affirmed." [Lyons, J.] Pendleton, P., dissented: [67] "the remainder was a good one; . . . being of personals" the children "were all entitled to equal shares."

*Jordan v. Murray*, 3 Call 85, November 1801. Held: although under the act of 1758, evidence of a parole gift of slaves cannot be given, yet such testimony may be received in order to prove five years' possession so as to bar the plaintiff's demand.

*Hairston v. Hall*, 3 Call 218, May 1802. "the slaves had been devised by Sarah Hall to her son Nathan Hall, father of the plaintiffs, for life, and at his death to her grand-children as her said son should see cause to divide the said slaves among them, but if her said son should trade, sell or dispose, hire or lend any part thereof any where, or to any person during his life, or the same should be taken in consequence of any debt of his, that the slaves should be divided among the plaintiffs as soon as they were known to be out of the possession of the said Nathan,"

*Wythe's Will*, Wythe xxxvii, April 1803. Will of Chancellor Wythe, dated April 20, 1803:<sup>1</sup> "i devise to him [William Duval executor] the houses and ground in Richmond, . . . and my stock in the funds, in trust, with the rents of one and interest of the other, to support my freed woman Lydia Brodnax, and freed man Benjamin, and freed boy Michael Brown, during the lives of the two former, and, after their deaths, in trust to the use of the said Michael Brown: and all the other estate . . . to George Wythe Sweney the grandson of my sister." First codicil, dated January 19, 1806: "To the said Thomas Jefferson's patronage i recommend the

<sup>1</sup> Letter of Henry Clay to B. B. Minor, May 3, 1851: "his last will . . . written by me, upon his dictation, before my departure from Richmond." Wythe xxxv. Clay acted as Wythe's amanuensis "for several years."



freed boy Michael Brown . . [xxxvii] for whose maintenance, education or other benefit, as the said Thomas Jefferson shall direct, i will the said bank stock, or the value thereof . . to be disposed." Second codicil, dated February 24, 1806: "I will that Michael Brown have no more than one half my bank stock, and George Wythe Sweney have the other immediately. . . If Michael die before his full age, i give what is devised to him to George Wythe Sweney. I give to Lydia Brodnax my fuel." Third codicil, dated June 1, 1806: "revoking the said wills and codicils in all the devises and legacies . . relating to . . George Wythe Sweney, the grandson of my sister; but I confirm the said will and codicils in all other parts, except as to the devise and bequest to Michael Brown, . . who, I am told, died this morning, and therefore they are void." Chancellor Wythe died a few days later, on June 8, from poison. Note to p. xxviii: "At the time of the poisoning, the Chancellor had been confined at home by indisposition. Swinney, indignant at the kindness and munificence of his uncle to the colored boy, intended to poison the boy, and put the poison in the coffee for breakfast, not expecting that the Chancellor would think of coming from his chamber, or would be in any danger of partaking of it. But during his absence, the Chancellor did make his appearance and drank of the coffee. The woman also died."

*Cowles v. Brown*, 4 Call 477, October 1803. Will of John Cooper, dated 1791: [479] "I should have made a more equal and general division among the negroes which I have right to dispose, which came by my wife Susanna, but to some it would be but burthening their conscience to hold them as slaves or they must liberate them, which in my opinion would be a very great disadvantage to the slaves."

*Cary v. Macon*, 4 Call 605, October 1803. [617] "October 1770, seventy pair of shoes charged to John, and none to Edward Cary, when it is presumable that they were for the whole slaves. The commissioner states that Edward had forty-two, and John ninety. One third part, therefore, should be charged to the former, and two thirds to the latter. The same occurs in May 1771, in November 1772, in November 1773, in November 1774, and in January 1776, and to be corrected in like manner." Mrs. Ambler was [618] "to pay the expense of feeding and clothing the slaves, their levies and taxes, and the doctor for attending them,"

*Charles v. Hunnicutt*, 5 Call 311, October 1804. "Gloister Hunnicutt, a quaker . . by his will, made on the 13th of April, 1781 . . : 'My will and desire is, that the following negroes should be manumitted on or before the first month next 1782, viz. Tom, Joe, Charles, Ben, Jenny and her child Charlotte. I give the above named negroes to the monthly meeting, of which I am a member, to be manumitted by such members of the said meeting, as the meeting shall appoint.' In December 1781, "the said monthly meeting appointed two of their members, to wit, Edward Stabler and Wyke Hunnicutt, the executor, to draw and execute an instrument of manumission of the said slaves in the said will mentioned. In May 1782, the act of Assembly,<sup>1</sup> entitled, 'an act to authorize the manu-

<sup>1</sup> Ch. 21, 11 Hen. 39.

mission of slaves,' passed; and, in pursuance of the said appointment, the said Edward Stabler and Wyke Hunnicutt, on the 6th of July, 1782, executed a deed of emancipation of the said slaves; which was admitted to record . . [312] in November 1782. In consequence of the foregoing proceedings, the appellants claiming a right to freedom under the will, order of the monthly meeting, and deed of emancipation aforesaid, brought suit at the common law to recover their liberties against . . Pleasant Hunnicutt [son of the testator], who held them in bondage, as part of the testator's estate." The district court gave judgment in favor of the defendant.

Judgment reversed by the court of appeals: [318] "It is not impossible that the prevailing sentiment of the country, and the general expectation that a law, authorizing the manumission of slaves, could pass, was known to the testator; and that he looked forward to an event which actually happened in thirteen months afterwards." [St. George Tucker, J.] [322] "in this case, the unhappy plaintiff has run out his race of existence, and the tedious forms of the courts bring liberty to him too late! . . [324] [the testator] Being proved to be a quaker, I believe that this court might . . take official notice of the principles of that society, holding slavery in abhorrence." [Roane, J.] [328] "the quakers had long been petitioning the legislature to pass such a law; and there was every appearance, that their request would be complied with, at no very distant period." [Fleming, J.] [330] "Devises in favour of charities, and particularly those in favour of liberty, ought to be liberally expounded: . . it is fair to infer, that the testator meant that the deed of manumission should not take place, until an act of assembly, to authorize it, should pass; for he knew, that the existing law<sup>1</sup> forbid it, and that his society had been anxiously endeavouring to procure an enabling statute, for that purpose, from the legislature; which it was generally believed would shortly be obtained. This . . puts an end to the objection founded upon the distinction between a present devise, and one with a future aspect." [Lyons, P.]

*Lambert v. Paine*, 3 Cranch 97, February 1805. Will of George Harmer, dated 1786: [98] "It is my desire that all my negroes, horses, and other property, be sold,"

*Wilson v. Isbell*, 5 Call 425, April 1805. Isbell was the slave of Whitney, a citizen of Virginia, and was born in this state before October 5, 1778, when the act<sup>2</sup> for preventing the further importation of slaves passed, [427] "and so continued till the year 1781 or 1782; when Whitney removed his family and part of his property to Maryland; among which property was the appellee. That she was hired out, in Maryland, for about two years and a half." Whitney removed back to Virginia, but during his residence in Maryland, in 1784, "he sold the appellee, then being in Maryland, to the appellant, as a slave, who brought her, from thence, into this state, at that time;" he being a resident of Virginia.

Held, unanimously by the court, that Isbell is entitled to her freedom.

<sup>1</sup> Act of 1748, ch. 38, sect. 26 (6 Hen. 112), re-enacting the act of 1723 (4 Hen. 132).

<sup>2</sup> 9 Hen. 471.

*Woodley v. Abby and other paupers*, 5 Call 336, May 1805. John Harrison died in 1790. "His wife Eliza administered on his estate in due form of law, sold it on a credit of twelve months, and in the year 1791, married David Bradley, . . . In September 1792, David Bradley, by deed, (which was duly recorded in the same month,) emancipated the plaintiffs, who were slaves in his possession before his marriage." The representatives of Harrison in 1798 brought suit "[337] against Bradley and wife, suggesting a *devastavit*; and obtained judgment against them, by confession, *de bonis propriis*. On this judgment, an execution issued, which was levied on the plaintiffs, after they had enjoyed their freedom, under the deed of emancipation, about twelve years. The plaintiffs applied for and obtained an injunction, which on a hearing, the judge of the . . . district court perpetuated;"

Decree reversed: Bradley [348] "became liable of the *devastavit*; whether it was committed before or after his intermarriage, as both of them are living. The claims of the appellants were therefore due from him; and he could not disappoint them by a voluntary manumission of his slaves." [Fleming, J.] Lyons, P., and Roane, J., concurred. Tucker, J., dissented: [342] "The existence of this very suit corroborates the opinion I have conceived, that a person *de facto* free, either by birth, as in the case of the children, or by actual emancipation in due form of law, as in the case of the parents, cannot be taken in execution to satisfy any judgment, or decree in any suit to which he is not a party. And this opinion, I conceive, accords with the act of 1794, ch. 15." Carrington, J., also dissented.

*Parish v. Gray*, 6 Call 18, April 1806. "The appellee [Jenny Gray] brought an action of assault and battery and false imprisonment on behalf of herself and several of her children, against the appellant in the county court. Plea not guilty, and issue. Five successive juries were sworn, and neither of them rendered a verdict. In consequence of which, the parties, by consent, transferred the cause to the district court, where it was docketed and tried. The jury found that the plaintiff was free, and assessed her damages to \$30: which she released. The judgment of the court was, that she should recover her freedom with costs of suit:" Affirmed.

*Winslow v. Beal*, 6 Call 44, April 1806. The deputy sheriff "distrained the slave [which had been conveyed to Beal in 1793] on the land of Hamilton in the year 1795, and sold him for the taxes" due from Hamilton. Held: [46] "the act of assembly gave him power to distrain the slave, if no other property could be found;"

*Moore v. Aylett*, 1 Hen. and M. 29, October 1806. In 1791 Moore agreed to lend Aylett the money to discharge an execution, to satisfy which certain negroes were about to be sold, "upon condition that Mary, one of the slaves, who was then with child, and had also a child in her arms, should be set up and purchased by him; that he should hold the slaves as a security" Moore "permitted them to return home after the sale, where they stayed eight or ten weeks, at the end of which time, seeing no prospect of the money being paid, he sent for them to his own house, where they remained twelve months, and then were sold."

*Austin v. Winston*, 1 Hen. and M. 33, October 1806. Austin [34] “proposed that his negroes should be sold under an execution for his debt, in lots, so that they might sell for little or nothing, and get some friend to buy them in for him: and that he . . . would become the purchaser, . . . Seventeen negroes were thus sold in lots, to satisfy a debt . . . actually reduced at the time to about 160 *l.* only. The sale amounted to 207 *l.* 15 *s.* and was publicly made September 20th, 1789:”

*Hudgins v. Wrights*, 1 Hen. and M. 134, November 1806. Hudgins, being about to send the appellees out of the state, “a writ of *ne exeat* was obtained from the Chancellor, on the ground that they were entitled to freedom. . . The time of the birth of the youngest was established by the testimony; and the characteristic features, the complexion, the hair and eyes, were proven to have been the same with those of whites. Their genealogy was traced back by the evidence taken in the cause . . . through female ancestors, to an old Indian called Butterwood Nan [who was 60 years, or upwards, in 1755] . . . her daughter Hannah had long black hair, was of the right Indian copper colour, and was generally called an Indian by the neighbours, who said she might recover her freedom, if she would sue for it; . . . [142] John, (a brother of Hannah,) brought a suit to recover his freedom; and that Hannah herself made an almost continual claim as to her right of freedom, insomuch that she was threatened to be whipped by her master for mentioning the subject.” On the hearing, [134] “the late Chancellor <sup>1</sup> perceiving from his own view, that the youngest of the appellees was perfectly white, and that there were gradual shades of difference in colour between the grand-mother, mother, and grand-daughter, (all of whom were before the Court,) and considering the evidence in the cause, determined that the appellees were entitled to their freedom; and, moreover, on the ground that freedom is the birth-right of every human being, which sentiment is strongly inculcated by the first article of our ‘political catechism,’ the bill of rights—he laid it down as a general position, that whenever one person claims to hold another in slavery, the *onus probandi* lies on the claimant.”

Decree that the Wrights are entitled to their freedom, affirmed: [141] “I do not concur with the Chancellor in his reasoning on the operation of the first clause of the Bill of Rights, which was notoriously framed with a cautious eye to this subject, and was meant to embrace the case of free citizens, or aliens only; and not by a side wind to overturn the rights of property, and give freedom to those very people whom we have been compelled from imperious circumstances to retain, generally, in the same state of bondage that they were in at the revolution, in which they had no concern, agency or interest. . . I heartily concur with him in pronouncing the appellees absolutely free;” [137] “By the adjudication of the General Court, in the case of Hannah and others against Davis, April term, 1777,<sup>2</sup> all American Indians brought into this country since the year 1705, and their descendants in the maternal line, are free. Similar judgments have been rendered in this court. But I carry the period

<sup>1</sup> George Wythe, who died June 8, 1806.

<sup>2</sup> Misprint for 1787. See *Hannah v. Davis*, p. 94, *supra*.



further back, viz. to the 16th day of April, 1691, the commencement of a session of the General Assembly, at which an act passed, entitled 'An Act for a free trade with Indians,' . . . [138] the enacting clause of which, I have reason to believe, is in the very words of the act of 1705, upon which this Court have pronounced judgment in the cases referred to. . . . On the trial of a similar question on the Eastern shore, two copies of Purvis's edition of the laws of Virginia, were produced. At the end of both<sup>1</sup> was added a manuscript transcript of all the acts . . . subsequently passed for a series of years; . . . In one<sup>2</sup> of these copies . . . evidently of ancient date, . . . I found the enacting clause in the same precise words, as they stand in the act of 1705.<sup>3</sup> . . . the acts of 1705, were . . . a digest of the former laws of the colony, rather than a new code." [St. George Tucker, J.]

Decree: [144] "This Court, not approving of the Chancellor's principles and reasoning in his decree . . . except so far as the same relates to white persons and native American Indians, but entirely disapproving thereof, so far as the same relates to native Africans and their descendants, who have been and are now held as slaves by the citizens of this state, and discovering no other error in the said decree, affirms the same."

*George v. Elliott*, 2 Hen. and M. 5, December 1806. "On the 9th of January, 1802, he [George] hired of Elliott a negro man for twelve months, . . . in a few days the negro was taken sick, and continued so, until about the 9th day of June, and then died."

Held: [6] "where one hires a slave for a year, that if the slave be sick, or run away, the tenant must pay the hire; but if the slave die without any fault in the tenant, the owner, and not the tenant, should lose the hire from the death of the slave, unless otherwise agreed upon. By pursuing this rule, the act of God falls on the owner, on whom it must have fallen if the slave had not been hired; from which time it would be unreasonable to allow the owner hire—Hire!—for what?—for a dead negro!"

*Henderson v. Allens*, 1 Hen. and M. 235, June 1807. "The plaintiffs Polly and Mima, were brought into this state in January, 1794, as slaves from Maryland," and sold to Henderson, a resident of Virginia. "In June following, the plaintiff Jenny was born. In October following, an application was made to this Court" and [237] "Henderson was prohibited from removing them." A suit which was instituted and prosecuted for the freedom of the plaintiffs, was dismissed in May 1800, and on the same day an order was made in these words: [236] "On the motion of James Breckenridge, gent. he is assigned counsel for Polly Allen, Mima Allen, and Jenny Allen, to commence and prosecute a suit against Alexander Henderson, who holds them in slavery, to recover their freedom, and it is ordered, the said Alexander Henderson, do not remove or abuse them, and it is further ordered, that the said Polly Allen, Mima Allen, and Jenny Allen, be taken into, and remain in the custody of the sheriff of Botetourt

<sup>1</sup> So it is in the copy of Purvis in the New York Public Library. Ed.

<sup>2</sup> "In the other copy, the leaf on which the act must have been transcribed, was . . . torn out: probably with a view to hide the act from the scrutinizing eye of a Court."

<sup>3</sup> See *Pallas v. Hill*, p. 116, *infra*.

County, till the said Alexander Henderson enters into bond with sufficient security, to the said James Breckenridge, in the penalty of one thousand dollars, to have them forthcoming, to answer the judgment of the Court: " By virtue of this order, " the present suit was instituted and prosecuted, the *capias* of which bears date the same day. . . the District Court decided, that the paupers should recover their freedom and the costs of suit."

[239] " Judgment reversed; verdict set aside and new trial awarded." Held: it was not proved " that the defendants in error were detained in this State twelve months, by the compulsion of the plaintiff, contrary to law." <sup>1</sup> " Henderson (being a party) was necessarily bound to take notice of the order of Court," [237] " That order continued in full operation till May, 1800. . . he was bound by it, and was not at liberty to remove the slaves out of the State."

*Garland v. Bugg*, 1 Hen. and M. 374, June 1807. Garland sold a negro woman with her two children to Bugg who, " by his deed in writing, . . did agree that the sale . . should be void . . if the said plaintiff [Bugg] should sell, hire, convey away, or otherwise divide the said slave from her two children, until they should respectively attain the age of ten years,"

*Pegram v. Isabell*, 1 Hen. and M. 387, July 1807. " Isabell, styling herself an Indian and a pauper, presented her petition to the Court . . praying to be permitted to prosecute her suit, *in forma pauperis*, for the recovery of her freedom, against Elizabeth Pegram who detained her in slavery. . . At the trial of the cause, the counsel for the plaintiff offered ' as conclusive evidence that Nanny (whom he proved to be the mother of the plaintiff) was entitled to her freedom, a record . . of a suit . . in which Nanny and others had recovered their freedom from a certain Stephen Mays:" The District Court gave judgment for the plaintiff, Isabell.

[390] " Verdict set aside and a new trial granted." <sup>2</sup> " the case stated and referred to in the verdict of the Jury, in this cause, was too imperfect for this Court to determine the question of law arising upon it."

*Whiting v. Daniel*, 1 Hen. and M. 390, July 1807. " Daniel and twenty-three others filed their bill . . stating that they were the only slaves of a certain Miss Mary Robinson, who on the 10th of March, 1803, made and published her will . . ' as I cannot satisfy my conscience to have my negro slaves separated from each other, and from their husbands and wives, . . I desire and will that the whole of them . . as far the law enables me to do it, be emancipated;'" She had previously deeded them to her nephew, Whiting. Whiting determined to remove the slaves to Georgia [393] " to prevent the machinations of those who inspired them with a belief that they were free" and [397] " embarked with them, (together with the overseer . . ) on board of a vessel for that purpose; but, having touched at the port of Norfolk, he was arrested by warrant from a magistrate on suspicion of having stolen the negroes."

<sup>1</sup> Act of 1792, sect. 2.

<sup>2</sup> See same *v.* same, p. 117, *infra*.

Decreed: [403] "that the appellees be delivered to the appellant as his proper slaves, and that the bill of the appellees be dismissed."

*Cooper v. Saunders*, 1 Hen. and M. 413, October 1807. On April 20, 1801, the county court "directed the overseers of the poor . . . to send to the City of Richmond for Billy and Jesse Cooper, two free boys of colour, who had been by them bound to Samuel Couch, . . . deceased, . . . On the 15th of June, 1801, it was ordered that the said boys be bound" to Hopkins and Saunders. "At August Term, the Court directed the said order to be rescinded, . . . because the said Billy and Jesse had been removed out of the said County more than twelve months before the time of making the order binding them to the said Saunders and Hopkins;"

*Patty and others (paupers) v. Colin*, 1 Hen. and M. 519, November 1807. Frances Timberlake emancipated her slaves by her will, dated 1794, and charged her land<sup>1</sup> with the payment of her debts. The land was sold by her administrator at less than half its value, after inadequate advertisement, and purchased by himself, before any judgment was obtained against her estate. The slaves were afterwards sold under an execution. On a bill brought by certain of them claiming the benefit of her will, and suggesting fraud in the management of her estate, it was unanimously decreed: that the land be resold, [528] "and, if . . . it shall appear . . . that there is sufficient of the estate . . . to satisfy and pay *all* the just debts . . . without recourse to the value of the complainants, . . . that then the said complainants be considered and declared free, reserving, nevertheless, leave to the other slaves who were objects of the benevolence of the said Frances, in her will, to become parties plaintiffs to this suit, and to assert an equal claim to their . . . emancipation, and to have the equal benefit of the estates . . . in accomplishing this purpose: If it cannot be wholly accomplished, that then the whole of the said slaves so claiming their freedom, and applying to be parties plaintiffs within a reasonable time . . . be sold for such term of years as may be sufficient to raise the adequate fund; and, if the whole value of them all be necessary, that then the bill be dismissed. And that, in the event of an adequate fund being found . . . and of the complainants being declared free, there be paid to the administratrix of Didier Colin fifty pounds, (the price by him paid for the said complainants,) . . . and that similar recompense . . . be made to the purchasers . . . of the other slaves who were objects of the said Frances' benevolence in her will, if there be sufficient of her estate" [Tucker, J.]

*Sale v. Roy*, 2 Hen. and M. 69, March 1808. [73] "James Micou, by his will, . . . 1781, bequeathed certain slaves to the children of Mungo Roy, whom he constituted his executor. In November, 1795, Mungo Roy advertised a sale of between twenty and thirty negroes at his plantation" Sale bought three of the negroes,<sup>1</sup> one of the legatees being present, and several months later, [79] "finding he had made an improvident purchase, . . . offered to give up the negroes to Roy the executor . . . under pretence of a defective title in the negroes:" [74] "Roy in his answer insisted

<sup>1</sup> [69] "Nanny, a woman, and Caroline and Aggy, her children, for the sum of ninety-two pounds,"

that he had a right to sell, and did sell the negroes to assist in the payment of his testator's debts; but does not allege any deficiency of other personal assets."

Held: [76] "the sale can never be impeached by them [the legatees], whether justified by a deficiency of the personal estate, or not." [Tucker, J.] If the executor [78] "sells a specific legacy, when there are other assets sufficient to pay all the debts of his testator, . . . he and his securities are alone responsible to the legatee; and the fair purchaser, for a valuable consideration, at a public sale, without notice, shall be quieted in his purchase." [Fleming, J.]

*Dawson v. Thruston*, 2 Hen. and M. 132, March 1808. "Dawson produced to the Court of Frederick County a deed of emancipation executed by himself as trustee of Robert Carter, deceased, to certain negroes therein named and prayed the Court to admit the same to record, and to certify on their record, that as many of the negroes (all of whom were then in presence of the Court) as appeared to their judgment to be so, were of sound mind and body; the males above the age of 21, and the females above the age of 18, and all under 45 years. . . . Carter's executor . . . moved the Court . . . to restrain Dawson, by injunction, from disposing of, or in any manner interfering with, such of the slaves referred to in Carter's deed of trust to him as were undisposed of at that time. The Court . . . awarded the injunction. Dawson again renewed his motion, as before, which was refused." Dawson obtained a conditional mandamus from the District Court, directed to the Justices of Frederick Court. [133] "The return recites the deed of trust from Carter to Dawson; which bears date the 8th of November, 1797, and is intended to provide for the gradual emancipation of the slaves therein conveyed. It vests in Dawson the right to sell a larger number of negroes for a term of years to raise a sum of money for the benefit of Carter, part of which was to be retained by Dawson for the use of the infirm negroes among those intended to be emancipated."

Held: the justices are [137] "merely ministerial to the proof and recording the deed: still, if any of the persons therein named are not entitled to their emancipation under the deed . . . , the acknowledgment and recording of Dawson's deed will not release them from slavery." [Tucker, J.] A peremptory writ of mandamus was awarded.

*Pallas, Bridget, James, Tabb, Hannah, Sam, and others (Indians and paupers) v. Hill and others*, 2 Hen. and M. 149, March 1808. "the plaintiffs exhibited the testimony of witnesses to prove them to be descendants in the maternal line of a native American Indian named Bess; . . . said Indian Bess was brought into Virginia in or about the year 1703. Whereupon the counsel for the plaintiffs moved the Court to instruct the Jury, that no native American Indian brought into Virginia since the year 1691, could, under any circumstances, be lawfully made a slave;" but "the Court refused so to instruct." Verdicts and judgments for the defendants. [150] "appeals were taken . . . as the question depended upon manuscript acts of assembly,<sup>1</sup> and property to a very considerable amount

<sup>1</sup> See foot-note, for Hening's account.



was involved in the decision, the Court took time . . . in order to obtain from the library at Monticello, the copy of a similar act, which was understood to be in the collection of the President of the United States." [157] "March 15, 1808. One of the reporters having, at the request of the Judges . . . procured from the library at Monticello, a copy of the MS act 'for a free trade with Indians,' this day submitted it to the Court. Judge Tucker observed that he required no further argument. Three copies of the same act agreeing in every essential point, had been produced: One from the eastern shore; one from Northumberland; and another from Monticello. Nothing but a miracle, or their being genuine, could have produced such a coincidence."

"March 22. . . Judge Tucker. The only question in these causes, is, whether the act of Assembly cited and relied on by me in *Hudgins v. Wrights*,<sup>1</sup> as having passed in the year 1691, is to be regarded as the law of the land, or not." All the judges concurred in holding that it was. [161] "Judgment [of the District Court] reversed, a new trial granted, with instructions conformably to the above opinion."

*Pegram v. Isabell*,<sup>2</sup> 2 Hen. and M. 193, March 1808. "The ground on which the appellee claimed her freedom, was, that she was descended in the maternal line from an Indian who had been imported into this " state since 1705, "on which ground, her mother Nanny had recovered her freedom of a certain Stephen Mayes, in the . . . District Court in the year 1799." Taylor [194] "proved that . . . in said suit, between Nanny and others, and Stephen Mayes, it was deposed by a witness . . . a very old man, who he believes . . . is since dead, that the said Nanny was descended according to general reputation, in the maternal line, from an Indian ancestor, who was imported into this state, since the year 1705;"

Ordered [211] "that a new trial be had . . . on which trial the record in the suit between Nanny and others and Stephen Mayes shall be admitted to go to the Jury as evidence that the said Nanny . . . was a free woman, or entitled to her freedom on the day of the emanation of the writ in that suit; leaving it open to both parties to shew, if they can, upon what ground the judgment in that suit was rendered; and also leaving it to them to shew, if they can, whether the plaintiff Isabell was born before or after the emanation of the writ in that suit."

[201] "In this country it [hearsay evidence] has always been admitted in pauper suits for freedom. . . [202] if she could be let in to prove the fact that her mother was a free woman by hearsay testimony, ought she not to be let in to prove it by a judgment? Since every judgment in favour of any person furnishes a conclusion in law, that the person obtaining it is free, and not a slave?" [Tucker, J.]

*Anderson v. Fox*, 2 Hen. and M. 245, April 1808. [247] "five, including Milley, and her children . . . had been sold for the payment of her debts; . . . one by the name of Phil, been a runaway for a considerable time, but . . . had been retaken, and would be sold for the benefit of the estate;" [249] "Milley, and her three children, Daniel, Aaron and Aggy,

<sup>1</sup> P. 112, *supra*.

<sup>2</sup> See same *v. same*, p. 114, *supra*.

were hired to Caty Anderson . . . who afterwards refused to return them; that the executor employed persons to retake them privately [(256) by stealth in the night-time], and so gained possession of Milley, Daniel and Aggy; that he advertised and sold Milley and Daniel, at public auction; became the purchaser himself at the price of sixty-one pounds; . . . that Milley ran away to Richard Anderson [husband of Caty]; as did also the other slaves who had been delivered and appraised . . . except Daniel, and Aggy who was afterwards sold by the executor to satisfy (as he alleged) further demands against the estate; . . . that Milley remained in the possession of [Richard Anderson] . . . until she had two children, which appeared to be twins, and was then, together with those children, taken and sold under the execution as before mentioned."

Held: [268] "if the said account should ascertain . . . that neither the said slave Milley, nor . . . was necessarily sold, or liable to be sold, for payment of the debts of the said testatrix, that then . . . the purchase of her by the said John Fox [the executor] should be held to be void;"

*Fitzhugh v. Anderson*, 2 Hen. and M. 289, April 1808. "William Fitzhugh, . . . about the year 1772, . . . put into the possession of his eldest son John, a number of slaves, amounting in the whole to about eighteen or twenty." A witness [293] "declares, that he was charged with a letter . . . to the said W. Fitzhugh, requesting his consent to the sale of a negro then in the possession of his son John; that W. F. throwing the letter in the fire, declared that he never had nor ever would consent to the sale of any of the negroes he had lent to his son John; that, during the time the witness lived with W. F. he was frequently importuned by different persons to solicit his consent to his son John's selling some of the negroes in his possession; but, from the agitation of mind always discovered by W. F. when the subject was mentioned, the witness was deterred therefrom."

*Upshaw v. Upshaw*, 2 Hen. and M. 381, April 1808. [393] "a just and reasonable allowance ought to be made her, for the support and maintenance of the aged, the children, and others that were unprofitable, . . . and for other incidental expenses which she may have incurred on their account; as I have been taught by experience, that the maintenance of a parcel of negroes, where a considerable proportion of them are breeding women, is rather expensive than profitable." [Fleming, J.]

*Kennedy v. Waller*, 2 Hen. and M. 413, May 1808. "An action of trespass *vi et armis* was brought . . . against Kennedy, for killing a slave, by shooting him." The jury found "for the plaintiffs four hundred and fifty dollars by way of damages,"

*Faulcon v. Harriss*, 2 Hen. and M. 550, May 1808. Harris purchased, in 1782, a tract of land, for which he agreed to pay "1,000 *l.* specie, or such further sum as shall be equal to the said 1,000 *l.* in the year 1774, that is to say, to purchase as much land and negroes, as it might have done in ready money, at the aforesaid time," The plaintiff proved by one witness, [552] "that the sum of 1,000 *l.* specie in the year 1782, 1783, 1784, 1785, 1786, and 1787, (within which years the several bonds became due,) . . . would

only be sufficient to purchase half as much land, or half as many slaves, as that sum would have purchased in 1774."

*Murdock v. Hunter*, 17 Fed. Cas. 1013 (1 Brockenbrough 135), May 1808. [137] "many of the negroes of the estate [of William Hunter] were carried away by the British troops, during the Revolutionary War, and have never since been heard of,"

*Sarah (a woman of colour) v. Henry*, 2 Hen. and M. 19, June 1808. "The plaintiff obtained an injunction to restrain the defendant from carrying her out of the commonwealth, asserting her right to freedom, . . . She was ordered to be kept by the serjeant of the city of Richmond, unless the defendant would give bond and security for her forthcoming. This he failed to do,"

Held: [20] "the plaintiff has mistaken her case. It has already been decided at law, . . . the defendant was bound for her expenses [while in the custody of the serjeant], as he might have retained her in his possession, upon complying with the conditions of the order, and avoided any expense."

*Corbin v. Southgate*, 3 Hen. and M. 319, March 1809. "Harwood sold a negro slave . . . for 130 barrels of corn,"

*Bates v. Holman*, 3 Hen. and M. 502, April 1809. "Charles Fleming Bates, attorney at law, at that time an unmarried man, on the 16th of November, 1799, made the following will: . . . [503] 'that Isaac, my slave, shall be free, at all events, at twenty-one years of age; and my slave Charlotte shall also be free at eighteen years of age.' . . . On the 23d of September, 1801, he annexed a codicil . . . 'as to Isaac and Charlotte, I revoke the preceding part of my will,' . . . On the 2d of September, 1803, he made another will, . . . [504] 'I have a daughter called Clemensa,<sup>1</sup> at Walter Keeble's, in Cumberland, I declare her to be free to every right and privilege which she can enjoy by the laws of Virginia. I most particularly direct, that she be educated in the best manner that ladies are educated in Virginia. I give her my lot in the town of Cartersville, and three hundred dollars, to be laid out at interest, renewed yearly, and paid when she marry or come of age.'" The testator's father died in 1805 and a year later he married the appellant. [541] "he therefore carefully cancelled the latter [will], by cutting out the signature of his name at the bottom of it, and let remain a little to the left of the signature cut out, the following words, to wit, 'I revoke all other wills heretofore made by me,' signed 'C. F. Bates,' all in his own hand-writing;" Clarkson, [546] "a respectable farmer," proved that Bates put the child Clemensa to board with him in 1805, "and it was then living at the house of the witness; that the testator furnished it with clothes, and regularly paid its board; that when he brought the child to the witness's house, he told him that her father's name was George Alexander Stevens Trueheart; that she was then about four years old, and when she was eight he intended to send her

<sup>1</sup> [546] "his natural daughter, who, together with her future offspring, the law has doomed to perpetual slavery, to her nearest blood relations, unless emancipated by their clemency;" [Fleming, J.]

to Bethlehem College, in Pennsylvania,<sup>1</sup> till her education should be as complete as any lady's in the country, and that afterwards he would make her fortune at least five hundred pounds."

*Spotswood v. Dandridge*, 4 Hen. and M. 139, October 1809. "Major General Alexander Spotswood . . [140] devised to his son and heir, John Spotswood, all his lands and working slaves in tail male, with several remainders over, and also all the tradesmen and servants who should be employed, or, in any way, used in and upon his mine tract of land at the time of his death; . . the said John Spotswood gave to his sister Dorothea [Dandridge], a negro woman named Molly, who, proving pregnant some time after, was received by him and replaced by another, called Mary Ann, who was one of the entailed slaves; . . Mary Ann and her children, at the request of Dandridge, were permitted . . to remain in his possession, she being the wife of a negro man belonging to him; the said Dandridge agreeing to pay hire for her;"

*Atwill v. Milton*, 4 Hen. and M. 253, October 1809. "1783, in consideration of 85 l. sold and delivered . . a certain negro boy;"

*Alexandria v. Chapman*, 4 Hen. and M. 270, November 1809. [273] "Chapman had four slaves in Alexandria, three of whom were hired by the year, . . and the fourth was permitted to hire himself,"

*Reno v. Davis*, 4 Hen. and M. 283, November 1809. Will of Francis Reno: "I give and bequeath to my daughter Jane Reno a negro woman and her increase, named Sib, . . [284] also a negro wench named Delph, . . and her increase . . It is my will that Bob and James and Kate shall be sold or hired to them that they like," [285] "Bailis Reno . . was certain it was his father's intention that . . Jane should not only have Sib and Delph, but also all the children that they might have from the time of making his will afterwards, because, whenever the said slave Sib was delivered of a child, and application was made by the midwife for pay, he sent her to Jane, saying that Sib was her property."

Held: "in this case it was the intention of the testator to pass all the infant children. . . in a case of doubt, the law of humanity ought to turn the scale, and prevent the separation of the children from their mother." [Roane, J.]

*Brown v. May*, 1 Munford 288, May 1810. "the plaintiff [May] had given a general permission to Brown . . to visit his negro quarters, and to chastise any of his slaves who might be found acting improperly; . . the act of beating the plaintiff's slaves . . had been committed in the presence of Brown by the defendant Boisseau, to whom . . no such permission had been given."

*Mooberry v. Marye*, 2 Munford 453, May 1811. Will of James Marye, dated 1774: the eleventh clause directed a negro woman to be sold in payment of his debts. [455] "The 15th . . in case any of my land should be sold, I desire that it may be the part of the tract whereon I live, . . which I rather should be sold than any of my negroes."

<sup>1</sup> [546] "where there is, perhaps, the best seminary for female education, in the United States." [Fleming, J.]



*Hughes v. Hughes*, 2 Munford 209, June 1811. The will of Ann Hughes, dated 1804, [210] "emancipated all her slaves, (by name,) and devised to Fanny, Henderson and Tinsley, (three of them,) twenty-eight acres of land; . . . to Polly and Henderson (two of the negroes) a bed and furniture; to the negroes, for their support, all the provisions on hand at the time of her death, and the growing crop. . . . By the codicil, she emancipated three negro children, . . . bequeathed to Henry and Polly (two of the negroes) each a cow;"

*Hook v. Nanny Pagee and her children*, 2 Munford 379, June 1811. "In a suit for freedom, the jury returned a verdict in the following words: 'We of the jury find that the plaintiff Nanny Pagee was brought into . . . Virginia from . . . North Carolina, by Thomas Jones, subsequent to the fifth of October, 1778; that if the said plaintiff was a slave, it doth not appear to the jury that the said Thomas Jones did comply with the provisions of the act, entitled 'An act for preventing the further importation of slaves.'"<sup>1</sup> We of the jury also find, from inspection, that the said plaintiff Nanny Pagee is a white woman. We of the jury, therefore, find that the plaintiffs are free persons and not slaves; and we find for them one penny damages.' Judgment for the plaintiffs, and appeal."

Judgment affirmed: [383] "Nanny was imported about the year 1780, or 1781; that the defendant purchased her at a sheriff's sale, to satisfy his own debt, at which time it was rumoured that she was free, and others thereby were deterred from bidding, so as to put him on his guard; that this suit had been depending about five years from its institution, until the verdict aforesaid was found; . . . notwithstanding, too, the *prima facie* evidence, from complexion, that this woman was free, (a circumstance well calculated to produce early inquiry and scrutiny,) there is not a particle of testimony going to prove . . . that Jones ever went to a magistrate to take the oath;" [Coalter, J.] [386] "In the case of *Hudgins v. Wrights*,<sup>2</sup> it is laid down, that where *white* persons are claimed as slaves, the *onus probandi* lies upon the claimant. . . . [387] the finding of the jury that, from inspection, the said plaintiff, Nanny Pagee, is a *white* woman . . . was quite sufficient; it being incumbent on the defendant to have proved, if he could, that the plaintiff was descended in the maternal line from a slave. Having not proved it, she and her children must be considered free." [Brooke, J.]

*Murray (a pauper) v. M'Carty*, 2 Munford 393, June 1811. Daniel M'Carty, a citizen of Virginia, married in 1800, before he was of age, and went to Maryland, [394] "where he continued between three and four years, living in the family of his wife's father; . . . in . . . 1803, the plaintiff, who had been purchased by the defendant in Maryland, was, at her own request, sent over by the defendant to Virginia, to the family of the defendant's mother, there to remain during her lying-in;" in March 1804 [395] "he and his family again returned to Virginia, and went to house-keeping; that, on the 24th day of April, 1804, the defendant took the following oath before a justice of the peace . . . : 'I Daniel M'Carty do

<sup>1</sup> Act of October 1778. 9 Hen. 471.

<sup>2</sup> P. 112, *supra*.

swear that my removal into the state of Virginia was with no intent of evading the laws for preventing the further importation of slaves; nor have I brought with me any slaves with an intention of selling them, nor have any of the slaves which I have brought with me been imported from Africa, or any of the West India islands, since the first day of November, 1778.' That the plaintiff had continued and remained in the state of Virginia, for one whole year, since her removal into it in the month of June, or July, 1803, and previous to the commencement of this suit." The defendant voted in 1803 and 1804 at the elections for delegates to the general assembly of Virginia.

Judgments of both courts (county and district) reversed, and judgment rendered in favor of the appellant, for her freedom. The proviso in the 4th section of the act of 1792, concerning importation of slaves from other states of the union, did not authorize such importation by citizens of this commonwealth, returning thereto, after a temporary residence elsewhere, without having made a permanent settlement in, or become citizens of, the state from which the slaves were imported.

*Commonwealth v. Dolly Chapple*, 1 Va. Ca. 184, June 1811. The prisoner was indicted for the malicious stabbing of a slave and was found guilty.

Held: [186] "an indictment for the malicious stabbing of a slave can be supported under the third section of the act passed the 28th of January, 1803," [185] "a slave in this country has been frequently decided to be legally and technically a person, on whom a wrong can be inflicted; that the giving a portion of the fine to the party grieved was intended to benefit him, and that his incapacity to take, ought not to skreen the prisoner from punishment: "

*Holladay v. Littlepage*, 2 Munford 539, November 1811. The verdict was, "that . . . the said Amy is of the price of 100. l. . . the said Maria [child of Amy] of the price of 50 l."

*Chaney v. Saunders*, 3 Munford 51, November 1811. [52] "objection to the reading of the deposition was then taken, on the ground that Nicholas Smith, the maternal grandfather of the said John Rose was a negro. . . the court refused to permit the reading of the deposition."

*McCargo v. Callicott*, 2 Munford 501, February 1812. Held: when a widow marries again, the slaves which she held for the term of her life, as part of the estate of her first husband, belong to her second husband and his representatives until her death.

*Patton v. Williams*, 3 Munford 59, February 1812. Will of Mann Page, dated 1780: "I give . . . a negro man Jack, value one hundred and thirty pounds; "

*Gay v. Moseley*, 2 Munford 543, March 1812. Held: [545] "that the female ancestor of the slave in the declaration mentioned having been loaned by David Mead to Rolfe Eldridge, and the said Rolfe Eldridge having remained in possession of the said slave more than five years since the commencement of the act to prevent frauds and perjuries,<sup>1</sup> without

<sup>1</sup> 1 Rev. Code, c. 10, sect. 2.

any demand made on the part of the lender; and the deed, under which the appellant claims the said slave, in trust for the benefit of Susannah Eldridge, not having been duly recorded in any court contemplated by that act, the same is not competent to do away the effect of such possession enuring in favour of the creditors of, or purchasers under, the said Rolfe Eldridge;”

*Randolph v. Randolph*, 3 Munford 99, March 1812. “William Randolph . . . in December, 1806, . . . made a conditional sale of a negro boy, by the name of Horatio, to Isham Randolph, for 110 *l.* to be paid, 200 dollars part thereof out of the said Isham’s then crop of tobacco, and the balance out of his ensuing crop;”

*Mortimer v. Brumfield*, 3 Munford 122, April 1812. “action of detinue . . . for a negro man slave, by the name of Tom, . . . [123] at the trial, . . . 1809, the plaintiff [Charles Brumfield] offered in evidence the affidavit of Mary Sullivan; . . . proving, that ‘about 23 years since, Charles Mortimer, the father of the defendant, Adam Hunter, and the affiant, stood sponsors for the plaintiff at his christening; (he being then not more than two months old;) and the said Charles Mortimer named him after himself; that the day after the christening, the said Charles Mortimer brought a little negro boy named Tom, to Mrs. Brumfield’s (the mother of said plaintiff,) and, in the presence of the affiant, Mrs. Willis, Mrs. Carter, and Nancy Mortimer, observed, that he had brought said negro boy as a present to his god-son, and he left said boy with Mrs. Brumfield, for her son, the plaintiff; the negro boy was then very small, not more than two years old, and appeared to be weakly: Mrs. Brumfield raised the said boy until she removed to Charleston, which was about six or seven years after: upon Mrs. Brumfield’s removal to Charleston, the boy was left in the possession of the said Charles Mortimer,” after whose death, “about eight years since,” his son (the defendant) took possession of the slave and sold him after the institution of this suit. [124] “The plaintiff also offered evidence to prove the value of the slave to be 105 *l.* and that his hires, since he came to the possession of the defendant, were of the value of 108 *l.*”

Judgment for the plaintiff, affirmed.

*M’Call v. Peachy*, 3 Munford 288, December 1812. Will of Dr. Nicholas Flood, dated 1774: [291 n.] “I desire, that all the wool which may be yearly produced from my sheep, may be delivered to her [my wife], and that she will have the same spun up by her house servants, or with the occasional assistance of one of the negro women who may work out; and that it be wove and appropriated to the clothing of the slaves which are set apart for her use, as well as for clothing my other slaves; . . . I likewise give unto her . . . a proportionable part of the clothing that is laid in for the slaves; and that she divide them according to the good behaviour of all my said slaves; . . . [292 n.] all such moneys as may arise by the sale of any of my slaves, that may turn out too roguish, runaways, obstinate, or irreclaimable, to be made to do their duty, (which sort of slaves I hereby empower my said executors, in their discretion, to make sale of,) . . . shall be placed out at interest”

[295] "an article ought to be allowed . . . if it be of such a nature . . . that a voucher for it, perhaps, could not have been procured: for example, . . . services performed by William Peachy's carpenter," [Wythe, Ch.] [296] "on the 21st of May, 1798, the Court of Appeals pronounced the following opinion: 'It appears by the will of Dr. Nicholas Flood, . . . that it was his desire his widow should live . . . "as happy as possible;" and that his executors should have as little trouble as possible in the management of his estate; and that his knowing (as it may be reasonably supposed) the turbulent and vicious dispositions of his slaves, was the reason of his empowering his executors to dispose of such of them as were, or should prove, roguish, runaways, obstinate, or irreclaimable, lest, contrary to his intent and meaning, they should disturb the peace and happiness of his widow, or give trouble to his executors; . . . [297] and it appearing, from the testimony of witnesses, as well as from the answer of the widow, . . . that *all* the slaves sold by the appellee, . . . as administrator, were of that description, except two young children, who could not, with humanity, (and ought not, on that account, to) have been separated from their mothers; and that the said slaves were sold . . . at the express desire . . . of the said widow; . . . this Court is of opinion, that the said appellee should not account for . . . more than the real amount of the sales,"

*Williams v. Moore*, 3 Munford 310, December 1812. Moore agreed to buy of Williams "a negro woman slave, named Peg, at the price of 300 dollars, on condition that, if the defendant did not like the said slave, he was to return her . . . in the space of two or three weeks; . . . upon the 6th day of February, 1807, by being exposed to the severity of the weather, her hands were so frozen that she lost several of her fingers, . . . and thereupon the defendant refused to keep the said negro,"

Held: [313] "if the injury of the slave . . . was not imputable to the neglect of the appellee, he would not be responsible therefor, unless he expressly agreed to be so liable; . . . he is only bound . . . for ordinary care "

*Broadfoot v. Dyer*, 3 Munford 350, January 1813. "an agreement under seal, dated the 2d of June, 1797, . . . setting forth that the said John Finney [much involved in debt] did bind the following negroes to the said William Dyer, to wit, Ned, aged eight years, Rebecca, aged five years, and Pleasant, aged three years; until they should each, and severally, arrive to the age of twenty-one years; upon condition, that the said William Dyer should treat them in a lawful and humane manner; and if the said William Dyer should die, or remove from the county, the aforesaid negroes should be treated equally well, or it should remain optional with the said Finney, whether the aforesaid negroes should continue any longer in the said service."

Held: [351] "the deed . . . having been made by a person indebted at the time, being grounded on no valuable consideration, . . . [352] and having imposed no conditions even in favour of the slaves themselves, other than such as are imposed by the principles of law and humanity,



upon every just and humane master, . . . ought to be considered, in relation to the appellant, one of the creditors of the grantor, as a *voluntary deed*;" [Roane, J.]

*Wilson v. Butler*, 3 Munford 559, February 1813. [560] "a *feri facias* was levied on several of the slaves conveyed in trust . . . The object of the bill was . . . to prevent a sale of those slaves; the plaintiffs suggesting, that although they might, as trustees, perhaps, recover their *value* at law, yet that would defeat the very objects of the trust, as the *hire* of slaves greatly exceeds the interest of the *purchase money*, which was one of the strongest motives of the donors for investing the money in the said slaves; . . . [563] The Court of chancery granted the injunction, and [a few days later] . . . dissolved it;" [565] "injunction reinstated,"

*Laughlin v. Flood*, 3 Munford 255, March 1814. The plaintiff "engaged [in 1795] to attend carefully, as an overseer, on the plantation of [Thacher Washington] . . . for a year, and was to have the management of twenty-six working hands: for these services [Washington] . . . was to pay him at the close of the year, one twelfth part of all grain made on the plantation; (after deducting the seed;) oats excepted. . . . [256] the second jury found for the plaintiff 385 dollars 50 cents damages;" Among other things, Washington also agreed [260] "to give him a certain specified allowance of provisions for the support of his family,"

*Butt v. Rachel and others*, 4 Munford 209, March 1814. "the plaintiffs claimed their freedom upon the ground of their being the descendants of Paupouse, a native American female Indian, who was brought into Virginia about the year 1747; . . . the defendant, (who claimed . . . [210] the said Indian . . . to be a slave, and held as such in the island of Jamaica, . . . and brought . . . into Virginia as a slave, about the year 1747,) moved the court to instruct the jury that a native American Indian, held in Jamaica as a slave, under the laws of that Island, and imported into Virginia . . . in . . . 1747, might be lawfully held as a slave in Virginia, notwithstanding such person was a native American indian; which instruction the court refused to give; . . . verdict and judgment for the plaintiffs; from which the defendant appealed. Wickham for the appellant. . . . The scope . . . of the act of 1691,<sup>1</sup> although in words it established free trade with all Indians '*whatsoever*,' was plainly to do away the preceding restraining acts, without contemplating foreign Indians, with whom the people of this country had no trade or connection. . . . [211] The word 'American,' [in *Jenkins v. Tom*]<sup>2</sup> . . . is ambiguous, and used, in its limited sense, to mean Indians in that part of America having intercourse with, or neighbouring to Virginia. No such word is found in any of the laws." Wirt for the appellees: [212] "Admit Mr. Wickham's construction of the word 'American;' the Indian woman Paupouse is declared by the bill of exceptions to have been a 'native American Indian,' carried from this country to Jamaica, and brought hither from that island." Wickham in reply: [213] "it is not so stated in the bill of exceptions.

<sup>1</sup> 3 Hen. 69.

<sup>2</sup> See p. 99, *supra*.

. . 'native American Indian' may signify a native of Jamaica, . . What I contend for is, that all persons, to whom the general provisions of our slave laws apply, may be slaves here, provided they were slaves by the laws of the country from which they are brought hither. I admit that an Indian native of Virginia, carried thence to Jamaica, and brought back, would be free, by the very terms of the law."

Judgment affirmed.

*Ross v. Woodville*, 4 Munford 324, January 1815. The Rev. James Stevenson appointed "his . . attornies, to make sale of the whole of his lands, negroes and other estate, . . in order that a division . . might take place between his children,"

*Fowler v. Lee*, 4 Munford 373, March 1815. [374] "sold [in 1809] . . one negro girl, named Patience, for and in consideration of 83½ acres of land, at four dollars per acre;"

*Bond v. Ross*, 3 Fed. Cas. 842 (Brockenbrough 316), November 1815. In 1807 [843] "Ross executed a deed of mortgage to . . Mewburn . . covering a very large number of slaves, . . which slaves were usually employed on an estate, called the 'Oxford Iron Works,' belonging to said Ross, in the county of Campbell, and state of Virginia. This deed was executed in the city of Richmond, where David Ross then lived, and was recorded in the county court of Campbell. . . several years after . . Bond [to whom Ross owed a large sum of money in 1804], sued out a writ of *feri facias*, against the goods and chattels of David Ross, . . which was executed upon the slaves covered by the mortgage deed to Mewburn . . The slaves were exposed for sale, and the sale was forbidden by Mewburn."

Held: the deed of mortgage to Mewburn was void as to creditors, not having been recorded in the county where the grantor lived: [844] "The slave, shifted, according to the caprice of the master, from plantation to plantation, or hired, sometimes in one county, and sometimes in another, has no place of residence, sufficiently certain and fixed, to furnish a safe guide for the court, in which a lien upon him should be recorded." [Marshall, C. J.]

*Lightfoot v. Colgin*, 5 Munford 42, February 1816. William Lightfoot, in 1809, conveyed to Allen, in trust, all his slaves except seventy-five. [45] "140 of his slaves were brought to his house, valued by Wm. Allen, and divided between the two sons . . but not removed."

*Isaac v. Johnson*, 5 Munford 95, February 1816. "a suit at law, *in forma pauperis*, was instituted November 13th, 1797, in behalf of Isaac, a negro man, claiming freedom, against Peter Corbell, . ." The jury could not agree, and at a subsequent term, May 1799, another jury found that Isaac was a slave. On the first trial, [96] "Johnson himself was a material witness in favour of the plaintiff, but failed to attend at the last trial when (the plaintiff's counsel having moved for a continuance, which the court refused), the verdict was found against him; after which, Johnson bought him of Corbell, with full knowledge of all the circumstances; that, in fact, he had been unlawfully imported from South-Carolina, and

kept in this state more than twelve months." Isaac [95] "preferred another petition . . for permission to bring a suit against Johnson, to try his right to freedom a second time; . . [96] he also filed a bill in the superior court of chancery" The cause was heard in 1811 and the bill dismissed. "A non-suit was soon after suffered in the suit at law; and, on the 9th of June, 1812, another suit in chancery was brought, on Isaac's behalf in the county court . . [97] and the court [in 1814] awarded a new trial at law, . . In March, 1815, a jury . . found a verdict, 'that the pauper, Isaac, is not a slave, but a freeman,' which was ordered to be certified to the chancery side of the court. The 6th of May following, it was decreed . . 'that the pauper Isaac recover his freedom;' . . Upon an appeal to the superior court of chancery, . . this decree was reversed, . . whereupon Isaac appealed to this court. Wickham for the appellant. No counsel appeared for the appellee. February 22d, 1816, the president pronounced the court's opinion that the decree of the superior court of chancery be reversed, and that of the county court [in favor of Isaac's freedom] affirmed."

*Scott v. Halliday*, 5 Munford 103, March 1816. Edward Davis, who died in 1806, bequeathed certain slaves to Martha E. Davis. A judgment was obtained against the administrator *de bonis non* of Davis, and [105] "a writ of *feri facias* . . was levied on three slaves of Martha E. Davis," who [107] "had been duly allotted to her . . by . . the executor . . and had been hired out by [him] . . as her guardian . . order, dissolving the injunction [to stop the sale] . . reversed."

*Sampson v. Bryce*, 5 Munford 175, October 1816. "The object of the Bill . . was to prevent the sale by the Sheriff, under an Execution . . of certain slaves, which had been [specifically] bequeathed . . and delivered . . by the executors . . an Injunction was awarded. . . perpetuated"

*Hudson v. Hudson*, 5 Munford 180, October 1816. [181] "the five negro men [in 1809] . . were worth 670 *l.* and would have sold, to the highest bidder, for much more, . . [182] certain plains (for negro clothing) purchased in 1802 . . were damaged, and of *no value*,"<sup>1</sup>

*Kendall v. Kendall*, 5 Munford 272, November 1816. "John Kendall, by his Will, after bequeathing his slaves to his wife, during her life, directed such of them as, at the time of her death, should have attained the age of twenty-five years, to be considered as free. . . [273] On the day of his death he caused a Codicil to be annexed . . 'I hereby annul and revoke those parts of the within Will, which relate to the liberation of my Negroes.'"

*Travis v. Claiborne*, 5 Munford 435, February 1817. Drummond conveyed a slave to the plaintiff to secure payment of a debt. Afterwards [436] "the defendant carried the said slave, as agent for the said Drummond, to some part of the western country, and sold him under a contract to that effect, for a commission of twelve and a half per cent. on the amount of the sale,"

<sup>1</sup> "Note. . . the overseer . . considered them of no value; and objected to receiving them; but the negroes were clothed with them, and possibly they might have been worth what was given for them by the administrator."

*Harris v. Nicholas*, 5 Munford 483, March 1817. Covenant under seal: "For the hire of four Negro fellows the present year, who are to be returned well cloathed on or before the 25th of December, I promise to pay Frederick Harris at that time the sum of two hundred and eighty dollars;" dated January 6, 1812. Nicholas [484] "delivered the negro fellow Joe . . into the possession of a certain John Patterson, to labour on his plantation;" whose overseer, Thilman, "so unlawfully, cruelly, and excessively beat and whipped the said slave Joe . . that the said slave afterwards died"

Held: [490] "the Appellee would not be held liable under the facts . . as the act of the said Thilman, which caused the death of the said Negro, was neither authorized by the Appellee, nor committed in the usual and proper course of his duty, as such; but was a wilful and unauthorized trespass."

*Garnett v. Sam and Phillis*, 5 Munford 542, April 1817. "On the trial . . in an action for freedom instituted in July, 1811, . . the plaintiffs offered in evidence two affidavits, shewing that they were brought into this State, by water, in the month of June 1787, according to one, and between 1787 and 1790, according to the other; that a Mr. Peck, who moved from the State of New Jersey to Virginia, said that he had brought them with him; that he treated Sam more like a white man than a slave; that he said, that Sam was as free as he was, and acted as his Overseer; that he had lived with him in New-Jersey; and that he and his family (Phillis being his wife) had agreed to come to Virginia in consequence of their mutual attachment."

Held: [545] "the right of freedom, *prima facie* acquired by the Appellees by such alleged importation, could only be obviated by evidence" that "the Oath, prescribed by the 4th section of the Act of 1792, (1 R. C. ch. 103,) has been duly taken" by the appellant. [546] "upon the new trial, the declarations of Peck . . are to be withheld from the Jury, as it does not appear . . that those declarations were made during the time, in which the said Peck claimed the Appellees, nor that the Appellant claims under him;"

*Lemon v. Reynolds*, 5 Munford 552, April 1817. Will of Joseph Holmes, dated 1811: [553] "it is my will and desire that my negro man Lemon shall have and enjoy his freedom after my death; and, for his attention and friendship during my illness, that he shall have my sorrel horse, with a saddle and bridle, and ten dollars in cash;" The "said paper writing was destroyed . . by inadvertency" and "a Writing, purporting to be a Copy" was admitted to record. The administrator "forcibly took possession of the plaintiff, . . and detained him in slavery . . the County Court gave Judgment for the plaintiff; but . . the same was reversed" by the superior court of law.

The [554] "Copy containing a clause . . which entitles the Appellant to recover his freedom," the judgment of the superior court was reversed, and that of the county court affirmed.

*South v. Solomon*, 6 Munford 12, October 1817. "the appellees, who were slaves unlawfully brought from North Carolina into this Common-



wealth, and kept therein more than a year, by the appellant, who had in them a life estate only,"

Held: they are not entitled to freedom: [13] "the 2d. section of the Act of 1792, ch. 103, only extends to cases of slaves brought in by the absolute owner of them, and not to such as are brought in by wrong doers, or by those having only a limited interest in them."

*Blakey v. Newby*, 6 Munford 64, January 1818. [66] "one of the slaves, a negro boy, was sent to John Chowning's . . . as a nurse, and stayed there twelve months, and then was carried back to see the said boy's mother at Newby's plantation; shortly after which, the said Newby died; and then all the said slaves absconded, and went to Churchill Blakey, administrator of his wife, Anne Chowning."

*Abraham v. Matthews*, 6 Munford 159, February 1818. Held: "in the case of slaves brought into this State, from any of the United States, before the Act of 1792, the fact of the master's having taken the oath required by law within ten days after removal, would be presumed from a lapse of twenty years possession without claim of freedom on the part of the slave; so as to throw the *onus probandi* on the plaintiff suing for freedom; but this presumption might be met or avoided by circumstances." Infancy is "a circumstance, the weight and effect of which should be left" to the jury. Judgment for the defendant affirmed.

*William and Mary College v. Hodgson*, 6 Munford 163, March 1818. "William Ludwell Lee of Green-Spring in James City County, by his last Will, devised and bequeathed to the President, Masters and Professors of William and Mary College, and their successors . . . five hundred Winchester Bushels of Indian Corn . . . annually . . . for the use . . . of a free school to be established in the centre of James City County . . . one thousand acres of the Hot Water Tract of Land . . . to stand pledged forever, for the full . . . execution of this devise;" will of William L. Lee: [164] "my will and desire is, that all my negro slaves may, on the first day of January next, be emancipated; that those who have arrived at the age of puberty, and who chuse it, may be allowed to settle on such part of my Hot Water lands as my executors may designate, where I wish comfortable houses to be built for them at the expence of my estate, with a sufficiency of Indian corn to be allowed from the same for their support for one year, and that they be allowed to retain such tenements and settlements, for ten years, free from any rent or charge whatever. I give to Joe a Blacksmith all the tools in my blacksmith's shop, with the use of the shop, free from rent, during his natural life. All those under age of eighteen years, I request my executors to remove to some one of the United States North of the Potowmac, where they may receive such an education as may be suited to their several capacities, at the expence of my estate; by which I trust they may be enabled to acquire an honest and comfortable support." "The President and Professors of William and Mary College filed their Bill . . . [165] contending that the estate generally was liable for the annual delivery of the Corn" Bill dismissed: "the 500 bushels of Indian corn devised . . . for the use and benefit of a free school . . . should

be charged . . not on the whole estate . . lest it might deprive some or all of the manumitted slaves of the testator of that liberty secured to them by his benevolence and humanity, which is supposed to have been an act no less meritorious than the establishment of a free school;" [Taylor, Ch.]

*Peggy and Mary v. Legg*, 6 Munford 229, November 1818. Suit for freedom. "Peggy was the daughter of Lucy, a slave who belonged to William Carr," who died in 1790. "After bequeathing Lucy to his son John Carr, he added; 'My will and desire is, that the negroes bequeathed to my dear children should remain with my dear wife during her life, unless she should marry: in that case, my will and desire is, that my slaves should go immediately to those to whom they are devised, and that none of them be sold out of the families to whom devised; if offered for sale, by any of them, out of the family of my wife, my daughter and sons, that they be immediately liberated, and I do hereby desire they may be free to all intents and purposes.' John Carr, under the devise, had possession of Lucy, of whom, while in his possession, Peggy was born. He died intestate, and Margaret Tebbs, daughter of Betsy Tebbs who was the testator's daughter, came into possession of Peggy. Margaret Tebbs married Thomas Triplett who sold Peggy to Nathaniel Legg, (a stranger not connected with the Carr family,) on condition that he would take her out of Virginia."

Judgment for the defendant. [230] "The plaintiffs appealed. Gilmer for the appellants . . [231] the condition annexed to the bequest of these slaves does not create a perpetuity; for . . alienation is permitted, to persons of the same family," But "the Court affirmed the Judgment."

*Ervine v. Dotton*, 6 Munford 231, November 1818. In 1803, a negro woman was sold for two hundred and seventy dollars.

*Mercer v. Commonwealth*, 2 Va. Ca. 144, November 1818. [145] "The free man sold by the prisoner was of full age, and was sold by his own consent, to the purchaser, under a collusive contract between the prisoner and the person sold, that they should divide the proceeds of the sale between them: the free man sold, was not proved to be either a negro or mulatto, but by one witness, who said he had heard that he was the offspring of a white woman by an Indian. The purchase money paid for him was afterwards returned by the prisoner to the purchaser."

Held: this is not such a sale of a free negro for a slave, as is made felony by the statute of 1787.

*Selden v. Coalter*, 2 Va. Ca. 553, November 1818. Will bequeathing many slaves in families. Valuation of some of the slaves [555] "appropriated to the payment of debts:" three men, \$350 each; "Toney, Hannah, and three children, . . 900; Will and Jenny, . . 500; Nelly and two children, 500; Sally and two children, . . 400; Mary, . . 350; Old Charles, . . 200; Old Quay, . . 200; Dick and his Mule team, . . 1,000." [559] "About a week or ten days before the death of Col. Selden, he sent for the deponent, and requested him to purchase for him a small piece of

land adjoining the Mill-Farm belonging to a coloured man, assigning as a reason, that he did not wish the family of that person to be so near his son Joseph."

*Ellison v. Woody*, 6 Munford 368, April 1819. Micajah Woody, by his will, dated 1771, lent to his wife all his estate during her widowhood. He gave [369] "to his daughter Agatha Woody, the first negro child his negro woman, named Beck, raised, . . . to his son William Woody, the said negro woman Beck;" all the rest of his estate, "not herein particularly before given," to be equally divided among his children. [371] "shewing . . . that he considered the progeny of Beck, whom he knew to be a young breeding woman, as one of the means of providing for his other children,"

Held: Agatha Woody is entitled to the first child of Beck that is raised, whether born before or after the testator's death. The rest of Beck's increase born before the testator's death pass by the residuary clause: such increase, born after the death of the testator, and during the life of the widow, belong to the remainder-man, William Woody.

*Commonwealth v. Cohen*, 2 Va. Ca. 158, June 1819. "The prisoner was indicted, tried, and convicted . . . of murder in the second degree, of a slave:"

*The Caroline*, 5 Fed. Cas. 90 (1 Brockenbrough 384), November, 1819. [91] "The *Caroline* was seized, as being forfeited to the United States, for being concerned in the slave trade, in violation of the acts of 1794,<sup>1</sup> and 1807,<sup>2</sup> or of one of them. The peculiar odium attached to the traffic, in which this vessel is alleged to have engaged, ought not to affect the legal questions which belong to the case. The information charges, that the *Caroline*, . . . 'was built, fitted, . . . or otherwise prepared, . . . for the purpose of carrying on . . . traffic in slaves, to a foreign country,' . . . [92] As this information charges that one of several offences has been committed, and they are not, in law, each of them cause of forfeiture, I should, so far as I can trust my own judgment, be of opinion, that a sentence of forfeiture ought not to have been pronounced. Sentence of the district court reversed." [Marshall, C. J.]

*Ellis v. Baird and Baker*, 6 Munford 456, December 1819. "Edward Ellis, a man of colour, exhibited a bill . . . for an Injunction (which was granted) to prevent "Baker from carrying him out of the commonwealth, "and for a decree against both defendants for his freedom." In January 1819, the suit was dismissed, "the plaintiff who was solemnly called, failing to appear and farther prosecute." At June term 1819, "a motion was made to re-instate the suit, upon a certificate from the Sheriff . . . shewing that the said Edward Ellis was then confined in the Jail, on account of an execution levied upon him as the property of John Baker, and wished to be discharged from confinement, for the purpose of obtaining testimony in support of his claim to freedom. Chancellor Taylor rejected the motion,

<sup>1</sup> 1 Stat. 347.

<sup>2</sup> 2 Stat. 426.

on the ground that he did not 'perceive that the defendant Baird had been paid a balance with interest due to him for the plaintiff.' And thereupon the plaintiff appealed."

Decree affirmed, but "without prejudice to any suit . . . which the appellant may be advised to bring for his freedom, pursuing the preliminary measures, to prevent vexatious suits, prescribed by the Act . . . passed the 25th of Dec. 1795,"<sup>1</sup>

*Woody v. Flournoy*, 6 Munford 506, February 1820. Woody hired for the year 1810 [507] "of Dr. William Flournoy five hands at the price of three hundred and fifty dollars, their time insured by their master; and the said hands to work in Martin Railey's coal works the present year; to be cloathed as usual;" In 1811 Flournoy told a witness [508] "that they had been returned naked; . . . that, during the year 1810, . . . they once ran away from the said pits, and went home to the plaintiff, who brought them back to the said coal-pits without delay, and delivered them to Woody, who being about to correct them for running away, the plaintiff objected to his doing so, saying that Woody should have nothing to do with the said slaves;"

*Smith v. Smith*, 6 Munford 581, March 1820. [582] "the fee simple value of the said slaves was, \$350 for Lucy and \$250 for Mary [her child]; and that their value for the life of the defendant was \$120 for Lucy, and \$80 for Mary;"

*The Wilson v. United States*, 30 Fed. Cas. 239 (1 Brockenbrough 423), May 1820. [240] "the *Wilson* was a private vessel of war, duly commissioned by the United Provinces of Venezuela and New Grenada, . . . [241] while at St. Thomas, the crew of the vessel was reinforced, by the addition of some eighteen seamen, principally people of colour, and all free." The *Wilson* arrived at Norfolk, on the 27th of October, 1819, having put in to refit, with intent to depart and resume her cruize in a short time." [243] "While in port, some of them were discharged, and came on shore. The libel charges that three persons of colour were landed from the vessel, whose admission or importation was prohibited by the laws of Virginia,<sup>2</sup> contrary to the act of Congress,<sup>3</sup> by which the vessel was forfeited." The district court decreed the forfeiture of the brig. [245] "so much of the sentence as condemns the brig *Wilson*, ought to be reversed," [242] "The first question . . . in this part of the case, will be the constitutionality of the act of Congress, under which this condemnation has been made. . . . [243] There is not, in the constitution, one syllable on the subject of navigation. . . . a control over navigation is necessarily incidental to the power to regulate commerce. . . . the power of Congress over vessels, which might bring in persons of any description whatever, was complete before the year 1808, except that it could not be so exercised, as to prohibit the importation . . . of any persons, whom any state, in existence at the formation of the constitution, might think proper to admit. . . . [245] The language . . . of the act of Congress,

<sup>1</sup> "See Edit. of 1794, 1803 and '14, c. 189, p. 346."

<sup>2</sup> 1 Rev. Code 1819, pp. 437, 438 (c. 91, sects. 64-66).

<sup>3</sup> Act of Feb. 28, 1803, c. 63. 2 Stat. 205.



shows, that the forfeiture was not intended to be inflicted in any case but where the state law was violated." The act of Virginia "imposes a penalty on any master of a vessel, who shall bring any free negro or mulatto. The third section provides that 'the act shall not extend to any masters of vessels, who shall bring into this state any free negro or mulatto, employed on board, . . . and who shall therewith depart.' . . . No probability, however strong, that the vessel will depart without the seaman, can extend the act to such a case, until the vessel has actually departed. . . . But this is not all. The act of assembly prohibits the admission of free negroes and mulattos only, not of other persons of colour, . . . Mr. Bush . . . says, that those discharged were 'of different colours and nations.' Andrew Johnson says 'that on the 29th of October, the people of colour received their prize tickets, went on shore, and, of course, took their own discharge.' There is, then, no evidence, that these people were negroes or mulattos." [Marshall, C. J.]

*Commonwealth v. Jerry Mann*, 2 Va. Ca. 210, June 1820. "The prisoner was a black man, held as a slave, but he had instituted a suit to recover his freedom, and, therefore, according to Law, was entitled to be tried as a free man, for any offence with which he was charged. He was indicted, tried, and convicted, in the Superior Court, of feloniously making an assault upon a woman, with intent to ravish her. The Law declares, that if a slave shall attempt to ravish a *white* woman, he shall be adjudged a felon." Judgment arrested "because it is no where in the Indictment stated, that Mary M'Causland was a *white* woman."

*Early v. Early*, Gilmer 124, November 1820. Will of Joshua Early: "I lend him one negro girl, by name Venus, now on his plantation, to him until he arrives to the age of 50 years, for the express purpose of supporting his family, and to his heirs for ever."

*Cole v. Fenwick*, Gilmer 134, November 1820. "The slaves were delivered . . . except one, who had run away, and could not therefore be had."

*Griffith v. Fanny*, Gilmer 143, December 1820. "Fanny sued Griffith, *in forma pauperis*, for her freedom. . . . the Jury found by a special verdict, that Fanny was the slave of one Kincheloe, until a short time before the 23d August 1816. Sometime in that month, he sold her to William Skinner, a citizen, resident in the state of Ohio. In conformity with the sale, Kincheloe delivered possession to Skinner at Marietta in Ohio, and received the purchase money. Griffith was present at this sale; and on the 23d August 1816, Kincheloe executed a bill of sale for Fanny, to Griffith, which bill was delivered to Skinner. This bill was an absolute sale of Fanny from Kincheloe to Griffith, who was at the time, and continued to be, a citizen of Virginia. The agreement to have a bill of sale executed to Griffith, was between him and Skinner, for Kincheloe was no party to their contract, though he executed the deed. At the time of its execution, Skinner stated to Kincheloe, that he wished the bill of sale to be to Griffith, because by the laws of Ohio, he could not hold a slave in his own right. Fanny was at different times seen at Skinner's residence in Ohio. She was last seen there, in the spring of 1818. About the 1st October 1818, she

returned to Virginia, where she was taken into the possession of Griffith, who claimed her under the bill of sale. The section of the Constitution of Ohio, prohibiting involuntary servitude was inserted into the verdict. And upon these facts, the law of the case was submitted to the court: which gave judgment for the pauper, and Griffith appealed." Judgment affirmed.

*Barnett v. Sam*, Gilmer 232, April 1821. "Sam was born in the county of Augusta, about the year 1788, the slave of Mary Teas, a native of that county, then residing there. Mary Teas removed to North-Carolina about 1790, where she resided and Sam with her, three years. In 1793 she returned to Virginia, bringing Sam with her; and not complying with the requisitions of the statute of Virginia of 1792. She continued in Virginia until the year 1811; when she sold Sam to Barnett." The county court gave judgment for Sam; affirmed by the superior court; reversed by the Court of Appeals.

*Backhouse v. Jett*, 2 Fed. Cas. 316 (1 Brockenbrough 500), May 1821. In 1783 Thomas Jett made a deed of gift of twenty-one slaves to his only son, William Storke Jett. In 1817 a bill was filed [317] "assailing the deed . . . as fraudulent, . . . as to creditors," Marshall, C. J.: [321] "I think . . . William Storke Jett, is responsible for the slaves now alive, at their present value, or for the slaves themselves; and for profits from the filing of the . . . bill which claims them; and for money actually received for those which have been sold, with interest thereon, from the same time."

*Dempsey v. Lawrence*, Gilmer 533, June 1821. Dempsey "hired himself of his master William Wallace, and having accumulated the sum of \$100, agreed to pay it, and \$200 more at a future day to his master, provided he would emancipate him.<sup>1</sup> The proposal was accepted. . . Lawrence . . . agreed to pay the \$200, and Dempsey was to be bound to him for it. . . Dempsey paid the money to Lawrence by instalments. Lawrence then went to North-Carolina, and promised Dempsey if he would go with him he would emancipate him. Dempsey went and remained two years; returned and lived on a piece of land adjoining Lawrence, always acting as a free man. Lawrence died, and his widow claimed Dempsey as a slave. The bill prayed, that all persons be enjoined from molesting or selling the plaintiff as a slave; and that the widow of Lawrence, be decreed to execute a deed of emancipation. . . Chancellor Nelson was willing to continue the injunction, until Dempsey could assert his freedom in a regular manner, in a court of law; but it being insisted that he should make a final decree, he dissolved the injunction and dismissed the bill:" Decree reversed, and the cause sent back [336] "with directions to the court, to appoint counsel for the appellant, and to proceed to a final decree on the merits."

*Commonwealth v. Tyree*, 2 Va Ca. 262, November 1821. The prisoner, [263] "as a free man of colour, was . . . brought before an Examining Court for the county of Caroline, charged with a Rape" [264] "it

<sup>1</sup> [334] "great and unusual merit, and money besides were the consideration."

appeared [by the record of the examining court] that he was examined as a free man of colour, by the name of John Tyree, and remanded for trial as a free man." He was [263] "indicted before the . . Superior Court, as a free man of colour . . and . . pleaded not guilty" [262] "On the next morning, one William Tompkins . . came into Court, and exhibited a petition, stating that on the 17th November, 1810, he owned a slave named Armistead, then about 18 years of age; that the said slave on that day absconded from him, . . that on Sunday last he found the said slave in the jail of Caroline, charged with a felony, under the name of John Tyree: . . that the jailor refuses to deliver him his said slave, . . he therefore prayed that the Writ of *Habeas Corpus* might be issued to bring up the body of the said slave before the Court, that the legality of his detention might be enquired into. . . [264] the prisoner had passed himself as the son of one Aggy Tyree, a free woman, in that county; that he had recently denied that he was her son; that, in point of fact, he was not of that family; that he was not registered as a free man;"

Held: [267] "as the prisoner, John Tyree, did not plead in abatement to the jurisdiction of the said Superior Court of Law [that he is a slave], no evidence whatever was admissible in support of the said William Tompkins's application, for the purpose of proving that the said prisoner is not a free man, but the slave of the said petitioner; and that the record of the Examining Court, remanding the said prisoner for trial as a free man of colour, (there being no such plea in abatement, as aforesaid,) is to be taken as conclusive proof, *quoad* the trial of the prisoner in the Superior Court, that he is free." [262] "In a capital case, a collateral issue to which the accused is not a party, may be made up, when it operates *in favorem vite*, as whether the accused be *non compos*, mute by the visitation of God, etc. but not where it is against life." [266] "The consequence of sustaining the objection to the jurisdiction here, would be, that instead of punishing him in the Penitentiary, he might be condemned to lose his life. The Court cannot, therefore, convert a principle dictated by humanity into an instrument of cruelty." [Brockenbrough, J.]

*Lewis v. Fullerton*, 1 Randolph 15, December 1821. "Lewis an infant, by Milly his mother, brought suit *in forma pauperis* . . to establish his freedom . . In March 1808, Milly the mother of the plaintiff, together with Naise her husband, applied for a writ of *habeas corpus* in Gallia county, Ohio, to be delivered from the illegal custody of John Rodgers, who claimed them as slaves. The writ was granted; and upon a hearing . . [16] the judgment of the court was, that Milly and Naise 'go hence, be discharged, and set at liberty.' Edward Tupper a witness proves, that the day after this discharge, Rodgers came to him, and requested him to prevail on Milly to live with him as an indentured servant for two years; that, if she would agree to do so, he would execute to her a complete deed of manumission, which should put the question of her liberty at rest; for now, he might possibly reverse the judgment on the *habeas corpus*. Agreeably to this request, the witness obtained the consent of Milly and Naise to indent themselves for two years, on R's first making the deed of manumission, which is spread on the record. The witness examined the deed, before Naise and Milly executed the indenture for two years

service. Bithia Tupper, a witness, heard R. say, he would execute the deed of absolute manumission, if Milly and N. would agree to serve him two years; that, he always intended to emancipate Milly at his death, and had so provided by his will. The deed of absolute manumission was executed in Gallia county, Ohio, on the 2d April, 1808, John Rodgers styling himself in it, a citizen of Virginia. It is attested by two witnesses. . . [17] One of the witnesses also proved, that Milly was seen working at a sugar camp in Ohio on a Sunday, while her residence was in Virginia. . . The proof of Lewis's birth subsequent to the right of freedom in Milly, in whatever of all these manners she was entitled to it (if entitled at all,) was clear; . . judgment for the defendant on the verdict, and the plaintiff appealed."

Affirmed: [21] "The appellant claims his right to freedom, on three grounds: 1st, on the right to freedom alleged to have been acquired by his mother, prior to his birth, by having sojourned within the state of Ohio, and . . been there employed by her master: 2dly, on the ground that her right to freedom was, prior to his birth, established by the judgment on the writ of *habeas corpus* . . and 3dly, . . under the deed of emancipation . . [22] There is no evidence . . of the mother's residence within the state of Ohio, prior to the appellant's birth, but that she was once seen, on a Sunday, working at a sugar camp therein, in the absence of her master, and without any evidence that it was with his permission. . . Such an occupation for a short time, and even for the benefit of the master, and probably in his presence, could never operate an emancipation of his slave. It could not so operate, when the *animus revertendi* strongly existed in him, both in relation to himself, and to his slave. There is indeed but a shade of difference between such a residence as this, (if indeed it can be called a residence,) and the mere right of passage through the state: and such a construction . . would whittle down to nothing the right of the citizens of each state, within every other state, guaranteed to them by the constitution. Such an occupation cannot be said to carry with it evidence of the assent of the master, that she should cease to remain his property, and become a member of the state of Ohio, without which the regulations of that state on the subject of emancipation cannot attach. As for the 2d ground of claim, under the judgment upon the *habeas corpus* . . that judgment has not *affirmed* the mother's right to freedom. Even if it had, and this mode of proceeding was legalized by the laws of that state, (as it *seems* not to be by the laws of this,) in favour of a slave against his master, those laws are not found in the case before us: and even if they were, it might well be questioned whether the judgment aforesaid could have concluded the right of the master in the present instance. The right of our citizens under the constitution to reclaim their fugitive slaves from other states, would be nearly a nullity, if that claim was permitted to be intercepted by a proceeding like the one in question; a proceeding of so extremely summary a character, that it affords no fair opportunity to a master deliberately to support his right of property in his slave. Such a proceeding ought not, therefore, to be conclusive on the subject. As to the deed of emancipation contained in the record, that deed . . [23] shews, that it had a reference to the state of Virginia. It is stated to have been



made by John Rodgers a resident . . of Virginia; . . it formed a part of a contract whereby the slave Milly was to be brought back, (as she was brought back,) into . . Virginia. . . If then this contract had an eye to the state of Virginia for its operation and effect, the *lex loci* ceases to operate. . . it must . . conform to the laws of Virginia. It is insufficient under those laws, to effectuate an emancipation, for want of a due recording in the county court, . . It is also ineffectual, within the commonwealth of Virginia, for another reason. The *lex loci* is also to be taken subject to the exception, that it is not to be enforced in another country, when it violates some moral duty, or the policy of that country, or is inconsistent with a positive right secured to a third person or party by the laws of that country, in which it is sought to be enforced. In such a case we are told '*magis jus nostrum, quam jus alienum servemus.*' That third party, in this case, is the commonwealth of Virginia: and her policy and interests are also to be attended to. These turn the scale against the *lex loci* in the present instance. For want of being emancipated agreeably to the provisions of our act on that subject, the duty of supporting the old and infirm slaves would devolve upon the commonwealth. That burden is only to be borne by the master, in relation to slaves '*so emancipated;*' that is, emancipated agreeably to the provisions of the act. 1 Rev. Code, p. 434. . . [24] For these reasons, we are unanimously of opinion to affirm the judgment." [Roane, J.]

*Ellis v. Baker*, 1 Randolph 47, January 1822. A marriage contract in 1811 provided that Catherine Baker should "enjoy . . the interest and occupation of the real and personal estate, which belonged to . . Catherine before her marriage . . and that . . Catherine should, at her death, or at any time before, dispose of it as she shall think proper, notwithstanding her coverture." She died in the lifetime of her husband, and "by her last will appointed and directed as follows: 'After all my just debts are paid, I desire that my negro man Tom and Polly, and her children, be sold, but give them the liberty of choosing their master, and receive all the money that they are sold for, except a support for Rose and Arion, which is to come out of the sale of the above mentioned negroes to be sold:'. . the debts of the said Catherine are few, and that there are assets sufficient . . without making sale of the said slaves:'"

Held: [49] "The marriage articles . . only re-invested the absolute property of the slaves, in her, in the event of her surviving her husband. That event did not happen. If it had, she might thereafter have emancipated the said slaves, at her will and pleasure. During the coverture . . she was . . only to have the use of the property, with a power to appoint it" [Roane, J.]

*Peter (a slave) v. the Commonwealth*, 2 Va. Ca. 330, June 1823. "At a Court of Oyer and Terminer, held by the Justices of Hampshire county . . for the trial of Peter, a slave, for the murder of William Poling, he, the said Peter, was convicted of the murder, and sentenced to be hung, but the execution has been respited by the Executive until a day yet to come." Application for a writ of error "was over-ruled, and the Writ refused. . . [331] the Legislature, in framing the Law under which this conviction took place" did not "intend that the judgment of these Courts

of Oyer and Terminer should be submitted to the revision and correction of any other *legal* Tribunal. . . the only relief which that Law leaves to the convict, is to be sought from the Executive,"

*Attoo v. the Commonwealth*, 2 Va. Ca. 382, November, 1823. "The prisoner was indicted [at the session of the grand jury commencing on the 15th September, 1823,] as a free man of colour, of the forgery . . The time alledged in the Indictment when the offence was committed, was the tenth of May, 1823. . . [383] By the 5th section [of the act of the 21st February, 1823]<sup>1</sup> . . all Laws coming within the purview of this Law, are repealed, . . By the last section, the Law is to commence on the 1st August, 1823; on that day the former law ceased,<sup>2</sup> and the offence committed before, was made the subject of Indictment after the expiration of the Law."

Held: "That there was no Law in force for the punishment of the offence, whereof the said Attoo was convicted at the time of the said conviction; that the judgment of the Superior Court was therefore erroneous, and must be reversed; and the prisoner acquitted and discharged, and go thereof without day." [White, J.]

*Maria v. Surbaugh*, 2 Randolph 228, February 1824. "An action for freedom was brought, *in forma pauperis*, by Mary, who sued for herself and on behalf of her four children, Maria, Nancy, Solomon and Samuel," William Holliday, by his last will, dated 1790, "bequeaths his slave Mary to his son William, with a declaration, that she shall be free as soon as she arrives at the age of thirty-one years." In 1804 the legatee sold her to White, who sold her to Gilkeson, who sold her to Carman, who sold her and her infant child, Maria, to Surbaugh. Later Mary had the three other children. All four children were born before Mary became thirty-one years of age (September 1, 1818). "The Court gave judgment, that the law was for the plaintiff Mary; that the children . . were not entitled to their freedom; and that as to them, the law was for the defendant."

Judgment affirmed unanimously. Judge Green reviews the history of slavery in Virginia [236-238], and discusses at length the case of Pleasants *v.* Pleasants:<sup>3</sup> [236] "the Chancellor and Judge Roane were of opinion, that so soon as the right of the mother to future freedom became certain, she was free, and her children born free; and that the testator had no power over, and could not impose any servitude on, them. . . [239] The opinions of Chancellor Wythe and Judge Roane, that a present right to future freedom, is present freedom, with an obligation to serve as a servant, would directly counteract the policy of the law of 1782, in regard to emancipation, unless the former owner was bound to support the children born during the period of service of the mother, . . [240] The former owner could not, upon such a construction, be bound to support them; for, he did not emancipate them, . . the public . . would inevitably be burthened with the support of the children, . .

<sup>1</sup> Acts of 1822, ch. 32.

<sup>2</sup> 1 Rev. Code of 1819, ch. 154, sect. 4, p. 580.

<sup>3</sup> See p. 105, *supra*.

[241] I am of opinion, that the children of Mary were born slaves, without any right to future liberty.”<sup>1</sup>

*Hopkirk v. Randolph*, 12 Fed. Cas. 513 (2 Brockenbrough 132), May 1824. In 1790 Randolph Harrison married Mary, daughter of Thomas Randolph, who had given her, prior to her marriage [518] “two negro girls, one of them an attendant on her person, . . . [519] There was also a negro girl sent on the birth of Mrs. Harrison’s first child. But this girl was sent as a present to the child.”

*Ben v. Peete*, 2 Randolph 539, June 1824. “Ben and twenty-three others, persons of colour held in slavery, brought a suit . . . to recover their freedom.” The plaintiffs “introduced a deed of emancipation to the female ancestor of the plaintiffs, from Howell Pennington, her former master, dated the 25th of June, 1795,” and [546] “duly recorded in the August following.” The defendant [539] “offered in evidence an office copy of a [lost] deed from the said Pennington to Martha Pennington, conveying the same negro girl, . . . for valuable consideration, dated the 20th of November, 1774.” [546] “The deed of 1774, is recorded, on the acknowledgment of the grantor, in 1812, thirty-eight years after its execution, and sixteen years after the execution of the deed of emancipation.”

Judgment for the defendant, reversed, and the cause remanded: [546] “the question is, must this acknowledgment be taken as proof of the execution of the deed, against the plaintiffs? I strongly incline to think not. . . after the execution of the deed of emancipation, the grantor could not, by any act or deed of his, revoke that deed, or divest the title to freedom, which it had vested in the plaintiffs; and yet, nothing would be easier than to effect this indirectly, if his subsequent acknowledgments are admissible against the plaintiffs. . . [547] although the rule of law be, that that acknowledgment is to be taken as evidence against him, and those claiming under him, I believe we must limit the meaning to those claiming under him, by title derived subsequently to the acknowledgment. . . [548] the copy of the deed, resting solely on that acknowledgment, ought not to have been admitted by the Court below.” [Carr, J.]

*Wicks v. the Commonwealth*, 2 Va. Ca. 387, June 1824. The deceased, “an honest and inoffensive blacksmith,” was “regarded with something more than ordinary kindness even by the blacks, on account of the fairness and liberality with which he traded with many of them for coal, which they were allowed by their masters to burn and sell.” The murderer [390] “declared his innocence, and alledged it was all owing to negroes; that had he killed colonel Greenhill’s Preston, he would have killed the right one:”

*Commonwealth v. Booth*, 2 Va. Ca. 394, June 1824. Indictment for violently assaulting the slave of Fenn. “We of the jury find the Defendant guilty and assess his fine to sixty dollars, subject to the opinion of the Court upon these questions: Can the Defendant be indicted and punished for the excessive, cruel and inhuman infliction of stripes on the slave Bob,

<sup>1</sup> The Virginia Code of 1849 (ch. ciii, sect. 10, p. 458) provided the remedy for such a situation.

while in his possession, and under his control as a hired slave, for the space of one month; no permanent injury having resulted to the said slave from such infliction?—Can the Defendant be punished under the Indictment found in this Case? ”<sup>1</sup>

Held: [395] “ The last clause . . . ought to be answered in the negative. . . where the original assault is justified by the relation of master and slave, and the *gravamen* of the charge is the want of moderation in the subsequent chastisement, we think the Indictment . . . ought to state distinctly, the connection of the parties, and to shew that it is the *excess* of the punishment which is complained of, and not, that the right to punish at all, is questioned. . . The offence of making an unlawful assault upon the slave of another person . . . is, certainly, not the same offence with making an assault upon one’s own slave, which, in general, becomes unlawful by subsequent excess and inhumanity, . . . the Defendant sufficiently answered the general charge . . . of cruelly beating Robert Fenn’s slave, by proving that he had himself for the time the ownership of him, which so changed the nature of the offence, as to entitle him to a judgment under this Indictment, . . . [396] however, we mean to express no opinion as to the first point submitted by the verdict. That involves a grave and serious, as well as delicate enquiry into the rights and duties of slave-holders, and the condition of their slaves, which we shall be prepared to enter upon with a due sense of its importance, whenever a proper occasion arises. The present Case is decided without reference to this more interesting question,” [Parker, J.]

*Mabry v. the Commonwealth*, 2 Va. Ca. 396, June 1824. “ a free man of color, charged . . . with stealing three sack bags of picked cotton, of the value of eight dollars . . . [397] the jury found the prisoner guilty of the grand larceny . . . and directed him to receive fifteen stripes. The judgment of the Court, was in conformity with the verdict as to the stripes, and moreover, that he should be transported and sold as a slave, according to Law.”

*Aldridge v. the Commonwealth*, 2 Va. Ca. 447, June 1824. The petitioner was “ indicted as ‘ a free man of color,’ for the larceny of Bank-notes of the value of one hundred and fifty dollars. . . He was convicted of the crime charged, and the jury ascertained the number of stripes to be inflicted on him, to be thirty-nine.” The Supreme Court pronounced judgment that “ he receive thirty-nine stripes on his bare back on the 26th of June next, and that after that day, he be sold as a slave, and transported and banished beyond the limits of the United States, in the manner prescribed by Law,<sup>2</sup> etc.”

Held: the act of February 21, 1823, is not contrary to the constitution of the state. [449] “ the Bill of Rights . . . never was contemplated . . . to extend to the whole population of the State. Can it be doubted, that it not only was not intended to apply to our slave population, but that the free blacks and mulattoes were also not comprehended in it? The

<sup>1</sup> The indictment did not mention that Bob was in defendant’s possession as a hired slave.

<sup>2</sup> Act of February 21, 1823, ch. 32, sect. 3.



leading and most prominent feature in that paper, is the equality of civil rights and liberty. And yet, nobody has ever questioned the power of the Legislature, to deny to free blacks and mulattoes, one of the first privileges of a citizen; that of voting at elections, although they might in every particular, except color, be in precisely the same condition as those qualified to vote. The numerous restrictions imposed on this class of people in our Statute Book, many of which are inconsistent with the letter and spirit of the Constitution, both of this State and of the United States, as respects the free whites, demonstrate, that, here, those instruments have not been considered to extend equally to both classes of our population. We will only instance the restriction upon the migration of free blacks into this State, and upon their right to bear arms.

“As to the ninth section of the Bill of Rights, denouncing cruel and unusual punishments, we have no notion that it has any bearing on this case. . . [450] the best heads and hearts of the land of our ancestors, had long and loudly declaimed against the wanton cruelty of many of the punishments practised in other countries; and this section in the Bill of Rights, was framed effectually to exclude these, so that no future Legislature, in a moment perhaps of great and general excitement, should be tempted to disgrace our Code by the introduction of any of those odious modes of punishment. In the decision of these points, the Court is unanimous. . . [454] It is notorious that the Legislature regarded as a great evil the confinement of free negroes and mulattoes in the Penitentiary; and that, when engaged upon the Law under our consideration, their total exclusion from thence, was one of their objects.” [Dade, J.]

*Byrd v. Byrd*, 4 Fed. Cas. 943 (2 Brockenbrough 169), November 1824. “William Byrd, . . by his last will, created . . a fund consisting of a tract of land, one hundred negroes, and other personal property, for the payment of his debts. He then gives to his wife, for life, the plantations of Westover and Buckland, with all the remaining negroes . . and adds: ‘It is my will . . that, at the death of my dearest wife, all my estates whatever, consisting of land, negroes, . . be sold as soon as convenient, and the money . . be equally divided among all my children . . I give to my son John . . his choice of ten negroes, after my wife has chose such as she pleases.’ . . to his daughters . . certain slaves by name. . . [944] to his son Charles . . ‘I likewise give him his man Tom, and little Jack White, and his choice of two negro girls,’ ”

See same *v. same*, p. 143, *infra*.

*Puller v. Puller*, 3 Randolph 83, December 1824. Will of John Puller, dated 1818: “I give to my beloved wife Ann Puller . . a negro woman named Jenny and her increase,” Jenny “had two children, Garrett and Icy, the youngest of whom was, at the date of the will, aged about 14 years: that the said Jenny had borne no child for at least 14 years next previous thereto, and, in all probability, never would have another, which was known to the testator: . . [84] he advised Mrs. Puller, if she and Jenny could not agree, to sell her, etc.”

Held: that the widow should recover of the executors the slaves Garrett and Icy, together with their hires and profits. [92] “From the parol

evidence . . it is to be inferred, that the testator used the word increase in its broadest sense."

*Allen v. Freeland*, 3 Randolph 170, February 1825. [172] "the negroes were sold at a tavern in Henrico county, in . . 1822, where there were 8 or 10 persons, or more, present; and they were all knocked off to Allen, as the highest bidder: . . an advertisement was stuck up at the tavern . . which stated that the negroes belonged to Wright; . . Wright declared his intention, while Freeland's suit was depending against him, to make over his property, so that he should never get anything out of him." Since the sale [170] "Freeland had obtained a judgment against . . Wright, for about \$1000, and sued out an execution thereon; and had levied the same on two of the said slaves, who were about to be sold by the sheriff, on the day that the bill [for an injunction] was filed. . . The injunction was awarded. Freeland . . [171] charges that Allen's claim to the said slaves is fraudulent, . . injunction . . dissolved."

Order affirmed. Carr, J.: [173] "No sacrifice of feeling, no considerations of humanity, are involved. These were not family slaves, but strangers to the plaintiff . . casually purchased at a public sale; no statement that they were peculiarly valuable for their character, qualities, or skill in any trade or handicraft;" Green, J.: [175] "the Court will . . interfere by injunction, to preserve specific property in possession of the owner. But the property must have a peculiar value, . . [176] I should incline to think that slaves ought, *prima facie*, to be considered as of peculiar value to their owners, and not properly a subject for adequate compensation in damages, . . but that this presumption may be repelled, as in the case of a person purchasing slaves for the avowed purpose of selling them again. In this case, the appellant does not appear ever to have seen the slaves before he purchased them. . . It is not necessary, however, to decide the case upon this ground, since I am perfectly satisfied, that Wright . . [was] . . guilty of a gross fraud . . multiplied proofs . . [177] The negroes were sold at a country tavern not very far from Richmond, where they certainly would not have been . . sold, if Wright had really intended to sell them in earnest, for the best price he could get." Brooke, P.: [178] "The principle on which the Court of Chancery exercises its restraining power in this country, in a case in which the peculiar value of the property cannot be compensated for at law, is the same on which the English Courts proceed. But, as regards slave property, there is a wider range for its application. Slaves are not only property, but they are rational beings, and entitled to the humanity of the Court, when it can be exercised without invading the rights of property; and as regards the owner, their value is much enhanced by the mutual attachment of master and slave; a value which cannot enter into the calculation of damages by a jury. In all such cases, therefore, this Court has exercised a restraining power, except a case in which, whatever may be the decision of it, the property is to be sold,"

*Minor v. Dabney*, 3 Randolph 191, February 1825. "His 'estate called Bellevue, . . with one half of the slaves,' . . he devised . . in trust for his relation, James Fife, near Edinburgh, . . His next devise is, of his

'estate called Whitings, with one half of the slaves, . . . on the Bellevue estate,' in trust, . . . for his relation, William Fife, in Scotland," The testator's guardian had cultivated [197] "the whole as one, . . . though the negroes theretofore settled on the Whitings plantation . . . continued to occupy their former cabins thereon, but labouring indiscriminately the whole estate."

Held: [212] "as to the lands, the testator meant to distinguish Bellevue from Whitings; but in regard to the slaves, treated them as belonging to the Bellevue estate, including the part called Whitings;"

*Byrd v. Byrd*, 4 Fed. Cas. 947 (2 Brockenbrough 179), May 1825.<sup>1</sup> "Of one hundred and twenty-five slaves left by the testator, William Byrd, (beside the jointure slaves of the widow, in which she had a life estate,) ninety were sold under the will immediately after the death of William Byrd, viz.: in April, 1777, and the fund arising therefrom being wholly inadequate to the payment of his debts, the residue were sold in November of the same year." Marshall, C. J.: "There were many circumstances to reduce the price of slaves and other property, at the time this sale was made. Our ports were blocked up, the produce of labour was unsaleable, and the nation was engaged in a war which would probably render this gloomy state of things of incalculable continuance."

*Vaiden v. Bell*, 3 Randolph 448, October 1825. [455] "The slaves . . . belonged to Thomas Cowles, who died intestate, in 1786, . . . the slaves . . . were assigned to the widow of T. Cowles, and upon her death, Nathaniel Cowles [the eldest son and heir at law] took possession of them, . . . as the law was at the time of Thomas Cowles' death, the heir at law was entitled to all the slaves of an intestate, including those assigned to the widow for dower, and was accountable to the younger children only for their respective proportions of the value of the slaves, other than those assigned as dower; to the reversion of which, he was entitled without account. This was the effect of the act of 1705, then in force."

*Jordan v. Williams*, 3 Randolph 501, October 1825. "In the year 1783, Charles Cross, conveyed ten slaves in trust, for the benefit of his wife, . . . for life, and after her death, to his daughter, Elizabeth Cross. . . . In 1814, the same C. Cross, conveyed to . . . Jordan, two slaves, named Burwell and Young Jenny, who are alledged to be descendants of the slaves mentioned in the first deed, for 160 *l.*" Jordan's widow, [502] "as administratrix, brought an action of detinue against Charles Cross, . . . for the two slaves, . . . and obtained a judgment, and 100 *l.* damages and costs. A *distringas fi. fa.* issued on the said judgment, and the sheriff returned, 'Executed on one negro man, named Phill, one negro boy, named George, and one negro girl, named Milley. Satisfied by the sale of Phill and Milley.' . . . Williams [husband of Elizabeth Cross] filed his bill . . . charging that the deed to Jordan was fraudulently obtained from C. Cross, . . . and praying . . . that the effect of the execution may be suspended,"

Bill dismissed: [503] "even admitting that he had a present right to the two negroes recovered by the judgment . . . he had no right to injoin

<sup>1</sup> See same *v.* same, p. 141, *supra*.

this particular execution, which was a *distringas fi. fa.*; for on such an execution, the sheriff cannot *distrain* the very property for which the *distringas* issued; nor can he seize and *sell* it to pay the damages mentioned in the execution; for that would be to sell the plaintiff's own property to pay a debt due to himself."

*Bowyer v. Creigh*, 3 Randolph 25, December 1825. [31] "various causes may exist, to give slaves a value in the eye of the master, which no estimated damages could reach. The slave may have been raised by him, and may possess moral qualities, which, to his master, render him invaluable. He may have saved the life of the master, or some one of the family, and thus have gained with them a value above money and above price. When any case of this kind is addressed to a Court of Equity, it will interfere . . . [32] upon the ground, that there is no complete remedy at law; . . . [but] in no case, where the plaintiff claims as an *incumbrancer* merely;" [Carr, J.]

*Wilson v. Shackelford*, 4 Randolph 5, January 1826. In 1821 Wilson, a negro trader, bought a negro woman and three children for \$700, and carried them to South Carolina. The woman was found to be "labouring under an inveterate dropsy" and pronounced incurable. Wilson "sold her and her children to a purchaser with a full knowledge of her situation, for \$475,"

*Sallust v. Ruth*, 4 Randolph 67, February 1826. "Ruth and her six children, brought an action of assault and battery against Sallust, to recover their freedom." [68] "Some years prior to 1780, John May, residing in . . . North Carolina, owned a negro slave called Esther." His widow "married Lewis Lowry; who, about the time of Gates's defeat (16th of August, 1780,) carried Esther and [her daughter] Ruth, (then about 5 years old) to South Carolina; . . . whether to avoid the enemy, or to sell the slaves, we are not informed. There, they were taken from his possession, and carried to Virginia." In 1794 Robert Lowry brought an action of detinue for Ruth, obtained a verdict, and sold her the next day for 80 l., [72] "a full [price] . . . for a woman, at that day." The superior court decided in favor of the plaintiffs.

Judgment reversed: the act of 1778 prohibiting the importation of slaves into Virginia, applies only to those slaves who are brought in with the consent of the owner, and not to those imported by wrongdoers.

*M'Michen v. Amos*, 4 Randolph 134, March 1826. Verdict of the jury: [136] "We find for the plaintiffs their freedom and one cent damages; subject to the opinion of the Court, whether the removal of Richard Wetherhead . . . from . . . Maryland to . . . this State, in . . . [137] 1800, and bringing with him the plaintiffs, and the taking the oath<sup>1</sup> prescribed by law,<sup>2</sup> within 60 days . . . by Elizabeth, the wife of the said Richard, was a compliance with the law regulating the importation of slaves. If . . . the law be for the defendant, then we find for the defendant."

<sup>1</sup> "the substance of which was, that the slaves . . . were not brought in with intention to sell them, nor were they imported from Africa or the West Indies, etc."

<sup>2</sup> Act of 1792, Rev. Code, ch. 103.



Judgment for the plaintiffs, affirmed: [139] "the Act . . . intended the oath to be taken by the *proprietor* of the slaves; . . . When . . . the jury speak of Richard Wetherhead, . . . they intended to speak of *him* as the *proprietor*; and when they speak of the wife, they speak of her merely *as wife*. . . [143] under the Act of 1792, a right to freedom was actually vested <sup>1</sup> in the imported slaves; and it was the intention of the Act of 1819,<sup>2</sup> to preserve that right." [Cabell, J.]

*Dabney v. Taliaferro*, 4 Randolph 256, May 1826. [260] "Taliaferro had a negro man committed to the jail of King William county, on the 7th of January, 1821, as a runaway. The slave having become frost-bitten, while in jail, Taliaferro brought an action . . . charging that the Sheriff is . . . bound to furnish necessary food, covering, fire, etc. to all prisoners: that the defendant . . . and those acting for him, so negligently . . . conducted themselves in that behalf, that the slave became diseased, frost-bitten from cold, crippled and maimed," Verdict for defendant; new trial; verdict for the plaintiff for \$400.

Judgment affirmed: [261] "I cannot for a moment suppose, that by the law of the land, a human being may be imprisoned in mid-winter, and yet the jailor not bound to provide him with covering or fire. I should as soon think that he was not bound to furnish him food." [Carr, J.]

*Almond v. Almond*, 4 Randolph 662, July 1826. [663] "she brought him seven or eight negroes, which have all been wasted by him in riot and drink; that her brother gave her a girl after her marriage, who has had three children: . . . that when she went, her husband told her to take her present along, meaning the woman: that the woman and her children soon after joined her at her son's: that her husband . . . took the children, and sold them out of the State; . . . he has since . . . recovered a judgment for [the negro woman] . . . The bill prays . . . that she may be quieted in the possession of the slave, and the judgment enjoined."

Bill dismissed: [664] "It is proved by four witnesses, that when the defendant . . . did take the children forcibly . . . he said he left their mother for his wife's use. . . But, there is nothing like a contract; . . . [668] The case . . . is entirely new in this court." Even a wife claiming alimony "has no lien on any specific property, without an agreement. She can no more, therefore, ask the Court to assign her this negro, or that tract of land, than a *creditor* of the husband could come into Court and ask such assignment; which . . . without a particular lien, could not be done." [Carr, J.]

*Commonwealth v. Isaacs*, 5 Randolph 634, November 1826. The grand jury made the following presentment: "We, on our oath, present David Isaacs, and Nancy West, (a free mulatto woman) for outraging the decency of society . . . by cohabiting together . . . as man and wife, without being lawfully married,"

<sup>1</sup> [142] "as soon as the violation of the law was complete; viz: as soon as 12 months elapsed from the importation."

<sup>2</sup> 1 Rev. Code 422, sect. 4.

*Fulton v. Shaw*, 4 Randolph 597, January 1827. "Fanny Shaw, a woman of colour, brought an action to recover her freedom," Deed of John Fitzgerald, executed in 1788: I "liberate, . . a certain woman slave named Mary Shaw . . reserving to myself, my heirs, etc., nevertheless, an absolute right and claim to all such child or children, which the said Mary Shaw . . may have born of her body, etc."

Held: [599] "the grantor could not reserve to himself a right to hold her future progeny in slavery. A free mother cannot have children who are slaves." The plaintiff "is free, because that was the condition of her mother at her birth." [Carr, J.]

*Kitty v. Fitzhugh*, 4 Randolph 600, January 1827. Suit for freedom. [602] "a mortgage from Patrick Sim to . . Contee, by which Kitty was conveyed, with other negroes, to secure a debt due to the said Contee. This deed was dated . . 1794. The property . . was . . sold; and . . Henderson became the purchaser of Kitty, . . The conveyance expresses, that . . Henderson desires the said Kitty with her increase to go to the present use . . of his daughter Ariana, (Mrs. Sim.) By a codicil [in 1801] to the will of . . Henderson, he gives Kitty and her increase to his daughter (Mrs. Sim) when she shall be capable in law to hold such property in her own right," [601] "Sim went from Maryland to . . Virginia, in 1801, carrying with him the woman Kitty; that he moved . . to . . Washington about the year 1803; and in 1808 or 1809, to . . Maryland, . . that Kitty . . returned with him to Washington, and was in his possession in . . Maryland: . . that P. Sim never acquired a settlement in Virginia, and never kept house there: . . [602] Sim and his wife . . were divorced in the year 1805 or 1806, by an Act of the Legislature of Maryland;" In 1814 Catharine Norris (Kitty) brought suit against Patrick Sim in Maryland, claiming her freedom [601] "in consequence of having been imported into . . Maryland contrary to the laws of that State, . . Sim, (as appears by that record,) disclaimed any right or title to the said Catharine; and judgment was rendered . . that the petitioner should be free. . . Sim's will, made in 1817, in which he declared that the children of Katy Norris were free, in consequence of their mother having been imported into Maryland, in the year 1804, without performing the acts required to be done by the law of that State; on which ground she had recovered her freedom by a judicial proceeding. . . [602] Kitty and her children removed to . . Washington soon after the death of . . Sim, . . [603] and from that time, until she was seized on by the defendant in October, 1825, resided and acted publicly and openly as a free woman," [602] "Fitzhugh employed constables and others to take up Katy and her children, who were . . carried to Fairfax court-house, and there lodged in jail for safe-keeping."

Judgment for the defendant, affirmed: [609] "As to the Maryland judgment, it could have no effect in favor of the appellant, except against Sim and those claiming under him, posterior to the judgment. The object of that judgment, and of the will of Sim, seems to have been, to admit and establish certain fictitious facts, and thereby prove a right to freedom in the appellant, on the return of Sim and wife from Virginia in 1801 or

1802, and prior to the time when he took possession of her; so as to shew in fact, that at that time she was a free person. The intention of this collusive judgment was, doubtless, to defeat the rights of Mrs. Sim, under the will of her father. . . [610] if the possession originated in fraud, no title could vest in Sim, by reason of lapse of time; and . . . lapse of time would not give property under such possession, unless he did really and *bona fide* claim property in the said slave, when he so forcibly possessed himself of her." [Coalter, J.]

*Gregory v. Baugh*,<sup>1</sup> 4 Randolph 611, February 1827. "James Baugh, a man of color, brought an action against Thomas Gregory, to recover his freedom. . . [612] the plaintiff proved by two witnesses that he is the son of Biddy, who was the daughter of Sybil; that Sybil was a copper-coloured woman, with long, straight, black hair, with the general appearance of an Indian, except that she was too dark to be of the whole blood; that she was called Indian Sibyl, but her color, and that only, shewed she had negro blood; that he also introduced the deposition of Benjamin Smith, aged 70, who proved that when he was a boy, between 7 and 10 years old, he knew a yellow woman in the family of Peter Ashbrooke, who was called Ashbrooke's old Sybil and Indian Sybil; that she had every appearance of an Indian, . . . and he was always under the impression that she was of Indian descent. . . that in the life-time of Sibyl, about the year 1770, it was currently said and believed in the neighbourhood, that she was entitled to her freedom." The superior court was of opinion that "it was legal and proper evidence . . . to aid the jury in deciding whether the African mixture in Sybil came from the father or mother, . . . [613] the Court would not instruct the jury, that further evidence to prove [that Sybil was descended, in the maternal line, from an Indian woman] . . . was of legal necessity, . . . and if, at the time spoken of, it was much more common for female Indians to be captured and domesticated among us, than males, that circumstance must be regarded by them as of some weight,"

Judgment for the plaintiff, reversed, [624] "and the case sent back for a new trial, on which such instructions are not to be given." Judge Carr: [619] "Suppose we . . . admit that in the case of persons claiming freedom by descent, through the female line, from Indian ancestors, general report of the neighbourhood should be admitted; still, it must be general report as to *pedigree*. . . But, there was no such evidence here. . . [623] Again, What was the evidence, on which the jury was to decide, that it was more common to capture females than males at this period, so vaguely alluded to? None is stated;" Judge Green reviews the acts of the assembly concerning Indian slavery and servitude. [632] "The provisions of the act of 1682, were virtually re-enacted in 1705,<sup>2</sup> and in 1753; . . . and prove that the Legislature had no idea up to 1753, that the permission to trade with all Indians, allowed by the acts of 1691, and 1705, prohibited the enslaving of all American Indians, as was decided by the

<sup>1</sup> See same *v.* same, p. 163, *infra*.

<sup>2</sup> Ch. 49, 3 Hen. 447.

General Court in 1777,<sup>1</sup> and repeatedly by this Court since; and so I should have thought, but for those decisions. Even if such a construction of the acts of 1691, and 1705,<sup>2</sup> was otherwise proper, I should have thought that the acts of 1705,<sup>3</sup> and 1753, directly contradicting it, would have prohibited that construction. We have no intimation that the idea that the acts of 1691, and 1705, allowing a free trade with Indians, could have the effect of prohibiting the enslaving of American Indians ever existed until the case decided in 1777 [1787],<sup>4</sup> occurred. . . [642] the proof that she was in 1770 reputed to be entitled to her freedom . . might be founded on the knowledge that she was born of an Indian woman servant, and therefore entitled to be free at her age of thirty-one. This reputation in 1770, probably could not be founded upon any idea that she was free, merely because she was descended from an Indian woman. For the construction of the act of 1705, authorising a free trade with all Indians, . . that all brought in after 1705, or rather after 1691, could not be held as slaves, was not probably known or thought of . . until after 1770. . . I think that this evidence of the reputation that Sibyl was entitled to her freedom, should be left to the jury to be weighed by them, with all the other circumstances of the case, in order to determine whether Sibyl's mother was an Indian, and if an Indian, whether she was a slave, or free woman bound to service, until her age of thirty years, or otherwise. . . [643] There was . . no probability of any Indians being captured and domesticated by us after 1691." Judge Coalter also reviews the acts on Indian slavery and servitude [645-651]. [653] "I think it would behove us well to consider whether *hear-say* of a title to freedom, resting on mere conjecture, . . would be at all admissible for any purpose? I think it would not."

*Green v. Judith*, 5 Randolph, March 1827. "Judith and her children and grand-children, brought an action to recover their freedom." [26] "They . . gave in evidence . . a statement in the hand-writing of Barrow, . . that in the year 1767, or 1768, Ball [his brother-in-law] gave to him and his wife a negro girl by the name of Jude, then about 6 or 7 years old, to go under the denomination of his wife's servant, in order to prevent her from being sold to pay his debts, he being much involved: that he raised her and her children, and had peaceable possession of them, . . [27] to the time of making the statement, viz: in 1808, . . Strode proved that Ball told him he had sold Judith to Barrow; and that Barrow told him he had sold her and her descendants to Hackley [his nephew], on consideration of Hackley's paying his debts. . . Hackley died before Barrow and Ball." By his will "he emancipates the plaintiffs at the death of Barrow." Barrow, by his will, "confirms to them their freedom. . . [28] the whole [of the testimony relied on by the defendant] . . is in conflict with the evidence of the plaintiffs. . . goes to prove only a loan from Ball to Barrow," The defendant demurred to the evidence. [2] "The Court gave judgment on the demurrer for the plaintiffs,"

<sup>1</sup> Misprint for 1787.

<sup>2</sup> Ch. 52, sect. 12, 3 Hen. 468.

<sup>3</sup> Ch. 49, *ibid.*, 447.

<sup>4</sup> Jefferson's *Reports*, containing *Robin v. Hardaway* (decided in 1772), were not published till 1829. Ed.



Judgment affirmed: [29] "the demurrant would not be permitted . . . to rely on testimony directly disproving the case proved by the other party, and admitted by the demurrer. . . the demurrer is to be . . . decided, as if he had 'waived' it."

*Hunter v. Fulcher*, 5 Randolph 126, March 1827. "Hunter, a man of colour, brought an action of assault and battery . . . to recover his freedom. . . the jury found a verdict for the plaintiff. At the trial, the plaintiff offered in evidence, a paper purporting to be the first section of an Act of Assembly of Maryland," [131] "It enacts that it shall not be lawful to bring a slave into the State, either for sale or residence there; and that any slave brought in, contrary to the Act, shall immediately be free," The depositions were [130] "taken wholly without notice, . . . [132] judgments . . . reversed, and the cause sent back."

*Land v. Jeffries*, 5 Randolph 211, June 1827. "Mrs. Birdsong, a widow, being entitled to sundry slaves, as her dower, . . . and intending to marry Jeffries, executed . . . a deed, conveying to Land, . . . her brother, the said slaves, . . . The marriage took place immediately after. . . Land, the grantee, was absent in the public service. The slaves continued in the possession of Jeffries after the marriage, and were hired to him by Land. . . [212] Stewart having obtained a judgment against Jeffries, caused an execution to be levied on some of the slaves . . . Mrs. Jeffries . . . filed a bill to injoin the sale of the slaves" [273] "injunction perpetuated."

*Commonwealth v. Carver*, 5 Randolph 660, June 1827. "The prisoner was indicted for . . . shooting . . . a negro man slave . . . the property of Andrew Houston." Held: [666] "a negro slave is a . . . person, on whom a free person may commit the offence" of "malicious and unlawful shooting, stabbing," etc. under the act of 1819.

*Jones v. Mason*, 5 Randolph 577, August 1827. "In the year 1816, Benjamin Jones made his last will, . . . To Robert [the plaintiff] . . . [578] his plantation in Brunswick county, . . . and 13 slaves by name, . . . among the negroes given, are Moses, Harry and Sam." [585] "the plantation devised to the plaintiff was settled as a quarter; and when the plaintiff attained full age, the testator invested him with the possession of the estate as it stood, except in relation to some of the negroes attached to it: that at the time . . . all the negroes contained in the said legacy, with the exception of Harry, (who was on the Manor plantation of the testator) were on the quarter aforesaid, together with several other negroes: that instead of the testator . . . [586] sending Harry up there, he, amongst others, brought Moses and Sam to his own house, and left, from among the negroes already on that estate, three other negroes, Ellick, Aggy and their child, . . . [591] and other articles not bequeathed to him . . . which, with the value of the three negroes not bequeathed, exceeded in value the three negroes bequeathed and not advanced . . . to Robert; . . . [592] no case has been decided, in which a gift of a specific thing has been adjudged to adeem a legacy of another specific thing; . . . the rule . . . is, that the thing given, and the thing bequeathed, should be *ejusdem generis*. . . [593] With us, the advancement of children is most frequently in ne-

groes;<sup>1</sup> and a bequest or gift of negroes is generally made as an advancement for the better establishing the child in life; and here, a gift of negroes, in lieu of other negroes, may be considered as an ademption of the legacy, if other circumstances shew that such was the intention of the testator. . . [595] I think the . . circumstances of the gift shew, that the intent of the testator was to give at once to the plaintiff all he intended to give him," [Green, J.]

*Shirley v. Long*, 6 Randolph 764, August 1827. Held: if a father gives a slave to a child, and the donor retains possession of the slave, and exercises control over it, the gift is not the less fraudulent because the child always lived with the father, and the slave was always called the child's in the family and neighborhood.

*Commonwealth v. Turner*, 5 Randolph 678, November 1827. Turner was indicted in 1826 "for cruelly beating his own slave." Demurrer to the indictment sustained: [684] "it is not pretended that there is, or ever was, an act of the Legislature, either of the Colony or State of Virginia, made for the punishment of this offence. . . [685] Since 1788, the life of the slave is protected by the laws equally with that of the freeman. And the statutes for punishing maiming extend as well to the protection of the bond as the free, . . But, without any proofs that the common law did ever protect the slave against minor injuries from the hand of the master, with the positive assurance that, if ever the common law extended so far, it was, for more than a century, and up to a comparatively late period, nullified by the existence of statutes entirely inconsistent with it, where are we to look for the source of the power which is now claimed for us? . . [686] It is greatly to be deplored that an offence so odious and revolting as this, should exist to the reproach of humanity. Whether it may be wiser to correct it by legislative enactments, or leave it to the tribunal of public opinion, which will not fail to award to the offender its deep and solemn reprobation, is a question of great delicacy and doubt. This Court . . declares, that it has not jurisdiction over this offence," [Dade, J.]

Brockenbrough, J. dissented: [687] "on one occasion within a few years past, . . I sustained an Indictment of this character, and pronounced judgment against the defendant. . . from the first introduction of slaves into this Colony . . to the year 1669, the homicide, of a slave by his master, . . was by law punishable as felony. This is apparent from the language of the statute passed in 1669,<sup>2</sup> . . If the master had possessed entire control over the slave, . . that statute would have been unnecessary. . . [689] In the long period between 1669 and 1788, I admit that this question could not have arisen. . . But, this ferocious and sanguinary system of legislation was abolished by the act of November, 1788.<sup>3</sup> By

<sup>1</sup> [582] "With us, nothing is so usual as to advance children by gifts of slaves. They stand with us, instead of money." [Carr, J.]

<sup>2</sup> "An act about the casuall killing of slaves." 2 Hen. 270: "if any slave resist his master (or other by his masters order correcting him) and by the extremity of the correction should chance to die, that his death shall not be accompted Felony, . . since it can not be presumed that prepensed malice . . should induce any man to destroy his owne estate."

<sup>3</sup> 12 Hen. 681.

that repeal, the common law was expressly revived: by that repeal, that law again extended its aegis over the slave to protect him from all inhuman torture, though that torture should be inflicted by the hand of a master. I had not supposed that I was stretching the principles of the common law to an unreasonable . . . extent. I had supposed that if, in England, the mere *attempt* . . . to commit a felony . . . be a misdemeanor,<sup>1</sup> if an Indictment will be allowed in Massachusetts for poisoning a cow,<sup>2</sup> or in Pennsylvania for killing a horse,<sup>3</sup> an Indictment might be sustained in Virginia for maliciously and inhumanly beating a slave almost to death. . . [690] I do not believe, that in those consequences [of the doctrine which I have supported] any thing can be discerned injurious to the peace of society. When it is recollected, that our Courts and Juries are composed of men who, for the most part, are masters, I cannot conceive that any injury can accrue to the rights . . . of that class of the community. And with respect to the slaves, whilst kindness and humane treatment are calculated to render them contented and happy, is there no danger that oppression and tyranny, against which there is no redress, may drive them to despair?"

*Glasscock v. Batton*, 6 Randolph 78, November 1827. In 1820 Batton purchased "a negro boy . . . of about 13 or 14 years of age, at the price of 440 dollars,"

*Durham v. Dunkly*, 6 Randolph 135, February 1828. Dunkly in 1804 delivered a slave, Jenny, "to the female Plaintiff [Nancy] . . . being both at that time under one year old," and on the same day executed a deed of gift conveying Jenny to Nancy, stipulating that Dunkly was "to keep the said negro, and raise it for" Nancy "until the said Nancy is thirteen years old." Immediately after the deed was executed, Jenny was taken back into the possession of Dunkly who has held the slave ever since. The donee never lived with him, nor was the deed ever recorded.

Held: the gift is void under the act of assembly.<sup>4</sup>

*Arthur v. Chavis*, 6 Randolph 142, February 1828. [143] "The ground on which the pauper [Milly Chavis] claimed her freedom, was, that she was the daughter of one Winny Chavis, a free woman: that between forty and fifty years before, when she was a girl of six or seven years old, living with her mother in Brunswick County, she was stolen from her, carried to Pittsylvania by one Davis, and sold by him to Bennett, who gave her to Arthur, his son-in-law." The deposition of Polly M'Kinney of Brunswick proved that the stolen child had a scar on her thigh. At the trial a scar on the thigh was relied on strongly as identifying Milly with the stolen child. Judgment for the plaintiff. New evidence discovered including bill of sale to Davis. Judgment reversed.

*Talbert v. Jenny*, 6 Randolph 159, February 1828. "B. Talbert, when he purchased the woman Jenny, made her a promise that when she should have a child for every one of his, (he then having five) he would set her

<sup>1</sup> 3 Bac. Ab. 549.

<sup>2</sup> 1 Mass. 58.

<sup>3</sup> 1 Dallas 335.

<sup>4</sup> 1 Rev. C. 432, sect. 51.

free. This promise, though no way binding, the old people, (and especially Mrs. Talbert,) seem to have been anxious to comply with. In 1792, B. Talbert made a Deed to his youngest son, Charles, then, and always after, living with him, conveying to him Jenny and her son Moses. The deed was confessedly voluntary, . . . No change of possession followed the Deed." In 1803 it was agreed that [160] "a new division take place. For this purpose, the children were called to their father's house, and all attended but one (Thomas). Jenny had now six children; and it was agreed, that the five children should have one each; and it was distinctly understood, that the former division was to be done away, and the Deeds (as the witness expresses it) to be forgotten and laid aside; and Jenny and her youngest son were to be set free. That the Appellant Charles assented to this arrangement is fully proved; for, several witnesses state, that while the division was pending, one of the sons-in-law finding Jenny not included in the scheme, asked 'what is to be done with big Jenny?' To which the Appellant answered, 'Never mind big Jenny. Our mother' (who was then dead) 'wished her to be free, and she shall be free.' Accordingly, B. Talbert, by Deed, emancipated Jenny, the day after the division; and some time after, he, by Deed, emancipated her son Lorenzo. Both these Deeds were recorded. Jenny had two other children afterwards. From the time of her emancipation in 1803, till 1813, Jenny acted in all respects as a free person, and kept her three youngest children with her. B. Talbert died in 1809. The Appellant never objected to the Deeds of emancipation; nor, that we hear of, ever made any claim to Jenny or her children, during the life of his father; nor after his death, till the year 1813, when he took possession of the three children, leaving Jenny at large. She sued at Law for the freedom of her children, and a verdict was found for the Defendant." Jenny and her children [159] "obtained leave [from the Chancery Court] to sue in *forma pauperum* for their freedom. The Chancellor decreed in favor of the Plaintiffs, and the Defendants appealed." Decree affirmed.

*Sawney v. Carter*, 6 Randolph 173, March 1828. "The pauper . . . claims his freedom on an alleged contract between his master and him, at the time he was purchased at an executor's sale, that on paying his purchase money, he should be free. He alleges that he has paid accordingly; but, that his master would not emancipate him. The proof of the contract is by no means clear; although, if that was proved, and such a contract could be enforced in Equity, there is perhaps proof enough in the record, of his master having some property, to wit, a waggon and three horses, which the pauper claimed as his own, and the proceeds of his earnings by waggoning, to send the case to an account." The chancery court decreed for the master and Sawney appealed.

Decree affirmed: [173] "There is no case in this court, that I find, justifying the idea that a Court of Equity can enforce such a contract; . . . [174] The case of John Rose, a pauper, *v.* Haxall, adm'r. of Duncan Rose, junr. was decided in this court against the pauper. . . this man belonged to the estate of the late Col. Banister, near Petersburg: that he was the son of Duncan Rose the elder, who, on his death bed, recommended him to the care of his nephew, the intestate of the Appellee. On



the sale of Banister's estate, he was purchased by Dr. Wilson for 90 *l.* who sold him to the intestate for the same sum. The intestate then put him apprentice to a carpenter. After his apprenticeship, he worked as a journeyman, and down to the death of the intestate, worked for himself, and was treated as a free man by his employer, who paid him his earnings. The intestate frequently admitted that he was free, and said that he had paid him his purchase money, and more; and never interfered with him as a slave. His administrator always considered him as free; but finding that he had not been emancipated by Deed, and not knowing but that he would be necessary to pay debts, considered it his duty to take him as a slave. He says he is not hostile to his claim to freedom; but suggests, for the consideration of the Court, whether a contract for freedom can be set up in a Court of Equity, and whether any other mode of emancipation than that prescribed by Law, can be sustained."

*Randolph v. Randolph*, 6 Randolph 194, March 1828. Brett Randolph "levied his execution on four slaves; when Catharine and Georgianna Randolph . . . filed a Bill of Injunction to stay the sale; stating, that some years before, a division of their father's estate had taken place . . . on which the slaves taken in execution had been allotted to them, . . . The Chancellor refused the Injunction. This Court granted it."

Held: [508] "in every case in which the owner of slave property [which has been taken by virtue of an execution issued against the goods and chattels of another] . . . applies to a Court of Equity, he will be entitled to an Injunction, and if he makes out his case, he will be entitled to relief, though he neither alleges, nor proves peculiar value of the property."<sup>1</sup> [Brooke, P.] Carr, J.: [197] "there are many cases, in which a slave has no peculiar value with his owner; some, among the large slave-holders, when he is not even personally known; or he may be vicious or worthless. To these, and other such cases, the principle of equitable interference surely would not apply. . . . [198] My opinion then is, that to authorize a Court of Chancery to grant an Injunction stopping the sale of a slave under execution, the Plaintiff must claim as owner, and state some fact or circumstance, whether the *pretium affectionis* or any other, tending to show, that the verdict of a Jury in damages would not compensate him; and that the mere claim of him as his slave, without more, does not authorize the staying such sale under execution." Green, J.: [199] "I cannot help thinking, that slaves ought, *prima facie*," to be considered property [198] "of such a nature, that it may fairly be supposed to have a peculiar and additional value in the estimation of the owner, the *pretium affectionis*. . . . [199] They have moral qualities, which make them, in some instances, peculiarly valuable to their owners; but which could not be the subject of enquiry in each particular case, without great inconvenience and uncertainty. And whatever may be their qualities, we know that attachments naturally and generally grow up between master and slave, which cannot be the subject of pecuniary estimate by a Jury. This *prima facie* presumption may, however, be repelled by circumstances."

<sup>1</sup> Quoted from President Brooke's citation of *Randolph v. Randolph*, in *Harrison v. Sims*, p. 155, *infra*.

Coalter, J.: [201] "The master has not only his own pecuniary interest to consult, and his own affections and predilections to gratify, . . . but, he owes a duty to the slave, as well as the slave does to the master, and which he ought to perform; the duty of protection from a violent seizure and sale, which may terminate in the destruction of his happiness, and in breaking asunder all his family ties and connexions. I have known slaves who could not be sold for \$20, and whose masters ought to consider themselves bound by ties of real gratitude to avert such a calamity from them, if able to do so, at the expense of hundreds. Surely, such considerations ought to receive the attention and countenance of the Courts."

Cabell, J.: [202] "slaves are human beings; and therefore, I do not think that even their attachments and feelings are to be disregarded. The inhumanity of wantonly invading these attachments and feelings, forms with me an additional argument in favor of the interference of a Court of Chancery. . . it should be regarded as a general rule, that the Courts of Chancery are bound to interpose, wherever the slaves of one man are about to be sold to pay the debts of another."

*Claytor v. Anthony*, 6 Randolph 285, March 1828. Patrick was sold, in 1812, for \$253.50.

*Redford v. Peggy*, 6 Randolph 316, March 1828. George Redford [340] "was a very old and infirm man, without any family, or any one living with him but his slaves." After his death the following documents were found in his own handwriting: I. Deed of 1803: [323] "I do hereby immancypate, and set free my negro boy Will, son of Tener, who was born 16 August 1791, and my desire is that the said Will be by the Court set free: . . . The above is done at the request of them that is no more." Will remained in slavery till the testator's death.

II. Will of 1811. [323] "I lend to my beloved wife Jane the following slaves that is Lewis, Peg, and all her children, and grand children, Beck and their increase during her life, and at her death my will and desire is that they, and their increase be freed, and immancypated, and if the Law of this State will not suffer them to stay here, or the Generall Assembly will not permit them to stay here that my brother Richard Redford or his heirs do contrive to get them to the State of Kentuckky, and county of Shelby; do git them carried there, for which trouble they are to serve him five years, and then to be free, and their increase. Item, my will further is, that the rest of the slaves, Tener and all her children be freed, or immancypated with all their increase, and if cannot be permitted to stay as above that may stay in this Commonwealth, they may be sent to my brother Richard to stay with him five years, except Will to stay four years, and that each of them be furnished with five dollars to bear their expenses there, and to have my small cart, and horse called Chancellor, or one as good; and that my still be sold to raise the money, and bal's afterwards to be applied to carrying Lewis, Peg, and children, and to be made up five dollars for each of them out of my estate; then Lewis, Peg, and children to be free. . . hoping they [my executors] will use their best endeavours to fulfill my desire with trying the Assembly to git them suffered to stay in this Commonwealth as many of them have husbands

and wives to leave behind, and they are as industrious and honest [as] any other slaves:” His wife died before 1818.

III. Will of 1818: [317] “My Will is that all my slaves may at my death be immancypated and sit free, to wit, Lewis, Peg, and all her children and grand-children, Tener and all her children and grand-children them and and their heirs forever: but Lewis, Essix, Tim, and Charles, Will, Daniel and Tarlton are to pay to some person appointed by the Overseers of the Poor for the support of Milly a lunatick ten dollars per year, and her mother Tener, and if they, or either of [them] do not [pay] the sum of ten dollars each the said Overseers are to hire them to some person to reese the sum of said ten dollars each: If the Assembly will not permit them to stay within this State my desire is that my Ex’rs. or either of them do imploy some person to carry them to some free State, and pay it out of my estate: . . . I have not had this witnessed as I think my [signature?] is well enough known and no person present.” In 1819 Redford sold Fanny, a daughter of Peggy, to Tuggle [321] “on account of her having a free husband. That free man had behaved badly. He insisted on visiting” Tuggle’s “house against his will, and finally attempted to carry her off.”

IV. Will of 1820, dated only a few days before the testator’s death, [340] “written in three successive paragraphs, each signed G. Redford:” (a) [324] “if should dy, I want Joseph Davis set them all at liberty: I have toiled if the behave themself that the never serve nobody after my death: I have been vary much enterrested about what Thomas Tuggle said to me my negroes that tha shod suffer after my death, but set them all at liberty at my death: Joseph Davis and Lucy Davis I depend on to see my negroes sot free.” (b) “all my negroes to sot free: Mary and Daniel must 5 dollars; vary sick when roat this, weak withall, I roat this is my negroes might not be imposed by no one. I hope Joseph Davis will see them righted. I depend on Joseph Davis to see them righted; her I say Mary and Daniel must have 5 dollars between them equally divided at my death.” (c) “but set set them free at any rate: I depend on your see them righted allways”

Judgment of the superior court admitting the will of 1818 to record affirmed.

*Harrison v. Sims*, 6 Randolph 506, June 1828. In 1827 Harrison and Jones bought three negro girls belonging to Irvine, but left them “on the plantation of the said Irvine, for the convenience of his family, the said girls being favorite house-servants, but at all times completely under the control of the Plaintiffs;” A short time after, Sims caused an execution “to be levied on the three negro girls [as property of Irvine] . . . and they will be sold, if not prevented by the interposition of the Chancellor, . . . The Injunction was refused by the Chancellor,”

Injunction re-instated: [508] “The Chancellor was mistaken . . . Though there is some little diversity of opinion, whether peculiar value of slave property ought to be stated in the Bill, praying relief in such cases, yet . . . when that matter is alleged in the bill, as in the case now before us, an Injunction ought to be awarded,”<sup>1</sup>

<sup>1</sup> See *Randolph v. Randolph*, p. 153, *supra*, and *Sims v. Harrison*, p. 173, *infra*.

*Moses v. Denigree*, 6 Randolph 561, November 1828. "I, Samuel Pretlow, . . after deliberate consideration, and from the conviction of my own mind, being fully persuaded that freedom is the natural right of all mankind, and that no Law, moral or divine, has given me a right to, or property in, the persons of my fellow-creatures; and being desirous to fulfil the injunction of our Lord and Saviour Jesus Christ, by doing to others as I would be done by, do therefore declare, that having under my care a negro boy, named Moses, aged about six years, do therefore . . [562] release unto him . . all my right . . to his person, . . after he shall attain to the age of twenty-one years, which will be on the 31st day of the twelfth month in the year 1796," This deed of emancipation was signed November 13, 1781. "On the 14th day of November, 1781, Samuel Pretlow made his Will, which was recorded on 23d of April following . . devised a tract of land to his son, . . and also the labour of his negro, Robin, and three others, until they 'become free, agreeable to the manumissions, I have given under my hand and seal,' and . . 'to his daughter . . the labour of four negroes, viz: Moses, Joe, Tom and Tabb, until they become free.'" The deed "was found among the papers of the acting Executor about fourteen years before the institution of this suit, and was never given to the Appellant, but had been offered by the Executor to the Court many years before, to be recorded, when the Court refused to receive it." It was recorded April 26, 1819. Judgment [561] "for the Plaintiff in the Court below, . . The Superior Court reversed the decision . . and the Defendant, Moses, appealed "

[565] "the judgment of the Superior Court must be affirmed." [563] "In 1723, it was enacted that no person should emancipate a slave but for meritorious services, and by permission of the Governor and Council. This Act continued in force till May, 1782, when a Law passed, saying, 'That it shall *hereafter* be lawful . . to emancipate' . . [565] Here, neither the Will nor the Deed looked to the passage of a Law as a condition,<sup>1</sup> but gave freedom upon the sole condition of the negro's living till twenty-one; and this was against Law, and void." [Carr, J.]

*Spotts v. Gillaspie*, 6 Randolph 566, November 1828. Suit for freedom. James Gilcrist of Pennsylvania, by his will dated 1782, bequeathed his "negro wench Hanna," after the death of his wife, to his son-in-law Robertson. The widow of Gilcrist died in the spring of 1786, and Susanna, the daughter of Hanna, was born a few months later. When Susanna was six weeks old, Robertson, a citizen of Virginia, took Hanna and Susanna from Pennsylvania to his residence in Virginia.

Judgment for the plaintiff, affirmed: after the passage of the act of Pennsylvania of 1780, for the gradual abolition of slavery, Gilcrist's property in Hanna was, as to her services, the same, but [572] "her condition was so changed that she could not be the mother of a slave in Pennsylvania, . . Susanna . . though born of a slave, . . was free: and . . the Law of Virginia . . does not . . permit a person free in Pennsylvania, to be held in slavery here." [Brooke, P.]

<sup>1</sup> As in *Pleasants v. Pleasants*, p. 105, *supra*.



*Commonwealth v. Booth*, 6 Randolph 669, November 1828. Booth was found guilty of permitting more than five negro slaves to assemble on his premises, in violation of the act,<sup>1</sup> and was fined ten dollars.

*Bledsoe v. Commonwealth*, 6 Randolph 673, November 1828. "the prisoner was indicted for feloniously stealing . . . a negro man slave . . . of the value of four hundred dollars." He was [674] "convicted and sentenced to five years imprisonment in the Penitentiary."

*Montgomery (a pauper) v. Fletcher; Whiteford v. Smith (a pauper); Cordell v. Smith (a pauper)*, 6 Randolph 612, December 1828. Hugh Whiteford, acting for his father, removed with his father's slaves from Maryland to Virginia in 1797; bought a farm for his father, and settled the slaves on it. He took the oath, within sixty days, prescribed by the act of 1792. The father removed shortly after and became a citizen of Virginia, but did not take the oath. [614] "In the third case, the action was brought by Fanny Smith, and her daughter Eleanor and Harriet, . . . these plaintiffs were sold . . . to . . . Johnson, who agreed to take \$300 for them from the Plaintiff, Fanny Smith, who, on the payment thereof, was to be free, as well as her children; but he made a Bill of Sale of them to . . . Chapple, who had assisted her with a part of the money: that Chapple permitted them to act as free persons for ten years, but that a part of the money being still due to him, he at length, in 1825, sold them to the Defendant as slaves. They were never legally emancipated either by Johnson or Chapple."

Held: [616] "The son, (who was the agent of the father,) and the father, were the importers of the slaves. . . . Either the son or the father might take the oath."

*Isaac v. West*, 6 Randolph 652, December 1828. Suit for freedom. [655] "In April, 1806, Abel West emancipated many of his slaves, by a Deed, which in the same month was duly recorded, . . . Amongst these was Jenny, the mother of the Appellant, who was born in 1813. West died in 1816. The operative words of the Deed were: 'I, Abel West have, and by these presents do manumit, and set free the following negroes at my death; they shall serve me as long as I live, and at my death shall go free from all persons; and I do hereby for myself, and my heirs, executors, and administrators relinquish all my right, and title of, in and unto the afore-said negroes Josiah,' etc. In the month of January preceding the date of the Deed, many of the negroes were settled by West, upon two hundred acres of land, which he afterwards devised to the negroes, which had belonged to him." [654] "I give all the negroes which belonged to me the land lying above the Neck road, supposed to be two hundred acres more, or less, it being part of the land where I now live, to them and their heirs forever on the female side in common amongst them all as a place of refuge. I also authorise my Executor to give them thirty barrels of corn, and one thousand weight of pork. I also give them all the flax, wool, and leather, that may be in the house at my death. Item, I give to my men Joshua, Will, Sam Parker, Edmund, and Adam, forty dollars each should

<sup>1</sup> 1 Rev. C., ch. III, p. 424.

they finish the crop." [653] "all the negroes who were placed on the said tract, were considered in the neighbourhood as free, and were dealt with, and dealt with others as such, from the time they were placed there till West's death:" [656] "rendering no service to West, and appropriating all their earnings to their own use, some of the women hiring out their children, and receiving their hires. Some of the slaves named in the Deed, continued to serve West until his death."

Judgment for plaintiff: the deed may be [657] "construed to give immediate freedom, to all intents and purposes, except to hold them bound to serve West himself, personally, during his life. . . If this condition was against Law, as inconsistent with the right granted, it would not frustrate the grant. . . If this construction is doubtful, some weight is due to the maxim, that every Deed is to be taken most strongly against the grantor, and to the spirit of the Laws of all civilized nations which favours liberty. '*In obscura voluntate manumittentis, favendum est libertati.*'<sup>1</sup> And for the Common Law, see *Coke Litt.* 124, b." [Green, J.]

*Stevenson v. Singleton*, 1 Leigh 72, February 1829. "Robert Gibbon, on the 11th December 1818, agreed with his slave Richard Singleton, the appellee, that he would sell him to himself, or in other words, that he would emancipate him, in consideration of the sum of a thousand dollars to be paid to him by the slave. . . 400 dollars were paid accordingly, in cash, by the appellee; and William Foushee and Andrew Stevenson, as his friends, executed their joint notes or bonds to Gibbon, for the two sums of 300 dollars each, . . But no deed of emancipation was executed by Gibbon. On the contrary, Foushee and Stevenson required, as a security for their indemnification, that Gibbon should convey the slave to them, by bill of sale in due form; which was done accordingly. The intention of the parties, however, was that the slave should be emancipated whenever he should pay to his former master, or to his sureties, the amount of the notes. He was thereupon permitted . . to go at large and act as a free-man, for the purpose of raising the funds necessary for the completion of his right to freedom. . . he paid to Gibbon at different times . . the sum of 166 dollars, . . In January 1821, after both notes had become due, Gibbon insisted on immediate payment; and as the appellee was unable to pay the money," he was re-conveyed to Gibbon. [73] "Gibbon appears to have been still very willing to give freedom to the appellee, provided he could have got the balance of the money. The appellee commenced this suit, in *forma pauperis*, in the superiour court of chancery . . and that court decreed, that the appellee was free, and entitled to all the immunities of a free man of colour;"

Decree reversed: "It is not competent to a court of chancery to enforce a contract between master and slave, even although the contract should be fully complied with on the part of the slave."

*Newsom v. Newsom*, 1 Leigh 86, February 1829. In 1808 a slave was conveyed by Keeling, in trust for his wife, and after her death, in trust to the use of their children. Mrs. Keeling sold the slave to Pendred who died in possession of him. His widow and administratrix married New-

<sup>1</sup> *Dig.*, lib. 50, tit. 17, sect. 179, Ulpian.

sum who [87] "sold him in his representative character . . . to one Bonney for 450 dollars, who afterwards sold him to one Adams."

*Rankin v. Bradford*, 1 Leigh 163, March 1829. Will of Edward Carter, proved in June 1792: "I give and bequeath to my son Charles Carter and Mr. Francis Thornton, four slaves, one male and three females, not under the age of ten nor over the age of thirty years, in trust for the purpose of applying the profits of the said slaves to the maintenance of my daughter Jane Bradford and her husband Major Samuel K. Bradford and their children" and after the death of the daughter and son-in-law, [164] "to be equally divided among the children" The four slaves were selected from the testator's estate and delivered to the daughter. Major Bradford died and her second husband, "in November 1798, sold to Richard Rankin, for £190, all the trust slaves (then six in number) for the life of his wife; and she joined him in the bill of sale. . . Rankin gave some of the slaves to his sons-in-law . . . and he and they sold the absolute property of some of them" [168] "the case is decidedly against the appellant."

*Hunter (pauper) v. Fulcher*, 1 Leigh 172, March 1829. Suit for freedom. "Hunter . . . was born . . . in Virginia, the slave of . . . Offutt, . . . by whom he was given to his daughter, who . . . removed with her husband . . . to . . . [173] Maryland. . . they carried Hunter with them, . . . and he resided, with his master and mistress, in Maryland, about twelve years. . . he was brought back to Virginia, and was sold . . . to one Hill; who afterwards . . . sold him to . . . Fulcher, for 450 dollars . . . after the year 1819."

Judgment for the defendant, reversed: [182] "The law of Maryland<sup>1</sup> . . . that slaves carried into that state . . . to reside, shall be free; and the owner . . . having carried him to Maryland, and resided there with him for twelve years, thus becoming himself a citizen of Maryland, and voluntarily subjecting himself and the slave to the operation of her laws; I think the right to freedom vested, and could not be divested, by the bringing him back afterwards to Virginia." [Carr, J.]

*Dunn v. Amey*, 1 Leigh 465, November 1829. Will of John Campbell, dated July 5, 1818: "I desire him [the executor] to dispose of all my real estate, except as much as he may think to reserve for a house and a proportionable small garden for my slave Amy. I wish Mr. Shipherd [the executor] to emancipate the above named Amy, and her child James, as also her sister Polly, and her brother Ned, and all their offsprings, should they have any; and, if possible, to have leave granted them to remain in the state; if that cannot be granted, I wish them (I mean Amy, the principal) to have the sum of 1000 dollars as soon as it can be made after my just debts are paid. My other slaves I wish [sc. to be emancipated] as soon as they may earn the amount of their first purchase, and paying Mr. Shipherd ten per cent. commission for his trouble: . . . [466] The residue of the money to be converted into United States' bank stock, the dividend to the use of Amy and her child James, until James arrives

<sup>1</sup> Act of November 1796.

at the age of twenty-one years; at which time I wish them equal in the stock until her death; at which period, I wish James to have all the stock, and Polly the house that is to be left to Amy her life." The will was wholly in the handwriting of the testator and was signed, but not sealed by him. The executor gave the slaves deeds of emancipation, but did not record them as required by the statute.

Held: [471] "It was, unquestionably, the intention of . . . Campbell to emancipate the appellees; and his will is sufficient for that purpose, although it is not sealed.<sup>1</sup> . . . [472] still the appellees remained liable to the payment of Campbell's debts; . . . an account ought to be taken of the assets, . . . and if it shall appear that the debts . . . can be satisfied without resort to the value of the appellees, then the appellees should be . . . declared free; but if that cannot be wholly accomplished, then the appellees should be sold for such term of years as may be sufficient to raise the adequate fund;" [Cabell, J.]

*Clarke v. Buck*, 1 Leigh 487, November 1829. Will of James U. Blair: "I wish that Miss Collins to provide for Diana and make her comfortable."

*Davenport v. Commonwealth*, 1 Leigh 588, November 1829. Davenport was indicted for stealing a mulatto boy, David Caesar, "who was a free boy and not a slave, the said Davenport at the time knowing him to be free." The boy was not more than eight years old at the time. The jury found Davenport guilty, "and ascertained the term of his imprisonment in the penitentiary, to be two years; and sentence was pronounced accordingly."

Held: I. the offence is complete by the kidnapping, without the actual sale of the negro by the kidnapper, under the statute;<sup>2</sup> II. the stealing a free negro, with felonious intent to appropriate him, is criminal, whether the person so stealing him knows him to be free or not; III. but if one comes lawfully into possession of a free negro, not knowing him to be free, and sells him, [594] "he is guilty of no offence against the freedom of the negro, unless he knows at the time of the sale that he is free;" IV. though the knowledge of the freedom is averred in the indictment, it need not be proved, but may be regarded as surplusage; V. when one takes and carries away a free negro boy of eight years of age, with criminal intent to appropriate him, the consent of such a boy does not excuse or lessen the offence.

*Robin and others (paupers) v. King*, 2 Leigh 140, March 1830. "The appellants brought suit in *forma pauperis*, against the appellee by whom they were held in slavery, to recover their freedom, . . . they introduced as a witness, Katherine King widow of William King deceased, to prove that she had heard him say, that Esther the mother of the plaintiffs was an indian woman, she the witness being then the wife of King; that these declarations were made in the presence of the family, and they were not requested to keep them secret; and that they were repeatedly made by him."

<sup>1</sup> 1 Rev. C., ch. 111, pp. 433, 434.

<sup>2</sup> *Ibid.*, sect. 28.



Judgment for the defendant: "the declarations of . . . the husband, were not legal evidence, when disclosed by the wife as a witness." Affirmed.

*McKinney v. Pinckard*, 2 Leigh 149, March 1830. "Pinckard, being entitled to a share of the reversion or remainder of sundry slaves, . . . conveyed the same . . . 1809, to . . . McKinney, for . . . 156 dollars cash. This expectant interest . . . was worth . . . [150] at least 1300 dollars. . . [151] The chancellor decreed, that upon the payment or tender, by Pinckard's executor to McKinney, of the sum of 156 dollars, with interest . . . [152] McKinney should release . . . all his . . . claim under the bill of sale of . . . 1809. . . McKinney appealed." Leigh, for the appellant: [153] "it is every day's experience, that expectant interests in slaves, even when fairly sold at public auction, are always sold at an immense sacrifice."

Decree affirmed: [155] "McKinney . . . could not but have known, that there was a . . . most unconscionable inequality between the value of the property he bought and the consideration he paid for it."

*Walthall v. Robertson*, 2 Leigh 189, June 1830. Will of Francis Walthall, who died in 1819: "Item, if it be agreeable to the laws of this state, Virginia, in which I live, that after the death of my said wife Mary, it is my will and desire, that the following slaves owned by me, viz. Joan senior, Gary, Jack, Tom and Peter, shall as soon as they attain the age of thirty-one years, shall be freed; and I appoint . . . trustees for the liberation of said slaves, and for them to make the necessary application to court on their the said slaves' behalf, both as to their freedom and their remaining in the state. If the laws of the state be against such procedure, then my will and desire is, that the said slaves shall be equally divided among my children" The testator made his mark instead of signing his name to the will. [192] "It is fair to conclude . . . that they were favorites as they were selected from among his slaves." [190] "The county court was of opinion, that the slaves were not entitled to their freedom; and decreed a division of them among the plaintiffs."

Affirmed: [194] "The laws in force when the will was made, permitted emancipation, but imposed . . . the condition of leaving the state within a twelve month . . . unless they were permitted to remain by an order of a . . . court, in cases in which the emancipation was founded upon the extraordinary merit of the slave, . . . the courts had considerable latitude of discretion, which was restrained by the act of 1819, . . . by the requisition that the act of extraordinary merit . . . [195] should be stated in the record. . . the testator . . . could hardly have doubted, but that, at his wife's death, the laws would allow emancipation upon some terms; but he might very reasonably have doubted, whether they would allow the courts to give leave . . . to remain in the state, or not. If they should, he desired to emancipate them; if not, to distribute them amongst his children. . . they are not suggested to have done any act of extraordinary merit." [Green, J.] Carr, J. dissented.

*Thrift v. Hannah*, 2 Leigh 300, June 1830. Suit *in forma pauperis*, brought by Hannah and Kate in the county court to recover their freedom. Rachel Magruder, being a feme sole, executed the following instrument

on November 25, 1798: [305] "Know all men by these presents, that I, Rachel Magruder . . . do set free, manumit and release from slavery, the following negroes at the periods hereafter mentioned, *viz.* negro Toney, one year from the date hereof; negro Pharo, one year from the date hereof; negro Hannah, eight years from the date hereof, and her future increase, males at the age of twenty-five, and females at the age of twenty-one years; negro Kate, nine years from the date hereof, and her increase, males and females, at the age of twenty-five years;" This instrument "was partly proved, by one of the subscribing witnesses, in the county court of Fluvanna, at April term 1799; and at June term 1819, it was further proved by the other; and was, thereupon, admitted to record." On November 7, 1799, Rachel Magruder had married Thrift who had no knowledge of the instrument of emancipation. They removed to Albemarle County, and the grantor, Rachel Magruder Thrift, [320] "was dead, before the deed in question, was attempted to be consummated by proof in the court of the county in which the grantor had formerly resided."

The judgments of the county and circuit courts upholding the deed of emancipation, were reversed: [320] "the grantor had, by her marriage, lost her power to emancipate the slaves before the requirements of the statute had been complied with; that she was dead before the deed was proved and recorded; and that, in either view, the requirements of the law could not be complied with." [Brooke, P.] Two judges concurred; two [Carr and Green] dissented.

*Madden v. Madden*, 2 Leigh 377, November 1830. Will of Mabra Madden: "I desire the moveable property of every description, after the death of my wife, shall be sold, and the proceeds thereof equally divided among my five daughters, Nancy, . . . after all my just debts are paid, my desire is, that all my moveable property shall be at the intire disposal of my wife, Jane Madden: on her decease, the same to be disposed of as above mentioned." The moveable property included one male and one female slave. "The female slave died in childbed, soon after the testator's death, leaving an infant child, a girl, afterwards called Lucinda, then only two or three weeks old, feeble, sickly and unlikely to live; and the testator's widow Mrs. Madden, promised her daughter Nancy, that if she would give her care to this child, and should succeed in rearing it, she would give it to her. Nancy Madden, accordingly, took charge of the child, and by the most humane and constant care, succeeded in rearing it." Some years afterwards Mrs. Madden and the husbands of two of her daughters deeded to Nancy all their interest in Lucinda, [378] "in consideration of her care, trouble and expense in rearing the girl."

Held: "the testator's widow . . . took under his will, only a life interest in the moveable property, and could transfer no more to Nancy Madden, . . . Nancy Madden had no title to . . . Lucinda, except as a legatee in remainder, and as assignee of the right of two others of the legatees;"

*Taylor v. Browne*, 2 Leigh 419, November 1830. The will of William Browne, who died in 1816, provided that if his widow should marry [420] "the residue of the slaves . . . should be sold, and that three female slaves,

from six to twelve years old, should be purchased out of the proceeds, one for Eliz. Marston, one for Eliz. Durfey, and one for Eliz. Nettles,”

*Pleasants v. Clements*, 2 Leigh 474, February 1831. Mrs. Clements [475] “represented that the slave was sound and healthy, and that though he had been afflicted with the malady called the king’s evil, he was intirely restored to health;” Pleasants paid \$375 for him, “but soon found he was incurably diseased with scrofula, and unable to endure the lightest labour, . . . [477] Verdict for the plaintiff, for 300 dollars damages, and judgement . . . [484] judgement . . . reinstated and affirmed.”

*Bishop v. Bishop*, 2 Leigh 484, February 1831. James Bishop bequeathed three slaves, Edy, Jenney, and Peter, to his son George, “for life, and the remainder after his death to his children, and ‘that they should not be sold, or go out of the family;’ . . . [485] George Bishop had sold the woman Edy to the defendants Avery and Comer who were dealers in slaves, and purposed to send them out of Virginia; . . . Injunctions were awarded . . . to restrain the defendants, respectively, from making any disposition of the slaves till farther order, unless they would give bond with surety to have them forthcoming to abide the final decree; . . . The slave Edy could not be found.”

*Heffernan v. Grymes*, 2 Leigh 512, February 1831. In 1808 Sayre, administrator of Grymes, sold to Cardineaux, “agent in making the purchase for James Mather and Abner L. Duncan of New Orleans, forty-three slaves of Grymes’s estate, for 10,033 dollars, . . . [513] Heffernan, who was to accompany Cardineaux and the slaves” to New Orleans, was empowered “to make sale there of the other slaves of Grymes’s estate, without limitation as to the number to be sold, or the terms of sale;” and soon after his arrival he “covenanted for Sayre, to sell and deliver to . . . [514] a hundred slaves of Grymes’s estate, for 40,000 dollars; of which the sum of 5,242 dollars was to be paid to Heffernan in cash;” he retained this with Sayre’s consent on account of his commissions and expenses. Soon after [515] “Sayre’s letters of administration of Grymes’s estate were regularly revoked, on account of his mal-conduct therein; . . . and thus the delivery of the hundred slaves which Heffernan had sold in New Orleans as the agent of Sayre, was anticipated and prevented, and the execution of that contract intirely defeated.”

*Gregory v. Baugh*, 2 Leigh 665, March 1831. [668] “transcript of an order made by the general court on the 13th October 1772, in these words: ‘On the motion of Sybill, who is detained in slavery by Joseph Ashbrooke . . . , she is allowed to sue her master *in formâ pauperis*, and Mr. Jefferson is assigned her counsel to prosecute the said suit: and it is ordered, that her master do not presume to misuse her on this account, and that he allow her to come etc. and attend etc.’ . . . [671] this order must have been founded on Mr. Jefferson’s professional certificate, that he was of opinion she was justly entitled to her freedom, and stating the grounds of that opinion:” Sybill dying soon after, that proceeding was abated. The plaintiff in the present suit, James Baugh, [666] “was the son of Biddy, who was the daughter of Sybill.” He brought an action against Gregory, to recover his freedom; and the verdict in favor of the plaintiff was set aside and

the judgment of the lower court reversed by the court of appeals in 1827,<sup>1</sup> and the cause remanded for a new trial. [666] "After several continuances in the circuit court, the new trial was had at June term 1829," William Clarke deposed "he was between five and seven years old at the time of Sybill's death: . . . he always understood they were descended from indians, . . . but whether it was from the mother's side or father's he was unable to say; and that Biddy had some appearance, in her looks and complexion, of an indian." Littleberry West, over eighty-three years old, deposed that when he was fifty or sixty years old, he heard his mother say [668] "that Sybill's mother was an indian, and that Sybill herself was one, and was entitled to her freedom. . . . I have never heard that there was any male indian kin to Sybill." [666] "the jury again found for the appellee, that he was free, and the court gave him judgement accordingly."

Judgment reversed and [698] "it is ordered, that the verdict of the jury be set aside, and the cause be remanded . . . for a new trial:" "the circuit court erred, in intimating to the jury, that Clarke had stated . . . 'that he had always understood that Sybill was an indian,' and that West had stated . . . that his mother had said, 'that Sybill had the appearance of an indian;' those witnesses having used no such expressions: . . . no instruction giving any such intimation is to be given." The majority of the court held that [678] "after such a lapse of time, the doctrine of *lis mota* cannot exclude" the declarations of Clarke and West. The court (four judges sitting) were divided on the point whether, in the case of a person claiming freedom on the ground of descent from an Indian ancestress, hearsay be admissible, not only to prove the plaintiff's pedigree, but also to prove that the ancestress, from whom he derives his descent, was an Indian. Carr, J.: [680] "the decisions of this court, in several cases, have gone to let in hearsay to prove descent from an indian woman; and this is the consideration which I have found it most difficult to get over; for I am exceedingly reluctant to unsettle what is at rest. But all who have examined the earlier cases in our books, must admit, that our judges (from the purest motives, I am sure) did, *in favorem libertatis*, sometimes relax, rather too much, the rules of law, and particularly the law of evidence. Of this, the court in later times, has been so sensible, that it has felt the propriety of gradually returning to the legal standard, and of treating these precisely like any other questions of property." Green, J.: [690] "In respect to the descendants of a female indian servant, in the female line, it might happen, that, in a succession of generations, none of them would live until their term of service expired; for not only such who were the children of a negro or mulatto man, but all their descendants born during their service, were bound to serve till their ages of thirty-one, and an additional year for every bastard child (as all their children were) born during their obligation to service; and they were moreover liable to an additional service of six months from a very early period of our legislation, for every instance of fornication. In such a case, if in every generation, witnesses had gone to court and testified to their knowl-

<sup>1</sup> Gregory v. Baugh, p. 147, *supra*.



edge of their state of service, and the testimony had been committed to record, even that precaution would have been unavailing, if, when the first of the race entitled to be exempt from service, sued for freedom, all who knew the remote ancestor and her condition were dead, and hearsay were inadmissible to prove that she was a free indian servant. . . It is important to the descendants of all female [691] indian servants, many of whom are still legally bound to a temporary service, and to a large stock of emancipated slaves, who are bound to service in all generations to the age of thirty years, under Pleasants's will.<sup>1</sup> All of the former class now, and all of the latter in a few years, must be reduced to unconditional slavery, if it shall become the settled law, that the identity and condition of their remote ancestors cannot be proved by hearsay evidence or traditional reputation."

The court were also divided on the point whether, if a person claiming freedom on the ground of Indian descent in the maternal line, prove his descent from a native American Indian ancestress, the *onus probandi* lies on the defendant, to prove, that such ancestress was brought into the country, at a time and under such circumstances that such Indians might lawfully be enslaved, or on the plaintiff, to prove that such his ancestress was brought into the country, at a time and under such circumstances that she could not lawfully be enslaved.

Green, J. : [685] "The sources for the supply of indian slaves, natives of the continent of America, between 1682 and 1705, must have been very scanty, adverting to the state of things with respect to our neighbouring indians during that period; and there was never any source of a supply from abroad, except such as might be kidnapped in the West Indies, for there slaves were more valuable than here. In respect to the sources for the supply of indian servants, in addition to what I said on that subject on the former occasion,<sup>2</sup> I find, that all such female servants who had bastard children of any sort, were bound to add to their previous term of service (which was generally thirty-one years) one year on account of each child: and considering their condition, and their habitual and early connexions with negroes, they could hardly, in any case, be entitled to be discharged from service until they were past child bearing. Their children, in turn, were bound to serve until thirty-one, and as long after, as the addition of a year for each child they had during their time of service would amount to. I find further, that the act of 1765, carefully discriminated between the children of mulatto servants (the bastard children of white women by negroes, and their descendants) and those of such indian servants; discharging the former thereafter born from any obligation to service, and requiring them to be bound out as apprentices; while the former acts requiring a service to the age of thirty-one, from the children of indian women servants, in all generations, with the addition [686] of one year's service for every child born during their service, were left in full force as to them, and so continued until the general repealing clause of the act of 1819. So that as our laws were framed, the females of this class of servants were almost always bound to service until they

<sup>1</sup> Pleasants v. Pleasants, p. 105, *supra*.

<sup>2</sup> Gregory v. Baugh, p. 147, *supra*.

were past the prime of their lives. No possible contrivance, short of reducing the whole race to absolute slavery, could be better calculated to obscure and confound their right to freedom, and to destroy the evidence of it. Considering these facts, in respect to the condition of indians introduced into Virginia, as slaves or servants, respectively, and of their descendants; facts derived from infallible sources of information; I cannot for a moment doubt the propriety of the former decisions of this court, and of the instruction under consideration, that proof that a party is descended in the female line from an indian woman, and, especially, a native american, without any thing more, is *prima facie* proof of his right to freedom;" [683] "This *prima facie* presumption could only be justified by the historical fact, that a greater number of indians had been incorporated into our community, as servants than as slaves, and that the descendants of the females of those introduced as servants, born during their service, continued in servitude to an advanced age in successive generations; facts, probably, well known to the elder judges who decided the case of *Hudgins v. Wright*, as well from their acquaintance with the history of the condition of the indians found amongst us, . . . as from the proceedings and evidence in the multitude of cases upon that subject, decided in the general court in June 1772, in which parol evidence was given reaching back to the close of the century before the last,"

*Rucker v. Gilbert*, 3 Leigh 8, May 1831. Suit by Gilbert *in forma pauperis* against the "administrator with the will annexed of Rucker, to recover his freedom." Will of Rucker: [9] "My said executors and trustees are hereby authorized to act in hiring out the balance of my negroes, except my mulatto man James Gilbert, . . . it is my will and desire that my mulatto man James Gilbert should be free; but finding there would be some difficulty for it to be so, and for him to remain here, I therefore request my executors to lay off three acres of land for said James Gilbert, at any corner of my land, and let him settle on it, that they may think proper; and he is to have it during his natural life on good behaviour, and then to return to my estate. I wish the said James Gilbert to enjoy the benefit of his labour, but always to be under the control and direction of my executors and trustees." In a subsequent part of the will, "the testator directed all his personal estate and lands to be divided among his children, excepting said James Gilbert, and all his slaves to be valued, excepting said James Gilbert, of whom he made no other or further disposition than as above mentioned." The county court gave judgment that Gilbert was entitled to his freedom; the circuit court confirmed the judgment. The Court of Appeals reversed both judgments: [11] "However much the testator desired that Gilbert should be free, it was very clear, that he was deterred by the difficulties which the law presented with respect to residence here;"

*Boyd v. Cook*, 3 Leigh 32, May 1831. Will of Philip Vass, 1816: [33] "I give unto my daughter Mary Boyd, negro girl Lydia and her increase, to dispose of as she pleaseth: also I lend unto A. [and] M. B. Rachel and her increase; which negro and her increase shall not be sold for no debt or debts of Alexander Boyd or his wife Mary Boyd, in no case whatever; the aforesaid negro Rachel and her increase is not to be

removed out of the county of Halifax, without the consent of a majority of the legatees concerned; in either of these two cases [if] a breach be made, a sale or removal, negro Rachel and her increase is forfeited, and return immediately into my estate,"

*Tankersley v. Lipscomb*, 3 Leigh 813, July 1831. "Upon the information and complaint of Moses Lipscomb, that Matilda Tankersley had harboured and employed his slave, knowing her to be a runaway, contrary to the statute<sup>1</sup> . . . judgement against the defendant, for a fine of ten dollars, one half to Lipscomb the informer, and the other half to the commonwealth for the literary fund."

*Winn v. Bob and others (paupers)*, 3 Leigh 140, November 1831. [141] "About three hours before the decedent's death . . . his attending physician, suggested to him the propriety of making his will; . . . Dr. W. handed Morgan pen, ink and paper, telling him that Mr. Schwartz wished his will written: Morgan seated himself at a table . . . some twelve feet from the sick man's bed." Schwartz [142] "asked his servant Bob, whether he wished to be freed; Bob said he was very willing to serve *him*, but he had rather be freed than have another master: Schwartz said 'he should be freed.' Schwartz then asked Frank, whether *he* wished to be freed; a conversation ensued similar to that with Bob, which ended in Schwartz's saying 'he should be freed.' Polly then said to her master 'what are you going to do for poor me?' Schwartz said, 'Polly and her children should be freed.' Bob then asked, 'as he had freed him, would he not also free his wife,' Letty? Schwartz said, 'Letty and her children should be freed.' These dispositions being thus declared by Schwartz, Dr. W. went to Morgan, and reported them to him, and he reduced them to writing." [140] "Bob and ten others . . . preferred their petition to the county court . . . setting forth, that they had been emancipated by their late owner, by will . . . and that they were still held in slavery by the testator's next of kin and distributees, or some of them; and praying permission to sue *in formâ pauperis*, to have the will proved and recorded, and thus to recover their freedom, according to the statute,<sup>2</sup> . . . The county court gave them the permission, and assigned them counsel. And then their counsel offered for probat, a paper containing, as they alleged, the written or the nuncupative will of the decedent, . . . The county court, upon a full hearing, was of opinion that the paper did not contain the will of the decedent, and refused to record it. . . [143] The circuit court reversed the sentence of the county court, and admitted the contents of the paper to probat and record, as a nuncupative will. Winn appealed to the Court of Appeals."

Carr, J.: [146] "Here we have . . . no expression, indeed, or act of the sick man, to shew that he thought himself making his will or whether he intended it to be by parol, or in writing; or that he wished any person to bear testimony to what was doing. To establish such a will as this, would, I think, be of the most dangerous tendency." Brooke, J. and H. St. Geo. Tucker, P. "said, they concurred in the opinion of Carr, J. that this was not a good nuncupative will. And they intimated, that *they*

<sup>1</sup> Act of 1823-1824, ch. 35, sect. 1. Supp. to Rev. Code, ch. 179, p. 236.

<sup>2</sup> 1 Rev. Code, ch. 124, sects. 4, 5, p. 481.

thought, slaves could not be emancipated by a nuncupative will, and had intended to give that opinion on that point; but they yielded to the suggestion of Carr, J. that the point should be left open for consideration when it should be necessary to decide it. Sentence reversed."

*Hansbrough v. Thom*, 3 Leigh 147, November 1831. [150] "Hansbrough observed he had some women and children that rendered him but little service; that, on his way down he should call at Thom's house, and expected to let him have some of his negroes. That, some time previous to this conversation . . . Hansbrough told the witness, he intended selling a parcel of his negroes to Thom [the husband of his granddaughter]; that Thom might pass them off to Armistead, for a debt he owed him;" Order to Hansbrough's overseer: "Mr. John Henderson will shew and deliver to Col. George Thom, the following negroes, viz: Pompey (he has seen), Moses, Harry, Sarah and her three children with her, Patt, (about the house,) Caroline and her two boys, Sally and her three children, Linda and her child. And oblige P. Hansbrough. 16th September 1822."

*Jackson v. Ligon*, 3 Leigh 161, November 1831. Will of Owen Haskins who died in 1808: [165] "that the following slaves (naming three men) shall be sold on twelve months credit, and the money arising from the sale thereof shall be laid out in young female slaves, for the benefit of my wife and children."

*Newell v. Mayberry*, 3 Leigh 250, November 1831. "Mayberry had purchased the slave Lewis of Shepherd, for 621 dollars, and the slave . . . had absconded from Mayberry's service: . . . [251] 'Memorandum of agreement made this 2nd day of July A. D. 1816, between T. Newell and T. Mayberry. Said Newell is to give out that he has purchased negro Lewis, or exchanged with him for negro Reuben, and to try all means in his power to take said Lewis, and when taken said Newell is either to keep him and settle with Shepherd for the price of him, or to deliver him up to said Mayberry at his option, that is, Newell's; if he keeps him, no deduction for taking him, and if he delivers him up to Mayberry, then he is to receive 20 dollars for his trouble. And the said parties bind themselves on their honour, that neither of them will ever divulge or communicate this agreement to any person whatever, either directly or indirectly, except Job Moore—(signed) T. Newell. This agreement to be in force until 12th July.' . . . [252] Newell regained possession of the slave on the 20th July," and kept him as his own property, refusing [251] "to take 20 dollars tendered to him for his trouble, and to restore the property to Mayberry;" or to "pay Shepherd the above mentioned price of the slave,"

*Wallace v. Dold*, 3 Leigh 258, November 1831. Devise and bequest of land, slaves and money (in 1819) "for the support and maintenance of my son William, and for the education of his children; . . . and at the death of my said son . . . to sell my said lands and negroes, and divide the proceeds thereof"

*Burwell v. Anderson*, 3 Leigh 348, December 1831. Will of Dr. William Pasteur, who died in 1791, empowered his executors [349] "to sell his lands in Goochland, and all the personal property at and upon the same, excepting slaves,"



*Garrett v. Carr*, 3 Leigh 407, February 1832. Will of Richard Allen who died in 1805 directed, "That all his land and other property, except slaves, should be sold at auction,"

*Dudleys v. Dudleys*, 3 Leigh 436, February 1832. [437] "after the will was written, the testator was apprehensive he had not secured a slave in the will mentioned, to one of his daughters and her children, . . and altered the will, by erasing a part and inserting the alteration;"

*Gallego v. Attorney General*, 3 Leigh 450, February 1832. Will of Joseph Gallego, who died in 1818, [451] "devising and bequeathing to P. J. Chevallie a merchant [a] manufacturing mill . . , all his slaves not otherwise disposed of, . . and after emancipating his slaves Rachel, Elsey and her daughter Cora, Nancy and her three children, and David, James, Aaron and Joe, and bequeathing to Rachel 2000 dollars, to Elsey, Nancy, Cora, and Mary, 500 dollars, each, and to David, James, Aaron and Joe, 150 dollars each, . . [454] By the fifth codicil, he bequeathed to his freedwoman Rachel, in addition to what he had given her by his will, 50 dollars per annum. By the eighth, he emancipated his slave Jack, and bequeathed to him an annuity of 150 dollars for life."

*Lynch v. Thomas*, 3 Leigh 682, May 1832. Will of John Thomas, who died in 1796, [683] "bequeathed to the plaintiff [his son], the woman Tabb and her increase, and other slaves to other sons;"

*Commonwealth v. Fields*, 4 Leigh 648, December 1832. "Fields, a free negro, was indicted . . upon the statute of 1822-3, ch. 34, §3, for violently and feloniously making an assault upon, and attempting to ravish, a white woman. The jury found the following special verdict: . . the prisoner did not intend to have carnal knowledge of the within named S. L. as alleged in the indictment, by force, but that he intended to have such carnal knowledge of her while she was asleep; that he made the attempt . . [649] when she was asleep, but used no force except such as was incident to getting to bed with her, and stripping up her night garment in which she was sleeping, and which caused her to awake."

Held: "judgement of acquittal ought to be rendered in favor of the prisoner."

*Paup v. Mingo*, 4 Leigh 163, January 1833. Will of William Walker, who died in 1789: "I also desire, when my affairs are settled and all my debts paid, that my negroes be emancipated according to law, excepting one known by the name of Lud, whose services of two years I reserve longer than the rest; then he also shall be liberated; and those under age or over forty, to be equally in the care of my beloved wife, daughter and son." [164] "In 1805, the slaves of Walker's estate (suing *in forma pauperis*, . .) exhibited their bill . . wherein . . they alleged, that a fund had already been raised out of the profits of their labor, more than sufficient to pay all the debts of that testator, and that therefore they were then entitled to demand deeds of emancipation, but that they were still held in bondage, . ." The first executor Jones, [165] "from the death of the testator Walker till 1795, left the young and old slaves in the care of the testator's widow on the plantation devised to her, with as many able

bodied slaves as sufficed to maintain those who were chargeable, and hired out the other able bodied slaves: that, in 1795, the widow being dead, he divided the young and old slaves under twenty-one and over forty years of age, equally between Leonard the son, and Paup the husband of Sarah the daughter, of the testator" who had ever since held them, insisting that the testator "intended to *give* them the young as well as the old, in order that by the labor of such as were profitable they might maintain those who were chargeable." Jones had in 1795 retained the slaves between twenty-one and forty, hiring them out from year to year, [166] "and for some two or three years before his death [in 1801], it seemed, he suffered" them "to take and enjoy the profits they earned, and only withheld deeds of emancipation from them, because he had reason to apprehend, that there might be other debts, particularly british debts, for which the slaves, as well as their profits, might be liable as assets in his hands:" In 1809 Chancellor Taylor, "finding that a fund amply sufficient to meet all claims . . . had been raised out of the profits" of the slaves, decreed, that they should all (except Lud) be free . . . [167] on the 1st January 1810, and that Lud should be free on the 1st of January 1812; and that Robinson [the new executor] should execute proper deeds of emancipation to each and all of the plaintiffs, and should execute bonds to the justices of the county courts of the counties wherein the plaintiffs resided, respectively, for the maintenance of the young and the aged and such as were unsound in mind and body, out of the estate of Walker in his hands—liberty being reserved to the plaintiffs, or any of them, to resort to the court for a distribution of any surplus of the fund raised from their profits, which might remain after the debts due from Walker's estate should be liquidated and fully discharged, or for any other arrangement in respect to such surplus." The debts were not finally liquidated and paid till 1827, when there appeared a surplus of profits. The freemen claimed this surplus.

Held: I. the decree of 1809 is a final decree as to the manumission, but makes no disposition of the surplus of profits; II. the freedmen are not entitled to the surplus of profits accruing while they were actually held in bondage; negroes recovering freedom by suit *in forma pauperis*, cannot, in any case, recover profits or damages. Carr, J.: [176] "It was strongly contended for the freedmen, that this fund having been raised from their labours, after they were entitled to their freedom, ought of right to go to them. There is much in this argument, which addresses itself to our sense of justice, and to our feelings; but unfortunately for them, the point has been irrevocably settled against them. Suits of this kind have been very frequent in Virginia, for more than a century past. There have been numerous cases of recovery of freedom by persons illegally held in bondage; and in many of them, the violation of freedom has been gross and palpable, and the public feeling strongly on their side; yet, in not one single case, have damages for the detention been given. In *Pleasants v. Pleasants*, the chancellor had allowed profits, contrary to the established rule; but this court reversed his decree in that particular; and the rule which denies profits in such cases, has been invariably followed ever since. Hard as the case may seem upon the freedmen, I for one, can never think,

at this day, of breaking through this settled course and policy of the country." Cabell, J.: [180] "I consider it the settled law of this country, that a person held in slavery, no matter how long and how unjustly, cannot recover damages in the form of profits, or otherwise, for his illegal detention in slavery. This being the settled law, I deem it unnecessary to inquire into its policy or abstract justice." H. St. Geo. Tucker, P.: [184] "No instance has ever occurred, I believe, in the history of our adjudications in these anomalous cases, in which profits or damages have been allowed to the claimants, as a compensation for detaining them in slavery." The profits [187] "cannot be paid over to the freedmen, since they were not free, when the profits accrued. They derived their freedom, indeed, from the will; but it was not perfected until the execution of the power under the will by the executor."

*Gore v. Buzzard*, 4 Leigh 231, February 1833. [232] "Gore was in the habit of sending raw hides to Buzzard's tannery, and getting tanned leather from him; but he never transacted . . . these dealings in person," but "by his slaves, without any written order from him," Held: [235] "though his slaves were . . . his instruments, for carrying raw hides to the tanner, and bringing back tanned leather, yet it was he who sent the raw material and received the manufactured article;" Gore is responsible to Buzzard for "the difference, if any, between the values of what he thus bought and sold."

*Elder v. Elder*, 4 Leigh 252, February 1833. Will of Herbert Elder, who died in 1826: "It is my will that my negro woman Clara, and her child Ann Eliza, and Clara's increase, be given to Gabriel Dissosway, in trust to be sent to Africa to the colony at Liberia, provided the expense of sending them will be defrayed by the colonization society—And it is my further will, that the remaining part of my negroes who may be willing to go, shall be left in trust to the said Gabriel Dissosway, to be sent to the colony at Liberia, in the same manner as Clara and her increase—Those of them who prefer staying, shall be given, within the space of twelve months after my decease, to my brother John" The testator's estate being involved in debts, which the other personal assets did not suffice to pay, the executor hired out the slaves for several years, to raise a fund out of the profits to pay debts. [254] "The chancellor [in 1828] . . . appointed five gentlemen of Petersburg, or any three of them, commissioners, to examine, privily and impartially, all the slaves of the testator's estate, and to ascertain from each individual, and report to the court, whether he or she was willing to go to Liberia. . . . The commissioners returned a list of the slaves (other than Clara and her children) specifying their names, sexes and ages; that there were fourteen of them; of whom eight were under age of twenty-one years, six between fourteen and twenty, one six, and one two years of age: and that they had examined them according to the directions contained in the order of the court; that upon that examination, the terms of the testator Herbert Elder's will being fully explained to them, one of them named Mingo refused to accept his freedom on the terms proposed, but all the rest declared, that they preferred to accept their freedom and go to Liberia; that, however, in respect to the

two infants of six and two years of age, who were incapable of determining for themselves, they had considered it their duty to take the election of their mother for them, as their election. And the defendant filed a document in the cause, in these words: 'Office of the colonization society, Washington, December 23, 1829. At a meeting of the board of managers of the american colonization society, June 11th 1826, the following resolution was adopted—Resolved, that the resident agent state, in reply to the letter of Mr. Dissosway, that the society with pleasure accept the late Herbert Elder's slaves on the terms proposed in his will, and will transport the persons left by him as soon as they can prepare an expedition—*Teste* R. R. Gurley, secretary.' "

Held: I. such of the slaves as prefer to go to Liberia are effectually emancipated; and it is not necessary to perfect their title to freedom, that they should have elected to go within the year, provided they made such election when it was offered to them, or that the colonization society should agree to defray the expense of sending them, provided any person would agree to do so; II. the slaves born after the testator's death and while the executor held their mothers in slavery, are also emancipated; III. as to the infant slaves incapable of making election for themselves, it was right to take the election of their mothers for them; IV. the executor did right in hiring the slaves out, in order to raise a fund out of their profits to pay the testator's debts, and consequently in forbearing to offer the slaves their election to go to Liberia within the year; for, V. when slaves emancipated by will, are set free by the executor, he is not entitled to a refunding bond to indemnify him against the claims of the testator's creditors, though the manumitted slaves are, notwithstanding manumission, subject to debts; and, VI. the burden of debts ought to be distributed among such freedmen as equally as practicable, Cabell, J.: [260] "I approve of the principle declared by this court, in the case of *Isaac v. West*,<sup>1</sup> that every instrument conferring freedom, should be construed liberally, in favor of liberty."

*Bird v. Wilkinson*, 4 Leigh 266, February 1833. "John Lunsford, by bill of sale, executed on the 6th August 1822, conveyed the slave Phil, with two others to Bird. . . The slave Phil was not delivered to Bird, at the time the bill of sale was executed; he was then a runaway, . . nor did Bird ever after acquire actual possession of him. But Lunsford got possession of him, and had him secured in the jail."

*Nicholas v. Burruss*, 4 Leigh 289, February 1833. "suit *in forma pauperis*, brought . . by Nicholas, a negro pauper . . for the recovery of the plaintiff's freedom." Will of John Peyton, 1801: "It is my will and desire, that all my slaves who at the day of my death shall be forty years of age and upwards, shall serve for one year, and no longer, and then be emancipated; all those who shall be thirty years of age and under forty, to serve until they be forty years of age, and no longer, and then be emancipated; all those who shall be twenty years of age and under thirty, to serve until they shall be thirty-five years of age, and then be emancipated;

<sup>1</sup> P. 158, *supra*.



and all who shall be under twenty years of age, to serve until they shall be thirty-one years of age, and no longer; and if during the servitude of any of the female slaves, they shall have any child or children, such child or children in like manner shall serve, the males until they are twenty-one, and the females until they be eighteen years of age, and no longer, and then be emancipated." The testator then [290] "devised 1000 acres of land in the western country for the use of his slaves," The executor stated in the county court that he considered the testator's estate sufficient for the payment of his debts, [291] "and at the same time, in open court, assented to the liberation of four of the testator's slaves (other than the plaintiff) who by his will were then entitled to be emancipated:" The defendant proved that an [292] "execution was levied [in 1810] on the plaintiff Nicholas, then in the executor's hands as part of his testator's estate, and that the plaintiff was sold by the sheriff at auction for 135 dollars, out of which the execution was satisfied; and that Quarles [the executor] attended this sale, and invited a person present to bid for the property, stating that the title was good except as to a claim of R. B. Peyton's children. Under this sale, the defendant claimed." The county court gave judgment that Nicholas was a free man. Judgment reversed by the circuit court.

The court of appeals reversed the judgment of the circuit court and affirmed that of the county court: When Nicholas was taken by execution, [302] "he had still some time to serve; that he was a negro man in the prime of life; and that having sold for the insignificant sum of 135 dollars, it was fair to presume he was not sold for life, but only for his remaining term of service. . . If so, those facts would amount to an assent on the part of the executor, and establish his right to freedom, which could not be divested by the levy of the creditor's execution;" [H. St. Geo. Tucker, P.]

*Sims v. Harrison*, 4 Leigh 346, March 1833.<sup>1</sup> "sundry executions having been sued out on judgements against Charles Irving, and levied by the sheriff . . . [347] on three negro girls the slaves of Irving, the plaintiffs purchased these slaves at their full value at the sheriff's sale, and paid the money for them, and then left them on Irving's plantation, for the convenience of his family (the slaves being favorite house servants) but they were at all times completely under the plaintiffs' control. And that, afterwards, Sims, having sued out a *fieri facias* on a judgement against Irving, and delivered it to the sheriff, caused it to be levied on the same three slaves; and the sheriff had advertised them for sale to satisfy this execution. Therefore, the bill prayed an injunction to inhibit the sheriff from making such sale."

Held: [348] "the court ought to award an injunction, and . . . to give relief, though it be neither alleged in the bill, nor proved, that the slaves have any peculiar value."

*Godwin v. Godwin*, 4 Leigh 410, April 1833. An administrator sold slaves of his intestate "under an apprehension that the sale was necessary to raise funds to pay debts" of the estate, "though it turned out that the

<sup>1</sup> See *Harrison v. Sims*, p. 155, *supra*.

sale was not necessary, or that more slaves were sold than necessary, to meet the debts." Held: [412] "The use [by the widow] of the purchase money for life, is . . . the most proper measure; . . . bond with security should be required of her, for paying it over at her death, to the persons entitled in remainder."

*Commonwealth v. Weldon; Same v. Marks; Same v. Sunket; Thompson v. Commonwealth*, 4 Leigh 652, July 1833. "These four cases depended upon the construction of the 11th section of the statute of the 15th March 1832,"<sup>1</sup> I. Weldon, a free negro, had been indicted in "the circuit superiour court" for horse stealing. Held: [657] "the circuit superiour court . . . had no jurisdiction to try the prisoner" [by the 11th section of the statute of the 15th March 1832]. That court was directed to "set aside the verdict which has been rendered, and to order the prisoner to be carried before a justice of the peace . . . who may proceed with his case *de novo*,"

II. Marks "was a free negro, indicted and tried, in the circuit superiour court," and found guilty of burglary. Held: "the said court had no jurisdiction."

III. Sunket, a free negro, was "indicted of grand larceny" in [661] "the circuit superiour court . . . The indictment charged, that he had been, once before, in 1829, indicted for the like crime of grand larceny, in the then circuit court . . . , tried, convicted and sentenced to be punished with stripes and six months imprisonment in the common jail of the county." He was found guilty of the second crime of grand larceny. Held: "the circuit superiour court . . . had no jurisdiction . . . for such offence he could only be tried by the justices of oyer and terminer for the county:"

IV. "Thompson, a free negro, was indicted in the circuit superiour court of Frederick, for violently and feloniously making an assault upon, and attempting to ravish, a white woman; a crime, which when committed by a slave, free negro or mulatto, is made punishable by death, by the statute of 1822-3, ch. 34, §3. He was found guilty by the jury, and the court passed sentence of death upon him." Held: "the circuit superiour court . . . had jurisdiction . . . and that there is no error in the judgement."

*Brooks v. Commonwealth*, 4 Leigh 669, July 1833. "Brooks was indicted for the murder of a slave," The prisoner was put on his trial at the September term, 1831, [670] "but the jury not agreeing in a verdict, were discharged; and there was another trial at April term 1832, which ended in the same way. At April term 1833, the prisoner was tried by a third jury, which found him guilty of manslaughter, and ascertained the term of his imprisonment in the penitentiary to be two years. . . . The court . . . sentenced the prisoner to imprisonment in the penitentiary for two years, and to be kept in a solitary cell there, on low and coarse diet, for one sixth of the term of imprisonment."

Held: [671] "the judgement is . . . to be reversed, and judgement to be entered, that the prisoner be confined in the penitentiary for the term of two years, and kept in a solitary cell etc. for one twelfth part of the term."<sup>2</sup>

<sup>1</sup> Sess. Acts of 1831-2, ch. 22, sect. 11. Supp. to Rev. Code, ch. 187, p. 248.

<sup>2</sup> Sess. Acts of 1832-3, ch. 19, sect. 2, p. 18.

*Betty v. Horton*, 5 Leigh 615, July 1833. "suit *in forma pauperis*, for the recovery of freedom, brought in 1828, by Betty, Pleasant, and their children against Horton, . . . The jury found a special verdict, stating, that one Blake, who was born in the state of Massachusetts, when a young man, removed to the county of Southampton, Virginia, married there, and received with his wife two slaves, the plaintiffs Betty and Pleasant. That some time after his marriage, and in the year 1797, he left Virginia with his wife and child, carrying with him those two slaves, then small girls, and arrived at Boston in July 1797. That having spent about three months in visiting his friends and relations, he rented a house in Boston in which he and his family resided, opened a store . . . [616] and declared that he intended to spend the rest of his days there. That he continued to reside and carry on business at Boston, till July or August 1798, when, his business not being prosperous, and his wife being in bad health, he disclosed his intention of returning to Virginia; and, closing his business, he left Boston for Virginia, in September 1798, bringing with him his family, and the two plaintiffs Betty and Pleasant. And that Betty since her return has had two children. The constitution of Massachusetts was also found as part of the verdict. And the question referred to the court was, whether upon this state of facts the plaintiffs were entitled to their freedom or not? The circuit superiour court . . . held, that they were not free,"

[626] "Judgment reversed, and judgment entered for the paupers." Blake had become [624] "reinvested . . . with his original character of a man of Massachusetts. . . [625] when he came to Virginia with his slaves, their destiny having been linked to that of their master, and they having acquired like him a Boston home, he was bringing into Virginia, slaves which had ceased to belong to this commonwealth. . . since her return, Betty has had two children; and she is here, moreover, when she exhibits her petition thirty years afterwards. We must take it, then, that she was brought back to Virginia, and has been kept here more than one whole year; and if so, she is free, unless her master complied with the law.<sup>1</sup> . . . after twenty years a jury may presume, that the requisitions of this statute have been complied with, if, in the meantime, there has been no suit for freedom, and if there be no circumstances to repel the presumption. . . But the jury alone can presume this fact. . . In this case, the verdict is silent, and the fact must therefore be taken to be against the defendant. The consequence is, that the plaintiffs are entitled to their freedom, and to a judgment in their favor upon the verdict of the jury." [H. St. Geo. Tucker, P.] Carr, J.: [622] "my impression is, that from [the constitution of Massachusetts and their judicial construction of it] . . . the paupers derive a good claim to their freedom." Tucker, P.: [623] "the construction of the constitution of Massachusetts by its courts, . . . we would of course respect and follow, if we were sufficiently advised of them."

*Commonwealth v. Watts*, 4 Leigh 672, December 1833. "Watts, a free negro, was indicted (upon the statute of 1822-3, ch. 34, §3) and tried,

<sup>1</sup> Act of 1792, 1 Old Rev. Code, ch. 103, sects. 2, 3, 4.

for violently and feloniously making an assault upon, and attempting to ravish, one J. B. described in one count of the indictment, 'a white woman unmarried,' and in another, 'a white maid.' The jury found him guilty. . . he made a motion in arrest of judgment, because J. P. . . was, at the time of the offence, under the age of twelve and above the age of ten years,"

Held: there is no distinction [673] "between a violence of this kind, practised upon a female between the age of ten and twelve years, and a similar violence practised upon one above the age of twelve. . . The court is of opinion, that sentence of death ought to be passed upon the prisoner."

*Commonwealth v. Stephen*, 4 Leigh 679, December 1833. "Stephen, a free negro, was indicted for murder," and found "guilty of murder in the first degree."

*Commonwealth v. Peas*, 4 Leigh 692, July 1834. Indictment<sup>1</sup> for feloniously and fraudulently taking and removing a slave from one county to another, with intent to defraud the owner and deprive him of the property.

Held: [693] "the omission of an averment in the indictment, that it was without the consent of the owner that the slave was removed or carried away, is a fatal defect, not cured by the verdict;"

*Anderson v. Commonwealth*, 4 Leigh 693, July 1834. See same *v.* same, p. 177, *infra*.

*Commonwealth v. Connor*, 5 Leigh 718, December 1834. "The defendant was presented, under the thirteenth section of the statute concerning slaves, free negroes and mulattoes,"<sup>2</sup> It was "proved, that, at various times, almost every day between the first day of January preceding, and the date of the presentment, the defendant knowingly permitted large numbers of slaves, frequently upwards of twenty, other than his own, to be and remain at one time in the defendant's shop at Norfolk; but the witness could not prove any particular number on any particular day, and did not know, whether the owner or overseers of the slaves permitted them to be there."

Held: the *onus probandi* lies on the defendant [719] "to shew that the slaves were on his lot or tenement with the consent of the owners or overseers."

*Winn v. Jones*, 6 Leigh 74, February 1835. Action "to recover damages for a trespass committed by the defendant's testator in his lifetime upon slaves of the plaintiff. . . the plaintiff was a white man, and the defendant a free negro, as was also her testator. And the plaintiff having introduced two free negroes as witnesses for him, the defendant's counsel objected . . on the ground, that free negroes could not be examined as witnesses in a cause to which a white man was a party; but the court admitted them, . . [75] verdict . . for the plaintiff;" Verdict set aside, and a new trial directed.<sup>3</sup>

<sup>1</sup> "on the statute 1 Rev. Code, ch. 111, sect. 30, p. 428."

<sup>2</sup> 1 Rev. Code, ch. 111, sect. 13, p. 424.

<sup>3</sup> *Ibid.*, sect. 5, p. 422.



*Whitton v. Terry*, 6 Leigh 189, March 1835. [193] "the slaves sold . . . very well; seven for 4420 dollars; averaging 631 dollars, though three of the seven were women."

*Erskine v. Henry*, 6 Leigh 378, April 1835. See same *v. same*, p. 189, *infra*.

*Brown v. Shields*, 6 Leigh 440, May 1835. Shields bought a negro boy slave from Brown who represented the negro boy to be his absolute slave, and was paid three hundred dollars for him. Letter of Brown to Shields, August 6, 1823: [441] "I wrote to the clerk of Rockingham county court, and obtained a copy of the deed of emancipation, by virtue of which Edmond claims his freedom, . . . [442] I find by the copy which I have received, that a boy by the name of Edmond was emancipated by James Smith, to take effect in March 1823; which I suppose to be the boy sold to you. As to any defect in the title, at the time I sold to you, or until I was informed by your son, I had no knowledge. However, I wish to do what is just and right in the business, and upon amicable terms." The negro boy absconded from Shields's service and [443] "went to Rockingham, the place of his birth, where the deed of emancipation containing the evidence of his title to freedom was recorded, and where the witnesses who could prove his identity resided; that being at large in Rockingham, he asked and obtained leave of the county court of that county, to bring suit there for his freedom;" The result was "that Edmond was found by the jury, and adjudged by the court, to be free."

*Anderson v. Commonwealth*, 5 Leigh 740, July 1835. "Anderson, a free negro, was tried for grand larceny, in the corporation court of Petersburg, sitting as a court of oyer and terminer, convicted and sentenced to imprisonment in the penitentiary for five years. He was prosecuted and tried, under the provisions of the statute of 1831-2, ch. 22, §11,<sup>1</sup> in the same manner in which slaves are prosecuted and tried. There was no indictment or information filed; nor did it appear that the prisoner was otherwise informed of the offence for which he was tried, than by the *mittimus* of the magistrate who committed him, and by an entry on the record, that he had been committed to the custody of the sergeant, and 'charged with larceny committed in stealing . . . one bale of cotton . . . whereupon the prisoner being arraigned of the premises, pleaded not guilty.' The court, after hearing the evidence, declared its unanimous opinion, that he was guilty: but before sentence was pronounced, the prisoner's counsel made a motion in arrest of judgment, 'because there was no indictment filed.' The court overruled the motion, . . . The prisoner first applied to this court [the General Court] for a writ of error to the judgment of the corporation court; which was denied;<sup>2</sup> . . . And then he applied to the circuit superiour court of Petersburg for the writ of error; . . . [741] The circuit superiour court allowed the writ of error; and then adjourned to this court, with the prisoner's consent, the following questions: 1. Does a writ of error lie to the judgment of a

<sup>1</sup> Supp. to Rev. Code, ch. 187, p. 248.

<sup>2</sup> *Anderson v. Commonwealth*, 4 Leigh 693.

county or corporation court, sitting as a court of oyer and terminer for the trial of a free negro?"

Held: [742] "a writ of error does not lie to the judgment of a county or corporation court sitting as a court of oyer and terminer for the trial of a free negro or mulatto." As in "the case of a slave, the court has the power to pass final sentence; and one of the incidents to the judgment of such a court, is, that it is not subject to revision."

*Poindexter v. Green*, 6 Leigh 504, December 1835. "By deed dated the 12th June 1767, and duly recorded . . . Abram Maury mortgaged [to British subjects, resident in Great Britain] <sup>1</sup> . . . three slaves, two of whom were females, . . . [505] Afterwards, by deed . . . dated the 18th February 1783, one of the female slaves mortgaged . . . and three other female slaves, her children, were sold and conveyed to William Green; . . . [506] The court decreed, that the slaves held by Green and his executors, which were the increase of the mortgaged slaves, should be sold by the marshal, and the proceeds applied to the satisfaction of the mortgage debt. The slaves, now seven in number, were accordingly sold in December 1814, for 1940 dollars,"

*Commonwealth v. Ned of Campbell; Commonwealth v. Isaac of Cowling*, 6 Leigh 608, December 1835. [608] "Ned of Campbell was emancipated by the will of Thomas Campbell deceased, which was duly proved and recorded in 1798. That testator, after emancipating one slave presently, directed 'that the rest of his black people should serve till his youngest child should be of the age of twenty-one years, for the use of raising his children and young negroes; and after his youngest child should be of age, his will was, that all his negroes should have their freedom and liberty.' The defendant Ned was born after the testator's death and before his youngest child attained to full age, which happened sometime before the 1st January 1826; ever since which time, Ned had resided in the commonwealth and in the county of Nansemond, without obtaining permission of court to remain in the county and state. He was registered as a free negro and received a copy of his register, in November 1831. . . . Isaac of Cowling was emancipated by the will of Josiah Cowling, deceased, which was duly proved and recorded in 1800; whereby the testator lent his son Thomas the use of certain slaves till [609] certain specified periods, and among others, he lent him the use of a woman slave named Dolly, till the 1st January 1813; 'at which periods,' the will directed, 'that the said slaves should go and be free, in the same manner as though they were born so;' and after similar bequests lending other slaves, male and female, to his other children, he bequeathed, 'that all the children that should thereafter descend from the aforesaid female slaves, and their increase after increase forever, should be held by the persons entitled to their mothers, until the time that they should severally arrive at the age of twenty-seven years, and then be free.' The defendant Isaac was a descendant of the woman Dolly, and attained to the age of twenty-seven years on the 1st January 1827, ever since which time he had

<sup>1</sup> *Anderson v. Commonwealth*, 4 Leigh 505.

resided in Nansemond, without obtaining permission of court to remain in the county and state. He was registered as a free negro, and received a copy of his register in January 1829."

Held: considering [610] "that Ned was emancipated by the will of Campbell in 1798, and Isaac, by the will of Cowling in 1800, before the passing of the statute of 1805-6, although their right to freedom accrued subsequently, we are all of opinion, that the defendants may lawfully remain in the state;"

*Henry v. Bollar*, 7 Leigh 19, January 1836. "Barbara Wilson . . by several deeds of emancipation, dated the 5th January 1822, and duly recorded in the county court . . in the same month, emancipated Henry and thirteen other slaves . . In the month of February following, proceedings were instituted by one of the relatives of Barbara Wilson, under the statute concerning idiots and lunatics," and in April 1822, "her estate was committed to Bollar, . . who, thereupon, took possession of the fourteen freedmen emancipated by the deeds of January 1822, as part of her estate. Upon this Henry and the other persons so emancipated, exhibited a bill . . in which they alleged, that they were in fact white persons, and therefore could never have been lawfully held in slavery, and that Barbara Wilson had, for the purpose of restoring them to the enjoyment of their rights, executed the deeds of emancipation of January 1822," and then [20] "prayed, that the court would give the plaintiffs leave to sue *in formâ pauperis* for the recovery of their freedom, and would decree that they should be liberated; . . The chancellor immediately made an order giving the plaintiffs leave to sue for their freedom *in formâ pauperis*, and requiring bond with surety from the defendants, to permit them to attend to the prosecution of the suit, and to have them forthcoming to abide the future decree of the court. Pending the suit, Barbara Wilson died, leaving a will, which she had made in August 1819, and by which the plaintiffs were emancipated, by name; and this will was duly recorded . . Upon which the plaintiffs filed a supplemental bill, setting forth this will, and claiming their freedom under it, as well as under the deeds of emancipation of January 1822. The defendants in their answers, said, that the plaintiffs were not white persons but mulattoes; and as to the deeds of emancipation, they alleged, that Barbara Wilson having been tomahawked by indians in her youth, her mind had always afterwards been extremely imbecile," that she was "in a state of dotage; in short, that she was not of sound mind; that her slaves had acquired great influence over her, and that the deeds of emancipation were procured by their influence and the fraudulent cooperation of one Eagle," There was [21] "upon the whole, no evidence that she was *non compos*. . . the court declared that all the plaintiffs and their children were entitled to their freedom, except one woman and her children, as to whom he required further proof; but the defendants consenting that these also should be liberated with the rest, the court decreed, that they should all be set free. And the court doubting whether the plaintiffs were entitled to the profits of their labour, or compensation for their services, while the defendants had held them in their possession, refused to decree them the profits,"

"*Per curiam*, Decree affirmed."

*Brown v. Handley*, 7 Leigh 119, January 1836. Detinue for a slave. "the plaintiff Handley married Betsey Brown, a daughter of the defendant. Soon after this marriage, a person who wished to purchase slaves, came to the defendant's house, and asked the defendant, whether he would sell the slave in question (a young female) who was then in the defendant's possession; and the defendant answered, that he would not, for he had given her to his daughter Betsey: and [120] the defendant said, on another occasion, that he would not sell the slave, for he had given her to Joseph and Betsey (the plaintiff and his then wife). Shortly afterwards, the defendant being at the plaintiff's house, said to his daughter, Mrs. Handley, 'Go and fetch your negro girl home, when you please;' and soon after this was said to her, Mrs. Handley went to her father the defendant's house (he being then absent from home) and got possession of the negro girl, and carried her home with her; but at the time of her so taking possession, Mrs. Brown, the defendant's wife, told her daughter, Mrs. Handley, 'that she did not give her the negro girl, but lent her to her.' Some six months after this, Mrs. Handley asked her father, the defendant, to give her a bill of sale or deed for the slave, but he refused to do so, . . . The slave remained in the possession of Handley and his wife until his wife's death, which happened about a year after they acquired the possession in the manner above mentioned, and about fourteen months after their marriage. And not long after Mrs. Handley's death, the defendant got possession of the slave, and refused to deliver her to the plaintiff, and still retained the possession. . . the jury found a verdict for the plaintiff, and the court refused to set it aside."

Held: [126] "a parol gift of slaves, followed by possession subsequently delivered to the donee, passes the title. . . the donee getting the possession, strictly in pursuance of the direction [of her father, though he was not at home at the time] . . consummated the gift, and put it out of his power to retract it."

*Emory v. Erskine*, 7 Leigh 267, February 1836. "Emory and seven other negroes brought a suit *in forma pauperis*," for the recovery of their freedom, against Erskine, the executor of Rebecca Crouch, to whom Absolom M'Coy, who died in 1803, had bequeathed all his estate for life, and at her death "all my personal estate (except my negroes, which are then to be free and at full liberty) to Thomas and Gustavus [George?] Fakes," The plaintiffs "were children of slaves held by the testator at his death, born during the life of Rebecca Crouch, who died in 1828. . . [268] the circuit court held that the plaintiffs were not entitled to their freedom, and gave judgment against them, upon the authority, no doubt, of *Maria v. Surbaugh*, 2 Rand. 228."

Application for a *supersedeas* denied: as Mrs. Crouch's [270] "title expired with her last breath, he [Erskine] had no title to hold them as her executor. The suit, therefore, is not against the persons entitled. It cannot therefore bind them if the slaves succeed. Nor can they take advantage of the judgment if against the slaves; for the effect of a judgment must be mutual, and as they would not be bound by it, so neither can they



have advantage of it.<sup>1</sup> The slaves may sue them *in forma pauperis*, and this judgment will be no bar if they can show title to their freedom. It is, therefore, evidently of no importance to the slaves to allow this appeal; and I am therefore of opinion that the motion to reconsider be rejected, as the reconsideration would be nugatory." [H. St. Geo. Tucker, P.]

In *Erskine v. Henry*,<sup>2</sup> Judge Tucker mentions this refusal of the Court of Appeals "to allow a *supersedeas* to that judgment [*Emory v. Erskine*, 7 Leigh 267]. Let me here express my deep regret at that refusal. . . I am now satisfied of the error, and if it were within our power, I should heartily concur in the reversal of that judgment. . . It can have no influence here, . . it is not [authority] . . [199] for us, when we see our error. Nor does it bind in this case, as *res adjudicata*. As Erskine could not use it against the plaintiffs, because they were not parties, so neither can they use it against him; for mutuality is the governing principle in such questions. The pauper suit is out of the question. . . Erskine having no pretence of ownership, the former action could not determine their rights; and if they could have had no benefit from its successful issue, they ought not to be affected by its unfavorable termination."

*Mahon v. Johnston*, 7 Leigh 317, March 1836. Detinue for a female slave. "One Grattan married a daughter of the plaintiff Johnston, in the state of Tennessee, where Johnston resided; and he contracted debts . . while there. Very shortly after Grattan and his wife left her father's house, for Greenbrier in Virginia, which was the place of Grattan's residence, Johnston got another son in law to draw a deed of loan of the slave in question (then about six years old) to Grattan and his wife, specifying that the girl was lent to them, and that they were to take good care of her, and deliver her to Johnston when he should demand her; and this deed was signed by Grattan and his wife. . . [318] A few minutes after the deed was executed, Johnston . . told the witness, that Grattan was largely indebted in Tennessee, and that he had taken this deed of loan, in order to shew that the girl was his property, should she be taken by Grattan's creditors while she remained in Tennessee, but that 'he intended to give the girl to Grattan any how.' A few hours after the deed was executed, Grattan and his wife, to whom the girl was delivered, set out to Virginia with the girl in their possession, and arrived in Greenbrier in June 1827." In that month Grattan mortgaged the slave to Mahon, the defendant, and delivered the slave to him. The jury found a verdict for the plaintiff, Johnston.

*Randolph v. Hill*, 7 Leigh 383, March 1836. [384] "It was proved by the testimony of two of Randolph's overseers at his coal pits, witnesses on the part of Hill—That the slave was hired by Hill to Randolph, to work in the pits, for one year. That it was discovered one evening, that there was foul air in the pit where this slave of Hill worked, and that he and all

<sup>1</sup>The "persons entitled," Joseph Henry and his wife Charity, "who was one of the next of kin and distributees both of the testator M'Coy, and of his residuary legatees," did, however, try to take advantage of this judgment. See *Erskine v. Henry*, 6 Leigh 378, and same *v. same*, p. 189, *infra*.

<sup>2</sup>9 Leigh 188 (198).

the other labourers were therefore drawn out; and that they were all, and particularly Hill's slave, told by one of the overseers present (who was one of the witnesses), not to stay in the pits, when they discovered foul air, long enough to be made sick by it. That, the next morning, the overseer superintending that pit (who was one of the witnesses), supposing that the foul air in the pit on the preceding evening, had been caused by a rain which then fell, and that, the weather being now clear, the foul air had probably left the pit, sent down one of the negro labourers at the pit (who, it seems, was a slave belonging to Randolph) with a lamp, to examine the condition thereof, and to ascertain whether the foul air was gone, so that the labourers could be safely sent down; which was the usual course in such cases, though the overseers themselves sometimes went down. That the person sent down was the foreman, and one of the most experienced labourers at the pits, perfectly competent to make such examination, and worthy of full confidence. That the foreman reported to the overseer, that the foul air was gone, and that the labourers might go [385] down with safety. That the overseer, placing as much confidence in that report as he would have had in a personal inspection, and apprehending no danger, sent the labourers down, ten in number, including Hill's slave and two of Randolph's own, none of whom were unwilling to go down; but after working there about half an hour, they found that there was foul air in the pit, and became sick, some more and some less, and were drawn out as fast as it could be done, one or at most two at a time: no preference was given to Randolph's own slaves, one of whom was the last drawn up, sending before him the body of Hill's slave, who had fallen into some water in the pit, about eighteen inches deep: he appeared to have been drowned, and could not be revived: and all the other labourers were made sick by the foul air, but one dangerously. . . That the shaft at this particular pit was about seventy feet deep, and a single shaft, which would admit of but one bucket to ascend at a time. . . that much greater hire was paid for slaves to work in coal pits, than for ordinary service, the difference being about twenty-five or thirty per cent." [384] "Verdict for Hill for 400 dollars."

[392] "The judges of this court being equally divided in opinion,—judgment of the circuit court [for Hill upon the verdict] affirmed."

*Thompsons v. Meek*, 7 Leigh 419, April 1836. Will of J. P. Thompson, dated June 9, 1813: [420] "I order, if necessary for the payment of my debts, that Peter, a negro boy I purchased from Day, be sold for that purpose."

*De Lacy v. Antoine*, 7 Leigh 438, April 1836. "Peter Antoine, Francis Colops, Romanda de Cost and Lychander Modina presented a petition, on the 26th of December 1835, to the judge of the circuit superiour court . . alleging that they were free born citizens of the island of Bravo; that against their will and consent they were brought into this commonwealth . . and were charged with piracy in the federal court . . that they had each been discharged from custody upon that charge; that since their discharge they had been taken into custody . . [439] and kept in close confinement; and therefore praying the benefit of the writ of *habeas*

*corpus*” which was granted. It was proved by [441] “two witnesses, white men from the island of Santiago, one of the Cape de Verde islands, that the petitioners were foreigners born without the limits of the United States; that the witnesses had known the petitioners for many years, in the island of Santiago; that they were free men in that island; that three of them had been soldiers in the portuguese army; and that the witnesses and the petitioners had come together to this country. Upon this evidence, the court was of the opinion that the petitioners were free persons.”

Affirmed: [H. St. Geo. Tucker, P.] [443] “I concede at once that under our law the *habeas corpus* is not the proper method of trying the right to freedom. . . [444] A free negro, as well as a free white man, must be entitled to the benefit of the *habeas corpus* act, . . . If it were otherwise, that wretched class would be altogether without protection from the grossest outrages, and their personal liberty would be an unsubstantial shadow. In such cases therefore, the court must exercise a sound discretion, discharging the party where there seems to be no real litigation as to the right to freedom, and remitting him to his suit *in forma pauperis* where there is. . . [447] The proof of the existence of a known master is wanted here to establish the fact that these men are property; . . . [449] I do not consider [the affidavit on which the writ of *habeas corpus* was awarded] as embraced by the inhibition against the introduction of the testimony of a negro against a white man. It is to be considered merely as laying a foundation upon which the court might proceed to award the writ, and is analogous to various other cases in the courts.” Brooke, J. dissented.

*Hayes v. Goode*, 7 Leigh 452, April 1836. Will of William Black, dated 1782: [455] “all my negroes, or any part . . . not already disposed of, . . . I give and bequeath unto . . . in trust to divide the same and their increase equally among the children of my son William taking my land, in proportion to the quantity held by each.”

*Manns v. Givens*, 7 Leigh 689, July 1836. “At a district court held at the Sweet Springs the 19th of October 1797, the following instrument of writing was acknowledged by Thomas Reynolds the maker thereof, and ordered to be recorded: ‘Be it known to all whom it may concern, that for certain good causes, but more especially that it is contrary to the command of Christ to keep my fellow creatures in bondage, I do hereby liberate all my slaves, and relinquish all my right, title and interest in them, to wit, Milly Mann, Isaac Mann, Jacob Mann, Mimey Mann, Esther Mann, Sally Mann, Frances Mann, reserving to myself the guardian care of Isaac aged ten, Jacob aged eight, Mimey aged six, Esther aged four, Sally aged two, Frances aged one month, until they arrive at the age of twenty-one. In witness whereof I have hereunto set my hand and seal the 18th day of October 1797. Thomas Reynolds (seal). *Teste* Samuel Mitchell, Mitchell Porter.’” The Rev. Samuel Mitchell, the first subscribing witness, [691] “at that time riding Botetourt circuit,” wrote the deed. “I do not now recollect what arguments were used either by Mitchell Porter or myself, or whether it was necessary to use any; but believing as I did that slavery was a moral evil, I know I was in the constant habit of advising all such as attached themselves to the methodist church to eman-

cipate their slaves, if they had any. . . [692] I am well assured I never told him he could not become a member unless he would emancipate his slaves, as it has never been a term of communion in the methodist church in the United States." H. St. Geo. Tucker, P.: [707] "the benevolent intentions of Thomas Reynolds the former master of these paupers, have been frustrated for forty years by some technicality in the law. . . In 1815 they instituted a suit for their freedom, in which a judgment was rendered against them, upon the ground that the instrument had not been proved and recorded in the proper court. They then proceeded to have the deed proved and recorded in Monroe in February 1821, and subsequently offered it for probat in 1830 to the county court of Botetourt, on the ground that at the time of the execution of the deed Reynolds resided in that county. The county court refused to admit the deed to record, because they deemed the evidence in support of it inadmissible and insufficient. From this sentence the paupers appealed. The [708] superiour court dismissed the appeal, but awarded a rule for a mandamus, to which a return being made, the rule was discharged by the superiour court; and from this judgment an appeal has been taken to this court. . .

"I am decidedly of opinion that the death of Reynolds the grantor did not revoke the deed of emancipation, and that it was competent to the paupers to proceed to have it recorded, for the purpose of perfecting their title to freedom." Emancipation was "expressly prohibited in 1691 and 1723, by acts, the last of which continued in force till the passing of the act of 1782, . . [709] That act was passed at the close of the revolutionary war, when our councils were guided by some of our best and wisest men; men who looked upon the existence of slavery among us not as a blessing but as a national misfortune, and whose benevolence taught them to consider the slave not as property only, but as a man. Declaring the expediency of permitting emancipation under certain restrictions, they proceed to the enactment of provisions, which distinctly evince that the caution and foresight of the lawgivers were not lost in the spirit of their philanthropy. . . [710] the act of emancipation is, by this act, the joint act of the master through his deed, and of the government through its court. The state was deeply interested that the community should not be flooded with a population of paupers, sinking under the weight of years and a life of hardships and labour. . . it is the practice, in the case of emancipation by deed, to produce the slave in court for its inspection and examination. It is not, then, until the instrument has been proved in the county court, that the emancipation is complete. But so far as the master is concerned, from the moment it is executed and acknowledged before two witnesses, and delivered, it is final and complete. . . [714] One would suppose that a slave, who is capable of nothing else, is at least capable to take his freedom, and that the grant of it is just as susceptible of gradations in its progress to perfection, as a bargain and sale of land, or a feoffment by the custom. . . [717] it is clear, that not only will an inchoate and imperfect right to freedom in a slave be recognized, but even a modified *quasi* state of freedom is sanction by this court; a state in which an emancipated female is held in unqualified slavery, yet is deemed capable



of having freeborn issue; a state, therefore, in which the party is half free, half slave, with the mingled rights of each state, I presume, cast upon her. . . [718] it would be monstrous to say that where a testator retained, till his last breath, the anxious purpose to give effect to a previous deed of emancipation, that purpose should be defeated by his casual death before the session of the probat court. . . what power can the executor have to defeat his wishes by a revocation, or by seizing the slaves and treating them as distributable estate? Such a proposition appears to me too extravagant to be maintained. I am therefore of opinion that the instrument of emancipation ought to be admitted to record, if duly proved before the county court of Botetourt. . . [719] now we are called upon to tell them, they have no right to ask that the instrument of their liberation shall be proved as the law requires. I cannot unite in doing so. . . In giving them an interest in having the deed proved, the act of assembly gave them a right also to have it done: otherwise it would indeed. 'keep the promise to the ear, and break it to the hope.' . . I think the evidence was admissible and satisfactory; that the mandamus was the proper remedy in this case; and that it was improperly dismissed by the superiour court of law. I am therefore of opinion to reverse the judgment, and to award a peremptory mandamus, as the judgment which ought to have been given by that court." All the judges concurred.

*Kinnaird v. Williams*, 8 Leigh 400, July 1836. Will of Isaac Williams, 1820, "directed that his slaves should be emancipated at the death of his wife;"

*Burley v. Griffith*, 8 Leigh 442, July 1836. Warrant obtained from a justice of the peace, under the act of assembly concerning servants and slaves, passed February 25, 1824:<sup>1</sup> [444] "Virga. Ohio county, sct. To P. W. Kennedy, const. and to the keeper of the jail of said county. Whereas Luke Griffith of said county has complained before me, that his negro man slave William Lee is now going about frequently from place to place, without his leave, and that he the said Griffith now entertains fears that he the said Wm. will leave him and depart the commonwealth, without he is confined; and the said Griffith having applied to me to commit him the said slave to the jail of said county for safekeeping: These are to authorize you the said jailor to receive the body of the said negro Slave William into your jail and safe custody, and him there safely keep, until said Griffith may demand him, or he be otherwise discharged by due course of law, Jan'y 5, 1834." [446] "The slave was committed, and shortly after escaped from the jail. Griffith then instituted his action on the case against Burley, sheriff of the county, for the escape. The declaration charges both a voluntary and negligent escape . . and also charges the defendant with the failure to make immediate pursuit with the purpose of retaking the slave. . . there was a trial by a jury, who assessed the plaintiff's damages to 300 dollars, and a judgment was rendered."

*Patterson v. Franklin*, 7 Leigh 590, December 1836. Deed of Edmund Franklin, 1801: "I . . at mine and my wife's death do give . . unto

<sup>1</sup> Supp. to Rev. Code, ch. 179, sect. 4, p. 237.

the said William Franklin, . . one negro girl named Sarah;" Sarah remained in the possession of Edmund Franklin, and several of her children were born in his lifetime.

Held: the deed [593] "had not the effect of passing the title of Edmund Franklin to the issue of Sarah born before the period at which William Franklin was by the deed to have title to the mother, and that they did not pass to him with the mother by accession."

*Pate v. Baker*, 8 Leigh 80, February 1837. [85] "Be it known to all whom it may concern, that I, Philip Hodnett of the county of Buckingham, did on the 3d day of March 1805 lend unto Absalom Baker . . a negro girl named Amy, about seven years old, which said negro girl I do by these presents again lend unto the said Absalom Baker, which he is to keep until I shall demand her . . In witness whereof I have hereunto set my hand and seal, this 19th day of November 1808." In 1822 a jury found [81] "that Amy [of the value of 300 dollars] has issue, now living . . three children, viz: a boy by the name of Wilson, aged about four years, of the value of 200 dollars, . . another boy by the name of Washington, aged about two years, of the value of 150 dollars, . . and of a girl of the name of Charlotte aged — months, of the value of 75 dollars," In 1825 "a second trial was had, and the jury found a verdict for Polly [Amy?] of the value of 200 dollars, Wilson of the value of 200 dollars, Washington of the value of 125 dollars, Delphia [Charlotte?] of the value of 90 dollars, and Amy of the value of 50 dollars,"

*Spencer v. Pilcher*, 8 Leigh 565, July 1837. Monroe, the slave of Pilcher, was hired to Spencer for the year 1828, at fifteen dollars per annum. [570] "near the close of the year . . [571] a conversation took place respecting the hiring of the slave Monroe for another year, in which the defendant [Spencer] remarked that Monroe was very awkward in farming business when he hired him, but that he had improved him in ploughing and other farming work, . . but as he considered the wages high for the first year, he was unwilling to give more for the ensuing year." It was agreed that Spencer "should keep the slave Monroe for another year on hire at 15 dollars per annum; but no particular stipulations were entered into, . . as to where the slave was to be employed, or the nature of his employment, . . defendant [Spencer] was a permanent inhabitant and extensive cultivator of the soil in Wood county; that he had been accustomed, for many years before, to carry the produce of his own farm, and sometimes of those of his neighbours, to New Orleans and the other markets on the Mississippi; but that he had not been so engaged for the two years immediately preceding the voyage hereafter mentioned, . . the said slave continued in the service of the defendant on his plantation, until the 15th of December in the last year of his hiring (1829) which [572] was within 10 or 15 days of the expiration of the time for which he was hired, when defendant set out from his farm in Wood county, with two large flat bottomed boats, pretty well loaded . . with flour made from the wheat produced on his farm, and other of his agricultural products." A few days before, Spencer had asked Dils, Pilcher's brother-in-law, [573] "whether he had any interest in the boy Monroe,

by which the defendant could be authorized to carry him down the river with him;” stating that he did not expect to be able to see Pilcher, “but that he would take Monroe with him at all events, and if lost, he would pay for him; that he would serve as a cook, and save him 50 dollars expense.” Spencer [572] “commenced his voyage with the said boats, with but two hands on board besides himself and the slave Monroe. . . on the evening of the first day of the voyage” Monroe “either went over or fell over into the Ohio river, and was drowned. . . he was about 13 years of age.” The plaintiff, Pilcher, offered [574] “evidence tending to prove that slaves taken from the county of Wood to the neighbouring county of Kanawha, and there hired for the purpose of being engaged in the manufacture of salt and the digging of coal, annually bring from 25 to 30 per cent. higher wages than slaves hired in the county of Wood for agricultural and household purposes: that this is partly owing to the great risque and danger which are considered to attend the employment in saltmaking and coaldigging, and partly to there being a greater demand for slave labour in the county of Kanawha than in the county of Wood: . . that slaves employed in voyages down the Ohio and Mississippi rivers brought much higher rates of wages to their owners, than slaves hired to be employed in the county of Wood, on the farm and for domestic purposes:” The court [578] “rendered judgment for the plaintiff for the damages assessed [317 dollars] and costs. To that judgment a *supersedeas* was allowed, on the petition of Spencer.”

Judgment affirmed: [583] “It cannot be maintained that the bailee of a slave for hire has all the rights of a master during the period of bailment. . . Our law in many instances recognizes a distinction between property in things and persons.<sup>1</sup> . . The master or owner of a slave is bound to treat him as an intelligent, sentient being, and will not be presumed, without proof, to place him under the dominion of a temporary bailee, to be used how and where he pleases. If he hires him with a reasonable expectation that he will be employed in a business comparatively healthy and free from danger to life, it ought not to be permitted to the bailee to immure him in an unhealthy mine, or to subject him to the hazards of distant voyages, and the perils of business he has never followed. Humanity to the slave requires this, and the security of the rights of property imposes other restrictions on the bailee, for the sake of the owner. A slave hired in a state recognizing the rights of the owner, cannot be taken to England, where the moment he touches the soil he is disenthralled, or to one of the non-slaveholding states, where the dangers of seduction and loss are probable and imminent.” [Parker, J.] [587] “I am of opinion that a farmer, resident even on the Ohio river, having hired a slave generally, without restriction upon his use, has no right to send him beyond the limits of the state, upon a hazardous voyage to another and distant state; and that if he does so, and the slave is accidentally drowned in the course of the voyage, though within the limits of this state, he is responsible for the value to the owner, even though no negligence or want of care should appear on his part.” [H. St. Geo. Tucker, P.] Judgment affirmed.

<sup>1</sup> Boyce v. Anderson, 2 Peters 154; Allen v. Freeland, p. 142, *supra*.

*Ball v. Commonwealth*, 8 Leigh 726, July 1837. "Alice Ball, a free woman of colour, was indicted and tried . . for the murder of a white man, . . The jury found her guilty of murder in the second degree, and ascertained the term of her imprisonment in the penitentiary to be five years. The evidence . . was entirely circumstantial: and the Circuit Court was of opinion, that it was utterly insufficient to satisfy the minds of a reasonable jury that the deceased came to his death by violence of any kind; that if the death was in fact occasioned by external violence, yet the evidence was insufficient to prove such violence to have been inflicted by human hands; and that even if the proofs furnished ground for believing that the death of the deceased was a case of homicide, they were wholly insufficient to establish that the prisoner was the perpetrator thereof. Under this impression, the Court, before the verdict rendered by the jury was received, sent them back to their room to reconsider it, and charged them upon the law and evidence in the case. Nevertheless they persisted in finding the verdict, which was finally received and recorded. The prisoner thereupon moved the Court for a new trial: but the Court, being of opinion that the power of granting a new trial, in such a case as the present, was clearly denied by the principles and practice of the English law, and was not warranted by any statute of Virginia, or by the authority of any adjudicated case within the knowledge of the Court; and believing that such a case was exclusively [727] fit for the interposition of the executive clemency—overruled the motion, and pronounced judgment according to the verdict."

[731] "Judgment reversed, verdict set aside, and cause remanded for a new trial."

*Bennett v. Commonwealth*, 8 Leigh 745, December 1837. "The prisoner then said [to the deceased], 'I suppose you have been killing Billy Graves's negroes.' (The deceased had been attending the negroes of the said Graves, as a Physician.) Deceased said, 'I suppose so;' and turned from the prisoner, . . neither, in the opinion of the witness, was angry with the other."

*House v. Commonwealth*, 8 Leigh 755, December 1837. "the indictment charged that Samuel House, on the first day of September 1836 . . did unlawfully and wilfully aid, abet and assist a certain negro man slave, viz. the slave of a certain George E. Deneale, to escape from the possession of said Deneale, . . and that the said slave . . did escape." "The prosecution was founded on the statute passed January 27, 1829;<sup>1</sup> . . [756] The jury found him guilty . . , ascertained the term of his imprisonment to be six months, and assessed his fine to 200 dollars;"

Held: the indictment was sufficient, without specifying in what manner the slave was aided to escape, and without naming the slave.

*Boyle v. Townes*, 9 Leigh 158, January 1838. Townes, "as curator and receiver appointed [by order of the hustings court] . . , was lawfully possessed of the slave in question, as one of the slaves belonging to the trust fund in the said chancery suit . . and . . casually lost the same out

<sup>1</sup> Supp. to Rev. Code, ch. 184, sect. 1, p. 243.



of his possession," and "the slave afterwards into the hands and possession of Boyle by finding came:"

*Commonwealth v. Fells*, 9 Leigh 613, January 1838. "Sidney Fells, a free man of colour, was indicted in the circuit superiour court . . . for an assault upon . . . a free white person, with intent to kill him; an offence which, by the statute passed March 15, 1832<sup>1</sup> is made punishable with death." The jury could not agree and was adjourned from day to day for nine days. It was then discharged because of illness in the family of one of the jury and of the consequences of the confinement on the health of another jurymen. The prisoner opposed the impanelling of a new jury, [614] "and moved for his discharge, on the ground that the discharge of the jury . . . entitled him thereto."

Held: [620] "it is in the power of the court for good cause, to discharge the jury, and to put the prisoner upon his trial before a new jury. . . in the case before us, it would not have been right or proper in the court below to discharge the prisoner,"

*Erskine v. Henry*, 9 Leigh 188, February 1838. "Absolom M'Coy . . . died in the year 1803, and by his last will" bequeathed to Rebecca Crouch all his estate during her life, "and at the death of her . . . , all my negroes to be free and at full liberty—I give and bequeath, at the death of her the aforesaid Rebecca Crouch, to Thomas Fakes and George Fakes all my personal estate (except my negroes which are then to be free and at full liberty) to be equally divided between them." Will of Rebecca Crouch who died in 1828: [189] "Absolom M'Coy, by his last will and testament, left me sundry negro slaves during my natural life; such of them as are not of age at my death, I leave to . . . James Erskine [my executor], to be hired out to good masters and mistresses, who will treat them with humanity and kindness, until they severally arrive at age according to law, and to apply the proceeds of such hire to his own proper use and behoof." Erskine took possession of eight negroes who were under age and "born during the continuance of the life estate held by mrs. Crouch under M'Coy's will. These eight negroes brought a suit against Erskine . . . to recover their freedom, . . . claiming that upon the just construction of the will of M'Coy, they were thereby emancipated as well as their parents; and in that suit the circuit court adjudged that they were slaves," . . . [190] Whereupon Henry and wife and others, distributees and next of kin of the testator M'Coy, as well as of Thomas and George Fakes, the residuary legatees of that testator, both of whom were now dead, exhibited their bill against Erskine . . . insisting, that the eight negroes born of the parent stock of M'Coy's slaves, after his death and during mrs. Crouch's life estate, having been adjudged to be slaves, were slaves belonging to the estate of M'Coy; . . . and praying, therefore, that Erskine should be compelled to deliver them to the plaintiffs," The circuit superior court, "considering that the eight negroes in question had been ascertained to be slaves by the judgment of the court in their suit for freedom, was of

<sup>1</sup> Sess. Acts of 1831-2, ch. 22, sect. 6. Supp. to Rev. Code, p. 247.

<sup>2</sup> See *Emory v. Erskine*, p. 180, *supra*.

opinion, that they were slaves belonging [191] to the estate of the testator M'Coy," and decreed that Erskine should deliver them up to the administrator of the residuary legatees of M'Coy "that division of the slaves and of their profits might be made among the next of kin.<sup>1</sup> . . . From this interlocutory decree, Erskine . . . prayed an appeal; which was allowed."

Decree reversed: I. the increase of the negroes, born during the life of the legatee for life, were emancipated by M'Coy's will. Brockenbrough, J.: [193] "It seems to me, that the right of the child to freedom is identical and cotemporaneous with that of the mother; and that when mrs. Crouch died, *eo instanti* the will of M'Coy operated to confer freedom on both." H. St. Geo. Tucker, P.: [197] "It is obvious that he [M'Coy] designed to exonerate from slavery every one bound to him by that tie: . . . [198] The increase of M'Coy's female slaves were emancipated by his will; and if so, they did not pass to the plaintiffs as their property."

II. [199] "But it was said, if on this ground the legatees fail and their bill is dismissed, the decree will operate to give the negroes to Erskine, who may continue to hold them as slaves, because the verdict and judgment<sup>2</sup> are conclusive that they are slaves. I think not—and, certainly, hope not.<sup>3</sup> . . . It will leave them, indeed, in his possession, if he still has them; . . . But if he has the possession, I do not think the former judgment would be a bar to a new action: 1. because a new case may be made at law, by proof of assent of M'Coy's executor, without proof of which they could not have succeeded in the former case; and 2. because Erskine having no pretence of ownership, the former action could not determine their rights;"

*Cross v. Cross*, 9 Leigh 245, February 1838. Will of John Tinsley, dated 1795: "I lend to my daughter Lucy Cross ten negroes, namely, . . . [246] the negroes and the increase I give to the surviving children of my said daughter" Shortly after Lucy's marriage to Samuel Cross in 1784, the testator [248] "gave and delivered . . . to Samuel Cross, eight of the ten slaves which he afterwards by his will bequeathed to his daughter Lucy, and the other two of the ten were the increase of the eight so given; . . . and he held the undisputed possession of the slaves for more than ten years before the death of the testator John Tinsley" in 1795. Held: [251] "the gift, if made at all, was made in 1784 or 1785, and was therefore void, the statute of 1758 being at that time in force, not modified by the proviso now in the statute book, which was first introduced on the 31st December 1787.<sup>4</sup> . . . This is decisive of the question of title; and it is gratifying to place the case upon this ground, instead of resting the proof of a gift alleged to have been made fifty-four years ago, upon the testimony of two witnesses, one of whom was only three years old at the time the gift is alleged to have been made, and the other only ten, and

<sup>1</sup> *Erskine v. Henry*, 6 Leigh 378.

<sup>2</sup> See *Emory v. Erskine*, p. 180, *supra*.

<sup>3</sup> [198] "Let me here express my deep regret at that refusal [to allow a *supersedeas* to that judgment]. . . I am now satisfied of the error, and if it were within our power, I should heartily concur in the reversal of that judgment." [Tucker, P.]

<sup>4</sup> 1 Rev. Code, ch. 111, sect. 51.

whose memory seems to have been singularly unretentive, except as to the particular fact of this gift. With respect to the length of possession, it could not give title against Tinsley in his lifetime. The possession was not adverse, for it was with Tinsley's assent; and under the circumstances, the transaction not being a gift, must be taken to be a loan, which, after five [252] years, would bar the lender as against creditors or purchasers, but could never ripen into a good title against himself in favour of the loanee. . . the just inference is, that mrs. Cross held under her father's will, and did not claim under her husband. I am moreover inclined to think, that as between father and child, possession of a slave is very equivocal evidence of a gift; as temporary loans, particularly of young females, are very usual from a father to a young married daughter; and from mere possession unaccompanied by evidence of gift, there is nothing from which a gift can be more fairly inferred than a loan. In such case, it is the duty of the court to infer the less rather than the greater,—the loan rather than the gift:" [H. St. G. Tucker, P.]

*Deane v. Hansford*, 9 Leigh 253, February 1838. Will of Thomas Cooke, who died in 1806: "After my wife's decease, I lend to my daughter Mary Deane one negro Hannah, Vennah, Amey (in possession) and one boy Nelson, . . with all the increase of the said negroes, during her life; and after her death, lend the said negroes . . to my grandson Thomas Deane and his heirs of his body; if he should die without a lawful heir, I give and bequeath the said negroes with all their increase . . to the children of my daughter Elizabeth Lee." Thomas Deane had come into possession of the slaves and their increase, on the death of the testator's widow and of Mary Deane, and had sold some of them. [254] "Deane was now childless, and his age and infirm health rendered it wholly improbable that he should have issue;"

Held: [255] "the limitation over to the children of Elizabeth Lee . . is too remote, being after a quasi estate tail to Thomas Deane;"

*Smith v. Browne*, 9 Leigh 293, March 1838. The slave Henry [295] "was in Smith's possession for one or two days, and Smith desired and intended to purchase him; but it appeared he did not; for the slave was taken sick, declared he would not live with Smith, ran off, and returned to the farm of Fox;"

*Miars v. Bedgood*, 9 Leigh 361, April 1838. Will of Elizabeth Fulgham, dated 1833: "1. After my funeral expenses and just debts are paid, my desire is that my negro man Kit have his freedom, and that he receive from my estate the sum of 50 dollars, to defray his expenses to any free state or country that he may prefer. 2. I give to Daniel Aswell my negro [362] Harry, and that the said Daniel Aswell receive from my estate 100 dollars, for the purpose of supporting the above named Harry during his life. . . 5. I give to my negro Kit . . a blue cotton bed cover, and to . . negro Harry one yarn bed cover."

*Weaver v. Tapscott*, 9 Leigh 424, July 1838. [425] "Trimble was deputed to the county of Buckingham, to hire slaves to aid in the navi-

gation of the boats [upon James River, between Rockbridge and Richmond]; that he hired slaves from three several persons . . for the year 1826,"

*Lightfoot v. Strother*, 9 Leigh 451, July 1838. Will of Sarah Chalmers, who died in 1813: "I give and bequeath to Jane Ewell during her natural life, the following negroes, . . Sucky and her increase" In 1828 Eliza, a daughter of the slave Sucky, was lent to Plummer, a son-in-law of Jane Ewell, who [452] "kept her until the 5th of August 1833, on which day he sold her and two children of her," born since 1828, "to a negro trader" who "immediately removed Eliza and her children out of the state of Virginia, to Alexandria in the district of Columbia, a distance from Plummer's residence of 12 or 15 miles, and placed them in the hands of his agent . . who took them to Richmond . . and there sold them and another slave to . . Lightfoot on the 7th of September 1833, for the sum of 625 dollars." On November 15, 1833, the trustee under the will "took possession of them in the county of Smyth, while Lightfoot was in the act of removing them out of the state through that county."

*Handly v. Snodgrass*, 9 Leigh 484, July 1838. Will of Robert Snodgrass, dated September 3, 1806: [485] "I desire and do hereby authorize my executors to . . hire out my negroes, except the old woman Magg, who I wish to be hired by my executors, and in case she should be rendered incapable of work, as much of the money arising from her hire to be applied to her support;"

*Parks v. Hewlett*, 9 Leigh 511, July 1838. "Suit for freedom . . by William Hewlett and Taylor Hewlett, suing *in forma pauperis* by Lavinia their mother and next friend, . . Edmund Edrington had executed [in 1817] an instrument in writing, purporting to emancipate and set free his slave Lavinia, . . The instrument . . was . . proved by the two witnesses in the Corporation Court . . [512] The plaintiff William was born about one year, and the plaintiff Taylor about three years, after the execution and recording of the instrument. Both plaintiffs were registered as free persons, in the hustings court . . on the 8th of July 1823. On the 25th of June 1825, Andrew Parks obtained a decree for a sum of money against Edmund Edrington . . and soon afterwards he sued out an execution on the decree, and levied it upon the plaintiffs, on the ground that the debt due him was contracted by Edrington before the emancipation was made; that the woman Lavinia, being emancipated after the debt was contracted, was liable to be taken by execution to satisfy it; and that her children, born after the emancipation, could not be more exempt than herself."

Held: [523] "Lavinia became absolutely free upon the execution of the deed, subject only to a charge for payment of debts. She never has had an execution levied on her, and if living, she is now free, and has been so ever since 1817. Her status then has always, since 1817, been that of a freewoman, and so still continues. If then her children follow the condition of the mother, according to the maxim '*partus sequitur ventrem*,' her children must be free, as she was free when they were born, . . [524] But it is said that the qualification attached to the emancipation of Lavinia,



of liability to execution, extended to those who were born afterwards in her state of freedom. I think not. We should not extend the proviso of the statute to those whom it does not expressly embrace, nor should we adopt a principle in direct conflict with what is now the well established law of the land. In *Maria etc. v. Surbaugh*,<sup>1</sup> . . . [525] Judge Brooke observes that 'the rule that children shall be bond or free according to the condition of the mother, imports the condition at the time of the birth, in exclusion of any future right to liberty;' and by consequence (I will add) in exclusion of any future obligation to servitude." [521] "Emancipation is not strictly a gift of property. It is the exoneration of a human being from the bonds which our institutions have fastened upon him, and which the beneficence of our times has authorized the master to remove. Still less can I look upon it as a gift without consideration. The considerations moving [522] to the act are of the gravest character, and but for the proviso in the statute, I should consider the emancipated slave as forever discharged from the creditor's demand, at least where it has not assumed the character of a direct lien." [H. St. Geo. Tucker, P.]

*Catlett v. Marshall*, 10 Leigh 79, February 1839. "Thomas lord Fairfax . . . by his last will and testament, dated the 8th of November 1777, . . . bequeathed all the negro slaves that he should die possessed of, to be equally divided among" his three nephews.

*Pownal v. Taylor*, 10 Leigh 172, April 1839. Deed of March 7, 1817: [175] "the said John Pownal senior and Elizabeth Pownal are to have the negro boy Dave to wait upon and make fires for them, and otherwise attend them as they may wish."

*Maund v. M'Phail*, 10 Leigh 199, April 1839. Will of Noah Maund, dated 1829: [200] "I give all my negroes to the agent of the new colonization society in Africa, to do as he pleases with them, Primus, Harry, Eady, Sam, Elcey, Kider, Charles, Wilcher and Ben. These he can take charge of after my death." Wilkins, administrator *de bonis non* with the will annexed, took possession of the slaves, "has hired them out, and received large sums on [201] account of the hires; that neither the slaves nor their hires are wanted for the payment of debts, but nevertheless the administrator has refused to deliver up the slaves and pay over the hires. The complainant [M'Phail], . . . insisted on having them surrendered to him, that he might, as soon as practicable, send them to Liberia, . . . Kain deposed, that . . . he had conversations with the testator respecting the manner in which he intended to dispose of his slaves; that the testator stated to him that he wished them to be freed and sent away to the new colonization society by John M'Phail taking charge of them, as he was acting in the line of that business; . . . [202] Broughton, editor of the *Norfolk Herald*, deposed that M'Phail advertised in the *Herald*, from November 1827 to September 1833, as agent of the american colonization society; that the object of the society was to remove free people of colour to Africa; that in 1829, the society was a new undertaking in that section of the country, and might with propriety have been described by a resident of that section . . . as a new colonization society in Africa;"

<sup>1</sup> P. 138, *supra*.

Held: M'Phail is "entitled to the slaves before mentioned, and the increase of the females since the testator's death; and decreed that an account be taken of their hires since they came to the possession of the defendant,"

*Moss v. Green*, 10 Leigh 251, April 1839. [253] "Moss agreed to lend the money [to redeem a negro girl of Green's, taken under an execution] on the following terms, *viz.* that for the loan of the money, the complainant [Green] should give him [Moss] a conditional bill of sale for a negro woman named Creasy, [which woman a negro man of his had for a wife] and her two children . . . redeemable by the payment of the money, with interest, at christmas following." Green retained possession of the slaves until December 25, when [254] "the said woman with her two children ran away from the complainant to Moss, and he has detained them ever since." On December 27 Green stated to Moss "his indisposition on the 25th, but that he had then, and still, the borrowed money ready to pay to him, as he wished to redeem the woman and her two children. Moss . . . would not permit him to redeem them;"

Held: the transaction is a conditional sale, and not a mortgage; *dissentientibus* Tucker, P. and Brooke, J.

*Crawford v. Moses*, 10 Leigh 277, May 1839. Will of James Johnson, dated 1785: "It is my will and desire that after the death or marriage of my wife, all my negroes shall have their right to freedom when they arrive to lawful age or twenty-one years old; and if any should be born hereafter, it is my will that they shall have a right to freedom when they shall arrive to the aforesaid term of years." Among his slaves was a woman, Winney, who [278] "after his death, and during the life and widowhood of his wife," had a daughter Jane, who, after the death of Mrs. Johnson, had a son, Moses, before she reached the age of twenty-one years. In July 1816, Jane "was registered in the county court . . . and obtained her free papers, . . . the plaintiff [Moses] is detained in slavery by the defendant, and has been so detained from his birth. The circuit court . . . entered judgment that he recover his freedom."

Judgment reversed. Stanard, J.: [283] "Though my judgment has never been convinced of the correctness of the decision in the case of Maria etc. *v.* Surbaugh<sup>1</sup> I feel judicially bound by its authority; and under that obligation I must decide that Moses, being born before his mother's right to freedom was consummated by the attainment of the age of 21, is a slave."

*Findlay v. Hickman*, 10 Leigh 354, July 1839. [359] "Allen was a free man. John Apperson emancipated his mother on the 19th of February 1806, and Allen was born afterwards. Polly, the daughter of John Apperson, married Joseph Vance in 1813, and Allen seems to have been in the family until after that marriage. He was then bound to Joseph Vance by the overseers of the poor . . . [About 1833] Vance sold Allen to Jones as a slave, at the price of 450 dollars." [355] "March 1835, sale was made of the negro man Allen to . . . Hickman for 900 dollars. . . . Jones . . .

<sup>1</sup> P. 138, *supra*.

warranted . . the title to him against the claims of all persons whatsoever; . . It afterwards appeared that Allen was entitled to his freedom." [359] "After it was ascertained that the boy Allen was free," Vance "executed his note . . to . . Hickman for the sum of 450 dollars. . . [360] the circuit court decreed . . that the contract for the sale of the negro be rescinded;"

*Ruddle v. Ben*, 10 Leigh 467, July 1839. "Adam Dirting owning a man of colour named Ben, . . sometimes called Ben Ware, as his slave, died intestate," leaving two sons, John and Adam. In 1830 Adam sold to John his moiety of the slave for two hundred dollars. He permitted Ben [469] "to work out, Ben paying him 1 dollar per week or 50 dollars per year; and all he earned over that sum was to be his own. Ben regularly paid Dirting the hire, and previously to the 31st of December 1833, deposited with him a little upwards of 75 dollars of his own money, which was taken and considered as part of the 200 dollars, the consideration for which" a bill of sale was executed for Ben to Michael Barr. "Dirting relied [470] on the promise of Ben to pay him the balance in a short time; and the same was so paid by Ben. There was paid, on the 25th of January 1834, 50 dollars, and on the 11th of October 1834, 25 dollars." All the money had been earned by Ben before December 1833, though not then collected. "When the bill of sale was executed, on the 31st of December 1833, Michael Barr signed a paper writing in which he stipulated that Ben should be free at his death." Barr gave Ben "orders permitting him to work for certain individuals and to receive the pay, and at one time a general order permitting him to work for any person he might choose. The earnings of Ben were in part received by him, and in part collected by Barr and paid over to him. Ben performed work for Barr, for some of which he was paid; for some he was not paid, as he did not claim anything. Ben's wife was a slave belonging to Barr. . . [471] The deed of emancipation from Barr to Ben was executed by Barr in consequence of the advice of an attorney whom he consulted, that he was liable to be presented by the grand jury for permitting Ben to work and trade as he did. This deed of emancipation, though dated the 31st of December 1833, was not executed until July 1836. It was antedated at Barr's request, with a view to shield him from prosecution for the time past," In 1838 an execution was levied on Ben to satisfy a debt of Dirting, contracted before he executed the bill of sale of Ben to Barr. [468] "Ben, being detained in custody under this execution, applied to the judge of the circuit court . . for a writ of *habeas corpus ad subjiciendum*" which was granted. [472] "The judge of the circuit court, being of opinion that the law and the evidence required that he should discharge Ben, ordered that he be discharged accordingly;" Affirmed.

*Commonwealth v. Barrett*, 9 Leigh 665, December 1839. "At September term 1839, the attorney prosecuting for the commonwealth . . moved for rules against Lysander Barrett and ten other persons, to shew cause why criminal informations should not be filed against them respectively, for violations of the 'act to suppress the circulation of incendiary publi-

cations, and for other purposes,' passed March 23, 1836.<sup>1</sup> In support of the motion, the attorney for the commonwealth produced affidavits of several witnesses, proving that the said Lysander Barrett had caused to be circulated . . . for the purpose of procuring signatures, and that the ten other persons aforesaid had signed, a memorial to congress, which prayed the abolition of slavery in the district of Columbia, and contained the following expressions: 'In the opinion of your petitioners, slavery and the slave trade, as at present existing in the district of Columbia, where congress has sole jurisdiction, ought not so to be,—as a sin against God, a foul stain upon our national character, and contrary to the spirit of our republican institutions.' Lysander Barrett appeared, and contested the motion for the said rule against him; "

Held: [666] "This court is unanimously of opinion . . . that to sustain a prosecution . . . the person accused must be a member or agent of an abolition or antislavery society. This court is also of opinion that the offence created by the 2d section of the aforesaid statute, being a felony, cannot be prosecuted by information; "

*Watkins v. Carlton*, 10 Leigh 560, January 1840. John Carlton in his last will made no provision whatever for his wife, Sarah Carlton, "nor did he make any provision for, or any mention of, a child of which his wife was then *enseint*, born about six months after the making of his will, and while the husband and wife were cohabiting, who was called William; . . . [562] the complexion of . . . William was such as to cast a cloud of suspicion on his legitimacy."

Held: upon the trial of an issue, whether this child is the legitimate child of the husband, evidence that the child [577] "is a mulatto, and evidence also of professional men that, according to the course of nature, a mulatto child cannot be the offspring of two white persons, shall be admitted, if offered." Note by H. St. Geo. Tucker, P.: [576] "Among the hundred millions of whites in Europe, there is no authenticated instance of the produce of the white race being other than white, where there was no possibility of access between a black and a white."

*Dawson v. Dawson*, 10 Leigh 602, March 1840. Will of Martin Dawson, dated 1833: "It is my will and desire, that what slaves I may depart this life the owner of, be emancipated by my executors, and removed to some part of the world where slavery is not tolerated, and from my present view, the settlement in Africa of the African Colonization Society, is most desirable; and for the object of so removing them, and finding them with the necessaries of life, my executors are to use out of my estate, for each slave so emancipated, 200 dollars. Should it be contrary to the laws of the country to emancipate slaves at my death, and such leave cannot be obtained, or should any of the slaves I may depart this life owner of, choose to remain slaves at or before the expiration of twelve months from my death, such as choose to remain slaves to be sold in families, and to be allowed to choose their masters so far as practicable; for this object, my estate to remain together twelve months after my death" Codicil, dated 1835: [604] "my Belle Air estate I give to my nephew Benjamin Dawson for the equitable support and maintenance of the slave population thereon."

<sup>1</sup> Sess. Acts of 1835-6, ch. 66, p. 44.



Held: [607] "It was a trust for their support, until the time when their emancipation, or sale, was to take place, which was to be within twelve months."

*Overton v. Maben*, 10 Leigh 609, March 1840. Will of Matthew Maben: "I give Edmund Williams his freedom in consideration of his faithful services to me since he was a child."

*Dunbar v. Woodcock*, 10 Leigh 628, March 1840. Will of Robert Woodcock, who died in 1808, [629] "emancipated four slaves by name;"

*Randolph v. Tucker*, 10 Leigh 655, March 1840. Will of John Randolph of Roanoke. See *Coalter v. Bryan*, pp. 204-205, *infra*.

*Fisher v. Commonwealth*, 10 Leigh 673, June 1840. "In the circuit superior court . . . 1838, the grand jury found an indictment against Henry Fisher" for employing and harbouring [674] "John, a free negro man, who has been emancipated within the commonwealth of Virginia since the first day of May 1806, and has unlawfully remained" contrary to the statute.<sup>1</sup> The court rendered "judgment against the defendant for a fine of five dollars and the costs of prosecution."

*Charlton v. Gardner*, 11 Leigh 281, August 1840. In 1821 John L. Charlton conveyed to his children, infants under the age of twenty-one: [282] "a certain female slave named Esther, aged 27 years, and two female slaves the children of Esther, one named Clarissa, aged seven years, the other named Kitty, aged 2 years, and the issue of their bodies which might be born thereafter; also a certain male slave named Nelson, aged 9 years; . . . the above mentioned slaves to remain in the possession of . . . Charlton during his natural life," In 1823 a sale was made under an execution, [283] "of the slaves Esther and Clarissa conveyed by the deed, and children of theirs born after its execution. . . . Esther and two children, who afterwards died, were sold for 281 dollars 50 cents, and Clarissa was sold for 166 dollars. Robert Gardner purchased Esther and the two children. Robert Kent purchased Clarissa, and sold her to Joseph Kent."

*Anderson v. Thompson*, 11 Leigh 439, November 1840. Witnesses [447] "deposed that in the year 1805 . . . they were at the house of Berryman Johnson, and he called on them, as well as other persons present, to take notice that he was about to give away two negro girls to his two sons. He then called the girl Polly, took her hand, and put it into the hand of Pulaski A. Johnson; he also called the girl Jenny, took her hand, and put it into the hand of David B. Johnson: and then he requested these deponents and the other persons present to take notice, that he gave those two negro girls to his two sons aforesaid. He further stated that he claimed a life estate in them. This occurred about three or four weeks before his death." [445] "1819. . . . Pulaski A. Johnson took forcible possession of Polly and all her children this year; and David B. Johnson took forcible possession of Jenny and all her children this year: . . . [446] Polly and her children (seven in number) . . . were valued at 1675 dollars, and Mary Ann, . . . also taken . . . was valued at 250 dollars . . . Jenny

<sup>1</sup> 1 Rev. Code, ch. III, sect. 61, p. 436.

and her children (five in number) . . were valued at 1175 dollars, and Jem . . also taken . . at 350 dollars; . . [447] it appeared that Anderson [surety of the administratrix *cum testamento annexo*] did retake from David B. Johnson the slave Jenny and several of her children; though it seemed that all of these were afterwards sold to pay David B. Johnson's debts. . . 'Many of the slaves were taken from his [Anderson's] possession by the legatees, . . One of the legatees went so far, as to be taken up and tried . . for stealing one of the negroes.'"

Held: [459] "As to the pretended gift of the slaves by Berryman Johnson to his sons, I am clearly of opinion it gave them no title. He did not intend they should have them till after his death, and such a gift in remainder cannot be made by parol." [H. St. Geo. Tucker, P.]

*Smith v. Commonwealth*, 10 Leigh 695, December 1840. [696] "the record of the conviction of the [ill disposed] negro slave Nelson, before justices of oyer and terminer . . for the offence of burglariously breaking and entering the dwelling . . and stealing" a gold coin and a promissory note. Smith was indicted for receiving the same, knowing them to have been stolen.

*Commonwealth v. Pleasant*, 10 Leigh 697, December 1840. Pleasant is the same negro woman "who united with Betty and others in a suit for freedom against Horton" <sup>1</sup> in 1828. [699] "The judgment of the court of appeals was rendered on the 11th of July 1833. That court . . gave judgment that the plaintiffs are free, . . the decision . . proceeded on the ground that the plaintiffs, Betty and Pleasant, had been imported into this commonwealth in 1798 in violation of the statute of 1792," <sup>2</sup> [697] "On the 19th of May 1840, the grand jury . . made a presentment" against Pleasant, as a person emancipated since May 1, 1806, and "unlawfully remaining in the . . commonwealth . . [698] more than twelve months after her title to freedom had accrued, and after she had attained the age of twenty-one years, without having obtained leave so to do."

Held: [700] "no information ought to be ordered to be filed in this case."

*Anderson v. Anderson*, 11 Leigh 616, March 1841. "Jordan Anderson . . died in 1805, and by his last will . . bequeathed as follows— 'I also give my son Nathan the raising of my young negroes, namely Anaca's increase, and Tom and Patt and Peter, Phillis's children, and her future increase, not to be moved out of the state, or so far as to deprive them of their freedom. It is further my will, that my son Thomas shall have all the labour and the raising of my young negroes, namely Amy's and Milly's increase [617] and Sall, till they come to the age of twenty-one years, but not to move them out of this state, or so far as to prevent their freedom; but Matt is excepted, now with Charles. It is further my will, that my son Jordan shall have the labour and the raising of all Rachel's increase, but not to move them out of the state, or so far as to prevent their freedom. As there are two young negroes now with Charles, and two with James,

<sup>1</sup> P. 175, *supra*.

<sup>2</sup> 1 Old Rev. Code, ch. 103, sect. 2, Pleasants's edit., p. 186.

they and all the others to be free at twenty-one years of age.'— 'It is my will and desire, that all my negroes that shall be twenty-one years old, now living with me and my sons Thomas, Jordan and Nathan, shall be free on the first day of January after my and my wife's death, and they shall be well clothed, both male and female, and shall have their working tools, and bread corn for one year, and liberty to settle on thirty-three acres of land, where my son Thomas shall choose for them; and I earnestly request that no advantage may be taken of them, or suffer any to be taken of them, that can be conveniently prevented, but let them have wood land as well as cleared.' . . . The testator's wife died shortly after him, in 1805. The negroes Tom, Patt, and Peter were the children of Phillis, born before the testator's death. The woman Patt was then very young, and the testator's son Nathan held her till she was twenty-one years of age, and afterwards, in October 1821, she was registered, in the clerk's office of the county court . . . by the name of Patty Anderson, as a free negro emancipated by the will of Jordan Anderson deceased. [618] Patty Anderson, after the testator's death, but before she attained the age of twenty-one, and while therefore she was still held by Nathan Anderson, had two children, Green and Henry, who were one sixteen and the other seventeen years old at the time this suit was commenced. Nathan Anderson continued to hold these two children of Patty till his death, which happened in 1834; and his executors . . . took possession of them, claiming them as slaves for their lives of their testator's estate. In November 1834, Patty Anderson, the mother of these two boys Green and Henry, exhibited a bill in chancery in the circuit court . . . against Nathan Anderson's executors, setting forth the facts above stated; insisting, that her children, Green and Henry, were presently entitled to their freedom, or if not presently, would be at their age of twenty-one respectively; representing, that the defendants claimed them as absolute slaves for their whole lives of their testator's estate, that they designed to sell and dispose of them as such, and that the children might probably be purchased by negro traders, who would remove them out of Virginia; and praying an injunction to restrain . . . The injunction was awarded. . . [619] Upon the hearing at October term 1836, the circuit superior court, declaring that the boys Green and Henry, though born before their mother attained the age of twenty-one years, were free from their birth, perpetuated the injunction, and decreed, that the defendants should forthwith enlarge and discharge them from their custody, and pay the plaintiff her costs expended in this suit."

Held: [622] "the intention [of the testator was] not to dispose of any of the slaves as slaves, but to emancipate all, . . . The slaves here were infants, bound to service until they attained the age of twenty-one; the legatee [623] and his representatives had a right to the custody of them. The bill avers an intention to sell; . . . If redress could not be afforded by a court of Chancery, the slaves would be without remedy. . . . The decree<sup>1</sup> is to be affirmed."

<sup>1</sup> Note: [623] "which held that they were free from their birth, and ordered that they should be forthwith discharged from custody, though neither was then twenty-one years of age. The reason of the general affirmance probably was, that, at the time of the decree of this court, they had both attained to that age." [Reporter.]

*Pigg v. Corder*, 12 Leigh 69, March 1841. [75] "the defendant had sold Charity, but still held one of her children."

*Newton v. Poole*, 12 Leigh 112, March 1841. Will of Robert Poole, dated 1803: [113] "I give to Venie, a free mulatto woman, the half of my house in the fields where she now lives, during her natural life, and after her death to go to her son George. I give to her daughter Mary, the other half of the house, with the enclosed piece of ground thereto. And I give to my negro man Andrew, in consequence of his faithful services, his freedom after my decease." He left thirteen other slaves "of all ages and sexes."

*Slaughter v. Tutt*, 12 Leigh 147, March 1841. "in 1816 or 1817, the plaintiff [Tutt], then a very young man, . . . removed to a place . . . [148] about fifteen miles from his father's residence, and there set up a blacksmith's shop (not being, however, a blacksmith himself); in which a negro man slave, named Moses, worked as a smith, and his wife Mimy, and one little negro girl, then their only child, lived there with him. . . . The blacksmith's shop was continued about a year, and then broken up; upon which the slaves . . . were returned to the residence of the plaintiff's father, who had a large farm, and many slaves upon it: there, Moses worked in a blacksmith's shop, and his family lived on the farm with the rest of the father's slaves . . . [149] in 1830, which was the first year the plaintiff was charged with taxable property, he was charged with two black tithables (two slaves above the age of sixteen) and three slaves between the ages of twelve and sixteen. . . . [150] A witness (a dealer in slaves) proved, that he had frequently . . . told [the father of the plaintiff] . . . that a negro blacksmith might be sold very well, and . . . applied to the plaintiff to purchase these slaves, who declined to sell them. . . . Mimy . . . died in the lifetime of Tutt, the father; and Moses and six children of Mimy, being found on the father's farm at his death, were inventoried . . . and then sold by his administrator Slaughter, . . . The slave Moses had been recovered by the plaintiff in an action of detinue against Slaughter . . . and the present action was brought to recover the value of Mimy's six children, which had been sold by Slaughter, . . . in October 1832, for 1200 dollars," The jury [147] "found a verdict for the plaintiff for 1500 dollars damages," A new trial was awarded: [157] "The circumstances . . . would rather lead to the inference of a loan than a gift." [Allen, J.] See *Tutt v. Slaughter*, p. 218, *infra*.

*Wheatley v. Calhoun*, 12 Leigh 264, April 1841. [266] "in the event of the purchase being made, J. Calhoun and his man Daniel are to keep the mill for the sum of 300 dollars per annum,"

*Commonwealth v. Howard*, 11 Leigh 632, June 1841. "Howard was indicted upon the statute of 1822-3, ch. 34.<sup>1</sup> . . . for knowingly and wilfully and without lawful authority injuring a female negro slave the property of John Hill, by violently and inhumanly assaulting and beating her to the great injury of the slave," Held: "the indictment can be sustained, and ought not to be quashed."

<sup>1</sup> Supp. to Rev. Code, ch. 226, p. 280.



*Commonwealth v. Nix*, 11 Leigh 636, June 1841. "Nix was indicted upon the statute<sup>1</sup> . . . [637] the prisoner made a contract in writing with Jones, . . . 'that said Nix do sell to said Jones a certain negro called Live; witness, that said Jones gives said Nix a roan stud horse, a certain brown horse called Jack, and one saddle, and 20 dollars in store goods, and 200 dollars in lawful money of Virginia, and a carryall wagon, for said boy; which said Jones takes the said boy on trial for one month,' . . . the negro remained with Jones about twenty days, and then ran away; which, with other circumstances which Jones learned, led him to suspect that the negro was either free, or had been stolen by the prisoner previous to the sale to him; and under this belief, Jones pursued the prisoner, who was then passing through the county of Lee, and apprehended him before the expiration of the month. And that the prisoner voluntarily and frequently made the fullest confessions, saying . . . that at the time of the sale to Jones, he knew the negro to be free."

Held: the sale of a free negro, to constitute the felony within the statute, must be an absolute sale. [639] "That contract is not a sale, but an agreement to sell, which the vendee had a right to affirm, or annul . . . at any time within the month allowed by its terms; . . . whether it was so affirmed or not, is a question for the jury"

*Kent v. Matthews*, 12 Leigh 573, August 1841. In 1835 English [575] "conveyed thirteen valuable slaves to Andrew Fulton, upon trust, that he . . . should make sale of the slaves, at such times or places as he . . . should think best for the interest of the creditors . . . In the autumn of 1835, Fulton sent the trust slaves to the southwestern states, under the care of" Jackson, "and English accompanied Jackson, carrying with him three other slaves . . . which he sold," Both parcels of slaves sold for the gross sum of \$12,325.

*Abrahams v. Commonwealth*, 11 Leigh 675, December 1841. "The hustings court of the city of Richmond imposed a fine of 20 dollars on Abrahams, for permitting a slave to go at large and hire himself out contrary to the statute"<sup>2</sup>

*Slaughter v. Commonwealth*, 11 Leigh 681, December 1841. John Slaughter was indicted for the murder of Joseph Pledge, tried and convicted. [684] "an anonymous letter had been, some nights before, thrown into his [Slaughter's] yard; . . . it was in these words: 'A. B. C. and fifty others give you notice, that you are to quit Blandford in twenty days, or you will be taken out and well dressed.' That Slaughter had been, some years before, taken out and lynched. That he was of infamous character, and, on that account, great and almost universal prejudice existed against him. . . . [685] That on the sunday night before, Pledge said, that he and others would lynch Slaughter that night; and that he said, three days before, that he had a negro man, who, if he told him, would go into Slaughter's house and bring him out; but he did not say he would make the negro man do it;" On July 9, 1840, Pledge, the deceased, had ridden to Slaughter's house to endeavor [682] "to satisfy him that he was not the

<sup>1</sup> 1 Rev. Code, ch. 111, sect. 28.

<sup>2</sup> *Ibid.*, sect. 81, p. 442.

author of the offensive letter." As Pledge rode off, [683] "Slaughter called him 'a damned free negro mulatto looking son of a bitch.' That Pledge immediately dismounted, and asked a black boy to hold his horse, who refusing to do so,"

*Martin v. Martin*, 12 Leigh 495, January 1842. [496] "the negro woman Lucy . . of the value of 600 dollars, the negro boy William . . of the value of 325 dollars, the negro boy Caesar . . of the value of 275 dollars, a negro girl (name not known) a child of the said Lucy born since the institution of this suit of the value of 200 dollars, and an infant negro girl, a child of the said Lucy, also born since this suit was brought, of the value of 100 dollars;"

*Henry v. Bradford*, 1 Rob. Va. 57, May 1842. Will of Brown Bradford, admitted to record 1795: "my will is that my negro girl Adah shall only serve ten years, and then have her freedom; and likewise my negro boy Abraham shall serve twelve years, and then have his freedom." Bradford died in 1794, and in 1798 Adah had a child named Ebby. Ebby was the mother of the plaintiff.

Held: Henry is a slave. [58] "The court is unanimously of opinion that this case is ruled by that of *Maria and others v. Surbaugh*,"<sup>1</sup>

*Abrahams v. Commonwealth*, 1 Rob. Va. 711, June 1842. In 1841 six slaves belonging to Simon Abrahams of Richmond were [718] "apprehended . . and brought before the . . mayor of said city and a justice of the peace . . by James M. Taylor informer, for having been permitted by the said Simon Abrahams to go at large and hire himself (or herself) out, contrary to the act of the general assembly"<sup>2</sup> The court of hustings [716] "gave judgment against Abrahams, for permitting the slave Tom Bow to go at large and hire himself out in the city contrary to law, for a fine of 20 dollars and the costs of the proceeding, including jail fees; directing that one third of the fine should be paid to the commonwealth for the benefit of the literary fund, and two thirds to Taylor the informer, . . the court dismissed the proceeding as to the slave Delphy Anderson, and gave judgment against Taylor, the informer, for the costs, including jail fees."

*Young v. Commonwealth*, 1 Rob. Va. 805, December 1842. "Young was indicted . . for felony in stealing a negro woman slave named Eliza," She [807] "disappeared on the thursday before she was taken up . . She carried away a trunk with clothing belonging to her . . John Moscow deposed that Young the prisoner came to his house . . about two o'clock, and asked permission for a lady to remain all night." They left the house together the next morning, [808] "the girl about fifteen steps behind Young." Near the water station Young asked the conductor of a freight train "to give him passage for himself and a lady to the Junction," but was refused. Afterwards Pae [807] "saw Young lower down the rail road lying in a bush. The witness asked him if he was going to Richmond? He replied, no. Near Sinton's turnout the witness saw the girl, who said that she was free, but that she had no pass or free papers. The witness and some others then returned in pursuit of Young: they found him, and

<sup>1</sup> P. 138, *supra*.

<sup>2</sup> 1 Rev. Code, ch. 111, sect. 81.

charged him with kidnapping; when Young said he had got into a pretty fix, and that he was a ruined man. . . [808] saying he had a wife and child, and that he saw the girl only the day before, who represented herself to be a free indian girl."

*Foushee v. Blackwell*, 1 Rob. Va. 516, February 1843. "During the late war between the United States and Great Britain, certain slaves, the property of Kenner W. Cralle, . . eloped to and were carried away by the enemy, and never returned or were restored to the owner."

*Williams v. Manuel*, 1 Rob. Va. 674, March 1843. Will of Elizabeth Magruder of Washington County, D. C., 1827: [675] "I will and bequeath to my niece Elizabeth Hamilton my negro boy Manuel Dodson, to serve for 27 years, and my negro woman Mary Dodson, to serve for 15 years, and at the expiration of the term of service of each, the said negroes shall be free. It is my understanding that the term of service of all the slaves above named shall commence at the period of my death." In 1839 Manuel "was placed in the jail of Washington city [by Dr. Hamilton] for the purpose of selling him. That Hamilton admitted at the time, that he had the right to retain him in servitude only for about 14 years, . . and had previously assured him, at his request, that he should be sold to some person residing in the city of Washington." Four weeks later Manuel "was removed from the said jail to the jail of one Thomas Williams, a trader in slaves; and Williams stated, in reply to the complainant's enquiries as to his destination, that he (Williams) intended to remove him to his farm in Virginia, a short distance down the Potomac. That after Williams had handcuffed him and taken him on board the steamboat, he asked Williams whether he was not free, and Williams answered that the will had been done away by act of congress, and that he had bought him for life." Williams took him to Fredericksburg, and thence to Richmond and confined him in a private jail. While Williams was in Richmond, he told a witness that he was on his way to New Orleans. An injunction was awarded by a judge in Virginia to prevent his being carried out of the commonwealth. The defendant Williams exhibited [677] "a bill of sale . . from C. B. Hamilton, purporting that Hamilton, in consideration of . . 262 dollars 50 cents, sold to Williams 'a negro man . . Manuel Dodson, to serve as a slave until . . 1854, and then to be set free' . . also . . a bond executed on the same day . . in the penalty of 500 dollars, with a condition that if Williams shall not sell or keep the said negro man for a longer period . . then the obligation is to be void." Williams denied that he had attempted to sell the slave for a longer period.

Held: [682] "it does not appear from the evidence . . [683] that the contemplated removal by the appellant of the appellee beyond the limits of the commonwealth, was with intent to defeat the appellee's right to freedom when the same shall accrue, or upon any claim to hold or sell him as a slave beyond that period:" injunction dissolved, and the negro restored to the possession of Williams.

*M'Key v. Garth*, 2 Rob. Va. 33, April 1843. In 1823 the constable levied an execution on the boy Randolph, the slave of Norvel; [34] "he

took the boy home, intending to keep him until the day of sale, but he ran away, and could not be found until after the August court, which was the time appointed for the sale; that after that time, . . he found the boy at work on Norvel's plantation, and retook him for the same debt,"

*Browning v. Headley*, 2 Rob. Va. 340, August 1843. Will of William Headley, dated 1836: [342] "that all his estate except slaves should be sold,"

*Cropper v. Commonwealth*, 2 Rob. Va. 842, December 1843. "Elkaney Cropper, a free woman of colour, was tried," in 1843 "by a court of oyer and terminer . . upon a charge of having . . stolen . . one cotton shirt and one pair of socks." She was found guilty and sentenced to the penitentiary for five years, "it appearing that she has heretofore been . . convicted . . for the crime of petit larceny," Ordered that she be discharged: the court of oyer and terminer had no jurisdiction.<sup>1</sup>

*Ellis v. Jenny*, 2 Rob. Va. 597, January 1844. Will of William Clarke, admitted to record in 1792: "My desire is that the abovementioned negroes [Lucy, Charley, Jenny, and Rhoda], as they arrive at lawful age (after my wife's death), shall have their freedom; . . My desire is that my negro woman Rachael be sold for the payment of my debts." At the death of the widow in 1833, [598] "there were living various descendants of Lucy, Jenny, and Rhoda, born after the testator died. . . The circuit court . . by a decree . . 1843, declared [them] . . entitled to their freedom." Decree reversed: [599] "this case is not distinguishable from that of Maria . . v. Surbaugh."<sup>2</sup>

*Hickerson v. Helm*, 2 Rob. Va. 628, February 1844. In 1832 [631] "there was allotted to mrs. Hickerson, King valued at 300 dollars, Lucinda at 260 dollars, Hannah at 50 dollars, John at 80 dollars, and Dick at 25 cents." In 1833 an execution [632] "was levied on the slave King" and he "was sold for 325 dollars," [654] "his actual value . . was [probably] 500 dollars,"

*Johns v. Davis*, 2 Rob. Va. 729, March 1844. Esther, Davis's reversionary slave, was carried out of Virginia and sold. Held: [736] "the measure of relief . . should have been not for the value of the slave Esther, but for the value of said Davis's reversionary estate in her, which ought to have been ascertained by reference to a commissioner."

*Coalter v. Bryan*, 1 Grattan 18, May 1844. [19] "In May 1833, John Randolph of Roanoke died, unmarried and childless; leaving a very large estate, both real and personal. His slaves numbered nearly or quite four hundred. . . After the death of John Randolph, it was ascertained that he had left several wills . . [20] The will of 1821, and the codicil of the 5th December of that year. 'In the name of God. Amen! I John Randolph of Roanoke, do ordain this my last will and testament, hereby revoking all other wills whatsoever. 1. I give and bequeathe all my slaves their freedom, heartily regretting that I have ever been the owner of one. 2. I give to my ex'or a sum not exceeding eight thousand dollars, or so much

<sup>1</sup> Acts of 1831-2, ch. 22, p. 22. Suppl. to Rev. Code, ch. 187, p. 247.

<sup>2</sup> P. 138, *supra*.



thereof as may be necessary to transport and settle said slaves to and in some other state or territory of the U. S. giving to all above the age of forty, not less than ten acres of land each. To my old and faithful servants Essex and his wife Hetty who I trust may be suffered to remain in the [21] state, I give and bequeath three and a half barrels of corn, two hundred weight of pork, a pair of strong shoes, a suit of clothes and a blanket each, to be paid them annually, also an annual hat to Essex, and ten pounds of coffee and twenty of brown sugar. To my woman servant Nancy the like allowance as to her mother. To Juba (alias Jupiter) the same; to Queen the same; to Johnny my body servant the same, during their respective lives. . . The land above the Owen's ferry road and the lower quarter, and the land I bought of the Reads to be sold at my said executors discretion, and whatever m (cut out in the original) y debts I give and bequeath to Francis Scott Key and the rev. Wm. Meade to be disposed of towards bettering the condition of my manumitted slaves. I have not included my mother's descendants in my will because her husband besides the whole profits of my late father's estate during the minority of my brother and myself has contrived to get himself the slaves given by my grandfather Bland as her marriage portion when my father married her, which slaves were [32] inventoried at my father's death as part of his estate and were as much his as any that he had. One half of them now scattered from Maryland to Mississippi were entitled to freedom at my brother Richard's death, as the other would have been at mine.' "

Signature cut out.

The codicil of 1826: " I do hereby confirm . . bequests to or for the benefit of all . . my slaves, . . I make the same provision for my body servant John that I made in my said will for his father Essex, and the same provision for the said John's wife Betsy, that I made for Hetty, the wife of Essex aforesaid, and similar provision for my man servant Juba, and his wife Celia, and the same for mulatto Nancy at the Lower Quarter, Archer's wife. And I humbly request the General Assembly (the only request that I ever preferred to them) to let the above named and such other of my old and faithful slaves as desire it, to remain in Virginia, recommending them each and all to the care of my said ex'or, who I know is too wise, just and humane, to send them to Liberia, or any other place in Africa or the West Indies. I revoke all and every bequest made in my said will, . . except as aforesaid to my executor William Lea and my slaves, . . These reversions or remainders, or executors devisees, or whatsoever the law chooses to call them, I bequeath to my said executor as a fund to be used at his discretion, for the benefit of my slaves aforesaid the surplus if any to be his own."

Codicil of 1831. [27] " I have upwards of two thousand pounds sterling in the hands of Baring Brothers and Co. of London, and upwards of one thousand pounds like money in the hands of Gowan and Marx; this money I leave to my ex'or Wm. Leigh as a fund for carrying into execution my will respecting my slaves. And in addition to the provision which I have made for my faithful servant John, sometimes called John White, I charge my whole estate with an annuity to him during his life of fifty dollars; and as the only favor that I ever asked of any government, I do entreat the

assembly of Virginia to permit the said John and his family to remain in Virginia, and I do earnestly recommend him and them to my ex'or aforesaid, and to my dear brother and niece aforesaid."

The will of 1832 revokes all other wills and codicils: [30] "My will and desire is that my said execu— may select from among my slaves, a number not exceeding one hundred, for the use of the heir; the remainder to be sold. . . having cancelled a former will this night in presence of Wm. Leigh" In 1834 Coalter presented to the general [31] "court for probat, the will of January 1st, 1832, which was opposed by William Meade as the trustee for the slaves under the will of 1821, and by Frederick Hobson as the committee of John St. George Randolph, on the ground of the insanity of the testator at the time of making the will. . . [32] The general court admitted the will to probat; but on appeal to the court of appeals, that judgment was reversed, and the will of 1832 was declared to be invalid and null. After this decision of the court of appeals, William Meade presented for probat to the general court at its July term 1836, the will of 1821, and the four codicils . . The general court was satisfied that the testator was sane when he executed the testamentary papers then offered for probat, and that he was insane when he cancelled the will of 1821; that act of cancellation having been done on the same night, and within a very few hours of the time, when he wrote the will of January 1st, 1832. That court accordingly gave a judgment admitting the will of 1821, and the four codicils thereto, to probat, which judgment upon appeal to the court of appeals was affirmed: "

*Commonwealth v. Smith*, 1 Grattan 553, June 1844. Held: in an indictment for selling ardent spirits to slaves, it is not necessary to state the names of the owners of the slaves to whom the liquor was sold.

*Phoebe v. Boggess*, 1 Grattan 129, September 1844. [133] "Richard Boggess, who was an unmarried man, owned the negro woman Phoebe, who had been his housekeeper for many years, and her children, six in number. On the day of his death, he requested Mr. Thomas S. Reeder . . to write his will." He "requested Reeder to sign it for him. Reeder had taken the pen, and was in the act of writing the name of Boggess, when Boggess swooned. The persons present were afterwards requested by Reeder to sign their names with him, as witnesses to the paper, which they did." Boggess died two or three hours later. Phoebe and her children offered this writing for probate [129] "as containing his nuncupative will. By this paper, Boggess emancipated these slaves; . . [130] The county court admitted the paper to probat," Affirmed.

*Bourne v. Mehan*, 1 Grattan 292, December 1844. The will of John Bourne who died in 1813 provides "that the land on which he lived and some personal property, particularly specified, should be appropriated to the support of his old negro woman Letty, during her life; "

*Binford v. Robin*, 1 Grattan 327, January 1845. Will of Frances T. A. Binford: [328] "I will that all my negroes be hired out, until all my just debts are paid, as well as legacies hereinafter devised shall be satisfied. . . I will and devise that all my negroes be liberated, after the above items

in this will be satisfied, and that they have their choice to go to Liberia, or to some free state in this Union." After her death two slaves in whom she had owned an undivided interest "held by another person for life" were allotted to her representative on the death of the life tenant.

Held: they are entitled to their freedom under her will.

*Harrisons v. Harrison*, 2 Grattan 1, April 1845. Randolph Harrison by his will, dated 1844, leaves his whole estate, to his wife, [2] "desiring her to do for some of my faithful servants, whatever she may think will most conduce to their welfare without regard to the interest of my heirs."

Decreed: [17] "she has authority to make distribution of said estate, . . . amongst . . . said children, subject . . . to her optional benefactions in behalf of some of the testator's faithful slaves"

*Lucy and others v. Cheminant*, 2 Grattan 36, April 1845. Will of Susanna Lester, 1801: "It is my will that my slaves Temple, Leah, and Mourning, a negro man called Mulatto Will or Will Brown, may be set free on my death, if such manumission is not prohibited by the laws of my country. All the rest of my slaves I lend to my brother and sister equally, during their lives, or the life of the survivor; and on the death of the survivor, it is my desire that the said slaves be set free, if it can be effected, or is not prohibited by the laws of the country,"

Held: [38] "the appellants, whether born before or after the death of the testatrix, were entitled to their freedom upon the death of . . . the sister who survived."

*Hobson v. Yancey*, 2 Grattan 73, April 1845. Will of John Anderson, who died in 1810, provided that his personal property should be sold, except his slaves.

*Commonwealth v. Jones*, 2 Grattan 555, June 1845. [556] "The defendant was presented by the grand jury . . . for cohabiting with and keeping a female slave . . . the property of" another. The jury found him guilty and assessed his fine "at twenty dollars for two offences of fornication."

[557] "this Court perceives no reason why, because one of the offending parties is exempt from the operation of the statute<sup>1</sup> by reason of being a slave, the other, who is not a slave, should also be exempt."

*Nemo v. Commonwealth*, 2 Grattan 558, June 1845. John Nemo, a free man of color, confined in the state penitentiary, applied for a writ of *habeas corpus*. [559] "the prisoner had been convicted . . . of voluntary manslaughter; and the term of his imprisonment fixed at three years," a term shorter than that prescribed by law. The court then sentenced him to imprisonment for five years in the penitentiary.

Held: "the judgment . . . is erroneous, the same being materially variant from the verdict. The verdict itself was manifestly illegal; . . . [561] set aside, and a *venire de novo* awarded."

*Wynn v. Carrell*, 2 Grattan 227, July 1845. Will of Josiah Wynn, 1812: [228] "I bequeath my negro girl Eliza to my daughter Jinney,

<sup>1</sup> 1 Rev. Code 555.

after the decease of my wife, not as a bond slave, but to be under her care and tuition; to receive wages for her labour. And if she should have children, for them to come under the same regulation, after they pay for their raising; but their labour to be equally amongst all my children, if they choose to employ them."

Held: the testator [229] "attempted to place the said Eliza and her increase in an intermediate condition between free persons of colour and slaves; a condition unknown to the laws, and contrary to their policy. . . this provision of the will is inoperative and void. . . further . . the will cannot be construed as a bequest of said Eliza or her increase. . . he did not contemplate disposing of her as property; . . [230] the will contains no disposition of the slave Eliza, or her increase, as slaves or property: "

*Day v. Commonwealth*, 2 Grattan 562, December 1845. "Everett Day, a free man of colour, was indicted . . for an attempt to commit a rape . . he filed a plea in abatement, that . . one of the grand jurors . . was a surveyor of a highway . . at the time the said true bill was found against him. The attorney for the commonwealth took issue upon this plea; and the Court, without empaneling a jury to try the issue, overruled the plea, . . [563] verdict of guilty, and the judgment of the court that the prisoner should be hanged."

Judgment reversed, and new trial awarded. "This issue . . ought to have been submitted to a jury for trial; " See same *v.* same, p. 210, *infra*.

*Logan v. Commonwealth*, 2 Grattan 571, December 1845. Logan was convicted for enticing Felix Smith, a slave, the property of John D. Miles, to abscond, and furnishing him with money, clothes, and provisions. The prisoner offered in evidence a deed of emancipation from John D. Miles, dated 1844: [572] "I . . for the sum of four hundred dollars, . . paid and contracted to be paid to me by my negro man named Felix Smith, have, and by these presents do manumit and set free my said negro man Felix, he serving me faithfully for the space of six years; and at the expiration of that period he is to be and go absolutely free . . if . . Felix shall, before the expiration of said six years, have well and fully paid . . the sum of four hundred dollars, with interest . . his period of service shall expire, and he is manumitted and set free by these presents, at the time of such full payment."

Held: this is [574] "an immediate, and not a future manumission. . . Unless the opinion pronouncing the construction to be future, and not immediate emancipation, be clear and disembarrassed of all reasonable doubt, the law entitles the prisoner to the benefit of that doubt, and the most favourable construction upon the deed."

*Johnson v. Commonwealth*, 2 Grattan 581, December 1845. "Moses Johnson, a free man of colour, and a convict in the penitentiary of the state, was tried . . for the murder of . . an assistant keeper of the penitentiary." [582] "He was found guilty . . and sentence of death passed upon him."

*Ex parte Ball*, 2 Grattan 588, December 1845. In August 1845 [589] "the slave Dennis, by the name of William Mayo, . . was . . charged



with having carried or caused to be carried from the town of Fredericksburg, beyond the commonwealth, three slaves . . for which offence he was regularly tried as a free man, found guilty, and sentenced to ten years imprisonment in the penitentiary." The [588] "trustees for Mrs. Nancy Horner, . . representing that Dennis, a slave of Mrs. Horner, had runaway from their possession; had possessed himself fraudulently of free papers; and whilst going at large, was apprehended, tried as a free man, and convicted" obtained a writ of *habeas corpus*.

[594] "The writ of *habeas corpus* discharged, and the prisoner remanded." [593] "the purposes of the writ cannot be perverted to such uses as this. That it cannot, under colour of an application on behalf of the slave, be used by the master to enable him to take possession of the subject of the writ, as property."

*Pollock v. Glassell*, 2 Grattan 439, January 1846. Will of Margaret C. Glassell, 1843: [444] "To her son John E. Glassell, she gives her servant Ben, and wishes him bound out to a trade for the benefit of John E. Glassell; and her wish is, that her cousin Henry W. Ashton should see that he is well treated, and any money that can be made from Ben to be taken care of for John E. Glassell."

*Brent v. Richards*, 2 Grattan 539, January 1846. "on the 5th day of January 1835, the plaintiff, by parol, sold to the defendant the negro . . for . . 475 dollars, on the following . . conditions, that the defendant should keep the slave for his own use, and should not thereafter sell the slave to any person without first giving the plaintiff the refusal at the said sum of 475 dollars. That the said slave was then worth in open market 700 dollars," In May 1836 the defendant [543] "sold and delivered the said slave to a trader, for the sum of 1000 dollars; who removed said slave to remote parts."

[544] "judgment entered for the appellant for 525 dollars, with interest from the 31st of May 1836, till paid, and costs."

*Anglin v. Bottom*, 3 Grattan 1, April 1846. [2] "Rives, in the presence of the plaintiff, made an absolute gift to the wife of the plaintiff, of the negroes Kate and Nelson. . . the plaintiff lived with his family, in the house of . . Rives, . . in the character of overseer . . the said negroes remained at the same place, . . the negro Kate . . acting as a cook for the family."

Held: [4] "actual possession in the donee . . is an essential element of title to slaves claimed in virtue of a gift not made by deed or will . . and cannot be inferred from the proof of an absolute gift originally, and nothing more."

*Jameson v. Deshields*, 3 Grattan 4, April 1846. In 1835 the agent of Burrage of Alabama [5] "sold a slave of Burrage's for 700 dollars;"

*Boyd v. Boyd*, 3 Grattan 113, July 1846. Will of James Boyd, 1816: [115] "I direct that all my just debts be paid, and in order to enable my executors . . to make such payments, I direct that my negro man Anthony be sold, and all my personal property . . except the remainder of my slaves; and they are not to be sold."

*M'Candlish v. Edloe*, 3 Grattan 330, October 1846. [331] "William Yates, a free man of colour, died in 1829, having first made his will, by which he gave his whole estate . . . to . . . , in trust for his wife Maria, who was his slave, to be paid over to her as soon as she could obtain her freedom, and get permission to remain in the State." All the personal assets were insufficient to pay the testator's debts and Maria was sold.

Held: [332] "where persons in the condition of slaves claim the right to freedom, they must assert such a right in a suit to be brought by them for that purpose; . . . they are not necessary or proper parties in controversies between third persons involving the question of such right to freedom;" [Baldwin, J.]

*Harris v. Barnett*, 3 Grattan 339, October 1846. In 1811 "two negroes, who were advanced in years," were sold "at 200 dollars."

*Carr v. Glasscock*, 3 Grattan 343, October 1846. [344] "the sheriff advertised the property for sale on the 15th May [1821] following; when . . . several persons, (among whom there were some negro traders,) attended," A few months later the fifteen slaves were sold for [346] "2000 dollars; which was their full value."

*Clere v. Commonwealth*, 3 Grattan 615, December 1846. [616] "The indictment found against him contained four counts: 1st, For larceny of the slave. 2d, For carrying the slave from one county to another, without the consent of the owner. 3d, For enticing a slave to run away from his owner. And 4th, For delivering a slave money, provisions and clothes, with intent to aid him to abscond from his owner. . . he had not been tried before an Examining Court, for the charges contained" in the last three counts. "the jury found him 'guilty . . . in manner and form as in the indictment . . . alleged;' and they fixed his term of imprisonment in the penitentiary at three years." [622] "the three last counts quashed, and the cause remanded for a new trial on the first count."

*Day v. Commonwealth*, 3 Grattan 629, December 1846. "The prisoner, a free mulatto man, was tried . . . for an attempt to commit a rape on a white woman; was found guilty and sentenced to be hung." Judgment reversed and new trial awarded, because one of the jurors [630] "was not a freeholder within the county . . . where the trial and prosecution were had." [Lomax, J.]

*Commonwealth v. Garner*, 3 Grattan 655, December 1846. The jury found that [658] "Peter M. Garner, Mordecai Thomas and Crayton J. Loraine, are citizens of the State of Ohio, and on the 9th day of July 1845, resided in that State about four miles back from the river Ohio, in the county of Washington, Ohio, and opposite said county of Wood in Virginia. That on the night of said 9th of July, early in the evening, a party of men residing in said county of Wood, who had received information that the negro slaves of said John H. Harwood of said county of Wood . . . intended to escape from their owner on that night and abscond from Virginia into the State of Ohio, crossed the Ohio river to the Ohio shore nearly opposite the residence of said Harwood, and concealed themselves on the bank of the river. That after remaining some

one or two hours, a party of men, six in number, passed by where they were lying, of whom the said Garner, Thomas and Loraine were part. That this last party went under the bank of the river, and remained there, at some distance on the beach above the water, till about 1 or 2 o'clock at night, when a canoe with six negro slaves the property of said Harwood came across the river to the Ohio shore. As it came near the shore, the party under the bank gave it a sort of hail, to which an answer not distinctly heard was returned from the canoe. That said negroes landed said canoe obliquely against the bank opposite to where the party under the bank were standing, running the bow of the canoe on the beach at the water edge. That certain bags of clothing and articles of property were in the bow of the canoe, occupying a space of six or eight feet in the bow. That as soon as said canoe struck the beach, the said party under the bank, among whom were said defendants Garner, Thomas and Loraine, came down the beach to the bow of the canoe at the water edge, and without entering said canoe, stepped into the water at the bow, and assisted said negroes to take said bags and articles of property out of the canoe. Said Garner, taking from the bow of the canoe a bag, started off with it up the beach towards the bank of the river. That at the same time the rest of the party, with the negroes, followed said Garner; when the first named party from Virginia, who lay in ambush, rushed down upon them, retook all of said slaves except one, and forcibly seized the said defendants Garner, Thomas and Loraine, and forcibly carried them across the Ohio river into said county of Wood, where they have been since detained in prison, and where the indictment on which they are now on trial was found against them."

Held: [786] "1st. That from the facts found, the offences charged were not committed within the jurisdiction of the Court of Wood county, or of the State of Virginia. 2d. That judgment ought to be rendered in favour of the prisoners."

*Sheppard v. Turpin*, 3 Grattan 373, January 1847. In 1821 [378] "the negroes . . . were levied on by the sergeant, at Benjamin Haley's brickyard . . . They were locked up in a room at the brickyard. . . . When the sale was about to take place, four posts were driven down in a square of about ten feet, just before the door of the room in which the negroes were placed, and the posts were planked up so as to make a breastwork before the door; two of the posts resting against the house. Benjamin Haley stood at the door during the sale, with the key in his hands, and let out one negro at a time; the sergeant cried him off. As soon as he was sold" he "was immediately returned to the room from whence he was taken. . . . [379] another was brought out and sold until the whole were sold. . . . one who was a cripple . . . was bought . . . for a shilling."

*Purcell v. Wilson*, 4 Grattan 16, April 1847. Slaves are bequeathed to a wife for life, [17] "to be disposed of at her own discretion, either by deed or will among my children"

*Dean v. Commonwealth*, 4 Grattan 541, June 1847. Dean "was indicted . . . for larceny in stealing the goods of William and John Ross. On the trial the Commonwealth introduced these persons as witnesses, who were

objected to by the prisoner as incompetent, on the ground that they were mulattoes. . . they had less than one fourth of negro blood. Their grandfather, David Ross, who was spoken of as a respectable man, though probably a mulatto, was a soldier in the revolution and died in the service. The evidence as to the grandmother was contradictory; though she was probably white: The mother was so certainly."

Held: "the witnesses were not incompetent under the Act of Assembly, in consequence of the impurity of blood," and evidence on the question of their competency cannot be introduced to impeach their credit as witnesses.

*Charlton v. Unis*, 4 Grattan 58, July 1847. "This was an action brought by Unis against Charlton, for the purpose of recovering her freedom. The plaintiff claimed to be the daughter of a negro woman called Flora, and that Flora was a free woman at the time of the plaintiff's birth, in Connecticut or Massachusetts, and had been abducted from thence and sold in Virginia as a slave. . . [59] a short time previous to the institution of this suit, in 1826," Meacham "stated that he knew the woman Flora in the State of Connecticut in 1775, when she belonged to one Benjamin Scott; . . the witnesses spoke of the common report that Flora had been considered a free woman in Massachusetts, and had been abducted by Hanchett, or Bronson and Hanchett." Verdict and judgment for the plaintiff.

Judgment reversed by the Court of Appeals, verdict and judgment set aside, and cause remanded for a new trial. Held: it was not competent to the plaintiff to introduce evidence which [62] "was hearsay, or gave the common report that Flora had been considered a free woman, . . and had been carried off."

See *Unis v. Charlton*, p. 238, *infra*.

*Taylor v. Beale*, 4 Grattan 93, July 1847. "In 1828, . . Crutchfield of Botetourt, married . . the daughter of . . Taylor of Smyth county. Soon after the marriage, Taylor sent to Mr. Crutchfield a family of negroes, among whom was a boy, Isaac. These slaves remained with Crutchfield . . until the death of his wife . . when all but Isaac were sent back . . Isaac remained . . until Crutchfield's death in 1834, having once accompanied Crutchfield to Mr. Taylor's, . . and on another occasion, having been sent by Crutchfield with some horses of his own, to Mr. Taylor's, where he remained for a part of the winter, and returned with the horses in the spring. On the death of Crutchfield his executors took Isaac into their possession, and hired him out until 1837, when he ran away and went to Mr. Taylor's, who retained him, and claimed him as his own property; insisting that he had only lent him to Crutchfield "

[95] "the Court held that . . as the negro had remained in possession of Crutchfield for more than five years, and no writing evidencing a loan had been recorded, he was liable to Crutchfield's creditors. . . the Court appointed a commissioner to collect the hires of the slave, who had been hired out under an order of the Court, and to make sale of him at public auction,"

*Ben Mercer v. Kelso*, 4 Grattan 106, July 1847. Will of Hugh Kelso, dated 1843: [107] "I direct my executors to hire out annually all the



slaves that may belong to my estate, giving said slaves liberty to choose as far as practicable, with whom they shall live, except one man and one girl suitable to cultivate the farm, and to attend to house business, to remain in the service of my wife Ann during her natural life; on the condition that said slaves be under forty years of age. If they, or either of them, be above forty years of age, such one, or if both above said age, they shall be emancipated; and also all the other slaves before named, or any others that may belong to my estate, on their arriving to the age of forty years of age shall be emancipated; and if there be any legal obstruction to their remaining within the limits of the United States such as renders their continuance therein impracticable, then I direct that they shall be sent to the Continent of Africa. And if they be unable to bear their expenses thither, then I direct that as much money as is necessary for that purpose be reserved from their share of the hires, (to be hereafter mentioned,) shall be applied to defray the expense of their voyage, and to furnish them with such outfit as is indispensable.

“ 8th. I direct that one third of the hires, that is of all the slaves, belonging to my estate now or at any future period, shall be paid to each of said slaves annually, in proportion to the sum each one shall earn.

“ 9th. I direct that on the arrival of the year one thousand eight hundred and fifty-five, (except my wife Ann be then living,) all the slaves belonging to my estate at that time be liberated, that is the residue of those who have not arrived at the age of forty years down to the youngest infant; those of forty years of age being previously entitled to freedom. Those slaves under forty years of age, shall remain in servitude until the decease of my wife Ann; at which time they shall be liberated, including the elder Ben and his wife Charlotte not before named.”

[109] “ In September 1844, Ben Mercer and Mary Wright, two of the slaves emancipated by the said paper writing, applied to the Superior Court . . . to be permitted to propound for probat the said paper . . . the jury found that Hugh Kelso was not of sound and disposing mind and memory on the 15th of November 1843, the date of the supposed will; . . . The Court . . . refused to admit the paper to probat. The counsel for the propounders . . . filed a bill of exceptions . . . [112] [Kelso] would make them [his daughters] do menial acts when his servants were idle in the kitchen. . . [113] sent a message by witness to a negro man of his at a furnace to send him some iron. . . [115] rung his hands, said he must cut out some shoes for his negroes at once, . . . That on one occasion he sent his daughters to the field with two negro men and a woman to work, . . . [116] That on several occasions for several years before his death, . . . Kelso has expressed . . . his conviction of the evil of holding men in slavery; and said he thought every one ought to liberate them as soon as he could. . . [117] About thirteen years before Kelso's death, he called on . . . his cousin, to write a will for him. . . the emancipation of his negroes was talked of by him, but the witness told him if his object was to disinherit his wife and children he must get some one else to act as his scrivener. . . he spoke of belling all his cattle, black and white, meaning his wife and children and slaves, and turning them out in the

world. . . [118] In conversation . . on slavery, he at one time would condemn it, and again would endeavour to shew from the Bible that it was right."

The Court of Appeals ordered that the [120] "verdict of the jury be set aside, and a new trial had:" "at the time of his executing . . his last will . . he was of sound disposing mind"

*Isbell v. Norvell*, 4 Grattan 176, October 1847. [177] "they were hired [for the year 1833] as sick negroes . . for the full price [\$165.12½] of healthy and sound negroes. That Henry was attended by a physician from the 15th of June until October, whose bill amounting to 44 dollars 25 cents, was paid by the defendant [the hirer]." Henry's arm was subsequently amputated. [178] "in the year 1833, Edwin was attending the plaintiff's stud horse, as a groom,"

*Cross v. Cross*, 4 Grattan 257, October 1847. [260] "Celia who was very infirm and idiotic," was valued [261] "at 70 dollars;"

*Hocker v. Hocker*, 4 Grattan 277, January 1848. [278] "Directions how I want my will wrote: The two girls that I left my daughter . . have value at 600 dollars; . . the woman 3 children that I left my son . . have I value at 1000 dollars; . . the negroes that I have in possession it—my wish that they shall be valued, and make their choice which of the legatees they will go to live with;"

*Davis v. Turner*, 4 Grattan 422, January 1848. In May 1833, "Davis, who was a dealer in slaves, purchased the slaves of Wyche for 4700 dollars, and paid him the money. The slaves were brought from the factory of Wyche, where they had been employed, and whilst Davis and Wyche were passing with the slaves to Davis' office, . . Davis, at the urgent request of Wyche, consented that Wyche should hire the slaves, the four men at eight dollars per month and a woman at five dollars per month, until the August or October following, when Davis intended to take them to the south."

*Miller v. Jeffress*, 4 Grattan 472, January 1848. "On the morning of the day on which he died [in 1828], . . Paschal Fowlkes . . in answer to questions asked him" made [473] "a charitable donation . . of 100 dollars to a Bible society . . and emancipated two favourite slaves."

*Peter v. Hargrave*, 5 Grattan 12, April 1848. "the Court made a decree establishing their right to freedom. They then asked for a decree for the profits of their labour since the death of their testator. . . on the ground that the defendants had detained them in slavery with a full knowledge of their right to be free; and had defended and protracted the suit upon pretexts that were entirely frivolous and groundless . . The Court below refused"

Decree affirmed: [17] "persons in the status of slavery have no civil rights, save that of suing for freedom when entitled to it: . . if it be true, as it unquestionably is, that persons in the status of slavery are, in contemplation of law, slaves, whatever may be their right to freedom, there can be no relation . . in behalf of those who have never occupied

any other status, . . . [19] A rule giving mesne profits to slaves, after a recovery of freedom, would operate harshly and often ruinously in regard to the master. The arrangements . . . and expenditures of slave owners are, in a great measure, essentially different from those of persons who employ free labour . . . The owner of slaves . . . is usually condemned to a constant . . . burthen of care and expenditure. It seldom happens that more than a small proportion of them are capable of productive labour; . . . the scantiness of net profit from slave labour has become proverbial, and that nothing is more common than an actual loss, or a benefit merely in the slow increase of capital from propagation. . . . [22] Freedom to them is a benefit rather in name than in fact; . . . While they remain in what is here their original status, provided for . . . in infancy, old age, and infirmity, they are exempt from the . . . anxieties of a precarious existence, . . . and those who are most familiar with the usually mild despotism to which they are subject, can best appreciate their sources of enjoyment from the commonly humane indulgence . . . of their masters. Compare this with the new condition . . . as free negroes . . . and there is no difficulty in believing that, in most instances, no practical injustice will be done them, by striking an even balance of profit and loss between them and their former masters." [Baldwin, J.]

*Billups v. Sears*, 5 Grattan 31, April 1848. Dillard, being indebted, "conveyed to Booker [in 1840] a tract of land . . . two negro men, two women and five children, horses," Subsequently Cooke [33] "recovered two judgments against . . . Dillard, on which executions . . . were levied on the two women and four of the children . . . a sale was made, the proceeds of which amounted to 679 dollars."

*Robinson v. Day*, 5 Grattan 55, April 1848. [58] "The will of . . . Day [who died in 1813] . . . gives the slave Maria and her increase to the plaintiffs, upon the death of Catharine Day without children living at her death; . . . Catharine died [in 1837] without children. . . . [59] in 1834 [her mother, at whose house Robinson stayed when in Richmond] executed a paper . . . 'that Maria and her children are the said Robinson's legal property, he having loaned me 100 dollars to redeem her when under a deed of trust, then only seven or eight years old, and has been at all the expense of raising her and her children.'"

Held: "the plaintiffs . . . were entitled to the slaves under the will of . . . Day,"

*Brewer v. Harris*, 5 Grattan 285, October 1848. "In October 1848 Retha Harris, a free woman of colour, and whose husband was a slave, on behalf of herself and her three children, Sally, Joannah and Milly Harris, applied . . . for a writ of *habeas corpus*, . . . charging that they were illegally detained in custody by Brewer. The writ was awarded; and Brewer certified . . . they had been bound to him as apprentices [in 1844] by one of the overseers of the poor . . . by virtue of an order of the County Court;" at [286] "an annual hire to the said Retha, the mother, for said apprentices, of one dollar each, from the age of fourteen to seventeen; and that he pay to each of them 12 dollars for the last year of their servitude." Brewer agreed "that he will instruct and cause the

said Milly to learn and be taught all the art, trade and mystery of washing and spinning; and that he will at all times treat the said apprentice Milly with humanity, and furnish her with good and wholesome food and raiment during the time of her apprenticeship:"

Held: [303] "the apprentices in question are bastards, their father being a slave, and therefore incapable of contracting matrimony in the mode prescribed by our law. And the County Court exercised its legitimate jurisdiction, by ordering them to be bound out by the overseers of the poor" [Baldwin, J.]

*Logan's Case*, 5 Grattan 692, December 1848. "The prisoner, who was a free negro, was prosecuted for burning a stable; and the Court found him guilty, and adjudged him to be confined in the penitentiary for two years." Five years was "the shortest period for which the offence of which the prisoner was found guilty, was punishable in a free negro. . . the Court held, that there was error, and adjudged the prisoner to be confined in the penitentiary three years in addition"

*Commonwealth v. Foster*, 5 Grattan 695, December 1848. Held: an indictment<sup>1</sup> for allowing more than five slaves, other than his own, to be and remain at one time on the defendant's premises, need not charge that it was without the consent of the owners of the slaves.

*Cole v. Commonwealth*, 5 Grattan 696, December 1848. "James Cole was indicted . . for advising slaves to escape from their master. . . [697] The jury found the prisoner guilty, and fixed the term of his imprisonment in the penitentiary at two years,"

*Ewing's Case*, 5 Grattan 701, December 1848. Ewing was indicted for stealing a negro man and carrying "the said slave from the City of Richmond to the county of Hanover"

*Blevins's Case*, 5 Grattan 703, December 1848. [704] "on Saturday, the 24th of June last, the four slaves named in the indictment, late in the evening of that day, left the service of their employers in the City of Richmond, and have not since returned to the same, nor been seen in Richmond. That one of the slaves was named Charles Rawlings, and was the property of J. H. Grant and John Enders; that he was about twenty-eight years of age, about six feet high, a black man, but not very black. That another of these slaves was named Isaac Page, was the property of Samuel Patteson; was about twenty-five or thirty years of age, a stout man, but not very stout, about six feet high, colour between a black man and a mulatto. That another of these slaves was named Jesse Ambler, was the property of Alexander G. Thompson; was aged about thirty-five years, and a dark mulatto, and about five feet ten inches high. That this slave usually obtained a pass to go and see his wife, who resided near Negrofoot in the county of Hanover, on a Friday, and to return on the Tuesday thereafter; that on this occasion, however, the slave deviated from this habit, and obtained a pass on Saturday evening to return on Monday. That another of these slaves was named Henry Cox, was the

<sup>1</sup> 1 Rev. Code, ch. 111, sect. 13, p. 424.



property of John and Daniel K. Stewart; was aged about thirty-five years, a bright mulatto, and about five feet six or seven inches high. That the prisoner was seen between the hours of twelve and two o'clock on Saturday, the 24th of June last, in the City of Richmond, [705] driving a wagon with three horses in it, one a bay, another a grey, and the third a sorrel. The wagon was of peculiar structure, with a high top, covering the body, deep and straight, and the covering drawn close over it. That he was then in the lower part of the town, not far from the corporation line, driving down the street, and had nothing in the wagon; that he enquired the way to Darby-town, a place below the City of Richmond, . . . That the prisoner proceeded as if he was going out of the City of Richmond, driving the wagon, on the 24th of June 1848, between the hours of twelve and two o'clock; that on the night of the same 24th of June, he was seen driving the same wagon, between the hours of eleven and twelve o'clock at night, about one and a half miles below the City of Richmond, on the road leading to New Kent courthouse, an entirely different road from the one leading to Darby-town; although the New Kent and Darby-town roads fork about half a mile nearer Richmond than the place where the prisoner was seen; that he refused to permit a man who applied to him to ride in his wagon, saying he had some troublesome men in it, and that he was taking them to Williamsburg; and afterwards said he was taking them to Old Point Comfort; and the heads of three persons were seen in the wagon, but whether they were white or black persons, could not be ascertained; that he was left proceeding in his travel on the same road, going in the direction of the New Kent courthouse. That he was next seen at a house some seven or eight miles below New Kent courthouse, on Sunday, the 25th of June, late in the evening, where he called and got some water, and was not accompanied by any one, and no wagon was seen at that time. That the next morning, soon after breakfast, and not far from the house where the prisoner had [706] procured the water the evening before, he was seen to come from the woods along a bye-road to the shore of York river, in the county of New Kent, with four negroes, one of whom appeared taller than the others. A small schooner, which some days before had been partly loaded with wood in the Pamunkey river, was riding at anchor in York river, and as soon as the prisoner and the negroes got to the shore, a boat put off, came to where they were, took the negroes in as quick as it could, and returned to the schooner, which immediately got under way, and proceeded down the river about ten miles, where she came to anchor again; . . . the prisoner having, on the negroes getting on board, left the shore and gone back the way he and the negroes had come. It was further proved that the prisoner resided in the City of Richmond; and he was absent about two weeks from the 24th of June 1848. That at one time, about the date of the offence charged, he represented himself as being engaged in trading in poultry, and in bringing down butter and feathers from the mountains, where he stated he resided. At another time, about the same date, he represented himself as peddling in fish and oysters between Richmond and York river; and when asked why he never brought any thing to Richmond, said he sold every thing along the road. That he had at one time been a

shoemaker in the City of Richmond but for some time past he had not pursued this or any other known business. That he had a conversation in Richmond with one of the Richmond police officers who had gone to the county of New Kent in pursuit of the prisoner, immediately after the escape of the negroes . . . [707] that he had heard he was suspected of being engaged in carrying slaves from the City of Richmond, but declared that he was innocent. He also said that he knew all about the business; that there were men engaged in it who stood high; that he could break them up if he chose, and he pointed out the direction in which they lived. When asked how he came to know so much, he said that he had given a negroe boy twenty-five cents to steal a letter for him, which had told him all about it." The jury [703] "found the prisoner guilty, and fixed the term of his imprisonment in the penitentiary at five years."

*Tutt v. Slaughter*, 5 Grattan 364, January 1849.<sup>1</sup> "When the cause went back, there was . . . a verdict for the plaintiff [Tutt], which was set aside . . . There was then a second trial, when the jury could not agree. On the third trial, the defendant demurred to the evidence, and the jury found a verdict for the plaintiff for 2012 dollars 13 cents, subject to the opinion of the Court upon the demurrer; and . . . the Court gave judgment for the defendant."

Judgment reversed: [373] "as by the demurrer to the evidence the demurrant has admitted all that could be reasonably inferred by a jury from the evidence given by the other party, and waived all the evidence on his part which contradicts<sup>2</sup> that offered by the other party, . . . the evidence of the plaintiff in error . . . taken by itself, . . . would have justified a jury in reasonably inferring a gift of the slaves in question," [Allen, J.]

*M'Kenzie v. Macon*, 5 Grattan 380, January 1849. [381] "a boy Jacob, who attended the mill, . . . During the period from 1829 to 1842, the slave Jacob continued to live at the mill, . . . but William H. Macon annually took from Miles Macon bonds for the hire . . . For the hire of Jacob and two other negro men, Miles Macon executed his bond for 150 dollars. . . . They were blacksmiths, and were occasionally sent for by William H. Macon to do the smith's work on his farm" Miles Macon sold [382] "one of the children of Dilsy . . . That being obliged to sell slaves to raise money, he preferred to sell her because she behaved herself badly;"

*Healy v. Rowan*, 5 Grattan 414, January 1849. In 1782 Elizabeth Robinson [415] "was possessed of seventeen hundred acres of land, and one hundred and fourteen slaves;"

<sup>1</sup> See *Slaughter v. Tutt*, p. 200, *supra*.

<sup>2</sup> [368] "The defendant . . . introduced the record of an action brought by the plaintiff against . . . Slaughter, as administrator of the plaintiff's father . . . to recover . . . for the hire of blacksmith Moses, . . . at 75 dollars a year, . . . And the account contained no charge on account of any other of the slaves in controversy in this suit. . . . [370] That . . . all the said slaves were in the visible possession of the plaintiff's father, in like manner as the other slaves on the said plantation, of which there were many. That Mimy, the wife of Moses, and Eliza their daughter, were house servants, and waited, as such, in the house,"

*Kelly v. Scott*, 5 Grattan 479, January 1849. [480] "bill filed in . . . 1838, by the four children of Mary Jane Scott, . . . to enjoin the sale of certain slaves which had been taken in execution to satisfy a judgment which had been recovered against" their guardian. "The bill charged that the slaves had been bequeathed to them by their mother; . . . and without stating any special grounds for the interference of a Court of Equity, prayed for an injunction, . . . granted" Affirmed.

*Pryor v. Duncan*, 6 Grattan 27, April 1849. Will of Charles Burrus, dated 1795: "I lend [to my daughter] . . . my negro woman Sidney, and her child Sarah, and negro boy named John, to her during her natural life, . . . But should my said daughter or her husband dispose of, convey out of the way, conceal or attempt to alienate the negroes aforesaid, I do hereby declare her title to cease,"

*Forkner v. Stuart*, 6 Grattan 197, July 1849. Two slaves [201] "sold for 1012 dollars, which was about or nearly their value."

*Williams v. Given*, 6 Grattan 268, July 1849. A negro girl sold [270] "for 350 dollars."

*Crumph v. Redd*, 6 Grattan 372, October 1849. "The slave Abby and her son Watt had been . . . sold by Henry Macon to his mother in June 1803; and Mrs. Macon living . . . some twenty-five miles from Henry Macon who owned the husband of Abby, she had permitted Henry Macon to take Abby and her child to his house, for his convenience. After the death of Henry Macon [in 1809], Abby and her children had been returned to Mrs. Macon, . . . [373] Palmore had employed some of the slaves as boatmen on the Appomattox river, in which employment two of them had died of the cholera."

*Morrisett v. Commonwealth*, 6 Grattan 673, December 1849. Morrisett "was indicted in March 1849 . . . for feloniously stealing two slaves, . . . and also for carrying the said slaves out of the county . . . [674] the jury found the prisoner guilty, and fixed the term of imprisonment in the penitentiary at two years;"

*Smith v. Commonwealth*, 6 Grattan 696, December 1849.<sup>1</sup> "Smith, was indicted at the October term 1849, . . . for . . . advising a slave, named Alfred . . . to abscond from his master, . . . The second count charged that the prisoner, in the City of Richmond, did . . . aid the said slave to abscond . . . by putting him in a certain box, . . . and by carrying the said box, with the said slave therein concealed, to the depot of the Richmond and Fredericksburg railroad company, in said city, . . . [698] The jury found the prisoner guilty, and fixed the term of his imprisonment, in the penitentiary, at four years and six months."

*Grayson v. Commonwealth*, 6 Grattan 712, December 1849. "William Grayson, a free negro [a ditcher by trade], was indicted . . . for the murder of David W. Miller. . . . Grayson became indebted to . . . Settle and Miller, . . . 1848, to the amount of some two or three dollars; . . .

<sup>1</sup> See same *v. same*, p. 221, *infra*.

[714] Settle took [Grayson's spade and shovel] . . and told the prisoner that he could not have them until he had paid all that he owed . . on the evening [of the murder] . . he went to the store, and again applied for his spade and shovel, . . but being peremptorily refused, he went off." Later he [717] "returned to the store and paid off his account, and got his spade and shovel; . . [721] about an hour and a half after night" he went to Huffman's cabin, [718] "where he stayed all night; . . he lost his spade and shovel between Wood's and Huffman's." [714] "some young men . . happening to come to the store, . . played marbles until it was too dark to play any longer; . . All went off except the deceased, . . [722] a negro man . . about midnight . . heard a noise at the store; . . and a cry of murder." [715] "the deceased was killed by several blows on the head, inflicted by a dull edged instrument, such as a spade or shovel, . . [719] The shovel [when found] had on it many marks of blood, and one human hair . . [722] the prisoner had on the same clothes late in the evening of [the murder] . . that he wore the next morning, when he appeared at the store [before the coroner arrived]; that there was no appearance of blood on his clothes or person, . . [which] were carefully examined" [713] "Upon the trial, the jury found him guilty of murder in the first degree; and the Court sentenced him to be hung."

[724] "Judgment reversed, verdict set aside, and cause remanded for a new trial." "there is no evidence which connects the accused with the homicide . . at most, it amounts only to a suspicion that he had some hand in it;" [Scott, J.]

See same *v.* same, p. 222, *infra*.

*Poindexter v. Davis*, 6 Grattan 481, January 1850. Davis [482] "in 1830, sold his life estate in the slave . . for 400 dollars. . . [483] the slave was about seventeen years old, was worth about 500 dollars, and his annual hire was estimated at 60 dollars." The purchasers [482] "had taken the slave to South Carolina, and had sold him there." [505] "supposing at the time . . that they had a complete title."

Held: "If [the grantee] . . was ignorant of the extent of his vendor's interest that was the result of his own negligence; . . To confine the operation of the statute<sup>1</sup> to the original life tenant, or such alienee as can be proved to have notice of the reversion or remainder, would . . in effect repeal the act."

*Moseley v. Moss*, 6 Grattan 534, January 1850. Action of slander. Moseley said, in 1844, [535] "that Turpin's negroes were trafficking or trading with Moss, . . and they were carrying the bacon to the coal pits to sell, meaning thereby, that the said Moss, his overseer, and living on his premises, had . . sold his the said . . Moseley's bacon, without his knowledge or consent, to . . Turpin's negro slaves, (without the authority or consent of their master,) who were carrying the same to the coal pits to sell, . . [536] that a negro of Turpin's had been seen coming from Moss's at a late hour of the night, and that a negro had been seen to go in his Moss's . . house, in the night time, when the candle was burning, but as soon as the negro went in, the candle was put out,"

<sup>1</sup> 1 Rev. Code, ch. 111, sect. 48, p. 431.



*Parker v. Brown*, 6 Grattan 554, January 1850. Will of Mrs. Sally Parker, dated 1821: "I give to Richard E. Parker . . . [555] the following slaves, to wit: Big Janey, her children and grandchildren, . . . It is my express will and desire, the negroes hereby willed shall not be sold . . . but that they shall be kept together "

*Beale v. Digges*, 6 Grattan 582, January 1850. In 1834 Beale [585] "put the slaves . . . into the possession of . . . Digges [his son-in-law]; and that all of them, except Jane,<sup>1</sup> remained [in his possession] . . . until . . . 1840. . . if they were intended as a loan, no record of it was made," His creditors "say that their execution was placed in the hands of the sheriff, who meeting with . . . Digges, he gave him a levy upon said slaves, except Jane, the sheriff not having seen them. That . . . the sheriff . . . permitted [Digges] . . . to retain the possession of the slaves until the day of sale, upon which day, the 1st of January 1840, they were brought to Warrenton for the purpose of being sold, when they were by the plaintiff, or his agent . . . secretly . . . carried off,<sup>2</sup> and concealed, so that the sheriff could not reach them, until one of them, Charles, was taken; "

Held: [590] "the slaves . . . with the exception of . . . Jane, . . . became liable,<sup>3</sup> to the demands of the creditors of . . . Digges, though the possession thereof was resumed by . . . Beale after the expiration . . . of five years."

*Smith v. Commonwealth*, 7 Grattan 593, June 1850. "Smith was indicted at the October term for 1849, . . . [594] for advising and aiding a certain slave named Sawney . . . to abscond from his mistress. . . The prisoner filed a plea of *autrefois convict*,<sup>4</sup> . . . That the offence was the same; not two offences of the same kind, but one offence of advising . . . and aiding both slaves at the same time, by the same means to escape. . . [596] The Court . . . informed the jury . . . that the record . . . of the . . . conviction . . . of the prisoner for . . . advising and aiding the slave Alfred . . . to abscond, could not be received . . . as sustaining a plea in bar . . . of a former conviction . . . for aiding and advising the slave Sawney . . . to abscond. . . [597] The jury found the prisoner guilty, and fixed the term of his imprisonment . . . at two years; and the Court sentenced him accordingly: The term of two years to commence upon the expiration of his imprisonment under another sentence pronounced against him at the same term . . . for another felony."

*Bacon v. Commonwealth*, 7 Grattan 602, June 1850. "At the April term for 1849, . . . Jarvis C. Bacon, a free person, was indicted for that on the 26th of March 1849, he did by speaking, maintain that owners have not right of property in their slaves. On the trial the jury found him guilty, and assessed his fine at 49 dollars 62½ cents. Whereupon he moved the Court for a new trial. Upon this motion the Court below certified the

<sup>1</sup> "Jane was returned to the plaintiff soon after the death of the wife of . . . Digges . . . 1838."

<sup>2</sup> [587] "they were . . . persuaded to leave Warrenton, by . . . agent for the plaintiff, and go into the plaintiff's possession,"

<sup>3</sup> 1 Rev. Code, ch. 101, sect. 2, p. 373.

<sup>4</sup> See same v. same, p. 219, *supra*.

facts proved upon the trial as follows: That the defendant, who is a minister of the gospel, on Sunday before Christmas 1848, . . . preached a sermon from the text in the New Testament: 'Ye are the salt of the earth,' or 'Ye are the light of the world.' That he proceeded to point out the duty of Christians, and in the conclusion of his discourse, after citing a passage of scripture which related to the overthrow of the tables of the money changers in the temple, said that those persons, (alluding to the money changers,) were pronounced by our Saviour, thieves and robbers; and then observed that there were thieves and robbers in the church at this day. In illustration of this view, the defendant said: 'If I was to go to my neighbour's crib and steal his corn, you would call me a thief, but that it was worse to take a human being and keep him all his life, and give him nothing for his labour, except once in a while a whipping or a few stripes.' Defendant did not mention the name of slave owners or masters of slaves at any time during his discourse; but witness stated that he understood these remarks to refer to slaveholders. These were all the facts proved; and thereupon the Court adjourned to this Court the question: Ought this Court to grant a new trial in this cause?"

Held: [612] "the motion for a new trial should be allowed." [608] "It is incumbent upon the Commonwealth to shew, in the alleged speaking, that the defendant denied the right of owners to property in their slaves;<sup>1</sup> . . . The defendant's language must plainly express that denial, or, in its plain meaning, necessarily imply it." "To dissuade a member of a Christian flock from merchandizing in slaves, or . . . keeping human beings in slavery, may be done by a pastor, without any denial of the right of owners to property in their slaves." [Lomax, J.]

*Grayson v. Commonwealth*, 7 Grattan 613, June 1850. For facts, see same *v. same*, pp. 219-220, *supra*. "The prisoner was again tried . . . 1850, . . . the time when the young men left the store on the evening previous to the murder . . . was the darkest time of the night, . . . the spade and shovel were not, at 12 o'clock, on the day after the murder, in the spot where they were found at 9 o'clock that night" [618] "during the whole period the accused was in close custody." [614] "After the inquest had been taken and signed, the prisoner was directed to be committed to jail, when it was proposed—the certificate of facts says—by a gentleman present, as a means of finding out where the spade and shovel were to be found, that the prisoner should have his hands put into a vice, and by torture compelled to confess. His hands were put into a vice and the force of the screw applied; but he persisted in the statement that he had before made, that he was drunk, had lost his spade and shovel, and did not know where they were." [613] "he was again found guilty of murder in the first degree, and sentenced to be hung."

Judgment reversed and a new trial awarded: [615] "we are again unanimously of opinion, that it [the evidence] is wholly insufficient to sustain the verdict and judgment. . . . [618] Declarations of persons accused are not much to be relied on; but in this case the truth of the declarations was persisted in under peculiar circumstances;—under severe

<sup>1</sup> Sess. Acts of 1847-8, ch. 10, sect. 24.

torture, which we are sorry to say the bystanders, under the great excitement of the moment, forgetful of the mild spirit of our law, thought themselves at liberty to inflict. . . [619] the testimony . . is hardly sufficient to raise a suspicion against him." [Leigh, J.]

"Note by the Reporter.—After the decision of the Court granting to the prisoner another trial, an armed mob in the day time, took him from the jail and hung him: And thus to punish a man whom they suspected of murder, they committed murder themselves."

*Williamson v. Crawford*, 7 Grattan 202, December 1850. In 1837 two slaves were "valued at 700 dollars" each.

*Fleming v. Toler*, 7 Grattan 310, April 1851. In 1838 Toler, the plaintiff, sold Fleming [311] "a negro man slave, . . for the sum of 1100 dollars;" Fleming alleged that the slave "was constitutionally liable to periodical returns of bilious colick once every week, . . plaintiff . . concealed his knowledge of said defect, and the fact of said defect . . [312] the defect lessened the value of the slave 900 dollars," The jury found [313] "for the plaintiff the debt in the declaration mentioned,"

*Morris v. Peregoy*, 7 Grattan 373, May 1851. "action of detinue . . for the recovery of four slaves, one of whom was named Fanny. . . The jury found a verdict for the four slaves mentioned . . and also for a fifth, the child of Fanny, born since the institution of the suit; . . judgment accordingly;"

*Tabb v. Archer*, 7 Grattan 408, May 1851. [412] "John Tabb died intestate about . . 1797, leaving a very large number of slaves to be divided among his widow Frances Tabb and his eight children, . . [413] 1806, . . [his daughter] Harriet Tabb died . . In 1818 . . the Court made a decree appointing commissioners . . to receive the [dower] slaves from Mrs. Tabb, and . . to allot one sixty-fourth part to Frances Tabb, to be held by her in absolute property, as her distributable share of her daughter Harriet's proportion of said slaves; . . then . . to divide the residue . . into seven equal portions . . having reference to value, and . . deliver one portion to each of the husbands of the female plaintiffs, . . [414] the slaves allotted to Mrs. Tabb . . were valued at 1580 dollars. The shares of the seven children were each 14,039 dollars;" [422] "the surrender of the whole of said dower slaves" and the release of Mrs. Tabb "was made on the consideration that she should retain slaves to the value of the sum of 2000 dollars agreed to be paid to her by each of the distributees," [410] "the slave Sye or Syphax . . had been purchased . . 1819, at the price of 800 dollars. . . [416] his hire . . 100 dollars per annum," [411] "one called Miller Lee, valued at 900 dollars . . was sold . . 1818 . . for 700 dollars, . . [412] shoemaker George . . was worth probably about 900 dollars:"

*Souther v. Commonwealth*, 7 Grattan 673, June 1851. [678] "The prisoner was indicted and convicted of murder in the second degree, . . April term last past, and was sentenced to the penitentiary for five years, the period of time ascertained by the jury. The murder consisted in the

killing of a negro man slave by the name of Sam, the property of the prisoner, by cruel and excessive whipping and torture, inflicted by Souther, aided by two of his other slaves, on the 1st day of September 1849. . . [679] The indictment . . . sets forth a case of the most cruel and excessive whipping and torture. The negro was tied to a tree and whipped with switches. When Souther became fatigued with the labour of whipping, he called upon a negro man of his, and made him cob Sam with a shingle. He also made a negro woman of his help to cob him. And after cobbing and whipping, he applied fire to the body of the slave; about his back, belly and private parts. He then caused him to be washed down with hot water, in which pods of red pepper had been steeped. The negro was also tied to a log and to the bed post with ropes, which choked him, and he was kicked and stamped by Souther. This sort of punishment was continued and repeated until the negro died under its infliction. It is believed that the records of criminal jurisprudence do not contain a case of more atrocious and wicked cruelty than was presented upon the trial of Souther; and yet it has been gravely and earnestly contended here by his counsel, that his offence amounts to manslaughter only." [678] "The motion for a new trial was overruled, and a bill of exceptions taken to the opinion of the Court, . . . The bill of exceptions states: 'That the slave Sam in the indictment mentioned, was the slave and property of the prisoner. That for the purpose of chastising the slave for the offence of getting drunk, and dealing as the slave confessed and alleged, with Henry and Stone, two of the witnesses for the Commonwealth, he caused him to be tried and punished in the presence of the said witnesses, with the exception of slight whipping with peach or apple tree switches, before the said witnesses' arrival at the scene after they were sent for by the prisoner, (who were present by request from the defendant,) and of several slaves of the prisoner, in the manner and by the means charged in the indictment; and the said slave died under and from the infliction of the said punishment, in the presence of the prisoner, one of his slaves, and one of the witnesses for the Commonwealth. But it did not appear that it was the design of the prisoner to kill the said slave, unless such design be properly inferrible from the manner, means and duration of the punishment. And on the contrary, it did appear that the prisoner frequently declared while the said slave was undergoing the punishment, that he believed the said slave was feigning and pretending to be suffering and injured, when he was not.' The judge certifies that the slave was punished in the manner and by the means charged in the indictment."

Held: [680] "It is the policy of the law in respect to the relation of master and slave, and for the sake of securing proper subordination and obedience on the part of the slave, to protect the master from prosecution in all such cases, even if the whipping and punishment be malicious, cruel and excessive. But in so inflicting punishment for the sake of punishment, the owner of the slave acts at his peril; and if death ensues in consequence of such punishment, the relation of master and slave affords no ground of excuse or palliation. The principles of the common law in relation to homicide, apply to his case, without qualification or exception; and accord-



ing to those principles, the act of the prisoner, in the case under consideration, amounted to murder. Upon this point we are unanimous." [Field, J.]

*Fleming v. Bolling*, 8 Grattan 292, December 1851. Will of Thomas M. Fleming, 1801, "emancipated his slaves, except those he had received by his wife; and these he gave to her." The executor [293] "sold all the slaves emancipated by the will, and applied the proceeds of sale to the payment of debts."

*Trice v. Cockran*, 8 Grattan 442, February 1852. Trice, the defendant, placed a slave [443] "in the hands of an auctioneer in Richmond to be sold, and . . . told him that . . . he was believed to be unsound, and that he, the auctioneer, must not sell him to any one without making that fact known to him; that the slave remained for some time at the auction house in Richmond, where he was seen by all the dealers, and among them the plaintiff, and finally he was exposed to public sale, proclamation being made by the auctioneer that a doubt was entertained of his soundness, but he would warrant him sound, and if the purchaser did not like him he might return him; . . . the plaintiff became the purchaser . . . at 470 dollars. This was in July. The plaintiff, after . . . a full statement by the auctioneer of all that the defendant had told him . . . declined to keep him, . . . and the slave remained at the auction house, where the plaintiff frequently saw him, until . . . September, when the plaintiff proposed to the auctioneer to sell him again, saying, that if he would do so, and warrant him sound, he, the plaintiff would bid 400 dollars for him; that accordingly . . . [444] the plaintiff purchased him at a single bid . . . and shipped the slave to the south. . . . if sound he would have commanded at least 550 dollars," The slave died.

*Forward v. Thamer*, 9 Grattan 537, January 1853. Will of Arthur R. Savage, dated 1836: "I emancipate and set free all my negroes at the following dates, . . . [538] provided they shall remove and leave the state of Virginia within six months after they shall go free; but if they do not remove and leave the state aforesaid within the six months, then and in that case to become slaves to my estate forever; and provided also that the laws of the state shall so require them to leave it: . . . Thamer and Charlotte to go free the 1st day of January 1844." The clause "proceeds to emancipate different slaves at different periods, down to the 1st of January 1871. The jury further find that on the 1st day of January 1844, Thamer had attained her full age of 21 years; . . . that she was duly registered as a free person with the assent of the executor, and free papers granted to her on the 14th of July 1845, and that a copy of the instrument of emancipation was delivered to her by the executor." Thamer remained in Virginia. On October 29, 1847, Savage's executor "took possession of Thamer and sold her to John W. Forward, . . . the sale of Thamer was not made for the payment of Savage's debts. On this verdict the court gave judgment for the plaintiff below [Thamer],"

Held: [539] "The conditions having for their object the defeasance of the grant of freedom, are in their nature, conditions subsequent. . . . he

could annex no condition subsequent, repugnant to the freedom conferred." Judgment for Thamer affirmed.

*Elliott v. Carter*, 9 Grattan 541, January 1853. In 1818 [544] "the land sold for 5961 dollars 9 cents . . . The slaves . . . in 1819 . . . were . . . valued at 13,900 dollars;"

*Mosby v. Mosby*, 9 Grattan 584, February 1853. Will of Littleberry Mosby, 1809: [585] "that his executors . . . should sell his land . . . together with all the personal estate thereto belonging, except the slaves;"

*Jincey v. Winfield*, 9 Grattan 708, March 1853. [709] "the slaves of Mary Winfield . . . were emancipated by her will . . . admitted to probat . . . 1847, . . . the administrator confessed judgments to creditors of his testatrix, amounting to near 2000 dollars. . . . Jincey and her six children . . . were sold by the sheriff [to defendant Field] . . . at the price of 1060 dollars," and "Scilla and her five children [to defendant Ragland] . . . at 1150 dollars. Scilla died during the progress of the suit. . . . It appears that the testatrix was an unmarried lady owning an unproductive farm with some thirty slaves, one of which was a shoemaker and two or more were blacksmiths; and that she carried on a shoemaker and two blacksmith shops. Her slaves were permitted to work very much as they pleased, and she would not permit them to be controlled by any one." She [723] "was in the habit of hiring out one, and sometimes two slaves; . . . She was the only white member of her family, and was extremely frugal; but was an indulgent mistress, and a bad manager of slaves;"

Moncure, J.: [714] "the right conferred by emancipation . . . requires the application of different rules . . . from those which govern the case of a specific legacy." Subject to [715] "claims of creditors . . . upon condition that there is no other estate liable and sufficient for their payment . . . they are free from the . . . recordation of the will. . . . They should not be sold absolutely, if a sale for a term would produce satisfaction; nor should some be sold while others are left free, but the burden of servitude should be equally distributed. . . . The rule of *caveat emptor* applies to a purchaser of emancipated slaves, . . . [717] In this case there is no ground whatever for [imputing laches] . . . [717] They were sold just ten months after the will emancipating them was admitted to record, . . . The slaves were probably ignorant of the sale until about the time it was made." A witness testified that he [718] "heard a good many people say it was not right to sell a portion of them to free the others. Of the thirteen negroes that were sold, eleven were infants, and most of them of tender years. They were sold for 845 dollars less than they were then worth; though they produced 239 dollars 61 cents more than the amount of all the executions. The bill was filed just a week, and the affidavit annexed thereto bears date but two days, after the sale. All the diligence that could be expected . . . has been used by the plaintiffs . . . and the purchasers . . . do not pretend that they did not in fact know that the negroes purchased by them had been emancipated; though they no doubt supposed that the sale was valid."

Decree of the court: [725]. "the appellants . . . are entitled to freedom; subject only to a charge for the balance which may remain unpaid of

the debts of the testatrix . . after applying to their payment all her other estate, . . if . . insufficient . . the appellants should be sold for such term of years as may be sufficient to raise an adequate fund to pay the deficiency, so as to distribute the burden of servitude as equally as possible among them:”

*Roberts v. King*, 10 Grattan 184, July 1853. [185] “ 1817 King executed . . a bill of sale for . . Celia and her child, in consideration of . . three hundred dollars; . . she left seven children,”

*Philips v. Martiney*, 10 Grattan 333, September 1853. “ Richard Kittle died in 1830, having first made his will by which he gave to his wife for her life . . a slave named Peg; . . The slave Elijah was the child of Peg born whilst she was in the possession of Mrs. Kittle. In August 1836 Mrs. Kittle sold Elijah, then about two years old, to William Martiney. In the same year Martiney sold the slave to Joseph Johnson, who gave him to his daughter: And she in the same year removed him to the state of Arkansas. Mrs. Kittle died in 1846.” In 1850 an action of trover was brought against the executors of Martiney. Judgment for the defendant.

*Smith v. Commonwealth*, 10 Grattan 734, July 1853. Indictment “ against Benjamin Smith, a free negro, for a rape upon . . a white girl. Upon the first trial the jury was hung. On the second trial the prisoner was convicted and sentenced to be hung. On both trials the prisoner excepted to an opinion of the court admitting evidence of his confessions. It appears that the prisoner was raised by Andrew Edmonson, a magistrate of the county . . and at the time of the confession he was an indented apprentice to Edmonson, and living with him. That when the constable came to the house of Edmonson to arrest the prisoner . . the officer went to bed; and early the next morning before the prisoner had got up, the witness Edmonson went to the kitchen where the prisoner was asleep and called him up. When the prisoner got up, the witness sat down beside him and said to him solemnly, ‘ The die is cast. The dog is dead. She (meaning the prosecutrix) has sworn it, and you must suffer. Now will you suffer and let Campbell escape. Now I want you to tell me the truth, the whole truth, and nothing but the truth; and I will save your neck if I can.’ And thereupon the prisoner made a full confession to the witness of his guilt. . . the prisoner seemed convulsed with fear. The Campbell spoken of . . was a negro man who before this trial, had been tried, convicted and executed for a similar offence committed upon the same prosecutrix, and at the same time.”

Held: [748] “ the Circuit court did not err in admitting the confession . . the sentence of death passed on the prisoner should be affirmed.” [Lee, J.] “ Allen and Samuels, Js. concurred . . Daniel and Moncure, Js. dissented.”

*Foster v. Fosters*, 10 Grattan 485, November 1853. “ William Foster, Martha Ann Johnson, Ellen Johnson, Richard Johnson, Betsey Johnson, Thomas Johnson, Eliza Johnson, and Francis Johnson, persons of color, brought suit *in forma pauperis* in the Circuit court of Henrico, for the recovery of their freedom, against Richard Adams, administrator of

Francis Foster deceased, who had them in custody, holding them as slaves belonging to the estate of his intestate. On the trial . . . evidence was offered tending to prove that on and before the 3d of November 1831, Francis Foster was the owner of a number of slaves, including William Foster, Betsey Johnson, Francis Johnson and Thomas Johnson, four of the plaintiffs below; That Martha Ann Johnson, Ellen Johnson, Eliza Johnson and William Johnson, the other plaintiffs, are the children of Betsey Johnson, born since the date above named. That Francis Foster acknowledged that he was the father of said William and Betsey, and of others of his slaves not parties to this suit. That about the 3d of November 1831, Francis Foster, having previously determined to emancipate his natural children, their mother also his slave, and the issue of his children, took with him to the city of New York these objects of his favor, including William, Betsey, Francis and Thomas, the only parties to this suit then in existence. That whilst in New York, November 3d, 1831, he executed a paper in the form of a deed of emancipation, which was attested by one witness and acknowledged before the mayor of the city, and ordered to be recorded. By this deed he professed to emancipate, amongst others, William Foster, Betsey Johnson, Francis Johnson and Thomas Johnson. That the sojourn of Francis Foster and of the colored persons taken with him, at New York, was for a few days only. That Francis Foster, before going to New York, and whilst there, and after his return, spoke of the trip to that place as intended for the sole purpose of giving freedom to the objects of his favor. That he returned to Virginia bringing back with him the party he had carried to New York. That Foster's reason for carrying his slaves to New York to be there emancipated, rather than to emancipate them in Virginia, was this, that they might remain in the state of Virginia; he supposing that the law requiring emancipated slaves to leave the state in twelve months would not extend to the case which he had devised. That after returning from New York, Foster and the party he had carried with him, lived together as a family upon terms of equality, and not as a master with his slaves. That Foster on the 27th of July 1835, executed a will which was admitted to probat the 9th of May 1836. By this will he emancipated by name, in express terms, his slaves other than his own children, their mother, and their descendants: To some of these last mentioned he bequeathed a portion of his personal property. That the persons claiming freedom under the alleged manumission in New York had not at any time thereafter been treated or regarded as slaves, although not registered as free negroes; that they had always after the death of Foster up to the year 1850, acted as free people, and were not included in the inventory or appraisement of Foster's estate: That in July 1850 they were taken into custody by the defendant below, claiming to hold them as slaves." Verdict and judgment for the plaintiffs.

Judgment affirmed: [490] "the law permitted Foster to emancipate his slaves, . . . There was nothing in the law to prevent Foster from taking his slaves whithersoever he chose . . . [491] it is impossible to perceive a reason why an emancipation without the state, according to the law of the place where made, should not be fully recognized here. . . the evi-



dence did not tend to prove such fraud upon the law as would justify the jury in avoiding the transaction, . . . [492] A safe . . . test . . . will be found by ascertaining whether the owner intended to surrender his right of property under the operation of the laws of a nonslaveholding state; if he so intended, no wrong is done by giving effect to the intention. If he did not so intend, his right of property should be held unimpaired, whatever may have been done to divest him thereof under color of law in any nonslaveholding state." [Samuels, J.]

*Commonwealth v. Scott*, 10 Grattan 749, November 1853. The grand jury presented [750] "William Scott sen'r, a free negro," for [749] "retailing ardent spirits to be drunk at the place where sold" without a license. The defendant [750] "moved the court to permit him to withdraw his plea of 'Not guilty,' and to plead that he was not a free negro, . . . but an Indian;"

Held: the description is [756] "immaterial and mere surplusage," [755] "In a prosecution for the offence charged in this presentment a white person, Indian or free negro, is tried and punished in the same manner"

*Nichols v. Campbell*, 10 Grattan 560, January 1854. [561] "Patterson had sold [in 1828?] . . . [562] a family of negroes, viz: Mary, Caleb and Nelson, at the price of nine hundred and fifty dollars," [566] "the price of these slaves was applied to the payment of the bond . . . [570] The net proceeds of Lucy and her child, sold by the sheriff under the decree of . . . 1841, and purchased . . . at the price of five hundred and ten dollars,"

*Claycomb v. Claycomb*, 10 Grattan 589, February 1854. [591] "It was not necessary to sell any of the slaves for the payment of debts, legacies or expenses of administration. The executor . . . did not sell, any of them."

*Parker v. McCoy*, 10 Grattan 594, February 1854. [595] "In May 1834 Mrs. Burton filed her bill . . . for an assignment of her dower; . . . there were three slaves of which they allotted one to the widow." The administrator "was directed to sell the [other] slaves."

*Frazer v. Bevill*, 11 Grattan 9, April 1854. Frederick Reese, who died in 1829, gave, by his will, to his son Herbert Reese "one-half of the balance of his estate: But if he should die without heirs, then at his death . . . [10] to his grand son Frederick A. Frazer . . . the administrators sold the personal estate except the slaves which proved more than sufficient to pay the debts; . . . [11] the slave Eliza fell to the share of Herbert Reese;" [10] "In 1830 a judgment was recovered against the personal representatives of Frederick Reese, . . . execution . . . was levied on . . . Eliza . . . [11] then a small girl; . . . [12] the deputy sheriff . . . offered the slave for sale at the June court, but that some of the legatees of Frederick Reese contended that Herbert Reese was bound for the debt himself; and that the negro[es] ought not to be sold, as they would be scattered about at the death of Herbert Reese. That in consequence of these remarks no persons would bid, and he therefore kept her until July

court when she was again put up, and sold. . . Bevill purchased the slave at one hundred and seventy dollars. . . it was publicly announced that she was sold to satisfy an execution against Herbert Reese, administrator of Frederick Reese" [10] "At the time of this sale, . . Herbert Reese was a debtor to the estate . . in the sum of two hundred and twenty-eight dollars and forty-two cents, . . In 1845 Frederick A. Frazer filed his bill . . and stated . . [11] That Bevill claimed a fee simple in said slave and her increase [three children]; . . That plaintiff was apprehensive . . that Bevill would send the slaves out of the state, . . Herbert Reese . . had ever been, childless. . . he prayed that Bevill . . might be required to give bond . . to have the slaves forthcoming at the death of Herbert Reese;"

Held: [21] "the Circuit court . . erred in dismissing the bill." [18] "under the circumstances the purchaser could acquire nothing but the interest of Herbert Reese in the slave:"

*Colvin v. Menefee*, 11 Grattan 87, May 1854. The slave Milley was sold in 1844 [88] "for the price of four hundred and eighty-one dollars;"

*Staton v. Pittman*, 11 Grattan 99, May 1854. A [101] "woman and child" were [100] "bid off . . at two hundred and twenty-two dollars" in 1842. "After the slaves went to the house of . . Staton, the sheriff went there to levy upon them, but after he arrived in sight of the house, the doors of the out-houses were closed, and the entry of the officer prevented."

*Boyles v. Overby*, 11 Grattan 202, May 1854. "a negro girl slave . . [203] at the time of the sale labored under an incurable disease called consumption, . . verdict for the plaintiff for two hundred and eighty-six dollars and fifty cents,"

*Fitzhugh v. Fitzhugh*, 11 Grattan 210, May 1854. [211] "eight slaves . . sold, and the prices amounting to three thousand two hundred and ten dollars. . . there only remained an old man, an old woman and a small girl, whose aggregate value does not exceed four hundred and fifty dollars."

*Morris ex parte*, 11 Grattan 292, May 1854. "William W. Morris a free negro . . [293] was charged before the mayor of the city of Richmond with remaining in the commonwealth contrary to law, after having forfeited his right to return to the state or remain therein, by going to a nonslaveholding state.<sup>1</sup> Upon this charge he was tried, and being adjudged to have violated the law in this respect, he was required to give bond in the penalty of five hundred dollars, with condition that he would leave the state within ten days. From this sentence he prayed an appeal . . but the mayor . . refused to grant it."

Held: [296] "a negro convicted of a misdemeanor by a justice is entitled to appeal<sup>2</sup> . . [In] the case of a refusal . . mandamus is the rightful remedy,"

<sup>1</sup> Code, ch. 198, sects. 28, 29, p. 747.

<sup>2</sup> Code, ch. 212, sect. 15, p. 788.

*Fitzhugh v. Fitzhugh*, 11 Grattan 300, May 1854. [301] "The second count, was for attendance upon the slaves . . and work . . done . . by plaintiff for and about the said slaves,"

*Nelson v. Cornwell*, 11 Grattan 724, November 1854. About 1811 [725] "Constance Cornwell [widow of Jesse Cornwell] purchased of her father a negro girl named Prucy, then about ten or twelve years old, for two hundred dollars." Will of Constance Cornwell, 1825: "to her grand son John Cornwell, the oldest son of her daughter Kitty Cornwell, the following slaves, viz: Letty, Prucy and her two children [726] Elizabeth and Albert, and the increase of the females forever, and also a horse: And she directed that he should not sell any of the slaves or their future increase; and if he attempted to sell them, they were to be free. And she directed that the proceeds of the sale of her stock, after paying her debts, should be retained by her executor [Nelson], and applied to the use of the slaves until John Cornwell came to the age of twenty-one years; at which time the slaves were to be delivered to him by the executor. . . Prucy and her children, of whom there were then three, were appraised at four hundred and fifty dollars, and Letty was appraised at ten dollars." In 1835 the estimate of the value of the slave Frank [732] "varied from three hundred and fifty dollars to eleven hundred dollars. Prucy and her six children were valued at that time by two witnesses at one thousand seven hundred and twenty dollars. A witness . . speaks of them as being of very light complexion; some of the children would be taken to be white, and they were generally delicate. They were valued at small prices, on account of their complexion and health." Prucy and her children were in the possession of Nelson at his death in 1845. His executor took possession of them and [733] "sold two of the children to a trader, who took them to Washington city; and in June 1847 John Cornwell . . instituted proceedings to recover them, as belonging to him under the will of Constance Cornwell. . . [735] It appeared that the plaintiff was the son of Kitty Cornwell, and was a mulatto. He attained the age of twenty-one years in 1830; and in 1828, when a minor, he received from Nelson the value of the horse left him by Constance Cornwell, and left the state; . . It appeared too that Prucy herself was a light mulatto, and her children very light mulattoes, some of them showing scarce a trace of negro blood; and it seemed that the children were the children of Nelson." [750] "They were chargeable slaves, incapable, it seems, of producing any hire; and they were in the care of one whose relation to them gave assurance that they would not be neglected." [Moncure, J.] [735] "decree in favor of the plaintiff for the slaves in controversy, and for an account of profits." Affirmed.

*Smith v. Betty*, 11 Grattan 752, November 1854. Betty and others sued in 1835 *in forma pauperis* to recover their freedom. [753] "William Gooch, . . the father of several of the plaintiffs, the children of Betty, being an unmarried man, and being anxious to secure to the plaintiffs, to whom he stood in the relation of a master, but particularly to Betty and her children, the full enjoyment of that liberty which he had always permitted, . . but being an extremely illiterate and uninformed man, applied to . .

Smith to . . . advise him as to the best mode of effecting this wish, and . . . of devoting the whole of his property to the plaintiffs." A deed was executed in April 1831 vesting the whole legal title to the said persons and property in Smith. [758] "Gooch was so drunk the witness could not understand anything that he said." In November [753] "Gooch being informed that Smith would claim the subject of conveyance as his own, he executed another paper, . . . [754] In it he says, . . . [755] if he should attempt to hire out, sell or convey any of said negroes, or sell my land that I have for my said negroes, I wish it to be taken from him, and put in the hands of Jesse Barker immediately; that it never was my intention for any of my negroes to be sold or hired. . . . [758] on the night before Gooch died he told the witness that everything was given to . . . Smith, but he was not to carry the negroes off the place. . . . he did not intend to make his negroes slaves, and that he intended to get some man to stand master for them. Some of these slaves, . . . he stated were his own children; . . . when . . . [759] taking an inventory . . . after Gooch's death, Charles [Smith] told the plaintiff Betty to bring all the things; they were hers." Barker [766] "states that . . . Smith employed him to act as master for the slaves, stating that the law required some person to do so; that he (Smith) . . . did not wish to be pestered with them; and that the slaves were to support themselves by their own labor." In October 1848, the jury found: [759] "First. That the deed from Gooch . . . April 1835, was executed without a knowledge of its contents and legal effect, and that he did not intend to convey to said Smith an absolute title to the slaves mentioned therein. Secondly. That the said deed was procured for said Smith . . . by fraud. Thirdly. That the said Gooch intended to emancipate the said slaves by the said deed. . . . [760] in June 1852, the court made a decree emancipating the plaintiffs in the first suit, and their descendants born since the institution of the suit; and that the deed of April 21st, 1831, be set aside and canceled, as having been obtained fraudulently "

Decree reversed, and both bills dismissed: [767] "It must be conceded . . . that Gooch intended to leave to his negroes his land after his death; and to allow them to live on it and enjoy the fruits of their own labor, under the supervision of Smith, who should stand as master for them, so as to prevent their being subjected to the operation of the laws with respect to residence in the state, of free negroes; . . . But . . . the deed was regularly acknowledged . . . [768] the grantor had declared that the slaves would prefer being servants to any good man, to being sent off to a free country;" [W. Daniel, J.]

*Cheshire v. Purcell*, 11 Grattan 771, November 1854. The will of Francis Cannon emancipated two slaves. [772] "As in leaving a portion of my estate to my niece . . . for her life, I had in view her ease and comfort, I think proper to stipulate, that in the event of any of the negroes left her becoming refractory and disobedient, . . . as to make it either necessary or desirable to her to sell or exchange them . . . I hereby authorize her to do so, with the consent . . . of my trustees,"



*Mayo v. James*, 12 Grattan 17, January 1855. "In September 1853 Clinton James, a free negro, presented a petition to the judge of the Circuit court for the city of Richmond, stating that he had been unlawfully prosecuted before the mayor . . . for a violation of an ordinance . . . providing that 'no negro shall keep a cook-shop [18] within said city,' under the penalty of stripes, at the discretion of the mayor; and that he had been duly licensed to keep a cook-shop under the provisions of the act of assembly of April 17th, 1853,<sup>1</sup> . . . insisting that the said ordinance is in conflict with the said act of assembly, and therefore void; . . . and praying for a writ of prohibition to restrain the said mayor from holding cognizance of any such prosecution. The writ was accordingly awarded . . . executed on the mayor, and returned. . . judgment for costs against the city." The mayor appealed.

Judgment reversed. [22] "Cook-shops kept by free negroes, 'being in effect taverns, negro taverns of the lowest description, and' liable to become 'sources of infinite disorder and corruption among the black population, slave as well as free,' the propriety . . . of regulating, . . . or wholly interdicting them in the city of Richmond, must be apparent to all. . . Stripes being the ordinary punishment inflicted by law upon a free negro for a misdemeanor, may properly be inflicted upon him for the violation of an ordinance of city police."

*Adams v. Gilliam*, 1 Patt. and H. 161, January 1855. Will of Absalom Flowers: "I direct that my negro man James have his choice to live with either of my children or grandchildren, whichever way he may select; but he may have the privilege to change his home, if he think proper, if not well treated, and may live where he prefers." "The negro James elected to live with the testator's daughter, Lucy, the wife to Littleton Adams, and he was delivered by the executor of Flowers, to Adams, who held possession of him as his slave for three years, when Gilliam and wife, who were distributees of Flowers' estate, filed their bill . . . in which they claimed, that the testator was intestate as to the said negro James, and prayed . . . a sale of the slave, for distribution of the proceeds among those entitled."

Held: the clause [166] "is inoperative and void, as a bequest of freedom to the negro man James." [164] "The sole object of the testator seems to have been . . . to leave him in a condition between slavery and freedom—a condition unknown to our laws and against its policy."

*Young v. Vass*, 1 Patt. and H. 167, January 1855. Will of Philip E. Vass, dated August 8, 1831, and admitted to probate April 22, 1833: [168] "My wish and desire is, that my two servants Mary and Jacob, and all my interest in the undivided servants belonging to my father's estate, to be emancipated, and that the sum of two thousand dollars be appropriated out of any moneys belonging to my estate, to purchase in the State of North Carolina a tract of land not less than 250 acres nor more than 300; the said land is to be of good quality and such as will command four or five dollars per acre, and higher then five I do not wish to be paid. If

<sup>1</sup> Sess. Acts, p. 20, sect. 4.

there is no houses on the land sufficient for my servants to occupy, my wish and desire is for them to be builded of good oak logs, three logs above joist, with cabbin rough well covered with good slabs, and if there should be more than one house necessary, my desire is for it not to be put up nearer then two hundred yards to any other, nor further aparte then three hundred yards. My wish and desire is that my negroes be furnished with two good work horses and the necessary plantation tools to make a crop with, and two good milk cows, meat and corn for the first year, say four barrels corn each, and one hundred and fifty pounds pork, . . if either one of the servants which is emancipated by me dose become rogueish and entire neusance to this country, he, she or them shall escheat to this commonwealth and be sent from this country to the colony of Liberia; and it is moreover my wish and desire that none of the servants emancipated by me shall ever have it in their power to dispose of the said land which may be bought for them, or any other property given them by me, either by gift or any other way whatsoever, but go to them and to their familys in succession; and it is my wish, that when the servants which is liberated by me, and the increase of their bodies on the female side be extinct, that the said land and all the property which may be in their possession previous to the death of the said servants, be sold . . [169] It is my wish and desire that James Young . . do take my servants in possession so soon as it may be legal for him to do so, hire a white man workman and put my male servants with him to aid in building houses, and compleating the same for them to move into." [174] " A controversy arose whether the slaves were emancipated, which was settled by the final decree of the Circuit Superior Court . . 1841, which ascertained and decreed that the plaintiffs in that suit, to wit, Jacob, Mary, Sam, Meriwether, Patty and Matilda were emancipated. In May, 1843, James Young and five of the emancipated negroes (one of them, Sam, having died in the meantime,) exhibited their bill . . against the executor, claiming the benefit of the \$2,000 appropriated to their use by the will, . . the executor filed his answer, in which he submits the question, whether, as the laws of North Carolina did not permit the settlement of the colored plaintiffs in that State, in that event they were entitled to the money aforesaid at all under the will; . . In June, 1850, the Circuit Court ' being of opinion that, as by the laws of North Carolina, emancipated negroes are not permitted to migrate into that State, the plaintiffs had no right to the said sum of \$2,000,' dismissed the bill."

Decree of the circuit court reversed and the cause remanded: [I.] the provision [175] " for their removal and settlement in that State . . must be regarded as only secondary and ancillary to the other, . . although the legacy cannot be appropriated precisely in the manner directed by the will, the legatees are entitled to have it applied in the manner most beneficial to them, . . [II.] [176] the legacy should be regarded as made to a class. . . the survivors take the whole, . . [III.] the whole, with the interest accrued should be paid to . . Young . . to retain as compensation for his trouble, according to the will, the sum of \$300, with its interest; that out of the residue, he pay the expenses of transporting the emancipated

negroes to such free State as they may be permitted to go to, or to the port of embarkation for the colony of Liberia, as they may elect to go to the one or the other, and divide the remainder among them." [Clopton, J.]

*Doswell v. Anderson*, 1 Patt. and H. 185, January 1855. [192] "there was a balance . . of \$289, arising from the price of a slave embraced in the said deed of trust, who had been condemned for felony and executed. . . and Dr. George Fleming raised an account against the trust fund, for medical services rendered the trust slaves and the beneficiaries."

*Graham v. Bardin*, 1 Patt. and H. 206, January 1855. [208] "Winston, valued at \$900, was exchanged . . for Frank, valued at \$600, the defendant paying . . \$300, the difference in value," [207] "shortly after . . [208] the plaintiff alleging that . . Frank was unsound, tendered him to the defendant . . with the . . \$300, and demanded . . Winston, which was refused; and subsequently the plaintiff sold . . Frank"

*Turner v. Campbell*, 1 Patt. and H. 256, January 1855. [257] "Ragland . . 1811, executed a paper . . 'I do hereby relinquish my right to a negro girl, . . in consideration of forty-five pounds,'"

*Smith v. Elliott*, 1 Patt. and H. 307, January 1855. [310] "Elliott had executed a bill of sale . . 1831, conveying an old negro man and a negro woman and three children, [for] . . three hundred and sixty dollars, . . [313] In . . 1848, Commissioner . . reported, that the slaves . . were worth . . 1831, the sum of \$725."

*Osborne v. Taylor*, 12 Grattan 117, February 1855. [118] "Previous to the 2d day of February 1835, Thomas O. Taylor . . made his will, . . he directs certain of his slaves to be liberated, or at their option to remain in the state and choose masters. . . [120] I devise two slaves . . in trust, . . [121] Eighthly. The whole of my negroes not before . . devised, I now devise . . in trust, for the benefit . . of Mrs. . . Johnson, during her life, . . [At her death] it is my further will and direction that the slaves embraced in this item be emancipated, . . But should a part or the whole of my negroes prefer remaining in the state, they can do so by choosing masters to serve during the life of the person or persons chosen, at the death of whom they shall have the option of freedom or slavery, by making a second choice. . . I have been obliged to mention my negroes in families or collectively, because being unacquainted with the names of some of them, I am unable to particularize." After the death of Mrs. Johnson, her administrator [122] "stated that the slaves directly emancipated by the will of Taylor had been set free before his qualification: That those emancipated at the death of Mrs. Johnson were under his care, hired out for that year;" The court ordered him to collect their hires and to hire them out until further order. In 1851 [124] "the court held that the slaves bequeathed to Mrs. Johnson for life became entitled to their freedom at her death; and that the provision authorizing them to choose masters was void; . . a commissioner made reports as to the hires of the slaves since they had been under the control of the court." They amounted to \$700 in 1851, and \$792.74 in 1852. In 1853 the court decreed that the administrator should [125] "cause them to be registered as free in the

court of Powhatan county, and to be furnished with certificates thereof:” He was “authorized to divide the money [for their hire] deposited in the bank equally among the said negroes; and that the amount in the hands of the plaintiff, after defraying some charges mentioned in the decree, should be paid to those of the negroes who had earned it: such payments to be made when they respectively received their certificates of registry.” The next of kin appealed.

Decree affirmed. [129] “all the slaves in being at Mrs. Johnson’s death, belonging to Taylor’s estate, are emancipated by his will. . . [131] no cause had existed which should have prevented the administrator from setting the slaves at liberty upon the death of Mrs. Johnson. . . To give the freedmen their hires accrued after they should have enjoyed their freedom will be clearly within the testator’s meaning. By giving them freedom he gave the right to enjoy the fruits of their own labor. The court, by giving them the hires under its control will, to that extent, give effect to the will.” [Samuels, J.]

*Harvey v. Epes*, 12 Grattan 153, February 1855. In 1849 the contractors on the Richmond and Danville railroad hired of Mrs. Epes [156] “three negro slaves . . . to work on the . . . railroad, for the present year. Said slaves to be returned at Christmas next, well clothed with the customary clothing, and furnished with a hat and blanket, subject however to the deduction of any extra clothing charged by the contractors, and also the doctor’s bill, at three dollars each.” A witness testified [155] “that they were to be worked only in the county of Amelia, and were to be attended by Dr. Cheatham, a physician residing in said county. . . [158] two of said slaves died during the year, while at work in Chesterfield . . . one a very likely man, about thirty-five years old, and the other a likely boy, about eighteen.” The slaves were attended by Dr. Ball. [160] “they died of pneumonia, a disease which was very prevalent at the time throughout the county; and that all necessary and proper comforts were provided for the said slaves. . . [165] verdict and judgment for the plaintiff [Mrs. Epes] for twelve hundred dollars:”

Judgment reversed. New trial.

*Wood v. Humphreys*, 12 Grattan 333, May 1855. “Joseph Pierce . . . died in 1798, leaving a will, . . . By one clause of his will he gave a negro woman and her four children to one of his daughters. In another clause he says he has set at liberty five negroes whom he names, and he wishes that they shall continue so. He then names five other negroes, who he says he cannot think of leaving slaves for life; and therefore they are to be at liberty at the end of five years. The testator then names separately eighteen other slaves, and directs that each of them shall be freed after a certain number of years. One of these is a woman named Nancy who is to be freed at the end of twenty years. The next clause of the will says: ‘It is my further desire, that if any of the above named female negroes mentioned in this my last will, shall have children while they continue in servitude, it is my will that the children shall serve until they shall become of the age of thirty-one years, and no longer; and so on until they shall all become free.’ The woman Nancy before the twenty years had expired,



became the mother of a female child named Julianna; and Julianna before she reached the age of thirty-one years, became the mother of Frances Wood, who after she had attained the age of thirty-one instituted proceedings in the Circuit court . . . [334] for the recovery of her freedom, against John Humphreys who held her claiming her as his slave for her life. Upon the trial the foregoing facts were found by the jury in a special verdict; upon which the court gave judgment for the defendant: And upon the application of the plaintiff this court allowed her a *supersedeas*."

Judgment reversed: [338] "He wished 'all' to become free; thus using that comprehensive word which has been so often held to embrace future increase, and to take a case out of the operation of the principle of *Maria v. Surbaugh*.<sup>1</sup> . . . [339] the only question is, whether the authority [to emancipate slaves *in futuro*] was subject to any limitation as to the period when the gift was to take effect; . . . if there was a limitation, it resulted from the rule of law in regard to perpetuities. . . . In *Pleasants v. Pleasants*,<sup>2</sup> . . . it was held<sup>3</sup> that the rule does not apply to a case of emancipation. . . . There is a manifest difference between a gift of freedom and a gift of property. . . . [340] the rule . . . [341] may not be applicable to a gift of freedom, which is a renunciation of property. . . . The case has never been overruled . . . the doctrine of that case remains untouched by legislation; . . . [342] I am therefore of opinion that *Pleasants v. Pleasants* ought to govern this case." [Moncure, J.] [362] "Lee and Samuels, Js. concurred in the opinion of Moncure, J."

*Taylor v. Cullins*, 12 Grattan 394, May 1855. Will of John Cullins, 1833: "it is my desire, that at the death of my daughters Henley and Polly, that the following slaves shall be set free: Nancy, Jane, Sally, Judith and America. And whatever property there may be left at the death of my daughters Henley and Polly, it is my wish and desire that it may be equally divided between the above named slaves." The testator [295] "provides that if one of his said daughters marries, the other shall have the property; and if both marry, that the said slaves shall be set free: And he gives them the property upon this event as upon the death of the daughters. Neither . . . married, and Henley survived Polly." In 1846 she conveyed all her property to Taylor. In her lifetime the slave Nancy died, leaving a child named Martha. "In 1850 the surviving slaves mentioned in the will of Cullins, filed a bill . . . setting out the will, the death of Henley Cullins, and of Nancy, and that Martha was in the possession of Taylor who was about to sell her; and claiming that she was a part of John Cullins' estate which was bequeathed to them; and asking for an injunction to restrain the sale, and that she . . . might be delivered to them."

Bill dismissed: [398] "Martha having been born during the servitude of her mother Nancy, was consequently born a slave."<sup>4</sup> According to

<sup>1</sup> P. 138, *supra*.

<sup>2</sup> P. 105, *supra*.

<sup>3</sup> "Two only of the three [judges] concurred in the decision; and it is therefore not, in itself, a binding authority."

<sup>4</sup> *Maria v. Surbaugh*, p. 138, *supra*.

the act of assembly, March 15, 1832, sect. 3, [399] "Nancy, the mother of Martha, was the only one of the legatees in remainder who . . could, under the exception in the statute, have acquired any title to Martha . . As she died in the lifetime of Henley Cullins, it is obvious that the other freedwomen have no legal . . interest in the title to Martha." [W. Daniel, J.]

*Nixon v. Rose*, 12 Grattan 425, May 1855. [426] "previous to 1848 Lewis had been in possession of the slave . . for five years, under an agreement . . to pay . . fifty dollars a year hire for him; . . about February 1848, . . [427] he . . took him to Richmond and sold him . . for . . about five hundred and sixty dollars."

*Johnson v. Commonwealth; Gary v. same; Pankey v. same*, 12 Grattan 714, May 1855. "presentments found against the several plaintiffs in error for selling ardent spirits to different slaves of . . Johnson, without the written consent of the master. . . [715] the plaintiffs in error . . produced a writing, proved to have been executed and delivered to them by the owner of the slaves, authorizing them to sell to his slaves, . . merchandise or liquor, upon the responsibility of the slaves purchasing." [714] "the court . . rendered judgment in each case for twenty dollars, the fine imposed by law,"<sup>1</sup>

Judgment reversed: [716] "no offense was committed;" [715] "There is nothing in the terms of the act which requires a special written consent for each act of selling."

*Unis v. Charlton*, 12 Grattan 484, August 1855. [485] "These cases were before the court in 1847,<sup>2</sup> . . They are four actions for freedom brought in 1826, in the Circuit court . . All the paupers were descendants of a woman named Flora, who, they alleged, was a freewoman in Connecticut, and abducted from thence with her two infant children; and that they had been brought into Virginia, without the oath being taken by the claimant of them which was then required by the statute. . . There were many trials of the cases;" Henry Carty [486] "said that old Flora . . had told him at different times that if she had her just rights she would be a freewoman; and she at the same time wanted him to write her a letter to send back where she came from, to obtain information from the people concerning her freedom. That Squire Howard, who is dead, told the witness that Flora had applied to him as a magistrate concerning her freedom. And that James Charlton was a man of severe temper, and likely to keep his slaves in subjection. . . [487] it did appear that her application to the justice Howard was not made within twenty years after she was brought to Virginia. . . Flora and her two children were brought from New York to Virginia by . . Simpkins; and that they had been sold by Simpkins to James Charlton," [492] "It appears from Carter's statement that Charlton had purchased Flora . . at least forty-five years before the date of his deposition; and he no where fixes the date of the loose declarations of Flora, that 'if she had her just rights, she would be a freewoman.'"

<sup>1</sup> Code, ch. 104, sect. 1, p. 459.

<sup>2</sup> See *Charlton v. Unis*, p. 212, *supra*.

Judgments for the defendants affirmed: "it has been settled that twenty years' possession, by the master, of slaves thus brought into the state, without any claim of freedom on the part of the slaves, justifies the presumption that the master had duly taken the oath required by law. . . These declarations . . may have been made long after the presumption had attached; and were therefore plainly inadmissible as testimony for any purpose. The opinion of the witness in respect to the temper and character of Charlton as a master, was, I think, equally inadmissible." [W. Daniel, J.]

*Ratcliff v. Polly*, 12 Grattan 528, September 1855. "By a petition bearing date the 10th of March 1851, Harrison Polly, and three others, his brother and two sisters, applied to . . a justice of the peace for Cabell county, stating that they were free persons of color, and were then in the possession of William Ratcliff, who held them as slaves: And they prayed that a summons might issue authorizing the sheriff of Cabell to take them into his possession for safe keeping, . . [529] with leave for the petitioners to sue for their freedom. This petition was sworn to on the 12th of March by L. D. Walton; and on the same day the justice issued his warrant to the Sheriff of Cabell county, directing him to take possession of the petitioners, . . and he was required to give to William Ratcliff notice of the detention and the cause thereof." The petitioners had obtained a writ of *habeas corpus* (dated March 8, 1851) [530] "directed to William Ratcliff, requiring him to have the plaintiffs before the judge of the Circuit court of Cabell county, . . on the 12th day of " March. On that day " Ratcliff produced the plaintiffs before the judge as directed," having brought them from his residence in Wayne county. [529] " On the same day the sheriff took possession of the petitioners, but surrendered them to William Ratcliff, upon his executing a bond with sureties . . to have them forthcoming on the first day of the next term of the said Circuit court. . . [530] The cause came on for trial in September 1854, . . verdict and judgment for the plaintiffs establishing their freedom;"

Judgment reversed and suit dismissed: [534] "the courts of Cabell county had no right to take jurisdiction of the case. . . [536] in presenting the petition for a *habeas corpus* the complainants did not, *bona fide*, seek to resort to it as a proper method of trying the right to freedom, (an office which, in such a case, it could not properly perform,) but that they took this course as a device by which they might be enabled to shift the scene of the trial of the regular suit they designed bringing, from the county of Wayne to the county of Cabell." [W. Daniel, J.]

*Armstrong v. Walkup*, 12 Grattan 608, September 1855. [609] "Armstrong's white family, besides his [three] wards, consisted only of himself and wife; and that he had a negro woman with three or four children, some of them females about the age of the wards, and able to work;"

Held: [613] "no charge should be allowed to the several wards for services . . the condition of the guardian's family did not require the services of these hired girls in its domestic affairs,"

*Chapman v. Campbell*, 13 Grattan 105, February 1856. [106] "That at a County court . . 1851, a slave, owned by a Mr. Barbee, was tried

for larceny, and found guilty, and the judgment of the court was that he should have ten stripes, lightly laid on. That thereafter, a slave named Gilbert, the property of the plaintiff, was tried as accessory, and found guilty; and before the court pronounced any judgment, the counsel for the slave applied to the court not to inflict a heavier punishment on the accessory than had been inflicted on the principal. To which the court replied, that the slave (the principal) had been sold and was to be taken from the commonwealth, and that fact was the inducement to the infliction of so light a punishment. The plaintiff, an old lady, the owner of the slave Gilbert, who was in court, was then applied to, to know if she would sell her slave, to which she assented, and authorized J. Y. Menefee to sell him. The defendant . . . enquired what price she would take for the slave. To which her agent replied, that she would take eight hundred dollars. The defendant then replied, I will give it. The agent replied, the negro then is yours. To which the defendant replied, well, I will take him. The court then remanded the slave to jail, without passing sentence on him; . . . [107] the defendant applied to the court to have the slave Gilbert confined in an apartment separate from the slave who was the principal in the larceny, and who was still confined in jail for safe keeping by his purchaser. And it was also proved that Barbee, the former owner of the slave, who was the principal, made a similar request, for the reason that the slaves were hostile, and might injure each other. Which order was given by the court to the jailor, and the slaves were accordingly confined in separate apartments. It was also proved that the defendant applied to the jailor, after the negro Gilbert was remanded to jail, to know whether there was any thing in the jail with which the negro could inflict an injury on himself; the witness proving that the defendant seemed to be apprehensive that the man might do some violence to himself. . . . [108] the slave broke jail that night, and made his escape,”

Held: the purchaser is bound for the price.

*Raines v. Barker*, 13 Grattan 128, February 1856. John Barker, who died in 1852, made his will in 1842: [129] “My will is . . . that my executor sell the land whereon I now reside, . . . also a tract . . . containing, I think, one hundred and sixty-three acres; also ten shares . . . and two shares . . . with all my household and kitchen furniture, all my stocks of all kind, plantation tools and implements, with every article of property belonging to me, except the wearing apparel that may be in the house at the time of my death; that I wish divided among the servants belonging to the estate.” He directs “that the people may be continued on the plantation until the money from the sale can be collected. And when there is money enough collected to purchase what may be necessary to fit them out for the trip, and to pay their passage there, he directs his executor to send them to Africa, after furnishing them plentifully with everything which is necessary for their comfort and convenience. He then gives to his nephew . . . five hundred dollars; and ‘the balance of’ his ‘estate, after paying all expenses,’ he wished ‘to go to furnish them in a situation to live.’ . . . [130] the land in controversy, about two hundred acres, was, purchased in March 1849;”



Held: [135] "the words 'the balance of my estate,' if held as intended to embrace lands at all, must . . . be referred to the balance of the testator's lands which he owned at the date of the will."

*Taylor v. Yarbrough*, 13 Grattan 183, March 1856. "By deed . . . 1823, . . . Taylor . . . conveyed to his daughter Patty Deshazor four certain young negroes . . . children of Nelly, and Rachel and Jenny, together with all the future increase of the said three women . . . And the deed recites that he had lent the three women . . . to Mrs. Deshazor for her life. . . . [184] John Deshazor, the husband . . . was alive, and the slaves went into his possession," After his death, in 1825, commissioners distributed his personal estate, "giving to the widow one-third of the four young negroes during her life, and the remaining two-thirds thereof" to John Deshazor's only child by a former marriage, [185] "leaving undivided and in the possession of the widow, the three women aforesaid, where they and their numerous increase born since the date of the deed, had ever since remained, except Nelly who was dead."

Held: [189] "the deed from Taylor . . . was effectual to pass such increase . . . being the absolute owner of the reversion of these slaves after the . . . life estate granted to his daughter, their capabilities of increase also belonged to him, and he might grant such increase . . . as the children were born they would vest in the donee . . . [190] the property in the slaves born during the lifetime of John Deshazor vested in him. But as to those born after his death . . . [194] [they] were the property of Mrs. Deshazor,"

*Daniel v. Leitch*, 13 Grattan 195, March 1856. The widow of John Daniel [197] "stated, that among the slaves belonging to the estate, there were some family servants who were very valuable, and from their good qualities and long association and early attachments, were of peculiar value to herself and her children: And that if the property left to them after the payment of the debts should be in slaves instead of land, it would be more agreeable to their feelings and more conducive to their pecuniary interests. . . . [199] the court . . . decreed [1851] that the [land] . . . should be sold . . . [205] The report of the commissioner . . . 1853, . . . The personal assets . . . consisting, except as to five hundred dollars, wholly of slaves, were valued at thirteen thousand five hundred dollars;"

The court decreed that two tracts of land should be sold [206] "investing the proceeds of sale, so far as the same might not be required in aid of the personalty, for the payment of debts, in the slaves left by . . . John Daniel,"

*Hepburn v. Dundas*, 13 Grattan 219, March 1856. Action of "ejectment . . . 1848, by the lessee of Moses Hepburn and Arthur Waring and Julianna his wife, persons of color, against . . . Dundas and others claiming as heirs at law of William Hepburn deceased, to recover a tenement in the city of Alexandria. . . . Moses and Julianna claimed as the brother and sister of Letty,<sup>1</sup> . . . [220] to whom the property was devised by William Hepburn." Letty had possession of the property from Hepburn's

<sup>1</sup> "sometimes called Letitia Hepburn, a woman of color, and a bastard."

death in 1817 "until her own death in 1823 or 1824, after having had living issue, which died in her lifetime. That Letty's mother being dead, Moses and Julianna . . . [221] are the bastard brother and sister of Letty, and the only surviving issue of Letty's mother." The husband of Letty died in 1834. "Letty, Moses and Julianna . . . were the children of Esther,<sup>1</sup> a slave . . . of William Hepburn," who, on February 1, 1816, conveyed them to Hannah Jackson, a woman of color, the sister of Esther. "That Hannah Jackson executed a deed of emancipation, dated February 12, 1816, in due form of law, whereby she set free Esther and her children, if she had capacity in law to acquire and manumit slaves. In regard to this question of capacity, it appears that Hannah Jackson had been the slave of one John Harper. That Harper, on the 23d of October 1810, in consideration of one hundred and ninety-six dollars, sold and by deed conveyed Hannah to one William Goddard for the term of ten years, and no more; and at the end of that time, set her free; and also set free any child or children of Hannah, born during her servitude. This deed was executed in form to operate as a deed of prospective emancipation. On the 24th of October 1810, Goddard executed a deed of emancipation, setting Hannah free whenever payment of the said sum of one hundred and ninety-six dollars, and the interest thereon, should be made; and providing that the receipt in full for the payment should be taken and admitted as complete testimony of such discharge. These deeds were duly recorded December 2d, 1811. It is shown by the evidence that Hannah Jackson acted as a free woman in buying and holding property."

Held: [222] "There is no force . . . in the objection that the payment of the hundred and ninety-six dollars and its interest could be proved only by Goddard's receipt. The deeds of emancipation and registry thereof, and the *fact of payment*, completed the manumission; and the payment is sufficiently shown by the circumstances above stated, which occurred soon after the date of Goddard's deed. The provision in regard to the receipt was intended for the benefit of the freed woman; to give it a weight and force beyond that usually given to a mere receipt; to make it complete testimony. I am of opinion that Hannah Jackson was a free woman on the 1st of February 1816; that Hepburn's conveyance of that date passed to her his title to Esther and her children; and that her deed of the 12th February 1816 was effectual to emancipate them. . . . [226] Moses and Julianna succeeded to the estate of Letty." [Samuels, J.]

*Hooe v. Hooe*, 13 Grattan 245, March 1856. [249] "the testator owned slaves, thirty-one in number and valued at the aggregate sum of ten thousand two hundred and ninety-five dollars,"

*Summers v. Bean*, 13 Grattan 404, August 1856. In 1851 [405] "Mrs. Summers and Mordecai Summers . . . bound themselves to secure to Bean the services of Caroline, a negro girl about twelve years of age, and McKendry, a black boy . . . [406] the services of which two slaves . . . Bean was to have during the life of Mrs. Summers." The slaves were "afterwards taken possession of by Mordecai Summers; . . . Bean filed his

<sup>1</sup> See *Cooper v. Hepburn*, p. 251, *infra*.

bill . . prayed that the defendants might be compelled to execute specifically their covenant, by delivering to him the said two slaves. . . [407] the court held that the plaintiff was entitled to a specific execution of the contract ”

Decree affirmed: [412] “Slaves are not only property but rational beings; and are usually acquired with reference to their moral and intellectual qualities. . . [413] if it appear that the slaves were purchased as merchandise, without reference to their peculiar value to the purchaser, or that the plaintiff is a mere mortgagee or other incumbrancer: in which case, as the slaves are to be sold at all events, damages at law . . would be adequate compensation. . . [418] A purchaser of slaves for his own use . . generally buys such only as will suit him. . . peculiar value . . will . . be presumed. . . it may be laid down as a general rule, that a court of equity has jurisdiction to enforce the specific execution of a contract for the sale or delivery of slaves, though it be neither alleged in the bill nor proved that they have any peculiar value.” [Moncure, J.]

*Roberts v. Kelly*, 2 Patt. and H. 396, January 1857. The plaintiff charged that Kelly, in 1843, caused the slaves [398] “to be taken away from Roberts . . fraudulently and clandestinely in the night time,” The defendant averred that [401] “they left Roberts and came to his residence, in obedience to orders that he had given them, in consequence of rumors that he had heard that Roberts and his sons intended to run them off to Richmond and sell them;”

*Bailey v. Poindexter*, 14 Grattan 132, February 1858. Will of John L. Poindexter, who died in 1835: [133] “He . . charged her [his wife] with hiring out his servant Aaron to whomsoever he might choose to live with, and to pay him at the end of every year all the money arising from his hire.” “The negroes loaned my wife, at her death I wish to have their choice of being emancipated or sold publicly. If they prefer being emancipated, it is my wish that they be hired out until a sufficient sum is raised to defray their expenses to a land where they can enjoy their freedom; . . If they prefer being sold and remaining here in slavery, it is my wish they be sold publicly, . . If any of the servants loaned my wife should be refractory or hard to manage, I wish my executor to dispose of such at public sale,” Codicil added the same day: “I wish it understood that in the event of my negroes loaned to my wife being emancipated at her death, . . [134] that my nephew . . shall pay the sum of one thousand dollars, to be equally divided between them; and that I give him my plantation of Cedar Lane on that condition.” The executor delivered to the widow “twenty slaves, of whom several had died, and, between the death of the testator and that of the widow, thirteen slaves had been born.” In 1855 the lower court held “that the negroes whereof the testator died possessed, were by the terms of the emancipating clause in his will contained, absolutely free at the death of the life tenant, and that it was not proper or necessary to put said slaves to their election. And also that the issue of the females born after his death and in the lifetime of his widow, were also free at the death of the life tenant, said issue being embraced by the general terms of the emancipating clause of said will.” The defendants, the heirs and devisees of Poindexter, appealed.

Judgment reversed: [200] "the provisions of the will respecting the manumission of the slaves, are not such as are authorized by law and are void," [197] "nothing short of the exhibition of a positive enactment, or of legal decisions having equal force, can demonstrate the capacity of a slave to exercise an election in respect to his manumission. . . [198] the master . . cannot impart to his slaves, as such, for any period, the rights of freedmen." [W. Daniel, J.]

Moncure, J. dissented:<sup>1</sup> [201] "A master may emancipate his slaves against their consent. Why may he not make such consent the condition of emancipation? . . [205] It is as competent for a slave emancipated on condition that he elects to be free, to make such election, as it is for a slave absolutely emancipated to propound the deed or will for probate, appeal from the sentence, or sue for his freedom. Such right of election is incident, as such remedies are incident, to the legal capacity of the slave to receive his freedom." [213] "Allen, P. and Lee, J. concurred in the opinion of Daniel, J. Samuel, J. concurred in the opinion of Moncure, J."

*Andrews v. Ivory*, 14 Grattan 229, February 1858. The administrator [230] "paid all the debts . . which was effected without the sale of his slaves. . . from the number of distributees and number of slaves, it was impossible to divide the latter, . . [231] the court made a decree . . commissioner . . was directed to sell the slaves to the highest bidder, . . and after defraying the expenses . . divide the balance "

*Dunlop v. Harrison*, 14 Grattan 251, February 1858. Bill filed by the heirs and next of kin of Nathaniel Harrison, seeking to set aside certain provisions of his will. Harrison died unmarried in 1852. By his will [252] "he gives to Frankey Miles, to Ann Maria Jackson and Laurena Anderson, each, a tract of land by metes and bounds; and . . a tract of land to Edwin Harrison's four youngest children, then in being, and any others that might be born after the date of his will. By the sixth clause of his will he gives to his executors in trust for the support and maintenance of Edwin Harrison's four youngest children, or any other after-born child of his, the sum of one hundred dollars for each child; and if the legislature should pass a law requiring said children to leave the state, he directs his executors to pay each of said children one hundred dollars. By the seventh clause he directs his executors to pay Frankey Miles six hundred dollars a year as an annuity during her life; and by the eighth and ninth clauses he directs his executors to pay to Laurena Anderson and Ann Maria Jackson each the sum of two hundred and fifty dollars a year during their lives: and if they should be required to leave the state, the executors were to pay each of them two hundred and fifty dollars in lieu of said annuity. By the tenth clause he gives to these three women all his household and kitchen furniture, to be equally divided among them. The eleventh clause of the will, which was the great subject of controversy, is in these words: 'Item 11th. It is my will and desire that my executors hold all the residue of my estate, as trustees, for the support and maintenance of Frankey Miles, Laurena Anderson and Ann Maria Jackson, and the children of

<sup>1</sup> See *Williamson v. Coalter*, p. 247, *infra*.



Ann Maria and Laurena, free from all debts and liabilities of the husbands of said Ann Maria and Laurena; and in the event of their being required to leave the state, I desire the said residue of my estate to be equally divided amongst Frankey Miles, Laurena Anderson and Ann Maria Jackson. And should it be necessary in carrying out this clause of my will, to sell my slaves, I desire my executors to sell them privately or publicly, as may seem to them best, selecting them good homes and good masters.' The estate of the testator consisted of about twenty-five hundred acres of land, eighty-four slaves, the usual amount of stock, crops and perishable property found on estates of that size, and about eighteen thousand dollars in money and bonds. He owed about from three to five thousand dollars; and as executor of his brother he was indebted to his testator's estate from eight to ten thousand dollars. Of the devisees and legatees Frankey Miles was a free woman of color, Laurena Anderson and Ann Maria Jackson were her daughters, and the others were her grand children by one of her sons. Laurena Anderson and Ann Maria Jackson were the reputed children of the testator; and the slaves disposed of in the eleventh clause of the will were neither husbands, wives or parents of the said legatees. The cause came on to be heard on the 5th of April 1855, when the court dismissed the bill with costs. Whereupon the plaintiffs applied to this court for an appeal, which was allowed."

Decree affirmed. [259] "although the legatees because of their status could not take the slaves<sup>1</sup> either directly or by means of a trust, there is nothing in the law or its policy to forbid their taking their value in money." [256] "no right of election to take it in any other [form] can be cast upon them. . . [264] It is the duty of the executors . . . to sell the slaves at once . . . [266] the residuary devise in the will was good to pass to the legatees the proceeds of the sale of the slaves after providing . . . for the debts due and the annuities previously given. . . [267] the whole is intended to be given to the legatees." [Lee, J.]

*Southall v. Taylor*, 14 Grattan 269, March 1858. Will of Taylor, 1848, "directed that all his property real and personal, except his slaves, should be sold,"

*Hunter v. Humphreys*, 14 Grattan 287, April 1858. Will of Mary Green Hardy, dated 1829, [288] "emancipated certain slaves by name and the children of one of them, at her death." "I give and bequeath unto my brother Basil Hatton, during his life, all the rest of my slaves; and at his death, those above the age of fifteen years to be immediately free and fully emancipated, and those under the age of fifteen years to be bound out in . . . Maryland, or in the district of Columbia, until they shall arrive at the age of eighteen years, when they and their increase shall be free and fully emancipated." Among the slaves "embraced in the residuary bequest . . . was a woman named Marietta, of whom the petitioner Harriet was born about the year 1836, . . . Hatton died in August 1840, . . . Hunter [Hatton's administrator] took the petitioner into his possession" Her petition for leave to sue for her freedom was filed in 1857.

<sup>1</sup> Code, ch. 103, sect. 4, p. 458.

Judgment for the petitioner, affirmed: [297] "The law of Maryland,<sup>1</sup> and the principle established in Virginia in *Maria v. Surbaugh*,<sup>2</sup> equally recognize the right of the testator to . . . determine the . . . condition of such issue born during the existence of the particular estate . . . [301] the testatrix intended to embrace all living at the termination of the particular estate, the increase as well as the mothers," [Allen, P.]

*Barksdale v. Finney*, 14 Grattan 338, April 1858. In 1837 [339] "John Heath purchased slaves amounting to eleven thousand three hundred and forty-five dollars. These slaves . . . were purchased for the Black Heath company of colliers,"

*Reid v. Blackstone*, 14 Grattan 363, May 1858. "An action at law for freedom." Will of P. J. Reid, dated 1851: [364] "I will and bequeath to my nephew John Reid of Pittsburg all that I die possessed of, land, negroes, . . . N.B. I wish you to take the negroes to Penn'a, where they will be free." Reid died in 1852. Joseph Blackstone and two others brought a suit for freedom against his administrator *de bonis non* with the will annexed.

Judgment for the plaintiffs reversed: [365] "They cannot recover their freedom of the personal representative in an action at law, without proving his assent to their emancipation. . . . If he improperly withhold his assent, . . . they . . . may obtain relief by a suit in equity."

*Williamson v. Coalter*, 14 Grattan 394, May 1858. Will of Mrs. Hannah H. Coalter, dated 1857: "Fourth. I hereby manumit my faithful servant Charles, and direct my executors to provide him with a fund sufficient to take him to such state or country as he may elect to live in, and pay to him an annuity of one hundred dollars during his life. Fifth. I direct in regard to the balance of my negroes, that they shall be manumitted on the 1st day of January 1858. And I authorize and request my said executors to ascertain what fund will be sufficient to provide the usual outfit for, and to remove, said negroes to Liberia. And I hereby direct my executors to raise said fund, or such an amount as in their judgment may be sufficient for that purpose from my said estate, and to use the said fund in removing and settling my said servants in Liberia, or any other free state or country in which they may elect to live, the adults selecting for themselves, and the parents for the infant children; and I further direct that if any of my said servants shall prefer to remain in Virginia, instead of accepting the foregoing provisions, it is my desire that they shall be permitted by my executors to select among my relations their respective owners; said election to be made by the adults and parents as aforesaid."

The slaves [395] "embraced in the fifth clause of the will were ninety-three in number. Some of these negroes were old; and many of them, consisting of families composed of a mother and six, seven or eight infant children, and one an orphan, were chargeable. Mrs. Coalter's estate, exclusive of her slaves, was estimated to be worth from fifteen to twenty

<sup>1</sup> Act of 1809, ch. 171, sect. 2.

<sup>2</sup> P. 138, *supra*.

thousand dollars; and was ample to carry out the provisions of her will in regard to the removal and settlement of her negroes in Liberia or a free state." The lower court held that the negroes "were emancipated by the will, unless they declined to accept its provisions, and chose to remain slaves: And that this condition of freedom was independent altogether of the removal of said negroes from Virginia, said removal being a condition subsequent to said emancipation."

Decree reversed. Allen, P.: [398] "Manumission . . . is the exercise of a power conferred on the owner by the law, with which the slave has nothing to do. . . . The intention of the owner to sever all connection between the slave and himself or his estate, must be apparent on the face of the will. . . . [407] I think that the operation of this will as an instrument of emancipation, as in the case of *Bailey v. Poindexter*,<sup>1</sup> is made to depend on the choice of the slaves, and therefore that the provisions of the will giving such option are void:" [421] "Daniel and Lee, Js. concurred." Moncure, J. dissented: "the negroes in this case are entitled to their freedom, even conceding that the case of *Bailey v. Poindexter* was rightly decided. I must say, however, that for reasons assigned in my dissenting opinion in that case, I still think it was not rightly decided; and I would now be willing to overrule it, if it were like this case. *Stare decisis*, I know, is a rule of the first importance. But the case itself, in my judgment, does so much violence to the rule, that it would be more vindicated by overruling than by adhering to the case." Samuels, J. concurred with Moncure, J.

*Sherman v. Commonwealth*, 14 Grattan 677, May 1858. "Sherman was indicted, tried and convicted . . . for a felony in advising a slave to abscond from his master; and he was sentenced to six years' imprisonment in the penitentiary."

*Craig v. Walthall*, 14 Grattan 518, August 1858. [520] "The slaves were only six in number, and three of them were so old as to be an expense."

*Monteith v. Commonwealth*, 15 Grattan 172, May 1859. "a motion . . . against . . . sheriff . . . for the recovery of a balance of the . . . [173] free negro taxes of 1857,"

*U. S. v. Amy*, 24 Fed. Cas. 792 (4 Quart. Law J. 163), May 1859. [793] "The slave Amy, the property of . . . Hairston, of . . . Virginia, was indicted for stealing a letter from the mail at Union Furnace post-office . . . under section 22 of the act of congress passed March 3, 1825,<sup>2</sup> which provides that, 'if any person shall steal a letter from the mail, the offender shall, upon conviction, be imprisoned not less than two nor more than ten years.' . . . the point being suggested by the defendant's counsel that a slave is not a 'person' amenable to the act, his honor [Halyburton, J.] said the point was one of great novelty and importance, and that, as the chief justice [Taney] was shortly expected, it must be adjourned for argument . . . until his arrival. . . . The slave was convicted upon the evi-

<sup>1</sup> See p. 243, *supra*.

<sup>2</sup> 4 Stat. 108.

dence, and . . on the arrival of the chief justice, the motion for a new trial on the reserved point was argued before the two judges." John Howard, counsel for the owner of Amy, argued [pp. 793-809]: I. that a slave is not a [793] "legal 'person,' and is not within the meaning of the act," citing the case of *Dred Scott v. Sandford*;<sup>1</sup> II. "If, however, they were intended to be so included, then the act was unconstitutional . . as to them. The principles recognized and established by the supreme court of the United States in *Dred Scott v. Sandford* clearly apply to this case." [805] "1. Congress has no constitutional authority to treat a slave as a freeman or civil person; . . 2. The federal government has no constitutional authority to punish slaves at all. . . [806] 3. This act is unconstitutional, if it includes slaves, because it makes no compensation to the owner for property taken for the public use." [795] "John M. Gregory, Dist. Atty., . . resisted the motion for a new trial. . . The constitution of the United States recognizes slaves as persons, . . They are recognized as persons in every state in the Union, . . I cannot prove more plainly that the prisoner is a person, a natural person, at least, than to ask your honors to look at her. There she is."

Motion for a new trial overruled: [809] "It is true that a slave is the property of the master, and his right of property is . . secured by the constitution and laws of the United States; and it is equally true that he is not a citizen, . . Yet, he is a person, and is always . . described as such in the . . public acts of the United States. . . [810] It is true that no compensation is provided for the master for the loss of service during the period of imprisonment. But the clause in the 5th amendment of the constitution which declares that private property shall not be taken for public use without just compensation cannot, upon any fair interpretation, apply to the case of a slave who is punished in his own person for an offence committed by him, although the punishment may incidentally affect the property of another to whom he belongs. . . A person, whether free or slave, is not taken for public use when he is punished for an offense against the law. . . and the loss which the master sustains in his property is incidental, and necessarily arises from its two fold character, since the slave, as a person, may commit offences which society has a right to punish for its own safety, although the punishment may render the property of the master of little or no value. But this hazard is invariably and inseparably associated with this description of property, and it can furnish no reason why a slave, like any other person, should not be punished by the United States for offences against its laws, passed within the scope of its delegated authority." [Taney, C. J.]

*Shue v. Turk*, 15 Grattan 256, August 1859. "In July 1859 John Shue, a man of color, applied . . for a writ of *habeas corpus*, alleging that he was a freeman, and had been levied on as the property of Abraham Hanna, . . [257] Hanna . . stated—That Shue the petitioner, was formerly owned by a gentleman named Dismuth, living in Eastern Virginia, but had been hired out for twenty years in Augusta. That about three years since he had received several letters from Dismuth proposing to sell Shue

<sup>1</sup> 19 Howard 407 *et seq.*



to the witness, and proposing to take three hundred dollars for him, provided witness would agree to allow Shue to pay off the amount of the purchase money by his earnings and hire, and that when so repaid, witness would emancipate him. That witness did purchase him on these terms, at the price of three hundred and fifty dollars, Shue being then worth double the money, and that witness had paid the price. That Dismuth by his agent Hoard gave witness a bill of sale for Shue; and at the same time witness, according to his impression, executed and delivered a contract in writing, wherein was set forth the fact and terms of the contract, viz: that witness had received the bill of sale for Shue, with the understanding and agreement that when Shue's wages and earnings should amount to a sum equal to three hundred and fifty dollars, paid by him to Dismuth, the witness bound himself to emancipate said slave. Where that contract then was, he did not know. Witness regarded himself as the fee simple holder of the legal title of the petitioner, only for the purpose of securing the amount paid by him, and in conscience and morality bound to emancipate him upon being repaid his advances; but did not consider himself as bound to account to the petitioner or his former master. That the object of the arrangement on the part both of himself and Dismuth, was to afford the petitioner an opportunity to refund to witness the amount he advanced; and thus to procure his emancipation. That witness gave public notice of this arrangement soon after it was made, and that all contracts for the services of petitioner were to be made with witness; which was invariably done. That witness's son kept a regular account of the expenses of witness for the maintenance of the petitioner, and of the proceeds of his work; and in the month of March last it appeared from said account the witness had been repaid the amount advanced by him, with the exception of about twenty-one to twenty-five dollars. That with a view and for the purpose of fulfilling his contract with Dismuth, he made a bill of sale for the petitioner to William A. Marshall, then on a visit to his son in law in the county of Rockingham, but a resident of the state of Ohio, and Marshall paid to him the amount still due, and undertook, when that amount was repaid to him, to emancipate the petitioner. The bill of sale from Hanna to Marshall bears date on the 26th of March 1859, and purports to be in consideration of three hundred and fifty dollars. By a deed bearing date the 19th of May 1859, Marshall emancipated Shue, stating the consideration to be motives of benevolence and three hundred and fifty dollars. This deed was admitted to record on the same day in the clerk's office of the County court of Rockingham. And in pursuance of an order of the County court of Rockingham, made on the 20th day of June 1859, the petitioner was on the 22d of the same month registered as a free negro in the clerk's office of that court. . . [259] The execution under which the petitioner Shue was levied on, was issued on a judgment recovered on a note . . . dated the 26th of March 1857, and payable two years after date, on which Hanna was the third accommodation endorser. The levy was made at the instance of Joseph F. Hottle, a subsequent endorser on the same note, who Hanna stated was informed of the arrange-

ment between Dismuth and himself very soon after it was made. The judge dismissed the writ, and remanded Shue to the custody of the sheriff."

Decree reversed: [267] "this contract is not void as being against public policy;" [268] "the emancipation was effectual to exempt the petitioner from all liability for the debt, the execution for which has been levied upon him; and that he ought to have been discharged from custody." [Robertson, J.]

*Fulton v. Gracey*, 15 Grattan 314, September 1859. [315] "This was a suit for freedom, brought under the Code, ch. 106, p. 464, by Gracey and her nine children, against John A. Dice and Thomas Fulton, executors of James Fulton deceased. Verdict and judgment were rendered for the plaintiffs." In 1805 Thomas Richards of Alexandria, D. C., "sold and conveyed to George Bolling and Elizabeth his wife a female negro named Nan for the term of twelve years from the date of the deed, and any children she might have before the expiration of the said term, to serve, each and every of them, till they should arrive at the age of twenty-eight years; and after expiration of the said term of twelve years the said Nan to be discharged from all further service; and each of her said children, upon arriving at the age of twenty-eight years, in like manner to be discharged from all further service. By successive assignments endorsed on the said deed, the interest thereby conveyed was assigned by said Bolling and wife to Thomas Hord, jr. on the 25th of January 1806; by Hord to James Sarkins on the 2d of August 1806; by Sarkins' administrator to Price Skinner on the 23d of February 1808; by Skinner to Christian Hottle on the 23d of October 1808; and by C. Hottle to Henry Hottle on the 9th of March 1813. Neither the deed nor any of the assignments was ever recorded. But the deed and assignments, as they were successively made, appear to have been delivered, with Nan, to the assignees successively. The last assignee, Henry Hottle, by his will, gave Nan to his wife Christena, to stay with her until the time she was bound to him should be expired. The said Christena by affidavit before a justice of the peace, bearing date the 11th of April 1817, made oath that Nan had served out the time for which she was sold to her deceased husband Henry Hottle, and was then free, and, as affiant believed, about the age of twenty-eight years. On the 5th of May 1817 Nan was registered as No. 32 in the office of Rockingham County court; it being stated in the register that she was born free, but bound to serve a certain number of years, which she had duly served, as appeared by her papers filed in the office. And at the succeeding term of said court, the said register was by the court compared with said Nan, and found duly made, and a copy thereof ordered to be furnished her in the manner prescribed by law. . . [317] Gracey was the daughter of Nancy; . . that her [Nancy's] children born before she arrived at twenty-eight years of age, were to be free at twenty-eight years of age; that she had four such children, viz: Gracey, Milly, Jerry and Jeff; that Milly died before attaining twenty-eight years of age, and that Jerry and Jeff were permitted to go free at that age; that these four children were divided by Henry Hottle among his children, Gracey having

been given to Mrs. Fulton, wife of James Fulton, who was a daughter of Henry Hottle;" Elizabeth Long testified that fifteen or sixteen years before the trial, while at the residence of Fulton, [316] "some little negroes, children of Gracey, were playing about the yard. She remarked to Fulton that those little negroes seemed to have a better time of it than the children of many white people; to which he replied, that now that Gracey was free, he had told her she could leave him if she chose, but that if she chose to remain with him, he would take care of her and her children, and treat them as well as he had always done." Snell [317] "proved that about twenty years before the trial he . . . remarked to Fulton that Gracey's children would make him rich; and Fulton replied, that the mischief of it was, Gracey and her children would be free at a certain age, . . . [318] about ten years before the trial, [a witness] heard James Fulton say that his brother in law Christian Hottle has been 'narrating' it about that Gracey was free, but he had been paying taxes on her, and meant to hold her." In the will of James Fulton, dated 1855, "the plaintiffs were disposed of as his slaves:" "Gracey . . . was born about the year 1814; . . . four [of her children] were born before and the other five after Gracey attained the age of twenty-eight years," [325] "the defendants . . . offered to give in evidence to the jury an old book entitled *Select Sermons by Mr. Andrew Gray*, in which book, and on 31st, 32d and 33d pages thereof, the date of the birth of Gracey's children, and also of other children of other negro women of said James Fulton, were written."

Judgment for the plaintiffs affirmed. [326] "There is nothing in the case to show that Nan was ever a slave, except the fact of her color and African descent; and the presumption arising from the fact, seems to be repelled by the other facts proved in the case."

*Poindexter v. Jeffries*, 15 Grattan 363, September 1859. [364] "two slaves, valued at one thousand three hundred and fifty dollars; . . . [367] one of the slaves, a man twenty or twenty-one years of age, hired for one hundred and twenty or one hundred and thirty dollars per annum, and the other, a woman eighteen or nineteen years of age, hired for about fifty dollars; . . . three women slaves, with ten or twelve children, . . . were believed to be then unprofitable by reason of the number of children;"

*Seaburn v. Seaburn*, 15 Grattan 423, November 1859. Will of Nathaniel Seaburn, 1859: "I desire that said church [to be built on the land attached to Mulberry Island church] shall have a comfortable gallery for colored persons, to be for the old side Baptist denomination." There is a similar provision in a bequest of money to build a church in Upper Grafton, York County.

*Evans v. Pearce*, 15 Grattan 513, January 1860. Evans [514] "seems generally to have hired out the slaves. . . he owned twelve or thirteen slaves. . . was a plasterer,"

*Cooper v. Hepburn*, 15 Grattan 551, May 1860. Will of William Hepburn who died in 1817:<sup>1</sup> [552] "On the first day of February one

<sup>1</sup> For further facts, see *Hepburn v. Dundas*, p. 241, *supra*.

thousand eight hundred and sixteen, I sold Esther (whom I bought some years ago of Benjamin Dulany, Esquire) and her three children, Moses, Letty and Julianna Eliza, to Hannah Jackson, and the said Hannah Jackson has since manumitted and set free the said three children, who have been maintained and supported by me since the death of their mother Esther, and are to be supported by me during my life. . . I give unto Moses the son of Esther aforesaid, the houses and lots where I now live . . together with my fishing shore during his natural life, and to his children, if he should have lawful issue; if not then I give the said lots and fishing shore, at his decease, to my grandchildren equally and their heirs forever." In 1827 Moses married Amelia R. Braddock, and had by her four children, [553] "Prudence Crandall Hepburn and three others . . 1848 . . he had qualified as guardian of said children. . . [555] At the November term 1854 . . [556] the grandchildren and heirs of William Hepburn, presented their petition, . . they say that the plaintiff Moses Hepburn is a slave; . . and they ask that the sale [of the houses and lots] may be set aside" In 1856 the petition was rejected.

Decree affirmed: [562] "no question having ever been raised, so far as the record discloses, as to his title to freedom, from 1817 to 1854, a period of nearly forty years."

*Baker v. Wise*, 16 Grattan 139, April 1861. Action to recover [190] "the sum of five hundred dollars, the penalty imposed by the first section of the act passed the 17th of March 1856,<sup>1</sup> entitled 'an act providing additional protection for the slave property of the citizens of this commonwealth.'" The jury found that Baker, "a citizen of Massachusetts, did on the 4th of August, 1856, then being the captain and owner of the schooner *Nymphus C. Hall*, . . leave the waters of Virginia with said schooner, for a port north of and beyond the capes of Virginia, without having first obtained a certificate of inspection as required by the provisions of the statute;" [141] "And they find for the plaintiff the penalty of five hundred dollars, with interest, damages and costs, if the aforesaid act is not in violation of the constitution of the United States, or the constitution and bill of rights of Virginia; . . judgment for the plaintiff; . . writ of error . . awarded." Johnson, of Massachusetts, for the appellant: [151] "the act is further unconstitutional because the proceeds, or a part of them, are to be paid into the State treasury to constitute a fund to be called the fugitive slave fund."

Judgment affirmed, unanimously: [195] "the act was framed with no view to the regulation of commerce, and with no design to interfere with its regulation by Congress; . . it forms a part of a system of police measures adopted . . in the honest effort to suppress and prevent the escape and abduction of our slaves. . . [229] The search is required of a vessel bound north not merely because of its being so bound, but because by reason of such destination the danger of attempted escapes through the instrumentality of the vessel is enhanced. The discrimination proceeds . . upon motives of State necessity," [W. Daniel, J.]

<sup>1</sup> Sess. Acts 1855-6, p. 38.



*Layne v. Norris*, 16 Grattan 236, April 1861. [237] "By his will [1824] Daniel Norris left a woman named Franky to his widow for her life; and directed that she should then be free; . . . the executor . . . placed in the possession of Mrs. Norris, Franky and another slave Judith who had been left to Mrs. Norris until she attained the age of twenty-one years, and the four small children of Franky, for whose support the executor was to pay her. . . . She held the slave Franky . . . until 1833 or 1834, when she sold her life estate in her to . . . Layne, . . . After the purchase and before the death of Mrs. Norris, viz: in 1835, Franky became the mother of the slave Vina; . . . and Layne has held uninterrupted possession of Vina . . . until the institution of this suit [1855]. . . . [238] Mrs. Norris died in . . . 1839;"

Held: the adverse possession by Layne for more than five years bars recovery by the remainderman.

*White v. White*, 16 Grattan 264, April 1861. [266] "claiming her dower in the land and her one-third of the slaves, in kind; and objected to a decree for the sale of either."

*Bayly v. Chubb*, 16 Grattan 284, March 1862. [285] "Congress adjourned on the 7th day of August, 1854; immediately after which, the testator [Bayly] left Washington, with the whole of his white family and some of his servants, and went to the White Sulphur Springs, sending his other servants to Accomack."

*Jones v. Bradshaw*, 16 Grattan 355, February 1863. [357] "in the year 1849, . . . he purchased . . . three negro slaves—an old woman named Lucy and her two sons named John and Reuben, one about fourteen or fifteen years of age and the other about nine, at the price of \$1,000." The commissioner reported "that Lucy was of no value in March, 1857, . . . and that the value of John and Reuben was at that time \$2,100. The hires since 1849 were reported at \$770."

*Harvey v. Skipwith and others*,<sup>1</sup> 16 Grattan 393, May 1863. [399] "Jefferson was one of the dower slaves held by Mrs. Mary Skipwith; . . . [400] her son Thomas . . . about the commencement of the year 1853, . . . on his way to Richmond to hire out the slaves, met with the defendant [Harvey], who proposed to hire the slaves again. This was declined at the time; but they met again in Richmond when the defendant remarked to Skipwith that he seemed to have an objection to hiring him the hands. Skipwith told him he had; the negroes had complained to him of being engaged in blasting the year before. Defendant said it was a mistake, that his overseer did the blasting. Skipwith then said that he had orders from his mother not to hire them for blasting, and that he would not hire them to blast or use powder in any way; that white men became careless in using powder and negroes more so. Defendant then said that his overseer did the blasting and that there would be no danger. The bargain was then closed." The obligors [395] "bound themselves to pay to Mrs. Skipwith on the 1st of next January, \$140 for the hire of the said slave for the year 1853; and moreover covenanted to return said slave to her at the ensuing

<sup>1</sup> Owners of the reversion of the slave Jefferson.

christmas well clothed with the customary clothing and furnished with a hat." Harvey [400] "was a contractor on the Roanoke Valley railroad, and that the [seven] slaves hired from Mrs. Skipwith were hired to be employed on that work. In May 1853, whilst so employed, the slave Jefferson was injured by the unexpected explosion of powder, so that his eyesight was entirely destroyed." Harvey's overseer stated, [401] "Sometimes some of the negroes were sent to bring the keg of powder from its place of safe deposit near, but after they had brought it and put it down they were sent away to their regular work, . . . in digging, excavating, or carrying away the earth on the road near where the drilling the holes and the blasting had to be done, but when the blasting was to be done they were always sent away. . . [402] an explosion took place, greatly to surprise of witness; . . . Jefferson, it seems, had come up behind witness, and was from behind an embankment of excavated earth overlooking witness at the time." Jefferson "was at the time of the injury about twenty-two years old, . . . very likely and of very good character; and that he was worth about \$1000." [399] "verdict for the plaintiffs for \$520— with interest from . . . 1854, . . . judgment on the verdict:"

Affirmed: [405] "if a hired slave is put by the hirer to a dangerous employment in violation of the contract of hiring, and is seriously injured while thus employed, the hirer is liable for the damage, notwithstanding the slave may have been negligent or imprudent or have acted in disobedience of the orders of the hirer in respect to such employment, and notwithstanding such negligence or imprudence or disobedience may have been the proximate cause of the injury." [W. Daniel, J.]

*Harvey v. Skipwith*, 16 Grattan 410, May 1863. "an action on the case<sup>1</sup> . . . brought by Mary Skipwith [who held a life estate in the slave Jefferson] . . . it was averred that the hiring was 'upon the terms . . . that the said slave should not be employed in blasting rocks or using powder whilst in the service of the said defendant, or exposed to hazard to life or serious injury from being thus dangerously employed.' . . . a jury . . . [411] returned a verdict assessing [damages] . . . at \$400; and the court entered up a judgment thereon. . . [412] On the [second new] trial in . . . 1859, . . . [413] There was a verdict in favor of the plaintiff for \$501.60"

Judgment on the verdict affirmed: [416] "I cannot undertake to say that the parties, . . . [417] with a knowledge of the notorious improvidence and carelessness of our negro slaves, did not mean to guard, not only against the employment of the slave in blasting, but also against his being allowed to use or handle powder in any manner." [W. Daniel, J.]

*Elvira, a slave*, 16 Grattan 561, February 1865. "In April 1864, Elvira, a slave, the property of C. Ford, was tried before a court of five justices of the city of Petersburg, for attempting to poison the family of her master; and the court by a majority of the justices present found her guilty, and sentenced her to be sold and transported beyond the Confederate States. The judgment of the court recited that one of the justices com-

<sup>1</sup> For facts, see the preceding case.

posing the court, dissented from the opinion and judgment. . . C. Ford, the master of the prisoner, applied . . for a writ of *habeas corpus* to have her discharged, on the ground, that the judgment of conviction having been rendered by less than the whole number of justices composing the court, was illegal, and in effect an acquittal of the prisoner."

Held: [570] "The offence for which the slave Elvira was tried being punishable with death, and all the parties who sat on her trial not having agreed in her conviction, she was therefore, in effect, acquitted. . . [571] a judgment to discharge her from imprisonment and restore her to the possession of her owner." Moncure, J., reviews the statutes in respect to the trial of slaves for felonies.

*Penn v. Spencer*, 17 Grattan 85, October 1866. [87] "four slaves, one old man and a woman and two children, the annual value of which he put at forty-five dollars."

*Tabb v. Cabell*, 17 Grattan 160, January 1867. Landon Cabell, by his will, 1834, gave to his wife for life [162] "the following slaves, to wit: Burgess, a man; Jordan, a man; Cyrus, a man; Margaret, a woman; Lucinda, a girl; and Charity, a girl. At the sale of said testator's estate, the girl Lucinda was sold, and in her stead . . [Mrs. Cabell] purchased two small negroes, Edward and Matilda, the children of the above named woman Margaret. This was done by consent of parties, to prevent a separation of families."

*Smith v. Smith*, 17 Grattan 268, February 1867. Will of Hugh C. Smith, 1854: [269] "To my servant Addison Webster, when he attains his freedom, the sum of one hundred dollars, recommending him to place it in the savings bank until he can use it profitably. I would recommend him also to seek Liberia as his home."

*Harvey v. Steptoe*, 17 Grattan 289, February 1867. Will of Thomas Steptoe, 1826: [293] "I give and devise to my son . . Winnie and her five children"

*Richmond v. Long*, 17 Grattan 375, April 1867. "in April, 1855, a slave named Ben . . was duly admitted into the hospital of the city [of Richmond], to be cared for and treated for the disease of small-pox or varioloid, . . [376] received there late in the night, being then in a state of delirium, and was placed in a room in the second story of the building, and a male nurse of the hospital was appointed to attend on him. In the morning the door of the room was found locked on the outside, but . . the slave was gone, and the window was raised: . . He was soon afterwards found dead some miles from the hospital; . . by exposure to cold; being insane. By the ordinance of the city the expenses of patients . . were to be paid by them or their masters. The jury . . found a verdict for the plaintiff for \$516.50 damages, . . judgement in his favor," Reversed.

*Clarkson v. Booth*, 17 Grattan 490, April 1867. Will of John Clarkson, 1817: [491] "I give and bequeath to my . . daughter Betsey Taylor and . . her husband, Mealy and her children, . . but is not to remove the said negroes out of this state, and at their death to be equally divided

among the rest of my children." Mrs. Taylor [492] "sold some of them to persons who carried them to North Carolina." In 1859 Edmund, a descendant of Mealy, was valued by a jury at \$1400.

*Scott v. Scott*, 18 Grattan 150, January 1868. Before 1849 [151] "Richard M. Scott, of Bush Hill, Stafford county, Va., by a will . . . devised . . . his St. Marysville estate, . . . twenty-five or more negroes, . . . [and] in August, 1850, [the trustee under the will and Mrs. Eliza D. Scott, the executrix and tenant for life,] . . . executed a lease to Richard M. Scott, jr. 2d" [the reversioner]. In 1852 he wrote to the executrix: [153] "In reply to your interrogatory, as to whether Lizzie is well and living, and what I will take for her, I have only to say that none of my servants are for sale." In 1865 Eliza D. Scott filed her bill charging [152] "that no rent had been paid since the 1st of January, 1861, and . . . asked for a decree . . . for the amount then due, with interest, . . . Virginia Scott [executrix of Richard M. Scott, jr., 2d] . . . alleges that in the years 1861 and 1862 the slaves, which constituted the most remunerative portion of the estate, left her, and on the 1st of January, 1863, they became free under the proclamation of the President of the United States. She insists, therefore, that there should be an apportionment of the rent. . . . [153] the court held . . . that there should be no abatement or apportionment of the annual amount"

Decree affirmed: [160] "The effect of the arrangement . . . was to extinguish the life estate of Mrs. Scott, . . . [163] he took the risk of her title," [Joynes, J.] [181] "It was doubtless not contemplated by either party that property in slaves was in any immediate danger of the complete annihilation which afterwards happened to it; but still that was one of the risks which the vendee encountered." [176] "The parties knew that the slaves were perishable, . . . That some of them might run away, and thus become free, was not at all improbable. They lived on the Potomac river, near the border of the free States, where the facilities of escape were very great and often made available for that purpose." [Moncure, P.]

*Hill v. Bowyer*, 18 Grattan 364, April 1868. [373] "Of the five slaves belonging to the infants, . . . one was sold by the order of the county court . . . for the payment of debts of the wards. . . . One seems to have been sold . . . in 1846; one was sold . . . in 1848; one . . . in . . . 1849, . . . the other woman died, and her child, of about a year old, was sold in . . . 1845,"

*Williamson v. Paxton*, 18 Grattan 475, April 1868. In 1862 [479] "he tendered . . . hire bonds for negroes" [485] "a written contract was made . . . 12th of December, 1862, for the sale . . . of six of the trust slaves . . . for \$6,800, subject to the confirmation of the court. . . . suit . . . brought . . . June, 1863, . . . to have the said sale . . . confirmed, . . . Among the reasons assigned therefor . . . 'In the present distracted condition of the country, negro property is, perhaps, of all other, the most insecure, the means of escape abundant, the temptations strong to abandon masters, and the enemy in our land, wicked, malicious, and bent by all means, good or bad (if possible) on destroying this species of property.



It is specially the interest of persons like your oratrix, owning none other but negro property . . . [486] to sell at least a portion of their negroes and invest in something more stable and permanent.' . . . depositions were taken and filed . . . but nothing further appears to have been done in the suit."

*Rhett v. Mason*, 18 Grattan 541, May 1868. The estate of Mason, of Alexandria, who died in 1838, [543] "consisted of a large real estate, some ninety slaves, . . . The executrix . . . purchased real estate and slaves to the amount of \$21,600. To one of her daughters she advanced, on her marriage, fifteen slaves; to the female plaintiff . . . [544] eight slaves on her marriage . . . 1847; and thirteen of the slaves having escaped to the North, she in 1849 advanced to her two sons a number of them, and they took them to Arkansas."

*Moon v. Stone*, 19 Grattan 130, March 1869. Will of Caleb Stone, probated 1810. "I lend to my daughter [Slave Phoebe] during her natural life,"

*Railroad Co. v. Snead*, 19 Grattan 354, March 1869. [355] "an action . . . to recover for certain work . . . performed by the slaves of the plaintiffs. . . [356] 'Richmond, . . . 1856. \$484. Due . . . Snead and . . . Smith . . . in full, of labor performed' . . . Robinson . . . applied to . . . Snead to hire the hands of the plaintiffs, and agreed to give him \$1.25 a day for each of them; that during . . . November and December, the hands worked under the direction of . . . a section master . . . in January 1855, the hands . . . were turned over to the control . . . of . . . Smith, who made all the contracts for work done by them"

*Corbin v. Mills*, 19 Grattan 438, March 1869. By the will of Nicholas Mills, dated October 17, 1861, [445] "The slaves not specifically bequeathed were directed to be hired out by the executors. The estate was appraised on the 14th of October 1862, the valuation being in Confederate money. . . the slaves were valued at \$12,100;" Mills's son [453] "retained the same overseer who had been there for ten years,"

*Raper v. Sanders*, 21 Grattan 60, June 1871. In 1853 the guardians filed a bill against the executor [61] "to restrain him from selling the slaves of his testator's estate, on the ground that the sale was not necessary for the payment of the debts; and this case continued in court until 1866. . . [64] Sanders was [in 1856] . . . regarded as a wealthy man, . . . He owned forty-odd negroes, mostly young, . . . and his credit remained good until after the war. He then became insolvent."

*Michie v. Jeffries*, 21 Grattan 334, September 1871. In February 1865, he [337] "was preparing to send negroes to Richmond to sell and make up the balance, when he was prevented by the raid of General Sheridan, which cut off Communication with Richmond," Moncure, P.: [347] "When slavery existed, . . . slaves were a common subject for conveyance by deed of trust; and slaves were generally sold for cash. And, except when sold in families, were sold separately, and it was proper to sell only so many of them as were required to satisfy the purposes of the trust."

*Booten v. Scheffer*, 21 Grattan 474, November 1871. In November 1863 [475] "Booten sold to Sheffer . . . one moiety of the Virginia hotel, . . . [477] he had paid in slaves \$34,500," Letter, February 1864: [480] "Maj. Briscoe wants to buy my Sheperdstown negroes, and if I succeed I will be able to take the other half of you at once."

*The Homestead Cases*, 22 Grattan 266, June 1872. [274] "the farmers and planters of the State, who, though they owed debts before the war, had generally ample means to pay them, . . . But the war having swept off their slaves and nearly all their personal property, leaving them little less [sic] than their lands, these lands are insufficient to pay their debts;"

*Jennings v. Jennings*, 22 Grattan 313, June 1872. In 1858 the guardian [317] "received from the administrator . . . \$791.18. Instead of investing this fund for the benefit of his wards, he used the money in the purchase of a slave for himself,"

*Smith v. Penn*, 22 Grattan 402, July 1872. In 1866 Smith "obtained a judgment . . . for \$4,210, with interest . . . on a bond executed for the purchase of slaves on the 5th day of January 1863."

*Fugate v. Honaker*, 22 Grattan 409, July 1872. The will of Henry Honaker, who died in January 1863, [410] "directs his executors to dispose of all his personal property . . . other than the slaves, . . . and his slaves he authorizes to be sold to masters of their own choosing, and at prices below their appraised value, if necessary to carry out his humane purpose"

*Henderlite v. Thurman*, 22 Grattan 466, July 1872. The will of Thurman, of Smyth county, probated 1863, "gave his estate, which consisted of houses and lots . . . and slaves, to his three sons, and the two children of [another son]. . . a decree was made . . . September 1863, appointing a commissioner to sell" The commissioner "sold the property in October 1863, . . . \$5,950 was the proceeds of the real property and \$13,110 of the slaves; that all the property was purchased by the three [sons] plaintiffs; that the purchasers had executed their bonds, which had been so arranged that bonds to the amount of the share of the infant defendants might be transferred to them, and . . . [467] Henderlite was the security. . . April 1864 . . . the court confirmed the report, . . . 1868, Henderlite and Thomas Thurman, in his own right and as administrator . . . applied to the court to be permitted to file a bill to . . . set aside the decrees entered . . . September 1863, and . . . April 1864. . . that by the emancipation proclamation . . . and acts of Congress the slaves . . . had been emancipated, and therefore, the bonds given for the price of them were . . . void. That the Alexandria constitution, adopted in April 1864, abolished slavery, . . . that they were also . . . void by virtue of the act of Congress of July 17th, 1862, to punish treason and rebellion: and they insist that the sales were made for Confederate money, . . . [468] 1869, . . . the court . . . refused to allow the bill to be filed."

Decree affirmed unanimously: [468] "It has never been maintained by any respectable authority, that the Federal government was authorized

under the constitution, in any manner to interfere with the institution of slavery in the several States. . . [472] As a war measure . . the proclamation of President Lincoln could only have the effect of emancipating such slaves as came within the control of the Federal armies. . . [474] as the negroes sold . . were . . occupying a territory exclusively . . within the lines of the Confederate government, . . They were slaves . . at the time of their purchase by the appellant's intestate . . the loss resulting [from their subsequent emancipation] . . must fall on him. . . Another ground taken by appellants is, that contracts for the sale of slaves made since 1st of January 1863, are void on reasons of public policy, . . opposed to the national policy . . [476] At the time of the purchase . . slavery was still an established institution of Virginia, recognized . . both by the Richmond and Wheeling government. Nor was its existence contrary to the public policy of the United States government. It still prevailed in the States claiming to be loyal to that government. . . [477] It would not be extravagant to say, that during the four years' war alone the investments in slaves amounted to millions. . . If slavery was lawful . . it is idle to say that the destruction of the institution can impair . . contracts made during the period of its legal and constitutional existence. . . [478] They were emancipated by force of arms by the conquest and subjugation of the South. . . [481] after the date of President Lincoln's proclamation . . it was well understood in the South, that the success of the Federal arms would be the doom of slavery. . . Parties bought . . in view of this contingency. With many confident in the expectation of ultimate success, this species of property was considered the best investment which could be made. By others who held to the idea, that when the cause was lost all else was lost worth having, slave property was regarded as safe . . as any other in the States south. . . [482] The appellants purchased with full knowledge of all the facts, and they assumed all the risks attending the acquisition of this species of property in the then existing condition of the country." [Staples, J.]

*Talley v. Robinson*, 22 Grattan 888, December 1872. In 1864 Robinson, "a freeman of color, of the county of Amelia," sold a tract of land to Talley, who paid down the price, [889] "but the land was not then conveyed to him; . . Robinson having refused after the war, to make a deed . . Talley . . brought this suit . . [890] Robinson, in his deposition, stated that he had been whipped by R. B. Trent and a good many others (some twenty-five or thirty men), driven from the county, and forbidden to be seen in it; that he would not have contracted to sell the land had he not been forced to do it by the treatment he received . . [891] Talley had made no threats against him, and was not with Trent's party when they whipped him." Talley deposed: "I was opposed to the whole proceedings, which John Robinson very well knew. . . I told him if they drove him off on account of his being a rogue, there would be a plenty more left behind. I was opposed to the whipping of him by Trent and his party. I was solicited to join them and refused. They were not the right sort of men for me."

Held: [896] "There is certainly no ground for the defence of *duress* . . . [897] this is a proper case for the specific execution of the contract." [895] "Undoubtedly a great outrage was perpetrated . . . upon Robinson (whatever his offence may have been), . . . and the perpetrators . . . were liable to a prosecution and condign punishment therefor." [Moncure, P.]

*Virginia v. Levy*, 23 Grattan 21, January 1873. Commodore Uriah P. Levy, who died in New York in 1862, [22] "owned Monticello and . . . Washington farm, . . . the latter of which, with the slaves upon it, he devised [by his will, dated 1858] to [his nephew] Ashel S. Levy."

*Hale v. Clarkson*, 23 Grattan 42, January 1873. Will of John Clarkson, who died in 1817: "I . . . bequeath unto my daughter, Betsy Taylor, and . . . her husband, Mealey and her children, . . . and if . . . Betsey . . . die, having no bodily heir, that she and Major Abram Taylor is to enjoy them during their life; but is not to remove the said negroes out of this State;" [44] "Under executions against Mrs. Taylor [after her husband's death] a number of Mealey's children were sold by John Wade, a sheriff . . . who became, himself, the purchaser. Mrs. Taylor afterwards . . . transferred her right in the negroes that said Wade . . . held under his purchase, to . . . Hale . . . Mrs. Taylor died in 1849, without issue; and . . . Hale . . . brought an action of detinue against Wade, for the negroes; . . . a judgment was recovered, in 1853, for some eighteen or twenty slaves, the descendants of Mealey," In 1854 the descendants of Clarkson brought suit, [45] "and insist that . . . the descendants of the woman Mealey passed to the children and grand-children of the testator."

Christian, J.: [43] "The whole subject matter of the controversy having . . . been extinguished by the result of the late civil war, . . . it is not necessary that this court should pass upon *the merits of the cause*. The question now presented, only involves the costs of the proceedings,"

*Crouch v. Davis*, 23 Grattan 62, January 1873. Hector Davis, who died in 1863, gave by his will, dated 1859, [63] "to his servant woman Ann, her freedom, to be removed out of the State with her four children; and after their removal, the sum of twenty thousand dollars; Ann to have the interest on one-fifth of the amount, and the interest of the balance to be expended in raising the children until they come of age; then the principal to be given them." [82] "Davis (like the executor, his partner,) was a buyer and seller and auctioneer of slaves, and had many dealings in the south and south-west" [64] "The testator left a large estate. . . [65] \$14,550 in slaves, all of whom, but those that he [the executor] had sold, had become free by the results of the war. . . [70] Statement G. is an account of money paid to Ann, the freed woman, for the support of herself and children since the war, \$1,474.50 . . . an agent sent to Arkansas . . . to see after . . . land . . . there being . . . no person on the land but slaves. . . The 6th and 9th exceptions<sup>1</sup> are to the investments made by the executor in Confederate States bonds. . . to the extent of \$20,000, if allowed at all it should be charged as the bequest to Ann and her children." Exceptions overruled.

<sup>1</sup> Filed by counsel for the residuary legatees.



*Moore v. Luckess*, 23 Grattan 160, February 1873. Luckess [162] "lived for fourteen years in the house of . . . Moore, who kept a house of private entertainment . . . charges . . . for extra services rendered to Luckess and his slaves, from 1845 to 1859, . . . with interest to 1859, . . . \$10,818.60" Staples, J.: [170] "A more extraordinary claim was never exhibited in a court of justice. . . 'Services rendered boy John, who was sick of fever from July 15th to Aug. 20th, \$360.'"

*Harrison v. Gibson*, 23 Grattan 212, March 1873. [215] "Gibson, the trustee . . . in . . . 1816 . . . enjoined the removal of the slaves out of the State . . . he charged that . . . Harrison had sold one of the slaves to a person who had removed her out of the State; . . . in 1830 Gibson sold eight of the slaves,<sup>1</sup> one of them an old man purchased by Mrs. Wagoner for forty dollars. The slaves sold for \$1,189  $\frac{60}{100}$ ,"

*Penn v. Reynolds*, 23 Grattan 518, June 1873. "In December, 1862, . . . Penn . . . purchased . . . a slave named Mary, at the price of \$2,168; . . . executed a bond . . . payable twelve months after date, in current money. . . January 1864, . . . a tender of the amount . . . in Confederate money, was . . . refused" In 1868 a jury [522] "valued the slave at \$1,000" [521] "scaling the debt 'as of the date of the contract.'"

*Johns v. Scott*, 23 Grattan 704, September 1873. Will of Joseph Glasgow, 1856: [705] "from and after the decease of my wife and daughter Elizabeth, I hereby emancipate and set free from slavery, all of my slaves, together with all of their future increase, . . . It being my intention, and I so expressly declare it to be my will, that all of my slaves, together with all their future increase, shall be emancipated and forever discharged from slavery, whenever my wife and daughter Elizabeth have ceased to live. And I hereby direct my executrix . . . to set aside and invest the sum of three thousand dollars, . . . and receive and reinvest the interest and dividends thereon annually; so that the same may accumulate in the way of compound interest, until such time as my slaves may be entitled to their freedom under this will; it being my intention by this clause, to provide an accumulating fund to aid in the removal of my slaves from the Commonwealth of Virginia to their future homes, when they acquire a right to freedom under this will. And I hereby direct that the said sum of three thousand dollars, with all its accumulated interest, shall be applied to the purpose of removing my slaves as aforesaid; and that any residue of the fund which may remain, shall be distributed among them as near equally as possible." At Joseph Glasgow's death—[706] "his slaves amounted to thirty-eight in number. They remained in the possession of Mrs. Glasgow until the end of the late war; when they left her. She died in 1868, when Mrs. Johns [her daughter Elizabeth] qualified as her administratrix, . . . In 1869 Jack Scott and nineteen others, some of them the slaves of Joseph Glasgow at the time of his death, and others born after that time, filed their bill," saying "that they served Mrs. Glasgow faithfully until they were discharged from slavery . . . by the operation of the

<sup>1</sup> [221] "to satisfy a decree against the estate of . . . Wagoner."

late civil war, by the amendment to the constitution of the United States, and by the law of Virginia; . . and ask that the defendant [Elizabeth Johns] may be required to pay to themselves and the other former slaves of said Glasgow the legacy of \$3,000, with its accumulated compound interest;” In 1870 the court decreed that Mrs. Johns should pay \$5,716.84 with interest from December 1, 1870, to the general receiver of the court “to be compounded annually until paid,”

Decree reversed: the appellees [716] “not only do not answer the description and character required by the will, but present themselves in a character utterly variant therefrom, and in irreconcilable conflict therewith.” [713] “They do not claim as his freedmen emancipated by his will. . . They claim their right to freedom under another and higher power, and directly against the testator’s will;” [Bouldin, J.]

*Moss v. Moorman*, 24 Grattan 97, November 1873. “a will . . made . . 1852, by which . . he gave to his widow, for her life . . six negroes which she should select, . . The rest of his estate, except his slaves, he directed to be converted into money; . . the negroes remaining after his wife’s selection, he directed to be divided equally among his children;”

*Rives v. Farish*, 24 Grattan 125, November 1873. [126] “December 1863 . . Rives contracted to sell and deliver . . in Albemarle county, on the first of next January, . . thirty-three negroes, . . Peyton agreed to pay . . \$25,000 in bankable Confederate currency; and in addition, to give his note . . for the further sum of \$20,000, . . [128] Rives, in 1865, to get through the federal lines, to ascertain the fate of his son, just at the close of the war, took the amnesty oath . . and that in the same year, he . . obtained a special pardon from President Johnson, . . and took the oath prescribed . . ‘This pardon . . to be void . . if . . Rives shall, hereafter, . . acquire any property whatever in slaves,’” In 1866 Rives made a demand for the payment of the rest of the purchase money. The money was not paid and he brought an action of covenant. The defendant demurred. The court “sustained the demurrer, and rendered a judgment for the defendant.”

Reversed: [130] “those slaves only were emancipated [by the proclamation of January 1st, 1863,] which came within the federal lines of occupation<sup>1</sup> . . The contract was, therefore, valid. . . [The] [132] condition in the pardon clearly was not intended to exact from the applicant an admission that his slaves had become free in any particular way, . . but that the sole object was to preclude any question in the future as to the right of these slaves to freedom; . . [135] The whole extent of the plaintiff’s oath is, to support the proclamation, as interpreted by the courts.” [Staples, J.]

*Puryear v. Cabell*, 24 Grattan 260, January 1874. In 1858 “the lots of the slaves were valued at from \$3,750 to \$3,900; . . [Mrs. Wilson] retained in her possession the . . slaves allotted to Mrs. Cabell, until January 1865, when . . she delivered . . the . . slaves . . to . . guardian of Mrs. Cabell’s children. . . [263] The slaves . . were valued [by a

<sup>1</sup> *Henderlite v. Thurman*, p. 258, *supra*.

commissioner in 1868] in Confederate money as at the time they were received, at \$18,000, which was reduced to current funds . . . making \$327.27 . . . [264] the court held that in January 1865 by the constitution and laws of the State the slaves were free, or if not . . . of no value . . . but rather an expense."

Decree reversed: [269] "the negroes delivered to the guardian of the appellees, the children of Martha C. Cabell, dec'd, in January 1865, were slaves at the time . . . recognized as such by the Constitution and laws then in operation, and so treated . . . by the said guardian until the close of hostilities. The Circuit court, therefore, erred in holding they were not the subject of advancement. And although the said appellees were not liable for the market price of said slaves, estimated in Confederate currency reduced to gold, . . . [270] they are chargeable for the fair value of said slaves, or for their services during the period they were under the control of said guardian."

*Allen v. Paul*, 24 Grattan 332, February 1874. [335] "there being a large number of coloured members of that church,<sup>1</sup> by a resolution of the conference, in February 1844, the house on Union street was appropriated to the use of the coloured congregation; and they worshipped there from 1842 to 1865, and were represented at the quarterly conference held at Washington street church by the stationed preacher sent to said congregation by the Virginia Conference of the Methodist church, and the trustees who held the property. . . in 1865 all the coloured members worshipping at Union-Street church connected themselves with the African Methodist Episcopal Zion church; . . . And since that time they have received their preachers from the conference of said Zion church."

*Burwell v. Lumsden*, 24 Grattan 443, March 1874. [448] "The property settled on her [in 1844] . . . consisted of three slaves: one of them, an old man, with a fractured skull, proved to be an incumbrance; a small girl of very little value; and a woman not estimated by any one as worth more than four or five hundred dollars. . . [450] the distributive interest of Mrs. Burwell in her father's estate . . . consisted of two very infirm slaves, proved to be worth about five hundred dollars."

*In re Caldwell*, 4 Fed. Cas. 1035 (2 Hughes C. C. 291), April 1874. In 1861 "suits were begun . . . to partition her dower estate, which consisted of . . . land and negroes. . . decree for sale . . . was pronounced April 10th, 1861. War interfering, prevented the sale and emancipated the negroes."

*Shannon v. McMullin*, 25 Grattan 211, June 1874. Endorsements on execution, dated June 1860: [214] "Levied [August 1860] on . . . one negro man George, Fred, Campbell, Stephen and David; one woman Ellen and Polly; one boy James, Hiram and King; one girl Mary, Deemy and Ann;" [215] "This execution held up and property not sold,"

*Persinger v. Simmons*, 25 Grattan 238, July 1874. [239] "By a decree . . . 1845, it was ordered that . . . the slaves, after assigning to the widow her third thereof, be divided among the heirs "

<sup>1</sup> [334] "Methodist Episcopal church in the Town of Petersburg,"

*Cocke v. Minor*, 25 Grattan 246, July 1874. [250] "He had . . . lost over \$3000 of the trust fund by the emancipation of slaves,"

*Kenny v. Kenny*, 25 Grattan 293, July 1874. [294] "By his will [admitted to probate in 1851] . . . he provides that his wife shall have his slaves for life; 'and at my death are to be valued, and Robert Kenny and William Kenny to hold them, and pay their brother . . . and their three sisters, an equal part with themselves, . . . My object for doing this is to keep them all together, where they will be well treated.' The slaves were four, and the widow . . . held them till her death in . . . 1860, when they went into the possession of Robert and William Kenny, who divided them between them, and they remained in their possession until two of them died, and the other two were freed by the results of the war. . . . Robert and William Kenny refused to let them be valued," In 1861 a suit in equity was instituted against them. [295] "The court made a decree appointing commissioners to value the slaves, . . . Robert and William Kenny took an appeal, and in . . . 1867 the decree was reversed. . . . They deny that they ever took . . . possession of the said slaves in their own right, . . . [296] it was finally agreed by the parties, that the four should be valued each at \$1,250. . . . the court held [in 1870] that Robert and William Kenny . . . made their election to take . . . the said slaves, and that they were concluded by such election. And decreed . . . in favor of the other parties, each for one-sixth of the agreed value of the slaves." Affirmed.

*Lee v. Chase*, 15 Fed. Cas. 147 (1 Hughes C. C. 402), July 1874. Will of George Washington Parke Custis, executed 1855, and admitted to probate 1857: [148] "upon the legacies to my four granddaughters being paid, and my estates that are required to pay the legacies being clear of debt, then I give freedom to my slaves; the said slaves to be emancipated by my executors in such manner as . . . may seem most expedient . . . the said emancipation to be accomplished in not exceeding five years from the time of my decease."

*Crosby v. Buchanan*, 23 Wallace 420, October 1874. [435] "the actual consideration for the deed [executed in 1811] was \$6000, payable in ten equal instalments, for each of which a note was given. . . . All of them were payable in negroes,"

*McChesney v. Brown*, 25 Grattan 393, November 1874. [395] "In April 1863, . . . Brown and . . . Lara, purchased . . . a large tract of land in . . . Georgia . . . and sixty negroes, . . . the negroes [estimated] at \$60,000; . . . [396] on the 3d of March 1865, they paid . . . [the second] bond [due October 15, 1865] off in full; and . . . received a receipt for \$60,000, in full for the sixty negroes,"

*Burnett v. Hawpe*, 25 Grattan 481, November 1874. Henry Hawpe, who died in 1859 [483] "directs [in his will] that his executors shall sell his servants, letting them choose their masters or mistresses, . . . [484] At the time of the death of . . . Hawpe, Mr. and Mrs. Steele [his daughter] had in their possession a negro girl belonging to Hawpe; and . . . the executor, insisted that the girl should be given up to him to be



sold, or that Steele should buy her." [490] "they were anxious to retain the slave [a family servant], and it was finally agreed that Steele should purchase her." [484] "he executed to the executor for the price of the girl two bonds, one for \$230, and the other for \$166.75 "

*Moses v. Hart*, 25 Grattan 795, February 1875. "Michael Hart, a citizen of New York, died in September 1861, . . left a large estate, . . that in this state consisting of . . slaves, . . [798] Henry Hart, . . a son . . came to Richmond soon after the commencement of the late war, . . when McClellan was near Richmond, . . Henry Hart fearing that Richmond would be taken, . . left the city and went to North Carolina, taking with him most of the slaves belonging to the estate,"

*Wood v. Sampson*, 25 Grattan 845, February 1875. [846] "at his death [in 1864], he owned . . upwards of sixty slaves,"

*Booker v. Kirkpatrick*, 26 Grattan 145, April 1875. [146] "an action of debt brought by . . Kirkpatrick [of Missouri] . . against . . Booker [of Virginia] and . . Halsey [of Missouri], partners, to recover the balance due on three notes . . note for \$145, was given for the hire of a negro slave . . and . . note for \$730, was given for the hire of six negro slaves . . and . . note of \$435, was given for the hire of three negro slaves . . [147] property of the plaintiff; that the said hiring was from the 15th day of March 1861 . . for the balance of the year 1861; and that the said slaves were so hired to be employed in . . manufacturing tobacco at . . Brunswick, . . Missouri, and were there so employed for the balance of the year."

Held: [150] "the dissolution of this partnership [by the breaking out of the war] did not relieve either of the partners from their antecedent obligations, . . another point . . These persons, who by the federal and state laws *were slaves*, had none of the rights . . [151] of citizens, and owed no allegiance to the government either of the United States or the state of Missouri. If allegiance could be predicted of . . *slaves*, that allegiance was due *to their masters*," [Christian, J.]

*Mason v. Jones*, 26 Grattan 271, May 1875. [274] "The widow took possession of the . . slaves, . . hired an overseer, hired out one or more of the negroes, . . 1855. . . [275] 1856, . . the executor . . offered all the slaves . . for sale; at which sale she purchased all the slaves but two, . . [276] As a result of the war the slave property, which probably chiefly constituted the estate, perished,"

## WEST VIRGINIA.

### INTRODUCTION.

“ In many counties [of Virginia], the local authorities and majorities of the people adhered to the national government; and representatives from these counties soon after [the secession of Virginia] assembled in convention at Wheeling, and organized a government for the state. This government was recognized as the lawful government of Virginia by the executive and legislative departments of the national government; . . . It was the legislature of the reorganized state which gave the consent of Virginia to the formation of the state of West Virginia. . . . the government which consented to the formation of the state of West Virginia, remained in all national relations the government of Virginia, although that event reduced to very narrow limits the territory acknowledging its jurisdiction, and not controlled by insurgent force.” Chief Justice Chase, in *Ex parte Caesar Griffin*, 8 Amer. Law Reg. N. S. 358 (360).

Under the constitution of 1862 the highest court of West Virginia (from which all of our cases come) was the Supreme Court of Appeals (three judges), having original jurisdiction in cases of *habeas corpus*, mandamus, and prohibition, appellate jurisdiction in other cases of any importance. The constitution of 1872 made the number of judges four.

#### WEST VIRGINIA CASES.

*Mathews v. Wade*, 2 W. Va. 464, January 1868. Sidney, the slave of Mathews, died leaving "her child, the said Anne Sidney, . . . about two months old. . . . Polly Wade was also then a slave belonging to . . . Mathews, and was the mother of the said Sidney . . . [466] That the mother of the infant Anne Sidney on her deathbed requested the said Mathews and wife to take charge of the child, and gave them a ring for her with the request to put it on her finger when she became old enough to wear it." Mathews "and his wife have always treated the infant with the utmost kindness . . . that the said infant has slept in their chamber all the time, and been treated by them always as if she were their own child, . . . Polly Wade is also of as good moral character as any colored person in Lewisburg; that she is an industrious, hard-working woman, a member of good standing in the Methodist Episcopal church . . . and that her husband is also a man of good moral character, and owns a wagon and two horses and some other property. . . . [They] are competent to the support and education of the infant, although in the opinion of several witnesses not as capable of providing for her physical wants or moral or intellectual education as the defendant and his wife. . . . order made by the recorder of Greenbrier county on the 12th day of November, 1866: 'The recorder doth assign Thomas Mathews guardian to Anne Sidney Jackson, mulatto child about five years of age,' " In 1867 Polly Wade, the grandmother, was awarded a writ of *habeas corpus*, and the court ordered that she have the custody of the infant Anne.

Order reversed.

*Sanaker v. Cushwa*, 3 W. Va. 29, July 1868. [31] "Sanaker . . . had sold the slave, Sam, . . . for the sum of 1,000 dollars . . . in October, 1860. . . . His daughter was opposed to the sale of the slave; was anti-slavery in her sentiments, . . . witness sold the slave because he himself had raised him. He was a very bad boy, and had made an attempt upon his life with an axe. . . . John B. Sanaker left at his death three slaves—a negro man who died shortly afterwards, the negro boy, Sam, . . . and a girl. This girl was injured by a fall from a cart. . . . by careful nursing and attention, she recovered in a great measure from the accident, and would have brought 800 dollars in the market, in 1861 or 1862. She is now living and is a useful and valuable woman. She lived with witness until after President Lincoln's proclamation of emancipation." [30] "Dr. . . . Burkhardt . . . testified . . . She seemed to have some disease of the spine, and was deformed . . . She might be worth from 150 to 300 or 500 dollars, or she might not be worth anything."

*Matthews v. Dunbar*, 3 W. Va. 138, January 1869. "This cause arose in Kanawha county." "Prior to 1861, Dunbar sold to Wilson certain slaves, who gave his bond for a balance of the price, . . . In 1865, Dunbar

recovered judgment . . on the bond and . . [139] filed his bill in 1866 to subject the lands of the debtors to the judgment lien. . . [140] the material fact in the original answer . . that slaves were the consideration of the debt, and had subsequently become free, . . was not denied "

Held: " The results of the war and the action of the government which liberated the slaves without the default of the complainant Dunbar could only affect the owner of the slaves at the time the fact of emancipation happened, and not the former owner, who had long before lawfully parted with all his property in them. . . [141] It is nowhere shown whether the emancipation of the slaves in question was the result of any of the acts of Congress or proclamations of the President against disloyalty, or the constitutional amendment, or of the act of the State legislature abolishing slavery; but one thing is certain that whereas once they were slaves now they are free. And as it has been the boast of the mother country that there were no slaves in England, so it was but recently the boast of the American minister at the court of St. James as the crowning glory of the country he had the honor to represent, that all were freemen in the land of Washington and Lincoln. If the emancipation was effected by the acts of Congress or the President's proclamations as a forfeiture for the owner's disloyalty, he should not shift the penalty of his own error from his own shoulders upon that of the vendor. Or, if it was the result of the acts of the State legislature, he should look to the State, whose constitution authorizes no act of legislation which impairs the obligation of contracts nor the taking of private property for public use without just compensation. . . the purchaser, and not the vendor, took upon himself the hazard of the future action of the government in respect to the slaves in whose services property existed only by virtue of its authority." [Brown, P.]

*Graham v. Graham*, 4 W. Va. 320, January 1870. " James Graham made his will in 1812, . . ' I give unto my daughter Rebeckah and her children . . my negro girl named Dinah, the land and the negro never to be disposed of out of the family, nor the increase of the negro, if any she has.' . . [Rebeckah sold] [321] two slaves, the increase of Dinah,"

*Parker v. Clarkson*, 4 W. Va. 407, January 1870. [409] " 1857, Clarkson conveyed . . the farm of 120 acres lying near Charleston, . . also certain slaves, . . to secure the payment of . . bills . . [410] the slaves mentioned . . were carried by . . Clarkson out of the State of Virginia, with the consent . . of . . the trustee,"

*Boner v. Boner*, 6 W. Va. 377, June 1873. [378] " In April 1860, the Plaintiffs filed their bill . . for the partition of slaves of which they were the joint owners; the Court finding from the report of a commissioner that partition of the slaves in kind could not be made among the claimants, directed a sale, . . a commissioner . . sold the slaves, eleven in number, on the 7th day of January 1861, to different purchasers,"



## KENTUCKY.

### INTRODUCTION.

The first constitution of the state of Kentucky (1792) provided "that all laws then in force, in the State of Virginia, not inconsistent with the Constitution, and of a general nature, and not local to the eastern part of Virginia, should be in force here, until altered or repealed by the Legislature." Accordingly, many of the Virginia laws respecting slaves were in force in Kentucky also, and among them the Virginia acts of 1705<sup>1</sup> and 1727,<sup>2</sup> declaring slaves to be real estate, and explaining the variations necessitated by the difference between the physical properties of human beings and of land. In 1748 the general assembly of Virginia "thought best to reduce them [the slaves] to their natural condition, so that they might not at the same time be real estate in some respects, personal in others, and both in others;" for the "last act being in the first part explanatory, was productive of many suits; . . . destroyed old titles, and created new, and was attended with such doubts, variety of opinions, and confusion, that new points are even yet started, and undetermined."<sup>3</sup> The acts of 1705 and 1727 were repealed, and it was enacted "that for the future, all slaves whatsoever shall be held, deemed, and taken, to be chattels personal."<sup>4</sup> But George II. and his advisers thought otherwise, and this act of 1748 "was repealed by the king's proclamation of the 31st of October, 1751."<sup>5</sup> Though Virginia might have had her will after the Revolution, she left the matter *in statu quo*; and Kentucky, to avoid any possible ambiguity arising from the proceedings of 1748 and 1751, passed a law in 1798<sup>6</sup> in almost the identical words of the Virginia act of 1705, but altered as to the manner of descent by the Virginia act of 1785.<sup>7</sup>

The Kentucky reports contain many cases which prove the wisdom of the Virginia assembly of 1748, by showing the complications involved in the attempt to adjust the law of real property to persons. This is especially evident in the matter of dower slaves.<sup>8</sup>

<sup>1</sup> Ch. xxiii., sect. 2. "That . . . all negro, mulatto, and Indian slaves, . . . within this dominion, shall be held . . . to be real estate (and not chattels;)" 3 Hening 333.

<sup>2</sup> Ch. xi. "An Act to explain and amend the Act, For declaring the Negro, Mulatto and Indian Slaves, within this Dominion, to be Real Estate;" 4 Hen. 222.

<sup>3</sup> "The humble address and representation of the council, and burgesses," Apr. 15, 1752. 5 Hen. 432 n. (441 n.)

<sup>4</sup> *Ibid.*, 439.

<sup>5</sup> *Ibid.*, 432 n.

<sup>6</sup> Act of Feb. 8, 1798. 2 Litt. L. 113 (120); 1 St. L. (Ky.) 566.

<sup>7</sup> Ch. lx., 12 Hen. 138; 1 St. L. (Ky.) 560. Slaves were made personal estate in Kentucky in 1852. Rev. St. 627.

<sup>8</sup> *Gale v. Miller*, p. 307, *infra*; *Hawkins v. Craig*, p. 310; *Hykes v. White*, p. 321; *Tibbs v. Tibbs*, p. 376.

The Virginia act of 1705<sup>9</sup> "That the widow of any person dying intestate, shall be endowed of one full and equal third part of all her deceased husband's lands, tenements, and other real estate, in manner as is . . . prescribed by the laws . . . of England," was in force in Kentucky; and Kentucky, in 1797,<sup>10</sup> passed a replica of the Virginia act of 1785, which provides that "When any person shall die intestate . . . after . . . debts . . . paid, if there be no child, one moiety, or if there be a child . . . one-third of the surplus shall go to the wife, but she shall have no more than the use for her life of such slaves as shall be in her share,"<sup>11</sup> and that a widow, who declares that she will not accept the provision made for her by her husband's will and renounces all benefit which she might claim by his will, "shall be entitled to one-third part of the slaves whereof her husband died possessed,"<sup>12</sup> which she shall hold during her life, and at her death they and their increase shall go to such person . . . to whom they would have passed . . . if such declaration had not been made."<sup>13</sup>

In those pioneer days, when life was often cut short by Indians or by absence of proper medical care, widows were numerous, but they seem not to have remained long in that condition. The frequent remarriages made the dower question a problem, not only mathematically, but tortiously. B who married A's widow was prone, if Mrs. A had received slaves as dower from A, to transport them to another state, in order to defeat the rights of the reversioners, A's legal representatives. Accordingly the act of Virginia of 1785,<sup>14</sup> and that of Kentucky of 1797,<sup>15</sup> contained provisions depriving such an offender of "all the estate which such husband holdeth in right of his wife's dower for and during the life of the said husband." This was hard on Mrs. A if she was no party to her then husband's tortious act.

Of the complications that might arise in the case of dower slaves, one variety may be seen, set forth in the ensuing pages of text, in the case of the slave Peter (1861),<sup>16</sup> another in that of the dower slaves Austin and Henry.<sup>17</sup> That of *Tom Davis v. Tingle*<sup>18</sup> presents additional complications, some of them from the purchase of the dower slave Harriet and her son by a free negro, husband of the one and father of the other,<sup>19</sup> some

<sup>9</sup> Ch. xxxiii., sect. 8. 3 Hen. 374.

<sup>10</sup> 1 Litt. L. 611 (618); 1 St. L. 660.

<sup>11</sup> Act of October 1785, ch. lxi., sect. 25. 12 Hen. 146.

<sup>12</sup> On the other hand, "the absolute right, property, and interest of such slave or slaves" as had been "conveyed or bequeathed, or have or shall descend to any feme covert" vested in her husband (2 St. L. Ky. 1477), she having no power to make a will (*ibid.*, 1538), "and where any feme sole is . . . possessed of any slave or slaves, . . . the same shall . . . be absolutely vested in the husband of such feme, when she shall marry." *Ibid.*, 1477.

<sup>13</sup> Act of October 1785, ch. lxi., sect. 21. 12 Hen. 145.

<sup>14</sup> *Ibid.*, sect. 23.

<sup>15</sup> 2 St. L. 1545.

<sup>16</sup> *Williams v. McClanahan*, p. 442, *infra*.

<sup>17</sup> *Evans v. Gregory*, p. 414, *infra*.

<sup>18</sup> P. 385, *infra*.

<sup>19</sup> The cases of free negroes buying relatives are numerous. *Ferguson v. Sarah*, p. 315, *infra*; *Craig v. McMullin*, p. 348; *Jones v. Bennet*, p. 349; *Saunders v. Kastebine*, p. 371; *Darcus v. Crump*, p. 374; *Kyler v. Dunlap*, p. 430; *Finnell v. Meaux*, p. 460.

from the doctrine of the court that the emancipation of a slave by any majority-in-interest of the joint owners would of itself make him a free man,<sup>20</sup> some from his period of residence in Ohio. "The residence of a slave, with the consent of his owner, in any of the States formed out of what was known as the North Western Territory, results in his freedom, by virtue of the ordinance of 1787. . . And this effect is given to such residence, not only by the Courts of this State, but by those of Virginia, Louisiana, Mississippi, and other slave States."<sup>21</sup> "There is no confliction between these views," declares Judge Simpson, who delivered the opinion of the court, "and the doctrine and principles asserted in the case of *Graham v. Strader* [decided four years previously]."<sup>22</sup> . . . There the reasoning all applies to a case where a slave is taken, for a mere temporary purpose, to a State where slavery is prohibited, with an intention not of residence, but to bring him back again as a slave to this State."

The distinction between the status of "resident blacks" and that of "transient slaves" in the Northwest Territory and in the states carved out therefrom is forcibly expounded by Judge Mills in the leading case of *Rankin v. Lydia*, a pauper,<sup>23</sup> which was decided by the court of appeals of Kentucky in 1820. It is still further defined in the case of *Graham v. Strader* (1844), just mentioned, the three slaves who were the subject of controversy having been "transient slaves" in Ohio, who had returned to their master in Kentucky, but later escaped across the Ohio River to Cincinnati and thence to Canada.

It will be observed that Judge T. A. Marshall, in delivering the opinion of the court, says: "What effect should be given here to the sentence of a foreign tribunal which, disregarding our laws upon this subject, should, on the ground that slavery is inconsistent with its own laws, wrest the slave from his master while on a temporary visit in another State,<sup>24</sup> and whether if the slave should afterwards return as a free man, he would, by our laws, be held subject to his former condition,

<sup>20</sup> The words "would of itself make him a free man" are a direct quotation from *Oatfield v. Waring*, 14 John. (N. Y.) 188 (192), decided in 1817, and cited by Judge Simpson. He seems to have included them in his opinion inadvertently, for his succeeding words, "Still, . . . the plaintiff, notwithstanding his partial manumission, continues a slave," are a contradiction, and show that he did not accept all the conclusions reached in the New York case. The opinion of the court in *Oatfield v. Waring* is that "the manumission of the plaintiff, by two of three joint owners, would, of itself, make him a free man. No person can be partly a slave and partly free, or a slave for one-third of the time and free for two-thirds; he must be one or the other entirely. The manumission by the two may be considered a destruction of the tenancy in common, and a conversion of the slave; as it regards the proprietor of one-third." Followed in *Nunnally v. White*, p. 443, *infra*, the court holding that the will of White (who owned three fifths of the negroes in question), "declaring said negroes free, destroyed the tenancy in common between him" and the owners of the other two fifths, "and was a conversion, which deprived his former co-tenants of any right to the negroes, and turned their claim thereto into a money demand against . . . White's estate." In *Berry v. Hamilton*, p. 455, *infra*, the court held that Miss Hamilton who "owned but an undivided interest of one fourth in the slaves, . . . could not convert the slaves by any disposition of her one fourth [one hundred or more negroes] into a state of freedom. The greater interest must be held as controlling, . . . and as all cannot go free, none can."

<sup>21</sup> 8 B. Mon. 545.

<sup>22</sup> 5 B. Mon. 173; p. 365, *infra*.

<sup>23</sup> P. 294, *infra*.

<sup>24</sup> As was done in the *Somerset* case, p. 14, *supra*.

need not be considered." There are, however, instances where the sentence of the foreign tribunal was disregarded when it adjudged a fugitive slave free. See, *e. g.*, *Davis v. Sandford*.<sup>25</sup> A female slave had fled to Ohio, was declared free there "by a judgment of a competent court," was seized by her owner "with others" and "brought . . . from the state of Ohio to this state, by force;" her owner maintaining that she was a slave and his property, "that she was a fugitive from this state;" and insisting "that the judgment . . . was not binding upon him or those under whom he claims, as they were not parties thereto." Davis, to whom he afterwards sold her, sought to evade payment because of the Ohio judgment for her freedom, though he "was fully apprised of the said judgment, and of the negro's claim to freedom under it, and . . . purchased expressly upon the terms that he would run the risk of that claim," and had, "since his purchase . . . sold the negro for more than he gave," but the court dismissed his bill. The "judgment or award on the writ of *habeas corpus* in Pennsylvania" discharging Maria from the custody of her mistress, Mrs. Kirby, was disregarded in the case of *Maria v. Kirby*, decided by the court of appeals of Kentucky in 1851, inasmuch as Maria and her mistress were merely sojourning for a short time in Pennsylvania.<sup>26</sup> But when the sojourn exceeded six months, as in the case of the slave Clarissa,<sup>27</sup> the Pennsylvania statute alone, which expressly conferred freedom on slaves who were "retained in this state longer than six months,"<sup>28</sup> was enforced by the Court of Appeals of Kentucky, though no proceedings to free Clarissa had been brought in a Pennsylvania court.

In another passage in his judgment in *Graham v. Strader*, Judge Marshall says: "Some stress seems to be laid on the fact that Henry and Reuben performed services while in Ohio and Indiana, for which wages were paid, and that they went there for that purpose, with the consent of their owner. . . . we do not see how it can affect the question. Williams was, at the time, their master. . . . And it is to be presumed that wages were paid . . . But this we deem immaterial. They were still sojourners for a transient purpose, not inhabitants or residents, and voluntarily returned with Williams." That wages were paid, was, however, material in the case of *Julia v. McKinney*,<sup>29</sup> for Julia had been hired two days in Illinois by her mistress in passing through the state, thus violating the Illinois Constitution of 1818, Art. VI., Sect. 2: "No person bound to labor in any other state, shall be held to labor in this state, except within the tract reserved for the salt works near Shawneetown; nor even at that place for a longer period than one year at any one time; nor shall it be allowed there after the year one thousand eight hundred and twenty-five; any violation of this article shall effect the emancipation of such person

<sup>25</sup> P. 289, *infra*.

<sup>26</sup> P. 402, *infra*.

<sup>27</sup> *Ferry v. Street*, p. 411, *infra*.

<sup>28</sup> Pennsylvania act of 1780, sect. 10.

<sup>29</sup> 3 Mo. 270 (1833).



from his obligation to service." The Supreme Court of Missouri held that she was entitled to her freedom. The constitutions of Ohio and of Indiana contained no such provisions.

Other significant cases in the same category were those of *Collins v. America*<sup>30</sup> and *Ferry v. Street*.<sup>31</sup>

Though the question of the status of slaves who had returned to Kentucky after a sojourn in Ohio was involved secondarily in the case of *Graham v. Strader*, the subject primarily before the court was that of their unlawful transportation across the Ohio River. The rights of Kentucky over the bed of the river and over the water flowing above it, are the peculiar rights which she derived from Virginia, which ceded to the United States in 1784 her territory northwest of the Ohio River only, including neither the river nor even half<sup>32</sup> the river; so that whatever some school geographies may say, Kentucky is not bounded on the north by the Ohio River, but only by the states of Illinois, Indiana, and Ohio. The Ohio River itself, to low-water mark on the northern shore, is a part of the state of Kentucky,<sup>33</sup> from its mouth up to the big Sandy river.<sup>34</sup>

In 1824 the general assembly of Kentucky passed an act,<sup>35</sup> providing That any master . . of a steam-boat or other vessel, who shall hereafter hire, or employ, or take as passenger, or otherwise, out of the limits of this state, or shall suffer to be hired [etc.] . . on board of such . . vessel . . or otherwise take out of the limits of this state any person . . of colour; unless such coloured person . . shall have . . the record of some court . . proving his . . right to freedom; or unless such master shall have the permission of the master of such person . . of colour for such removal, every such master . . of a . . vessel, shall be liable to indictment, fine and imprisonment, . . and . . in damages to the party aggrieved . . and the steam-boat or other vessel . . shall be liable to the party aggrieved . . and may be proceeded against . . and condemned and sold to pay . . such damage and the costs of suit.

"Edwards,<sup>36</sup> under the provisions of this statute, filed his bill in chancery against Vail, and the steamship *Virginia*, charging that [his] . . negro . . was taken on board said boat, at Louisville, and transported out of the limits of the state of Kentucky." It was proved, however, that

<sup>30</sup> P. 391, *infra*.

<sup>31</sup> P. 411, *infra*.

<sup>32</sup> "All grants of land bounded by fresh-water rivers, where the expressions designating the water-line are general, confer the proprietorship of the grantee to the middle thread of the stream." *Jones v. Soulard*, 24 Howard 65.

<sup>33</sup> See Chief Justice Marshall's opinion in *Handley's Lessee v. Anthony*, 5 Wheaton 374 (1820); and *Commonwealth v. Garner*, 3 Grattan 655 (1846), in which one hundred and thirty pages are devoted to discussing to what limit on the Ohio side Virginia's jurisdiction extended.

<sup>34</sup> The Revised Statutes of 1852 declare the boundary of Kentucky, on the west and north, to be from the middle of the Mississippi River, where it intersects the parallel of latitude, 36 degrees 30 minutes, below New Madrid, Missouri, "up said river to the mouth of the Ohio river; thence crossing the Ohio river to the north-west bank, at low water mark; thence up the north-western bank of said river at low water mark, to a point opposite the mouth of the Big Sandy river;" p. 159.

<sup>35</sup> Act of Jan. 7, 1824. 1 St. L. 259.

<sup>36</sup> *Edwards v. Vail*, p. 315, *infra*.

the negro "came on board from Jeffersonville, Indiana, . . and left the boat on its arrival at Cincinnati, or shortly afterward." The counsel for Edwards "contended that as our territory extends to low-water mark on the north bank of the Ohio river, the negro was taken on board in Kentucky, and his coming from Indiana can make no difference." But Judge Underwood did not accept this view: "A literal application of the same argument would prove, that the negro was not taken 'out of the limits of the state' in the boat, unless it had been shewn, that on its arrival at Cincinnati, it had been hauled out on dry land, on the north bank, with the negro in it. . . The negro came voluntarily on board, from another state, and left the boat voluntarily, and went into another state, the boat remaining all the time in Kentucky." Consequently the act of 1824 was not violated by the master of the steamboat.

To remedy this defect, an amendatory act was passed in 1828,<sup>37</sup> which extended the application of the act of 1824 "to the owner, mate, clerk, pilot and engineer" of the offending vessel, and provided

That the liabilities under said act shall accrue whenever the person of colour shall be taken on board any steam vessel from the shores of the Ohio river, opposite to this State, to the same extent as if they were taken on board from the shores or rivers within this State; and the like liability shall occur for landing or suffering them to go on shore within, as without the State: Provided, Nothing in this act, or the act to which this is an amendment, shall be so construed, as to apply to any person of colour who is not a slave.

The constitutionality of these acts was sustained in 1835, in the case of *Church v. Chambers*,<sup>38</sup> and in 1846, in *McFarland v. McKnight*,<sup>39</sup> and their provisions were embodied in the Revised Statutes of 1852,<sup>40</sup> the latter, however, being more general than the amendatory act of 1828 (which extended the liability under the act of 1824 to a taking on board of a person of color "from the shores of the Ohio river opposite to this State"); for the act of 1852 declares that its provisions "shall also apply when the slave is taken on board of the boat . . at any place out of this state."<sup>41</sup>

Among the suits for freedom brought in Kentucky were a number based on the Pennsylvania acts of 1780 and 1788<sup>42</sup> for the gradual abolition of slavery. Thus in 1834 the three children of Dinah Barrington, a negress born in Pennsylvania in 1800, but afterwards brought to Kentucky, where, before she was twenty-eight years old, she gave birth to the appellants, were adjudged free by the Court of Appeals,<sup>43</sup> on the ground

<sup>37</sup> Act of Feb. 12, 1828. 1 St. L. 260.

<sup>38</sup> P. 329, *infra*.

<sup>39</sup> P. 375, *infra*.

<sup>40</sup> Ch. vii., sect. 3, p. 143.

<sup>41</sup> See also the case of the slave Ambrose, *Bracken v. Steamboat Gulnare*, p. 424, *infra*.

<sup>42</sup> Pennsylvania acts of Mar. 1, 1780, and Mar. 29, 1788. 1 Dallas Laws 838 and 2 Dallas Laws 586.

<sup>43</sup> *Barringtons v. Logan*, p. 328, *infra*.

that Dinah, although under the Pennsylvania act of 1780 she was to be retained in a state of pupillage until she should attain twenty-eight years of age, was born free, and never was a slave; and that, as she was never a slave, her children must be free. A similar decision (1835) was given in *Gentry v. Polly McMinnis*.<sup>44</sup>

But in the statute of Pennsylvania passed in 1780, abolishing slavery in respect to those born in that state after its passage, section 10 excepted "domestic slaves attending upon . . . persons . . . sojourning in this state, and not becoming resident therein, . . . Provided, Such domestic slaves be not . . . retained in this state longer than six months." An act of 1847<sup>45</sup> repealed so much of the act of 1780 "as authorizes masters or owners of slaves to bring or retain such slaves within this commonwealth, for the period of six months, in involuntary servitude, or for any period of time whatsoever." It will be seen on later pages, that in *Maria v. Kirby* (1851),<sup>46</sup> Judge T. A. Marshall, who delivered the opinion of the court affirming the decree dismissing Maria's bill claiming freedom, declared:

If any State were to enact that any slave brought within its limits by the authority of the owner, and permitted by him to remain there six months, or three, or even one, should be free, there might be some reason for saying that such law should operate permanently, even upon the rights of strangers, because they would have an opportunity of knowing its provisions and avoiding its consequences. But a statute declaring that any slave so brought into the State should be instantly and absolutely free, would . . . be unreasonable and unjust as to strangers who, though ignorant of its terms would, while within the State, be subjected to the consequences of its infraction, without the possibility of avoiding them. We do not admit that these consequences, though expressly declared, should be recognized and enforced by any other State against its own citizens who may ignorantly have incurred them.

Judge Marshall's novel corollary to the maxim "*Ignorantia juris neminem excusat*" was invoked two years later by Judge Crenshaw, who, in delivering the opinion of the court of appeals in *Ferry v. Street*,<sup>47</sup> made use of Judge Marshall's argument which condemned Maria to slavery, to free the slave Clarissa. Her owner "was apprised of what the law of Pennsylvania was when [1838] she sent her slave there, . . . That law was that the slave might be brought there, and her condition be unchanged for the period of six months, but that if she remained there longer . . . she should be deemed a free woman. . . and we think, that in such a state of case, the condition of Clarissa in that state, after remaining in that state longer than six months, should follow her to Kentucky, and be her condition here. . . She was free there, and should be free here."

The Kentucky Reports contain numerous cases involving wills, which grant freedom to slaves on condition that they go to Liberia. In case a slave prefers to remain a slave, he is devised usually to a relative of the

<sup>44</sup> P. 330, *infra*.

<sup>45</sup> Laws of 1847, p. 208.

<sup>46</sup> P. 403, *infra*.

<sup>47</sup> P. 411, *infra*.

testator. If children "were too young to exercise the privilege of election, . . . the parents" were permitted "to do it for them."<sup>48</sup> Children born between the date of the will and the death of the testator, whose mother had been emancipated by the will<sup>49</sup> on condition she went to Liberia, were decreed to be free also: "It would be exceedingly difficult to suggest a satisfactory reason why he should free all that were in being, and in the same instrument, which so clearly develops his benevolent feelings towards his slaves, should intend that after born children of the manumitted mother, should be separated forever from that mother's care." And children born since the death of a testator<sup>50</sup> who emancipated all his slaves who should "become willing and give themselves up to embark for Liberia," allowing them "dispensation of ten years," in which to be hired out, "not to the highest bidder," to earn a fund for their "outfit" ("a decent suit of clothing and one hundred dollars cash"), were also declared free.<sup>51</sup> Other varieties of testamentary disposition may be seen in the wills of John Stith<sup>52</sup> and of Nelson Graves.<sup>53</sup>

The Kentucky constitution of 1850<sup>54</sup> provided that the general assembly should "pass laws . . . to prevent [slaves] . . . from remaining in this state after they are emancipated." Such laws were passed in 1851<sup>55</sup> and in 1852,<sup>56</sup> one hundred and sixty years after Virginia's first enactment on the subject.<sup>57</sup> Their working may be seen in the cases of "Elisha, of color, *ex parte*" (1858),<sup>58</sup> of *Winn v. Sam Martin* (1863),<sup>59</sup> of *Neely v. Merritt* (1873)<sup>60</sup> and of *Walters v. Ratliff* (1869).<sup>61</sup>

The next best thing to freedom was the privilege sometimes given to the slave of choosing his master. Illustrations of its operation may be found in connection with the wills of Constance Blakey and of Joseph Morgan.<sup>62</sup>

The legislature of Kentucky followed the example of the Virginia assembly in enacting laws compensating the "taker up" of a runaway slave, the reward being "increased by the distance which he might have to travel."<sup>63</sup> In 1835, as "Escapes of slaves continued to increase and

<sup>48</sup> *Graham v. Sam*, p. 377, *infra*.

<sup>49</sup> *Adams v. Adams*, p. 392, *infra*.

<sup>50</sup> John Graham, who made his will about 1840.

<sup>51</sup> *Graham v. Sam*, *ubi supra*.

<sup>52</sup> *John v. Moreman*, p. 381, *infra*.

<sup>53</sup> *Isaac and others v. Graves*, p. 422, *infra*.

<sup>54</sup> Article X., sect. 1.

<sup>55</sup> Act of Mar. 24, 1851.

<sup>56</sup> Rev. St. of 1852, pp. 645 (and note), 647. Judge Stites says in *Smith v. Adam*, 18 B. Mon. 685 (689): "It is a part of the history of the state, and thus judicially known, that the chief causes which led to the enactment of those stringent constitutional and legislative provisions was the rapid increase of that class of population [free negroes] within the state, and the evils to be apprehended therefrom."

<sup>57</sup> Act of April 1691. 3 Hen. 87.

<sup>58</sup> P. 431, *infra*.

<sup>59</sup> P. 444, *infra*.

<sup>60</sup> P. 467, *infra*.

<sup>61</sup> P. 465, *infra*.

<sup>62</sup> *Blakey v. Blakey*, and *Hopkins v. Morgan*, pp. 315, 328, *infra*.

<sup>63</sup> *Elliott v. Gibson*, p. 394, *infra*.



but few recaptures were made, because, as was supposed, of the inadequacy of the reward allowed by law for such services,<sup>64</sup> the Legislature . . . increased the compensation . . . to thirty dollars if [the fugitive was] taken up out of this State.<sup>65</sup> It was soon ascertained that, because of the odium which in the non-slaveholding States was visited upon those of their citizens who engaged in the apprehending of fugitives from other States, it was necessary to offer a greater reward, and such as would probably be sufficient to induce men to consult their own interests, regardless of the public sentiment around them." Accordingly an act was passed in 1838,<sup>66</sup> providing "That the compensation for apprehending fugitive slaves taken without this Commonwealth, and in a State where slavery is not tolerated by law, shall be one hundred dollars, on the delivery to the owner at his residence within the Commonwealth, and seventy-five dollars if lodged in the jail of any county in this Commonwealth, and the owner be notified so as to be able to reclaim the slave." The constitutionality of this act was brought in question in the case of *Elliott v. Gibson*,<sup>67</sup> which came up to the Kentucky Court of Appeals in 1850. The act was upheld. See also the case of *Tunstall v. Sutton*.<sup>68</sup>

The rule against perpetuities was deemed, by the Virginia court of appeals, in 1798, "too rigid" to be applied "with all its consequences" to the case of the slaves of John Pleasants,<sup>69</sup> who had declared in his will, made in 1771: "all my slaves now born or hereafter to be born, whilst their mothers are in the service of me or my heirs, to be free at the age of thirty years." The rule was otherwise disposed of in 1856, by the Kentucky Court of Appeals.<sup>70</sup> The will of Thomas Davis, made in 1801, and admitted to record in that year, provided that "negro Beck, and all her offspring, shall be set free from all bondage at forty years of age." Beck was then fourteen years old and died before reaching forty. She "gave birth to a female child named Sicily, about the year 1803 or 1804," and half a century later, the "descendants of Sicily . . . some children and others grand-children" "some twenty . . . persons of color" filed a petition "to . . . establish their freedom against Wood and others, holding them in bondage." The court held that "the attainment of [the age of forty] . . . by Beck herself was not a condition precedent to the freedom of her offspring, . . . the testator intended that his devise should take effect at a particular time, fixed by reference to the age of Beck, instead

<sup>64</sup> "Ten shillings, and one shilling for every mile" "between the place where the runaway was apprehended, and that from whence he fled;" act of Jan. 16, 1798. 2 St. L. 1411. Nevertheless, even after the offer of a larger reward, "the escape of a slave to Ohio, was equivalent to a total loss to the owner." If a slave should "escape across the Ohio, . . . his recapture would be hopeless." *McClain v. Esham*, 17 B. Mon. 146 (154) [1856].

<sup>65</sup> Act of Feb. 28, 1835. Acts of 1835, p. 282.

<sup>66</sup> Act of Feb. 8, 1838. Acts of 1837-8, p. 158.

<sup>67</sup> P. 394, *infra*.

<sup>68</sup> P. 426, *infra*.

<sup>69</sup> *Pleasants v. Pleasants*, p. 105, *supra*.

<sup>70</sup> *Davis v. Wood*, 17 B. Mon. 86 (1856); p. 424, *infra*.

of by naming the year itself. . . If the intention was that Beck and her offspring in successive generations remaining in slavery until they respectively attained the age of forty years, should then be free, this would . . be an illegal and ineffectual devise, because it attempts to create a perpetuity."

The "fellow-servant rule," the injustice of which has contributed to the passage of workmen's compensation acts in many jurisdictions, was held by the Kentucky Court of Appeals, in 1856, in a railroad case,<sup>71</sup> not to apply when the injured "co-employee" was a slave.

White complexion was considered to lessen the value of a slave. The color of the slave Albert<sup>72</sup> who escaped to Ohio or Canada, "could not be distinguished from a white man," and several witnesses "say that owing to his being almost white, and to the consequent facilities of escape, they did not consider him to be worth more than half as much as other slaves of the ordinary color and capacities." In *Graham v. Strader*,<sup>73</sup> the court held, that in assessing damages for the loss of "the three yellow men," the jury "had a right . . to take into consideration their qualities as musicians, . . to consider the appearance, and manners, and address of these slaves, their acquirements in literature, as well as in music, their habits of subordination or of independence, the liberties which had been allowed to them, and the effect of all these circumstances, not only upon the value of their services, but also in generating a restlessness under restraint, and a desire of freedom, and in affording facilities and opportunities of escape;" the jury "had the right to determine how far any of these considerations should operate to enhance or diminish the fair value of the slaves as such."

The Kentucky courts accepted the doctrine of *Maria v. Surbaugh*<sup>74</sup> (that a female slave whose freedom was, by will or deed, to take effect *in futuro*, remained a slave till the date set for her liberation, and that her children born before that date, were, therefore, slaves, though born after the date of the emancipating document); but made an exception in two cases where the strong language used by the emancipators in opposition to slavery convinced the court that immediate emancipation was intended, in spite of the fact that emancipation was coupled with a provision for future service. Both emancipators were Virginians. The earlier instrument of emancipation (construed by the Kentucky Court of Appeals in 1836)<sup>75</sup> was a deed, acknowledged in Virginia, in 1790: "Know all men by these presents, that I, John Baker of Chesterfield county, do believe that all men by nature are equally free; and, from a clear conviction of the injustice and criminality of depriving my fellow-creatures of their natural

<sup>71</sup> *Railroad Company v. Yandell*, p. 427, *infra*.

<sup>72</sup> *Ewing v. Gist*, p. 360, *infra*.

<sup>73</sup> P. 365, *infra*.

<sup>74</sup> P. 138, *supra*; *Esther v. Akins*, p. 361, *infra*; *Johnson v. Johnson*, p. 384, *infra*.

<sup>75</sup> *Hudgens v. Spencer*, p. 335, *infra*.

right, do hereby emancipate or set free " various slaves at various future dates. The claimant was the son of one of the female slaves, born between the date of the acknowledgment of the deed and the date when she was to be free. The Court of Appeals affirmed the decree establishing her son's right to freedom.

The other document whose construction involved a deviation from the rule of *Maria v. Surbaugh* was a deed of emancipation which, among other provisions, provided for "a negro girl named Susannah, now ten years old, to go free at the expiration of eight years from this date."<sup>76</sup> The son of Susannah, who was born about seven years after the date of the deed, brought suit for his freedom, and the Kentucky Court of Appeals held, in 1831, that "Susannah was a free woman when she bore the plaintiff. . . Her freedom immediately . . . resulted from the acknowledgment and registration of the deed of emancipation; . . . The . . . emphatic language of [the grantor's] . . . deed evinced a fixed determination on his part, never again to exercise . . . dominion, as proprietor, over any human being as a slave."

With the exception of a few federal cases originating in Kentucky, nearly all the cases which follow are cases tried in the highest court of the state, called, under all the successive constitutions, the Court of Appeals. The constitution of 1792 gave that court original and final jurisdiction in certain land cases, appellate jurisdiction in all other cases. That of 1799 confined it, practically, to appellate jurisdiction. Original jurisdiction in some land cases and some others was restored to it in 1809. Under the constitution of 1850 it had appellate jurisdiction only. From 1810 to 1850 the Court of Appeals consisted of three judges, after that date of four.

<sup>76</sup> *Charles v. French*, p. 319, *infra*.

#### KENTUCKY CASES.

*Jackson v. Wilson*, Hughes Ky. 162, May 1795. [161] "some time in the year 1783 . . . Wilson proceeded to survey his land . . . [162] Aaron Collett and negro Tom carried the chain, when they first set out."

*Ward v. Fox*, Hughes Ky. 406, March 1801. About 1790 [428] "Wm. Wood forewarned the said Ward from using or taking possession of the land where he had settled, as the said Wood claimed it; upon which the said Ward informed the said Wood that he should continue where he was; and told the said Wood if he would wait, he should see his negroes in the act of deadening some trees."

*Enderman v. Ashby*, Ky. Dec. 65, July 1801. "bill of exceptions . . . brought for money supposed to have been illegally recovered, on the act of 1792, which prohibits dealing with slaves without the consent of their owners."

*Stapp v. Howdershell*, Ky. Dec. 198, June 1802. "Stapp . . . delivered to Howdershell a bond executed by John Hunt, junr., . . . for two negroes, which Howdershell was to keep if Stapp should not deliver to him one negro boy or man over fifteen years of age, and not to exceed thirty, to be sensible and sound; "

*Lyne v. Lyne*, Ky. Dec. 354, December 1803. Will of Edmund Lyne, 1791: "first after my death each slave that is in bondage under me, shall be liberated. . . I do hereby constitute Harry Innes, my trusty friend, to take charge of all my cash . . . This, together with the whole of my property personal and real, to support the freedom of my slaves, after which the balance to be disposed of as the law directs."

Held: the executor has the right to the custody of the negro children during their minority and to retain a sufficient amount of the estate for their support during minority. [355] "It only remains to inquire whether" the executor was "by this will . . . authorized to pay for the schooling of these young negroes. . . [356] 'to support the freedom of my slaves'—is very comprehensive. . . it must mean . . . every thing which is necessary to make their freedom a real advantage to them. . . It will no doubt be his duty . . . to have these young negroes bound out to learn some beneficial trade; . . . if the executor has sent, or shall send these children to school at the expence of his testator's estate, the more certainly to secure them those branches of learning which the law specifies such apprentices shall receive, he ought to be justified for so doing."

*Will (a negro) v. Thompson*, Hardin 52 n., May 1805. See *Thompson v. Wilmot*, 1 Bibb 422 (1809), *infra*.

*Campbell v. Sullivan*, Hardin 17, June 1805. Will of Campbell: "the slaves and personal estate to be sold at twelve months credit; and out of the money arising by the sales thereof, to pay and satisfy my just debts,"



*Beall v. Joseph (a negro)*, Hardin 51, May 1806. "The negro, Joseph, had been the slave of Woods. Woods, in 1799, sold a tract of land . . . to Edwards, and agreed to let Edwards have Joe for four years; after which Joe was to be free. . . Edwards sold him to the defendant as a slave. After the expiration of this four years, Joe brought his action of false imprisonment against Beall, to try his right to freedom."

Held: [32] "it not appearing that he ever was out of the limits of this state, and the one from which it was separated, there is no law of either of them, by which slaves in that situation, can obtain freedom, or enjoy the rights of free persons, only by deed in writing, or the last will and testament of the owner, duly authenticated and recorded: but no such deed, nor will, nor certificate, of freedom in favor of Joseph, was produced at the trial. It is therefore clear, that no declaration nor promise made to a slave in this state, or for his benefit, . . . can be enforced by a court, either of law or equity,"

*Tardeveau v. Smith*, Hardin 175, February 1808. Bond, 1788: "Whereas the above bound Tardeveau, brothers, are indebted to the said James Smith, two likely negroes between the age of fifteen years and twenty-five, to be sound and healthy; which said negroes ought to have been delivered in the month of January last past; but from some circumstances, it hath been inconvenient for said Tardeveau, brothers, to pay the said negroes."

*Spiers v. Willison*, 4 Cranch 398, February 1808. Rebecca Willison offered parole proof that her grandmother, "while Kentucky was a part of Virginia, had given them [the slaves] to her by a deed, which was lost."

*Kennedy v. Terrill*, Hardin 490, June 1808. "a warrant to search Kennedy's house . . . for certain slaves, by name; and, if necessary, to break doors, to raise the *posse comitatus*, to deliver over the negroes, when found, to the administratrix of Benjamin Harrison, deceased, who had proven them to be her property, . . . that they had been carried off during the American war"

*Caldwell v. Myers*, Hardin 551, June 1808. "in the year——Peter Young had a negro woman who was pregnant, and not having the means of supporting her, during the illness inseparable from her condition, applied to the said Rebecca's mother, and agreed if she would take care of the said negro woman, and support her during her illness, that the said Rebecca (then sole, and under age) should have the child with which the said negro woman was then pregnant, at the death of the said Peter Young. . . the negro woman was received into the family, and taken care by the said Rebecca, until she recovered of her illness; that she was delivered of a girl child; and that the said Rebecca furnished the child with clothes, until the child was seven years old; and, when called on by the defendant, Peter, furnished money to pay the taxes due for it." Peter has taken offence and has sold the girl who is now about thirteen years old to Caldwell for \$180, "one half less . . . than her real value; and they [Myers and Rebecca, his wife] charge . . . that the two Lovelesses are about to take the girl down

the Mississippi, into the Spanish dominion. . . the circuit court were of opinion . . . that the complainants had a right to the girl, at the death of Peter Young; and decreed that Peter Young and George Caldwell should give bond . . . to be void upon the delivery of the said girl, and her increase, if any, to the complainants, within 30 days after the death of Peter Young. . . [554] decree . . . reversed . . . directions to dismiss the bill . . . but without prejudice to any suit at law," [553] "it is believed, there is no instance where a parol executory contract, concerning a personal chattel has been specifically decreed: . . . [554] By our law, slaves . . . partake, in all their qualities, except that of descent, of the nature of personal estate." [Trimble, J.]

*Burton v. Wellers*, Litt. Sel. Cas. 32, June 1808. "Weller asked, if they knew where he could purchase a likely negro boy? Mr. Powell said, no. In a few minutes, Burton said that he knew of one. Mr. Powell said to Mr. Burton, 'not that sickly one?' Burton winked, or nodded to Mr. Powell. . . Weller observed, he would not buy, nor have one, unless he was a sound, healthy, and active boy. Mr. Burton said to Weller, the negro boy I mean, is as sound, well, healthy a boy as you will find one in a thousand." Weller bought him of Burton in 1802, for \$300. The negro "labored under an old and inveterate complaint in his legs," and "afterwards died of the same complaint."

*Pringle v. Samuel*, 1 Bibb 167, October 1808. "the defendant did hire of Thomas Samuel, in his lifetime, a negro woman for the space of one year, for which the defendant was to pay the deceased the sum of forty dollars:"

*Rumsey v. Matthews*, 1 Bibb 242, November 1808. "whereas the above named Rumsey and Wallace, have hired two negro men of the aforesaid Matthews, for one year, to commence from the day of the date hereof, for the sum or price of one hundred dollars each, . . . and to find the said negroes in clothing suitable to the seasons, and to pay their taxes, and to return the said negroes to the said Matthews, at Barren court house, at the expiration of the year."

*Scott v. Clarkson*, 1 Bibb 277, November 1808. "testator had purchased of William Scott a negro woman, at the price of £89, . . . that said William . . . represented the said slave as twenty five years of age, and as sound and healthy, . . . that the slave was, at the sale, . . . unsound and nearly forty years of age or upwards;"

*Thompson v. Wilmot*, 1 Bibb 422, June 1809. "In May 1805, Miss Ruth Wilmot exhibited her bill against Thomas A. Thompson, setting forth that in October 1790, she exchanged a slave named Will, of whom she was possessed in the state of Maryland, for a slave called Harry, the property of said defendant, who was about to remove to Kentucky; that one of the moving considerations in said exchange was the express stipulation on the part of said defendant, that he would manumit and emancipate said Will in seven years; that the defendant on the day of the exchange made a memorandum of the said agreement, and delivered it to her as his act and deed; that said slave was persuaded by Thompson, to

leave her and go with him to Kentucky, by the prospect of freedom thus held out to him; that in said instrument it was inserted that if the said Will did not choose to live with said defendant in Kentucky, he should be at liberty to return to Maryland after one year of the term had expired; that said defendant in a few months after said agreement arrived in Kentucky with said Will, who faithfully served the said term of seven years, and has ever since been held in slavery by the defendant: she states that the slave had instituted a suit at law in the said court to recover his freedom, but had failed because the said instrument was held not to amount to an actual and formal emancipation, and the slave therefore not entitled to sue.<sup>1</sup> She therefore prays a specific execution of the said agreement, which she exhibits; and for an account and payment for the value of the service of the slave beyond the said term of seven years, during the illegal detention of the said slave, by the said defendant so wrongfully committed; and for general relief. . . [424] the circuit court decreed a specific execution of the agreement, and a manumission of Will; caused a jury to be empanelled to assess the damages by the said detention of Will, beyond the said period of seven years in the bill complained of; which being assessed at 691 dollars 25 cents, were decreed to be paid by the defendant to the complainant in trust for said negro Will "

Decree affirmed.

*Hazlerigs v. Amos and Jane*, 1 Bibb 425, June 1809. " the appellant being a resident of the state of Virginia, and holding the appellees as slaves under the laws of that state, in October or November of the year 1780, left his residence with the view and intention of removing to and settling his family in Kentucky; that when he arrived at Cross creek, six miles from the Ohio, he found the difficulty of passing down the river so great, and the danger from the savage foe so imminent, that self preservation induced him to halt until he could descend the river with more safety; that in the spring of the year 1781, the inhabitants in the vicinity of Cross creek were much alarmed from the Indians, and some of them, who stayed, forted for their mutual safety and protection; that the appellant, with his family and servants moved eastward to a place called Shirtee, about two and a half miles from Catfish, (now Washington), where he rented land and lived until the fall of the year 1783, when he descended the Ohio, and came to this country with his family and servants, where he has ever since resided; that during his stay at Shirtee, he always manifested his intention of proceeding to Kentucky as soon as possible, without hazarding the lives of his family and servants; that the place where he lived was in the territory claimed both by Virginia and Pennsylvania; that the officers of both states exercised jurisdiction therein, and that great public commotion was produced and existed amongst the people; that the conflicting claims to jurisdiction were not adjusted, and the boundary line settled, until the year 1784; and that, according to the line as settled between the two states, the place where the appellant had resided is several miles

<sup>1</sup> Will (a negro) v. Thompson, p. 280, *supra*.



within the state of Pennsylvania." [425] "a verdict was found for the appellees. The appellant . . moved . . a new trial, but the court overruled his motion,

[428] "Judgment reversed." "the evidence in this case does not warrant the finding of the jury." [427] "Under these circumstances . . [the appellant] was bound to obey the laws of Virginia, and, in his turn, was entitled to the benefit of their protection."

*Mitchell v. Gregory*, 1 Bibb 449, June 1809. "In covenant for the delivery of a negro girl thirteen years of age, of good size, . . 'it was expressly agreed' . . that the plaintiff would deliver to the defendant . . the sum of 29 dollars in pork, or pay it in cash, being the balance and residue unpaid of 200 dollars, the consideration stipulated for the negro girl "

*Redding v. Hall*, 1 Bibb 536, October 1809. Redding "hired of Margaret Hall . . a negro woman for one year, for which he executed his note for the sum of £7 1 s. Shortly after the negro was taken sick and he employed a physician," and paid his bill to the amount of £4 4 s. 9 d.

Held: the hirer of a slave is not entitled to abatement for sickness or physician's bills, unless so stipulated. He is bound to pay proper attention to the health of the slave, and to employ a physician if necessary; a palpable neglect in this respect would render the hirer responsible to the owner. Otherwise [541] "he can have no incentive to treat the slave humanely, except the mere feelings of humanity, which we have too much reason to believe in many instances of this sort are too weak to stimulate to active virtue," [Boyle, J.]

*Cox v. Robertson*, 1 Bibb 604, December 1809. [605] "slaves shall be deemed real estate, but under many modifications. . . slaves are liable to the payment of debts, but not to be sold or disposed of by executors or administrators, unless in case of a deficiency of the personal estate." Held: slaves pass to executors and administrators, and they may maintain detinue for slaves.

*Children of Sibley ads. Shannon*, 1 Bibb 615, December 1809. "The paupers suing for their freedom in the court below had judgments . . in their favor. Their mother, Sibley, was a slave in the state of Pennsylvania, previous to the passage of the act for the gradual abolition of slavery, and was afterwards duly registered according to the requisitions and provisions of that act, whereby she would have remained a slave for life, even in the state of Pennsylvania, any thing in that act notwithstanding. She was afterwards removed into the state of Virginia, and was in the district of Kentucky registered according to the laws then in force, whereby she remained a slave for life. The appellees, her children, were all born after her being removed from the state of Pennsylvania; and according to the rule '*partus sequitur ventrem*,' they must be deemed slaves, unless they can show some right to freedom, acquired since their birth, or can show that the rule before mentioned did not apply to their birth. To do this, the act of Pennsylvania, amendatory to the former, has been relied on; . . enacted previous to the removal of the mother. . .



[616] By the provisions of the original act, the children of slaves 'born within the state' after the passage thereof, were declared free after the age of twenty eight years; and if Sibley's children had been born within that state, the right of freedom would have been incipient, to be consummated by the attainment of the age specified; and having once attached, a subsequent removal of them from Pennsylvania, would not have defeated that incipient right, according to any existing laws of Virginia or of this state. But . . . The children of Sibley never were in the state of Pennsylvania, . . . The legislature of Pennsylvania have not even attempted to extend the operation of their statutes to slaves born *extra territorium* [sic], and never carried within her jurisdiction; although the mother may have been registered as within the operation of their laws. . . . Judgment reversed." [Bibb, C. J.]

*Mahan v. Jane*, 2 Bibb 32, Spring 1810. "Action of assault and battery and false imprisonment brought by appellee to obtain her freedom:" Will of Clarke, dated 1796: Jane "was devised to Sarah Mahan . . . until the age of twenty five, and then to be free." But [33] "Clarke, eight or nine years before his death, and about five before the execution of his will, gave the plaintiff Jane to his daughter Sarah Mahan . . . in whose possession and under whose control she remained until the commencement of this suit. . . . The declarations of Clarke, both before and after the gift, (which probably had an undue weight on the minds of the jury,) that he intended to liberate his young slaves at his death, does not change the nature of Mahan's right;" "though in doubtful cases we may presume in favor of liberty, we cannot indulge it in a cause where the testimony is as clear and decidedly opposed to the verdict as in this." [Clark, J.]

*Donaldson v. Jude*, 2 Bibb 57, Spring 1810. Deed of Walter Clark, 1781, manumitting Jude, was "re-acknowledged by him in the fall of the year 1783," In 1787 "this deed poll of emancipation" was proved by one of the two subscribing witnesses.

Held: not sufficient evidence to admit the writing to record under the statute of Virginia.

*Belmore v. Caldwell*, 2 Bibb 76, Spring 1810. "Belmore declared against Caldwell in trespass for beating his slave." Held: "Slaves, by act of our legislature,<sup>1</sup> are declared to be real estate. . . . there must be a possession in fact to enable the plaintiff to bring his action."

*Meredith v. Sanders*, 2 Bibb 101, Spring 1810. [103 n.] "William Meredith, sen. and his wife, swore, that the slave in question (now about nine years old) was given by said Meredith, sen. to his son, William Meredith, jr. when about twelve years of age; that the donor had refused to exercise any act of ownership over the said slave, considering him as the property and under the exclusive control of the son, and that he, the donor, had so declared to several who wanted to purchase the boy. It appeared in evidence that when the slave in question was born the mother was hired out by Meredith, sen.; that generally since that time she has been hired out, and the boy in question always went with and remained

<sup>1</sup> Litt. L. K., vol. 2, p. 120.

with the mother. Meredith, the father, swore the boy went with the mother by the permission of his infant son. Three several persons who had hired the mother, and supported the boy along with the mother, swore they had never heard of the son's claim until shortly before the sheriff's sale."

*Gray v. Prather*, 2 Bibb 223, Fall 1810. A negro boy was sold "for the sum of eighty pounds,"

*Davis (a man of color) v. Curry*, 2 Bibb 238, Fall 1810. In 1789 Davis "was brought as a slave into the then district, now state of Kentucky, from the state of Delaware, where he had before his removal . . . been held as a slave;"

Held: color and long possession are such presumptive evidences of slavery as to throw the burden of proof on a negro claiming freedom. A man of color brought from Delaware presumed a slave unless it is proved that the laws of that state since the Revolution have abolished slavery.

*Meaux v. Caldwell*, 2 Bibb 244, Fall 1810. Held: a loan of slaves is within the statute of frauds and perjuries, and must be evinced by will or deed recorded to be good against creditors and purchasers.

*Ned v. Beal*, 2 Bibb 298, Spring 1811. Isaac Cox devised his slaves to his wife, "to serve in the following manner, and to be free at the following periods, to wit: Easter, on the 1st day of May, in the year of our Lord, 1793; Jude, to be free in the year 1804; and Dinah, to be free in the year 1806; and in the mean time, the above named Jude and Dinah, shall be schooled in such manner as to be able to read a chapter in the Bible." [299] "After the death of Isaac Cox, and before the year 1804, several children were born of Jude, who brought suit for their freedom,"

Held: the children are slaves.

*Speaks v. Adam*, 2 Bibb 305, Spring 1811. Suit "by persons of color for their freedom. . . Speaks . . . removed from the state of Maryland to Kentucky, 1785, and claims the appellees as slaves by marriage: but having failed to take the oath required by law,<sup>1</sup> the appellees instituted this suit in 1808,"

Held: the act of Virginia, passed in 1778 against the importation of slaves, did not require the oath prescribed, of persons claiming slaves in another state by marriage or descent.

*Yoder v. Allen*, 2 Bibb 338, Spring 1811. "Yoder . . . covenanted to furnish Allen by a given day, with two healthy, sensible, likely and sizeable negro boys, between fourteen and eighteen years of age, in consideration . . . of 450 dollars then paid, and 210 dollars to be paid on the delivery of the boys."

*Caldwell v. Sacra*, Litt. Sel. Cas. 118, May 1811. Caldwell's negro boy had tied large sticks of wood "to the horse's tail, the horse having frequently broken into his wheat-field." He "had so beat and caused the said horse to run as thereby to occasion his death."

Held: the master of a slave is liable for the trespass of a slave.

<sup>1</sup> Va. act of 1778, sect. 3.

*Frazier v. Spear*, 2 Bibb 385, Fall 1811. "The fact agreed is that 'Daniel is the grandson of Phoebe, in the will of John Spear mentioned.' If marriage between slaves was recognized by law, some doubt might exist whether he was to be understood as the grandson through the male or female line; but as the father of a slave is unknown to our law, we are irresistibly led to conclude that he is descended in the female line."

*Lawrence v. Speed*, 2 Bibb 401, Fall 1811. By virtue of an execution the deputy sheriff "seized four negroes, to wit, Joseph, Milly, Ruth and David, . . . [402] and sold the same at public auction in the town of Danville. Joseph and Milly were first severally sold, the former at the price of \$115 50 cents, and the latter for \$293. There still remaining between \$250 and \$300 of the execution unsatisfied, the sheriff sold Ruth, and David her son, between two and three years old, in one lot at the price of \$400. . . the defendants in the execution moved the court to quash the sale . . . at least so far as respects Ruth and David, because they were sold together, whereas they ought to have been sold separately, and because the sale of both was not necessary to make the money then due on the execution."

Held: [404] "The mother and child were indeed physically divisible, but morally they were not so; and the Sheriff in selling them together certainly acted in conformity to the dictates of humanity," [Boyle, C. J.]

*McDaniel v. Will*, 2 Bibb 550, Spring 1812. "The appellees, as paupers, brought suit [in 1801] . . . asserting their right to freedom, under the [Virginia] act of assembly of 1778, for preventing the further importation of slaves. . . [551] verdict and judgment in favor of the appellants; after which, . . . 1806, the appellees exhibited their bill . . . to obtain a new trial. They charge that they were imported from the state of Maryland into this state, by Edmund Tucker, in the month of May 1785; that by the then laws every person importing slaves, with intention of becoming a citizen, should, within ten days, take the oath prescribed by the act of 1778; that said Edmund Tucker did not comply with the law and take the oath prescribed thereby; . . . the [circuit] court decreed that the . . . judgment . . . be set aside . . . and that the defendants be severally free."

Held: [554] "the decree of the circuit court . . . must be reversed;" [554] "Edward [sic] Tucker, within a very few days after his arrival in this country, was informed of the necessity of taking the oath; . . . Garrard was then a justice of the peace; . . . he did actually take the oath before Garrard, . . . Garrard did not act as a justice until 1786, . . . the probability is great, that the witnesses are mistaken as to the year in which Tucker removed."

*Grimes v. Grimes's devisees*, 2 Bibb 594, Spring 1812. Held: by the act of November 26, 1800, "the legal title of a slave which is devised, is immediately transferred to the devisee, and the assent of the executor is not necessary to entitle him to the enjoyment of it."

*Violet and William v. Stephens*, Litt. Sel. Cas. 147, July 1812. "The plaintiffs brought this action, as paupers . . . to recover their freedom. On the trial they asserted their right to freedom, under an act of Pennsyl-

vania, passed 1780, entitled 'an act for the gradual abolition of slavery' in that state: Also, under the . . . act of Virginia, passed in 1778." Gilbert Simpson brought "the mother of the plaintiffs into Virginia when he removed from Pennsylvania." Judgment for defendant reversed.

[148] "the penalties and forfeitures, contained in the act of Pennsylvania, cannot preclude the plaintiffs from asserting their right to freedom in this state. The coercive act of the master in bringing them to this state, cannot alter their rights; cannot make them slaves, if they were free." But "They cannot maintain a joint action for their freedom.<sup>1</sup> . . . the error . . . is not of that description, for which the judgment should be affirmed. . . . to affirm the judgment produced by the misdirection of the court . . . for the irregularity on their part, cannot be correct." For it "would bar an action properly brought for the same cause. . . . their action should have been dismissed . . . before trial. . . . judgment . . . reversed . . . suit . . . remanded . . . and the action of the plaintiffs dismissed." [Owsley, J.]

*Cotton v. Haskins*, Litt. Sel. Cas. 151, July 1812. "he purchased the slave from Cotton and carried him down the river,"

*Ewing v. Beauchamp*, 3 Bibb 41, May 1813. [43] "there was a bond given by . . . Beauchamp to . . . Ewing, for 100 l. or a likely negro fellow between the age of 17 and 24 years; . . . dated the 25th of February 1795; . . . that on the 26th day of February 1795," Beauchamp [41] "executed to Ewing the following writing obligatory, to wit: 'Whereas I have bargained and sold to Charles Ewing a negro fellow, to be paid to him next fall, this shall oblige me to pay to him or his order forty shillings per month . . . for every month said negro, or a good hand in his room, shall be absent from this date: ' "

*Richardson v. Brown*, 3 Bibb 207, October 1813. October 24, 1808, Riddle borrowed \$200 from Brown, "and agreed to deliver to him a negro boy, to be kept for the use of said money and as a security for its repayment. . . . as the boy . . . was worth \$80 per annum, the agreement was usurious and void."

*Johnson v. Carneal*, Litt. Sel. Cas. 172, October 1813. [174] "1788 . . . July 24—To a negro paid Gen. Wilkinson, at, etc., £100"

*Coleman v. Hutchenson*, 3 Bibb 209, November 1813. Hutchenson [210] "obtained a decree for one third of the value of two slaves" which had been devised to the three nephews of John Hutchenson.

Held: [214] "Whatever may be the consequence resulting from an alternate holding between tenants in common of such slaves as cannot be divided, it is the effect of the law, the legislature not having vested the courts with the power to decree a sale of the slaves. The court below should, therefore, have decreed to each party the possession of the two slaves from time to time, according to their respective proportions." "See Co. Litt. 164-5, Bac. Abr." [Logan, J.]

*Buckner v. Cotrell*, 3 Bibb 257, April 1814. Action to recover the amount of an obligation executed "by Jacob Jones, a negro slave, and

<sup>1</sup> See (*contra*) *Coleman v. Dick and Pat*, p. 102, *supra*.



Thomas Cotrell his security. The suit was discontinued as to Jones; Cotrell pleaded 'that Jones, the principal, was a negro slave . . . and that the whole consideration of the obligation was the hire of said Jones, his wife and children, . . . and averred that in consideration of the hire or stipulated wages aforesaid to be paid, the plaintiff [guardian of Jones's owner] licensed said Jones, his wife and children, to go at large, and trade as free persons and hire out themselves, contrary to the statute' "

*Mason v. Mason*, 3 Bibb 448, October 1814. Will of Charles Mason, 1804, "ordered that all his slaves, fifteen in number, should be hired out until the sum given to his wife [1500 pounds] should be raised, . . . and then he willed the said slaves, describing them specifically by name, and their offspring, to be free. After making this will the testator purchased two slaves, Charles and Harry; "

Held: [449] "They must be considered as part of the testator's estate undisposed of by his will, and consequently must descend as if no will had been made."

*Davis v. Sandford*, Litt. Sel. Cas. 206, June 1815. A bill to restrain appellee "from proceeding upon a judgment he had obtained . . . for a part of the price of a negro woman sold by him to . . . Davis. The bill alledges that the appellee sold her as a slave, . . . that, prior to the sale, the said negro, by a judgment of a competent court in . . . Ohio, had been declared free . . . that the appellee was fully apprised of said judgment, and had, in violation of it, seized and brought the said negro to this state by force, and that since the sale . . . she has asserted her freedom, and is going at large, unmolested. The appellee . . . alledges that she was a slave, . . . and that she was a fugitive from this state; and insists that the judgment declaring her free was not binding upon him or those under whom he claims, as they were not parties thereto. He further charges, that . . . [207] Davis was fully apprised of the said judgment, and of the negro's claim to freedom under it, and that he purchased expressly upon the terms that he would run the risk of that claim, . . . that since his purchase the appellant has sold the negro for more than he gave, and denies that she is going at large and unmolested."

Bill dismissed: "The deed states the negro to be a *born* slave, and contains a warranty against all persons who 'shall claim her as such.' . . . it is neither alledged nor proved that the negro was not a *born slave*, nor is it pretended that any person has set up claim to her *as such* " [Boyle, C. J.]

*Clarke v. Bartlett*, 4 Bibb 201, October 1815. Suit "by a man of colour to recover his freedom. He asserts his right to freedom upon the following instrument of writing, viz: 'Being sensible of the unspeakable advantage of liberty, and desirous that my slaves, Bartlett, Harry, and Dick, should be free after my decease; and I do now by this instrument secure their liberty to them, and allow and authorize them at my death to go out free from me, my heirs, etc. and to exercise all the privileges to which they shall be entitled by the laws of their country, to the end of their lives, and recover my interest in the negro woman named Dolly. I resign to herself at my decease, and the eighth part of her time to which I am entitled I

allow her to use to her own advantage during her life. In testimony of these things I have hereunto set my hand and annexed my seal this third day of March, in the year of our Lord one thousand eight hundred and eleven. Agness Clarke (seal.) Signed, sealed and delivered in presence of us—John Andrews, Eliza Andrews.'” This instrument was acknowledged and recorded two months later. In 1813 “it was produced in court, and proved by the oaths of . . . Slayton, . . . Walker and . . . Slayton, to have been acknowledged by Agness Clarke . . . One of these witnesses . . . [202] saw John and Eliza Andrews sign it as witnesses: the other deposed to the acknowledgments only, and one of them to the handwriting of John Andrews, . . . the subscribing witnesses were both residing in . . . Ohio;”

[203] “the judgment of the court below ought to be affirmed.” [Logan, J.]

*Smith v. Hancock*, 4 Bibb 222, November 1815. Action “against Smith and Harris, for beating and wounding a negro slave; the property of the plaintiff, whereby he afterwards died.” Harris alleged “that the slave . . . was on the night of the day on which the trespass is supposed to have been committed, at an unlawful assembly of negroes at the house of John Smith, and . . . [Harris] went with Smith to disperse said negroes, who were combining to rise and rebel against the free white citizens of this commonwealth, when the said negro . . . refused to surrender; and the defendant being at the window of the kitchen of Smith, with a pitchfork in his hand, said negro struck at him with a club, and would have beat and wounded him if he had not defended himself; when he in his own defence struck the negro with the pitchfork,”

*Cockran v. Bowles*, 4 Bibb 233, November 1815. “Cockran sold to Bowles a negro man at the price of \$550, and by the contract of sale promised that . . . he would make a bill of sale warranting the negro should sustain no injury from a disease in the mouth in appearance like a cancer.” Later Cockran refused to give a bill of sale with warranty.

*Allen v. Cockerill*, 4 Bibb 264, December 1815. “Allen, whilst he held an indenture given by a certain woman of color, containing covenants on her part to serve in the capacity of a servant a certain number of years, and whilst the woman was actually in his service, sold his right, and by an endorsement upon the writing, sealed and subscribed by him, actually assigned his right and title to the said negro to the plaintiff in error;” After the sale “the negro was discharged from the service of the plaintiff under a writ of *habeas corpus*,”

*Scott v. Perrin*, 4 Bibb 360, June 1816. “Scott purchased of Perrin a negro man, for whom he paid \$50 in hand, and executed his obligation for \$300, payable at some future day. Before the time of payment the negro ran off; and Scott . . . refused payment,” Perrin had represented [361] “the negro to be a faithful servant of good character, and not subject to run away. . . . The evidence . . . incontestably proves that he knew the negro to be a faithless servant, of infamous character, and a notorious and worthless runaway.” Decree of the court below reversed.

*Hopkins v. Tarlton*, 4 Bibb 500, April 1817. "The slaves of Hopkins were under execution; Tarlton as his friend became the purchaser . . . took upon himself the payment of those debts, and obtained from the officer who had the slaves in custody their surrender to him. The purchase, we apprehend, was made for the benefit of Hopkins, partly with his own money . . . under assurances that the slaves should be returned upon the payment of the balance. . . . This was the stipulation that seems to have allayed the distress of both himself and wife. . . . We are aware of the peculiar hardships which may result to the defendant in raising up a family of young negroes, that are thus to be swept from him. . . . [501] ample provision . . . ought to be allowed for raising and maintaining the negro children, during a minority that rendered them incapable of real utility to the defendant. . . . and he be made to pay reasonable hireage<sup>1</sup> for the negroes." [Logan, J.]

*Davenport v. Tarlton*, 1 A. K. Marsh. 243, June 1818. See *Hopkins v. Tarlton*, 4 Bibb 500 (1817), *supra*. Held: on the redemption of mortgaged slaves, the mortgagee is answerable for the usual hireage only, and not for what was actually made by the slaves.

*Knox v. Black*, 1 A. K. Marsh. 298, October 1818. "On the 11th of October, 1813, Knox applied to Black for a loan of \$300, and obtained the money upon executing a bill of sale for a negro girl, taking from Black, at the same time, a writing, obliging him to deliver the said girl to Knox upon his paying the sum of \$306, on or before the 25th day of November. This Knox failed to do; but within a few days thereafter, made a tender of the money to Black, having been absent from the state on the 25th. The weight of the evidence very abundantly shews, that the negro was worth from four to five hundred dollars, and was a family servant, with which the owner was very unwilling to part; and, for her redemption, had offered not only the \$306, but also a horse. . . . [299] the use of the negro [was] proved to have been worth \$40 to \$50 a year"

Held: "the appellant ought to be permitted to redeem the girl and her increase, . . . paying the principal and interest. And that the appellee ought to account for the reasonable hireage of the negro, allowing him for maintaining . . . [300] her child or children, as well as for the . . . loss of her time during such time." [Logan, J.]

*Embry v. Millar*, 1 A. K. Marsh. 300, October 1818. "Sims died intestate in the Spanish dominions, . . . the slaves . . . were brought to this country since his death,"

*Boothe v. Boothe*, 1 A. K. Marsh. 355, November 1818. "his right to a negro woman Ama, and one half of her children." The appellant had sold part of the slaves.

*Foster v. Smoot*, 1 A. K. Marsh. 394, December 1818. In 1809 the plaintiff "commenced an action of detinue [in Virginia] . . . for a negro woman, named Cate, a boy, . . . and a girl, named Rachel, . . . and a judgment was rendered in favor of the plaintiff's right to said negroes: . . .

<sup>1</sup> See *Davenport v. Tarlton*, *infra*.

1812, two of these negroes,—to wit, Cate and Rachel,—the defendant run off to this state, and the negro woman Cate has had two children, to wit, Malinda and Vincent, which negroes . . are worth . . Cate, \$400; Rachel, \$400; Malinda, \$300; and Vincent \$300.”

*Murphy v. Riggs*, 1 A. K. Marsh. 532, May 1819. Will, 1769: “I lend to my daughter, Keziah Murphy, two negroes, . . Henry and Phillis, during her natural life, and after her decease, to be equally divided between her children” [533] “Phillis, after the date of the will, and during the life of the testator, had a child, named Absalom: . . Not long [after the testator’s death] . . she had a daughter, called Celia, who, during the life of . . Keziah, had three children, Lewis, Jinny, and Simon. Keziah departed this life, as did . . Henry and Phillis. Richard Murphy [husband of Keziah] . . retained the possession of the five surviving negroes, and claimed them . . in right of his wife. The court below decreed the slaves to the [eight] children of . . Keziah; and as they were not susceptible of a division into eight parts, decreed them to be sold, and the money . . divided”

Decree reversed and the cause remanded: “It is . . a long . . settled rule, that the children of a female slave, born during the tenancy for life, shall go with their mother, to the claimant in remainder. This rule has, also, its sanction in some of the . . tenderest feelings of our nature. The mother is not, by its operation, torn from her infant child, nor is the sucking child torn from the breast of the mother. . . [534] The slaves . . born after the death of the testator, belong to the children of . . Keziah, . . Absalom, . . having been born before the death of the testator—did not pass by the *will* to Keziah, or to her children. . . [The decree] is, moreover, erroneous in directing a sale of the slaves. Slaves claimed by descent may, if a division *in numero* cannot be made, be decreed to be sold. . . Slaves, claimed by purchase, may be divided by direction of the chancellor, but not so as to divest any one of the purchasers, or legatees, of his . . interest therein. . . The possession of the slaves should have been decreed to the claimants respectively, in such portions, for such periods, and in such order of succession, as their number and character, and the number of the claimants, rendered most practicable and equitable.”<sup>1</sup> [Rowan, J.]

*Breckenridge v. Duncan*, 2 A. K. Marsh. 50, October 1819. “Jack he hired to one of his sons, for several years before [1818] . . at the price of \$80 per year.”

*Flowers v. Sproule*, 2 A. K. Marsh. 54, October 1819. “An execution for about the sum of £86 10 s. . . against Alexander Sproule, was levied upon a negro woman, Jane, and Maria, her child, . . The negroes were sold by the sheriff in June, 1806, . . They were purchased at the sale by Edward Flowers, at his bid of £122. . . [He,] [55] on the day of the sale, promised Jane, the wife of said Alexander, that if she would, within three months thereafter, pay to him the amount given by him for the said slaves, with interest thereon, she should have them. But they [the appel-

<sup>1</sup> *Coleman v. Hutchenson*, p. 288, *supra*.



lants] deny that the money was paid or tendered to him within the three months. . . there are now seven slaves, in all; the negro woman having borne five children since the purchase of her . . The court below decreed that the appellants should surrender to the appellees the . . seven negroes, upon being paid . . £112 [sic], with interest thereon from . . 1806, or, upon failure to deliver the negroes, . . \$3,000, the ascertained value of the said slaves, . . subject to a deduction of the aforesaid £112,"

Decree reversed and the cause remanded: Flowers's agreement is [57] "a conditional promise, gratuitously made, and could not be enforced, first, because the condition had not been complied with; . . As a contract, in the nature of a mortgage, there is still less reason to consider it. . . it could, at most, amount to a conditional sale . . which, by the failure of the condition, became absolute. . . [58] we feel a strong disinclination to convert, by *construction*, conditional sales of slaves into mortgages. When a contract of this sort is construed to be a mortgage, it follows that a redemption, and that, perhaps, after a great lapse of time, must be permitted, which, from the nature of the property, must often be attended with injurious and afflicting consequences. . . Afflicting, as slaves, though property, are intelligent and sympathetic beings; they interchange sentiments, mingle sympathies, and reciprocate, with their possessor and the members of his family, all the social regards and kind attentions which endear the members of the human family to each other, and bind them in the social state. The agonies of feeling, as well on the part of the slaves as of their possessors, inseparable from a sudden disruption of those social relations, ought not to be lightly regarded by the judge" [Rowan, J.]

*Hannah et al. (paupers) v. Peake*, 2 A. K. Marsh. 133, December 1819. Johnson "deposed that Mr. [Spencer] Peake, the testator, in the year 1813, when they were together on the Canada expedition, recited to him, in a friendly conversation, the disposition which he had made, or intended to make, of his estate—and that the provisions of the will corresponded substantially with the recital aforesaid, particularly so far as related to the emancipation of the slaves, and the provision made for them. Peake died on the 15th of December, 1817. His nephew, Mr. Anderson, deposed that two or three days before his uncle's death, the will was shewn to him by Hannah, one of the negroes therein mentioned, who said her master, the testator, had given it to her, with directions that if he died, she was to give it to Presley Peake, the defendant, and if he lived she was to say nothing about it . . Hannah was the confidential house servant of the testator." It was presented for probate by Suggett [133] "in behalf of Hannah and other slaves therein named," and established as the will of Peake.

*Payne v. Long*, 2 A. K. Marsh. 158, December 1819. Held: free persons of color should not be bound out by the county court unless the person in whose custody they have been, has been served with summons to show cause.

*Calloway v. Middleton*, 2 A. K. Marsh. 372, June 1820. Action of slander. "there was an old report . . that Mrs. Middleton had had a

mulatto child before she was married, and that she was the mother of Harry Butcher's wife, who is alleged to be a free man of color," Callo-way, before the trial, "said Middleton . . . was a damned rascal, and had sold his wife's children,"

*Thomas v. Thomas*, 2 A. K. Marsh. 430, October 1820. "Harry, aged twenty-three years," was sold for \$1050. Bond: [431] "Under the penalty of forty dollars, I bind myself, . . . to pay Jacob S. Gardner, . . . the sum of twenty dollars for the hire of a negro, Mary, which said negro is to be returned at Huntsville, and the money to be paid on or before the first day of January, 1813; I moreover bind myself to furnish said negro, with good suits of summer and winter clothes, and blanket and hat."

*Rankin v. Lydia (a pauper)*, 2 A. K. Marsh. 467, October 1820. Action of "trespass, assault, battery, and false imprisonment; . . . Lydia was born a slave in Kentucky, in . . . 1805, and belonged to . . . [468] Warrick . . . who removed hence . . . shortly after the 17th September [1807] . . . together with Lydia and her mother," "to the territory of Indiana, where he settled," In accordance with the Indiana act of September 17, 1807, he [470] "before the clerk of the county where he resided, made the agreement with Flora, the mother of Lydia, to serve him 20 years, which was duly recorded; and in November, 1807, registered Lydia as a slave under 15 years of age . . . which was likewise recorded there," In 1814 Warrick sold his right to Lydia to Miller, likewise a resident of Indiana," [468] "who sold her to Robert Todd, . . . of Kentucky, who brought her to Kentucky [(474) without her consent] and sold her to . . . Rankin, . . . The parties . . . made part of the record two acts of the legislature of the territory of Indiana;<sup>1</sup> . . . [470] the court below . . . gave judgment for Lydia, for one cent damages, agreed by the parties, and costs:"

Affirmed: "Slavery is sanctioned by the laws of this state, . . . But we view this as a right existing by positive law . . . without foundation in the law of nature, or the . . . common law. . . . The law on which the counsel for Lydia relies, is the ordinance of Congress for the government of the territory northwest of the river Ohio. . . . [471] Warrick . . . had adopted that country as his own, . . . his right to her was extinct; or, in other words, that she was her own. . . . [472] and we are not aware of any law of this state which can . . . bring into operation the right of slavery when once destroyed. . . . She was not the slave of the purchaser while he remained in Indiana after his purchase; and is it to be seriously contended that so soon as he transported her to the Kentucky shore, the noxious atmosphere of this state, without any express law for the purpose, clamped upon her newly forged chains of slavery, after the old ones were destroyed! For the honor of our country, we cannot for a moment admit, that the bare treading of its soil is thus dangerous, even to the degraded African. . . . [476] Although none of the states may allow [free people of color] . . . the privileges of office and suffrage, yet, all other civil . . . rights are secured to them; at least, . . . by the ordinance [of 1787] . . .

<sup>1</sup> Acts of Sept. 17, 1807, and of Dec. 14, 1810.

for the government of Indiana. If these rights are once vested, in that or any other portion of the United States, can it be compatible with the spirit of our confederated government to deny their existence in any other part? . . . The argument which has been relied on as most formidable, is that arising *ab inconvenienti*. . . that if the ordinance could give freedom at all, it could . . . [477] do it in a moment when the slave touched the enchanted shore, and that the consequence would be, that the slave of the traveller . . . the slave of the officer who marched in the late armies of the United States; those sent of errands to the opposite shores; or attending their masters while removing beyond the Mississippi through the territory, would all have an equal right to freedom with Lydia; . . . [478] There is a difference in fact, and a corresponding difference in law. . . [479] the ordinance . . . was designed to operate on the *inhabitants* and settlers . . . exclusively; . . . If the comity between this state and . . . Indiana, is to have any bearing . . . it will be most promoted by this construction. . . the territory adopted laws prohibiting the removal of their domiciled negroes. If, then, such are removed, and . . . their vested rights are denied by the functionaries of this government, it is calculated to produce retaliatory measures, and to cause them to detain . . . our transient slaves, . . . we consider Lydia as free. . . She acquired that freedom . . . during her absence from the state, by the voluntary . . . acts of her master; and . . . it ought to be held equally sacred here, whither she is brought against her will, as it would be, had it been her birthright." [Mills, J.]

*Talbot v. David (a pauper)*, 2 A. K. Marsh. 603, October 1820. Order book of the county clerk: "February court, 1810: 'On motion of Jesse Griffith, ordered, that Jack, aged 29 years, Jane, aged 25 years, and George, aged 21 years, his slaves, be manumitted and set free, agreeable to a deed which said Griffith has filed;' " No deed could be found emancipating either David or his mother Jane. A witness proved [603] "that Talbot had traded with the father and mother of David as free persons; and was informed by Talbot, the manner he obtained the custody of David in 1818, and brought him from the state of Ohio, to which place he had fled for refuge; and that Talbot claimed him in right of his wife, who was "a daughter of Houston who owned David's grandmother in the state of Delaware. Houston's widow married Jesse Griffith, removing with him to Kentucky in 1800. The court instructed the jury [605] "that they were bound from the records to presume a deed of emancipation from Jesse Griffith to the mother of David, duly executed; . . . the jury found a verdict for David,"

Judgment reversed and the cause remanded: [609] "the order . . . cannot have the operation supposed by the court below . . . the order was made not only without the authority of law, but it contains no suggestion from which the execution of a deed of manumission can . . . be presumed." [Owsley, J.]

*Ely v. Thompson*, 3 A. K. Marsh. 70, December 1820. "This is an action of trespass, assault, battery, and imprisonment, brought by a free person of color, against a justice of the peace and constable in their individual characters. The justice pleaded his office, and the fact, that the



plaintiff had lifted his hand in opposition to a white man, who had proved the fact before him, and that he had issued his warrant to apprehend the plaintiff, who was accordingly brought before him, and that he gave sentence, that for the offence the plaintiff should receive thirty lashes on his bare back, according to an act of assembly . . . and avers this to be the same trespass in the declaration mentioned. The constable likewise justifies by alleging his office, and the execution of the warrant, and the infliction of the stripes, pursuant to the sentence of the justice."

Judgment for the defendants reversed, and the cause remanded: I. [73] "the statute relied on by the defendants,<sup>1</sup> was repealed<sup>2</sup> as to all . . . assaults . . . committed by free persons of color," II. [71] "it is contrary to the constitution of this state, and therefore void; . . . [74] If a justice . . . should . . . inflict the stripes against a free person of color, who lifted his hand to save himself . . . from death or severe bodily harm, all men must pronounce the punishment *cruel* indeed. . . The act . . . subjects the free person of color to punishment, on the oath of the party, without trial, . . . is against both the letter and the spirit of the constitution. . . [III.] [75] They are certainly, in some measure, parties [to the political compact]. Although they may not have every benefit . . . which the constitution secures, . . . yet they are entitled to repose under its shadow, and thus secure themselves from the heated vengeance of the organs of government." [Mills, J.]

*Humble v. Humble*, 3 A. K. Marsh. 123, December 1820. Will of Conrad Humble, 1791: "I give and bequeath . . . all my household goods, money and moveable effects." His negroes are not mentioned, "nor is there any clause in the will importing a residuary bequest of the balance or residue of his estate."

Held: [125] "by the expressions 'moveable effects,' the testator intended to dispose of his slaves."

*Hume v. Scott*, 3 A. K. Marsh. 260, April 1821. Action against Hume "to subject him to damages on account of the death of a negro hired or pledged [to him,] . . . through harsh treatment and neglect."

*Moseby v. Corbin*, 3 A. K. Marsh. 289, April 1821. Will of Corbin, 1789: "my will and desire is, that my daughter Ann Grant, shall have a negro wench, to be purchased and raised out of that part of my estate not already bequeathed,"

*Magowen v. Hay*, 3 A. K. Marsh. 452, June 1821. Constable's return: "Executed on a negro child named Rachel, the property of John Hardwick, given up to satisfy this debt; I exposed her to sale, agreeable to law, and Maple Hardwick became the purchaser."

*Samuel v. Minter*, 3 A. K. Marsh. 480, June 1821. Minter bought of Samuel a negro woman and child for eight hundred dollars. She "was diseased by the venereal . . . [and] shortly after the sale the negro took worse, with the disease, and lingered with it till she died, after medical

<sup>1</sup> 2 Littell's Laws 116.

<sup>2</sup> The act to suppress riots, etc. 3 Littell's Laws 55.



aid had been applied in vain. . . [482] about five or six years before the sale, the woman was affected with the disease and that some of her offspring appeared to expire with some similar complaint—and from the advanced stage of the disease, when she became confined, and the opinion of the physicians, it is strongly inferrable [*sic*] that she had the complaint. . . [the appellant] strongly represented her to be sound, and never to have been sick except during the stages of pregnancy.” [481] “The circuit court . . . decreed that the complainant should restore the child, and that the defendant should refund the money received, with a physician’s fee,”

Affirmed.

*Winney v. Cartright*, 3 A. K. Marsh. 493, June 1821. “Mrs. Reed . . . had procured an instrument of writing to be written, emancipating the appellant after her death, which writing she executed and acknowledged . . . before at least two persons, . . . the instrument of writing had been lost, and the witnesses proved its contents, . . . Neither . . . could remember certainly whether the instrument was sealed, . . . The court . . . [494] rejected this evidence”

Judgment reversed, verdict set aside, and new proceedings directed: [498] “the act of 1800<sup>1</sup> allows emancipation by instrument of writing without seal, and without proof or acknowledgment in the county court, and that the court erred in rejecting the proof of the execution of such writing and its contents after its loss was proved,” Such an instrument [495] “may be recorded on proper evidence, to make it evidence against certain persons, and *in perpetuam rei memoriam*; but the act of recording does not vest the title, nor is the title suspended until that is done.” [Mills, J.]

*Smith v. Rowzee*, 3 A. K. Marsh. 527, June 1821. Rowzee sold Lucy to Smith for \$285. [528] “The bargain was made in the counting room of Smith, the girl Lucy not being present. A third person, then present, fixed the price of the slave, at the request of the parties, not by an inspection of the negro, but from a description of her given by Rowzee, and Rowzee was to deliver the negro by sending her from his own house to the house of Smith shortly afterwards, on the same evening. An hour or two after Rowzee had departed, Smith sold the negro to a certain Mr. Bishop, whom he had previously agreed to furnish with a negro of that description. The negro was sent to the house of Smith that evening, veiled with a shawl or handkerchief, and directly after her arrival and before she was seen by Smith, Bishop, who deposed that he never inspected her farther than to compel her to rise from her seat, to her feet, to examine her size, placed her behind him on his horse and started home with her, about eight miles distant. She soon complained of sickness and inability to ride, and grew so bad, that after frequent restings, she was left at a house, on the road, from which she was afterwards, shortly, taken to the house of Bishop, where she, on examination, was found to be very ill.—The hair was gone from one side of her head and she exhibited appearances

<sup>1</sup> 2 Litt. 387.

of severe previous sickness. . . The slave remained at Bishop's and was attended by physicians, employed by Smith, for some days. . . [Smith] then took her to his house, where she remained still sick, and under the care of physicians for some days longer, when she died." Rowzee's family physician [531] "stated that he had been called to attend her about ten or twelve days after she had taken the measles, and by some considerable effort he abated a high fever, under which she labored, and she appeared better and he supposed out of danger. That some days afterwards he was called again to attend her, and she was still diseased,—that he administered more medicine, and shortly after she was sold—that if she had not been moved, and had been well nursed, she might and probably would have recovered." [529] "The jury found a verdict for Rowzee. Smith asked a new trial, which the court refused;"

Judgment reversed and new trial granted.

*Watts v. Griffin*, Litt. Sel. Cas. 244, October 1821. "On the first of July 1816, Griffin purchased, at the price of \$600, a negro man from John Watts, . . . During the same year, Watts removed to the Missouri territory; but, owing to the circumstance of a negro woman he then owned, the wife of the man he had sold to Griffin, being unwilling to go with him, and having run away, Watts was compelled to hire her to Griffin until Christmas following. This negro woman afterwards came to the possession of Francis Watts, the son of John; . . . [248] It is proved that John Watts gave to his son Francis a bill of sale for the woman; but it . . . was not intended by either, to pass the property to Francis, but to enable them, by deluding the woman, to transfer her from this country, to the Missouri territory with more facility."

*Pinkard v. Smith*, Litt. Sel. Cas. 331, October 1821. Held: the act of 1798 has placed slaves, as respects the interests of husbands, on the same footing with chattels at common law.

*Scotts v. Hume*, Litt. Sel. Cas. 378, October 1821. "to secure the loan, a negro was pledged by the plaintiffs in error, who had been inhumanly treated by the defendant, by exposing him in inclement weather, so that he sickened; and after his sickness commenced, was neglected, and no physician was procured to attend him, and he died;"

*Hughes v. Waring*, Litt. Sel. Cas. 402, October 1821. "For the hire of five negro men . . . not exceeding the sum of eighty dollars in each month, . . . I am to return the said negroes to the said Waring, well shod, with new, strong, double-soled shoes, and in the mean time I am to keep them well shod, and have them well treated in every respect, and not to suffer them to be abused in any manner whatever; and if any of them be taken sick, I am to have them particularly attended to, and advise the said Waring of such ill health immediately; and should the said boys, or any of them, be ill for any considerable length of time, the said Waring is to make a proportionate deduction for the time so lost, and is also to furnish the said negroes with all their clothing, except shoes, which the said Hughes is to furnish." The negroes hired "were sick and unable to labor for seventy-two days, . . . [403] the defendant in error did not furnish the negroes with clothing, as agreed on his part."

*Barnett v. Powell*, Litt. Sel. Cas. 409, October 1821. Powell, in 1818, bought from the slave of Barnett, "without the leave or consent of the plaintiff, in writing or otherwise, one mare of the value of one hundred dollars;" violating the act against dealing with slaves.

*Trigg v. Northcut*, Litt. Sel. Cas. 414, November 1821. "Trigg on his part covenanted to place with Northcut a yellow boy named Nelson, and continue him with him for three years, as an apprentice: and Northcut on his part, among other things, covenanted to teach the boy, Nelson, the art of house-plastering. . . Trigg took the boy . . out of Northcut's possession, . . a plasterer, stated . . that he would not give \$7 a month for said boy, nor for any other who understood the business no better,"

*Cook v. Wilson*, Litt. Sel. Cas. 437, December 1821. Wilson was, [438] "during the revolutionary war . . an officer in the ten months' service, in South-Carolina; that an officer in that service was entitled to two confiscated slaves; that the mother of Juda was allotted to him, . . Juda about the close of the revolutionary war, was given to the wife of the plaintiff, as a compensation for her trouble in taking care of the other confiscated slaves,"

*Cabiness v. Herndon*, Litt. Sel. Cas. 469, December 1821. [474] "The negro . . was not delivered to Herndon [who had bought her for \$325] until two or three days after the time when she was to have been delivered, when she was sent to his house, where he had her inspected by a physician, and then, on the same day or next morning, dismissed her. This was about the tenth of January," [470] "She wandered about. . . [474] and some time in the month of February following, she died in the kitchen of John Moss, into which she crept for shelter, half naked and starved, and where she remained four or five days."

*Overall v. Overall*, Litt. Sel. Cas. 501, December 1821. Will of John Overall, dated 1821: [502] "From this day, I declare old Nell to be free, and fairly emancipated from any future bondage to me or my children."

*Grundy v. Jackson*, 1 Littell 11, April 1822. [14] "one of the slaves was sick for a considerable time, and was put under the hands of a physician, and boarded by another individual, to be near the physician;"

Held: the hirer of slaves is chargeable with physicians' fees and the expenses of their sickness, unless there is an express agreement to the contrary.

*Morris v. Barkley*, 1 Littell 64, April 1822. Action of slander. The words were that the plaintiff "kept his negro woman, and had a child by her;" Plaintiff obtained a verdict.

*Barbour v. Robertson*, 1 Littell 93, April 1822. James Robertson left "considerable personal estate, and one slave, named Caesar; that Philip Barbour, in the year 1782, administered on his estate, and received into his hands about three hundred pounds, for the services of the said James Robertson as a lieutenant in the revolutionary war, as well as for the service of negro Caesar;"



*Overstreet v. Philips*, 1 Littell 120, April 1822. "immediately after the purchase of the negroes, Philips took them to Natchez, for market, where he sold them to one Job Ruth, who discovered the woman to be afflicted with the disease commonly called the King's Evil, and returned her and her child to Philips;"

*Findly v. Tyler*, 1 Littell 161, June 1822. Action "brought by Nancy Tyler, a woman of colour . . . to recover her freedom. . . [witness] proved that about twenty-eight years previous to the trial, he resided in Jonesborough in Tennessee, and that a free woman, by the name of Polly Tyler, was delivered of a mulatto child, as he was informed, and that he afterwards saw the child at the breast of the woman; and that, whilst young, the child was taken from its mother, and . . . put into the possession of a certain Thomas Scott, . . . that, some time thereafter, he saw a mulatto girl, who was reputed to be the same girl, going to school in the neighborhood of Scott's and near to his house; and, when interrogated, observed that it was not usual for people of that country to educate their slaves, and that he knew of no instance in which it was done. He further proved, that whilst the mulatto girl was going to school, she, in play with an Indian, fell and received a cut in her eyebrow, . . . [162] Whereupon the girl was brought into court, her eyebrow examined, and a scar found to accord with the description of the wound given by the witness." Verdict found against Findly. Motion for a new trial denied.

Judgment affirmed. See *Finley v. Nancy*, p. 306, *infra*.

*Brownston v. Cropper*, 1 Littell 173, June 1822. Brownston "purchased a negro of Cropper, on the 19th of November 1819, and that she died on the 5th of the ensuing month, . . . [175] Two witnesses prove the representations of Cropper, that the slave was hearty and sound, and fit for business;" Cropper's daughter [176] "deposes that the slave herself told Brownston of her sickness, before the sale; and after the sale, when informed by him that he had bought her, she stated she could not be of any use to him, as she was near death. When it is recollected, that frequently, on such occasions, there is a strong indisposition in such creatures to be sold, and that by stratagem, to avoid a sale, they may frequently feign sickness, or magnify any particular complaint with which they are affected, Brownston might well disbelieve her story; especially, when the words of the master assured him to the contrary."

Held: "For his own statements, the master is responsible, and ought not to be permitted to release himself of responsibility for his own falsehoods, by showing that the slave, at the time, so far corrected him, as to tell the truth."

*Watts v. Bullock*, 1 Littell 252, June 1822. Mildred Gregory "was a widow and childless, and had long determined against intestacy. The primary motive of that determination, was the emancipation of her slaves; to effect which . . . was, of all earthly objects, the dearest to her heart." Will established.

*Hughes v. Graves*, 1 Littell 317, June 1822. "The court . . . pronounced a decree foreclosing the mortgage and directing a sale of the



slave Fanny. She was accordingly sold for . . \$325. . . [318] Fanny, subsequent to the execution of the mortgage, had two children, . . Walker [who bought Fanny from the mortgagor] . . admits . . that he sent them off by an agent, who sold them for \$150; but states that he is ignorant to whom they were sold, or where they are, and contends that they are not liable to the mortgage;”

Held: [319] “the children born of Fanny, after the execution of the mortgage, are as much liable as Fanny herself is;”

*Amy (a woman of colour) v. Smith*, 1 Littell 326, June 1822. [327] “an action of trespass, assault and battery, and false imprisonment, . . the plaintiff proved by a witness, that in the year Cornwallis surrendered, he went to Pennsylvania, and resided in the house of . . Gingery, . . the plaintiff . . waited upon Mrs. Gingery, . . was from fourteen to seventeen years of age; that he heard the Gingerys, in repeated conversations, say that she was to be free at a particular age, not exceeding thirty or thirty-five; . . that the Gingerys, in 1783, moved to Maryland, taking the plaintiff with them; . . The plaintiff also proved by sundry witnesses, that between 1780 and 1790, they knew her in Virginia, . . and that for several years she acted and passed as a free person, without any one exercising any ownership over her. . . read in evidence the will of Christian Gingery, . . in which, among other devises to his wife, he directs ‘that she is to have the mulatto girl during her natural life, or until the girl comes to the age of thirty-one years;’ . . The plaintiff also read the abolition act of Pennsylvania.” [346] “Amy set up a claim, that she belonged to that class of servants in Pennsylvania who were servants until thirty-one years of age.” [327] “On the part of the defendant, it was proved, that the plaintiff’s mother was of unmixed African blood, and a slave for life, and that the plaintiff was born in Pennsylvania, prior to the passage of the abolition act of that state, and was sold, when very small, to old Mr. Gingery . . [328] that she was always held in slavery, except for a short time, when she ran away from the Gingerys, in Virginia; and that they sold her to the defendant in 1790, in Virginia, who shortly after removed to Kentucky, . . The defendant read the statute of Kentucky, approved February 20th, 1808, entitled ‘an act limiting actions in certain cases.’ . . [329] a verdict and judgment having been rendered against her, she has appealed”

Judgment affirmed, without cost: I. The will did not emancipate her; II. the act of 1808, [331] “in limiting the right to maintain the action to two years, . . [335] cannot be an infraction of” the constitution of the United States, as she was not [334] a “citizen, either of Pennsylvania or of Virginia, unless she belonged to a class of society upon which, by the institutions of the states, was conferred a right to enjoy all the privileges and immunities appertaining to the state. That this was the case, there is no evidence in the record to show, and the presumption is against it. Free negroes and mulattoes are, almost everywhere, considered and treated as a degraded race of people; insomuch so, that, under the constitution and laws of the United States, they cannot become citizens of the United States. . . III. [335] Nor can we think it a violation of the constitution of this state.” Mills, J. dissented, pp. 337-347.

*Johnson v. Moore*, 1 Littell 371, June 1822. [372] "He owned some slaves, all of whom were dead or sold before his death, except one female, who lived with him, as was supposed, in a state of concubinage, and possessed considerable influence over him. Her he had emancipated by a written instrument, recorded, to take effect at his death. . . [373] in 1820 . . he executed a will giving to his female slave \$1500,"

*Wright v. Wright*, 2 Littell 8, October 1822. Joseph Wright had bought a negro slave in Maryland and "brought him to this country, and many years since, placed him under Benjamin Wright, to learn the trade of a Blacksmith; . . [9] the slave is worth at least fifteen hundred dollars, and his annual hire, three hundred and sixty dollars,"

*Hanks v. McKee*, 2 Littell 227, December 1822. McKee sold Hanks "a negro woman slave at the price of four hundred dollars, . . represented to be sound and healthy, except the phthisic, which he represented that she had but slightly," The messenger sent by Hanks for the slave went home with McKee. His wife [228] "remonstrated against sending the slave on account of her sickness. She was, however, taken home [ten or twelve miles away]; but was found, unable to travel there upon foot, and unable to work, and lingered and died with the complaint in two or three weeks."

*Quinn v. Stockton*, 2 Littell 343, December 1822. [348] "When distributees come into hotch pot, the personal estate must make a separate parcel, to be divided in kind. Nor do we conceive that personal estate advanced ought to be blended with slaves."

*Thomas v. White*, 3 Littell 177, April 1823. Will of Daniel White of Virginia: [181] "my will and desire is, for my well beloved wife to have the use of negro woman Bett, while she raises three children fit to be raised without the breast; then the said negro Bett to return to my son, Daniel White, and his heirs, . . I give . . to my son, William White, one of the children before mentioned is now born, named Dina; and if he lives to have an heir, if not, to be sold and equally divided between his sister, Mary White, and brother, George White, . . I give . . to my daughter, Mary White, . . the next child my negro Bett raises; to be divided in the same manner as the before mentioned, if she dies without heir, . . I give . . to my son, George White, the third child the said negro woman raises, to be divided among the survivor or survivors."

*Peter Cooke (a person of colour) v. Cooke*, 3 Littell 238, April 1823. "William Cooke entered into an agreement with his slave, Peter, to emancipate him, on the payment of two hundred and fifty dollars; or rather, the contract was made with Seth Cooke and Abraham Bohannon, as agents for the slave, and was reduced to writing and signed by them in these words: 'A statement of a contract made by William Cooke and us, Seth Cooke and Abraham Bohannon, as agents for Peter, a slave, on the terms following; Said Cooke agrees to emancipate Peter, for \$250, with interest on \$125 from the 4th day of June, 1815, until paid, the balance of the above \$250.' . . In his last illness, he made his nuncupative will,

reduced to writing at the time it was spoken, but not signed by him, in which he directs that 'Peter should be free, on the payment of \$50, a balance of \$250, which Seth Cooke and Abraham Bohannon, as agents for Peter, had undertaken to pay; which is all paid, but the aforesaid \$50.' After his death, Peter paid the remaining \$50 to his widow and executrix, and brought this action of trespass, assault, battery and false imprisonment, against the appellee, to assert his right to freedom. On the trial, it was proved that after the date of the aforesaid contract, Peter went at large as a free person, by the indulgence of his master, who until his death always recognized the right of Peter to freedom, on the payment of \$250."

Held: Peter cannot support his claim to freedom, under the writing aforesaid, [239] "because it was an executory contract; . . slaves, when they pass by last will and testament, being considered as real property," cannot pass by a nuncupative will.

*Bell v. North*, 4 Littell 133, October 1823. The sheriff "had, in virtue of an execution . . seized the slaves in question, and taken them bound to the jail, where they were kept and treated humanely, until the 20th day after the seizure, when they were released by a *supersedeas*;"

*Williams v. Dorsey*, 4 Littell 265, November 1823. "he purchased . . a negro man at the price of \$500, . . the slave . . was subject to fits, and laboring under a consumption, . . having discovered the slave to be unsound, . . he offered to return to them the slave, . . they refused . . he has since died with the diseases"

*Watts v. Hunn*, 4 Littell 267, November 1823. "the slaves had lately before the purchase run away, and had laid out exposed in a cold cave, which had brought on new complaints or had increased the existing ones, . . the two parents of the family were far older . . than represented."

*Yancey v. Downer*, 5 Littell 8, April 1824. "Yancey, in an action of trespass for breaking his close and house, and beating and wounding his slave, so that she was confined and useless for many months, recovered against Downer a verdict and judgment for five hundred and fifty dollars," Downer answered [10] "that he had not injured the slave of Yancey to the value of one dollar, as he had only moderately chastised her, and the injury which she received, was by a fall, which happened by her running out of the kitchen, in a passion."

*Harris v. Paynes*, 5 Littell 105, April 1824. [117] "The slaves had been placed by Alfred Payne to work at a salt well . . about five miles from Scottsville."

*Williams v. Blincoe*, 5 Littell 171, May 1824. Williams, "a justice of the peace, permitted a bright mulatto single woman, to make oath before him, that the appellee was the father of her bastard child, and thereupon issued his warrant of arrest in the usual form,"

Held: the acts of Kentucky [173] "impose no such disqualification to take any oath, or make any affidavit which may be necessary, as in this case, to commence the controversy, or to forward an accusation or support a defence incidental and preparatory to the trial in chief." Though a



warrant may be granted on the application of a free woman of color, she is an incompetent witness on the trial before the county court.

*Chasteen v. Ford*, 5 Littell 268, June 1824. Action of "trespass, assault and battery and false imprisonment, brought . . . by Daniel Ford, a man of colour, to recover his freedom. . . [269] Whilst a widower and having two children, Lewis Chasteen in 1800, made his will, directing that all the slaves of which he died possessed, should be emancipated; the males at their arrival to the age of 25 years, and the females at the age of twenty-one. . . He afterward married a second wife, and died, leaving several children by his second marriage. At the time of his death, Daniel Ford . . . was a slave and belonged to the testator, and was under the age of twenty-five; but he arrived at that age before the commencement of this suit. . . The children of the testator by the second marriage . . . exhibited their bill in equity against the children by the first marriage and the executors, alleging the invalidity of the will," and it was pronounced invalid.

Held: [270] "as respects the slaves mentioned in the will, the executors were the only necessary parties to the suit brought in equity to set aside the will, and consequently the decree pronounced in that suit, to which they were parties, must be conclusive against the right asserted by Ford under the will." Mills, J. dissented: "the revocation of a will . . . by the birth of after-born children, under the third section of the statute of wills, does not exist in cases of emancipation, and that such revocation is totally taken away and repealed in this respect, by the twenty-seventh section of the act concerning slaves, 2 Dig. 1155; and that no after-born children can claim an interest in slaves emancipated by the will, but are barred from so doing by the latter act."

*Stanley v. Earl*, 5 Littell 281, June 1824. Boyle, C. J.: [285] "No man can, by the laws of nature, have dominion over his fellow-man; . . . if the master voluntarily removes the slave to such non-slaveholding state, or if the slave escapes into a foreign country, which does not tolerate slavery, the master's right, so long as the slave remains there, is gone; because he has no remedy to enforce or protect it."

*Young v. Bruces*, 5 Littell 324, June 1824. "On or before the 25th of December, 1819, we promise to pay Aaron H. Young, the sum of one hundred and twenty dollars, for the hire of a negro man, named Dick, from this time until the said 25th of December, 1819, to be returned well clothed at that time." Dated December 29, 1818. In "July, 1819, without any fault of theirs, and by inevitable accident, the slave, Dick, was drowned in the Ohio river,"

Held: not "a covenant to ensure such return, in the event of his death in the mean time."

*Free Frank and Lucy v. Denham*, 5 Littell 330, June 1824. "an action of debt . . . brought upon a sealed writing executed by free Frank and Lucy, stipulating for the payment of two hundred and twelve dollars to the intestate. . . 'Free Lucy . . . says, that at the time of the supposed execution . . . she was . . . married to Frank, a person of color,' . . . the administrator replied, that . . . the said defendants are free persons of color, and therefore not authorized to unite in the bonds of wedlock;"



Held: "Whilst in a state of slavery, we admit that persons of colour are incapable of contracting marriage, for any legal purpose. . . [331] but immediately upon being emancipated, the restraint which was imposed upon their will and actions, by their bondage, is removed, and with that, their competency to contract matrimony is restored. . . the *feme* becomes subject to the disabilities of coverture," [Owsley, J.] See same *v.* same, p. 307, *infra*.

*Chinn v. Respass*, 1 T. B. Mon. 25, October 1824. "in the year 1777, Isaac Hickman died [in Virginia], possessed . . of a slave, the mother of those in controversy . . having previously made a nuncupative will . . 'That if his wife should be with child, and that a son, he gave him all his land, and one negro boy, near his own age, . . to be paid to him at the age of nineteen years; . . in case his daughter Elizabeth should come to age, or marry, then his wife to have half his personal estate. . . further . . fifty pounds currency, more than her part, . . [26] and that a negro boy, Daniel, should be sold to pay the above sum,' . . a male child . . was afterwards born, . . the wife of the testator, after his death, intermarried with Peter Rust, and had died" Rust gave the slaves to the defendant. Hickman's daughter, Elizabeth Chinn, and her husband brought an action of detinue.

Held: I. [27] "the interest of . . Mrs. Chinn, in the slaves in controversy . . must be derived from the will . . and can not have been cast upon her by descent; for the posthumous son was, as the law . . stood in Virginia, the only heir of his real estate, and slaves were then . . real estate, . . [II.] the testator intended the residue of his estate, after the devise to his son, should be divided between his wife and . . Mrs. Chinn. . . [III.] [28] Slaves were . . real estate, . . But, it does not follow that the testator, by the devise of his personal estate, did not intend that his slaves should pass; for, although slaves were, by law, made real estate, for the purposes of descent and dower, and, perhaps, some others, yet they had, in law, many of the attributes of personal estate. They would pass by a nuncupative will, and lands would not; . . When, therefore, a man devised his personal estate, he must be understood to intend, that his slaves should pass thereby, unless he used some expressions indicating a different intention," [Boyle, C. J.]

*Ward v. Deering*, 2 T. B. Mon. 9, April 1825. "\$60, as the hire of the boy [negro man] for that year;"

*Bailey v. Duncan*, 2 T. B. Mon. 20, April 1825. Held: [22] "Technically, the word *goods* does not include land or slaves;" but, in a devise, may embrace them.

*Marshall v. Moore*, 2 T. B. Mon. 69, June 1825. Will, admitted to probate in 1800: "\$160, . . to be put to the use of buying her a negro girl,"

*Hocker v. Davis*, 2 T. B. Mon. 118, October 1825. [120] "by the will of Philip Hocker, senior, [1821], she could only be held in slavery until she was twenty-five years of age;"

*Jenkins v. Morton*, 3 T. B. Mon. 28, November 1825. A negro man slave was sold at the price of six hundred dollars and fifty cents.

*Kenningham v. McLaughlin*, 3 T. B. Mon. 30, November 1825. "when she was three or four years of age, she was taken on a visit to her paternal grandfather's dwelling, in 1808. While there, the grandfather presented to her the negro boy slave in question, about the same age with herself; that her father took the slave into custody for his child,"

*Bush v. White*, 3 T. B. Mon. 100, November 1825. In 1793 [104] "when Stites got the slave, he moved to, and remained in the then territory northwest of the river Ohio, now the State of Ohio, where the slave Betty, since the mother of the other slaves,<sup>1</sup> remained with him until the time he abandoned his wife." She then returned to her father's house in Kentucky with Betty.

Held: "This residence in the now State of Ohio, being before it was a State, and while it was under the ordinance of Congress which forbade slavery there, certainly destroyed all title to Betty,"

*Carney (a coloured man) v. Hampton*, 3 T. B. Mon. 228, May 1826. Carney "was the son of a female slave, sold in the year 1792, in the State of New York, by Philip Lott, a resident of that State, to Gen. Matthews, then a resident of the State of Georgia, and a member of Congress from the latter State. Matthews removed the said female to Georgia, and there gave her to his daughter, whose husband afterwards came to Kentucky and sold her; and the plaintiff was born long since the sale to Matthews and the gift to his daughter." The claim of Carney rests upon the act of New York, February 22, 1788.

Held: the act of New York prohibited only the purchase and exportation of slaves for the purpose of being sold without the state, not their exportation for other purposes.

*Trumbo v. Sorrencey*, 3 T. B. Mon. 284, October 1826. Sorrencey "devised to his wife during life, . . . his slaves by name—the slaves to be disposed of at her death, as she may think proper, except Ails, whom he directs to be set free at the death of his wife." He died in 1817.

*James v. Neal*, 3 T. B. Mon. 369, October 1826. "Neal hired of James, for the term of one year, a negro man, at the price of two hundred and fifty dollars,"

*Finley v. Nancy*,<sup>2</sup> 3 T. B. Mon. 400, December 1826. "Afterward, Finley filed this bill, praying the chancellor to interfere, and grant a new trial at law." Bill dismissed. Decree affirmed: [402] "It may be a matter of some consideration . . . whether the chancellor ought, in any case, to grant a new trial at law, for the purpose of taking away a right to freedom gained at law. For, as the chancellor will only interfere to take from a party a legal advantage, which, in conscience, he cannot retain, it may be

<sup>1</sup> One of the slaves has [105] "commenced an action to assert and establish his freedom."

<sup>2</sup> For other facts, see *Findly v. Tyler*, p. 300, *supra*.

doubted whether a right to freedom can ever be a claim of that character. . . the case which would warrant such interference ought to be strong and clear." [Mills, J.]

*Gale v. Miller*, 3 T. B. Mon. 416, December 1826. Held: if the husband of the doweress [419] "remove, or voluntarily permit to be removed out of this commonwealth, any of the slaves which he may hold in right of his wife's dower, without the consent of him. . . in reversion, the act declares, it shall be lawful for him . . . in reversion to enter into, possess and enjoy, not the slave removed only, but all the estate which such husband holdeth in right of his wife's dower, for and during the life of the said husband." [Owsley, J.]

*Davis v. Hall*, 4 T. B. Mon. 23, January 1827. In 1811 Davis sold Hall about two hundred acres of land. "Hall agreed to pay Davis a negro man slave in hand, at the price of \$500; . . . And the residue of the whole price, to-wit, \$1,750, might be discharged in good young negroes by the 1st day of March, 1816."

*Free Lucy and Frank v. Denham*,<sup>1</sup> 4 T. B. Mon. 167, January 1827. Held: [169] "the court below should have allowed the plea offered by Frank, in which he alleges that he was a slave when the writing sued on was delivered by him, to be filed."

*Moore v. Howe*, 4 T. B. Mon. 199, April 1827. Will of John Dunlap, 1791: "I will to my daughter Jane, one negro girl, named Nan, and issue, also one mulatto boy named Jack, until he is of the age of twenty-six years; and in that time, to be learned the art and mystery of shoe-maker, and to be taught to read, and when he comes to the age mentioned, then to be free; or at liberty to work or labor for himself;"

*Wood v. Lee*, 5 T. B. Mon. 50, June 1827. Will, 1794: [51] "To his daughter Matilda . . . one slave, by name, and another, to be the first child that a certain slave bequeathed to his wife should have."

*Mitchell v. Warden*, 5 T. B. Mon. 261, June 1827. Witness "had a runaway negro in his custody as jailor; the negro gave an order to his former master for a horse which the negro claimed, and then in possession of Mitchell, requesting the witness to get the horse, and deliver him to the negro's wife. Mitchell said he should not have the horse, for Warden and himself had got the horse for catching the negro; . . . [262] Mr. M'Donald had bought the negro of Mr. Smith; the negro ran away; M'Donald employed Mitchell to search for the negro, and agreed to give a dollar per day for his services; M'Donald had also employed Warden to search for the negro. Mitchell proposed to M'Donald, that if he would let him have the horse which the negroe had, he would not charge the dollar per day for his services; M'Donald declared the horse was not his, he had not bought the horse, and had no claim to him; but if he caught the negro, he, Mitchell, might have his, M'Donald's, interest in the horse; and Mitchell had caught the negro. Mr. Smith, the former proprietor of the negro, deposed that the negro had been in the habit of riding his horses

<sup>1</sup> See same *v. same*, p. 304, *supra*.

at night, to prevent which he had given the negro a poney; the negro had swapt several times until he had got a very good horse, by giving boot, which the negro had paid with Smith's property, taken out of his mill; . . . [263] Mitchell applied to him to know what claim he had to the horse; Smith replied, that if his claim of \$12 was paid, he would give the horse to the negro; Mitchell paid him the \$12, and from that time, Smith had set up no claim to the horse."

*Roberts v. Smiley*, 5 T. B. Mon. 270, June 1827. "Smiley sold to Roberts and Co. a negro boy named John, and on the 28th day of February, 1816, executed to them a bill of sale, in which he covenanted to warrant and defend the boy against the claims of all and every person whatsoever. The boy was afterwards carried by Roberts and Co. to the State of Louisiana, and there sold; and in a suit brought by him in that State, to recover his freedom, the boy was adjudged by the court to be free. Whilst that suit was pending, the purchasers from Roberts and Co. informed them thereof, and they thereupon gave notice to Smiley, and requested him to attend to the procuring evidence to prove the boy a slave. After the boy had succeeded in recovering his freedom, Roberts and Co. brought an action of covenant against Smiley, upon the bill of sale."

*Dougherty v. Holloway*, 5 T. B. Mon. 314, June 1827. "that the oxen were delivered, . . . and that a negro was employed one day in driving the oxen, twenty-seven miles, to the defendant, and one day in returning."

*Harrison v. Murrell*, 5 T. B. Mon. 359, July 1827. "Harrison hired of Murrell two negroes, for the term of one year, at the price of \$160, and covenanted to pay the same . . . 25th day of December, 1820. The negroes had not been in the possession of Harrison but little more than one month, before one of them died,"

Held: Harrison is not entitled to an abatement in the sum agreed to be paid for the hire, [360] "however hard it may seem to be upon him to have to pay hire for a negro after he is dead,"

*Jarrett v. Higbee*, 5 T. B. Mon. 546, October 1827. "Jarrett declared against Higbee in a plea of trespass *vi et armis*, for . . . imprisoning . . . [his] slave, . . . and for loss of service, and for expense of regaining the possession. Higbee . . . justified, because he apprehended the negro man [Allen] in the highway, in Fayette county, suspected to be a runaway, . . . [548] Gatewood . . . saw [Higbee] . . . when examining the passes, and advised him to take up the slave as a runaway. The negro got in a rage at being called a runaway, and drew out of his boot another pass;" Higbee [546] "brought the slave to the jail to be committed as a runaway, . . . [547] the jailor refused to receive him without a mittimus; the defendant went away with the slave and returned with a mittimus" signed by a justice of the peace, who suspected that the pass carried by the slave was a forgery. It was as follows: "Know all men by these presents, I, J. Jarrett, of Livingston, and State of Kentucky, do agree that this black man Allen, do bargain and trade for himself until the first day of May next; and also, for to pass and repass from Livingston county, Kentucky, to the Monongalia county, State of Virginia, Morgantown, and then to return home



to the same Livingston county, Kentucky, again, near the mouth of Cumberland river, Smithland. Given under my hand this 26th day of September, 1822. . . John Jarrett." [Witness, Thomas Jarrett.] He ordered "that said Allen be committed to the jail of Fayette, there to remain until answer can be had from said John Jarrett, which the jailor will procure as speedily as possible. Upon this mittimus the jailor confined the slave in jail sixty-eight days, until he wrote to the plaintiff, who came up to Lexington, proved his property and paid fees, amounting to upwards of \$32, and took the slave away;" It turned out that the slave was not a runaway, [548] "as Jarrett acknowledged he had given the passes; that \$40 was a fair compensation to come from Livingston and carry the slave home. It was agreed that the distance from Livingston to Fayette, is between 230 and 250 miles."

Judgment affirmed: [551] "To bargain and trade for himself, contains an authority to hire himself, as well as to buy and sell and deal in articles and commodities, without specification or limitation. These permissions, and such acts of the slave, are violations by master and slave, of the policy, spirit and letter of the statute of 16th of December, 1802, against permitting slaves to go at large and hire themselves, 2 Dig. 1159; and of the 12th sect. of the act of 1789, 2 Dig. 1152, against buying, selling or receiving to, or from, or by a slave, without a note in writing from the master, expressive of the article. . . It was not a lawful pass or permit, it was a species of temporary and unlawful manumission, unlawful in its purpose and duration, wanting the solemn form, sanction, authentication and safeguard, as a deed of emancipation, and by its terms and purposes, shewing that the slave was not proceeding upon the lawful business of the master, but at the will and for the purposes of the slave himself. . . [556] reasonable grounds to suspect the slave as a runaway, justifies the taker-up who acts in good faith. . . [557] Experience teaches, that there is no danger to be apprehended from too great an alacrity, or passionate ardour, in apprehending slaves as runaways, without probable cause. The reward fixed by law for the service of apprehending or conveying a runaway to his owner, is no temptation to abuse." [Bibb, C. J.]. Mills, J. dissents: [559] "leave to bargain and trade for himself, inserted in the permit, although illegal, does not vitiate the authority to pass, which the master had a right to give; and that whosoever apprehends a slave to the prejudice of his master, acts at his peril, if he be not a runaway, and has a pass which is genuine; just as he would act in apprehending a supposed felon."

*Commonwealth v. Kimberlain*, 6 T. B. Mon. 43, October 1827. "to answer a charge of felony in killing a slave, which the justices have adjudged to be manslaughter."

*Hart v. Fanny Ann*, 6 T. B. Mon. 49, October 1827. Will of William Hart, 1803: "directing his slave Peter, to be free after five years service . . . 'and all the rest of my slaves, by name Alsey, Lucy, Anna, Selina and Turner, shall be emancipated, with their children if they should have any, as soon as they severally arrive at thirty years of age, except the last mentioned and by name Turner, who shall serve Jer'h. Davis until he is twenty one years of age and then be free.'"

Held: the children of the females are manumitted as soon as their mothers respectively reach the age of thirty years.

*M'Dowell v. Lawless*, 6 T. B. Mon. 139, October 1827. Held: slaves devised pass as real estate immediately to the devisee; if not specifically devised they pass to the personal representatives.

*Roberts v. Sayre*, 6 T. B. Mon. 188, December 1827. Wilkerson "agreed with him that if he should send down the Mississippi and regain the slave which Walter B. Wilkerson had carried away with him, and cause that slave to be sold and the money brought back, or should cause the said slave to be brought up the river and restored to him,"

*Hawkins v. Craig*, 6 T. B. Mon. 254, December 1827. The second husband's administrator claims the slaves assigned the wife for dower in the first husband's estate, against the third husband. Held: slaves are for most purposes chattels. Slaves assigned the *feme* for dower in her first husband's estate, and reduced to possession by her second husband, do not survive to her on his death (as would dower land assigned to her), but pass to his personal representatives.

*M'Cracken v. M'Cracken*, 6 T. B. Mon. 342, December 1827. Will of Virgil M'Cracken, 1812: [343] "the negroes devised to my children, to be kept together for the purpose of supporting and schooling them; but it is my wish that my executors should dispose of every foot of land for the purpose of paying my debts before the negroes should be sold."

*Horsburg v. Baker*, 1 Peters 232, January 1828. In 1813 a bill was filed stating that, in 1787, Horsburg [233] "did, by deed, confirm to Martin Baker, and Hannah his wife, for their lives and the life of the survivor, then residing . . . in Virginia, a negro girl named Charlotte, previously loaned to them; . . . reserving to himself and his heirs, the reversion of the said slave, and her increase; and prohibiting any alienation of them, under the penalty of forfeiting the loan. . . . that Baker and wife have removed to Kentucky with the slave Charlotte, and her increase; . . . [234] In May 1814 . . . [a] supplemental bill . . . states, that Baker and wife had sold Charlotte and her increase to . . . Clarke and . . . Boyce; who intend removing them out of the state, and concealing them. . . . In answer . . . Baker and wife say, that, in . . . 1773, . . . Simmons, and others . . . contributed forty-three pounds, for the purpose of purchasing a negro girl, for the said Hannah, which sum was placed in the hands of . . . Horsburg, as their agent, with instructions to convey the said negro to the defendants for their lives, and to their children, after the death of the survivor. . . . [235] Under these instructions, Charlotte was purchased, and delivered to them. In the year 1787, after the defendants had been in peaceable possession of Charlotte, about fourteen years, . . . Horsburg . . . sent to them . . . the deed; . . . on the same day, . . . Horsburg executed another writing, obliging him to convey Charlotte and her increase, after the death of the defendants, to their children, . . . In May 1824, . . . [an] amended bill charges, that Clarke and Boyce purchased, not only pending the suit, but with knowledge in fact thereof;—that they purchased

the said slaves for a trifle, less than half their value, in consequence of an agreement to take upon themselves the risk of the title."

*Groves v. Kennon*, 6 T. B. Mon. 632, April 1828. Will of Thomas Berry, dated 1806: [633] "Whereas I put into the hands of my daughter Sally, wife of William Kennon, a negro girl named Lucy, which negro girl it is my will and desire shall be set free at the age of twenty-five years, but I reserve to myself all the children she may have previous to her arriving at the age of twenty-five years, all of which is to be considered part of my undivided estate until the death of my wife, . . . [634] except the first she has, which I hereby give and bequeath to my grand daughter, Fanny Kennon."

*Tumey v. Knox*, 7 T. B. Mon. 88, April 1828. "Mr. Durham, who occasionally bled in the neighborhood, . . . was permitted, to detail . . . what the slave himself had stated . . . to Mr. Durham, who had been sent for to bleed the negro then in bed;"

Held: declaration of the slave to Durham excluded. Mills, J. [92] "thinks the declaration of a slave may, in some cases, constitute a part of the *res gestæ*, and be proper to be given in evidence, and, as the opinion of a physician . . . is often based on his examination of his patient, combined with other circumstances, it might be competent for the physician to detail the reasons for his opinion combined with his examination."

*Forsyth v. Kreakbaum*, 7 T. B. Mon. 97, April 1828. "In the latter part of 1804, Forsyth and his wife, made a visit to her father, having with them the plaintiff, Evelina Forsyth, a child of the marriage, then a few months old. The father who was in easy circumstances, and in the habit of advancing his children in slaves, and of presenting a slave to each of his grand children, during the visit, . . . presented to Evelina . . . an infant slave, then between four and six years of age, and delivered her to the father of Evelina, to be kept and raised by him, along with his child, as her natural guardian."

*Miller v. McClelland*, 7 T. B. Mon. 231, May 1828. Held: children of a female slave, born in the time of an estate for life, go with her, at the termination of the particular estate, to the remainder man, and not to the tenant for life.

*Jarman v. Patterson*, 7 T. B. Mon. 644, December 1828. Held: slaves in Kentucky have no rights secured to them by the constitution, except of trial by jury in cases of felony. [645] "However deeply it may be regretted, and whether it be politic or impolitic, a slave by our code, is not treated as a person, but (*negotium*), a thing, as he stood in the civil code of the Roman Empire." [Mills, J.]

*Conclude v. Williamson*, 1 J. J. Marsh. 16, January 1829. "In 1825, the Legislature of Kentucky passed an act, (see Sessions acts of 1824, p. 195,) declaring that the plaintiff in error, Zachariah Conclude, should be a freeman, and should inherit the estate of Isaac Conclude, his father, who being a free man of color, had died without heirs. . . . [17] Isaac Conclude, in his life time, purchased the complainant; and had expressed

a determination to purchase and emancipate his daughter, . . he had deposited \$200 with a friend to aid in the purchase, and directed him to make the purchase of his daughter, and set her free, if he himself should die before the desired object could be accomplished." The administrator [16] "received of the estate of the intestate, \$440 75 cts.; . . before the date of the act of the Legislature, he had expended \$400 of that fund in the purchase" of intestate's daughter, "whom he purchased to emancipate, according to the intention, and in fulfilment of the repeatedly expressed wishes of the decedant in his life time; and whom he did liberate by Deed, immediately after the purchase."

Held: [19] "Zachariah had no right to this money when it was applied to the manumission of his sister. He then was a slave, and under the control of the administrator."

*Boyce v. Anderson*, 2 Peters 150, January 1829. Action against the "owners of the steam boat *Washington*, to recover from them the value of [Boyce's] four slaves . . the steam boat *Teche*, in descending the Mississippi, with the plaintiff's agent, and the negroes . . and others . . was blown up, and set on fire, and the passengers escaped . . to the shore, . . the steam boat *Washington* was ascending the Mississippi, and passed the burning *Teche*, and when she came opposite to them, . . the agent of the plaintiff, with the negroes . . was received into the yawl belonging to the defendants . . for the purpose of conveying the negroes from the shore . . to the steam boat, . . and that the yawl was upset, the negroes . . were drowned; and evidence conducing to show that the yawl was upset by ill . . management, in putting the steam boat in motion as the yawl approached, and before the passengers were on board the steam boat. . . there was no contract . . about reward;"

Judgment of the lower court in favor of the defendants, affirmed: [156] "the carrier would certainly be responsible only in a case of gross neglect;" [154] "A slave has volition, and has feelings which cannot be entirely disregarded. . . He cannot be stowed away as a common package. . . this rigorous mode of proceeding cannot safely be adopted, unless stipulated for by special contract. Being left at liberty, he may escape. The carrier has not, and cannot have, the same absolute control over him, that he has over inanimate matter. . . he resembles a passenger, . . It would seem reasonable, therefore, that the responsibility of the carrier should be measured by the law which is applicable to passengers, rather than by that which is applicable to the carriage of common goods." [Marshall, C. J.]

*Bucklin v. Thompson*, 1 J. J. Marsh. 223, April 1829. "1821, James Johnson executed a mortgage to Thomas D. Carneal, on . . thirty-eight slaves, . . [224] James Johnson remained in the possession and use of all the property mortgaged, sold some of the slaves and sent others to the lead mines, on the Mississippi,"

*Ellis v. Gosney*, 1 J. J. Marsh. 346, April 1829. "Tom, having afterwards fled from the state, and taken refuge among the Indians, she employed William Ellis, to pursue and reclaim him if possible, and agreed,



that if he should succeed, in restoring to her Tom, she would sell him to him, for £100. Having found Tom, on the northwestern frontier and brought him back to Kentucky,"

*Emily v. Smith*, 1 J. J. Marsh. 593, June 1829. "The deed under which the plaintiff in error claims her freedom, completely emancipated her, from the time of its execution, with the reservation to retain the guardianship of Emily, then an infant, until she should arrive at age. This reservation was personal to Enoch Smith. The defendant had no right to retain the plaintiff, against her will, after the death of said Enoch." [Underwood, J.]

*Leah v. Young*, 2 J. J. Marsh. 18, June 1829. Bill "to enjoin the sale and abduction of Leah and her children, until a suit at law, then pending, for their freedom, should be tried. The court, on demurrer, dismissed the bill." Reversed by the Court of Appeals. "There seems to be a peculiar fitness in an appeal to the conscience of the law, for liberty. . . The chancellor delights in his guardianship over personal liberty; . . he will secure to every individual, who claims to be free, the humble privilege of asserting the claim fairly, freely and fully." [Robertson, J.]

*Reed v. Rice*, 2 J. J. Marsh. 44, June 1829. "Reed, as constable, summoned the defendants . . to assist him, . . they . . went to the residence of Rice, there found the slaves mentioned in the warrant, took them and carried them before a justice of the peace. The wife and sister of Rice seized some of the negroes, who were taken from them; they screamed, and the scene was one of some confusion. It lasted not more than an hour." Berry had sworn "that the slaves, consisting of a woman and four children, had been stolen and carried away from the residence of his intestate,"

*Fanny v. Dejarnet*, 2 J. J. Marsh. 230, October 1829. "On the 10th day of May, 1822, Thomas Dejarnet signed and acknowledged, in the presence of three attesting witnesses, a deed for emancipating Fanny his slave. . . [231] it was the 'dying request' of Mrs. Dejarnet, (the wife of Thomas,) that Fanny should be manumitted, whenever she should bear five children, one for each of her (Mrs. D's) children; and that Fanny had become the mother of more than five children, when the deed was executed;"

Held: [232] "The deed should be recorded, not because its registration will be necessary, to the freedom of Fanny, but because she desires it for security,"

*M'Daniel's Will*, 2 J. J. Marsh. 331, October 1829. Will of Francis M'Daniel, dated 1826, emancipated three slaves. [335] "his wife had requested, on her death bed, that, at his death, the female slave, (the mother of the other two) should be liberated."

*Joe v. Hart*, 2 J. J. Marsh. 349, October 1829. Will of Thomas Hart, 1809, "emancipated his slave Joe, and devised to him \$200, 'to assist him in buying his wife.' . . the representatives say, that one of them, (Hunt) owns Joe's wife, and is unwilling, at least at this time, to sell her, and that, therefore, as the devise was for a specific object, which cannot now be effected, Joe is not entitled to a decree" for the legacy. Joe "was

a gardner . . attended market for Mrs. Hart, waited in the house and performed other services; that he would occasionally go away on Friday or Saturday, and not return until Monday; that sometimes Mrs. Hart gave him fifty cents, and sometimes a dollar, and at one time \$20 . . [350] that he was settled on the land near Lexington, for the purpose of raising poultry for Mrs. Hart, but that it was not recollected that he furnished any; that the use of the ground which he occupied, was worth at least \$100, but that there was no contract for paying any rent, and Joe frequently said, whilst he occupied the ground, that he was to pay no rent." He lived on it only a few years.

Held: the legacy was given absolutely to Joe and vested immediately. The executors cannot withhold it until he shall be able to purchase his wife.

*Scroggin v. Allin*, 2 J. J. Marsh. 466, October 1829. Held: [469] "the land [of an infant who dies without issue] descends according to the act of 1797. The slaves and personalty vest according to the act of 1785."<sup>1</sup>

*Mims v. Mims*, 3 J. J. Marsh. 103, December 1829. He [104] "redeemed Jesse from Davis, by paying the debt with a negro named Sampson, his own property, and thereby got possession of Jesse; that, thereafter, the testator again mortgaged Jesse . . he satisfied Bradshaw, and again possessed himself of Jesse, who had been delivered over each time, to the mortgagee, to work for the interest of the money: . . [109] In estimating the reasonable hire of the slaves, it must be done, deducting all reasonable charges and expenses, such as taxes, medical attendance, raising, etc."

*Pate v. Joe*, 3 J. J. Marsh. 113, December 1829. [117] "Joe, whose freedom is secured by the will," of Thomas Pate, dated 1803.

*Tyson v. Ewing*, 3 J. J. Marsh. 185, January 1830. "Ewing being the owner of a slave, occasionally hired him to work on board steam boats. Tyson, as captain of a steam boat, made a contract with the slave, or permitted some one engaged on board the boat, to make the contract, by which the slave was received on board as a hand, and performed one trip out from Louisville. To all this, Ewing gave no consent. He was not consulted on the subject. Upon the return of the boat, Tyson paid the slave the wages due for his services, and discharged him. The slave did not go home to his master. Ewing notified Tyson of the fact, who thereupon found the slave and restored him, after he had been absent and out of his master's service about two months. For the first month the services of the slave were proved to be worth \$15, and \$20 for the second."

*Logan v. Withers*, 3 J. J. Marsh. 384, April 1830. [386] "about the first of January, 1827, the testator having been displeased with the slave Solomon, whom he had owned for a considerable time previously, determined that he should be hired, and should not again return to his plantation. He requested a friend to take him off for that purpose,"

<sup>1</sup> 1 Dig. 435.

*Johnson v. Davenport*, 3 J. J. Marsh. 390, April 1830. "a slave which he had sold . . . 1824, . . . [was] laboring . . . under an incurable malady, denominated the *Cachexia Africana*, of which he died in the November next thereafter."

*Brown v. Miller*, 3 J. J. Marsh. 435, April 1830. At a sheriff's sale, "Miller purchased a slave named John, at the price of \$608,"

*Edwards v. Vail*, 3 J. J. Marsh. 595, April 1830. [596] "The negro on the boat, and who ascended in it to Cincinnati, came on board from Jeffersonville, Indiana, with a white woman, and left the boat upon its arrival at Cincinnati, or shortly afterwards."

Held: the act of 1824 does not apply to [597] "cases where coloured persons are taken on board in other states, and pass 'out of the limits of this state' in their transit over our territory. But in this case, it is contended, that as our territory extends to low water mark on the north bank of the Ohio river, the negro was taken on board in Kentucky, and his coming from Indiana can make no difference. A literal application of the same argument would prove, that the negro was not taken 'out of the limits of the state,' in the boat, unless it had been shewn, that, on its arrival at Cincinnati, it had been hauled out on dry land, on the north bank, with the negro in it. . . . The negro came voluntarily on board from another state, and left the boat voluntarily, and went into another state, the boat remaining all the time in Kentucky." [Underwood, J.]

*Blakey v. Blakey*, 3 J. J. Marsh. 674, April 1830. Will of Constance Blakey, 1824, directs the executor to sell all her slaves, "giving the said negroes the full right of choosing their masters; the mother and father of the younger negroes choosing the masters they would wish their children to belong to." The sale [679] "was a most barefaced fraud, . . . [680] Clark [who acted as crier] read to the company present, that part of the will, which related to the sale of the slaves, and enquired of the oldest of said slaves, whom they would choose for their master, to which they replied, Thomas Blakey. Some of the persons, who had gone there with the intention of bidding, had the slaves been sold separately, understood that no one had a right to become a purchaser, unless with the consent of the slaves. . . . the slaves were stricken off *en masse*, to [Blakey] . . . at a sum, by several hundred dollars below their value, at a credit of two years."

*Prewitt v. Singleton*, 3 J. J. Marsh. 707, April 1830. "It was his duty to have made known the true condition of the slave, at the hiring. His diseases, asthma and rheumatism . . . were not so manifest, that they could have been ascertained by observation at a public hiring. . . . [708] The slave died some months after he was hired." Relief granted against the note given for the hire.

*Ferguson v. Sarah*, 4 J. J. Marsh. 103, June 1830. "Enoch Smith, in principle an emancipator, and who liberated all his own slaves, having bought Sarah, the wife of Ben, a free man of color, for the purpose of securing her eventual emancipation, sold her to her husband in 1809, and took his promissory notes, for the price, payable in instalments, and on

long credits. It was understood, at the time of the sale, that Sarah and her children should be liberated; and Enoch Smith, after the sale, manifested a solicitude, that the emancipation should be effected without delay, lest Ben, who seems to have been insolvent, might, by incurring debts, incapacitate himself for the effectuation of the contemplated object. Under the influence of this benevolent forecast, he prepared a deed for the emancipation of Sarah, in 1813, and presented it to a lawyer for his advice as to its sufficiency, who inserted the names of Milton and Fanny, children of Sarah, and in the possession of Ben; and then, at the instance, and in the presence of E. Smith, had the deed acknowledged by Ben, in the county court. The price, promised to Smith for Sarah, was not paid, and the greater part of it yet remains due. E. Smith lived several years after the emancipation, during all which time, he recognized Sarah, Milton and Fanny, as free persons. . . In 1825, E. Smith died; Ben died intestate in 1818. After the death of E. Smith, Ferguson, who is one of his executors, was appointed administrator of Ben, and thereupon took Sarah, Milton and Fanny, into his possession, evincing a determination to sell them, for the purpose of raising a fund for the payment of the debt due his testator."

Injunction granted restraining Ferguson from selling or otherwise molesting Sarah, Milton or Fanny: [105] "after manumission, the person, so liberated, is free, as against the emancipator, and the world besides, excepting only *bona fide* creditors, or some other person, who had a better right to the slave, than the person had, who attempted the liberation; and, as to such a creditor, his right does not nullify the act of emancipation, nor otherwise affect it, farther than as a lien for the *ultimate* security of the debt. The person emancipated is no part of the assets in the hands of the personal representative of the emancipator." The act of 1798 saves rights of creditors of the emancipator, only as the statute of frauds protects rights of creditors. Therefore, if a creditor assent to and urge emancipation of a slave, he waives his right to subject him after emancipation to the satisfaction of his debt. "*Volenti non fit injuria.*"

*Johnson v. Sevier*, 4 J. J. Marsh. 140, June 1830. Will of Edwards, 1790, "devised to his son, William Edwards, for life, a slave named Stephen; remainder to the children of said William, . . . The slave Stephen was repeatedly sold and transferred until he came to Sevier . . . by purchase from [Johnson] . . . who executed a bill of sale, warranting the title in fee."

Held: [141] "When Johnson sold to Sevier, the life estate of William Edwards, passed, and no more, although Johnson warranted the title in fee. . . [142] the value of the slave, at the time he is demanded by the remainder claimants, after the termination of the life estate with interest on that value, is the proper criterion by which to measure the warrantor's responsibility." [Underwood, J.]

*Crawford v. Beard*, 4 J. J. Marsh. 187, June 1830. "the only consideration for the note, was the sale by the obligee to Crawford of a man of color, as a slave, who was a free man."

Held: total failure of consideration. [189] "It was not the duty of Crawford, to restore to his vendor, possession of the person, whom he



sold to him as a slave. . . The disposition, which Crawford has made of him, might become an important inquiry." [Robertson, J.]

*Allcorn v. Rafferty*, 4 J. J. Marsh. 220, June 1830. [221] "Rafferty, before the day of sale, clandestinely and fraudulently carried said slaves, out of this State, to some place, at that time unknown to him [Allcorn]; concealed them, and refused to give him any information on the subject, unless he would execute the note above described, which he did, as the only means of regaining the slaves,"

*Fanny v. Bryant*, 4 J. J. Marsh. 368, October 1830. "Whereas, I, George Smith, of Powhatan county, being fully convinced that slavery in all its forms, is contrary to good policy, that it is inconsistent with republican principles; that it is a violation of our bill of rights, which declares, *that all men are by nature equally free*; and above all, that it is repugnant to the spirit of the gospel, which enjoins universal love and benevolence. In order, therefore, to do justice to my own feelings, and to do justice to my fellow-creatures, I do hereby emancipate, set free, and for myself and my heirs, relinquish all right, title and claim, to the following persons, after they arrive to the date herein mentioned, (*viz:*) Edward, Mathew, John and Jenny to be free immediately; James, the 2d. day of March, 1800; Jacob, the 21st of June, 1810; Anna and her increase 1st of August, 1810; Fanny and her increase, June 9th, 1812; Rachael and her increase, February 15th, 1815; Julia and her increase, January 1st, 1816; Isaac, December 9th, 1817. In witness whereof I have hereunto set my hand and seal, this 21st day of February, 1798. George Smith, (Seal.)" Fanny [369] "is a child of Julia, and was born since 1798, and before 1816."

Held: a deed of emancipation liberating a female and "her increase" on a given day *in futuro*, emancipates all her issue born after the date of the deed.

*Duncan v. Mizner*, 4 J. J. Marsh. 443, October 1830. Joseph Duncan, who died in 1822, directs by his will, "that after his death, his slaves consisting of a man named Garrard, and two families with their children, should be manumitted; but his executors were first to receive the sum of \$1200 from their services or hire, in the following proportions: From the hire or services of Garrard \$200, from those of Nancy and her children \$400, and from those of Lavina and her children \$600; which sum of \$1200, was to be divided into six equal parts, between" his children and grandchildren.

*Turner's Will*, 4 J. J. Marsh. 536, October 1830. Testator [527] "said he would not separate his little negroes. . . He caused his servants to be collected around his bed side, and admonished them on the subject of their duties, and the necessity of preparing for another state of existence." He died the next day.

*Bostick v. Keizer*, 4 J. J. Marsh. 597, October 1830. [601] "Slaves will perhaps more readily, than any other property command at sale under execution, their value;"

*McDowell v. Gray*, 5 J. J. Marsh. 1, October 1830. "The maximum value of the [female] slave, as proved, was \$400. The jury assessed the value at \$800!"

*Long v. White*, 5 J. J. Marsh. 226, December 1830. "in 1804, Reuben Daniel, of Spotsylvania county, Virginia, by deed, . . . sold and delivered, for £50, Hannah, then six years old," to his sister.

*Patton v. Patton*, 5 J. J. Marsh. 389, April 1831. Bill against the executors of Patton's will "and sundry negroes liberated by it, for the purpose of setting aside the instrument,"

"The fact that the deceased evinced an inclination to marry the slave, Grace, whom he liberated, is not a stronger evidence of insanity than the practice of rearing children by slaves without marriage; a practice but too common, as we all know, from the numbers of our mullatto population. However degrading, such things are, and however repugnant to the institutions of society, and the moral law, they prove more against the taste than the intellect. *De gustibus non disputandum*. White men, who may wish to marry negro women, or who carry on illicit intercourse with them, may, notwithstanding, possess such soundness of mind as to be capable in law, of making a valid will and testament." [Underwood, J.]

*Sneed v. Ewing*, 5 J. J. Marsh. 460, April 1831. "by a paper, purporting to be the will of Robert K. Moore, dated in April, 1806, and proved in Indiana, in 1807, the slave Agnes, and the tract of land in Shelby, were devised to Sneed," Agnes was kept in Louisville, Kentucky.

Held: [485] "as slaves are moveable, and essentially personal estate, and therefore, pass according to the law of the owner's domicil, Indiana would have a right to declare, by law, how the slaves of her intestate citizens should descend or be distributed . . . although slaves cannot be carried to, and domiciled in Indiana,"

*Sodusky v. McGee*, 5 J. J. Marsh. 621, April 1831. Chowning was asked "if he was not engaged at the time, or shortly before the commencement of that fight, some distance off playing cards with a negro fellow?" The circuit court "refused to permit the witness to answer it . . . [because] [622] an affirmative answer involved the degradation and perhaps the punishment of the witness."

Held: "for simply playing cards, or even playing cards with a negro, no punishment or penalty has been denounced by law. . . it is . . . very questionable . . . whether a witness should, as a matter of course, be excused from answering . . . merely because an answer might, *in some degree*, tend to subject him to reproach, not infamy; or might tend to reflect on his character some degree of disparagement." [Robertson, C. J.]

*Munsell v. Bartlett*, 6 J. J. Marsh. 20, April 1831. Held: slaves are assets in the hands of the administrator and he may sell them for the payment of the debts of his intestate, if it be necessary to do so.

*Hubbard's Will*, 6 J. J. Marsh. 58, April 1831. "he devised to Narcissa, a slave, and his reputed daughter, all his estate 'provided . . . that her master or mistress . . . will let her go at a moderate price, if not, I will and

bequeath all the property aforesaid, to Austin F. Hubbard,' . . the reputed illegitimate son [(60) 'not tainted by African blood'] of the testator. . . [59] After the will was finished, Hubbard called Narcissa and gave it to her for safe keeping, . . Narcissa and her mother had been hired by him for some years before Hubbard's death, and there were no white persons living with him when the will was made. . . He could not reasonably have anticipated that Narcissa would be detained in slavery, when the will secured to her owner a fair price. To counteract the cunning and avarice which he may have anticipated might spring up among his heirs, to detain Narcissa in slavery, he devised the estate to a discarded illegitimate son, in the event of more being asked by her owner than was reasonable. We think the solicitude of Hubbard, to provide for a mulatto child, no more evidence of insanity, nor as much, as incurring the shame of being her father," [Underwood, J.]

*Poague v. Boyce*, 6 J. J. Marsh. 70, April 1831. [77] "on the day of the sale [of the six slaves] the old lady was crying about the situation she was placed in, when Boyce told her not to be uneasy, that he would let her have Saul and Hanna for her use during life, and a place to live in;"

*Commonwealth v. Hart*, 6 J. J. Marsh. 119, June 1831. Hart's letter, 1827, "proceeds to upbraid Twiman, with relying on information derived from a negro, in support of some charge . . against Hart, and pronounces such conduct proof that the negro, instead of a gentleman, was the companion of Twiman." After heaping up insults, he closes, [120] "I have thought proper to send this [challenge to fight] by my man Granville, knowing that he will be in company at least not better than himself."

*Commonwealth v. Gilbert*, 6 J. J. Marsh. 184, June 1831. "Elizabeth Gilbert was indicted for permitting her female slave 'to go at large, and hire herself out contrary to the statute' of 1802, in the county of Madison, from the 1st day of June, 1822, to the 8th day of September, 1829."

Held: [187] "both the act of 1802, and that of 1825 were violated; . . The two acts are therefore, in no respect repugnant or inconsistent, but are perfectly harmonious."

*Sublet v. Walker*, 6 J. J. Marsh. 212, June 1831. Held: "Even if the slave had injured or offended the defendant; (and there is no sufficient reason for inferring that she had injured him or given him just cause of offence) he had no legal right to beat her, with force and arms, as he did, without the plaintiff's consent. The battery was not justified by any right of self-defence; nor was it necessary for the prevention of any injury to the defendant." [Robertson, C. J.]

*Charles (a man of color) v. French*, 6 J. J. Marsh. 331, June 1831. Deed of emancipation: [332] "Upon the principle of love, justice, mercy and truth, and in obedience to the command of the creator of all things, who commanded us to do unto all men as we would they should do unto us, and to break every yoke and let the oppressed go free, and agreeable to the bill of rights, by which opposed the power of Britain; I do, by these presents, renounce all claim to any power over man, be him white or black; and I do, upon the house top confess my sins, and hope that God,

for Christ's sake, will pardon me for what is past; and yet I now freely, and immediately, liberate and quit claim to a negro man named John; and a negro woman named Lucy, his wife, and a negro man named Bromley, as also a negro girl named Susannah now ten years old, to go free at the expiration of eight years from this date, as also a negro girl named Rachel, now eight years old, to go free at the expiration of ten years from this date. In witness whereof, I have hereunto affixed my hand and seal this 29th day of September, 1794. John Watson," (Seal). On the same day "the deed was acknowledged and ordered to be recorded in the court of the county in Virginia, in which the grantor resided, and was so recorded. The plaintiff is the son of Susannah, and was born about seven years after the date of the deed. It is necessary, therefore, only to decide whether Susannah was a free woman when she bore the plaintiff."

Held: Susannah's freedom "immediately succeeded and resulted from the acknowledgment and registration of the deed of emancipation; *eo instanti*, John and his wife and Bromley were certainly free; 'I freely and immediately emancipate' applies as effectually and as certainly to Susannah as to John, . . . [333] Susannah and Rachel . . . were actually free persons, but were not to 'go free;' that is, *go forth* into the world, until they should acquire sufficient experience and discretion to enable them to enjoy the blessings of freedom." "They remained in *servitude*, but not in slavery." [Robertson, C. J.]

*Curlin v. Battoe*, 6 J. J. Marsh. 336, June 1831. "The second count charges a battery and imprisonment of the slave for the space of twelve hours. There is nothing in the plea which can justify the imprisonment."

*Jones v. Tutt*, 6 J. J. Marsh. 379, June 1831. Richard Tutt's will: "My two negro men, John and James, I direct to be disposed of as follows: James to be set free according to the existing laws of the state, when he attains the age of 31, which will be in September, 1820. In the interim, his services for hire, etc. to be applied to the use of schooling and benefit of Abel Stewart's children. The same in every principle respecting John, only that his age of 31, will not expire until the 4th of September, 1822, except, that he is to serve Thomas Tutt's family until the time of his emancipation; but I do desire, he may not be hired out of Bourbon or Nicholas counties; my intention being, that their services during their servitude, be applied for the benefit of Stewart's children."

*Mitcherson v. Mercer*, 6 J. J. Marsh. 381, June 1831. The sheriff went to Mercer's house [384] "and found the slave at the spring, and . . . [Mitcherson] [385] directed him to levy on her, which he did, and took her to the house, and the plaintiff [Mercer] gave a delivery bond for her, to produce her at the day of sale; and she was delivered accordingly, and sold for \$98."

*Singleton v. Carroll*, 6 J. J. Marsh. 527, October 1831. "a writing . . . bearing date 4th January 1828; by which they bound themselves to pay to him for the hire of a negro man, from that time until Christmas, one hundred dollars, to furnish for said slave the usual summer clothing, and to deliver him with as good clothing as he then wore, to the order of Single-



ton, in Lexington, at the expiration of the time for which he had hired him. . . previous to the day on which they were bound to deliver the slave; he had run away from them, without any negligence or fault on their part: ”

Held: the hirers did not bind themselves to return the slave at the time named [531] “in all events.” They “were not prevented . . by the act of God, . . but by the act of the slave himself; . . by an event over which it was as impossible for them to have any control, as it would be for a single individual to control the movements of an hostile army, unless they had caused the slave to be watched day and night, or had exercised a rigor and cruelty by keeping him constantly in chains;” [Buckner, J.]

*McCampbell v. Gilbert*, 6 J. J. Marsh. 592, October 1831. Held: [599] “the devise of a slave since the statute of 1800, operates as an absolute conveyance of the title to the devisee, altogether independent of the will of the executor; and he has no more right to assume the control of a slave so devised, in virtue of his office as an executor, than he would have if he were not executor; ”

*Walton v. Walton*, 7 J. J. Marsh. 58, November 1831. Held: a general devise of slaves will be considered as speaking at the death of the testator, notwithstanding the act of 1800 makes slaves real estate.

*Commonwealth v. Thruston*, 7 J. J. Marsh. 62, November 1831. Dr. Thruston was indicted for importing slaves from Virginia into Kentucky, in violation of the statute of 1815.<sup>1</sup>

Held: [63] “The indictment is good. Importation alone may be an indictable offence; a subsequent sale is not a necessary ingredient ”

*Moore v. Howe*, 7 J. J. Marsh. 64, November 1831. The heirs prayed for [65] “a decree for the value of a slave, the daughter of one of those devised to Jane . . and who was sold in 1818, and taken by the purchaser to the state of Mississippi, and also for the value of three other slaves sold in 1817, and taken by the purchaser to Missouri; and also for the value of some slaves who had gone, or had been sent to the state of Ohio, and there settled; ”

*Ellis v. Gosney*, 7 J. J. Marsh. 109, April 1832. “the circuit court ascertained . . [110] that the use of the slave Tom, from the date of the judgment in detinue, (13th March, 1818,) was worth \$60 per annum,”

*Hykes v. White*, 7 J. J. Marsh. 134, April 1832. Held: slaves held in dower vest absolutely in the husband by second marriage, during coverture; [136] “and, consequently, after his death, and during her life, the whole estate in the slaves for her life vested in his representatives, subject to her right to dower in them, as his wife.”<sup>2</sup>

*Clarke v. Baker*, 7 J. J. Marsh. 194, April 1832. “action for the trover and conversion of slaves.” “in 1813 the slaves were sold to [Clarke] . . by . . Baker; . . 1825, . . they secretly left him, or were carried off in

<sup>1</sup> 2 Dig. 1162.

<sup>2</sup> Act of 1797, 2 Dig. 1247, sect. 26; act of 1798, *ibid.*, 1156, sect. 34.

the night, and a few days afterwards were found in the possession of the defendant, who refused to deliver them up. . . because of alleged fraud and imposition on the part of Clarke, in their obtention ;”

Held: five years’ adverse uninterrupted possession invested Clarke with so perfect a title that he can recover them from the former owner who may have obtained possession of them wrongfully.

*Pyle v. Maulding*, 7 J. J. Marsh. 202, April 1832. Held: a deed of gift of a slave, when possession does not accompany the deed, will not pass the title even from donor to donee, unless the deed be actually recorded within eight months from its date.<sup>1</sup>

*Bishop v. Rutledge*, 7 J. J. Marsh. 217, April 1832. “On the 7th of January, 1828, Bishop executed an absolute bill of sale to Rutledge, for a slave, in consideration of \$200, paid him. On the same day Rutledge bound himself to Bishop in the penalty of \$400 to reconvey the slave whenever the \$200 were paid, provided the slave was living at that time; but if the slave died before the payment of the money, then Bishop was still bound for the money.”

Held: the contract was “only a pledge or mortgage of the slave for the purpose of securing the payment of \$200 advanced, and that it was intended to balance the interest of the money with the services of the slave; and so far usurious, . . All that Rutledge could equitably demand was a return of his \$200 with interest from the time he advanced it, subject to a credit for the value of the services of the slave.”

*Adkinson v. Stevens*, 7 J. J. Marsh. 237, April 1832. The slave had been warranted sound. “The breach assigned is a defect in the eyes of the slave which produced total blindness.”

*Hart v. Burton*, 7 J. J. Marsh. 322, May 1832. “Borrowed from Charles Hart Senr. \$275, for which I have placed in his hands as security, a negro girl: should I not pay said sum of money by the 20th inst. the said girl is to be the absolute property of said Hart, and I bind myself to give a bill of sale when demanded. Feb. 9th, 1827 (Signed) C. F. Burton.” The slave died in April, 1827, without Hart’s fault. Hart brought action against Burton because the \$275 had not been paid.

Held: the contract [325] “contains a covenant to refund the money.” Underwood, J. dissented: [327] “The doctrine of redemption shall not be a sword in your [Hart’s] hands.” “it shall not be perverted to enable you to throw a dead negro, contrary to your contract, upon the hands of the borrower of your money; when if the negro had lived, you would have used the contract to prevent a redemption,”

*Gray v. Combs*, 7 J. J. Marsh. 478, October 1832. Gray brought an action on the case against Combs for killing a negro man slave. A variety of goods of great value had been stolen repeatedly from a warehouse of which Combs had the custody. Combs “not being able to apprehend said thief, for the protection of said property and prevention of such stealing, set up a loaded gun on the inside of the house, with a string tied to

<sup>1</sup> Act of 1798, sect. 41. [2 Dig. 1158.]

the trigger; that said slave, in the dead hour of the night, with the intent of stealing said goods, broke and entered said house, pushed against said string, and thereby caused the gun to go off and himself to be shot and killed."

Held: the defence used by Combs was [485] "lawful, and the calamity which ensued, ascribable to the slave's own act." [483] "though the robbery attempted in this case would only have been a misdemeanor in a slave, yet, in a white person, it would have been a felony; and, therefore, though according to strict law, it may not have been a justifiable means of prevention as against a slave, such being known to be the character of the thief, yet, in the absence of such knowledge, we would suppose a resort to such means justifiable, as is permitted against the general, more numerous and worthier class of the community, and the circumstance of the calamity lighting upon one of the other class, is to be taken as misadventure." [Nicholas, J.]

*Commonwealth v. Griffin*, 7 J. J. Marsh. 588, October 1832. Held: "the bringing of a slave to Kentucky, by a person not protected by any of the exceptions in the statute of 1815,<sup>1</sup> . . . intending to export, and afterwards actually exporting the slave to another state for sale, is an importation into this state," in violation of that statute. "the importation of a slave into this state, for any purpose, or by any person not authorized by the statute of 1815, is an indictable offence."

*Commonwealth v. Greathouse*, 7 J. J. Marsh. 590, October 1832. Held: "Importation is one specific offence, and subsequent sale is another and different infraction of the law."<sup>2</sup>

*Taylor v. Lusk*, 7 J. J. Marsh. 636, November 1832. Held: in assignment of dower in slaves, an allowance of a sum of money to the widow, to make her share of the slaves equal a full third, is not error. [640] "there are inconveniences resulting from the alternate use of a slave, which render it more beneficial to have the inequalities in lots made up in money. We do not look upon the assignment of dower as precisely analogous to the case of joint tenants, by purchase, owning a single slave, and who will not make partition by sale, and division of the money."

*Lee v. Lee*, 1 Dana 48, April 1833. Held: the act of 1800<sup>3</sup> "gives the right of emancipating by will, untrammelled by any reservation whatever in favor of the widow's right of dower, and, as we understand it, excludes all pretence of such claim."

*Beaty v. Judy and her children (persons of color)*, 1 Dana 101, April 1833. Daniel Beaty and his wife, by deed, emancipated Judy and her children and other slaves on January 2, 1832. Judy and her three children brought "a joint action of trespass, for assault and battery and false imprisonment, . . . [102] and the jury having . . . found a verdict [in their favor] . . . the court overruled a motion for a new trial, and rendered judgment on the verdict."

<sup>1</sup> 2 Dig. 1162.

<sup>2</sup> Act of 1815, 2 Dig. 1162.

<sup>3</sup> 2 Dig. 1247.

[103] "reversed, and the cause remanded with instructions to set aside the verdict, and dismiss the suit without prejudice." "because the defendants in error could not maintain a joint action, for personal and individual injuries, or for the assertion of personal and individual rights." [Robertson, C. J.]

*Pool v. Adkisson*, 1 Dana 110, April 1833. Pool [125] "was employed as an agent, by Edward Carlton, who had brought the slaves from Virginia, . . . to carry the slaves to Missouri, and sell them;" The slaves were claimed by Adkisson [110] "under a deed of trust, whereby Edward Carlton, sen. transferred . . . the right to the said slaves . . . for the payment of certain debts due by Carlton"

*Stone v. Halley*, 1 Dana 197, April 1833. Held: [199] "since the decisions which have exempted slaves and personalty from going into hotchpot with each other, every dictate of policy, as well as justice, requires, that slaves and land should be brought and kept together with regard to this subject."

*Betty v. Moore*, 1 Dana 235, May 1833. Betty claimed her freedom "under the will of Jeremiah Morton, emancipating her after the death of his wife Judith, who was dead previous to the institution of the suit, . . . Mrs. Morton obtained Betty from her brother, Frank Moore, by purchase . . . 'on condition that Betty and her increase were to return to Frank Moore, provided Judith had no child to heir them.' . . . [236] Judith died without issue."

Held: [237] "wherever by any of the ordinary modes of conveyance, an estate in fee conditional . . . is granted in or out of personalty, . . . it passes the whole estate to the grantee or first taker, and consequently, all further limitations or reservations [sic] are null and void."

*Fenwick v. Macey*, 1 Dana 276, May 1833. [287] "In 1807, Fenwick made a bill of sale to Macey, for two negro men and a woman, redeemable in two years, on the payment of a thousand and odd dollars. This . . . is treated by the courts only as a mortgage. Fenwick agreed to pay two hundred and fifty dollars a year, as hire for the negroes; and if they died before the end of the two years, the loss was to be his. In 1809, Macey took the woman into possession; Fenwick retaining the men, and agreeing to pay two hundred dollars a year as their hire." [277] "Ann has had five children. In June, 1822, Fenwick filed his bill, asserting his right to redeem the slaves,"

Held: [286] "Fenwick is entitled to redeem Ann and her children. And as . . . Macey received his principal and legal interest thereon, more than five years before the institution of this suit, the redemption must be effected by taking an account of the hire of Ann and her children, for five years before the commencement of the suit, . . . and after deducting . . . a proper allowance for the expense of raising etc. the balance, if any, must be decreed to Fenwick, with the slaves."

*Doram and Ryan v. Commonwealth*, 1 Dana 331, May 1833. "Doram and Ryan, free men of color, were arrested . . . upon a warrant, charging that they had migrated to this state, in violation of an act of assembly of



1808, . . Upon a hearing . . an order was made, requiring them to give a recognizance, binding them to depart from the state, and directing that, if they should fail to do so, they should be sold for the term of one year."

Held: [332] "the act of 1808 is highly penal. . . The penalty is a temporary disfranchisement of a free man, as a punishment for violating a public and economical law of the state. . . the act of 1808 should be interpreted as dispensing with a jury; and therefore it, so far, conflicts with the supreme law of the land. The act cannot be constitutionally enforced without the intervention of a jury. A free man cannot be sold, even for an instant, unless a jury of his peers shall have passed condemnation upon him. . . the order, for selling or hiring Doram and Ryan, is set aside, and annulled." [Robertson, C. J.]

*McCans v. Board*, 1 Dana 340, October 1833. "In 1821, . . Board, in his last sickness, made a nuncupative will . . by which he devised his whole estate to his wife during widowhood. She . . in 1825, married McCans. . . dower [was] allotted to Mrs. McCans in [Board's] . . slaves." The circuit court considered her "as not entitled to any portion of the slaves,"

[343] "The decree must be reversed . . and cause remanded," I. The slaves did not pass to her by the nuncupative will, [340] "As real estate cannot be devised by nuncupative will, and as our statutes have converted slaves into real estate, . . [II.] [341] a nuncupative will is not now such an one as the statute requires to be renounced; . . the act concerning wills, of 1797, and the act of 1800, directing slaves to pass by wills as land . . [should] be construed together as one act, . . making the latter a repeal of so much of the former as falls within this subject; . . [342] the abstraction of slaves from the operation of a nuncupative will, should be deemed a *pro tanto* . . repeal, of the prior law. . . so far as regards slaves, the twenty fourth section of the act concerning wills, no longer applies to nuncupative wills." [Nicholas, J.]

*Bosworth v. Brand*, 1 Dana 377, October 1833. Brand had "obtained a verdict and judgment against Bosworth, for the value of a slave killed on Bosworth's farm, at a negro frolic, or dance. The case, when stated most favorably for the verdict, is, that Bosworth permitted some fifty negroes to assemble and dance at an out-house; that a patrolling party surrounded the house about midnight, for the purpose of apprehending the negroes and breaking up the frolic; that the negroes refused to surrender when called upon so to do, and endeavored to make their escape; that one of the patrol, without any necessity for so doing, wantonly fired a pistol, loaded with balls and buck shot, into a dark room, crowded with negroes, and thereby killed the slave of Brand."

Held: though permitting the negroes thus to resort to and remain on his plantation, was unlawful and exposed Bosworth to a penalty of two dollars for each one,<sup>1</sup> it did not render him liable for the value of the slave so destroyed, as the death and damage were the direct and immediate consequence of the shooting, and not the probable or natural consequence of the unlawful act of Bosworth.

<sup>1</sup> 2 Dig. 1151.

*Engleman v. Engleman*, 1 Dana 437, October 1833. "he was not twenty one years old until 1829; that he managed the farm of his father (whose estate was large) during the years 1828-9, and that both himself and two slaves, whom he got by his wife, worked on the farm."

*Commonwealth v. Oldham*, 1 Dana 466, November 1833. Held: though a free man of color cannot be a witness in any case, except where none but negroes, mulattoes, or Indians are parties, he may by his own oath require a white man to give security to keep the peace. "He is not a 'witness,' but a party swearing to what any other party may, for the like purpose, make an affidavit."

*Commonwealth v. Rodes*, 1 Dana 595, November 1833. [601] "some of the fee bills . . . apparently exhibit a signal exemplification of that 'splitting up' of orders which it was the object of the act of 1830 to prevent. Fee bills for services of the clerk in the emancipation of slaves, belong to that classification. The following is an example:

'John Skinker (colored man)	
To the clerk of Fayette county court, Dr.	
1828, April, order on producing deed of emancipation to Jacob,	
25; order acknowledging same, 25—order to record, 25;	
recording, 75; order that certificate be granted, 25—	
order that he is not likely to become a county charge, 25;	
order taking description, 25,	\$2.25
May—order on producing deed of emancipation to	
Dorcia, Sr. 25; order acknowledging the same, 25; order	
to record, 25; recording, 75; order that certificate be	
granted, 25; order that she is not likely to become a	
county charge, 25; order taking description, 25,	2.25
Same for emancipating Dorcia, Jr. except for recording,	1.50
Do. Susan,	1.50
Do. Marshall,	1.50
Do. Nelly,	1.50
Do. John,	1.50
Do. Elizabeth,	1.50
Do. Ben,	1.50
	<hr/>
	\$15.00
J. C. Rodes, Clerk."	

"Thus the round sum of fifteen dollars seems to have been charged for two deeds emancipating the family of a colored man."

*Keith v. Johnson*, 1 Dana 604, November 1833. Held: "a sheriff, having an execution under the statute of 1828,<sup>1</sup> has a right to make a forcible entry into the defendant's house, to levy it on a slave, for which it had issued, on a judgment in detinue," if he finds the house closed and has good reason to believe the slave is secreted there.

<sup>1</sup> Session Acts, p. 159.

*Wells v. Bowling*, 2 Dana 41, April 1834. Held: [43] "though our statute declares that slaves shall descend to heirs, yet, at the same time, it makes them assets in the hands of the personal representative, and it has uniformly been determined, that the heir acquires an *inchoate* property only, such as gives him no absolute legal ownership, without the assent of the personal representative. The legal title to slaves must, therefore, rest in abeyance, until the appointment of a personal representative, in the same way as does the title to those chattels that are strictly and exclusively personal."

*Merrill v. Tevis*, 2 Dana 162, May 1834. "action of detinue for a female slave, born in 1822 or 1823, . . . of a slave named Rose, and sold, in 1826, to the defendant, by Samuel Merrill; but claimed by . . . the son of said Samuel, under the will of Levin Payne, . . . who died in 1821, and who had, . . . in 1819, delivered Rose to the said Samuel, (his son in law), and . . . 'made him a bill of sale of her, for five years.'"

*Coleman v. Simpson*, 2 Dana 166, May 1834. "the defendant and his wife ordered and directed the plaintiff in the performance of her work, as they would a slave, with some difference of manner,"

*Keas v. Yewell*, 2 Dana 248, October 1834. [249] "notwithstanding the utmost care and diligence of Keas, the slave had run away from him, between the execution of the bond [conditioned to have the slave forthcoming] and the rendition of the decree, and . . . he was unable to reclaim her,"

Held: [250] "The casualty by which the slave was lost, is a peril incident to the very nature of such property; and therefore in contracts or covenants concerning such property, that peril should never be presumed to have been intended to be guarded against, unless so expressly stipulated. . . the loss is not to be considered as provided against by a general covenant, and its happening, therefore, presents the same excuse for non-performance, that the death of the slave would have done."

*Young v. Slaughter*, 2 Dana 384, November 1834. "The late Colonel Gabriel Slaughter, by his will, emancipated his slave John Young, and declared it to be his further will and desire, that his son John H. Slaughter should furnish John Young with food and raiment during life." Young alleged that John H. Slaughter had refused to furnish him with food and raiment. "Slaughter admits his refusal and failure, as charged, because Young is able-bodied, and competent, with proper industry, to feed and clothe himself, and insists . . . [385] 'that his father could not have intended complainant should set down and do nothing, and be clothed and fed like a gentleman.'"

Held: "We concur with the defendant, that the testator did not intend Young should be clothed and fed like a gentleman, . . . but we can find nothing in the testator's language, to warrant the idea that he was not to be clothed and fed at all, except in the event of his not being able to clothe and feed himself." The proof is [384] "that it would be worth fifty dollars a year to furnish him with food and raiment. . . [386] a decree to be rendered in favor of the complainant, against the defendant,

for a sum to be ascertained by computing at the rate of fifty dollars per annum, from October, 1830, till the time of rendering the decree."

*Campbell v. Threlkeld*, 2 Dana 425, November 1834. Campbell "obtained an order requiring the sheriff to take the slave into custody, to abide the event of the action of detinue, unless Threlkeld would give bond and security to have the slave forthcoming. Threlkeld failing to give the bond, the sheriff took the slave into custody, and kept him until the termination of the suit, about two years thereafter."

*Pate v. Barrett*, 2 Dana 426, November 1834. Will of James Mason of Virginia: "To my sister, Janet Crawford, I leave my mulatto girl Nelly, during her life, and at her death, to leave Nelly to any of her children she may think proper, or free her by emancipation, as she pleaseth."

*Barringtons (coloured persons) v. Logan*, 2 Dana 432, November 1834. "Dinah Barrington, a woman of colour, . . . was born in the State of Pennsylvania, in March, 1800, but was afterwards brought to Kentucky, where, before she was twenty eight years old, she gave birth to the appellants," Winney, Julian, and Henry Barrington.

Held: Dinah was free by the act of Pennsylvania, March 1, 1780, though she would have been subject to apprenticeship till twenty-eight years old, if she had remained in Pennsylvania. [434] "as she was never a slave, her children must be free."

*Hopkins v. Morgan*, 3 Dana 17, April 1835. Will of Joseph Morgan: "It is my will and desire that my two negroes, Rebecca and Mary, be sold privately by my executor, and that they select their own master, without much regard to price." The two negroes "applied to Moses Hopkins, requesting him to buy them, and he, professing that he had no need for them, and was willing to buy them only because they wished it, offered to give two hundred dollars for them; which he admits is much less than their value to one who needs them, and wishes to buy. The executor refused to sell them at that price, which he alleges to be less than half their value, . . . [18] that he is willing to sell to Hopkins, and had offered to take three hundred and ten dollars from him."

Held: [20] "it would certainly be his [the executor's] duty to sell to any humane person whom they might select, and who would give a fair price for them. He has the discretion to take less than their fair value; it may be his duty, under certain circumstances, to take less. . . . This court cannot decide that it was the duty of the executor, paying due regard to this provision of the will, to sell the negroes, worth four hundred dollars, for two hundred dollars, the sum offered by Hopkins." [T. A. Marshall, J.]

*Pickens v. Walker*, 3 Dana 167, June 1835. "whereas the said Walker is about to remove, and to make the said Pickens safe in his debt, he, the said Walker, leaves in the said Pickens' custody, a negro woman and child, the woman named Hannah, until the last of June, and the said Pickens is to use them humanely, and take care of them, and deliver them if alive, to the said Walker, . . . But should they die, or either of them, a natural death, the said Pickens is not accountable. And if the money is



not paid by the last day of June next,<sup>1</sup> the negroes are to be said Pickens', for the debt;" The parties were residents of Virginia. "Shortly after its execution, Walker removed to Tennessee, and in . . . 1808, Pickens followed him, . . . [168] but afterwards removed to Indiana, leaving the negroes in Tennessee; and, at a still later period, . . . settled with them, in . . . Kentucky; where, in 1821, he departed this life—directing, by his will, that his negroes should be sold." They were all sold. "the Circuit Court had an account taken . . . of the cost of raising the young negroes till the age of seven, . . . at the date of the agreement, or at the last of June following. No person says they [the woman and child] were worth more than four hundred dollars."

*Perkins v. Drye*, 3 Dana 170, June 1835. [172] "the negroes Esther [about sixteen] and Amy [about fourteen] were worth about seven hundred dollars" in 1827, and Samuel [about sixteen years old] "was worth near three hundred dollars."

*Stover v. Boswell*, 3 Dana 232, June 1835. [233] "said Mingo [Stover] was, many years ago, a slave, that he was emancipated by his master, and claimed the appellant and cohabited with her as his wife; that the appellant and her first child was [sic] emancipated by her master; that after their emancipation, said Mingo and the appellant lived and cohabited together as man and wife, for many years, and was generally recognized as such, until, in 1828, they quarrelled, and said Mingo took up with another woman, and left the state for New Orleans, where he died; that prior to his separation from the appellant, he had three children by her, to whom he made a deed of gift of said house and lot, after which, they died."

Held: marriage may be presumed from circumstances, as from cohabitation, and this general rule must apply to free persons of color as well as to whites. But if [235] "said Mingo was not the husband of said appellant, . . . upon the death of said children, the descent in fee simple was cast upon the appellant," by the 19th section of the act of 1796.<sup>2</sup>

*Bright v. Wagle*, 3 Dana 252, October 1835. [254] "the boy was worth three hundred and fifty dollars at least, . . . [257] a young boy slave . . . , it is well known, will readily command in cash, at all times, his intrinsic value."

*Church v. Chambers*, 3 Dana 274, October 1835. The slaves of Chambers "having crossed the Ohio river, from the Indiana to the Kentucky shore at Louisville, agreed with McManaway, who was acting as master, *ad interim*, and with Neydenbousch, the clerk of the boat, for their passage to Cincinnati; . . . they were afterwards taken on board from the Indiana shore, some miles above Louisville, and carried to Cincinnati; and that they had been, shortly afterwards, pursued and sought after by the agent of the defendant, who believed from what he learned in the pursuit, that they had fled to Canada."

<sup>1</sup> 1808.

<sup>2</sup> 1 Dig. L. K. 180.

Held: the acts of 1824 and 1828 to prevent slaves being carried away as passengers in steamboats or other vessels, prohibit the taking them [278] "from the shores of the Ohio river *opposite to this state*—and the like liability shall occur for landing, or suffering them to go on shore, within as without the state;" and these acts are not invalid. "The Ohio river, as far as it is a boundary of this State, is within its jurisdiction." The measure of damages is not the full value of the slaves, but the actual damage to the slave-holder or party injured, which cannot, in general, be presumed equal to the entire value of the slaves. Upon the proof in this case the owners of the boat are not personally liable for damages under the acts of 1824 and 1828; [277] "their only responsibility was the eventual hazard of a judgment or decree, against the actual delinquents for damages, being enforced by a sale of the boat, on which the statute of 1824 gave a lien."

*Gentry v. McMinnis*, 3 Dana 382, October 1835. Polly McMinnis was born in Pennsylvania since 1780, and "had been brought to Kentucky in 1797 or 8, and had, about the year 1804, been sold as a slave to one John Courtney, and had ever since been held and treated as a slave; . . . [385] Courtney declared, in effect, not four years prior to the commencement of this suit, that the defendant was entitled to be free."

Held: [384] "Prescription alone cannot be proof of slavery, . . . [385] being a mulatto, or having at least one fourth of African blood, has been held, in Virginia and in Kentucky, to be presumptive evidence of being a slave. And, *e converso*, it has been as well settled, that being a white person, or having less than a fourth of African blood, is *prima facie* evidence of freedom. . . . [388] when a jury, on their view, decide that the color is white, testimony will be admissible to prove that, notwithstanding the visible complexion, there is African blood in the veins sufficient to doom to slavery. . . . [390] from the whole record, it might be presumed that the jury did not believe from inspection that the defendant was white, and that consequently their verdict was founded on other and amply sufficient evidence." [389] "Her long ostensible submission has already been considered, . . . the natural answer to the question—why did she acquiesce so long in her servile condition? is, *that she was treated and governed as a slave*; forced, when an infant from the country of her birth, and from her kindred and friends, and subjected to the dominion of a master, who made her in fact a slave, she was either kept in ignorance of her rights, or was afraid or unable to assert them. Her admission that she was a slave, can be entitled to but very little if any effect. . . . [390] the general statute of limitations could not apply, because, if the defendant be a free woman, her detention as a slave was a continued trespass to the moment when her suit was instituted; . . . She claims to be free because she never was a slave; and there is no statutory limitation to a suit for freedom *a nativitate*." All born of mothers in slavery in the state of Pennsylvania, since the year 1780, were born free, though subject to apprenticeship till twenty-eight years old; and their right to entire freedom at twenty-eight, is not impaired by their being brought to this state before they attain that age. [Robertson, C. J.]

*Stroud v. Barnett*, 3 Dana 391, October 1835. "On the 25th of December, 1824, . . . Barnett had advanced to said Stroud one hundred and fifty dollars, . . . and said Stroud had placed in the possession of said Barnett, a negro woman by the name of Amy, to remain with him, and work for the use of said money, until the 25th of December thereafter, or so long thereafter as said Stroud should delay to repay said money; and it was further stipulated that if said girl should die before the said money was refunded, the loss should be Stroud's. Said girl became pregnant before the year was out, and was taken home by Stroud, to be afterwards returned, and was never after returned."

*Williams v. Greenwade*, 3 Dana 432, October 1835. Action of slander against Williams, "for falsely and maliciously uttering and publishing the following words:—'negro Jude said that Mrs. Greenwade was a drunken whore, and it is rumored every where.' . . . verdict and judgment were rendered for one hundred dollars in damages;" Williams's third objection to the judgment is, that the Court "erred in refusing to permit him to prove, that 'negro Jude' had 'said' " the words.

Held: [435] "If a white person venture to publish, in a manner implying malice, the slander of a negro, the slandered party should not be driven to the humiliating alternative of submitting in silence, or of suing the negro for character. Such a social organization as ours will not, in our judgment, permit a white person to justify the injurious repetition of a negro's slander." [Robertson, C. J.]

*Meredith v. Wood*, 3 Dana 456, October 1835. "a negro girl, by the name of Charlotte, was sent to Wood's, . . . bearing the following note:—'Mr. Wood—Since you left, I have determined to send you the girl: if you have any work fit for her to do, I wish you would employ her till I can sell or hire her. If you know of any person who wishes to hire or buy such a girl, or who has one to sell, please let me know, as I want to dispose of this girl, and get another. E. B. Coleman.' That the girl was, shortly after she arrived at Wood's, taken sick, grew worse, and died in about twelve days. That Mr. and Mrs. Wood were attentive to the girl; kept up fires etc. That an old negro man, her father, . . . [457] attended upon the girl; so did Mr. and Mrs. Coleman frequently visit and attend to the girl, during her sickness. And she was attended by a physician [their family physician] employed by them."

*Brown v. Lowens*, 3 Dana 473, October 1835. Contract to hire a negro man from January 1, 1833, to December 25, 1833, for "the sum of ninety dollars, and furnish said negro man with two summer suits of good clothes, one fall suit of jeans, and one pair of shoes."

*Pennington v. Pyle*, 3 Dana 529, November 1835. In September 1822 a negro woman and child were sold for three hundred dollars.

*Russell v. Russell*, 4 Dana 40, April 1836. [43] "the grandfather was in a state of almost servile subjection to his second wife and one of the slaves mentioned in the deed;"

*Black v. Meaux*, 4 Dana 188, June 1836. Humphrey Black, one of about sixty slaves emancipated by the will of John Meaux, remained with

John Woodson Meaux and labored for him during the period of a controversy as to the validity of the will. After the will was established he sued Meaux for compensation for his services, and, on the trial, "proved that the defendant had, on different occasions, . . . said, though not to *him*, that he would pay him for his labor in the event of the establishment of the will "

Held: it should have been left to the jury [189] "to determine, from the facts, whether the defendant ever agreed with the plaintiff to pay him for his labor, on the contingency of the will being established; . . . the plaintiff was a free man from the time of the testator's death. . . . [190] Nor does an emancipated slave pass, at all, to the personal representative, as assets; "

*Reeder v. Anderson*, 4 Dana 193, June 1836. Will the law "imply a promise by the owner of a runaway slave, to pay a reasonable compensation to a stranger, for a voluntary apprehension and restitution of the fugitive? "

Held: "though such friendly offices are frequently only those of good neighborhood, which should not be influenced by mercenary . . . expectations—nevertheless, it seems to us that there is an implied request from the owner, to all other persons to endeavor to secure to him lost property . . . and that, therefore, there should be an implied undertaking to (at least) indemnify any person who shall, by the expenditure of time or money, contribute to a reclamation of the lost property." [Robertson, C. J.]

*Blackwell v. Oldham*, 4 Dana 195, June 1836. In 1831 Oldham and Company purchased nine slaves at New Orleans for \$4200. They were warranted to "'be sound and healthy in body and mind (except Jerry who has the dysentery,' and another, whose defect is mentioned.) In a short time . . . Jerry . . . died of a complication of diseases, . . . a decayed liver," Oldham and Company "refused to pay the whole amount . . . but . . . retained in their hands \$550 to cover their estimate of Jerry's price, and the expenses incurred on account of his sickness and death."

*Bakewell v. Talbot*, 4 Dana 216, June 1836. [217] "the parties lived in the same town; that the appellant had the mother of Washington on hire from the appellee; that Washington, being only about nine years old, frequently stayed with his mother and made the appellant's house his principal home; that there was a mutual attachment between him and the appellant; that he had been, on more occasions than one, confined by sickness at the appellant's house, and once with the cholera, and that the appellant nursed him and had him attended by his own family physician—and that, whilst he was thus at his house, the appellant, on one occasion, took him with him, in his gig, to an island in the river not far from his residence, and, having fastened the horse and gig on the island, wrapped him in his cloak and left him in his gig, whilst he himself was shooting ducks in full view; that when he returned to the gig, though Washington's hat, and the cloak, and the horse and gig remained—Washington himself was not there, and never afterwards was seen or heard of."



*Boyce v. Nancy*, 4 Dana 236, June 1836. "Nancy, a colored woman born in the state of Maryland about the year 1795, and claiming to be free in consequence of the last will of Rebecca Ring . . . in the year 1801, brought an action of trespass against Robert Boyce, who had held her as a slave more than twenty years, and, after a protracted trial, obtained a verdict and judgment, from which he has appealed to this Court. . . [237] The will declared that Nancy, then about six years old, should be free when she should attain twenty-one years of age; . . . [238] The alleged sale of the appellee is unsupported by any other testimony than that of the executor himself; and was not, according to his own exhibits, at all necessary for the payment of any debt. . . [240] it, also, may be inferred from the proof, that sometime in the year 1805, the appellant sold the appellee, as a person entitled to be free at twenty-one years of age, and bought her himself; and that, about the time of the pretended sale of her under execution, she was forced from Maryland, under the cover of night, and brought to Kentucky. . . [241] It is argued . . . that there being no proof that the appellee was, when she attained twenty-one years of age, able to maintain herself, the jury had no right to decide that she was free, according to the law of Maryland. To this only one answer will be given, and that is, that, although the fact has not been expressly proved, yet we suppose that the jury had a right to infer it from the conduct of the appellant in holding her in slavery, and in resisting her efforts to be liberated, and permitted to maintain herself by her own labor. . .

"judgment of the Circuit Court . . . affirmed." [236] "Chief Justice Robertson delivered the Opinion of the Court—Judge Ewing took no part in the decision."

*Aleck v. Tevis*, 4 Dana 242, June 1836. Depositions state that Cloe Pen [243] "was married and lived in Maryland with her husband nearly twenty years; that, during that time, the mother of Aleck was born a slave in the family; that Mrs. Pen came to Kentucky in 1806 or 7, leaving her husband in Maryland; that she brought Aleck's mother with her; and that they had heard, that she had abandoned her husband because he was intemperate. . . [245] she lived here about seven years as a *feme sole*—claiming and enjoying the slaves as her own, all the time, and without any interference or question from any quarter." In her last will, admitted to record in 1813 she [246] "declared that they should be free; and made careful, detailed, and provident prospective arrangements for their welfare." Tevis alleges [242] "that, though Aleck was, in fact, liberated, and had actually enjoyed the privileges of a free man, from early in the year 1813 to some time in September, 1818, yet, not doubting himself that he was the slave of the representatives of Mrs. Pen's husband, and believing that he, as well as others in the same condition would be enslaved by some speculating purchaser, he (Tevis) bought him, and those others, in 1818, from those representatives, for a price greatly disproportionate to their value, for the purpose of liberating some of them; and that, accordingly, he had since emancipated as many of them as he could consistently with his own indemnity for his purchase." In 1832 Aleck "filed a bill in chancery

against Samuel Tevis (who holds him as a slave) praying for a decree establishing his freedom and liberating him from servitude."

Held: Aleck is free. [247] "the testatrix intended that the plaintiff in error should be free from the moment of her death, although he was required to serve his mother until he attained twenty-one years of age; . . . though a deed of manumission by the executor was directed by the will, such a document was not essential to the plaintiff's freedom, but was prescribed only from prudential and precautionary motives." Tevis is liable for the value of Aleck's services, [250] "as long as he has enjoyed the benefit of them—counting from the time of the decree back, not longer than five years prior to the institution of this suit. A Court of Equity will give no more than the profits . . . the actual value which, all things being considered, Tevis derived from the services of Aleck. . . . The value of hire . . . is not necessarily the true test;" [Robertson, C. J.]<sup>1</sup>

*Boggess v. Boggess*, 4 Dana 307, October 1836. Rosanna Boggess abandoned her husband "on the alleged ground of barbarous and inhuman treatment endangering her life, . . . [308] the chief, if not the only, reason alleged for her declared apprehension of danger, is that he permitted to remain on his farm a female slave whom she suspected for an attempt to take her life by enchantment or poison."

*Steele v. Curle*, 4 Dana, 381, October 1836. Steele sold a slave to Curle in Virginia, both of them being citizens of Kentucky. Steele pleaded "that Curle bought the slave with the intention and for the purpose of importing him into this state, in violation of the act of 1815, interdicting the importation of slaves for merchandise."

Held: the purchase of a slave abroad for importation into this state, is not prohibited. The statute extends only to the actual importation.

*Catherine Bodine's Will*, 4 Dana 476, October 1836. "A paper purporting to be the last will of Catherine Bodine—in which, among other things, she declared that her slave Jenny should be 'set free' whenever she should cease child-bearing, and that other slaves should be 'set free' after designated periods not yet expired—having been exhibited by those persons, in the proper County Court, for probate, and rejected by the judgment of that Court, the same persons prosecute this writ of error against the other devisees; and the right to prosecute the writ in the names of the plaintiffs in error, being questioned, must first be decided, as a preliminary question. If the paper had been admitted to record, as the will of the testatrix, the plaintiffs nevertheless should yet be deemed to be slaves; for, even as to Jenny, there is no proof that the contingency on which her liberation depends has yet occurred. And therefore the objection to the prosecution of the writ by the plaintiffs, is that a slave cannot sue. . . . [477] But, although the law of this state considers slaves as property, yet it recognizes their personal existence, and, to a qualified extent, their natural rights. They may be emancipated by their owners; and must, of course, have a right to seek and enjoy the protection of the law in the establishment of all deeds, or wills, or other legal documents of emanci-

<sup>1</sup> See *Tevis v. Eliza*, p. 343, *infra*.

pation; and, so far, they must be considered as natural persons, entitled to some legal rights, whenever their owners shall have declared, in a proper manner, that they shall, either *in presenti* or *in futuro*, be free; and, to this extent, the general reason of policy which disables slaves as persons, and subjects them to the condition of mere brute property, does not apply; and the reason ceasing, the law ought also to cease. In this case, if the paper in contest be the true and valid last will of Catherine Bodine, it vests in the plaintiffs an initiate legal right to freedom; and though the enjoyment of their personal liberty is postponed to a future period, they have an undoubted present and perfect legal title to the prospective fruition of that which the testatrix had a right to concede, and has endeavored to secure, to them. That right depends altogether on the establishment of the will, and cannot be deemed to exist as long as the judgment of the County Court shall remain unreversed. . . [478] The fact that they may not be responsible for costs, cannot be material; because, were they admitted to be free, they might and probably would be allowed to proceed *in forma pauperis*. Unless, then, there can be such an absurdity as a legal right without any remedy, the plaintiffs may proceed in their own proper names, for establishing the will." [Robertson, C. J.]

*Hudgens v. Spencer*, 4 Dana 589, November 1836. "Spencer, a man of color, claiming to be free in consequence of a deed of emancipation, acknowledged in Virginia, in 1790, by John Baker, the then owner of his mother, Judy, and liberating her and other slaves—sued Hudgens, in chancery, for the purpose of establishing his claim. The deed—duly acknowledged and recorded—is in the following words:—'Know all men by these presents, that I, John Baker of Chesterfield County, do believe that all men by nature are equally free; and, from a clear conviction of the injustice and criminality of depriving my fellow-creatures of their natural right, do hereby emancipate or set free the following men, women, and children, viz:—

Bob and Daniel,		December 25th, 1790
Grace and Amy,		December 25th, 1790
Barbara,		December 25th, 1790
Tom,	to go out	December, 1793
Sally,	to go out	October, 1796
Betty and Pat,	to go out	December, 1802
Oliver,	to go out	November, 1805
Judy,	to go out	September, 1806
Hannah,	to go out	January, 1807
Nann,	to go out	February, 1808
Peter,	to go out	December, 1809
Amy,	to go out	March, 1811

" 'I do hereby relinquish all right, title and claim to the said people after they severally arrive to the dates above mentioned, and not before. In witness whereof, I have hereunto set my hand and seal, this the ninth day of June, 1790. John Baker (L. S.) Teste—John Kobbler, Martin Baker, jr.'

" Spencer was born between the date of the acknowledgment of the deed, and September, 1806, when Judy, his mother, was 'to go out.' "

Held: [593] " the grantor intended that all his slaves should be forthwith free 'people,' and that, in postponing the times of their actual liberation, he did not mean to put off, to future periods, their enjoyment of personal rights, but intended only to reserve to himself such a title of temporary service and dominion as would effect a transition from slavery to mere servitude and pupilage for a limited time. . . [594] the question as to his [Spencer's] right to freedom was sufficiently doubtful to authorize the presumption that he had been held in slavery in good faith; and that, therefore, according to the doctrine recognized by this Court in *Aleck vs. Tevis*, (*ante*, 247-8,) he is not entitled to a decree for compensation for his services whilst he was detained by Hudgens; but that he is entitled to the amount due for his hire, under the order of the Circuit Court, during the pendency of this suit " [Robertson, C. J.]

*Moore v. Beauchamp*, 5 Dana 70, April 1837. Will of Robert Moore who died in 1819: [71] " It is my will and desire that my slave Will shall not be sold, nor put out of the family, except Mrs. Moore, who owns his wife, shall choose to buy him—in such case, he may be sold to her, as she owns his wife, and I desire he shall not be parted from his wife and family, and to be hired in the family, or neighborhood, at a reasonable rate, to some good master," [79] " As to the slave Will, although the executor sold him, not exactly as directed, yet he did not, as we presume, frustrate or essentially evade the intention of the testator, by a *bona fide* sale, for a full price, to one of the testator's family who lived near the slave's wife."

*Jameson v. Emaline*, 5 Dana 207, April 1837. " Emaline, an infant girl of color, by her next friend, sued Jameson, in an action of trespass and false imprisonment in detaining her as a slave, and the Circuit Court, on the trial on an appropriate issue, having instructed the jury that she had a right to recover, verdict and judgment were accordingly rendered in her favor. It appears that she is a daughter of Nancy, who was a child of Maria, whom her mistress, Mrs. Levy, emancipated, by an instrument of writing, signed and sealed by herself and by Evan Gwynn, purporting to be a bill of sale of 'the possession' of Maria to Gwynn, for the term of fifteen years; and declaring that, at the expiration of that term, she 'shall be and is hereby manumitted, set free and discharged from all claim of service and right of property whatsoever;' and also stipulating and declaring that, if she should have 'issue at any time or times during the said fifteen years, they and each of them shall be manumitted and set free when they shall respectively arrive at the age of thirty years.' It appears, also, that Nancy was born between the date of that document and the expiration of the prescribed term of fifteen years, and that Emaline was born before Nancy had attained thirty years of age."

Held: Maria continued to be a slave for the fifteen years inasmuch as the "right of property" is reserved for that period. Maria's daughter, Nancy, was therefore born a slave and so remained until she was thirty years of age. Emaline, born while her mother, Nancy, was a slave, as the deed of emancipation did not extend to her, or to any of Maria's grand-



children, must be deemed a slave for life. [209] "And therefore, notwithstanding the peculiar nature of the subject in issue, and the fact that a verdict has been rendered in favor of liberty, the record, as now presented, forbids an affirmance of the judgment. This, like every other case, must be decided, by this Court, according to the law of the land applied to a rational and consistent interpretation and effect of the facts proved. Judgment reversed, and cause remanded for a new trial." [Robertson, C. J.]

*Carter v. Leeper*, 5 Dana 261, April 1837. Leeper had "obtained a judgment . . . in an action of covenant, on an obligation given [by Carter] in September, 1826, for two hundred dollars, . . . Carter filed a bill enjoining the judgment on the ground . . . that the only consideration of the covenant was a promise by Leeper, to emancipate two old slaves of his own, . . . 1827; and that he had failed and still refused to emancipate them, . . . Leeper . . . [262] averred that the only consideration for the covenant by Carter, was . . . that he (Leeper) had, for about two years prior to the date of it, permitted the . . . slaves to go at large and acquire property, for which he considered himself entitled to compensation, . . . witnesses . . . swore that, but a short time before the date of the covenant, . . . Leeper . . . said [to Carter] that he would never incur the responsibility of emancipating the old slaves, but that he would, for two hundred dollars, agree that they might, during their lives, act for themselves without his control."

Injunction perpetuated: "there was no valuable consideration; because the slaves could not have been indebted to their master for the value of past services devoted to their own use, or for property thus acquired by their labor, and which, in judgment of law, was, and still must have continued to be, his. . . the consideration was illegal and contrary to public policy; for it is inconsistent with the policy of our State, and contrary to the fourteenth section of an act of 1798, and the first section of an act of 1802, to permit a slave to go at large and act for himself." [Robertson, C. J.]

*Howard v. Samples*, 5 Dana 306, May 1837. "an action of trespass . . . The plaintiff derives his claim to freedom from a conveyance of his mother and himself from their master, John Howard, . . . to his son, James P. Howard, by a deed executed . . . January, 1830, and recorded, . . . and from a deed of manumission executed by James P. Howard, in open Court, . . . 1831, emancipating him . . . at the death of the grantor's father, . . . who died in 1835, . . . The defendant resists . . . upon parol evidence of a lost writing, purporting to transfer him, by gift, from James P. Howard, in March, 1830, to . . . [defendant and Story] husbands of the said James' sisters. . . the possession of the plaintiff, remained in John Howard . . . until his death, . . . the writing said to have been given by James P. Howard to the defendant and Story, was . . . [307] deposited with . . . John Howard, and was not seen after his death,"

Held: "As there was no proof of actual possession by the donees, . . . or of the registration of the memorial of gift, no title whatsoever passed by it, from the donor."

*Bryant v. Sheely*, 5 Dana 530, October 1837. Bryant had bought a horse "from the slave of Sheely, after Bryant had obtained the written

permission of Sheely to trade with said slave. . . it was proved that the slave . . . was trading or dealing for himself, by the allowance of his master,"

Held: [531] "A slave, so far as he is authorized to deal in property, acts, in judgment of law, as the agent of his owner, and for his benefit. If he make a sale by authority, the master thereby loses all right to the thing sold, and acquires a legal right to the price agreed on. . . [532] But he cannot authorize the slave to coerce the payment of the price. . . if the price agreed on was not paid to the slave who made the sale, his master had a right to recover it,"

*Owens v. Durham*, 5 Dana 536, October 1837. "a covenant by Nathaniel Owens, to 'give' Samuel Durham, for his services in working with his slaves, and superintending his farm during the year 1833, one seventh part of the corn, wheat, oats and rye, which should be 'raised and secured' "

*Maupin v. Dulany*, 5 Dana 589, October 1837. [595] "it was hard, also, to charge for hire of the negro woman, for some years, when she was in such a condition that the children, who were then keeping house, kept her alternately among themselves, as a distributive burthen, rather than benefit."

*Case v. Woolley*, 6 Dana 17, October 1837. "A. R. Woolley—whose slave, named William Gorden, had, without his consent, been taken (in violation of the statutes of this State, of 1824—1 Stat. Law, 259-60,) on board the steam boat *Lancaster*, from Louisville in Kentucky, the place of his residence, to New Orleans, whence he had fled to some place unknown, so as to have escaped vigilant search and enquiry after him—proceeded . . . to attach the said boat, for the purpose of subjecting it to the lien given by the said statutes, for the damages which he had sustained. . . [18] a jury . . . fixed the amount of damages at one thousand dollars "

*Susan (a colored woman) v. Ladd*, 6 Dana 30, October 1837. Susan was emancipated in 1827 by the last will of Benjamin Ladd of Tennessee and "was, from thenceforth, permitted to go at large, as a free woman, until the 1st day of April, 1833, when she was taken up by the defendant as a slave."

Held: "We cannot perceive upon what ground the bill was dismissed. A bill will as well lie, to assert, and establish her freedom, and quiet her in the enjoyment of it, when she claims under the will of her deceased master, as when she claims by deed of emancipation . . . [31] unless he be inhibited [from emancipating] by some municipal regulation of the State where he is domiciled and dies. . . no such inhibition is shown in this case." [Ewing, J.]

*Willis v. Willis*, 6 Dana 48, November 1837. "B. G. Willis and William Willis made an exchange of slaves, in the lifetime of the former, by which the latter exchanged a boy, with the former, for a girl. . . [49] The slaves were small, and the former owners of each were the owners of their mothers, and they were permitted mutually to remain with their mothers." The girl died.

Held: [50] "Each seemed to be permitted to remain in possession, as *quasi* bailee for the other, without limitation as to time when the possession might be taken, or any thing to be done to entitle either to the possession. The right of property and right of possession, therefore, vested immediately, and the risk devolved on each of the owners." He who is in possession of the living child, is liable to the action of the other for it, without any tender or act on the part of the latter.

*Mitchell v. Miller*, 6 Dana 79, November 1837. [80] "Claiborne having run away from Rodes, or been run off by him"

*Jackson's Will*, cited in 8 Dana 398, November 1837. [399] "It was after Samuel D. Jackson had been stricken on the head by one of his slaves, that affiant discovered his mental infirmity," Edes, a constable, stated that "in the summer of 1831, said Jackson brought one of his negroes to town, with a gun in his hand, and his clothes bloody, for having struck him. . . He once took this affiant to his house, to correct his negroes, of whom he had complained often; but affiant discovered that Jackson's complaints of them were not very well grounded, and that he was too insane and unreasonable to have them corrected, and he declined to do it."

*Laughlin v. Ferguson*, 6 Dana 111, April 1838. Smedley [115] "had the woman conveyed to Louisville, and sold for five hundred and eighty seven dollars. The child remained with Grimes, in consequence of sickness, of which it soon after died."

*Bronaugh v. Bronaugh*, 6 Dana 124, April 1838. [126] "such boys as Austin and Beverly would have been worth, in 1820, about as much as such a woman and child as Judy and her offspring then were; and that such a woman and child as they then were would have been worth, in 1835, about as much as Austin and Beverly were each worth at that time. . . Austin and Beverly should be estimated at about five hundred and eighty dollars each."

*Nancy (a colored woman) v. Snell*, 6 Dana 148, April 1838. "The appellant sued Snell for her freedom; failed in the Circuit Court, and has appealed to this Court. She claims her freedom under the will of Ann Burgess, her former mistress, who died in Maryland, in 1826 . . . 'After my debts and funeral charges are paid, . . . It is my will that my colored woman Nancy go free, and her two children, Charles and Richard Hamilton, go free with her;' and . . . directed that others of her slaves should go free;" Claggett, administrator with the will annexed, "in March, 1832, sold Nancy and her children to one Osburn, of Scott county, Kentucky; who brought them to this State, and sold her to the defendant. . . [155] Nancy did go at large, and live as a free woman, some five or six years, from about eighteen months after her mistress' (Ann Burgess') death, and supported herself as a free woman, and was regarded and dealt with, as such, by the neighborhood."

Held: "This being with the knowledge of the administrators—which must be presumed—is strong evidence of their assent to the bequest. . . a tacit assent, and unless countervailed by other evidence . . . [156] would

. . . justify a finding in her favor." Slaves when emancipated by will, [149] "occupy the double character of property and legatees, or *quasi* legatees. And, as freedom is a legacy above all price, humanity, justice and the spirit of our laws, inculcate the propriety of placing them in the most favored class of legatees. . . [151] in a case like the present, where the slave has been sold in a foreign State, and hurried off to this, and where the estate, debtors and creditors, legatees and administrators of the estate are all residents of the foreign State, and without the power or control of a court of equity here, to make her claim depend upon a precedent indemnity to the purchaser, or drive her back to a court of chancery in Maryland, for redress, where she is inhibited from going, by the restraints of a master, would be tantamount to an absolute denial of justice." [Ewing, J.]

*Briscoe v. Wickliffe*, 6 Dana 157, April 1838. Will of Samuel Briscoe, 1822: "I . . . bequeath unto my wife, Nancy Briscoe, all my real estate, during her widowhood, or until one of my children marries, which consists of eleven negroes named as follows, . . . but if my wife Nancy marry again, I . . . bequeath to her one third of my estate. When my first child marries, . . . the balance to be equally divided between my three children." In 1824 Nancy Briscoe married Brady, and six of Briscoe's negroes were allotted to him in right of his wife as devisee. In 1827 a judgment was rendered against Briscoe's administrator for \$998, and [158] "an execution thereon was levied on three negroes of Briscoe's estate, other than those which had been allotted to Brady, and in September following, they were sold by the sheriff, and purchased by C. A. Wickliffe, . . . In 1834, Ruth E. Briscoe intermarried with J. W. Simpson, being the first married of the testator's children; "

Held: [167] "the slaves, until the contingency happens [the marriage of the first child] are personal property," for the purpose of satisfying debts; and [169] "while they remain in the hands of the personal representative, the future possible interest of the devisees is, for the purpose of paying debts, merged in the present estate in possession; that for this purpose the slaves are . . . fully subject to sale under a judgment and execution against him; that, as between the purchaser of a slave under such sale, and the contingent devisees, the question of the necessity of the sale is concluded, and that the purchaser who has purchased the entire right, holds it freed from the contingency."

*Commonwealth v. Major*, 6 Dana 293, April 1838. "an old negro man slave, the property of Major, had, with his master's knowledge and permission, and in a house on his land, kept a tippling house,"

Held: [294] "the law should decide that it was the master's tippling house, and should hold him responsible for the penalties denounced against all keepers of such pestilent houses."

*Bernard v. Chiles*, 7 Dana 18, June 1838. In 1826, action of detinue was commenced for a female slave Esther and her son William, or their value; in 1833, judgment was obtained; in 1836, a *scire facias* was issued "for obtaining a judgment for execution, and also for ascertaining the value of five children alleged to have been borne by Esther, between the com-



commencement of the original action [1826] and the date of the judgment therein [1833], and of two other children alleged to have been borne by her since the date of the judgment, and for obtaining also, a judgment for execution therefor. . . [22] one of the two children born after judgment was born within less than one month after the date of the judgment."

Held: [23] "the judgment for Esther had the legal effect of a judgment for the child with which she was pregnant when it was rendered." A supplemental judgment expressly authorizing execution for the child is [24] "necessary for compelling a submission to the original judgment to the full extent of its comprehensive legal effect. And therefore, and the more especially as the application of the judgment to the child depends on extraneous facts, a *scire facias* is . . . the only effectual proceeding" [22] "as to the children born before and the child conceived and born after judgment, there is no foundation for a *scire facias* to have execution,"

*Dunlap v. Archer (a man of color)*, 7 Dana 30, June 1838. "Archer is of servile complexion, and had been held and claimed as a slave; . . . more than seven years prior to the commencement of this suit, one James McDonald, now of the State of Tennessee, having sold him to one Tidence Lane . . . the latter deposited with the former . . . simultaneously with the sale, a 'bond,' 'binding' himself 'to give the said Archer his freedom, at the expiration of seven years, upon condition that (he) would serve him faithfully for seven years from that time;' that the 'bond' was lost; and that Archer had served as a slave in Kentucky for the last four years preceding the institution of the suit"

Held: if the paper was given to the slave, or to another for his use, it did of itself constitute a conditional emancipation, which, if the seven years' service was faithfully performed by the slave, would take effect and make him free without any new writing.

*Whitesides v. Dorris*, 7 Dana 101, June 1838. Dorris mortgaged several slaves to Whitesides who afterwards transferred them to "Powell, who run off and sold the slaves."

*Railroad Co. v. Kidd*, 7 Dana 245, October 1838. "On a Sabbath day, in October, 1835, Philip . . . agreed with another slave, who was one of the hands engaged to attend the cars on the railroad, to go, in his place, with them, on that day, from the city of Lexington to Midway, whither the agent of transportation was in the act of starting, with the locomotive and about ten burthen cars, for wood for the city; but the agent—being asked for his approval of the proposed substitution for that trip, and ascertaining from Philip, that he was a slave, and had no authority from his master to go with the cars—told him that he could not go; and, in reply to an expostulation from the slave who desired momentary respite by the substitution of Philip, he told him, also, that *he* knew that Philip could not go without violating the rules of the company, and that, therefore, he should not go; . . . both of the slaves got upon the rear car—the agent being on the front one." Philip in jumping off the cars with others, while entering Midway, at the agent's order, [246] "boys, let us get down and stop the cars," fell, being inexperienced, and "had one of his legs crushed under the wheels of one of the cars." He died three weeks later.

*Withers v. Butts*, 7 Dana 329, October 1838. Plaintiff's overseer and the overseer's wife "stated, that they saw and examined the slave, on the evening of the day of her delivery to the plaintiff; that she was then obviously diseased; that she complained of a pain in one of her sides, and had a 'shortness of breath,' and an ashy, husky skin; that she was not required to do any work for four or five days; after which, 'she knocked about the house,' and spun and cooked occasionally; . . . [330] that, at her own instance, she was permitted to hoe corn, in May; but that, in hoeing, she was in the habit of stopping 'to rest,' after hoeing twelve or fifteen hills; that she was pregnant, and had her child about the first of July; before which, she had been confined by her disease about a week; that she died about the first of September; . . . his family physician . . . was first called to her as a patient in June, 1836, . . . her disease was the *cachexia Africana* or '*negro consumption*;' . . . though the defendant owned other slaves, but no other woman, and had never before sold a slave, and, moreover, had reason to apprehend that, if the plaintiff should buy her, he would send her out of this State, yet he was anxious to sell her, because, as he said, she did not suit him;' and that he did sell her *alone*, though she had a child not more than four years old, still retained by him"

*Graves v. Smedes*, 7 Dana 344, November 1838. Letter, December 25, 1834: "Mr. Benjamin Graves.—Harry wishes to live with me another year. I will give you \$100, which is the most I can do:" Harry was sent by his master to Smedes on January 1, 1835, and continued in his service during the whole of the year 1835.

*Hundley v. Perry*, 7 Dana 359, November 1838. Perry, a negro man, filed a bill "to assert and establish his right to freedom, against John B. Hundley, who claimed and had long held him as a slave. The complainant claims his freedom under a deed of emancipation executed by his former owner, Charles Hammond, of . . . Maryland. Which deed, bearing date the 7th day of May, 1802, was proved and recorded in the county of Anne Arundel, and afterwards recorded in the county of Jefferson in this State, to which several of the slaves emancipated thereby, had been removed. Among twenty two negroes, whom this deed purports to emancipate—to be free at different periods, are Deb and her two children, Perry and Nace: Deb to be free in 1804; Perry . . . [360] in 1822, and Nace in 1824." Hundley claims that Hammond had sold Deb and her two children to Dorsey and exhibited the receipt: "Received—Feb. 16th, 1801—of Edward Dorsey, seven pounds ten shillings, it being full payment for one negro woman named Deb, and her two children named Nace and Perry. Charles Hammond of Chs. Teste, Isaac Randall." [361] "at the date of the receipt . . . Deb, who was about twenty years old, and her two children, (of whom one was about three or four, and the other, one or two years of age,) were worth in Maryland from four hundred and fifty to five hundred dollars; that Dorsey owned the husband of Deb, and was about to bring him to Kentucky; . . . that Dorsey bought Deb and her children to prevent a separation;" [360] "in the spring of 1801, Edward Dorsey

removed from Maryland to Kentucky, bringing with him the three negroes Deb, Perry and Nace; that he used them as slaves until his death in 1804; . . . [365] Deb does not appear to have been detained after 1804." [360] "Perry remained in the family until the year 1822, when Hundley having intermarried with one of Dorsey's daughters, acquired, in right of his wife, and, as he says, by purchase from the other heirs, the sole interest in him, and has held him as a slave ever since."

Held: [364] "the interest actually transferred, and for which the payment was made ['the negroes . . . were worth, as slaves for life, about twenty times the entire sum paid'—'£7 10, or \$25'], was not the absolute right of property in the negroes as slaves for life, but a temporary, limited interest in their future services, . . . [365] such . . . as would amply compensate Dorsey for his money paid, and for the trouble and expense of removing them to Kentucky, and there maintaining the two children until they should be capable of useful service." The deed of 1802 has the effect of making Perry free in 1822. [367] "But as it does not appear that, when Hundley took possession of Perry, . . . he knew or believed that Perry was entitled to be free, . . . we are of opinion that this case is not one which . . . entitles Perry to damages, from Hundley, for the value of his services." [T. A. Marshall, J.]

*Tevis v. Eliza*, 7 Dana 394, December 1838. Cloe Penn left her husband in Maryland about the year 1805, and came to Kentucky "bringing with her the negroes Nell and her daughter Nann, whom she claimed as her own, . . . claiming them and the after-born children of Nann, . . . until her death in the early part of 1813." Her will emancipated "Nell and the children of the latter then born, of whom [Eliza] the plaintiff was one, . . . The executor named in the will assented to the freedom of the slaves, who went at large as free persons for about five years, during a great portion of which they lived in the State of Indiana, until about the year 1818, being alarmed by a rumor that they might be kidnapped there, they returned to Kentucky, and afterwards, in the year 1818 or 1819, were taken into possession by Tevis. . . . [397] who, conceiving that Mrs. Penn's title was insufficient to secure the freedom of the negroes whom she attempted to emancipate, and apprehending that they might be kidnapped—employed the agency of a person who was going to Maryland, to seek out the heirs of Penn, and purchase up their claim or interest in the negroes, for the joint benefit of himself and the agent. Transfers were accordingly obtained, in the early part of the year 1818, from six of the heirs resident in Maryland and Ohio, of their interest in the negroes, at the cost of about one hundred and sixty dollars; and Tevis having shortly afterwards, at the price of five hundred dollars, acquired the interest of the agent who had procured the transfer, he emancipated Nell and Nann and one of the children of the latter, and took possession of the rest as slaves. At that time Nann had five children, and . . . [398] the whole of them must have been worth more than two thousand dollars." Eliza, a daughter of Nann, brings this action of trespass against Tevis by whom she was claimed and by whom she had been held as a slave for about twelve years since he had reduced her to slavery again, in order to establish her right to freedom under the will.

Held: that the jury were authorized by the facts to infer that, by some arrangement between Mr. and Mrs. Penn, the right to the exclusive possession and disposal of the slaves was secured to the latter; or that she was entitled to and held them as her distributive part of his estate; and that the verdict in favor of the plaintiff below (the defendant in error) establishing her right to freedom, ought not to be disturbed.<sup>1</sup>

*Carr v. Bobb*, 7 Dana 417, December 1838. Held: slaves do not pass by a nuncupative will made in 1814.

*Turner v. Johnson*, 7 Dana 435, December 1838. [436] "the slave [Edmond] had a wife in Warren county, and the plaintiff having occasion to raise a sum of money, agreed to sell him for five hundred dollars less than his real value, in consideration that the defendant agreed to keep him in Warren county, and not separate him from his wife, and that, if he should be compelled to sell him, he would let the plaintiff have him at the same price he gave for him." But the defendant "sold him out of the county, in some one of the southern States, for a large sum of money, without giving the plaintiff notice of his intention to sell him, or offering him back to him, at the same price he gave for him;"

Held: [438] "the contract against alienation to the south, or to any except the plaintiff" is not invalid as being in restraint of trade. Slaves [440] "are property, and must under our present institutions, be treated as such. But they are human beings, with like passions, sympathies and affections with ourselves. . . It would, therefore, seem to be a hard and unconscientious rule, which would restrict a benevolent master in the sale of a favorite slave from providing, by express contract, for his peace and comfort, or against a merciless disregard of his moral rights, or that would declare such a contract void, as against the policy of trade and traffic." [Ewing, J.]

*Clarkson v. White*, 8 Dana 11, April 1839. Peter Clarkson proposed "that the slaves seized for the satisfaction of other judgments, should be purchased by the latter [R. L. Clarkson] for the benefit of his (Peter's) children; whereby they would remain in his use and possession, and that he should furnish, as a payment on the judgment of R. L. Clarkson against him, as much money as should become payable on the purchase of the slaves, all of which was done."

*Mountjoy v. Lashbrook*, 8 Dana 33, April 1839. "in 1835, land, slaves, . . . were devised to his two sons, . . . in trust for the use and benefit of his daughters . . . to each of whom the testator devised the use, in severalty, of specific lands and slaves, . . . during their respective lives, remainder to their children."

Held: the daughters are entitled to the possession, as well as the use of the slaves devised to them respectively without any bonds being given by them or their husbands, for the preservation, proper use, or surrender of the slaves, [36] "subject to such control only by the trustees, as may become necessary to prevent any abuse of the property or evasion of the trust."

<sup>1</sup> See *Aleck v. Tevis*, p. 334, *supra*.



*Curling v. Curling*, 8 Dana 38, April 1839. "James Curling, who died in 1833, by his will, published in 1815, devised his estate to his wife during her life, and then made the following devise: 'And at the decease of my said wife, it is my will and desire that my negro boy, Harry, shall cease from slavery and be emancipated and set free,'"

*Chenault v. Barr*, 8 Dana 148, May 1839. "on her death-bed, . . she also gave the slaves to her husband, with the solemn injunction that he should emancipate two of them, which he accordingly did, and give another to one of his daughters, which he also did, and dispose of the only remaining one as he should think fit; and this slave was, after the death of Phelps, sold by his personal representative."

*Covington Ferry Company v. Moore*, 8 Dana 158, May 1839. "A slave, named Preston, who had been in the habit of passing from Covington to Cincinnati, on the business of his master (a tavern-keeper of Covington), having, on one Sabbath evening, passed on the ferry-boat of the Covington Ferry Company, and escaped to Canada, Zedekiah Moore, the master, sued the company in two actions, and recovered a judgment for \$891, the assessed value of the slave, and also a judgment for \$200, as a penalty under a statute of 1831. . . It does not appear that any member of the company was either present when the slave was passed to Cincinnati, or had any personal knowledge of his so passing. And it does appear that the company had instructed its managers never to permit any slave to pass on the boat to the Ohio shore, without the owner's consent."

Held: the company is not liable to Moore, under the statute of 1831.

*McLaughlin v. Daniel*, 8 Dana 182, June 1839. [187] "shortly after the marriage, Nelly . . was put into the possession of the married couple, and most probably upon a loan, . . 'Nelly went to her old master's regularly for a number of years . . and when Nelly had two children, . . she had them at Charles Daniel's, to be under the superintendence of Mrs. Daniel, who was a midwife.'"

Held: [188] "the occasional returns proven will not suffice to exempt them from the claims of creditors. The returns . . may have been such as family servants are usually permitted to pay to their old masters," [Ewing, J.]

*McIsaacs v. Hobbs*, 8 Dana 268, June 1839. [269] "about twenty years before the levy now in question, Cartmel had purchased one of these slaves, who was afterward the mother of the others, and placed her in possession of Higdon, or his wife, then recently married; that they had returned annually to Cartmel's possession for a day or two, during which he claimed them; and that on the 1st of January, 1835, having gone, on that day, from Higdon's house to the late residence of Cartmel, to attend his funeral, they were there seized by the coroner." [268] "averring that they were the property of William Higdon, and, as such, subject to levy and sale,"

*Singleton's Will*, 8 Dana 315, June 1839. Singleton's son William charged that his father "was laboring under an unfounded prejudice against, and insane aversion" to him, when he made his will disinheriting

him. [326] "the pastor of the church in which the decedent was a member, . . . says that he [Singleton] took part against William, to procure his expulsion from the church, . . . and flew into a violent rage because the church would not hear the evidence of a slave against him; . . . the sole ground of complaint against William, and that for which he prosecuted him in the church, was that he had been guilty of sexual intercourse with one of his negro girls; which William always solemnly denied, and which his mother and sisters believed there was no foundation for; and the only proof, as alleged by him, was that he was told so by one of his negro women, whose husband William had forbid to come on the place, on account of some charge of poisoning; . . . wife of the decedent, states . . . [328] She heard John Singleton say, in the presence and hearing of the old man, . . . Do you see the striking likeness of Harriet's child to William? the old man said, Oh Jonny, Jonny." Another witness: [329] "Before the church committee, he said that he had been watching Will for six months, and looking out of the window one morning he had seen the girl hand Will a drink of water, and that was all he knew of his guilt. William offered to go down upon his knees and beg his father's pardon, if he would forgive him; the old man said he would forgive him, if he would leave his house, and never set foot on his place again." [326] "William behaved humbly and respectfully to his father, and, to gratify him, withdrew from the church." The testator's widow thought [335] "his drinking was sometimes the cause of his derangement and violence among his negroes" [365] "At the September term of the Woodford court, preceding testator's death, he came to witness, and said there is a prosecution against my son William, for improper treatment to his slaves, and he is below, and requested witness to go into court and get him clear of it—and asked what fee, and being told, said he would pay it;" Singleton's will was found invalid by the jury.

The circuit court refused a new trial, and the judgment was affirmed by the Court of Appeals. Robertson, C. J. dissented: [339] "The testator suspected his son William of conduct which he looked on with peculiar indignation and horror. I do not know that his suspicions were without rational foundation. There is no testimony to that effect. Nor can I admit that the father's extreme sensibility on the subject of such a supposed breach in his household, committed by a favorite son, who was a professing Christian, and a co-member with himself in the same church, was any proof of insane delusion, or insane aversion. William certainly deported himself rudely and rebelliously toward his passionate and venerable father. He told his mother he would cut his throat, if he was not his father. When about his father's dwelling, he sometimes sang spiritual songs in a boisterous and ludicrous manner, for the purpose of convincing his father, as he said, that he was not with any of the negroes. . . . [340] And he admitted to William Barr, that once, when his father was in one of his fields with some of his slaves, he (William) being near, said, in a loud soliloquy, 'I see some negroes who have been telling damned lies on me, and I will have their hides;' and then naming one, and pointing his gun at him, said, 'I will have that fellow's hide,' when the negro, thus

menaced, ran off. He then said, 'I see another,' and pointing his gun at him, he ran off, also; and thereupon all of them ran out of the field, their old master with them."

*Chancellor v. Milly*, 9 Dana 23, October 1839. "Milly, apparently a white woman, about forty years old, and who had been treated as a slave from her birth, brought an action of trespass against Chancellor, who held and claimed her as his property. Upon the trial, . . . [24] she was exhibited before the jury for their inspection; and thereupon Chancellor, in order to repel any presumption arising in her favor from her color, offered to prove that, in the family in which she was born and reared from infancy, she had ever been called and reputed the child of a woman of color, who was a slave, and the property of that family. But the circuit court refused to admit the proffered evidence, and in this there was error.

"Milly's color being only *prima facie* proof that she is free, the fact that, nevertheless, her mother was a slave, might rebut the presumption arising from her being, apparently, a white woman. And we do not doubt that such reputation of Milly's maternity as that which the plaintiff in error offered to prove, was admissible as evidence. After the lapse of forty years, such a fact would scarcely ever be susceptible of any other proof than that of reputation. . . . Such reputation would have been admissible in Milly's favor, if her reputed mother had been free; and that which she might have proved to create a presumption in her favor, her adversary should be permitted to show against her. . . .

"Wherefore, the judgment in favor of Milly must be reversed, and the cause remanded for a new trial." [Robertson, C. J.]

*Ready v. Commonwealth*, 9 Dana 38, October 1839. Cato, the slave of Ready, had been committed to prison, "on a charge of having feloniously caused the death of another slave, by striking him with a deadly weapon, with the intention of killing him." His master gave bail "for securing the appearance of Cato in the circuit court, to answer that said charge of felony. He failed to appear." Judgment "was rendered against Ready. in consequence of the forfeiture adjudged for the non-appearance:"

Affirmed: [40] "Ready had a right to bail Cato, if the offence with which he was charged would have been bailable in the case of a freeman."<sup>1</sup>

*Offutt v. Twyman*, 9 Dana 43, October 1839. Suit brought "on a covenant of warranty of soundness of a slave, . . . Hilery was interested in the profits of a lot of slaves carried to the south, of which the slave in question was one."

*Watham v. Oldham*, 9 Dana 50, October 1839. "a decree for damages against the owners of a boat, used as a ferry-boat, on the Ohio river, between Louisville, in this state, and Jeffersonville, in Indiana, rendered on the ground that their ferryman—though without their knowledge or authority—had, in violation of a statute of 1824, permitted a slave of the appellees to pass on the boat, without their authority, from the Kentucky to the Indiana shore, whence he had fled to Canada. . . . Neither of them [the two witnesses] stated that he saw the slave cross the river on the

<sup>1</sup> Statute of 1800, 2 Littell's Laws, 418.

boat; each of them only swore that he saw the slave on the boat before it had left the Kentucky shore, . . . another witness swore that he had since seen the slave in Canada."

Held: [51] "his value is the utmost amount to which the . . . owners of him, can be entitled."

*Craig v. McMullin*, 9 Dana 311, May 1840. "Charles McMullin, a free man of color—being desirous to buy his infant son John, a slave, whose owner was about to take him to a foreign state, whither he intended to remove—applied to one Leonard Wheeler, who had previously assisted him in purchasing his own manumission, to aid him in the purchase of his son, with a view to his ultimate emancipation also. Wheeler conferred with McCutchen, the owner of John, who, though unwilling to sell, consented, nevertheless, to take three hundred dollars from the father, for the purpose of gratifying his paternal feelings and of promoting the liberty of the son. Wheeler, not being himself able to advance the required sum, applied to Elijah Craig, who was in the habit of loaning money at ten per centum annual interest, and urged him to advance the three hundred dollars, and secure reimbursement, with profit, by a lien on John. Craig, whose chief object seems to have been to secure a debt of about fifty dollars due to him from Charles McMullin, agreed to advance as much as two hundred and seventy-five dollars, provided that Charles would, on account of his said indebtedness to him, pay fifty dollars thereof. . . . McCutchen having thereupon made an absolute bill of sale of John to Craig, the latter wrote and delivered to Wheeler a memorandum, reciting that, at the instance of Charles McMullin, he had bought his son for two hundred and fifty dollars, and binding himself to deliver John to his said father, or to 'do any legal act in (his) power to secure his freedom,' if, within three years, the sum . . . [312] should be refunded to him, 'with interest, and a reasonable allowance be made for the risking of his (John's) life, not exceeding the rate of ten dollars per annum for the time.' . . . Craig having obtained and continued to hold the possession of John, Richard Pindell, shortly before the expiration of the prescribed period of three years, tendered to him two hundred and fifty dollars, and legal interest thereon from the date of McCutchen's bill of sale, and also about thirty dollars for the stipulated insurance of John's life, and demanded a delivery of John to himself, as the authorized friend of Charles McMullin, for whom he made the tender, under an agreement that, for his own indemnity, he should have the use of the boy for about ten years. Craig rejected this proposition on two alleged grounds: first, because, as he insisted, he was entitled to two hundred and seventy-five dollars, and ten per centum for interest thereon, and ten per centum also annually for insurance; such being, as he averred, the verbal contract, and there being, as he also averred, a mistake in the written memorandum, so far as it purports to be variant in those particulars; and secondly, because he denied that he was bound to surrender John upon any other condition than his immediate liberation; though he admitted that he was, in principle, opposed to emancipation, and that, in making the contract, he was not influenced by benevolence, but was solely actuated by a desire to secure the debt



which Charles McMullin owed, and to make profit on his money. Shortly afterward, Charles McMullin brought this suit in chancery, for compelling Craig to surrender John to him, upon equitable terms."

Held: [315] "Charles McMullin has a right to a decree for the surrender to himself of his son John, upon the condition of first paying to Craig \$275 and six per centum interest thereon, together with the stipulated amount of insurance, after deducting the value to Craig of John's services, to be applied as a credit from year to year, up to the time of rendering the final decree." [Robertson, C. J.]

*Jones v. Bennet*, 9 Dana 333, May 1840. "Early in the year 1830, John Bennet, who, though once an owner of slaves, seems to have been in principle opposed to slavery, liberated a female slave, then the mother of four children, and the wife of a colored man named Levi Jones, once also a slave, and who was emancipated by his master, William Chenault, on the 31st of May, 1830, in the county of Madison in this state, where both Bennet and Chenault then resided. About the date of Levi's manumission, and probably on the same day, Bennet, being about to remove to Missouri, and not wishing to take with him, or to hold longer in slavery, the four children of the recently emancipated mother and father, sold and delivered them to Levi, for the inconsiderable sum of \$300, payable in three annual installments, with legal interest from the date of the contract; which was not, however, committed to writing until sometime after the date of the verbal contract, and the delivery of the children to Levi. Bennet having emigrated from this state before the first installment became due, returned in the autumn of 1831, on a visit, but received no portion of the price of the four children; Levi not then seeming to be able to pay conveniently. In May, 1832, Samuel Bennet, then and yet a citizen of Kentucky, procured from his father the said John Bennet, in Missouri, a document purporting to be a bill of sale of the said four children, for the recited consideration of \$336, the sum then due from Levi, according to the terms of his contract; and shortly afterward abducted the three oldest of them and whom he has ever since detained as his slaves, without Levi's consent. In 1836, Levi filed a bill in chancery against John and Samuel Bennet, praying for a decree, upon equitable terms, for restitution of his children, and averring that he had offered, and was still willing to pay, the full amount of the conventional price. John Bennet never answered the bill, and Samuel Bennet resisted any decree for relief on two grounds: first, because, as he insisted, the chancellor had no jurisdiction; and, secondly, because as he also alleged, the terms of the contract of sale to Levi authorized John Bennet to vacate the sale, in the event of a failure by Levi to make punctual payment of any one of the annual installments of the consideration; and which, as he averred, the said John had done by selling the children to him (Samuel) for a valuable consideration."

Held: [337] "the abduction and detention of the children by Samuel Bennet were unauthorized and tortious. He should, therefore, be compelled to pay damages for the wrongful detention, and make restitution of the children, upon receiving the price which his father would have been entitled to receive from Levi, and the accruing interest thereon from the

date of the contract in 1830. . . upon the return of the cause to the circuit court, a jury should be impaneled, or an auditor appointed, to ascertain the reasonable value of the use of the three children in the possession of Samuel Bennet, from the time when he took them to the date of the inquisition; and if the amount so to be assessed shall exceed the aggregate amount due from Levi, under his contract with John Bennet, the balance should be decreed to him, together with a restitution of his children. But, if the assessment should not extinguish the debt, the court should make a set-off as far as it will go, and give day for the payment of the balance due from Levi; and on his paying that balance, he should have a decree for the restoration of his children to himself." [Robertson, C. J.]

*Caleb v. Field*, 9 Dana 346, May 1840. Quertermus devised his slaves to his wife, "with express authority to dispose of them as she should choose at her death. . . by her last will, . . she emancipated one of those slaves named Caleb. Some time after the death of the testatrix, Caleb was sold under an execution issued on a judgment which had been obtained by one John Murphy, against the executor of the testator, . . The purchaser having sold Caleb to one Abraham Field, who treated him as a slave, he filed a bill in chancery . . asserting that he was a freeman, and praying for a decree accordingly. The circuit judge having dismissed the bill absolutely, on the final hearing, the case is now to be revised."

Held: [348] "Caleb was . . undoubtedly a freeman, with the contingent liability to be subjected to the satisfaction of any *bona fide* debt due by his deceased master. And we are clearly of the opinion that the sale of him, under Murphy's execution, was unauthorized and void. . . the lien reserved by statute in favor of the creditors of the emancipator, can not be enforced by an execution against the assets which came, or could ever come, to the hands of the executor; but can be secured only by a proceeding in which the person manumitted would be entitled to defend his rights, and should never be disfranchised for an instant, unless the debt of the pursuing creditor can not be otherwise made, nor to a greater extent than the payment of it should render necessary. . . [349] the facts in the record conduce strongly to the conclusion that the claim is fictitious, and was fraudulently contrived for the mere purpose of depriving Caleb of his freedom. . . there is not, in our opinion, any sufficient ground of equity, for resisting or postponing an immediate decree in Caleb's favor." [Robertson, C. J.]

*Snead v. David*, 9 Dana 350, May 1840. "This action of trespass was brought by David, a man of color, to assert his freedom, under the will of Charles Wilkins, his former owner. The will was proved and admitted to record in 1827, and in express terms emancipates David and other slaves of the testator. The defendant, Snead, relied upon a bill of sale executed by the acting executors of Wilkins, within a few months after the probate of the will, by which they sell and warrant David as a slave for life, under the apprehension, as the writing states, that the estate of said Wilkins would not be sufficient to pay his debts. And it provides that, if the estate should prove sufficient, the purchase-money should be received back, and

David restored to the executors, that the will might be executed with regard to him. It was proved that the estate of Wilkins, both real and personal, was insufficient to pay his debts; . . . David, under the direction of the circuit court, obtained a verdict, and from the judgment rendered thereon, Snead appeals."

Held: [355] "under the act of November, 1800, no distinction can be made between the effect of a will which emancipates a slave, and one which devises a slave to be held as property. And from this conclusion it seems to follow, that, as the statute takes slaves devised as property, out of the reach and control of the executor, so it also takes the slaves emancipated by will, out of his reach and control; that as the slave devised as property can only be subjected to the debts of the testator by means of a direct proceeding against the devisee, so the slave emancipated by will can only be subjected by a direct proceeding against him; in which the necessity, or propriety, and manner of subjecting him to the satisfaction of the debt, and the extent to which he should be subjected, may be ascertained; that, as the devisee of a slave may retain the slave by paying his value, or so much as may be required for the satisfaction of the testator's debts, so the slave emancipated by will may retain his freedom upon the same terms. And that, as the title of the devisee of a slave is not divested by the fact that the testator is indebted greatly beyond the value of his entire estate, but can only be divested, against his will, by regular, legal proceeding, so the title of the slave emancipated by will remains until it is regularly divested under authority of law, subject only to such legal restraints as may be necessary to save the rights of creditors. . . . [356] since the act of November, 1800, this restraint is to be imposed, not by the naked acts of the executor or creditor, but through the intervention of the chancellor; who, whenever it shall be made to appear that a creditor is in danger of losing his debt, in consequence of the emancipation of his debtor's slaves, by will, may subject the slaves so emancipated to such terms as will secure to the creditor all that he has a right to ask; while he will not, without absolute necessity, destroy nor impair, further than the exigency of the case shall require, the right to freedom given by the will of their owner, and subject by law only to the saving already stated. . . . [358] although it seems that the value of David may be required for the payment of his former owner's debts, and although, if necessary, he may still be subjected to involuntary servitude for life by proper proceedings instituted for that purpose, he must, until that is done, be regarded at law as a freeman, and therefore was entitled to sue and recover as such in this action. Wherefore, the judgment is affirmed." [T. A. Marshall, J.]

*Fletcher v. Ferrel*, 9 Dana 372, May 1840. [373] "In contempt of the authority of the chancellor and of his orders, James J. Norvell run the slaves across the line [from Tennessee] into Kentucky, and left a part of them at the house of John Fletcher, in Knox county, and the others he put into a cabin on Yellow Creek, in the neighborhood of Fletcher's, but in Harlan county. . . . [375] Fletcher, on the 22d day of November, 1828, for \$250, hired Maria from J. J. Norvell, for ninety-nine years, and on the

2d of January, 1829, for \$180, hired Lucy and Charity for the same term, and . . . September, 1829, for \$300, took a bill of sale for Anna, . . . binding himself to permit her to be redeemed by a given day. And that Betsy and her child, Mary, were taken back to Tennessee, an execution levied upon her and her child, under which they were . . . purchased by Fletcher, for \$350, in . . . 1829. Sharp . . . procured Charles to return to Tennessee, . . . when he was levied on, . . . and purchased by Sharp, for \$701, in November, 1829."

*Weir's Will*, 9 Dana 434, May 1840. Will of George Weir, written in his own hand, and attested September 26, 1839: "With respect to my negroes, I wish them to be hired out for, say two years from my decease, at the end of which time the proceeds of such hire shall be given or divided between them, and each and every one of them be set at liberty, and placed, or directed to be placed, in such situation as may be thought most advisable by my administrators. And I beg that my beloved wife will throw no hindrance in the way of such arrangement in respect to the negroes." Codicil: [435] "There will be deducted out of my estate, means sufficient to pay debts incurred in liberating my negroes, and my heirs shall not be entitled to the provision made for them, unless they shall go security to court for said negroes' good behaviour." The "foregoing paper was presented to the county court of Woodford, for probate; but the court, consisting of eight justices, being equally divided in opinion as to his capacity to make a valid will, rejection was the necessary consequence of that division. . . [436] Weir, at and about the times of writing and publishing the paper, was in extreme mental agony, bordering on total despair and absorption on the subject of religion and his eternal destiny, yet, nevertheless, he was rational and of disposing mind. . . he owned five hundred acres of land, and about twenty slaves, and a valuable personal estate; . . . [437] the day after the publication [of his will], George Weir visited his brother James, . . . manifested much anxiety about the emancipation of his slaves, . . . and that, about ten days afterward, he handed to James Weir an abstract of debts due to him, and from him, . . . [ending] [438] 'Henny ought to be set free.'<sup>1</sup> . . . [442] Considering him an emancipator, it would be difficult to conceive for him a juster or wiser will. . . [445] It appears that he had expressed the opinion that those who emancipate their slaves and leave them in a slave state, thereby do an injury to the persons liberated, and great injustice to the resident white population; and it appears, also, that, as late as August, 1839, he offered to buy a slave or slaves at auction in his neighborhood. But his brother James testified that he (George) had always been opposed in principle to slavery, and that he had in the winter of 1838-9, evinced to him, in a confidential conversation, that he considered it his duty not to die a slaveholder. It seems, therefore, that, though he was willing to use slave labor and own slaves in a slave state, he was, in principle, an emancipator, and intended, when his capacity was unquestioned to liberate his slaves at his death. And though he may have felt rightly as to the impolicy of letting loose, in the bosom of a slave community, a degraded cast of manumitted ne-

<sup>1</sup> He owned only a part interest in her.



groes, yet his will does not show that he had changed that sentiment, or had forgotten his duty on that subject; for he confided the disposition of his emancipated slaves to the discretion of his brother and Mr. Stiles, who knew his own feelings and opinions as to what would probably be the best disposition of them as to residence and society. In emancipating his slaves, therefore, we can not presume that he did otherwise than he had deliberately intended when his sanity was unquestionable. . . [446] Wherefore, the order of the county court is set aside, and the paper purporting to be the last will of George Weir, deceased, is admitted to record in this court, as his true last will and testament," [Robertson, C. J.]

*Commonwealth v. Edwards*, 9 Dana 447, May 1840. "This is a proceeding against George S. Edwards, a free man of color, for an alleged violation of the statute of 1808, 2 Statute Law, 1219, entitled 'An act to prevent the migration of free negroes and mulattoes to this state.' A jury, impaneled in the county court, in obedience to an act of 1838, Sessions Acts, 70, requiring a jury in such cases, returned a special verdict, certifying that the accused had emigrated to this state and settled in Maysville, prior to the enactment of 1838, and about sixteen months before the institution of this prosecution; and that he had been once a slave in the state of Virginia, where he had been emancipated in the year 1803. Upon that finding, the circuit judge, being of the opinion that the act of 1838 could not be constitutionally applied to an offense previously committed, and that the act of 1808 was not enforceable without the aid of that supplementary enactment, adjudged that Edwards was not guilty, and therefore discharged him." Affirmed.

*Chancellor v. Milton*, 1 B. Mon. 25, October 1840. "The verdict and judgment in favor of the mother should, until reversed, be deemed conclusive proof of the fact that she was a free woman when she instituted her suit for freedom, and should be as conclusive in favor of any child borne by her after that time, as a deed of manumission of the same date could possibly be. But though, in a similar suit by her child, the record of her judgment would always be admissible as evidence of the fact that she had been adjudged free, yet, in the absence of any proof that the child was born after the impetration of her writ, her judgment, though *prima facie* evidence, would nevertheless be inconclusive as to the freedom of such child—because the judgment could not prove *per se*, or as between strangers, that she had never been a slave, and if she had ever been a slave, her emancipation, operating prospectively only, could not liberate her child born whilst she was a slave, and which child was therefore born a slave under the operation of the legal rule, *partus sequitur ventrem*" [Robertson, C. J.]

*Thomas v. Beckman*, 1 B. Mon. 29, October 1840. "Henry H. Thomas, of Estill county, Ky. having carried to Louisiana, a colored man named Ben Reed, claimed by him as his slave, and who had there escaped from his custody, employed Frederick Beckman, a Commission Merchant in New Orleans, to reclaim and sell the fugitive, and on the 23rd of May, 1826, gave to him the following written authority: 'Should he (Beck-

man,) be able to get in possession of my mulatto slave Ben, I give him full power to sell him at auction on the best terms, without (authority) to guaranty his character except the title.' During the year 1826, Beckman found Ben, sold him at auction, to one Florence, for \$350, and gave him a Notarial bill of Sale in which, both as agent and as surety for Thomas, he guarantied that Ben was a slave—and after deducting his commission, he remitted to Thomas the price received for Ben. Florence sold Ben to one Palfry. In 1829 Ben, claiming to have been born a free man, sued Palfry in Louisiana for detaining him as a slave. According to the mode of procedure under the civil code of that State, Palfry cited his guarantor, Florence, and the latter also cited Beckman to appear; and they did appear and respectively responded and interpleaded. In December, 1831, Ben having, in the mean time, obtained a decree against Palfry for his freedom and for \$450, the assessed value of his services whilst detained by him, a verdict and decree were rendered in favor of Palfry against Florence for \$450, the consideration between them, and \$450, the sum recovered by Ben, and another verdict and decree were rendered also, in favor of Florence against Beckman, for \$350, the consideration between them, and for \$450, as recovered by Palfry from Florence, for Ben's services, and interest on those sums, and the costs of the suit. And these decrees were affirmed by the Supreme Court of Louisiana. Beckman having paid to Florence \$1015.69, as the total amount of principal, interest and costs due under the decree, at the time of payment, filed a bill in chancery against Thomas in the Estil Circuit Court, in the year 1835, seeking a decree for what he had thus paid as his surety. . . [31] The only evidence, tending to show that Ben was a slave, is the fact that one Gentry brought him from South Carolina, and sold him as a slave: but, according to the proof, Ben's complexion and hair indicate that he is of Indian rather than African taint—and it appears that Gentry bought him in Jail, for the prison fees only, for which he was sold, because, according to the local law, he had been imprisoned one year on suspicion that he was a fugitive slave, and no person had ever claimed him as such. These last facts conduce strongly to the conclusion that Ben was not a slave, and seem to us sufficient to repel any other presumption which might have been authorized by the fact that he had been claimed and held as a slave since Gentry's purchase; and, consequently, if the Louisiana record be only *prima facie* evidence, it remains unaffected by any countervailing fact or presumption. We therefore consider the fact that Ben was a free man sufficiently established; and, of course, a recovery against Beckman on his guaranty being therefore proper, he has unquestionable right, in equity, to demand some restitution from his constituent and principal Thomas."

Decree of the Circuit Court [30] "that Thomas should pay to Beckman \$1015.69 cents, and 6 per cent. interest thereon, from the filing of the bill in this case" affirmed. [Robertson, C. J.]

*Brown's Will*, 1 B. Mon. 56, October 1840. "Gustavus A. Brown, of Smithland, Kentucky, having on the 10th of December, 1835, written and published his last will, in the first clause of which he emancipated his

slaves, afterwards, in the presence of a credible witness, carefully cut off so much of the paper as contained the other and succeeding devises or legacies, declaring at the time, that his purpose was to make another will at some future day respecting all his other estate, but that, lest some accident might defeat his intention to manumit his slaves, he had left un mutilated and intended to preserve the provision on that subject, which so far was and should remain his last will." A few days later "Brown was killed before he had made any other will."

Held: it is a valid will.

*Haydon v. Ewing*, 1 B. Mon. 111, December 1840. "George Ewing, after having, in the second clause of his will, emancipated the negro slave 'Simon,' . . . [112] and his wife Judah, proceeds in the 5th clause, to devise 'the children of Si and his wife Judah,' to his daughter "

*White v. Turner (a man of color)*, 1 B. Mon. 130, December 1840. "These appeals are prosecuted for reversing three several decrees, declaring that Jones, Turner, and Willis, men of color, and once the slaves of Wm. White, deceased, were emancipated by the valid last will of their said former master, alleged to have been destroyed by the heirs of the testator, after his death, and before there had been any probate thereof; and also ordering the survivors of said heirs . . . to pay to each of the complainants \$500, as the estimated value of his services. . . [The heirs] alleged that it provided for only an ultimate liberation, depending on contingencies which had not occurred, and on prescribed conditions, which had been violated by each of the appellees; and, to give color to this allegation, they exhibit a paper signed by all of them, about three months after the testator's death, and purporting to be a bond to the County Court of Jefferson, reciting the substance of the emancipating provision, and binding them, without proving the will, to effectuate its benevolent purposes, as thus recited. . . the two subscribing witnesses, both of whom read or heard the will read, testified that the testator had unquestionable capacity to make a valid will, and that the one they attested contained provisions essentially different from the pretended recital in the ostensible bond, and such as entitled the appellees to be free in September, 1834."

Held: [131] "the will was substantially such as described by the subscribing witnesses, and that it was suppressed at the instance or with the connivance of all the signers of the undelivered covenant with the County Court. . . for the purpose of defeating the title of the appellees and others to freedom. . . [132] the representatives of the five deceased heirs of Wm. White, who were parties in each of these cases, should have been equally contributory with the five survivors, to the payment of the damages decreed in each case." [Robertson, C. J.]

*Crooks v. Turpen*, 1 B. Mon. 183, April 1841. Linney of North Carolina, "who died in the year 1821 . . . bequeathed to ten of his infant grand children . . . [184] of Kentucky, several slaves . . . Brunty [guardian] . . . proceeded to North Carolina, and received about ten slaves,

chiefly children, and a wagon and team, as a portion of the said bequest; . . . [187] probably necessary for transporting the young slaves,”

*Swift v. Hopper*, 1 B. Mon. 261, May 1841. Action for breach of warranty. “Malinda and her two children were sold together, at public auction, for \$1030, at a general sale of negroes, by the defendants [Swift and Neet], when a great many others were sold.” To the bill of sale “this clause was added: ‘It being understood that the boy child had been diseased, but was supposed to have recovered.’ . . . the defendants offered to prove . . . [262] that, when these negroes were up for sale, it was openly proclaimed that this boy was not sound and would not be warranted so.”

*Shelby v. Shelby*, 1 B. Mon. 266, May 1841. Will of Alfred Shelby, 1832, gave [267] “to his son Isaac, on his attaining 21 years of age, . . . ‘six of the choice of (his) negroes, and one equal half of all the others under fifty years of age, also those over fifty years of age,’ ”

*Johnson v. Bryan*, 1 B. Mon. 292, May 1841. “the slave was taken on the coach, as a passenger, in the suburbs of Paris, between the stage office at Paris and that at Millersburg, by the stage driver, in the absence of and without a written request from his owner, and was entered on the way-bill as a passenger to Maysville, by the son of the keeper of the Stage office at Millersburg, who attended to the business of the office in the absence of his father, . . . and was carried to Maysville; that the slave escaped to Ohio, and though pursued at much cost and trouble by the son of the owner, at his instance, and at the urgent solicitation of Johnson, one of the company, to spare no pains or costs in the pursuit, has never been recovered, but is lost to the owner;” The action “was brought under the statute passed the 8th February, 1838<sup>1</sup> and a verdict obtained and judgment rendered for Bryan, for the value of the slave and costs expended in efforts to recover him,”

Judgment affirmed: [294] “Slaves availed themselves of the facilities afforded by stage lines and steam cars to escape from their masters. The rapidity with which they were carried by those conveyances, as also the mode of travelling, enabled them to elude pursuit and detection. The evil was growing, as stage lines were increasing and improvements advancing. A remedy was attempted to be provided, commensurate with the growing evil, and adequate to the remuneration of the injured master.” [Ewing, J.]

*Brizendine v. Bridge Company*, 2 B. Mon. 32, September 1841. “Brizendine and Hawkins, as joint owners of a male slave and wagon and team . . . sued . . . for an alleged injury to the said property, resulting from the fall of the bridge whilst the slave, wagon and team were passing upon it.”

*Woodard v. Fitzpatrick*, 2 B. Mon. 61, September 1841. “reserved a reasonable hire, to-wit: \$10 a month for each of them; . . . every day lost by the slaves was to be deducted in the computation of the time of their service, and all medical charges were also to be borne by him;”

<sup>1</sup> Acts, 1837-8, 155.



*Armstrong v. Hodges*, 2 B. Mon. 69, September 1841. "a free white woman named Thomason Grady, who cohabited with a black man named James Hog, and sometimes called James Grady," sold a small tract of land to Jackson. "But the complainant, [Armstrong, insisted] . . . that Thomason Grady was the wife of the said James, and that, therefore, her sale to Jackson was void. The Circuit Court dismissed the bill, and we think rightly. . .

[70] "But, although there is abundant proof of cohabitation and occasional recognition, yet the fact that the said James was a slave whom the said Thomason had bought and never expressly emancipated, but sometimes threatened to sell, would alone be sufficient to repel the presumption of marriage, which would result, in ordinary cases, from mere cohabitation ostensibly in the conjugal relation; and this repellant circumstance is fortified by the additional fact that a heavy penalty, by imprisonment and fine, is denounced against marriage between white and black persons, by an act of the colonial Legislature of Virginia, of 1753,<sup>1</sup> which was adopted by the Constitution of this State, and is still in force here. Under these circumstances, in the absence of more direct and specific proof, the presumption should be, that the relation between the black man slave and free white woman, was that of concubinage rather than marriage; and even if this be doubted, we are clearly of the opinion that there is not sufficient proof of the said Thomason's coverture to require us to decide that her sale to Jackson was void for want of legal capacity to bind herself or make a valid contract. Moreover, we are inclined strongly to the opinion that the marriage, if ever in fact consummated or intended, was void as against the policy and implied prohibition of the local law. It rather seems to us that our local law should be understood as prohibiting such marriages, as inconsistent here with decorum, social order, public policy, and the national sentiment; and if so, they must, therefore, be deemed unlawful, and of course void." [Robertson, C. J.]

*Cook v. Colyer*, 2 B. Mon. 71, September 1841. "the slave had been delivered to Colyer in June, 1830, to work for the use of money which he had loaned to Cook, and for securing which Cook had given him a lien on the slave, as well as on his land—that in November . . . Slaughter, as agent to Cook, executed to Colyer, a writing purporting on its face to be an absolute bill of sale for the slave, for the recited consideration of \$424, the slave being then worth, according to the proof, at least \$800, and Cook being peculiarly attached to him and having refused . . . to sell him for \$750 "

Held: [73] "It does not appear that Cook had ever contemplated or desired any fraudulent device for defeating . . . his creditors, . . . Cook is entitled to redeem the slave, Preston, upon equitable terms—accounting for the \$424 as principal, and legal interest thereon, and being credited with the annual money value of Preston's services to Colyer as a provident and humane man, and opposed to slavery, as he seems to have been." [Robertson, C. J.]

<sup>1</sup> Stat. Law, 1153; 6 Hen. 361.

*Reed's Will*, 2 B. Mon. 79, October 1841. The will of Alexander Reed, sr., had been rejected by the county court. "The only negative facts are the testator's age and physical infirmities, his attachment to an emancipation of his slaves, . . . [80] the liberation of his slaves at his own death, had been his settled purpose for many years, and when there could be no question as to his capacity."

The will was upheld by the Court of Appeals. [80] "A codicil, dated in 1840, and providing for the transportation of the emancipated persons to Liberia or the sale of them in the event of their refusal to be thus transported, has not been proved or offered for probate; and therefore, the only purpose of noticing it in this opinion, is to suggest that it may be hereafter proved and recorded as an appendage to the will, if in fact it was legally published, and the testator was competent at the time of its publication." [Robertson, C. J.]

*Craddock v. Hundley*, 2 B. Mon. 113, October 1841. In 1835 Craddock received "from Thomas Hundley five thousand dollars, 'to lay out in negroes for him' "

*Strader v. Fore*, 2 B. Mon. 123, October 1841. Damages had been assessed by a jury, for the unauthorized transportation on the steamboat *Pike*, [124] "and consequential escape of a slave,"

*Waggoner v. Hardin*, 2 B. Mon. 153, December 1841. [154] "on the night of the 12th Ellen was seized by the Sheriff as the property of Robert Trabue, and taken off and subsequently sold,"

*Gordon v. Longest*, 16 Peters 97, January 1842. [98] "Longest, of . . . Kentucky, instituted an action <sup>1</sup> against . . . Gordon [of Pennsylvania], to recover the value of a certain slave . . . which . . . Gordon, who was commander of the steamboat *Guyandotte*, then proceeding from Louisville up the Ohio river to Cincinnati, was alleged to have taken on board . . . from the Indiana shore . . . as a passenger to Cincinnati. . . a jury gave a verdict for the plaintiff, for six hundred and fifty dollars, on which judgment was entered for the plaintiff."

*Narcissa v. Wathan*, 2 B. Mon. 241, April 1842. "Austin Hubbard, who died . . . 1823, without legitimate issue, and possessed of an estate . . . then estimated at about \$13,000, devised the whole to a mulatto female slave of Dr. Elliot, named Narcissa, on condition that her freedom could be purchased on reasonable terms. . . After the affirmance [of the will], Peter Sweets, who had, as early as 1824, bought the contingent interest of Austin F. Hubbard,<sup>2</sup> for \$100, and had attended to the preparation of the case in this Court on the side of the will, offered to buy Narcissa with the avowed purpose of holding her as a slave; but her master refusing to sell her except for the purpose of liberation, in fulfillment of the testator's intentions, the said Sweets and the curator Wathan, agreed with her and Elliott, that they would pay him \$350 for emancipating her, if she would

<sup>1</sup> Under the Kentucky act of Feb. 12, 1828.

<sup>2</sup> See Hubbard's Will, p. 318, *supra*.

convey to them her entire interest in the testator's estate. Accordingly, at the October County Court, 1831, Elliot acknowledged a deed of emancipation; and simultaneous or immediately afterwards, Narcissa signed a written relinquishment to Sweets and Wathan, of all her right to the property devised by A. Hubbard. In the succeeding spring, Sweets filed a bill in Chancery against Wathan, for a division of the spoil, charging that the personal estate was worth about \$10,000 and the real estate and its profits, more than \$5,000. Narcissa, who was made a defendant, made her answer a cross bill, in which she alleged that Sweets and Wathan had defrauded her, by concealing the value of the estate, and falsely representing that it was insolvent, or not worth more than about as much as would pay the \$350 given by them to her master for her liberation; and therefore, she prayed for a rescission of the relinquishment thus fraudulently procured, and for a restitution of the estate to her as devisee. . .

[242] Narcissa died and devised her whole estate to trustees, with plenary power, and in trust for the purchase and emancipation of her children, born whilst she was a slave. But, on final hearing, her cross bill, revived in the names of her trustees and executors, was dismissed; and that decree is now sought to be reversed."

Decree reversed. "the invalidity of the contract with Narcissa, cannot be reasonably doubted. . . [243] And there can be no doubt that, had not he [Wathan, her curator] and Sweets paid to Elliot the \$350, some other person would have done so, especially if Wathan had disclosed candidly, as it was his duty to do, the extent of the estate. Nor is there any ground for doubting that Narcissa would have been retained in slavery and Sweets would have enjoyed the estate, under the alternative devise to A. F. Hubbard, could he have bought her as a slave from Elliot." [Robertson, C. J.]

*Coppage v. Alexander*, 2 B. Mon. 313, May 1842. Will of Robert Alexander: [314] "my negro man, Moses, is to stay with my said wife during her life, and to take care of her, and is to have, at her death, for his services, the one-fourth part of the half of my land and be set free;"

*Commonwealth v. Jackson*, 2 B. Mon. 402, May 1842. "To an indictment against John Jackson for importing slaves into Fayette county . . in violation of the prohibitory statute of 1833, he pleaded that he had since taken and registered the oath as prescribed by the statute of 1841, to emigrants who had imported slaves in good faith, but had failed to take the oath required by the first of said enactments, only because they were ignorant of the requisition. . . judgment in favor of the accused."

Affirmed.

*Barnett v. Stephens*, 2 B. Mon. 446, June 1842. Held: the hire and increase of slaves in the possession of an administrator are assets in his hands for administration as much as the slaves are.

*Fry v. Throckmorton*, 2 B. Mon. 450, June 1842. Fry sold to Throckmorton "thirteen young slaves of three different families, but connected generally by different degrees of consanguinity. About two years after the sale and delivery, one of those slaves, a young man named Jordan, died of tubercular consumption. A physician living in the Galt House,

where Jordan and most of the other slaves were kept after Throckmorton's purchase of them, was of the opinion that shortly after they were delivered he 'recognized the existence of constitutional scrofula in many of them,' and also, that 'Jordan, two years before his death, presented symptoms of scrofulous taint.' Several other persons who had known the slaves intimately from their birth, were of opinion that all of them had always been remarkably sound and healthy, and testified that their parents and grandparents, paternal and maternal, had been apparently sound, and lived, most of them, to extreme old age. Jordan was estimated in the sale at \$1,000,"

Held: [453] "that Jordan himself was not unsound at the date of the warranty," [451] "Mere organic or constitutional predisposition to a particular malady is not unsoundness either in the popular, scientific or legal sense; if it were, there would perhaps be but few, if any, upon earth who are sound. . . [452] may it not be probable that the appearance of all, as interpreted by the doctor, resulted from an essential change in their habits, occupations and mode of living, after they were translated from an airy country residence to a large hotel in a crowded city?" [Robertson, C. J.]

*Ewing v. Gist*, 2 B. Mon. 465, June 1842. [468] "The jury have found that by the negligence of the defendants while they (or one of them) had the slave on hire, he was permitted to go off and make his escape; and from the evidence it is probable that he has gone to Ohio or Canada, and that any attempt to retake him, if not utterly hopeless, must be attended with great expense and trouble. As it is not absolutely impossible that he may still be recovered, the jury might not be authorized to find that the plaintiff had sustained damages to the full amount of his value. And although between \$240 and \$250 of the damages [\$360] found by the jury, must be applied to the breach alleged, of the defendants having failed to return the slave, there is nothing in the record to show either that the jury found that sum as being his exact value, or that it was in fact his exact value. No witness estimates his value in money; several say that owing to his being almost white [(466) his color could not be distinguished from a white man], and to the consequent facilities of escape, they did not consider him to be worth more than half as much as other slaves of the ordinary color and capacities. But the defendants had hired him for several years at \$110 a year, and it cannot be assumed on this evidence that he was only worth in full property \$250. . . the damages found do not appear to be excessive." [T. A. Marshall, J.]

*Price v. Boswell*, 3 B. Mon. 13, September 1842. "1819, Hawes made a public sale of the trust property, consisting of eight slaves, for the aggregate sum of \$2,380, and . . . Boswell became the purchaser . . . [14] of Charles, at \$340; Cate and child at \$525; Lewis at \$350; Peter at \$565; and Jerry, who was claimed by a daughter of Norton, and was not present at the sale, at \$90, . . . and John Brand became the purchaser of Let and child at \$510. . . All the slaves purchased by Boswell, except Peter, were permitted to return to the possession of Norton, where they remained for years, as Boswell contends, on hire,"



*Esther v. Akins*, 3 B. Mon. 60, September 1842. "David Rice, deceased, being the owner of several slaves, Dick, Edith, and the children of Edith, devised Dick to one of his sons, the 'use of Edith' to a daughter, and as to the children of Edith, made the following devise: 'But it is my will that the children that the said Edith now has, may be free, as well as those she may have hereafter, the males when they shall severally arrive at the age of 25—the females when they shall arrive at the age of 23 years. This because freedom is a natural and inalienable right, belonging to them as well as others, of which the proprietor of man has not authorized me to deprive them.' About twenty two years after the testator's death, several persons, as grand children of Edith, filed bills in Chancery for obtaining liberation from bondage . . . the Circuit Court liberated all the complainants except Esther, Dudley and Nancy Jane, three grand children who were born before their mothers had attained 23 years of age."

Held: "the emancipation was prospective, and applied only to Edith's children, and after they had attained the prescribed ages. . . [61] *Partus sequitur ventrem*, hitherto applied to such cases, (however questionably in the opinion of some at first,) must, therefore, govern this case, and dooms Esther, Dudley, and Nancy Jane to slavery, because, at their births, their mothers were slaves, and the will contains no provision as to themselves." [Robertson, C. J.]

*Abel v. Cave*, 3 B. Mon. 159, October 1842. Action "for alledged fraud in the sale of a family of slaves,"

*Dennis v. Warder*, 3 B. Mon. 173, October 1842. Nelly Moss [174] "devised the said land to some persons of color, whom she emancipated."

*Nutter v. Connet*, 3 B. Mon. 199, October 1842. "On the night of the 9th of January, 1839, William C. Connet . . . started, with his family and several slaves and other moveables, for Missouri, with the intention of permanently settling there. On the next day, (10th,) William Nutter [and others] . . . filed their several bills in Chancery for attaching four slaves left by him in the possession of . . . [and] alledged, substantially, that Connet was secretly removing from the State . . . [200] for the purpose of . . . defrauding his creditors."

*Commonwealth v. Griffin*, 3 B. Mon. 208, October 1842. "Griffin, a citizen of Pulaski county in this State, having been found guilty, under an indictment against him for importing a slave into this state, in violation of the statute of 1833,<sup>1</sup> judgment was pronounced against him for the statutory penalty of \$600; and he . . . was . . . committed to jail until he should pay the penalty or be discharged by law."

Held: [211] "Kentucky may prohibit those who are already her citizens from bringing slaves into the State, while she invites those who are not now her citizens, to become so by allowing them to bring their slaves with them. . . [214] slavery and slave property, and commerce in slaves, are matters of a peculiar character, standing on grounds which distinguish them in all their relations, from the general subjects of property and of

<sup>1</sup> Stat. Law, 1482.

commerce. And whether slavery shall exist in a State, and whether if it does exist to some extent, it shall be increased by the importation of slaves from other States; in a word, whether slaves shall be an article of commerce at all, between one State and another, are questions peculiarly of internal regulation in the several States, and over which Congress has no power." [T. A. Marshall, J.]

*Taylor v. Gibbs*, 3 B. Mon. 316, April 1843. "Heatherly and Taylor were partners in stock trading to the south, and in the purchase of slaves in Virginia, and that Heatherly had collected in the south money due to Kincade and Rogers, and by the assent and direction of Taylor took the same to Virginia and laid it out in the purchase of partnership slaves,"

*Eckler v. Eckler*, 3 B. Mon. 387, May 1843. "In 1834 or 1835, Jacob Eckler gave to the appellant, his manumitted female slave, in consideration of her valuable and faithful services to himself and family, about ten acres of land, to possess and enjoy during her life. . . [388] The appellant took possession, erected a small dwelling house and out houses, and otherwise improved the little tenement."

*Thompson v. Drake*, 3 B. Mon. 565, June 1843. [566] "the assets of the firm consisted of . . . ten negroes . . . estimated by the assessor in 1839, at \$7050, and in 1840, at \$5800, and a colored boy who had been bound to Thompson and Drake, and hired out by them after they quit business [rope-making]; and second, of the hire of said negroes for the year 1839, coming due at the end of that year, and amounting to at least \$1300;"

*Frederick v. Commonwealth*, 4 B. Mon. 7, September 1843. "indictment against Frederick, a free man of color, for keeping a disorderly house. . . 'drinking, tippling and otherwise greatly misbehaving themselves.' . . Emily McCune and other prostitutes, occupied the upper rooms of the defendant's house, as his tenants, . . . [8] The rooms had been rented to Emily McCune by the agent of the defendant, . . . the disorders were committed, mainly, by the females in the upper rooms; . . . The jury found the defendant guilty, and assessed his fine at \$150," Judgment reversed and cause remanded for a new trial: "he cannot be said to have had control over the rooms leased." [Ewing, C. J.]

*Smith v. Pollard*, 4 B. Mon. 66, September 1843. [67] "sold Faro to Moses Black, in discharge of a debt . . . The slave being dissatisfied, she subsequently re-purchased him of Black, and to effect the purchase, sold a slave which she held in her own right."

*Chancellor v. Wiggins*, 4 B. Mon. 201, October 1843. Action "brought upon the implied warranty of title in the sale of two negroes as slaves, who afterwards recovered their freedom . . . by judgment in their favor,"

*Young v. Small*, 4 B. Mon. 220, October 1843. "In 1826, Thomas Young, being the owner of a female slave, Fan or Fanny, placed her in possession of his niece, wife of John Morris, and executed to Morris a writing, the exact tenor of which is not certain but which conveyed at least a right to the possession and services of the girl . . . until she should be twenty-one years of age; . . . In 1834, . . . Morris, by writing under

seal, sold and conveyed [to Small] the time and services of Fanny . . . till the 1st day of November, 1836, when . . . she will be twenty-one years of age . . . [221] 'and then and forever thereafter the said negro woman, Fanny, is to be free;' . . . while Fanny was in the possession of Small . . . and probably a few months only before the time had expired, she had a male child, who remained with his mother for a few months at Smalls, and was then taken to the house of its grand-mother, a free woman of color, who resided a mile or a mile and a half from Small's farm, . . . while his mother was taken into possession by Young at the expiration of the gift, . . . In July, 1842, the present action of detinue was brought by Young's administrator against Small to recover the child of Fanny,"

Held: [223] "if the deed granted only the services and possession of Fanny to Morris for the time specified, and declared that she was then to be free, . . . it did not grant any child . . . which she might have in the interval, but the right to such child . . . remained in the grantor, Young,"

*Parks v. Richardson*, 4 B. Mon. 276, October 1843. Nevels [278] "was a planter in Louisiana, . . . killed a man and ran away to Texas; that some of his slaves absconded from his plantation;" [293] "the slave, Tom, under the name of Henry, was taken from a steam boat and put into the work house in Louisville as a runaway, in June, 1837, and after he escaped, he was found in the possession of Parks." Parks says, [279] "while he was the owner of the slave, on account of gross misconduct, he carried the slave, bound hand and foot, to the jail, of which Chenowith was keeper, and there depositing him with Chenowith, who was trading, at the time, to the south, in negroes, authorized Chenowith to sell him to some one down the river. . . . [288] Chenowith says, . . . that a Mr. Bull had deposited a girl, called Louisa, for sale at the jail . . . November, 1837, and . . . on the 22d of December he [Chenowith] sold Louisa to Parks, and Parks agreed to pay for Louisa out of the money for which Henry should be sold,"<sup>1</sup> Richardson [279] "exhibits, as his title to the slave, a bill of sale [for \$700] dated 28th December, 1837, . . . signed by 'Edward Parks by Stephen Chenowith, his agent.' He alledges that . . . the slave . . . belonged to Nevels, and the sale was fraudulent, . . . [280] Mr. McLean, a negro driver and overseer from Louisiana . . . [deposed, in 1842, that he] [281] acted as overseer for [Nevels] . . . in 1837, . . . during that year Nevels worked some 25 or 30 hands. . . . within the past week deponent, with some others, went into the jail in this City, to see said slave. On going in, the slave, Tom, recognized deponent as being his old overseer and called him by name,"

Held: [277] "Parks having no title to the slave . . . should refund what he received, with interest. . . . Richardson may be yet made responsible to the true owner for the services."

*Bybee v. Tharp*, 4 B. Mon. 313, October 1843. In 1823 "in virtue of his marriage and guardianship, he became possessed of a large number of slaves, of both sexes and of all ages and descriptions, . . . [314] The

<sup>1</sup> "Parks alledges . . . that . . . the boy had been, by him, traded to Chenowith for a negro girl, and \$150 'to boot,'"

slaves . . with few exceptions, remained in Bybee's possession " until after his ward's marriage in 1833, " many of them having been employed by him in a bagging factory, from the year 1825 or 1826."

*Denny v. Williamson*, 4 B. Mon. 372, April 1844. " 1828, Denny loaned to F. Williamson \$338, and at the same time received her negro boy, Tom, about 16 years of age, on the agreement to have his services for the use of the money. Under this agreement the boy was held for eight years, . . The value of the boy's services . . greatly exceeded the legal interest on the loan."

*Stone v. Willis*, 4 B. Mon. 496, May 1844. " In 1812, Elisha Stone executed to James Lillard the following bill of sale: ' Know all men by these presents, that I, Elisha Stone, of Mercer county and State of Kentucky, have this day bargained and sold unto James Lillard, one negro woman by the name of Peggy, for the consideration of the sum of three hundred dollars, to me in hand paid by the same James Lillard, the receipt whereof I do acknowledge, and I will warrant and forever defend the said negro to said Lillard, from myself, my heirs, and every other person whatever, and likewise to be sound at this time, and age to be nineteen or twenty, as witness my hand and seal this 19th day of November, 1812. Elisha Stone, Seal. Test, John J. Allen, David R. Reese.' On the same day the following defeasance was executed by Lillard: ' Whereas I have this day bought a negro woman by the name of Peggy, for which I give Elisha Stone \$300, now if the said Elisha Stone, himself, shall pay me \$300 in the course of two years, he, the said Stone, shall have the negro back if she be alive; as witness my hand this 19th of November, 1812. James Lillard. Test, John J. Allen, David R. Reese.' . . [497] Willis admits he had possession of the woman and her children, and been so possessed for about eleven years before the institution of the suit, claiming them as his own absolute property,"

Held: [498] " the contract was a conditional sale, and not a mortgage or pledge for the security of money."

*Thompson v. Thompson*, 4 B. Mon. 502, May 1844. [503] " Fleming Thompson, whose name is first upon the note in contest, was formerly the slave of Joseph Thompson, deceased, and at the date and execution of the note, was the slave of the plaintiff, who was the widow of said Joseph, and of his children; that the defendants executed the note [for \$550, bearing date the 7th March, 1837,] as the securities of said Fleming, and upon the promise and undertaking of the plaintiff . . [504] in consideration that the plaintiff and a part of the other owners of Fleming [three out of five], agreed to relinquish their right to him as a slave, and to emancipate him as far as they could, and license him to go abroad and trade as a free man, and that the plaintiff and a part of the other owners, in consideration of said note, had relinquished to said Fleming their right and interest in him as a slave, and executed a partial deed of emancipation [1838] and licensed him to go abroad as a free man, and that under said deed he had so gone at large and hired himself out."



Held: I. a verbal promise to emancipate a slave is a good consideration to support a note, although promisor was only part owner of the slave; II. [506] "as three out of five have emancipated the slave, emancipation by the other two would effectually free him—it would seem then to follow, that the act of the three has, *pro tanto*, accomplished the work of freedom, and . . . they have no power to recall or annul it. They . . . have ceased to be owners or masters, and cannot, therefore, be liable to the penalties of the act [which prohibits the master or owner of a slave to license him to go at large and trade as a free man] . . . three fifths of the work of entire emancipation has, in effect, been accomplished, and it is not improbable that an arrangement has been made or was contemplated, with the other part owners to complete it. The case is one of rare occurrence, and by no means free from difficulty," [Breck, J.]

*Thomas v. McCann*, 4 B. Mon. 601, June 1844. [603] "McCann . . . represented . . . that the negro woman, Hannah, the subject of the sale, was twenty-nine years of age, when in fact she was then about forty years old; . . . that the woman had had but three children, . . . as far as he knew, when it now appears she had in fact had nine or ten."

Held: [604] "such a fraud as authorized him [the vendee] to rescind the contract;"

*Coombs v. Glass*, 5 B. Mon. 11, September 1844. "Coombs had sold to Glass a negro woman and child for \$800, on trial till the first of October next."

*Graham v. Strader*, 5 B. Mon. 173, October 1844. "Graham filed his bill in the Louisville Chancery Court, attaching the steamboat *Pike*, and making the owners, Strader and Gorman, parties, under the acts of 1824 and 1828, to recover damages for the unauthorized transportation of his three slaves, Reuben, Henry, and George, on board said steamboat from Louisville to Cincinnati, whence they escaped to Canada. The slaves are described as three yellow men between nineteen and twenty three years of age, well trained as dining room servants and as scientific musicians, in which capacity they had been in the habit, for some years, of playing together on various instruments, at balls and parties, and during the watering season were retained by the complainant at the house kept by him at the Harrodsburg Springs, to play for the entertainment of his company. The bill alleges and several witnesses state, that each of them were worth \$1500. The evidence conduces to prove that they were taken on board the *Pike* at Louisville, about the last of January, 1841, when they had with them, besides their clothes, musical instruments and books of the value of about \$250; that from Cincinnati, to which place they were transported in the boat, they escaped to Canada, and that the complainant had expended from \$700 to \$1000 in fruitless efforts to recover them." The defendants [174] "charge that the complainant allowed the slaves to go to Louisville to live with Williams, a free man of color, to learn music, and afterwards gave them written permission to go to the State of Ohio, that they did go and remained there a long time, and were sent there by complainant's direction, to perform service as slaves, and that in conse-

quence thereof, they acquired a right to freedom, and are free, and were so when the bill was filed and long before. The defendants seem to have filed an exhibit . . . of the following tenor: 'Harrodsburg, August 30, 1837. This is to give liberty to my boys, Henry and Reuben, to go to Louisville with Williams, and to play with him till I may wish to call them home. Should Williams find it his interest to take them to Cincinnati, New Albany, or to any part of the South, even so far as New Orleans, he is at liberty to do so. I receive no compensation for their services except that he is to board and clothe them—My object is to have them well trained in music. They are young, one 17 and the other 19 years of age. They are both of good disposition and strictly honest, and such is my confidence in them that I have no fear that they will ever act knowingly wrong, or put me to trouble. They are slaves for life, and I paid for them an unusual sum; they have been faithful hardworking servants, and I have no fear but that they will always be true to their duty, no matter in what situation they may be placed. C. Graham, M. D. P. S. Should they not attend properly to their music or disobey Williams, he is not only at liberty, but requested to bring them directly home. C. Graham.' It appears that the boys, Henry and Reuben, while under the care of Williams, were with him once in Cincinnati, Ohio, once and perhaps twice in Madison, Indiana, and two or three times in New Albany, Indiana, playing as musicians, at balls or other entertainments at those places. . . [175] none of them had been under the care of Williams, or living with him, for about two years prior to their escape, but that except during the watering season, when they were required to be at home, they were stationed at Lexington as their head quarters, with liberty to go to the neighboring towns to play as musicians, and to give their master what they made beyond their expenses, and that they did thus go about to the neighboring towns. . . Graham [stated] that it would cost \$500 to supply their place as musicians at the Harrodsburg Springs, for a single season. Upon the hearing, the Chancellor being of opinion that the writing of the 30th August, 1837, above set out, was a sufficient license and permission, without limit as to time, to authorize any steamboat to take the slaves Henry and Reuben on board, and land them at any place, in or out of the State, dismissed the complainant's bill and claim of damages for the exportation of those two slaves; and as to the slave George, directed a jury to be empaneled as required by the 9th section of the act of 1837,<sup>1</sup> to ascertain such facts as should be submitted them. . . [176] a verdict was found for the complainant, of \$1000 in damages."

Decree reversed, and cause remanded: I. [177] "the writing of 30th of August, 1837, . . . [179] furnishes no authority for the asportation of Henry and Reuben, in the winter of 1841, and no ground for dismissing the bill as to them. . . [II.] [181] If it were conceded that in consequence of the establishment [of the principle declared in the ordinance of 1787 'that there shall be neither slavery nor involuntary servitude',] . . . in any State, the laws of that State may not only refuse their aid to a master voluntarily bringing his slave within its territory, even for a tem-

<sup>1</sup> 3 Stat. Law 16.

porary purpose, to enforce his claim of dominion while there,<sup>1</sup> but may aid the slave in resisting that claim, and thus enable him, if he will, to remain there as a free man; and this seems to be giving to the principle its fullest effect; still it does not follow that the master, in thus subjecting himself to this temporary suspension of the legal right of enforcing his dominion, would incur any thing more than the hazard of losing it forever. He certainly is not to be understood as renouncing it when he takes the slave with him as a slave, with the intention of bringing him back immediately as such. And if the slave, without resort to such means of resistance as the laws of the foreign State may have offered, acknowledges his subjection while there, and returns with his master in a state of servitude, we perceive no principle which would afterwards entitle him to claim his freedom in the domestic forum, on the ground that he might have asserted it in the foreign State, and could not have been compelled to return. . . . What effect should be given here to the sentence of a foreign tribunal which, disregarding our laws upon this subject, should, on the ground that slavery is inconsistent with its own laws, wrest the slave from his master while on a temporary visit in another State, and whether if the slave should afterwards return as a free man, he would, by our laws, be held subject to his former condition, need not be considered.<sup>2</sup> . . . [182] But . . . the principle . . . that a slave returning voluntarily with his master from a free State, is still a slave by the laws of his own country, is sustained by the opinion of eminent jurists even among those who have maintained that by an appeal to the foreign law while within its jurisdiction, the slave may obtain the benefit of the constitutional principle which prohibits the existence of slavery. Judge Story, in his commentary upon the conflict of laws, after intimating, in the 95th section, that in the free States of America, as in England, a slave coming within the territory, (except as a fugitive,) becomes free, goes on in the 96th section to say that, 'it is a very different question how far the original state of slavery might re-attach upon the party, if he should return to the country, by whose laws he was declared to be, and was held as a slave,' and quotes the opinion of Lord Stowell, in the case of the slave Grace,<sup>3</sup> that upon such a return of the slave to his original domicil, the state of slavery would re-attach upon him." III. In assessing damages, the jury had a right [185] "to take into consideration their qualities as musicians, . . . they had a right to consider the appearance, and manners, and address of these slaves, their acquirements in literature as well as in music, their habits of

<sup>1</sup> See *Stanley v. Earl*, p. 304, *supra*. [285] "if the master voluntarily removes the slave to such non-slaveholding state, . . . the master's right, so long as the slave remains there, is gone; because he has no remedy to enforce or protect it." [Boyle, C. J.]

<sup>2</sup> "The opinion contains no concession . . . that the slaves in question were ever free, or could properly have become so by being temporarily in a free State with their master or other citizen of the State, having control of them. . . . the Court does not admit that in consequence of such a fact, and by force of the mere general prohibition of slavery in the fundamental or declaratory law of the State, which might be thus visited, the relation of master and slave, as existing under the laws of their own State, would be affected. And a question is made even as to the effect to be given here, to the decision of a tribunal in the free State, which upon the appeal of the slave there, should have declared him free." Judge T. A. Marshall, in *Strader v. Graham*, 7 B. Mon. 635 (1847).

<sup>3</sup> P. 36, *supra*.



subordination or of independence, the liberties which had been allowed them, and the effect of all these circumstances, not only upon the value of their services, but also in generating a restlessness under restraint, and a desire of freedom, and in affording facilities and opportunities of escape, even if they had not been taken on board the *Pike*; and they had a right to determine how far any of these considerations should operate to enhance or diminish the fair value of the slaves as such. . . . [186] although after ascertaining where the slaves were, it should be deemed useless and therefore imprudent to have incurred any further expenses for their recovery, still he should be entitled to the expense reasonably incurred in ascertaining their condition and the probabilities of recovering them.” [T. A. Marshall, J.]

“After the return of the cause to the Louisville Chancery Court . . . 1845, . . . the jury . . . found . . . for the complainant, and assessed his damages at \$3,000,”<sup>1</sup> and the court “decreed that the complainant is entitled.” The defendants appealed, and the decree was affirmed.<sup>2</sup> The case was then brought by the defendants to the Supreme Court of the United States, by writ of error.<sup>3</sup> The writ was dismissed, for lack of jurisdiction: [94] “the condition of the negroes, as to freedom or slavery, after their return [to Kentucky], depended altogether upon the laws of that State, and could not be influenced by the laws of Ohio. . . . But it seems to be supposed in the argument . . . that the law of Ohio . . . has some peculiar force by virtue of the Ordinance of 1787, . . . The argument assumes that the six articles which that Ordinance declares to be [for ever . . . unalterable unless by common consent] . . . are still in force in the States since formed within the Territory, and admitted into the Union. . . . The Ordinance . . . if still in force, could have no more operation than the laws of Ohio in the State of Kentucky, . . . But it has been settled by judicial decision in this court, that the Ordinance is not in force.<sup>4</sup> . . . [95] when it decided that this Ordinance is not in force in Louisiana,<sup>5</sup> it follows that it cannot be in force in Ohio. . . . [96] The Constitution was, in the language of the Ordinance, ‘adopted by common consent,’ and the people of the Territories must necessarily be regarded as parties to it, and bound by it, . . . It became the supreme law throughout the United States. . . . It is undoubtedly true, that most of the material provisions . . . of these six articles, not inconsistent with the Constitution of the United States, have been the established law within this territory ever since the Ordinance was passed; and hence the Ordinance itself is sometimes spoken of as still in force. But these provisions owed their legal validity . . . after the Constitution was adopted and while the territorial government continued, to the act of Congress of August 7, 1789, which adopted and continued the

<sup>1</sup> *Graham v. Swigert*, 12 B. Mon. 522 (523).

<sup>2</sup> *Strader v. Graham*, 7 B. Mon. 633 (1847).

<sup>3</sup> *Same v. same*, 10 How. 82 (1850).

<sup>4</sup> *Permoli v. Municipality*, 3 How. 589.

<sup>5</sup> “the act of Congress of April 7, 1798, chap. 28 (1 Stat. at Large 549), extended the Ordinance of 1787 to the then Territory of Mississippi, with the exception of the anti-slavery clause;” and the act of Mar. 2, 1805, chapter 23 (2 Stat. at Large 322), secured the same privileges to “the inhabitants of the then Territory of Orleans.” 10 How. 95.



Ordinance of 1787, . . with some modifications, which were necessary to adapt its form of government to the new Constitution. And in the States since formed in the territory, these provisions, so far as they have been preserved, owe their validity and authority to the Constitution of the United States, and the constitutions and laws of the respective States, and not to the authority of the Ordinance of the old Confederation." [Taney, C. J.]

*Wood v. Wickliffe*, 5 B. Mon. 187, October 1844. Will of Nathan Wood, 1834, [189] "provides for the emancipation of five of his slaves, viz: Ann, Eliza, Elizabeth, Bertrand, and Louisa, and the emancipation is directed to take effect at his death. His executors are also directed to pay over to J. J. Wood and Joseph Funk, five hundred and fifty dollars, whom he appoints trustees for certain specific purposes, in reference to the liberated slaves, and directs the manner in which they are to appropriate the five hundred and fifty dollars for their use and benefit." The circuit court decreed that [188] "the attached slaves . . be sold, and the proceeds applied to the payment of the judgment, and if insufficient for the payment thereof, then the emancipated slaves, or so many of them as may be necessary for that purpose, are decreed to be sold."

Held: I. [191] "The liberated slaves were devisees, and directly and vitally interested in this controversy. They were necessary parties, and should have been brought regularly before the Court, and as several of them were infants, a guardian should have been appointed for them," II. [192] "the decree is also erroneous, in decreeing an absolute sale of the liberated slaves. After exhausting the assets in the hands of the executors, if any portion of the appellee's claim should still remain undischarged, as several of the liberated slaves have been taken under the attachment and hired out since the institution of this suit, the proceeds of their hire should be applied in payment of such residue. And, in the event of a balance still remaining unpaid, the Court should apportion such balance among those whose labor is productive, . . In making such assessment, the mother with infant children should be assessed in view of the incumbrance. . . The testator designed all to be free, and at the same time, and it is right that the labor of all should be expended for that purpose. But if the sums assessed should not be paid, nor secured by the emancipated slaves, nor by any one for them, then they should severally be sold or hired out for the shortest periods that would bring the sums respectively assessed upon each. . . The mother with infant children should be hired together." [Breck, J.]

*Jones v. Perkins*, 5 B. Mon. 222, October 1844. [224] "Jones was persuaded to buy the girl Minerva, then about five or six years of age. He agreed to do so upon the condition only, that she should be valued by two disinterested neighbors of Perkins, . . and she was valued at \$160 in silver. . . [225] Perkins urged upon Jones the purchase of the slave Patsy, as he was the owner of her children, which was agreed to, reluctantly, by Jones, and only upon the condition that the sale was entirely satisfactory to his wife."

*Grigsby v. Daniel*, 5 B. Mon. 435, June 1845. "In January, 1831, at the city of New Orleans, Thomas Blackwell and A. G. Daniel, joint owners, sold and transferred to the plaintiffs, nine slaves, warranting them 'sound in body and mind, except Jerry, who is indisposed with the dysentary, and Garland, whose knee is a little swelled.' "

*Throckmorton v. Jinny Lewellin*, 5 B. Mon. 585, July 1845. "This is a suit instituted in chancery by Jinny Lewellin, a free woman of color, and her daughter, Mary Adams, and her three children, against Throckmorton and Russell, to enforce specifically the emancipation of Mary Adams and her three children, under the alledged contract to do so, upon their refunding to Throckmorton, out of their services, the price of their purchase by him, from one Crow, of Virginia, and interest thereon, the said Russell having purchased one of them from Throckmorton, with the like understanding, alledging that they had refunded the price and interest. If it be conceded that a parol contract for the emancipation of slaves may be specifically enforced in a Court of Chancery, we insist that the contract should be fair and reasonable, certain in its terms, made with a person able to contract, and for a fair and adequate consideration. . . [586] it clearly appears that Throckmorton purchased them for his own use, through his brother, as agent, under the authority of a letter borne by Jinny Lewellin, and shown to Crow, . . . They were sold by Crow to him as slaves for life, and an absolute bill of sale executed. . . The slaves and their mother, were, no doubt, anxious for Throckmorton to buy them, as well to get clear of the hands of a slave dealer, as to get to Louisville, where the mother resided, and may have held out inducements to Crow, of an expectation of ultimate freedom. And they may, in fact, have conceived the idea, that if they could get to Louisville, that they might, through the instrumentality of Bates and Russell, and other friends, be able to obtain their freedom. But no promise or agreement is shown to have been made by Throckmorton or his agent, on the subject. The same hopes and expectations may have induced Joe, the husband of Mary Adams, to surrender up his claim for the \$100 previously advanced. . . [587] Did Throckmorton before or after his absolute purchase from Crow, make any specific agreement with Jinny Lewellin, for the emancipation of the slaves? . . . It is true, after the slaves arrived in Louisville, Throckmorton discovering that they would not suit his business, or having heard of the proposition of Bates and others upon the subscription to buy them, with a view to their emancipation, was willing, and proposed to Bates to take them at his purchase, including expenses; and he may have agreed, as an inducement, that they were purchased under the subscription; but Bates refused to do so, and surely this proposition cannot be construed to amount to a binding contract to emancipate, . . . [588] There is nothing in the character of the accounts exhibited, of items of money deposited with Throckmorton, that is incompatible with a hiring, . . . it is reasonable to suppose, that as she [Mary Adams] collected money, that she would deposit the same with her master, in advance of her hire, as the safest place of deposit. . . she did hire her own time from her master, and pay him for the same. Moreover, it is proven by Pratt, that Mary Adams acknowledged to him

that she was the slave of Throckmorton, and hired her own time from him. . . no such contract is made out as will authorize this Court to decree specifically the emancipation of the slaves, either against Throckmorton or Russell. The latter derived his title by purchase from the former, and holds under him, and has done nothing since, which lays him under any legal obligation to emancipate the slave he purchased. He said, as is proven by Bates, . . that he intended to free the slave when her services paid him the amount he advanced; but this declaration cannot be construed into a contract." Bill dismissed. [Ewing, C. J.]

*Fitzhugh v. Fitzhugh*, 6 B. Mon. 4, September 1845. The administrator, "having exhausted the personal estate, except a slave, in payment of debts of the deceased, filed his bill . . to subject the real estate, . . [5] and a decree [was] rendered for the sale of certain lots,"

Held: [6] "there is error in the decree, in not directing the slave to be first sold in satisfaction of the debt, there being no good reason shown why the slave should not be first sold, and the proceeds applied to lessening the burthen upon the land." [Ewing, C. J.]

*Saunders v. Kastenbine*, 6 B. Mon. 17, September 1845. "Saunders, a man of color, exhibited this bill in Chancery against the executor and devisees of Charles Kastenbine, alledging a purchase from the latter, in his lifetime, of a slave by the name of Matilda, the wife of complainant, and upon the following terms: that he was to pay the purchase money, which was \$400, in monthly installments of not less than four dollars nor more than eight dollars per month, unless the complainant should find it convenient to pay more; that he obtained possession of the said Matilda at the time of the purchase, and yet had her in possession, but that the representatives of said Kastenbine had been recently denying his purchase and threatening to take said slave from complainant with a strong hand; that he had paid \$270 of the purchase money, and was willing to go on and pay the residue according to the terms of his contract."

Held: [18] "the testimony preponderates in favor of his having purchased and not hired her [but] The contract . . falls within both the spirit and letter of the statute of frauds." Decree dismissing the bill affirmed. [Breck, J.]

*Smith v. Commonwealth*, 6 B. Mon. 21, September 1845. Indictment "for keeping a disorderly house. . . [22] the persons who were assembled at the defendant's house, (a grocery,) from time to time were slaves, and free persons of color. . . But the testimony does not establish that they were in the habit of cursing, swearing and making a noise, to the annoyance and disturbance of the neighbors, but the contrary appears by the proof. We do not doubt that the facts proven, or those which may be rationally inferred from the proof, constituted the house a disorderly house. The keeping of a grocery, at which that class of the community are habitually allowed to assemble, and buy whisky and tipple and drink at pleasure, is calculated to corrupt their morals, to tempt them to petty larcenies, by way of procuring the means necessary to buy, to lead them to dissipation, insubordination and vice, and obstruct the good government,



well being and harmony of society. A house in which such practices are encouraged and indulged, though no cursing or swearing or noise is made whereby the neighbors are disturbed, is a public annoyance, and may properly be denominated a public nuisance. Nor is it rendered less a public nuisance, from the fact that statutes have prescribed specific penalties for trading with, or selling or giving liquor to slaves, without the permission of their owners, or permitting more than a prescribed number to assemble. . . [23] But the peaceable and habitual assembling of white persons, in the same or any other number, at the grocery for the same purposes, and who even indulged in the same practices as those proven against the slaves, it is believed would not constitute the house a public nuisance, as such assemblies and indulgences would not be of the same evil consequences to the public, and are not prohibited by law, unless the sale of liquors by retail, and the tipling and drinking in the house, should constitute it a tipling house, . . an indictment . . should distinguish and charge that they were slaves that assembled." [Ewing, C. J.]

*Bowling v. Bowling*, 6 B. Mon. 31, September 1845. "the widow finding that the negro woman, Hannah, devised to her, was high tempered and unmanageable, and frequently ran away, delivered her to her son-in-law and daughter, as more capable of managing them [*sic*]; also delivered to Hord and wife a negro girl, . . Both Hannah and the girl frequently ran away from Hord, and making efforts to escape to Ohio, and Hannah succeeding once or twice in getting to Cincinnati, they were apprehended at great costs and expense, and much trouble to Hord, who after several escapes, sold Sarah to some person unknown, who removed her out of the State, and sold Hannah to one Anderson, whose executor sold her to some one, who removed her to Mississippi, where she died, leaving two children living."

*Allison (a man of color) v. Bates*, 6 B. Mon. 78, October 1845. Allison "claims his freedom under the will of John Bates, . . The Circuit Court having decided against his right to freedom, he has appealed to this Court." Bates's will: "I also give to my said son-in-law and daughter, in addition to the eight negroes formerly given, the following, to-wit: James, Wesley, John, Berry, Emely, Bill, Mariah and her child, also, Stephen, Margaret, and Green, to serve them eight years and then to be free, also, little Green absolutely, unless redeemed by Mrs. Todd, and should Hannah, Margaret, and Green desire to stay near my son-in-law, I desire that he shall let them have a spot of land to make a support upon. . . [79] I also give my nephew, S. W. Bates, Joe, Nash and his wife, Berry and his wife, Lewis Davis and his two children, Cuffee, and Allison, Abraham's wife and his two children, Elsey, Clabourn, Theophilus, and Betsey, Rhoda's children, Isaac Butcher and his wife, to serve eight years, and Rhoda I set free."

Judgment of the circuit court reversed: "Allison . . is entitled . . to his freedom after the service of eight years, and also, that all the persons named [Berry, Jane, Clabourn, Theophilus, Cuffey, Elsey, and Wesley,] in the agreement to await and abide the decision in the cause of Allison



against Bates, are entitled to their freedom after the expiration of eight years service, said eight years to commence running at the death of the testator." [Ewing, C. J.]<sup>1</sup>

*Anderson v. Irvine*, 6 B. Mon. 231, October 1845. Held: [233] "the slaves allotted and delivered to the widow, were not liable to a seizure under an execution against the administrator *de bonis non*, as assets in his hands. . . [235] it is not the duty of the administrator to convert the slaves into money, unless it be necessary for payment of debts; but the widow and heirs have a specific interest in them, which, like the interest of the legatee of a specific chattel, becomes a perfect title by the mere assent of the administrator." [T. A. Marshall, J.]

*Coleman v. Commissioners of the Lunatic Asylum*, 6 B. Mon. 239, October 1845. The lunatic [241] "was kept at the charge of the Commonwealth for about five years, when the Commissioners of the Asylum discovered that during all that period he had three valuable negro men slaves, whose hire was worth annually, much more than enough to support him,"

*Rachel (a girl of color) v. Emerson*, 6 B. Mon. 280, October 1845. "Waggener, at the September term of the County Court . . . appeared in open Court, and relinquished all right, title, and control over Rachel [a free girl of color], who was bound to him by the Court, . . . 1837, and desired that the Court might take said girl under its jurisdiction and control. Whereupon, by the order of the Court, without summons or notice to the next friend, or person with whom the child resided, as required by the statute, Rachel was bound to Emerson until she arrived at the age of eighteen, to learn the art of house keeping, . . . her counsel assigns for error, that the statute has not been pursued in the summons required, nor does the indenture contain a covenant to teach the girl how to spell and read."

Held: "The covenant . . . is dispensed with by the statute of 1843. . . [281] She, though colored, has a right to be heard by her next friend or person with whom she resides, and the order should show that the one or the other . . . was summoned or appeared in Court." [Ewing, C. J.]

*Lafon v. Chinn*, 6 B. Mon. 305, November 1845. "Chinn sued Caldwell and Lafon as co-partners in a bagging factory, . . . for the services of a slave hired by Caldwell, to work in the factory, . . . and for medical services rendered by himself as a physician, in attending the hands in the factory."

*Williamson v. Williamson*, 6 B. Mon. 307, November 1845. "Patrick Williamson, Sr., by his will directed" that "a negro girl of 14 years of age . . . [308] be purchased by four of his children . . . for the children of said John, to be put in the care of Patrick Williamson, the testator's son and executor, to see that she should not be sold, hired nor removed out of this State until the youngest child become of lawful age, then with two other slaves devised in the same manner, to be equally divided between them. The slave never was purchased."

<sup>1</sup> See *Stephen v. Walker*, p. 388, *infra*; also *John v. Walker*, *ibid*.

*Darcus, etc. (free persons of color) v. Crump*, 6 B. Mon. 363, April 1846. "Jacob Cox, a man of color, by his last will and testament, devised to his wife, Mary, during her life or widowhood, one-third of all his estate . . . and at her death or marriage, to go to his two daughters, Darcus and Charlotte. The other two-thirds of his estate, he directed his executors to sell, and with the proceeds to purchase and manumit his two mentioned daughters, and the residue, if any, to go to them. The will was admitted to record . . . in 1821, and Daniel Crump, one of the executors therein named, was duly qualified as such. The testator's wife was a slave, and died before he did; his daughters were also both slaves at his death, one living in Virginia, and the other in Tennessee. The executor sold all the estate, consisting of about one hundred and fifty acres of land, besides personalty. He purchased, and in 1823, emancipated Charlotte. Darcus was also purchased and emancipated in 1826. In 1841, the two daughters exhibited their bill against the executor . . . [364] The Court decreed the complainants one third of the land, but subject to a lien in favor of the executor, of \$442.63,"

Held: I. [365] "The provision for the complainants may . . . be regarded as an executory devise, and by which a portion of the testator's estate was to vest and did vest in them as soon as they obtained their freedom. . . . [II.] [366] the sale of the land was fraudulent, . . . The sale was made at an unusually early hour in the day, . . . But few persons had arrived when the land was sold; . . . The whole tract sold for \$1,210; was purchased in by Glover for the executor. . . . [367] it was worth from three to five hundred dollars more than the executor paid for it." The decree of the circuit court [368] "is erroneous in awarding to the executor any thing against the complainants." [Breck, J.]

*Orchard v. David (a free man of color)*, 6 B. Mon. 376, April 1846. Will of Alexander Orchard, dated 1845: [377] "I will that my two negroes, David and Jenny, have the privilege to bid and purchase themselves and their child, Mary Jane, provided they comply with the terms of sale in giving security for the amount of the debt, and the law, in giving security for their good behavior, etc." Codicil, dated December 4, 1845, attested by only one witness: "provided that in the event that my man David, and Jane his wife, pay or cause to be paid, four hundred dollars, in lawful money of Kentucky, they and their child be set free, as is written above, to have the same credit as is common at executors' sales, say twelve months."

Held: "the slaves in question are entitled to their freedom, upon the payment of the sum specified in the codicil. . . . [378] The sum to be raised by the bid of the slaves or the charge upon them, was, by the will, to be divided among the testator's children; surely he possessed the power, by a codicil, executed as aforesaid, to take the excess over four hundred dollars, from his children and give it to the slaves." [Ewing, C. J.]

*Oldham v. Bentley*, 6 B. Mon. 428, April 1846. Bentley of Madison County, "being under the necessity of selling ['a family negro slave'] . . . he was willing to sell her to a citizen of Madison county, to be kept in his or her family, for his or her own use, but was unwilling to sell her to be

taken by slave dealers to the south; and that the defendants being well apprised of this, . . . falsely represented that they . . . wished to purchase her for . . . their own use, in Madison county, . . . that said slave was worth, and the plaintiff could have sold her to slave dealers to be taken to the south, for \$400, but would not . . . that the plaintiff, giving credit to the representations aforesaid, . . . sold . . . said slave to them, . . . for the reduced price of \$325; . . . but very shortly after the purchase, [they] sold her to a slave dealer or his agent to take to the south, and thereby deceived and defrauded the plaintiff and caused great distress and anxiety of mind in him and his family. . . . [429] a verdict having been found for the plaintiff, a judgment was rendered in his favor for \$100, the damages assessed by the jury."

*McFarland v. McKnight*, 6 B. Mon. 500, June 1846. "These suits<sup>1</sup> are against the owners and master of the steamboat *Versailles*, for having taken on board, in the Circuit of Jefferson, of this State, and transported beyond the limits of this State, a female slave called Ruthy, the property of McKnight, and a man slave [her husband] called Thornton Blackburn, the property of Oldham. . . . [503] The owners of the slaves resided in Louisville, the slaves ran away from their owners, and on the next day, the steamboat *Versailles*, having just before left the port of Louisville upon a trip up the Ohio, upon being hailed by these negroes from the Indiana side of the river, was checked in her headway by taking off the steam, and whilst the boat *Versailles* was floating in the Ohio river, but a short distance above Jeffersonville, (which town is opposite to Louisville,) the two slaves were taken on board, registered as passengers on the books of the *Versailles*, conveyed on board to Cincinnati, and there landed, whereby they have been lost to their owners." The steamboat belonged to the port of Wheeling, in Virginia.

Held: [509] "The commencement of the offence is by the taking on board, from the shore of the Ohio river, opposite to this State, and is consummated by the transportation on board. . . . [510] The State of Virginia ceded to the United States the territory lying northwest of the Ohio river. . . . By the erection of Kentucky into an independent State, . . . Kentucky, as a State, became invested with the domain, sovereignty and jurisdiction over the Ohio river, from its mouth up to Big Sandy river, as fully as formerly held and possessed by the State of Virginia. . . . the whole power, legislative, executive and judicial, belongs to the State of Kentucky, over the waters of the Ohio river to the northwestern shore or bank, along its course from the mouth of Big Sandy river to the mouth of the Ohio river; . . . [514] decreed, that the surviving defendants . . . pay to the plaintiff, Virgil McKnight, four hundred dollars." [Bibb, Ch.]

*Catholic Church v. Offutt*, 6 B. Mon. 535, June 1846. Offutt's will: [536] "The balance of my slaves to be subject to my wife, and if she cannot manage them, she may sell them."

*Rowe v. Williams*, 7 B. Mon. 202, July 1846. [203] "the ten slaves . . . were given up . . . to be sold in satisfaction of the said executions"

<sup>1</sup> Prosecuted under the statutes of 1824, 1828, and 1837.

but the sheriff "permitted them to remain in the possession of . . . [their owner] after levied on, without taking a forthcoming bond for their delivery on the day of sale, as required by law, and went on to advertise a sale, but before the day fixed, the slaves were removed and carried off . . . out of the Commonwealth;"

*Commonwealth v. Young*, 7 B. Mon. 1, September 1846. "indictment against Young for importing, to this State, six slaves, contrary to the provisions of the Statute of 1833,"<sup>1</sup>

*Wooldridge v. Lucas*, 7 B. Mon. 49, September 1846. "the plaintiff was . . . sentenced to a confinement in the Penitentiary for two years, for felony; . . . before his pardon and discharge, one of his sons sold the slave in question, which before his conviction was his property,"

Held: the slave reverted to him on his discharge.

*Tibbs v. Tibbs*, 7 B. Mon. 112, October 1846. Held: a widow renouncing the provisions of her husband's will, is entitled, under the 24th section of the statute of 1797,<sup>2</sup> to only one-third of the slaves of which the husband died possessed, for life, though there be no children.

*James v. Langdon*, 7 B. Mon. 193, October 1846. Roper was [194] "a credulous, feeble minded, very old and illiterate man, and was greatly alarmed at a suit . . . for alimony by his second wife, . . . his neighbor . . . increased his alarm by telling him that his wife would recover one third of his entire estate, including a favorite family of slaves, whose emancipation at his death, had been long the fixed purpose of his heart, . . . [196] entertained for near twenty years," [193] "Two deeds of emancipation of David Roper's slaves [Hector and Lucy, and their children], one dated . . . 1834, the other . . . 1837" were sustained. By his will, 1839, "he bequeathed all his personal estate to two of the slaves whom he had emancipated by the deeds, the father and mother of the residue. . . . [196] Lucy and Hector, his two elder slaves, were attentive to his wants and he was much under their influence and control, and there is good reason to believe that Lucy used means to prejudice and embitter his mind against his children," A jury found against the validity of the will.

A [199] "new inquiry directed" because [197] "some of the instructions given by the Court . . . were misleading," [196] "Had the jury found against the will, unembarrassed by the instructions of the Court, we should not have felt disposed to disturb their verdict." [Ewing, C. J.]

*Thomas v. Davis*, 7 B. Mon. 227, October 1846. Pryor [229] "states that in the month of November, 1843, he was upon the Pharsalia Race Course, in the State of Mississippi, and heard the plaintiff tell the defendant that if he would take a negro boy the defendant had to New Orleans at the approaching races, and bet him on Lucy Dashwood the day she ran, the plaintiff would go his halves, and pay the defendant two hundred and fifty dollars if he lost said negro on said race; that afterwards, in December, 1843, at the Meterie Race Course near New Orleans, on the day of

<sup>1</sup> 2 Stat. Laws 1482.

<sup>2</sup> 1 Stat. Laws 660; 2 Stat. Laws 1544-5.



the race when Lucy Dashwood ran, the defendant called on deponent a few moments before the race, and told him that he had bet the negro boy on the race; that deponent at same time asked the defendant if he considered Davis in, and he replied he did; that Lucy Dashwood ran and won the race. . . Defendant . . won \$500 on the race,"

Held: [230] "the plaintiff was entitled to a moiety."

*Irvine v. Rousseau*, 7 B. Mon. 233, November 1846. [234] "Charles, when an infant, was a sickly child, that he belonged to Nelson R. Owen, the father of Sarah Ann; that he, by parol, gave Charles to his daughter, Sarah Ann, then an infant of eight or ten years of age, if she would nurse and take care of him; that she did nurse and take care of him and he recovered; that afterwards, he was called in the family, Sarah Ann's, as proven by members of the family, but others, who were intimate in the family, had never heard him so called; that he remained in the possession of and under the control of N. R. Owen, as the ostensible owner, during his life, and in the possession of his widow after his death, as his administratrix, . . Irvine purchased Charles under execution against the estate of Owen, for a debt originating before the pretended gift of Charles."

Held: [235] "Such a gift . . must be pronounced absolutely fraudulent and void as to Irvine, the purchaser, and as passing no title, as against him at least, to the donee."<sup>1</sup>

*Kendall v. Hughes*, 7 B. Mon. 368, November 1846. An action "to recover two slaves, a woman and her infant child, which Kendall had purchased under executions"

*Commonwealth v. Stout*, 7 B. Mon. 247, June 1847. "The indictment . . was found under this statute,<sup>2</sup> and charges that the defendants attempted to remove from the Commonwealth of Kentucky, Nancy, a person of color, having a suit pending for freedom in the Louisville Chancery Court. The knowledge of the defendant of the pendency of the suit for freedom is not alledged,"

Held: [249] "this indictment is insufficient on account of the absence of this allegation."

*Hardin v. Smith*, 7 B. Mon. 390, June 1847. "In 1823, George Smith being then possessed of a tract of land of 100 acres, sixteen slaves, old and young, . . was found to be a lunatic . . [398] the charge of \$100 for trouble and expenses incurred . . in recovering the slave, Jackson, who had run away while the action of detinue, in which he and the two others were recovered, was pending, should not have been allowed."

*Graham v. Sam and others (persons of color)*, 7 B. Mon. 403, July 1847. "This bill in chancery was exhibited by Sam and fourteen others, persons of color, some of whom were infants, and sued by Sam as their next friend, . . claiming the benefit of the provision made for them by . . [404] Graham, their former master, in his last will. . . 'Lastly,

<sup>1</sup> Stat. Law 1479.

<sup>2</sup> 3 Stat. Laws 225.

I will that my negroes should go to Liberia, and for that purpose I now give them dispensation of ten years, viz: until the 1st of January, 1850, during which time they will be hired out annually, by my executor, but not to the highest bidder; the proceeds of said hire kept as a separate fund. Now should any or all of those slaves become willing and give themselves up to embark for Liberia, I do hereby emancipate all such for that purpose. That each grown emigrant be furnished with a decent suit of clothing and one hundred dollars cash, as an outfit, to be furnished out of the proceeds of the hires above kept as a separate fund for the purpose, if need should so require, if otherwise, at the expiration of the ten years as above, on the 1st day of January 1850, it is my will that they be equally divided amongst all my grand children by valuation, then living.' The complainants alledge that they elect to go to Liberia, and give themselves up for that purpose, and pray that the Chancellor will cause the provisions in the will for their benefit to be enforced and carried out according to the benevolent intention of the testator. The defendants resisted upon various grounds, the relief sought. The Court below decreed that the complainants should be permitted to depart immediately, or as soon as might be practicable, for Liberia, and that neither the executor or others should interpose any obstacle to prevent their emigration to that country; that the executor should pay to each of the grown complainants, one hundred dollars, and furnish them with clothing as directed by the will. The Court further decreed that the complainants were entitled to their hire subsequent to the exhibition of their bill, and their election therein to embark for Liberia, and directed the same to be paid over to them; and that out of this fund the young as well as the old, should be properly and amply furnished with clothing for their removal."

Held: I. [405] "it was not the intention of the testator that the complainants should wait till the expiration of ten years before they could exercise the privilege of electing and surrendering themselves up to embark for Liberia. It is manifest, in our opinion, that he intended to give them the privilege to elect, at any time during the ten years, and that the privilege should continue until the expiration of that period, and then cease. . . Upon their making the election and actually embarking, their emancipation should be regarded as having relation back to the death of the testator. This construction, which we think is very clearly authorized, obviates the objection that some of the complainants have been born since the death of the testator. If the freedom of the mother, upon her election and embarkation, relates back to the death of the testator, it would follow, of course, that the child would be free, and ought, not only in view of the clearly presumed intention of the testator, but in obedience to the dictates of humanity, to be considered as embraced by the provision and to follow the destiny of the mother. It is evident the testator intended that infants as well as adults, should enjoy the benefit of the provision. It was his will that all should go to Liberia, and we think the Court below was right, if the children were too young to exercise the privilege of election, in permitting the parents to do it for them, and more especially as the election was such as the Chancellor would approve. . .

[II.] [406] the widow can interpose no right of dower as an obstacle to the execution of the will . . . [III. The testator] [407] evidently intended to leave the consummation of his purpose in the discretion, and indeed at the option of the complainants. The Court, therefore, if the executor under the circumstances was not deemed a suitable person, should have appointed some other person as an agent or commissioner, to make suitable arrangements for the complainants for sending them to Liberia. The funds which the complainants were entitled to, should have been directed to be paid over to such agent, with directions, after furnishing the necessary supplies for their emigration, to pay it over to them upon their embarkation. Bond and surety from such commissioner, for the faithful performance of the duties which the Court from time to time might enjoin upon him, should be required. The Court should retain the control of the whole case till the devise in regard to the complainants was fully enforced. Should a proper opportunity for conveying the complainants to Liberia not immediately occur, the Court should retain control over them, and have them hired out, and proper care taken of them till such opportunity should be presented. The complainants would of course be entitled to their hire." [Breck, J.]

*Chisholm v. Ben, Celia, etc. (persons of color)*, 7 B. Mon. 408, July 1847. The county court rejected "a paper offered for probate as containing the substance of the will of Benjamin Chisholm, . . . the judgment of the County Court was reversed [by the Circuit Court], and a provision giving to Mrs. Chisholm for her life, the tract of land on which Chisholm had lived, and also six slaves, Ben, Celia and others, and emancipating them at her death, was ordered to be recorded as the will of Chisholm. . . . [418] there appears . . . near two years before his death, to have been some dissatisfaction on the part of Mrs. Chisholm, and a short separation between herself and husband in consequence of his having made or intended to make a will emancipating his slaves, . . . her dissatisfaction seems to have arisen [rather] from his emancipation of one or two slaves which she claimed, than of his freeing the others," The judgment of the county court was affirmed by the Court of Appeals.

*Naylor v. Hays*, 7 B. Mon. 478, July 1847. Naylor "having in his hands as Constable, an execution against Dick Hays, a man of color, and having sold, in satisfaction thereof, various articles of personal property," David Hays, the owner of Dick, brought action against Naylor for the property seized. [479] "many years previously, the slave and his master entered into a written agreement, and deposited it with the witness, stipulating for the freedom of the slave, upon the payment of a certain sum, the amount of which was not recollected by the witness. That the writing was some time thereafter surrendered to the parties, and nothing had been known of it since. It was also proved that for eight or ten years before the trial, Dick has been going at large, trading for himself, and in every respect acting as a free man, the plaintiff not exercising any control over him, nor doing or saying any thing which indicated that he was still his slave; but on the contrary, declaring that he had nothing to do with him, and using language calculated to create the impression that he was free."

Held: "third persons, who were strangers to the relations actually subsisting between the plaintiff and Dick, had a right to rely upon the conduct of the plaintiff as creating a presumption of Dick's freedom, and as estopping him from denying the fact, so far as they were concerned, unless he made it appear that they knew at the time they dealt with Dick as a free man, he was in reality a slave. If he were still a slave, and had never been emancipated, the conduct of the master was a palpable violation of the law, and to permit him under the circumstances, to hold others to an accountability as if Dick were a slave, whilst he was treating him as a free man himself, would enable him to take advantage of his own wrong, and thereby perpetrate a gross fraud upon the community." [Simpson, J.]

*Mahan v. Mahan*, 7 B. Mon. 579, September 1847. [580] "after the decease of myself and wife, . . . I give unto the said Jas. C. Mahan, my two black boys, known by the names of Sol and Isaac, but it is expressly understood we retain both the use and right of said negroes during our natural lives."

*Strader v. Graham*, 7 B. Mon. 633, October 1847. See *Graham v. Strader*, p. 365, *supra*.

*Swigert v. Graham*, 7 B. Mon. 661, October 1847. "Edmund, the plaintiff's slave, . . . while employed as a hand, hired for the service of the [steam]boat, was drowned in the Kentucky river, in August, 1844. . . . [666] an order was given . . . that the hands should go on shore and bring the boat with the wood. . . . soon after an alarm was given, and they . . . were seen in the deep water, not far from shore, between the bar and the flat boat. Edmund was nearest the shore, and as some of the witnesses say, safe in water not waist deep, when the alarm was made on account of the other two, and a cry from some one on the boat for Edmund to save one of them by name. On this he seems to have turned back and was drowned,"

*Waller v. Cralle*, 8 B. Mon. 11, December 1847. [13] "The slaves in controversy had been removed from this State by the directions of the plaintiff, under suspicious circumstances. They were taken by L. J. Cralle in the night, for the plaintiff, who is his mother, and hurried along with great rapidity, for the purpose of removing them to Virginia, and were in the State of Tennessee at the time they were overtaken by Waller, who there purchased them. Another creditor sued out an attachment in Tennessee, and had it levied on the slaves as the property of Long. . . . Finding that he [Cralle] would be unable to withdraw the property from the reach of Long's creditors, he finally sold the slaves sued for to Waller, at a price agreed upon by the parties, and took from the purchaser a written instrument, securing the right to re-purchase the slaves at the same price, within the period of eighteen months."

*Parker v. Commonwealth*, 8 B. Mon. 30, December 1847. The mistress of the slave Clarissa was indicted for permitting her slave to go at large and hire herself out, and found guilty.



Held: "The law<sup>1</sup> is equally violated, whether the owner give the permission to the slave without promise or compensation, or is induced to do it in consideration of stipulated wages to be paid by the slave." [Simpson, J.]

*Hadden v. Chorn*, 8 B. Mon. 70, December 1847. [72] "the number of members [of the Baptist Church of Christ at Lulbegrud] on the 3d Saturday in July, 1843, white and colored, was 136 or 137. That of this number, 68 were white members;"

*John or Jack v. Moreman*, 8 B. Mon. 100, December 1847. "The last will of John Stith contains this provision: 'I desire that whenever my negro woman Susan, and her two sons, John and Nathan, consent to go to the Colony of Liberia, that they be permitted to go. Should said woman not consent to go, if after the said two boys, or either of them, shall have passed the age of twenty-one, should they consent to go, that they shall be permitted to go.' John having attained the age of twenty-one, filed this bill, alledging that he had elected to go to Liberia, and that he had been taken by force by Jesse Moreman and Richard Stith, who were runnig him off, for the purpose, as he believes, of selling him into slavery. He prayed the Court to take charge of him, etc. Moreman and Stith, and the executrix of Stith, were made defendants, and contested the right of the complainant to freedom, or to go to Liberia. The Court below . . . decreed, that John had the right to go to Liberia, and that the Court had the power to arrange for his transportation; and accordingly appointed a Commissioner to take charge of him, and to hire him out until the further order of the Court, or until an opportunity should present for a passage to Liberia, in which event the Commissioner was to make arrangements for his going. The Court was also of opinion that the complainant was not entitled to his freedom upon his mere election to go, but upon his actually going to Liberia. . . [101] further decreed the hire of the complainant after he exhibited his bill, up to the rendition of the decree, about two years, during which time he had been hired out by order of the Court,"

Held: "The Commissioner should have been directed to collect the hire, and after setting apart such portion thereof as might be deemed reasonable for discharging any necessary expenses incurred by the complainant in the prosecution of this suit, including compensation to the Commissioner, the residue, and the proceeds of his labor afterwards, should be a fund for paying the expense and securing to the complainant a comfortable passage to Liberia; and upon his embarkation, the overplus, if any, should be paid over to him. . . The complainant had an inchoate right to freedom as soon as he made his election to go to Liberia, and in the event of his going, should be regarded as *free* from the time the election was made." [Breck, J.]

*Page v. Carter*, 8 B. Mon. 192, January 1848. "The plaintiff, (a free person of color,) having been bound as an apprentice to the defendant . .

<sup>1</sup> Act of 1802 (2 Stat. Law 1480).

brought this suit after the expiration of his term of service, for a breach of the stipulations contained in the indenture." The jury found a verdict for the defendant.

Held: "The verdict was wholly unsustained and unauthorized by the evidence. . . [193] a new trial should have been granted. On the trial had in the Circuit Court, the defendant offered to introduce a man of color, as a witness, to testify in his favor against the plaintiff. The witness was rejected. The counsel for the defendant desires this Court, in the event of a reversal, to pass upon this question. . . An act . . passed in 1798,<sup>1</sup> contains the following enactment, which is still in force, viz: 'No negro, mulatto or Indian, shall be admitted to give evidence, but against or between negroes, mulattoes or Indians.' This seems to confine such testimony to suits between the persons named, and to proceedings by the Commonwealth against them. . . As the plaintiff . . could not rely upon such testimony, if the defendant had the right to do it, the right would not be reciprocal. . . the Legislature should not be presumed to have intended to produce such want of reciprocity" [Simpson, J.]

*Miller v. Porter*, 8 B. Mon. 282, January 1848. The owner of a runaway slave made a contract with "the county jailer, by which the latter, for a reward to be paid, undertook to receive and keep safely in the public jail, the runaway slave then in possession of the owner, . . [284] there was . . but one other person confined in the jail, . . the runaway slave and the other prisoner, who was a slave confined upon a charge of a heinous crime, actually made their escape,"

Held: the contract [282] "is contrary to public policy and to the law, and therefore, cannot be the basis of a recovery against the jailer . . [283] The running away of a slave is not a public but a private offence, the prevention and punishment of which the law leaves to the owner, without making any provision in aid of his rights, except that when a runaway slave is taken up by a stranger, he may be placed in a county jail, where he may be reclaimed by the owner; or if not reclaimed within a certain period, may be sold for his benefit." [T. A. Marshall, C. J.]

*Dickey v. Thompson*, 8 B. Mon. 312, February 1848. "M. W. Dickey borrowed from Charles Thompson a large sum of money, in 1833, and to secure the payment thereof, executed to him a mortgage upon certain lots in Georgetown, and two slaves, John and Leah. In 1834, Dickey sold, by absolute sale, the slave John, to Morehead, who the next year, sold the same to T. S. Theobald. In 1837, Dickey, by like absolute sale, sold certain tavern lots embraced in said mortgage, to Herndon, and in like manner, the slave Leah was sold to Isabella Dickey. Numerous payments having been made on the mortgage debt, but a considerable residue remaining unpaid, in 1840 Thompson filed his bill against the representatives of Dickey, the mortgagor, and against the vendees and possessors of the several parcels of property sold as aforesaid, to foreclose the mortgage and sell so much of the property as was necessary to pay the mortgage debt. The Chancellor below decreed a sale of so much of the

<sup>1</sup> 2 Stat. Law 1549.


property as was necessary to pay the residue of the debt and costs, first selling the slave Leah, purchased by Isabella Dickey, as the last parcel sold by the mortgagor or his representatives; next the tavern lots, and lastly the slave John, in the possession of Theobald, as the first parcel of the mortgaged property sold by the mortgagor."

Held: [314] "the burthen of the mortgage debt should not have been thrown exclusively upon the last purchasers, but should have been distributed ratably among all, according to the value of the property held by each. . . [317] by reason of the fluctuation in the value of property, the standard of value, if fixed at the date of the several purchases, might be very unequal. A slave in his prime at the date of the mortgage, might be worn out at the time of his purchase, or when the mortgage was foreclosed, and one who was young and of little value, might at the two latter periods, be greatly increased in value. So a female slave who had no issue at the date of the mortgage, might or might not have a child or children at the date of the purchase, and a numerous brood at the time of foreclosing the mortgage. . . it would seem to us to be the most just and equitable, as a general rule, to estimate the value of each parcel at the date of foreclosure." [Ewing, C. J.]

*Bull v. McCrea*, 8 B. Mon. 422, June 1848. Action brought "by E. McCrea, a free woman of color, against N. Bull, upon an alledged promise of Bull to support her during her life, . . [426] she had been in the habit of doing various sorts of labor or service for others, and that she was a healthy woman of thirty eight or forty years of age. And upon a compromise and reconciliation of a quarrel between her and the defendant, he promised to support and take care of her during life, if she would release him from her claim, . . amounting at most, to six or seven hundred dollars,"

[425] "conceding, what a part of the Court is greatly inclined to doubt, that the jury was authorized to find that a continuance or renewal of illicit intercourse between the defendant and plaintiff, formed no part of the consideration of the defendant's promise, we are of opinion that the verdict giving damages at the rate of \$200 a year for the failure to support the plaintiff, was based upon an entire misconception of the legal effect of the contract" [T. A. Marshall, C. J.]

*Mullins v. Wall*, 8 B. Mon. 445, June 1848. "Cain and Dorcas, persons of color, have attempted to establish their right to freedom, under a paper executed by their former owner, Rebecca Mullins, and which, after having been offered for probate as a will, in the county Court, and there rejected, was destroyed by B. Mullins, the subscribing witness, who was also one of the two heirs of the decedent. There is no doubt, upon the evidence, that Rebecca Mullins did execute a paper intended to emancipate her slaves, and which, if effectual, would have made Cain and Dorcas free. . . [447] the slaves were the only property of the decedent; that her two brothers were, or claimed to be her only heirs; that they were averse to the emancipation of the slaves; and yet, that they were the only witnesses to the instrument executed for that purpose, and which, according to an intimation in the evidence, was written by that one who stated in Court



that he had not signed it in the presence of his sister, but who may nevertheless, and without the commission of perjury, have signed it under such circumstances as that the law would adjudge the attestation to have been in her presence. . . . It further appears, that notwithstanding the rejection of the will, the eldest of the negroes intended to be emancipated thereby, and who was the mother of the others, brought an action against one of the brothers, which was defended by both, in which she established her freedom. Upon which she took her children to live with her, and all were for some time regarded as free. But the mother having died in a year or two, the brother who had offered the will, asserted a claim against his sister, which he had previously disavowed, and procuring a stranger to become administrator for the purpose, although he had at first told the Court there was no need of an administrator, obtained a judgment against him for \$100, and had the negro children taken in execution; that they were all, three in number, purchased for eleven years for the debt; that the other brother and witness, whose testimony had defeated the probate, proposed at this sale that he and a third person should purchase them and run them off to a distant State, where they could not establish their freedom. These and other circumstances show that there is little probability that there was a fair trial of the question upon the will in the Court of probate, and that the beneficiaries then under disability [one of whom was an infant of tender years, and the other not born when the paper was presented as a will], should not be precluded by the rejection of the will, when it was attested by their antagonists in interest, offered for probate by one of them, and defeated by the general statement of the other, without, so far as appears, any cross examination which might elicit the particulars, or any person present who was interested in establishing the will. And as each of these interested witnesses showed himself capable of resorting to improper devices for the purpose of injuring the beneficiaries under the will, we think there is fair ground for the presumption, that the instrument subscribed by both as attesting witnesses, was, as it appeared to be, executed and attested in proper form of law. . . . [449] Wherefore, the decree establishing the right of Cain and Dorcas to freedom, is affirmed." [T. A. Marshall, C. J.]

*Johnson v. Johnson*, 8 B. Mon. 470, June 1848. Will of Job Johnson: "I give unto Margaret Johnson, my beloved wife, the negro girl Lytha, to wait upon her as long as she lives, and in case of the death of my wife before Lytha arrives at the age of twenty-one, her services shall be rendered as is hereinafter directed. If my wife dies before my negro girl Lytha arrives at the age of twenty one, she shall also be hired out, year by year, until she arrives at that age, and then she shall be free." The widow lived "after the negro girl Lytha had attained the age of twenty one, but is now dead. After the death of the testator, and before the death of the widow, Lytha had seven children."

Held: I. Lytha is free. II. [471] "The children having been born when their mother was a slave, are themselves slaves, according to the maxim *partus sequitur ventrem*." III. [473] "the children must belong to the representatives of Margaret Johnson, deceased, inasmuch as no



remainder was created nor reversionary interest retained. . . [474] In this case the absolute property of the slave passed to the tenant for life. The slave herself is given, not merely her time and services." [Simpson, J.]

*Stewart v. Wyatt*, 8 B. Mon. 475, July 1848. "Alexander Stewart, deceased, by his last will and testament, gave his negro woman, Priscilla, to his wife, Catharine, during her natural life. He, in a subsequent part of his will, made the following provision, viz: 'My will and desire is, that my negro woman, Priscilla, remain with my son Isaac, until she is forty five years old, and that she then be free, and that her three children, viz: Mary, Jane and Ann, be valued, and that the amount of their valuation, added to the residue of whatever estate I possess at my death, not heretofore disposed of, shall be equally divided between all my children. . . The widow died shortly after the testator. After her death and before the period had arrived when Priscilla was to be free under the will, she had three [more] children."

Held: these children belong to Isaac. [476] "The devise to Isaac does in fact, vest in him an estate in remainder; the slave [Priscilla], in the language of the will, is to remain with him. He became the owner upon the death of his mother. His right was not subject to any qualification but that of time. The duration of his estate was limited, but in all other respects it was absolute and unconditional, from the time of its commencement. . . [As] [477] the testator reserved no interest in her, the children born during the continuance of the estate in remainder, belong to the devisee in remainder." [Simpson, J.]

*Hawkins v. Phythian*, 8 B. Mon. 515, July 1848. Action "for the value of a negro boy slave, alledged to have been thrown from a horse, and by reason of the injuries thereby received, to have died."

*Tom Davis (of color) v. Tingle*,<sup>1</sup> 8 B. Mon. 539, July 1848. "In 1788, a slave named Harriet, then a small girl, belonging to the estate of John Ball, deceased, was allotted to the widow of the decedent as dower. The allotment was made by the County Court of Fauquier county, Virginia. The widow removed to Kentucky about the year 1796. In the year 1808, she made a deed of gift of Harriet and other slaves, to H. R. Graham, her son by a second husband; which deed purported to transfer an absolute title in the slaves to the donee. Harriet is the mother of Tom, the present plaintiff. In 1826 they were both sold under an execution against H. R. Graham, and purchased by a free man of color, the husband of Harriet and father of the plaintiff; who afterwards, in the year 1834, liberated Tom by a deed of emancipation, regularly admitted to record in the Mason County Court. The widow of John Ball died in 1836, and shortly afterwards Nicholas Warfield, claiming Tom under a purchase from A. D. Orr, whose wife was one of the heirs of John Ball, took him into his possession and held him as a slave, until 1845, when he instituted this suit asserting his right to freedom. . . [542] It was proved that Alexander D. Orr and his wife, she being one of the children and heirs of John Ball,

<sup>1</sup> See *Warfield v. Davis*, p. 407, *infra*.

deceased, were present when the plaintiff was sold under execution and purchased by his father. That the sale was of the absolute property in him, and the price paid was his full value at the time, and that Orr and wife remained silent in reference to their interest in the slave, made no claim to him or any disclosure on the subject, nor any objection to the sale."

Held: Orr and his wife are [543] "bound by the sale," and Warfield, "So far as he derives title under Orr, . . . is not at liberty to dispute the validity of the title acquired by the purchaser at the sale under execution," Tom's father, who [544] "became tenant in common with the other heirs, and had a right to the possession of the slave, even after the expiration of the life estate of the widow, and could emancipate him to the extent of his interest, a deed of emancipation by a part owner of a slave being effectual *pro tanto*: And the emancipation of a slave by two of three joint owners, or by any majority in interest of the joint owners, would of itself make him a free man. . . Still, however, the plaintiff notwithstanding his partial manumission, continues a slave, until his emancipation is made complete by the act of the other joint owners, at which time, and not previously, the partial manumission, enures to the benefit of the slave, and becomes operative. . . But the other heirs of Ball, . . . [545] . . . having asserted no claim to Tom since the death of the widow, and consequent termination of the life estate in 1836, although he had been emancipated two years previously, the jury might have presumed his manumission by them, notwithstanding he was wrongfully held in slavery by Warfield part of the time, as all presumptions should be indulged in favor of human freedom. There is, however, another aspect of the case, decisive in favor of the right of the plaintiff in error, to his freedom. His father, after he had purchased him and his mother, viz: in the year 1831, removed to the State of Ohio, took them both along with him, and resided there for the space of two years. His wife became dissatisfied, and he afterwards returned to this State, bringing his family with him. By his residence in Ohio, the plaintiff became free, and being once free, his return to this State did not make him again a slave. The residence of a slave, with the consent of his owner, in any of the States formed out of what was known as the North Western Territory, results in his freedom, by virtue of the ordinance of 1787," To be sure, "his father was not his absolute owner, there being other persons who had an interest in remainder. But it must be recollected that he was the proprietor, not only of an estate in him during the life of the tenant in dower, but also by his purchase at the Sheriff's sale of an undivided third in remainder. Besides having removed him to Ohio without objection, the consent of the other part owners may be implied from their failure to resist or oppose it. Indeed when the condition of Harriet and Tom, at the time of their removal is considered, the mother feeble and declining, and the child then but a few years old, sickly, delicate, and of but little value, no great sacrifice was made in giving such assent, it being, under the circumstances, but the mere dictate of humanity." Furthermore, the law of Ohio permitted Tom to enjoy his freedom "without regard to the rights of the reversioners. In this respect it differs from the law of this State, which will not permit the tenant for life by a

deed of emancipation, to destroy the right of those in remainder or reversion. When he became domiciled in Ohio, his right to freedom was vested," [Simpson, J.]

*Willis (of color) v. Bruce*, 8 B. Mon. 548, September 1848. [550] "there was an understanding between Willis and his colored friends [who were free] who purchased him from Mrs. Bruce, that they were to emancipate him when he should discharge, by the proceeds of his labor, the note executed by them for two hundred and fifty dollars, with the interest which should accrue thereon; but Mrs. Bruce was no party to this arrangement," She [549] "denies positively, that she ever entertained any desire for the freedom of the complainant, or that in making the sale to her co-defendants, such purpose was contemplated by her, . . . She alleges that the plaintiff, whilst she owned him, had feigned sickness, when in fact, as her physicians informed her, he was not in the least unwell; that he had become idle and worthless, had rendered her no service, under the pretence of being sick, for upwards of a year; was insolent in his language and bearing towards her, in consequence of these annoyances and the advice of her friends, she had determined to, and did make sale of him. Instead of desiring his freedom, she was opposed to it, and was induced to sell at the low price she did, on account of his worthlessness and little value; . . . The other defendants [Willis's two colored friends] state that Willis, by his representations, had induced the belief, he had the means to purchase and pay for himself. Supposing such to be the fact, they had applied [in 1844] to Mrs. Bruce . . . who . . . agreed to take for him three hundred dollars. Willis was then applied to for the money, when it was ascertained he had none, and no means of raising any. A subscription was set on foot for the purpose of obtaining his freedom, and the sum of fifty dollars raised and paid to his mistress, by one of the defendants; and after some fruitless attempts to get the balance of the price, the project was abandoned as hopeless. Some months afterward, learning that Willis was in jail, for using towards his mistress improper and insolent language, and would, in all probability, be sold and taken out of the State, they came to the conclusion to execute to Mrs. Bruce their note for two hundred and fifty dollars, to prevent him from being separated from his wife and children, and become the purchasers of him themselves, which was done. They intended to emancipate him whenever he repaid to them by his labor, a reasonable hire, and the amount they had to pay for him, . . . [550] That they permitted him during the time they owned him, to procure employment wherever he could do so, he paying to them the avails of his labor, and the amount so received by them did not exceed a reasonable hire. And having learned that he threatened to run off, and was circulating reports among the colored population prejudicial to them, they solicited Mrs. Bruce to rescind the contract and take him back, as they were unable to pay for him, which, with some hesitation, she finally concluded to do, with the avowed determination to sell him, and send him to the South." Willis [548] "relies upon a receipt purporting to be executed by his two colored friends, as . . . amounting, in effect, to a conditional emancipation. . . . [551] It was executed by one only of the

two joint purchasers, although it purports to be the act of both of them. . . 'Received, Lexington, Ky., March 31, 1845, of Willis Johnson, eighty four dollars, being in part payment of the sum of two hundred and fifty dollars, for which sum, with interest, William and Samuel Warfield, have become responsible as the purchase price of said Willis, and which sum, with all interest and expenses, he is fully to refund to us, before our claim on him can be released. Wm. Warfield, S. Warfield.' "

Held: It is [551] "contrary to the policy of the law, and inconsistent with the relation of master and slave, to permit a suit to be brought by the latter against the former, for the enforcement of this or any other promise. . . [552] We do not . . deem it [the receipt] to be such an instrument of writing as the law requires for the emancipation of a slave, had it even been executed by both the owners. . . his idle and vicious habits and refractory spirit, defeated their humane purpose, . . [553] the decree . . dismissing his bill, is affirmed." [Simpson, J.]

*Stephen (of color) v. Walker*, 8 B. Mon. 600, September 1848. For facts, see *Allison v. Bates*, p. 372, *supra*. Held: Stephen is entitled to his freedom.

*John, James, etc. (of color) v. Walker*, 8 B. Mon. 605, September 1848. The plaintiffs brought suit, "asserting their right to freedom under the last will and testament of John Bates, deceased<sup>1</sup>, against his executors. It appears that although the defendant, Walker, either as executor or devisee under the will, had the possession of the complainants and retained them in slavery after the death of Bates, yet they had been sold by him, placed in the possession of the purchaser, and removed out of this State, about two years previous to the institution of the present suit; and that none of the defendants in the suit, had the possession of the complainants, or any of them, or any right to them, since that period."

Bill dismissed without prejudice: the suit "should be brought against the person claiming ownership, or having the complainants in custody at the time of its institution."

*Gatliff v. Rose*, 8 B. Mon. 629, September 1848. "In 1833, Rose and her children and grand children, in all now numbering thirteen, instituted actions of trespass against Charles Gatliff, etc., claiming them as slaves, for the purpose of trying their right to freedom. The suits were commenced in the county of Whitely, and the venue afterwards changed to the county of Pulaski, where they were submitted to two juries, but neither was able to agree upon a verdict. They were afterwards moved to the county of Knox, and then to the county of Estill, where, in 1846, verdicts and judgments were rendered for the plaintiffs, . . [630] On one side, the testimony conduced to prove that the mother of Rose was a mulatto woman, and a slave, by the name of Jin, and as early as 1780, was owned by one James Lauderdale, in Bottetourt [*sic*] county, Virginia; that about 1784, Lauderdale sold Rose as a slave, then being from five to seven years of age, to one Gill, who shortly afterwards brought her to Garrard county, Kentucky; that Gill very soon afterwards sold her to one

<sup>1</sup> See *Allison v. Bates*, p. 372, *supra*.



Jones, and he to one Gwinn, who sold her to one McNitt, who, in 1799, sold her and her oldest child, to Gatliff, by whom and his representatives, she had ever since been held as a slave. On the other side, the testimony conduced to prove, that the mother of Rose was an Indian woman by the name of Jin, and that she was free. There was also testimony conducing to prove, that Lauderdale was the father of Rose, and on that account parted with her to Gill; and that she was to be free at the age of eighteen or twenty-one. But there is great contrariety in the testimony, . . . There is, however, no confliction in the testimony in regard to the color of Rose. Witnesses on all sides speak of her when young, as being very white—as white as most white children through the country—and there is proof that she was sometimes mistaken while in the family of Lauderdale, for one of his children. It very conclusively appears also, from the testimony, that she has more or less Indian blood in her. . . . [633] there is proof that Jones, Gwinn and McNitt, while Rose was held by them, spoke of her as a bound or indented Indian girl, to be free at the age of eighteen or twenty-one; and that they had purchased her time on indentures.”

For error in one instruction, the judgments were [634] “reversed and the causes remanded, that a new trial may be granted” [Breck, J.]

*Denton v. Franklin*, 9 B. Mon. 28, December 1848. [30] “during the few last years of his life, . . . he [the testator, who died in 1845] seems to have had no will of his own, but to have submitted implicitly to the dictation of a colored woman whom he had emancipated, and whose familiar intercourse with him, had brought him into complete and continued subjection to her influence. . . . The gratification of the wishes of this colored woman, seems to be its leading object. The natural duty of providing for his own children . . . was entirely . . . disregarded.”

Held: the will should be rejected.

*Moore v. Ann (a woman of color)*, 9 B. Mon. 36, December 1848. In a suit at law, brought by Ann “for her freedom, a copy of an indenture of apprenticeship, bearing date in 1811, and purporting to have been executed by Moore, . . . was offered in evidence, . . . It is certified by the clerk of the County Court of Campbell county, State of Virginia, . . . [38] Moore availed himself of his rights as master under the indenture, claimed and enjoyed all the benefits it conferred upon him, and should not therefore now be permitted to controvert the right of the apprentice to her freedom.” [Simpson, J.]

*Young v. Young*, 9 B. Mon. 66, December 1848. An injunction had been awarded “restraining the sale of four slaves by the Sheriff, who had taken them under sundry executions . . . The bill alleges, in regard to two of the slaves, ‘that they were not only family servants peculiarly endeared to the surviving children and widow of the testator, and possessing, therefore, to them, a value far above their vendible price, but the condition of the title thereto would embarrass the sale of them under said executions, and strangers might, if so sold, purchase them at a great sacrifice,’ ”

Bill dismissed as the “legal remedy . . . was ample,”

*Burnsides v. Wall*, 9 B. Mon. 318, January 1849. Robert Burnsides, by his will executed in 1839, devised to his wife "eight slaves by name, of whom one was to be free at a designated period."

*Henry v. Commonwealth*, 9 B. Mon. 361, June 1849. Indictment "for keeping a disorderly house, which is alleged to have been a common nuisance to the neighborhood where it was located. They were found guilty, and a fine of one hundred dollars assessed against them by the jury. The proof was, that a number of slaves had on various occasions, assembled in and around the house of the plaintiffs in error, . . . and had been furnished by them with spirits, and were seen on several occasions upon the Sabbath day, in considerable numbers, playing cards in an adjoining lot in their possession. That the crowd was frequently so great on the public highway near the door of the house, that it was difficult to pass along it."

*Ross v. Carpenter*, 9 B. Mon. 367, June 1849. The slave "died, in consequence of injuries inflicted on him by Thos. Kennedy and others. . . [His mistress] brought a suit against the persons concerned in the trespass on the slave, and recovered a judgment against them for the sum of one hundred and ninety five dollars and costs,"

*Bondurant v. Jeffries*, 9 B. Mon. 381, June 1849. Will of Sarah Goodwin: "After my slaves, each of them, arrive at the age of thirty years, I wish them, should they so elect, to be free." The plaintiffs, "Justices of the Peace in . . . Montgomery county, . . . charge that at the death of Mrs. Goodwin, two of her slaves, Bristoe and his wife Joice, were old, and that they are now very infirm; . . . and they verily believe and charge, will in a short time become chargeable to the county, and are at this time, not supported by the executor or devisees. They ask that some money due to some of the devisees, be enjoined and a suitable provision made, by requiring the defendants to execute bond with security, to maintain said negroes, and such of the other slaves as may hereafter become chargeable to the county."

Bill dismissed: [382] "It is very questionable whether old Bristoe and wife are free. They were fifty years of age when the will was made, and had, therefore, long before the death of their mistress, arrived at the age of thirty years. . . The old negroes have not yet become a charge on the county, and it is to be hoped, that the humanity of those for whose benefit they have toiled in their days of vigor and strength, will not cast them, in decrepitude and old age, a useless burthen on the community." [Graham, J.]

*Davenport v. Gentry*, 9 B. Mon. 427, June 1849. "certain negroes, claiming to be free, procured the services of Gentry to aid them in the assertion of their claim, in which they were successful. For Gentry's services, and for some expenses to which he had been put in the prosecution of their suits, they promised [verbally] to serve him five years. On the 12th of April, 1837, (after the negroes had been declared free by the judgment of the Court,) Gentry sold to Davenport six of them for five years, for the consideration of five hundred dollars, . . . Some of the

negroes . . . were infants. . . [428] At the July term, 1837, of the Lincoln County Court, that Court, at the instance of Davenport, directed their Clerk to bind three of the young negroes to him as apprentices."

Held: [429] "as he [Davenport] could not compel an execution on the part of the negroes, of the contract which they had made with Gentry, and as most of them refused to render him service, he cannot be compelled to pay any more than the value of the services rendered." [Graham, J.]

*Collins v. America (a woman of color)*, 9 B. Mon. 565, September 1849. "This action of trespass was brought by America, a woman of color, to assert a right of freedom against Collins, who claimed to be her owner, and Harrison, who had her in possession under hire from Collins; and the plaintiff having obtained a verdict, which the Court refused to set aside, the defendants have appealed to this Court for the reversal of the judgment against them. It appears that America had been, for many years, the slave of Collins, in this State; that after the death of Mrs. Collins, she had assisted greatly in nursing and rearing her infant daughter, who afterwards intermarried with one Woodrow, and resided with him at Hillsborough, in the State of Ohio, and that, in 1844, America went, by the authority of Collins, to the residence of his daughter in Ohio, and after remaining there a short time, (about two weeks or less,) returned to the house of Collins, in company, as it would seem, with Mrs. Woodrow, his daughter; upon the termination of whose visit to her father, America went back with her to Hillsborough, and, in a few days, again returned to the residence of Collins, as his slave, and continued subject to his control as such, until December, 1846, when this suit was brought. On her first journey to Ohio, America took with her one or more written notes, or passes, . . .

[566] "Greenupsburg, June 26th, 1844. Mr. C. A. Garrett: My black girl America comes to Cincinnati, on her way to Hillsborough, Ohio, to stay with my daughter, who is very unwell: will you be good enough to procure a passage for her in the stage to Hillsborough, . . .

[568] "it is certain that there was no intended renunciation of dominion on his part, and no disclaimer or rejection of it on hers, either in Ohio or in Kentucky, until some time after her return, when she asserted a right to freedom, as being founded on this temporary sojourn in Ohio."

Judgment reversed and the cause remanded: [576] "if America was sent to Ohio for a merely temporary purpose, (as that of aiding her master's daughter in her illness, or of visiting or staying with her on such occasion,) and was to return upon the accomplishment of the object, which was expected to be in a few days or a few weeks, and, if, under this authority, she did go and accomplish the object intended, and returned, as expected, she can claim no benefit from her absence, nor any privilege under the law of Ohio, and is not free, but continues to be a slave." "If the opposite principle should prevail, the slave owner upon the Ohio would be absolutely deprived of his right, by sending his slave across the river, and even by permitting him to go across on the most trivial errand, or on the most pressing emergency—though it were to

rescue an individual from murder or robbery, or to extinguish the flames which were consuming his neighbor's house, or to bring a cord of wood or a bucket of water." [T. A. Marshall, C. J.]

*Brasher v. Kennedy*, 10 B. Mon. 28, December 1849. "Brasher was the owner of two slaves, who ran away, and were conveyed across the Ohio river on a ferry boat, at a ferry established from Covington to Cincinnati. Kennedy was part owner of the ferry, but was not present when the slaves were conveyed across the river, nor does it appear that they were carried over with his knowledge or consent. . . The slaves made their escape, and were lost to their owner."

Held: Kennedy is not liable for their value.

*Esham v. Lamar*, 10 B. Mon. 43, December 1849. "The father of Mrs. Esham, having by a written instrument, vested in her and her four children, the title to a young negro girl, aged about ten years," they, in 1844, removed to Kentucky. Being [44] "in almost utter destitution," Lamar lent them twenty-five dollars, taking the girl as a pledge for the repayment of the money with interest [43] "within the eighth year from this date, . . but if they do not so redeem said negro in the said eighth year, . . then they are to forfeit all right to do so," [45] "The slave is proved to be worth at least \$350. Her hire for a single year, would be nearly worth the sum advanced. Here is no delay. The only complaint, as to time, is, that the complainants have come too soon."

Contract rescinded, "decreeing the \$25, with interest, to have been already fully paid by the use and services of the negro girl," [Graham, J.]

*Adams v. Adams*, 10 B. Mon. 69, December 1849. Will of Nathan Adams, dated 1835: "It is my will that, after my death, all my negroes, viz: Mary, about 25 years old and her child, now about two months old; David, about 23 years; Jacob, about 21; Fanny, about 13; Frank, about 9; Henry, about 8; Edward, about 7; John, about 6; and Joel King, about 2, shall be and they are hereby declared to be free upon the following conditions: that they be placed under the care of my nephew, James Adams, who shall treat them humanely and allow them fair wages for their labor, and when they have earned money enough to pay their own and the smaller one's expenses, and to pay the passage of the whole to the colony on the coasts of Africa and support the whole for six months after their arrival there, then they are to be sent to that colony where they will be free, but should any, or all of them, refuse to go to Liberia, as aforesaid, each and all so refusing, are to remain slaves for life and belong to my nephew James Adams." The testator died in 1845. Between the date of the will and his death, [70] "the negro woman Mary had two other children, named James and William. . . James [Adams] took possession of all the negroes, aforesaid, and kept them until his death. By his will he emancipates a negro man, (the only slave he owned, unless those in controversy be his,) and makes no allusion, in any part of his will, to any other slaves."

Held: [71] "James and William are free on condition of going to Liberia." "the testator intended that all the slaves he might own at his death should be free." [Graham, J.]



*O'Bryan v. Goslee*, 10 B. Mon. 100, December 1849. Will: "I give and bequeath to all my negroes their freedom, that my heirs or executors shall have no right nor title to them after they arrive at the ages hereinafter mentioned, the males at twenty-eight years and the females at twenty-five years." John, the complainant, [101] "was born of one of the females after the testator's death, and before she arrived at twenty-five years, and his right therefore depends on the question whether the will gave his mother immediate emancipation with a postponement of its enjoyment till she attained 25, or gave her only a prospective right of emancipation to take effect, provided, or only when, she attained that age."

Held: "the testator meant immediate emancipation, with a reservation to his heirs of merely the use of their services until they attained the prescribed ages. . . The testator evidently intended to dispose, by will, of his whole estate; . . if he had intended the issue, born before [the slave mother reached the prescribed age,] . . should be slaves, and as such a part of his estate, he would have so said or made some specific disposition of them as such. . . [103] the testator meant to manumit his slaves immediately, but to postpone the perfect enjoyment of freedom, and in the meantime they were to be servants and not slaves." [Nicholas, Ch.]

[100] "We concur with the Chancellor, not only in his exposition of the law in this case, but in his reasons and arguments. We therefore affirm the decree, and adopt [it] as ours," [Graham, J.]

*Berry v. Hamilton*, 10 B. Mon. 129, January 1850. Will of Eliza Ann Hamilton, who died in 1844: "I will all my servants to be free, both those I am entitled to as an heir of my father, Archibald Hamilton, deceased, at this time, and those that I will be entitled to, as an heir of my father, at my mother's death, and also my portion of the servants of my sister, Maria Hamilton, deceased. And if said servants will go to Liberia, in Africa, I will each one of them one hundred dollars; but if they do not go to Liberia, I will them fifty dollars each, on their permanent removal to a free State. I will that my servants have what they earn, after the first day of January next, that is, over and above their expenses and the expense of attending to them."

Order of the county court, establishing the will, affirmed: the testatrix [133] "entertained conscientious scruples upon the subject of slavery, but was very decidedly of the opinion that slaves should not be manumitted without previous preparation. She repeatedly expressed her determination that her slaves should never serve any other person but herself. Her intention to emancipate them at her death, was evident from all her conversations on the subject. With her it was not only a desire, but she felt it to be a moral duty." [Simpson, J.] See same *v.* same, p. 455, *infra*.

*Calvert v. Stone*, 10 B. Mon. 152, January 1850. "some time before day light, or about day break, a negro called at his house for some spirits. That plaintiff and his son and the witnesses got up. The son went into the kitchen, and shortly afterwards called to his father that a man was there and had drawn a pistol on him. The plaintiff immediately got his gun, . . Immediately on the plaintiff's entering into the passage, some of

the defendants [Calvert, the deputy sheriff and those summoned by him to go with him to the plaintiff's house] seized him and took first his gun and then a stick from him, throwing him on the floor twice in the course of the struggle. . . [They forced] open the door by breaking the hasp." Calvert had come to levy an execution on the slaves of Stone. In an action of trespass by Stone, the jury rendered him a verdict for \$200.

*Moore v. Foster*, 10 B. Mon. 255, June 1850. "The keeper of a ferry is authorized by the statute,<sup>1</sup> to take a slave across the river in the presence and company of the owner, or at his request. . . The hirer of a slave is in legal contemplation the owner for the time that he has him hired." In case of the escape of the slave, [256] "the owner must rely upon [the liability of the hirer] for his indemnity, as the keeper of a ferry . . does not incur the penalties of the statute, when the hirer authorizes him to take the slave across the river." [Simpson, J.]

*O'Neal v. Beall*, 10 B. Mon. 272, June 1850. "the slave, King, devised to his wife, was . . to be retained by her until the youngest child of the testator 'may get its education,' . . and 'when the youngest child may get its education,' the boy was to be hired out for the benefit of the children until the youngest arrives at full age or marries, when he is to be sold and the proceeds distributed among the testator's children."

*Marsh v. Marsh*, 10 B. Mon. 360, July 1850. N. C. Marsh's will emancipates a female slave, with certain directions as to her treatment, and then proceeds as follows: [362] "I devise to my brother Benedict B. Marsh, as my trustee, the farm on which I live and the slaves I own, to him and his successors forever, subject to the following condition: he is to see that my slaves are well treated and attended to and properly worked and managed as long as they live, and all the children of said slaves, born after my death, shall be raised and attended to by my said trustee, until they are twenty-one years old, and as they respectively attain to that age, they shall be free. He shall pay all of my debts and legacies as they fall due, and the balance of the yearly proceeds of the farm and slaves shall belong to the said Benedict, to be used as his own, but he is not to have the liberty to sell the land or the slaves. My object is that the land and the slaves shall be kept together until the slaves to be born shall be raised and liberated. I do not expect my said trustee to live to see the end of it, but I wish him to appoint a suitable trustee to hold and manage the farm for the purposes aforesaid, the children or heirs of said Benedict to have the proceeds after paying the trustee a reasonable compensation; and as soon as the slaves are all liberated, the fee simple title in the said land to vest in the said Benedict's heirs at law to be held by them forever."

*Ellott v. Gibson*, 10 B. Mon. 438, September 1850. [440] "the plaintiff [Gibson] had arrested the defendant's runaway slave in Indiana, and that after being by him brought to Louisville the negro escaped. . . having two other runaways in his charge, he, as soon as he could, and did deliver them to the jailer, immediately commenced searching for the

<sup>1</sup> Of 1831 (1 Stat. Law 715).

negro in the part of the city in which the slave had eluded his grasp." Vanseikles arrested the negro in Louisville. [444] "Elliott cheerfully received his slave from Gibson, and professed himself willing to compensate him." [439] "The jury . . found for the plaintiff one hundred dollars in damages." New trial refused.

Judgment affirmed: Gibson had [440] "acquired such an interest in the slave as to authorize him, upon the recapture . . and delivery to the owner, to demand the reward to which, by law, he would have been entitled, had the escape from him not have taken place, and that he was as *quasi* owner for the time being, liable to Vanseikles for the reward due to him for apprehending the runaway in Louisville. . . [441] By an act passed 16th January, 1798, a reward, increased by the distance which he might have to travel, was given to the apprehender of a runaway slave upon delivering him to his owner. . . very recently . . it was found that the compensation fixed by it was insufficient to effect its object. Escapes of slaves continued to increase and but few recaptures were made, because, as was supposed, of the inadequacy of the reward allowed by law for such services, and therefore the Legislature in the year 1835, increased the compensation to ten dollars if the fugitive was taken in the State, and to thirty dollars if taken up out of this State. It was soon ascertained that, because of the odium which in the non-slaveholding States was visited upon those of their citizens who engaged in the apprehending of fugitives from other States, it was necessary to offer a greater reward, and such as would probably be sufficient to induce men to consult their own interests, regardless of the public sentiment around them. It cannot well be doubted that to the owners of slaves generally, the act of 1838 [raising the reward to one hundred dollars, on the delivery to the owner, at his residence, of a fugitive slave 'taken without this Commonwealth, and in a State where slavery is not tolerated by law'] . . has operated very beneficially, not only because fugitives are more frequently now than formerly returned to their owners, but because the difficulty of final escape has had some tendency to prevent others from attempting it." The act of 1838 does not violate, in any particular, the organic law of the state. [444] "although the owner of the fugitive may not be under any obligation of duty to receive him from the hands of the taker up, yet if he does so, he, by the act of reception, enters into a compact to pay the prescribed reward, which has been, perhaps, the sole inducement on the part of the other to take upon himself the trouble and responsibility of apprehending the slave. As soon as the slave has escaped to the opposite shore of the Ohio, he finds himself in a land, where the institution and existence of slavery is not recognized, and unless some one shall aid the owner in his apprehension, he will most probably never be retaken. It is argued that if the owner desires the recovery of his slave, he should offer such a reward as he may be willing to pay, and the captor should look only to the compensation so offered by the owner. Such an offer would probably be known to very few of the citizens of the State to which the negro may have escaped. Even after the owner may have, at great trouble and expense, posted advertisements

through the country, it might be a curious subject of enquiry how long they would probably be permitted to remain to meet the observation of such as would be induced by it to undertake the recapture. On the other hand, the public law of a sister State upon that subject may become a topic of conversation, and very readily known to all. One person having apprehended a runaway, and obtained the \$100, his neighbors soon learn that he received that sum by reason of a law of Kentucky requiring the owner to pay it; and thus a few instances will soon diffuse the information through a whole community, and the people reposing confidence in the good faith of Kentucky, will apprehend the runaway and restore him to his owner, when, under other and different circumstances, he might be permitted to escape." [Graham, J.]

*Commonwealth v. Kenner*, 11 B. Mon. 1, December 1850. "presentments found under the second section of the act of 1834,"<sup>1</sup> concerning the sale of spirituous liquor to slaves by tavern keepers.

*Graham v. Kinder*, 11 B. Mon. 60, December 1850. "Kinder, a boy of color, exhibited a bill in chancery, in which he alledged that his mother was a free woman of color, and he was born free. That Graham was the owner of an old black man named Ned, who was the husband of complainant's mother; and that in the year 1842 Graham and his mother, entered into a written contract by which the former sold Ned to the latter, and in consideration thereof the latter sold and transferred to the former, all her right to the complainant, and to another son by the name of Timothy, until they arrived at the age of twenty-one. He also alleged that Ned was very old and of little value at the time the contract was entered into, but that Graham availing himself of the wife's affection for her husband, had fraudulently induced her to make the agreement, although Ned was so old and infirm that he was a charge instead of a benefit. The complainant also alleged that Graham by virtue of the contract, had taken him into his possession and had hired him out from year to year, whereby he had been subjected to bad treatment and harsh usage; and that a short time previously, an effort had been made by a man by the name of Hart, to sell him to a Southern trader as a slave for life, which was done with the approbation and concurrence of Graham."

Held: [62] "Regarding the boys in the light either of apprentices or wards, he had no right to hire them out, or transfer their services to other persons. The testimony shows that he treated them in every respect as slaves; and if he did not participate in the attempt to sell one of them into slavery during life, had enabled Hart to make the effort, by having sold the boy to him until he arrived at the age of twenty-one. . . [63] Kinder and Timothy, are free, and that Graham has no right to the custody or control of them;" [Simpson, J.]

*Strader v. Graham*, 10 How. 82, December 1850. See *Graham v. Strader*, p. 365, *supra*.

*Harris v. Hill*, 11 B. Mon. 199, January 1851. Harris "obtained an order directing the sheriff to take the slaves into his possession, upon an

<sup>1</sup> 2 Stat. Law 1503.



allegation that the mortgagor intended to remove them out of the State for the purpose of avoiding the payment of the debt. The sheriff having seized the slaves, and the defendant having failed to execute a bond as required, to have them forthcoming to abide any order or decree that might be made in the suit, he delivered them to the jailer of Mason county, where the suit was pending." Harris objected to the jailer's account as excessive.

Held: [201] "The slaves were in possession of the jailer, not as prisoners—he held them merely as the bailee of the Sheriff. The Sheriff had no power to commit them to the jail of the county, nor had the jailer any right to regard them as prisoners. They remained with him in the character of boarders, requiring, however, for their security and safe retention, a superintending care, which is not necessary to be given to ordinary boarders. The jailer, however, is only entitled to a reasonable compensation for keeping them; he has no right to demand in this case, the fees allowed by law in cases where prisoners are legally committed to his custody. Now \$138 70 cents for keeping and boarding a female slave and five small children for one hundred days, even if the Court would have made an allowance for the whole time, would be unreasonable and oppressive." [Simpson, J.]

*Ben Mercer (of color) v. Gilman*, 11 B. Mon. 210, January 1851. "It seems to this Court that Joseph Mercer the former owner of Ben did not lose his property by hiring Ben to cut 100 cords of wood in the State of Illinois, because the purpose was defined, and the employment limited to an object to be accomplished in a short period, and the absence from Mercer's house which was still Ben's home, though altogether covering two months was generally for about one week only, at a time. The whole transaction shows that Ben was in Illinois as the slave of Joseph Mercer, and not as a free man, or for the purpose of thereby becoming free, or of residing there as his home. But there is other evidence in the cause tending to show, and which in our opinion authorizes the conclusion, that on other occasions afterwards and for several years, Ben with the knowledge and permission of Joseph Mercer, went to Illinois at pleasure, and remained there for long periods according to his own will, residing there when he pleased, and acting in all respects while there, as a free man without any control actual or implied on the part of Joseph Mercer while there or in going or coming back, and that Joseph Mercer had during this state of things and at various times not only declared that he intended that Ben should be free, and should serve no person as a slave after his own death, but that he declared on some occasions that he was then free, and so treated him. And although such declarations and corresponding acts are wholly insufficient under our laws to emancipate a slave without a deed or will, yet they may operate to show the intention with which Ben was permitted to go to and remain in Illinois at his own pleasure, and to show that he was permitted to go to a State in which slavery is not tolerated, in order that he might thereby become free, or that he was permitted to go and remain under such circumstances as made him free. And the circumstances seem at least to prove that he went with the

privilege assented to by his owner of staying as long as he should choose, and of making his home in that State if he pleased."

Held: "Benjamin Mercer was entitled to his freedom. . . [212] the decree dismissing his bill is reversed," [T. A. Marshall, C. J.]

*Henry v. Nunn*, 11 B. Mon. 239, January 1851. "Samuel Nunn, who resided in Crittenden county, was the owner of a large number of slaves, and of other property of very considerable value. He never married, and had no children or descendants. He had resolved to emancipate his slaves, having, as he expressed himself, determined that they should never serve any other person. In January 1844, he had a will drawn up by a lawyer to whom he had applied for the purpose, by the provisions of which, all his slaves were to be entitled to their freedom immediately after his death, except three of them, and one of the three was to be free at the expiration of six years. Of the remaining two, one was a female whose children, either born before or after the testator's death, were to be free at the age of twenty-one. He devised portions of his estate to Chesley Nunn and Samuel Nunn, and required them to become the securities of the persons he had emancipated, so far as the County Court might demand security to be given that the persons emancipated would not become a charge upon the county; and provided expressly that a failure or refusal by Chesley Nunn or Samuel Nunn to comply with that requisition, should produce a forfeiture of the estate he devised to them. He also devised a considerable part of his estate to the slaves he emancipated. But this will was not executed by him so as to be effectual either in manumitting his slaves, or disposing of his real estate. He subscribed his name to it, but never had it attested by any subscribing witnesses, although he was informed by his lawyer that it was necessary to its validity, that it should be attested by two witnesses. Afterwards in October 1845, he executed under his hand and seal, a bill of sale of all his slaves, being upwards of thirty in number, to John E. Prow, purporting to convey them to the latter as slaves for life. The consideration stated in the bill of sale was five hundred dollars. It also contains the following statement, made by the grantor: 'Having at one time made a will which was to free the above named negroes, on calling them up and enquiring of them, and explaining the matter to them, all of them that were old enough to have a judgment upon the matter, requested to be sold and live with the said John E. Prow, rather than risk giving security. I do therefore sell and deliver them unto the said John E. Prow in presence, etc.' Another instrument of writing was executed at the same time, by Samuel Nunn, purporting to be an agreement between the said Nunn of the one part and the said John E. Prow of the other part, in which it is stated that the said Nunn had that day hired of the said Prow the same slaves contained in the bill of sale, for and during the natural life of the former, for which he bound himself to furnish them with good clothes suitable to the season, to take good care of them and treat them with humanity. The writing then proceeds, substantially as follows: 'Having at one time a will emancipating the above named negroes, after consulting my own mind and the negroes on the subject, I concluded with them that I would trade them to the said

Prow, which they preferred rather than run the risk of giving security after my death, and in my will I was to give them some land and money and other property, and as the said Prow has removed all responsibility upon them to give security, I therefore bind my heirs, executors, etc., to pay all the devises made by me to the above named negroes, unto John E. Prow, and after my death the said John E. Prow is authorized to take possession of said negroes, and to receive from my executors the devises I have heretofore made to them, etc.' This instrument of writing as well as the bill of sale was attested by two witnesses; and in the month of February 1846, they were proved before the Clerk of the Crittenden County Court, and recorded. Samuel Nunn having afterwards died, the writing purporting to be his last will and testament was offered for probate, and rejected . . . [241] This suit in chancery was subsequently instituted by the slaves claiming their freedom, either under the writings already adverted to, or by virtue of an alleged written or parol agreement between Nunn and Prow, binding the latter to emancipate them upon the death of the former."

Decree dismissing the bill affirmed: [243] "The most reasonable conclusion from all the evidence upon the point, . . . is, that Prow was to retain the title to them and keep them nominally as slaves, but they were to be substantially free, and to enjoy many of the advantages and privileges of free persons. An arrangement which as before remarked, depends entirely for its fulfillment and observance, upon the good faith and honesty of Prow, as the substituted master and owner of the slaves. If however there were an express agreement upon the part of Prow to manumit the slaves after the death of the former owner, . . . [244] Slaves cannot maintain a suit in their own names, to have a contract for their emancipation specifically executed, because not being free when the suit is brought as is apparent from the contract itself, and the object of the suit, they cannot assert any right, and also because, they cannot from their condition be regarded as parties to the contract, although it was for their benefit. The contract therefore can be enforced alone by the parties to it, or by some person having a right to do so, growing out of his relation to one of the parties." [Simpson, J.]

*Wilson v. Commonwealth*, 12 B. Mon. 2, June 1851. Indictment for keeping a disorderly house in the city of Lexington. Held: [3] "a house in which slaves are permitted from time to time to assemble and remain, drinking, tippling, and buying ardent spirits, is a disorderly house, and a common nuisance . . . whether the liquor is sold or given to the slaves, with or without the permission of their owner." [T. A. Marshall, J.]

*Blackburn v. Collins*, 12 B. Mon. 16, June 1851. [19] "Both witnesses prove that the slaves [Ned and Stephen], at the time of the sale [1842], were worth \$1200, and Morris [the sheriff, who made the sale] states that each negro was worth per annum \$100."

*Minor v. Thomas (of color)*, 12 B. Mon. 106, June 1851. Will of Jeremiah Minor, dated 1839. "By this paper, . . . the testator emancipates all his slaves, and gives to them all his land, a tract of 350 acres, as well

as the greatest part of his personal property." He was [107] "between 90 and 100 years of age, . . . [and] [108] two of the subscribing witnesses upon their testimony, condemn the will as the production of a mind rendered incompetent by disease and extreme old age, the other subscribing witness and draftsman of the paper, in his evidence leaves it a doubtful question, at least as to the testator's capacity to make a will. . . [109] after his wife's death, the testator lived alone with his slaves, that they had unbounded influence over him, and controlled him at discretion. . . his children were obedient and affectionate when with him, which excludes the inference that his slaves were preferred to them as subjects of his bounty on account of ungrateful or improper conduct. It is proven that Glass, who wrote the will, owned a negro woman who was one of the same family of slaves belonging to the testator; that he resided eight miles distant from the residence of the testator in a different County; that the information that the deceased wished him to come and write his will, was communicated to him at three different times by negroes, first by a negro man who was the husband of his negro woman, next by a free negro man, and the third time by a negro named Tom, one of the emancipated slaves. The style and orthography of the document, . . . [110] shows most conclusively that Glass, its author, was not much better qualified to compose than the testator was to dictate a last will and testament. . . the influence of testator's slaves may have caused his selection to perform a task to which he had never been accustomed, and for the performance of which he was so indifferently qualified. . . his (testator's) slaves, and especially old Fan, the mother of the family, could make him do as they pleased;"

Held: [111] "the paper in question is not the true last will and testament of Jeremiah Minor, deceased," [Hise, J.]

*Streshly v. Powell*, 12 B. Mon. 178, June 1851. In 1850 Streshly sold Powell "a negro boy for the sum of \$700, . . . [179] The negro, however, was never delivered; and it turned out that, if he had not actually made his escape at the time the contract was made, he did so, shortly afterwards."

*Western v. Short*, 12 B. Mon. 153, July 1851. "Western sold to Short a female slave and her child, at the price of five hundred dollars,"

*Dowrey v. Logan*, 12 B. Mon. 236, September 1851. "Frazeur, in the year 1795 or 6, executed and acknowledged in the Scott County Court a deed of emancipation, by which it was provided that their mother Sukey Dowrey, should be free at the age of thirty years, and that the children to which she might thereafter give birth (she being then childless,) should each have their freedom as they severally arrived at the age of thirty years. That at the same time or on the same day, when the deed of emancipation was acknowledged, Wm. Frazeur sold and delivered their mother to Lucas, and that shortly thereafter, Lucas sold her to Moore, and that in the bills of sale from Frazeur to Lucas, and from Lucas to Moore, it was expressly stipulated and provided that Sukey Dowrey and the children born of her, should, as they respectively arrived at the age of thirty years, be free; that the deed of emancipation had been deposited and recorded in the Scott County Court Clerk's office, but that the deed



and book in which it was recorded, was, with many of its other records, destroyed when that office was burnt down in the year 1837. That Moore conveyed Sukey to Wm. Logan, the grand-father of the defendant, and whilst in his possession, she gave birth to the complainants and some other children, that some time before the institution of these suits the complainants had each arrived to the age of thirty years. . . The complainants claim compensation for labor and service done and performed by them for defendant, after they were, as they allege, entitled to their freedom. . . [238] The important provision contained in the lost record and the bills of sale attempted now to be supplied by parol proof, was short, not complicated, but simple—and would be without difficulty correctly remembered, especially by the witnesses in this case, one of whom was the daughter-in-law of Frazeur, who executed the deed of emancipation; another is the son of Lucas, to whom Sukey was conveyed by Frazeur; and the other is the son of Moore, who purchased the woman from Lucas. They, no doubt, were familiar with the facts all the time, and had heard Frazeur, Lucas, and Moore, often acknowledge the existence and contents of the deed of emancipation, and of the bills of sale, as stated by them."

Decrees of the circuit court dismissing the bills of Harvey and Robert Dowrey reversed, [239] "and the causes remanded with directions that decrees be rendered in favor of the complainants, by which their freedom shall be declared and established." But they are not entitled "to any compensation for labor and service performed by them for defendant, previous to the institution of these suits. It is not proven that the defendant had any notice or information whatever, until the commencement of these suits, that complainants were free at 30 years of age, or that they in bad faith held the complainants in bondage as slaves, knowing or believing that they were justly entitled to their freedom." [Hise, J.]

*Johnston v. Jones*, 12 B. Mon. 326, October 1851. [327] "At the time of the marriage [1847], Mrs. Jones was the owner of a considerable property consisting mostly of slaves. . . [329] prior to the passage of the act of February, 1846,<sup>1</sup> the title to the slaves, would have vested absolutely in her husband. But as she was married after the passage of that act, her slaves are to be regarded as real estate, and can only be disposed of by deed in the same manner, that husband and wife, may dispose of the lands of the wife. . . [333] the vendor acquired no interest in the slaves or land of the wife by the writings executed by the husband in their joint names," [Simpson, C. J.]

*Basye v. Beard*, 12 B. Mon. 581, October 1851. [584] "Billy and Jacob were purchased together in February 1833, . . at the price of \$800, of which \$450 was the price of Billy, . . that in March 1834, Basye sold Billy to Briscoe of Mississippi, for \$550, . . it was stated by the agent of Mrs. McDonald [the former owner of Billy], and by her son, that Billy had run off from Briscoe, and was in her possession."

*Chadoin v. Carter*, 12 B. Mon. 383, December 1851. Held: [383] "a gift of slaves not delivered, though evidenced by any written instrument

<sup>1</sup> Sess. Acts 1845-6, p. 42.

except it be by will or deed duly executed, witnessed or acknowledged and recorded in due time and in the proper office, will pass no title whatever to the donees." [Hise, J.]

*King v. Shanks*, 12 B. Mon. 410, December 1851. [412] "the defendant took his horse (then about two years old) to the pond for the purpose of being swum, that he mounted him himself for the purpose, but the horse proving restive, he dismounted—that he requested another person . . . to ride him in, but after at first assenting he declined—and that the defendant afterwards offered twelve and a half cents, to a negro, to swim the horse, when Berry coming up about this time offered to do it for 25 cents, to which the defendant agreed. . . [415] the slave, either in a rash attempt to duck the horse, . . . or from other imprudence, or from carelessness or want of skill, was drowned." [411] "The evidence conduced to prove that the slave Berry had . . . made some trades and acquired some little money and property, there being, however, no direct evidence of the plaintiff's knowledge of these facts. . . from his having acquired a little money, etc., and from his alacrity on the occasion now in question, it is highly probable that he had done little services for a compensation to himself, as is frequently the case with slaves. . . it could not be assumed, in the absence of all proof on the subject, that Berry had any license, express or implied, to engage even on Sunday, which was the day on which this transaction occurred, in services of an extraordinary and hazardous character. It is in proof that his master had refused to hire him where he would be exposed to water, in consequence of the danger of his being drowned."

Held: the defendant is liable for the value of the slave: [421] "he stood in effect as an insurer against the loss of Berry by drowning while engaged in the service in which he had employed [him]." [T. A. Marshall, J.]

*Graham v. Swigert*, 12 B. Mon. 522, January 1852. See *Swigert v. Graham*, p. 380, *supra*.

*Maria v. Kirby*, 12 B. Mon. 542, January 1852. "In 1848, Mrs. Rebecca Kirby, a resident citizen of Kentucky, and the owner of a female slave, Maria, took Maria with her on a journey, or trip of pleasure, to the eastward, and during a delay of three or four days in Washington county, in the state of Pennsylvania, a writ of *habeas corpus* was issued on the petition of a colored man named Brown, commanding that Maria . . . should be brought before the judge. And upon the return of the writ showing that Maria was claimed as a slave purchased in Kentucky, she was discharged from custody and restraint, and declared to be a free woman, to go where she pleases without coercion or restraint from any one. But Maria returned to Kentucky with her mistress, and was here held as a slave until January, 1850, when she filed this bill, claiming that she was free by virtue of the proceedings and judgment or award on the writ of *habeas corpus* in Pennsylvania. The defendant . . . [543] states that all that occurred before the judge was, that Maria, on interrogation, said she would rather go back to Kentucky, as the defendant's slave, than to remain in Pennsylvania."

Held: [551] "the transitory ingress of Mrs. Kirby and her slave into the State of Pennsylvania did not make the slave absolutely free, notwithstanding the statute [the 10th section of the statute of Pennsylvania for the abolition of slavery, passed in 1780, and also a statute of 1847 repealing the exceptions contained in said 10th section] and the decision under it." [546] "our statute [of 1798]<sup>1</sup> is even more peremptory, and apparently more direct in its operation than that of Pennsylvania, . . . And yet, while it can not be doubted that many persons who our statute declares shall not be slaves within this Commonwealth, have been brought into it as slaves, it has never been imagined that the statute, by its own force, emancipated them while temporarily here, and much less, that it made them free on their return to the domicils of their owners, from which they were brought and to which they returned, or were taken back as slaves." [T. A. Marshall, J.]

*Hill v. Squire (of color)*, 12 B. Mon. 557, January 1852. Will of Humphrey Tunstall, admitted to probate in February, 1850: "I emancipate and set free my several negroes here mentioned, say, Squire, Jack, etc, (naming seven,) provided they give the Madison County Court good and sufficient security for their maintenance and good behavior. And if they should fail to comply with the above requisition, I give them all to Humphrey T. Hill, son of Harrison and Patsey Hill, as slaves for life." Two months later "five of the negroes emancipated by the foregoing clause, offered . . . to execute separate bonds with security as required by the will. . . having heard the statement of one of the executors who refused to give his assent as required by the statute, the Court refused to permit the bond to be executed and to grant certificates of freedom. . . The executors . . . [558] withheld their assent on account of the short period which had elapsed from the testator's death, and not being fully acquainted with his affairs, they were unwilling to incur responsibility by immediate and absolute assent, and because they had in fact taken no control over the complainants, but had let them go about as free persons." [557] "On the same day, the five negroes whose application had been thus refused, filed this bill in equity against the executors of Humphrey Tunstall, in which they state, in addition to the foregoing facts, that the testator was not indebted to the amount of \$100, and left a large estate in lands and personalty worth thousands of dollars, and that the executors are in fact willing for them to be free, and they pray for general relief, and offer to execute proper bonds. . . [558] H. T. Hill, the contingent devisee . . . contested . . . the right of the complainants . . . insisting that bond had not been tendered in proper time, nor with good security; that all the seven were required by the will to give bond so as to bind all for each, or at least that all must give bond, and that if this were not done, all were devised to him. He also insists that he is entitled to the hire of the seven from the death of the testator,"

Held: [559] "freedom is given to the slaves severally, and that each one upon compliance with the condition prescribed, is free as far as the

<sup>1</sup> Stat. Law 1471.

testator could make him so. . . [560] the entire proceeding and the final performance of the condition by the execution of bonds accepted by the County Court, relate back to the valid offer of performance originally tendered, and have the same effect in vesting and completing the right to freedom as if the performance tendered had been at once executed and accepted. . . [561] With regard to the claim of H. T. Hill to the hire of the complainants from the death of the testator, it is sufficient to say that the statute of 1841, although it requires the executors to hire out slaves emancipated by will until they are satisfied that there is other estate sufficient to pay the debts, . . expressly enacts . . that the hire shall be for the benefit of the emancipated slave, if the executor becomes satisfied that the other estate is sufficient. . . [562] it was certainly right to decree against him all the cost of the complainants in their contest with him;" [T. A. Marshall, J.]

*Orndorff v. Hummer*, 12 B. Mon. 619, January 1852. [620] "the testator provides, if his daughter should die leaving no lawful heir of her body, all his negroes should be free, and that his executors should retain \$500 in their hands, to carry the same into effect."

*Grigsby v. Breckinridge*, 12 B. Mon. 629, January 1852. Shelby [630] "devised to his son Isaac, on his arriving at age, . . six of the choice of his negroes, and an equal half of all the others under fifty years of age,"

*Commonwealth v. Cook*, 13 B. Mon. 149, June 1852. Held: [150] "It is necessary, in presentments for selling spirituous liquors to slaves, or for purchasing from them any commodity without the consent of the owner or master, to describe by name the person to whom such slaves belong, or who may have the control of them and be entitled at the time to their services, or at least to identify the slaves." [Simpson, C. J.]

*Hord v. Grimes*, 13 B. Mon. 188, June 1852. Hord sued Dr. Grimes "for having caused his negro Bill to take and swallow poisonous drugs by reason whereof the slave became sick and died." Verdict for the defendant. Judgment reversed, and cause remanded for a new trial: [189] "the plaintiff should recover the full value of his slave," if [188] "the defendant did administer drugs, medicine, or poison to the slave of the plaintiff, without his consent," [Hise, J.]

*Graves v. Allan*, 13 B. Mon. 190, June 1852. "Charles Allan (a free man of color,) having by his last will, which has been duly recorded, made divers bequests to certain slaves named therein, most of whom he recognizes as his children, and others as the mothers of these children, this bill was filed by the owner of some of these slaves against the executor of Allan, claiming the money bequeathed to his slaves, . . [191] The claimants assert a right to the legacies, not as trustees for the benefit of their respective slaves, which would itself be an anomaly, but as owners of the legatees, and as therefore being entitled to the legacies themselves, absolutely, and as their own."

Decree dismissing the bill affirmed: [192] "as a slave cannot take under a devise or bequest, he is in fact incapable of being a devisee or



legatee, and any devise or bequest to him, except that of freedom, must be void, and of course unenforceable. For substantially the same reasons a devise in trust for the benefit of a slave is alike void." [T. A. Marshall, J.]

*Adams v. Gardiner*, 13 B. Mon. 197, June 1852. "Gardiner, the owner of a female slave, Kitty, hired her for the year 1848 to one Lemmons, who in March of that year hired her to H. C. and J. Q. Adams for the residue of the term. While in their possession she was taken sick, and after an illness of some weeks died on the seventh of August." Gardiner sued them, alleging that they neglected "to extend such care" "as men of ordinary prudence would extend and give to their own slave in like case; . . . [199] a verdict was rendered in favor of the plaintiff for \$500 in damages."

*Hawkins v. P. F. Hawkins et al. (persons of color)*, 13 B. Mon. 245, September 1852. Will of James Hawkins, admitted to record in 1803: [246] "It is my will and desire that my wife Lucy should have all my negroes during her life or widowhood, with full power to emancipate them all before or at her death, as they [*sic*] said negroes arrive at the age of thirty-one years. It is my wish and desire that my wife Lucy should emancipate said negroes as above directed."

Held: I. "the will was not mandatory with respect to the emancipation of the slaves, but was precatory or advisory, and gave only a power to emancipate which rested in the discretion of Mrs. Lucy Hawkins. And as she had done no act in execution of the power in behalf of Eada or her mother, Maria, there was in that case no emancipation."

II. After the death of her husband, Lucy Hawkins sold the testator's slave, Clary, the mother of Pauline F., Jackson, James F., Harriet C. and George W. Hawkins, to William Lee, "until she should arrive at the age of thirty-one years, (she being then twelve years old,) and took from him a bond in the penalty of \$2,000, conditioned to liberate and set free Clary and her children, should she have issue, as each attains the age of thirty-one years, and stipulating for various other acts in aid of that object; that in the year 1826, when Clary was about thirty-one years of age, the heirs of William Lee, in pursuance and in discharge of said bond, went into the county court of Logan, and emancipated her as appears by the record of said court; and that from that time Clary and the complainants, her children, all of whom except Jackson, were born since said act of emancipation, have gone about and been recognized as free persons, until since the death of Mrs. Lucy Hawkins, whose executor, Edmond O. Hawkins, claims to hold them as slaves."

Held: [249] "There was no valid exercise of the power by Mrs. Hawkins, nor in fact any attempt by her to execute it in or by writing, in which form alone it could be so recognized as that a court of equity would aid in a defective execution of it. And as it was not effectually transferred, and as we think could not be, it is scarcely necessary to inquire into the validity or effect of the attempted emancipation by the heirs of Lee. . . . [250] none of the complainants are entitled to freedom," [T. A. Marshall, J.]

*Major (of color) v. Winn*, 13 B. Mon. 250, September 1852. "The complainant in this case is not only held in slavery, but he is actually a slave. No writing has ever been executed emancipating him. . . [251] It was alleged in the bill exhibited by the complainant, that Martin, his former owner, when he sold him to the defendant's intestate, did not intend to sell him as a slave during life, but only during the life of the purchaser, at whose death he was to be free; that although this was the verbal contract between the parties, the bill of sale executed by Martin did not contain that part of the agreement which secured to the complainant his freedom, but purported, according to its terms, to sell him to the purchaser, absolutely as a slave, and that the reservation of freedom to complainant was omitted to be inserted in the bill of sale, through the ignorance and mistake of the vendor, and the fraud of the purchaser."

Held: [252] "his bill was properly dismissed." [251] "Slaves cannot maintain a suit in their own names to have a contract for their emancipation specifically executed. Neither can they maintain a suit for the purpose of correcting a mistake and having an instrument of writing altered, that it may be so constructed as to confer upon them the right of freedom. . . The vendor might maintain a suit in his name" for a specific execution of the contract according to its terms. "The appropriate relief under such circumstances, would consist either in vacating the bill of sale that had been executed, and having one executed by the vendor, according to the terms of the contract, or, which would more directly attain the same end, in requiring the vendee or his personal representatives to execute a writing emancipating the slave." [Simpson, J.]

*Darnall v. Adams*, 13 B. Mon. 273, October 1852. "In January, 1842, Wigginton died, having first made a will, by which . . he gave to his wife . . his negro girl Artimesia and one-third of his negro man David."

*Baker v. Baker*, 13 B. Mon. 406, December 1852. "a mulatto boy named John" had been sold "in 1817, for the consideration of three hundred and fifty dollars,"

*Bayse v. Briscoe*, 13 B. Mon. 474, January 1853. [475] "I have this day sold to E. C. Briscoe one boy named William, about twenty-two years of age, for and in consideration of \$550, . . I warrant said negro sound in body and mind, and a slave for life." Dated 1834. "in an action brought and tried in a court in Louisiana, it was adjudged that the slave was not the property of the plaintiff in this suit, but belonged to other persons."

Held: "the words, 'I warrant said negro a slave for life,' . . do not refer to the title of the vendor, nor to his right of property in the slave, but refer exclusively to the condition of the negro as a slave, and mean that he was not entitled to his freedom at that or any subsequent time." [Simpson, J.]

*Emmerson v. Claywell*, 14 B. Mon. 18, June 1853. "The title bond . . had been executed to King, and assigned by him to free Billy, a man of color, as indemnity for a debt owing to him by King, . . [19] Free Billy's right to it . . was not absolute,"

*Warfield v. Davis*,<sup>1</sup> 14 B. Mon. 40, June 1853. During the pendency of Davis's suit for freedom against Tingle, the agent of Warfield, Warfield sold him to a purchaser who took him [42] "to the south." Warfield had executed [41] "a bond with security, conditioned to have him forthcoming at a subsequent term of the court, and in the mean time not to sell or dispose of him, or send him out of the commonwealth;" Davis returned to Kentucky [42] "after a final judgment was rendered in his favor in the suit against Tingle,"

Held: [42] "The verdict and judgment in favor of the plaintiff . . . having allowed him but one cent in damages for illegal detention, is conclusive against his right to any hire before that suit was instituted. And as his right to freedom was very doubtful, until it was settled by the final judgment in his favor, the same principle which denied his right to compensation for services rendered before the institution of the suit, would also deprive him of any right to it against Warfield, for services rendered during its pendency. . . [43] The bond executed by Warfield does not contain any stipulation for the payment of hire. . . The plaintiff's detention in slavery, after he had been adjudged to be free, was however, illegal, and for such detention, he has a right to be compensated in damages, and for this injury the defendant is liable upon his bond. The sale of the plaintiff, during the pendency of the appeal, was also in contravention of the object of the bond, and consequently such reasonable expenses as were necessarily occasioned thereby to the plaintiff, after his right to freedom had been established, in availing himself of that right, and in returning to this state, he is also entitled to recover in this suit." [Simpson, J.]

*Harper v. Straws*, 14 B. Mon. 48, June 1853. "a contest between . . . two portions of a divided congregation of African Methodists, in the city of Louisville, each claiming the church property. . . about the year 1845, the lot and meeting-house thereon, which had been erected by the Methodist Protestant Church, in Louisville, at the corner of 4th and Green streets, was sold [to Harper] . . . for the benefit of the African Society of Methodists, called 'Asberry Chapel;' . . . [49] and in 1847, a deed was executed conveying the property . . . to David Straws and four others, among whom was Harper, 'to be held . . . in trust, for the use and benefit of the religious Methodist Society of the African race, now worshipping, or which may hereafter worship in said church, now called Asberry Chapel.' In the meantime, the society . . . had worshipped at the house at the corner of 4th and Green streets, . . . with three hundred and forty-four members, under the superintendence of the Methodist Episcopal Church, south, under the charge of William Holeman, the stationed minister at 8th street church in Louisville; and the said Harper was their pastor of the African race. . . he was expelled from the Methodist Episcopal Church, south, and his congregation supposing that his expulsion was occasioned by his unwillingness, that their church property should be given up to the Methodist Episcopal Church, south, according to the discipline of

<sup>1</sup> For facts see *Davis v. Tingle*, p. 385, *supra*.

that church, adhered to him, and continued for some time, to worship under his pastorate, without connection with any other organization. In a short time, however, he and they, at his instigation, were received into connection with a body called the African Methodist Episcopal Church of the U. S., which had its principal organization in the free states. Under the authority of this church, Harper was removed from the society worshipping at Asberry Chapel, in Louisville, and sent as a preacher to New Orleans, and H. S. Revel was appointed as pastor to the society in Louisville. After remaining some time in New Orleans, Harper returned to Louisville, and being expelled from the African Methodist Episcopal Church of the U. S., for insubordination, induced a number of persons who were, or had been members of the society of Asberry Chapel, to unite with him in forming an independent Methodist Church, which was done in July 1851. . . [53] if a trust for the use of a religious society of the African race be not unlawful, of which there is no intimation, then this contest presents simply a question of property, that is, of pre-existing rights, and considerations of expediency or policy growing out of the institution of slavery, and the proper relations of whites and blacks in the community, can no more authorize the imposing of conditions or restrictions upon the right when determined, than they can properly influence the determination itself. . . Harper had acted with great impropriety towards the ministers and officers of the Methodist Episcopal Church, south, while that church claimed the superintendence of the original society. . . [54] according to the weight of the testimony, so many of those who united with Harper in erecting the independent new church, had previously been expelled or withdrawn from the society, that a majority of the actual members at the time, remained with Revel." All the parties are now seeking a reunion with the Methodist Episcopal Church, south. [58] "the record contains pregnant proof that these people ought not to be left wholly to their own guidance in the management of their ecclesiastical affairs and relations; "

Held: [56] "the seceders [under Harper] lost their identity with the society from which they seceded, and forfeited the rights dependent upon that identity." [T. A. Marshall, J.]

*McClelland v. Kay*, 14 B. Mon. 103, July 1853. [104] "shortly after midnight, the defendant being in bed, heard a noise amongst his poultry in the trees of his orchard, whereupon he arose from his bed, and taking a double-barreled shot gun, he went from his house to the place from whence the noise came, and there perceived three men, one in a tree, the other standing by it, and the third stationed off at some distance apparently to keep watch; that they were engaged in stealing the poultry of defendant; the person standing under and near to the tree was receiving the fowls from the other, who was in the tree, and that the defendant, supposing himself to be at the distance of twenty-five yards from the thieves, and with the purpose merely of wounding one of them slightly, in order to his future identification, and with no intention of killing him, fired one barrel of his shot gun at the legs of the thief standing on the ground beneath the tree, believing at the time that his gun was loaded with small



bird shot," but he was nearer than he supposed, and his brother had reloaded the gun with large shot without informing the defendant. [105] "the night was so dark that defendant could not discern whether the thieves were black or white men, and it was impossible to identify them." [104] the wound thus inflicted caused the death of the slave in a short time. "She [the owner] demands in damages, one thousand or twelve hundred dollars for value of the slave, and the amount of the physician's bill for attendance upon him. . . verdict and judgment against the defendant for ten hundred and fifteen dollars, in damages."

Judgment reversed. [Hise, C. J.]

*Craig v. Lee*, 14 B. Mon. 119, July 1853. Suit "to recover from the defendant, N. T. Lee, the value of a slave that had belonged to plaintiff's intestate, upon the charge that defendant's overseer and agent, under whose control and management the defendant's farm and slaves, including the slave in question, had been placed, had so cruelly chastised, beat, and whipped the said slave, thus under his control, whilst she was in a state of pregnancy, that an abortion was thereby caused, and that in consequence thereof the said slave became sick and diseased and finally died; and that her death was caused by the sickness and disease which was superinduced by the immoderate and inhuman chastisement inflicted upon her when she was pregnant; and because she had been neglected, and was suffered to languish in her sickness, without sufficient nursing and attention." Verdict and judgment for the defendant.

Judgment reversed: [121] "the constitution and laws of this state, as well as of all the states in which the institution of slavery legally exists, so far as known, furnish some protection to the slave, and regard him as a human being, and as such, the owner, though entitled to his person and service during life, cannot kill or maim his slave; he has no right to inflict upon him such cruel and inhuman punishment, even with the purpose of securing service and obedience, as that it must result in the death of the slave as a consequence of the punishment inflicted. If then the actual owner and master is thus limited and restricted in his authority to punish his own slave, of course a mere bailee, having possession of the slave on hire, his agent or overseer may not possess and exercise over the hired slave power and authority which does not belong to the owner himself, and inflict punishment in a degree and to an extent which would be unlawful if inflicted by the master. If the owner exceeds his authority he is not civilly responsible to any other person, or to the slave himself in a civil action, for the injury done. His responsibility would be criminal, if he intentionally murders or maims his slave by a single blow, or by slow degrees, and by protracted punishment; but the bailee of the slave of another, holding him on hire, besides the criminal responsibility incurred, is responsible to the owner, if he or his overseer, in the course of his service as such, shall, by cruel neglect, or by inhuman treatment, cause the death of the slave, or impair his health, or otherwise injure him whilst in their service and possession. . . [123] If the extent of the injury done is the loss of a limb, or of the health, or the life of the slave, in such case it is not a legal presumption that sufficient cause existed for its infliction,

but on the contrary the burthen of proof is upon the defendant, to show that a sufficient cause of justification existed. . . [124] the jury . . are told, if they believe that sufficient cause existed to punish the slave, that then the overseer was not limited or restricted by law as to the degree of punishment or beating which he might inflict, short of the coercion of the absolute obedience and submission of the slave, although it might require the infliction of the most cruel tortures, and even the deprivation of the members of the body, to procure that submission, and although the slave might have the firmness to suffer death rather than to yield, . . by these instructions collectively, the bailee's overseer may beat another man's slave, for the time being in his possession, on hire, to death, if the slave will not otherwise submit to him and obey his orders. Such is not the law, and the principle embodied in the third instruction cannot receive the sanction of this court." [Hise, C. J.]

*Hamilton v. Auditor*, 14 B. Mon. 230, December 1853. "After the slave of Hamilton was found guilty by the jury of a capital offense, and before sentence or judgment had been given against him, he was remanded to jail, and there, before judgment, died by his own hands; and the question is, whether Hamilton, the owner, is entitled to his value from the commonwealth. The circuit court fixed the value of the slave at \$900 after his death, notwithstanding no judgment had been pronounced."

Held: the auditor is not required [232] "to pay for the slave under the circumstances of this case." The statute<sup>1</sup> [231] "evidently contemplates a death in jail after sentence, and before execution, consequent upon that sentence, and not a death after verdict merely." [Crenshaw, J.]

*Jones v. Lipscomb*, 14 B. Mon. 296, January 1854. "The complainants, Dodson and Spicy, of the negro race, claim the right to their freedom, and legacies to each of two hundred dollars, under the following clause of the will of Humphrey Jones, deceased, to whom, in his lifetime, they belonged: 'In consideration of faithful services, I will and require that my executors give my slaves, Dodson and Spicy, \$200 each, to be paid out of my estate. . . [299] I will and require that my slaves Bob, and Hannah, and Chantis, and Jane, be free at my death. . . [300] I will and require that my other slaves have liberty to choose their masters at their value.'" [296] "The ground taken by the complainants council [*sic*] is, that . . by giving to them [Dodson and Spicy] these legacies they have been constructively emancipated, and thereby rendered capable, in legal estimation, of claiming and receiving them as valid bequests."

Held: the residuary clause, in which [300] "Dodson and Spicy are necessarily included . . instead of supporting conclusively repels the implication founded upon the pecuniary legacies intended to be beque[a]thed to these two slaves." [Hise, C. J.]

*Hart v. Soward*, 14 B. Mon. 301, January 1854. Held: the act of 1846,<sup>2</sup> reduces the estate of a husband in the slaves of his deceased wife, [304] "which before the passage of the statute was absolute, down to a mere

<sup>1</sup> Rev. Stat., p. 178, sect. 7; p. 641, sect. 24.

<sup>2</sup> Sess. Acts 1845-6, p. 42.

life estate. But his life estate is not conditional or dependent upon there having been issue of the marriage."

*McKay v. Merrifield*, 14 B. Mon. 322, January 1854. Held: a devise of a slave in fee, to take effect on the death of the donor, with a limitation over in case of the death of the donee without issue, (which means issue at the death of the first taker,) is valid as an executory devise; otherwise, if the conveyance be by deed. [323] "This limitation over, however, does not have the effect to reduce the estate of the first taker to a life estate, but it continues to be a fee simple, subject only to be defeated by the failure of issue." [Simpson, J.]

*Ferry v. Street*, 14 B. Mon. 355, January 1854. "In the spring of the year 1838, Clarissa, a woman of color, the property of Mrs. Trigg, at the instance of her mistress, accompanied Mrs. Alexander to the city of Philadelphia. The object of Mrs. Alexander in visiting that city was to consult physicians there, upon the subject of her eyes, which were much diseased, and, if necessary and advisable, to place herself, under their treatment. Mrs. Alexander being a near relative of Mrs. Trigg, and being in a very helpless condition in consequence of defective sight, and Clarissa being a very faithful and trust-worthy servant, Mrs. Trigg determined to send Clarissa with Mrs. Alexander to Philadelphia, to take care of, and wait upon her. But before they departed on their journey Mrs. Trigg sent for Jephtha Dudley to consult him in regard to the laws of Pennsylvania, and what effect they might have upon slaves sent by their owners into that state. Dudley visited Mrs. Trigg according to her request, and informed her that he was no lawyer, but his impression was, that if Clarissa should remain in Pennsylvania as long as six months she would be entitled to her freedom. Mrs. Trigg, as Dudley states, then said that she had no calculation that Mrs. Alexander would return in less than a year, and she intended to send Clarissa with her to remain until Mrs. Alexander's return, because she could not trust Mrs. Alexander with any other person; that she did not believe Clarissa would avail herself of the laws of Pennsylvania, because she had a husband and children in Kentucky, and because Clarissa knew that she was to be free at her (Mrs. Trigg's) death; that Clarissa, having been the patient and attentive nurse of Major Trigg in his last illness, he desired her and her child to be purchased by Mrs. Trigg and liberated at her death, and that she had promised to do so. Mrs. Alexander and Clarissa departed for Philadelphia, and Clarissa remained there more than six months. She then returned to Kentucky according to the united wish of herself and Mrs. Trigg, and went again into her service. After this, Mrs. Trigg having occasion to borrow a sum of money from Miss Thompson, (now Mrs. Ferry,) her adopted daughter, who seems to have resided with her, executed to her an absolute bill of sale for Clarissa. Dudley states, that notwithstanding the absolute character of the bill of sale, it was intended only as an evidence to Miss Thompson of the debt, and to secure her in its payment, and that, before Mrs. Trigg's death she enjoined on him, who was to be her executor, to raise the means from her estate and discharge the debt to Miss Thompson, that



Clarissa might be free. Mrs. Trigg made her will, liberating her other slaves, and making Miss Thompson her devisee. And Dudley says he would soon have raised the means, from the hire of the other negroes, to redeem Clarissa, had it not been for the interposition of Miss Thompson, who desired the liberated slaves to be discharged from further service. Although Miss Thompson was the devisee of Mrs. Trigg, the amount of property realized by her from the estate does not appear to have been sufficient to discharge the debt to Miss Thompson, of \$500, which constituted the consideration of the bill of sale to her of Clarissa. It is proved that Miss Thompson was cognizant of the desire and intent of Mrs. Trigg to liberate Clarissa. But the only ground upon which Clarissa bases her right to freedom, necessary to be considered, is her remaining in Pennsylvania more than six months, when she accompanied Mrs. Alexander to Philadelphia."

Decree that Clarissa is free, affirmed: [360] "the law of Pennsylvania<sup>1</sup> . . . was, that the slave might be brought there, and her condition be unchanged for the period of six months, but that if she remained there longer than that period of time she should be deemed a free woman. Mrs. Trigg was informed that such was the law of Pennsylvania, and she resolved to hazard the consequences; and we think, that in such a state of case, the condition of Clarissa in that state, after remaining in that state longer than six months, should follow her to Kentucky, and be her condition here. Under the circumstances, she was free there, and should be free here. This result was voluntarily incurred by her then owner, of which Mrs. Ferry was apprized, and having taken her bill of sale for Clarissa with a full knowledge of the circumstances, neither she nor her husband has any cause to complain, especially as she was also apprized that it was the intention of Mrs. Trigg that at her death, or as soon thereafter as the sum of \$500 could be raised out of the means of her estate to redeem Clarissa, (the raising of which sum, according to Dudley, was prevented by herself,) Clarissa was to be free." [Crenshaw, J.]

*Weddington v. Sam. Sloan (of color)*, 15 B. Mon. 147, December 1854. "In September, 1846, James Sloan made a writing stating the terms on which his slave Sam should be free." [151] "The deed of emancipation was conditional, to become absolute on the payment of \$305; he paid James Sloan \$167, and before the remainder was due James Sloan died [in 1847], and appointed his wife executrix. She refused to qualify, but received the remainder of the \$305. Upon proof of the foregoing facts before the Pike County Court [in 1849], Sam was ordered to give security that he would not become chargeable to any county in this state, which was done, and the clerk was ordered to give him the papers evidencing his freedom, which was done." [147] "without any notice to the heirs or devisees of James Sloan. . . [Four years later] some of the heirs of James Sloan . . . took Sam into their custody, claiming him to be their slave. In 1853 Sam presented his petition to the county judge, claiming freedom under the paper given him by his former master, James Sloan,

<sup>1</sup> Act of 1780, section 10.



and praying a writ of *habeas corpus*, and his restoration to liberty. The writ was served, and by consent of parties the case was heard in the Pike Circuit Court, and under the writ the judge decided that Sam was free, and set him at liberty. From that decision of the judge, Weddington and others, claiming property in Sam, have appealed to this court."

Appeal dismissed: [155] "this court has no appellate jurisdiction in the present case." [154] "The writ of *habeas corpus* is not an appropriate proceeding for the trial of the right to freedom. The decision of the judge or justice, upon the return of the writ, may operate to discharge a person held in slavery from the custody of those who may have him in possession, but it does not establish his right to freedom; nor can the proceedings under the writ be used even as *prima facie* testimony of the existence of the right in an action brought to assert it. He may be again taken into possession by the claimant, and held as a slave, after he has been discharged, and another officer, if he should again resort to a similar writ, might conclude that he was rightfully held in slavery and refuse to discharge him. This principle was substantially recognized in the case of *Maria vs. Kirby*,<sup>1</sup> . . . [155] Upon the return of a writ of *habeas corpus*, if it should appear that the petitioner is held in slavery, and asserts a right to freedom, and there seems to be any reasonable grounds for the claim, the judge, instead of undertaking to investigate the question himself, should only make such an order as would enable the petitioner to bring an action and have an opportunity afforded him of establishing the right which he claims. The proceedings on a writ of *habeas corpus* may be *ex parte*, and carried on without the knowledge of the persons directly interested in the decision. Wherever therefore a question of freedom or slavery arises, its decision should be referred to the proper tribunal, upon an investigation conducted according to the forms of law, in an action instituted for that purpose." [Simpson, J.]

*Delia v. Hays*, cited in 17 B. Mon. 97, December 1854. The will of Dowdell provided that "all his negroes, after the death of his wife, that shall have arrived at the age of thirty-one years, shall be freed from slavery and bondage at the death of his wife." "I also will and desire that all my negroes that I have disposed of, as well as those that are yet to come, be freed from bondage and slavery at thirty-one years of age."

Held: "that such as were embraced in the words 'those yet to come' were not free until they severally arrived at the age of thirty-one years, and that the clause was not intended to apply to any born after the testator's death."

*Allen v. Vancleave*, 15 B. Mon. 236, January 1855. [241] "This action was brought by Allen to recover damages for the alleged breach of a written warranty of the soundness of a female slave, purchased by him from the defendants. The bill of sale bears date on the 10th December, 1852, and the slave died on the 5th of February following, after she had been for about two weeks under the constant attendance of a physician, who, from symptoms stated, and examinations made by him, was of

<sup>1</sup> P. 402, *supra*.

opinion that she had pneumonia and a chronic inflammation of the womb, which was incurable, and which in his opinion, must have been of several months' continuance before her death." "Other witnesses speak of her being an unusually healthy woman, and that plaintiff was well pleased with his contract, and said he would not take a thousand dollars for her." The jury found a verdict for the defendants.

Motion for a new trial overruled: [242] "the court allowed the witness [her attending physician] to state all the woman said as to her existing illness, and the manner of her attack, and the progress of her disease; but refused to let him state what she said in relation to any former illness, or the manner of the attack, or the progress of the disease, or the history of her former disease. . . [245] In two manuscript opinions at the present term, such declarations to the attending physician in relation to the immediate malady under which the slave was laboring at the time, were held to be admissible on the question of soundness or unsoundness at a previous time. But they do not extend to the admission of declarations as to a previous malady or illness. . . [246] the judgment is affirmed." [T. A. Marshall, C. J.]

*Evans v. Gregory*, 15 B. Mon. 317, January 1855. [322] "The appellant being possessed, in right of his wife, of some dower slaves, took with him, some eight or nine years since, two of said slaves, as hands on a flat boat, to the city of New Orleans, and brought them both back again with him, when he returned to his residence in this State. It appears that they were not taken out of the State by him, for any other purpose than that of assisting him to take the boat to market, and with the intention of bringing them home with him, so soon as the object of the trip was accomplished. He subsequently hired one of the same slaves at Louisville, to the captain of the steamboat *Saladin*, as a hand on that boat, which was at the time engaged in the St. Louis trade. After remaining on the boat for some months in the service for which he was employed, the slave ran away, and has finally escaped. He had been previously furnished by the appellant, with a writing authorizing him to go to Louisville and hire himself out, under which he had acted for some time. And the appellant, notwithstanding he was informed that the slave had assumed a false name and pretended to be free, still permitted him to go at large, and failed to exercise over him, that controlling restraint, which was necessary to prevent his escape, and which the law of the land required at his hands."

Held: [323] "A removal [of a dower slave] out of the state,<sup>1</sup> denotes, according to the usual signification of this language, an actual change of residence, and not a mere temporary absence. . . [324] neither the taking of the slaves to New Orleans, in the manner described, nor the hiring of one of them on the steamboat which was in the St. Louis trade, was such a removal of them, or either of them, out of the State as is prohibited by the statute. Consequently, no forfeiture of the dower estate was incurred by these acts. But . . . [the] tenant in dower . . . permitted the slave to leave his home in Muhlenburg county, and to go to Louisville and hire himself out. The act was illegal in itself, and its tendency was to

<sup>1</sup> Acts of 1797 (2 Stat. L. 1545) and of 1835 (3 Stat. L. 553).

furnish the slave with an opportunity to escape, if he desired to do so. Besides, after the appellant had been apprized that the slave had assumed another name, and pretended to be free, he still extended to him the same indulgence, and permitted him to regulate, in a great degree, his own movements. He must be, therefore, responsible to the appellants for the value of their reversionary interest in the slave, but not for the whole value of the slave, inasmuch as he has himself lost the life estate of his wife therein." [Simpson, J.]

*Anderson, Cynthia Ann, and Lorinda (of color) v. Crawford*, 15 B. Mon. 328, January 1855. [335] "Anderson and two others, children of Milly, who formerly belonged to B. Ray, and was, by him, devised to his daughter, Mrs. Crawford, filed their separate bills against Crawford, claiming that they were free, and born free. This claim, of course, depends upon the alleged freedom of their mother at the time of their respective births. But Milly was certainly the slave of Ray until his death, about the year 1819, when under his will, she passed into the possession of Crawford, and, by operation of law, became his property. She remained in his possession as a slave, until about 1828, '9, or '30, when she left with her husband, a free man of color, she being then about 18 years of age. There is some intimation in the evidence, that Milly was Ray's child, that he had intended to emancipate her by his will, but the provision to that effect was accidentally omitted." [331] "Ray was the father of Milly—that he exacted a promise of Crawford to free her at the age of eighteen years—that she was permitted to go free at that age—that Crawford frequently spoke of his promise to Ray—and soon after she left, said he would go where she was and give her her freedom—that, when lodged in jail as a runaway, he directed her release, and enclosed her forty dollars—that she was the sister of his wife, and the aunt of his children" <sup>1</sup> [336] "no deed or other instrument for the emancipation of Milly had been executed by Crawford before she left his possession, . . . Crawford made no effort to reclaim her or her children, for a period of nearly or quite 20 years, during a great part of which, she was in the adjoining county to that of his residence, and at about 25 miles distant, passing and recognized as a free woman, until she left her first husband, and went off to a free state, as is supposed with another free man of color, and that having been arrested in this adventure, and put in jail, in one of the counties bordering on the Ohio, Crawford, when informed of the fact by a letter from the jailer, remitted to him \$40 to pay fees, and told him to let Milly go, and she has not been heard of since. Within a few years after she left Crawford's possession, and before her second flight, Milly had four children, all of whom she left behind, and of whom three are claiming their freedom, in the bills contained in this record. These children were bound out as free persons by the court of the county in which they had been born, and remained in service under the indentures, until they were claimed by Crawford, as his slaves, a short time before these suits were brought, in 1848." One witness testified that Milly [337] "claimed her freedom under the will of Ray, her former owner, and that

<sup>1</sup> Argument of counsel for the slaves.



upon being informed of her mistake, she said she was too white to serve as a slave, and asked the witness to get her free papers from Mr. Crawford. . . [338] the information that she was not free by Ray's will, may have induced her second flight to a place where her freedom might be more secure than in the vicinity of Crawford."

Held: [340] "Milly may have become free, if, being allowed to act as a free woman, and to go where she pleased, she went to a free State, for the purpose of acquiring or enjoying freedom, and especially, if she went to reside there, with the consent or even knowledge of her owner. But if she thus acquired her freedom, it was after her children, now complaining, were born; and as they remained in Kentucky, they can have no claim to freedom on account of her thus becoming free. Nor can they derive any right from the fact that a County Court, supposing them to be free, took the control of them, as being free, and bound them out by indentures." [T. A. Marshall, C. J.]

*McGaughey v. Henry*, 15 B. Mon. 383, January 1855. Will of Arthur McGaughey, 1852: [394] "As to my negro property, . . my daughter Harriet got two likely young women, . . My daughter Ellen, as her sister, at her marriage got two likely negro women. My wife and son Robert are requested to call in three or five discreet men, . . to ascertain the value of my slave property, and then my widow shall have her choice of the negroes to equal one-third of the total value, and at or before the death of my widow, she is privileged to divide said slaves as she may think proper, among her children. Out of the remaining two-thirds of slave property, my widow, if she thinks proper to do so, set apart two negroes to each of my sons . . [395] to equal the value of the negroes I gave to their sisters, . . my sons having their choice to take those two negroes male or female. After this is done, the above named men . . will proceed to divide the remaining negro property equally among my children,"

*Baker (of color) v. Winfrey*, 15 B. Mon. 499, February 1855. [502] "These five cases are brought by appeals from the proceedings of the County Court in binding out the appellants, free persons of color, of whom some are the children of Eliza Baker and others the children of Mary Baker, free women of color. It appears that a summons issued against each of the mothers to appear at the October term of the County Court, and show cause why her children should not be bound out, etc. That on their appearance, the county attorney moved the court to bind out the children, ten in number, to five persons whom he named; to which the mothers, by their counsel, objected, claiming the right to choose the masters to whom their children should be bound, and naming four persons whom they selected under that right. But the court . . [503] denied the right claimed; and without any evidence of the condition or character of the mothers, or of their ability or inability to support the children, or their disposition to bring them up in moral courses, proceeded to bind out to the persons named by the county attorney each of the ten children, the males to learn farming, and the females to learn house-keeping. It appears from the orders and the indentures that several of the children were



between ten and fourteen years of age, one three years old, another five, and the others between five and ten. It is somewhat singular that in two or three months after these proceedings most of the persons to whom the children were bound came again into court, and on their several motions, and as the order says, for good cause shown, they were severally released from the indentures, and the children were immediately bound again to other persons. In most of these instances the mothers, by their attorney, again objected." [501] "The indentures contain all of the stipulations required, except education, which is prohibited to free negroes,"<sup>1</sup>

Held: the county court [505] "erred in overruling the objection of the mother[s] to the persons proposed by the county attorney as the masters to whom the children were to be bound, and in disallowing their right to choose the masters, and in proceeding to bind out the children severally to the different persons objected to by the mothers. . . [507] The mere fact that these are colored persons does not put them out of the protection of the law, nor subject them to be dealt with or disposed of with a view merely to the interest of individuals. There must be some ground of necessity, in view of the requirements of the law, to authorize the binding out of these children. . . No such necessity is shown to have existed . . . We only say further, that although the statutes do not in terms require it, the indentures ought, in all propriety, to contain a covenant on the part of the master to teach his apprentice the art or business for the purpose of learning which he is bound to him." [T. A. Marshall, C. J.]

*Chambers v. Davis*, 15 B. Mon. 522, February 1855. [526] "Jonathan Nelson died in 1846. . . He devised all his slaves to his wife, except a man named Ned, for a certain period of time, at the expiration of which they were to be free. He also bequeathed to his wife a part of his personal estate, and the residue thereof together with the rents of his land, and the hires of his slaves for one year, he constituted a fund for the payment of his debts," "every one of the slaves owned by the testator, except Ned, came by her as a part of her inheritance." The widow married the executor. The "estate which the testator provided for the payment of his debts . . . proved insufficient. . . [527] the court decided that the time the slave had to serve the widow before they were to be free, should be first liable, and if the slaves proved insufficient, then so much of the land [devised to the widow during her life] should be sold as might be necessary to make the residue, . . . the plaintiffs have appealed, and contend that . . . all the other estate of the testator should be first exhausted, even including the right of the slaves to their freedom."

Held: [529] "The slaves were not left as assets in the hands of the executor, nor had he any power over them, except for one year. . . The devise of the slaves to her must therefore be regarded as a specific devise, . . . [530] The estate in the slaves, devised by the testator to his wife, and the estate in remainder in the land, will have to be valued, and each of them will have to contribute proportionably to the payment of the balance of the debt that may be found due, after crediting thereon the personal estate and hires aforesaid." [Simpson, J.]

<sup>1</sup> Argument of counsel for the appellees.

*Commonwealth v. Hatton*, 15 B. Mon. 537, June 1855. Held: an indictment against one for giving, selling, or loaning spirituous liquors to a slave must aver that the defendant had not for the time being the rightful care and custody of such slave. [538] "sheriffs, jailers, and other officers are often the rightful custodians of slaves belonging to others, and are not entitled to their services. It would not, we suppose, be contended that under the section of the Revised Statutes referred to,<sup>1</sup> such officer would subject himself to the penalty of the law, if, whilst custodian of another's slave, he deemed it proper to give to him spirituous liquors in moderation." [Stites, J.]

*George (of color) v. Bussing*, 15 B. Mon. 558, June 1855. [565] "This appeal is prosecuted by George, a slave, who, according to the provisions of the will, was to be free at the death of the husband of the testatrix." [559] "By this will [made in 1850] Mrs. Bussing attempted to dispose of two slaves, George, the appellant, and Betty." [560] "The husband was active in having the will made; . . he now attempts to defeat his wife's benevolent intention, by enslaving the appellant." <sup>2</sup> [559] "John Bussing had the possession of George from his marriage until he was forcibly taken from him by Scott, the trustee [under the will], after the death of Mrs. Bussing." [565] "The court below decided that the will was invalid, so far as it attempted to make a disposition of the slaves,"

Affirmed: [564] "A verbal authority from the husband is not sufficient. The wife cannot, therefore, with the consent of her husband merely, without some other power, make a valid disposition of her slaves by will." <sup>3</sup> [Simpson, J.]

*Williams v. Langford*, 15 B. Mon. 566, June 1855. "This suit was brought by the administrator of Williams against David Langford, (a man of color,) who was the slave of Williams until the 23d of September, 1842, when he was emancipated by deed duly admitted to record. On the day after the date of the deed of emancipation, Langford, with four others as his sureties, executed and delivered to Williams a covenant by which Langford was bound to pay, in consideration of his being emancipated to Williams one hundred dollars a year during the life-time of Williams, and if Williams should survive David, then during the natural life of David; payable in equal installments on the 1st of January and 1st of July in each year, commencing with January, 1843. . . [567] Williams died . . 1850, . . Langford, a short time before the death of Williams, paid him one hundred dollars, which was accepted by him in full discharge of the covenant sued on,"

*Norris (of color) v. Patton*, 15 B. Mon. 575, June 1855. Norris, the property of John M. Patton, "a citizen of Virginia, was permitted by his owner, to reside in Covington, Kentucky, for some years, paying the proceeds of his labor to his master, who, being on a visit to Cincinnati,

<sup>1</sup> Rev. Stat. 632.

<sup>2</sup> Argument of counsel for the slave.

<sup>3</sup> Act of 1800. 2 Stat. Laws 1546.

Ohio, sent across the Ohio river a request that the appellant meet him at the house of C. A. Withers and Co., in Cincinnati, when he proposed to appellant that if he would give him \$400 and pay it in five years that he might have his freedom, and that he would not sell him in the meantime. This proposition was at once agreed to by the appellant, and he immediately returned to Covington, in Kentucky. Before the expiration of the five years, and before the \$400 was paid, John M. Patton, the owner of the appellant, sold him to James M. Patton, who dying, his representative came to Covington. The appellant, apprehending that he would be removed, brought this suit to enjoin his removal, asserting his right to freedom and praying that his right might be established under the contract."

Held: [583] "Norris was not free merely because he was temporarily in Ohio by the act of consent of his owner, even if he was there for the purpose of making this agreement with him. According to the principles also maintained here, and deemed essential, the agreement with him was unobligatory, and he could not sue upon it, because he was a slave. And, moreover, it could not effect his emancipation here, because it was in parol. . . Norris, even if he might have been regarded as free if the condition on which he was to be free had been performed in Ohio, can not be so regarded here when the conditions have not been performed. And who, being a slave, cannot maintain a suit in our courts." [T. A. Marshall, C. J.]

*Patton v. Harris*, 15 B. Mon. 607, June 1855. [615] "The bill charges that the mortgaged slaves, a female and several infant children, were in possession of Patton, living near the Ohio river; that the husband of the mother is a free colored man; that Patton desires the emancipation of the woman and her children, has declared that they shall not be sold, etc., and will, as is believed, remove them to Ohio to prevent it. . . The slaves were properly attached, and no bond having been given by Patton, they were, on the 12th of April, 1849, placed by the sheriff in the jail of Mason county, situated in Maysville. At the succeeding May term of the Mason Circuit Court, in which the bill was filed, the slaves being still in jail, were directed by an interlocutory order to be taken into possession by McMillan, a deputy sheriff, and hired out, under bond from the hirer to have them forthcoming to satisfy any decree, etc., and in case he could not hire them he was directed to deliver them to the complainant [Harris], who was directed to hire them on the same terms. This deputy sheriff states in his deposition that he could not hire the slaves on the conditions prescribed, and that in June, 1849, he delivered them to the attorney of the complainant, who took them to the neighboring county of Fleming, where he resided. At the same time of this removal the cholera prevailed in Maysville, the slaves who had been insufficiently clothed while in jail, were nearly destitute of that article, and otherwise in bad condition; one of the children died in a day or two afterwards; others had been and were still sick; one had the cholera. They were worth nothing by way of hire while in jail, nor for the remainder of the year, but their keeping, removal,

clothing, and doctoring occasioned heavy expenses,<sup>1</sup> which, as consequent upon the legal attachment and the directions of the court, should be borne by Patton or the mortgaged property." [612] "after a decree of sale had been rendered, the mortgaged slaves which had been attached constituting the only security for the debt, were removed from the jurisdiction of the court, and in fact taken from this State to some distant part of the State of Ohio, or to other unknown parts, so that they could not and cannot yet be subjected to the mortgage. And there being sufficient evidence that this was done by the act or contrivance of Patton, process of contempt was issued against him, and he was committed to jail under an order of the court, requiring, as the condition of his discharge, that he should pay a certain sum assumed to be the amount of the mortgage debt,"

[614] "A longer continuance of an imprisonment already protracted through a period of two or three years would, as a punishment, seem to be unreasonable and inconsistent with the spirit of the constitution with respect to excessive bail, excessive fines, and cruel punishments,<sup>2</sup> and also with the enactments with respect to contempts. But considering the order with respect to the commitment and imprisonment as a punishment for contempt, this court has no jurisdiction to reverse it. . . [615] it is sufficient to suggest, as we do, that unless it should be made to appear to the Circuit Court, at its first term, that a further continuance of the imprisonment will probably coerce from Patton either a payment of the decree or a production of the slaves or of such as will suffice to make the sum due, he may be discharged from imprisonment, by making a fair and full surrender of all his means of paying said decree, or of such as shall be sufficient," [T. A. Marshall, C. J.]

*Bullitt v. Clement*, 16 B. Mon. 193, September 1855. Three slaves were brought before a justice of the peace [198] "by a police officer in . . . Louisville; and upon hearing the proof in the cause, it appeared to his satisfaction that they were runaways, and therefore he committed them, as it was his duty to do, to the jail of Jefferson county" [197] "where they were confined for the space of twenty-four hours, when, in fact said slaves had not run away," The owner sued the justice. Judgment for the defendant affirmed.

*Delphia Jackson (of color) v. Collins*, 16 B. Mon. 214, October 1855. [215] "Delphia, a free woman of color, brought this suit as heir-at-law to Jemima, her mother, also a free woman of color. Jemima made a will, dated in 1839, which was admitted to record, by which she devised the property in controversy to be sold and the proceeds divided between her two daughters, Delphia and Caty; . . . If the daughters and their children should die without issue, then she directs that the whole be divided between the children of Mary P. Collins, wife of Willis Collins. By a codicil dated in 1851, the testatrix recites her purchase of Delphia, and

<sup>1</sup> [610] "The commissioner allowed \$190.50 for physician's bills, and funeral expenses of one of the slaves that died in Harris' possession. . . [611] also for expenses incurred in searching for the slaves," after [616] "they were secretly abducted," [611] "and for their keeping in jail,"

<sup>2</sup> Art. 13, sect. 17.



gives to her two grand-sons, Billy and Ellick, sons of her son Robin, instead of her daughter Delphia, one-half of the property mentioned in the will, and of any other property she may possess at her death, except her daughter Delphia, who is to be free. Delphia was emancipated by her mother, by deed, 26th October, 1850. All the beneficiaries in the will of Jemima . . . [were] slaves at her death, except the children of Mrs. Collins, . . . [216] At the date of the deed by which Delphia was emancipated, no statute had been passed by the Legislature under the 10th article of the constitution of Kentucky, which took effect in June, 1850," requiring the legislature to pass laws to prevent slaves [218] "from remaining in this state after they are emancipated," The circuit court decided that Delphia was not free.

Decree reversed. Held: I. the emancipation of Delphia was valid under the provision of the act of 1798. II. Delphia, [216] "her heir-at-law and only child or grand-child who is not a slave" [229] "has at least a *prima facie* right to the relief sought, or to some relief," [227] "as the devises to the slaves in this will are void, there seems to be reason as well as justice in saying that the interest, which is, in words, given to them, being in effect undevised, shall go to the heir as if it were blotted out of the will, rather than that by an artificial construction the ultimate devisees, who were intended to have nothing until the happening of a designated contingency, shall, before that has happened, take immediately, to the exclusion of the heir, all that was intended for the preferred devisees." [T. A. Marshall, C. J.]

*Spurrier v. Parker*, 16 B. Mon. 274, October 1855. [279] "Emily Parker and others, persons of color, brought this suit for freedom, and base their rights thereto upon the following instrument. 'I, Samuel Peaco, of the city of Annapolis, . . . Maryland, do hereby set free from bondage the following negroes, purchased by me of John Callahan and Mary Mann, viz: negro woman Rose, on the 25th day of July, 1802; negro girl Kitty, on the 25th day of July, 1817, and negro girl Harriet, on the 25th day of July, 1825; also the negro girl Poll, which I purchased at Col. Chew's sale of negroes, who is aged about nine years and six months, on the 25th day of January, 1814, and likewise the negro woman named Rose, that I bought of Eleanor Davidson, executrix of John Davidson, this present day; and I do, for myself, my executors, and administrators, release unto the negroes aforesaid, all my right and claim whatsoever as to their persons, or to any estate they may acquire after the dates to each person respectively affixed as aforesaid, and hereby declaring the above mentioned negroes absolutely free, without any interruption from me or any person claiming under me.' This instrument is signed by Peaco, and is dated the third day of August, 1798. The plaintiffs are descendants of the girl Poll, mentioned in the foregoing deed, and are children and grand-children of Lucretia, who was a daughter of Poll, and was born about the year 1807, before the 25th day of January, 1814, at which time Poll, by virtue of the deed, was no longer to be subject to service at the command of another."

[284] "the chancellor erred in decreeing the freedom of the plaintiffs." [283] "the grantor did not, when all the different clauses of the deed are put together and made to harmonize, confer immediate freedom, with a postponement of its enjoyment, but deferred it until a specified time—he 'set Poll free from bondage on the 25th day of January, 1814,' and not before. An effort was made to prove that the grantor in this deed was a Quaker, and entertained principles hostile to slavery, so as to bring this case under the influence of considerations like those mentioned in the cases in 4 Dana and 6 J. J. Mar., *supra*; but this effort signally failed of success, for whilst he is shown to have been a Quaker, and to have expressed sentiments in opposition to slavery, it was also proved that he sold Lucretia, the mother of Poll, to a southern trader." [Crenshaw, J.]

*Western v. Pollard*, 16 B. Mon. 315, October 1855. [319] "the hirer had employed him [the slave] in rafting or floating saw-logs, a business involving great risk and danger to both health and life, and that the slave, whilst thus employed, was drowned. The defendant contended that he hired the slave for the express purpose of working at his mill; . . . [321] and he also proved that the plaintiff had been at the defendant's mill and saw the slave at work there before he was drowned, and made no objection to his being engaged in that business." Judgment for the plaintiff reversed.

*Taylor v. Embry*, 16 B. Mon. 340, December 1855. Held: "The devise in this case to Embry, for the benefit of Joe Traveller, his slave, is . . . void, and no interest passed by it to the trustee nor the beneficiary. And the testator having no children or other relations that were free, and could take by inheritance, his wife . . . [341] was his sole heir-at-law, and as such entitled to the whole of his estate. She being thus entitled to the land in question, and in possession thereof, had the right . . . to file her petition in equity against Embry to quiet any claim he set up under the will, as devisee in trust for his slave." [Stites, J.]

*Isaac and others (of color) v. Graves*, 16 B. Mon. 365, December 1855. The will of Nelson Graves, admitted to record in 1853, directs the executor [366] "to sell all the real and personal estate of the testator except the slaves, as soon as possible, . . . gives \$1,000 to the Kentucky State Colonization Society. . . directs that when the above property is sold, and the proceeds collected, the executor shall pay one half of it to certain relatives of the testator. . . 'The other half is to be paid over to my slaves, each and every one of them to have an equal share. . . Each and every one of my slaves are to be liberated and placed in the hands of the Kentucky State Colonization Society for the purpose of being colonized to Liberia.' . . Many of the slaves appear to be infants,"

Held: [368] "the intended emancipation of the slaves is prospective, and so connected with the purpose of their being colonized, as to be incapable of a separate and independent operation without violating the manifest intention of the testator. The colonization . . . is a condition precedent to the emancipation, . . . none are entitled to the legacy who refuse or fail to do their part in the performance of the condition by

conclusively submitting themselves to be transported to Liberia for the purpose of being there colonized, and that it is only to those who thus secure their freedom as designed by the will, that the legacy is to be paid to each an equal share. . . [369] if there be no other means properly applicable to this object [the expense of their removal to Liberia] and as far as other means may be deficient, the legacies given to the persons themselves, who for their own supposed benefit are required to go or to be taken to Liberia, may and should, under the direction of the chancellor, be appropriated to that purpose. But there is another fund, viz., that arising and which may have arisen from the hires of the slaves before their departure for Liberia, which is primarily liable to be appropriated for bearing the expense of their removal. . . [371] the intermediate hires accruing before the departure for embarkation, should be a common fund to be appropriated to the general object of preparation and removal. . . [372] And the society, or its agent, undertaking to transport and colonize the negroes, may properly be selected by the court as the agent or commissioner to be entrusted, under proper security by bond or otherwise, with the duty of receiving on this side of the Atlantic, and after making proper deductions for necessary disbursements, paying over the legacies to parties entitled, on their arrival at their destination in Africa. . . [373] We think the payments should be made at any rate after embarkation, and we should think it more provident to make them even to the adults after arrival in Liberia, and that the shares of the infants should be paid there to such person or persons as, by the laws of the place, are entitled to receive and would be responsible for them. As it is of the utmost importance to the intended colonists that the funds intended for their use in their new homes, should be scrupulously guarded and secured for their use, we think it would have been provident to require the executor, or a commissioner, to ascertain what arrangements or provisions, made either by the Colonization Society or by the laws of Liberia, may be made available for this security in the present case." [T. A. Marshall, C. J.]

*Carney v. Walden*, 16 B. Mon. 388, December 1855. [395] "The principal question in this case arises upon the writing executed by Coates, and Carney his surety, for the hire of a female slave, during the year 1853, which writing contains a covenant for the return of the slave at the end of the year. It appears that during the year, Coates caused the death of the slave by inhuman treatment, and having immediately thereafter absconded, this action was instituted for the purpose of attaching the property of Carney, the surety, who, as alleged in the petition, was about to dispose of his property<sup>1</sup> with the fraudulent intention of evading his liability for the value of the slave, and the hire. The slave belonged to Lucy Walden, and had been hired by her to W. C. Thompson and R. W. Payne, for the year 1853, and they hired her to Coates," [393] "for the year 1853 at the price of \$65,"

Held: Carney is liable [396] "upon the written contract, for the failure to return the slave. . . [397] Thompson and Payne were liable

<sup>1</sup> [394] "It was after the bringing of the suit . . . that Pettit bought the negro man . . . at \$1,000,"



to Lucy Walden for the value of the slave, inasmuch as Coates, to whom they had hired her, had caused her death by bad treatment." [Simpson, J.]

*Bracken v. Steamboat "Gulnare"*, 16 B. Mon. 444, December 1855. [452] "This is a proceeding by attachment against the steamer *Gulnare*, instituted in the Louisville chancery court, under the provisions of the Revised Statutes, 143-4, to obtain satisfaction for the value of a slave named Ambrose, who escaped upon her from New Madrid, Missouri," where his owner lived, in April 1855. The boat was [453] "then lying at the wharf of New Madrid, and bound for Cincinnati on her trip from New Orleans to said city, and that the boat passed through the waters of Kentucky with said slave. That the value of the slave was \$1,000, and that the plaintiff had expended \$100 in his efforts to recover him. The chancellor dismissed the petition, and the plaintiff has appealed to this court."

Judgment affirmed: [453] "It was, doubtless, the primary object of the legislature, in the enactment of the law above adverted to, to protect the slave owners of our own State. Still, the legislature should be regarded as having intended to protect the owners of slaves, sojourning with them in this state, though not residents thereof, and also as having intended to protect the owners of slaves who might reside in another State, and whose slaves might, at the time of their escape, be permanently or temporarily within our state; and the law should be construed to embrace such states of case. But we do not believe that the legislature intended to afford the remedy of the enactment to the citizens of another state, whose slaves do not escape from this state, but from a state in which both the owner and slaves reside, and in which they are at the time of escape, simply because the slaves, after escape, may pass in a boat up the Ohio river, over which this state has jurisdiction." [Crenshaw, J.]

*Wheeler v. Jennings*, 16 B. Mon. 476, December 1855. Held: [481] "The act of 1846 exempts slaves which may be given to the wife from liability for her husband's debts, whether the gift be oral or by deed."

*Davis and others (of color) v. Wood*, 17 B. Mon. 86, June 1856. Will of Thomas Davis, 1801: "I give and bequeath unto my son, Thomas Davis, jr., legal heirs, one negro girl named Beck, aged fourteen years.—Its my will and desire that said negro Beck, and all her offspring, shall be set free from all bondage at forty years of age." Beck died in 1819 or 1820, before she reached the age of forty years. [91] "Matilda Davis and some twenty others, persons of color, claiming to be the descendants of Beck, formerly the property of Thomas Davis, filed this petition to assert and establish their freedom, against Wood and others holding them in bondage."

Held: [92] "the attainment of that age by Beck herself was not a condition precedent to the freedom of her offspring, and that although her death under the age designated necessarily prevented her enjoyment of the freedom devised to her, it did not affect the devise to her offspring. . . [93] the testator intended that this devise should take effect at a particular time, fixed by reference to the age of Beck, instead of by naming the year itself, which might have been ascertained by calculation. . .



[100] in every instance [the testator] couples the offspring with the named ancestor in the devise of freedom. . . in no instance does he use the word slave or slaves, but always negro or negroes. . . although the plaintiffs are free, and some of them have been so for a considerable length of time, we are of opinion, upon the facts of this case, that they are not entitled to recover hire against the defendants. . . judgment dismissing the petition is reversed," [T. A. Marshall, C. J.]

*Johnson v. Green*, 17 B. Mon. 118, June 1856. [121] "with the consent of Mrs. Johnson, he received from her husband the girl, . . and conveyed her to New Orleans and sold her . . in the year 1849, . . she was worth from \$475 to \$500."

*Kelly v. White*, 17 B. Mon. 124, June 1856. [128] "This action was brought by White to recover the value of his slave Edmund, hired to the Kellys, who were carrying on iron works and hired the slave to aid in that business," Edmund [134] "had been regularly at work in the pit in which he was killed, until three or four days before the accident, when the pit being exhausted, the superintendent put him to work on the top of the bank, and . . [135] immediately on the edge or brink of the pit, though that side of it on which he was at work did not fall in. The superintendent says that his attention was attracted by the sound of the earth cracking, and looking round he saw Edmund leaning on his shovel in the pit, and looking up at its sides. The sides fell in and he was crushed to death." [128] "The plaintiff maintains that Edmund was hired under an express agreement that he should be employed only at the forge, and that he should not be put to work at the ore banks or in digging ore. The defendants insist that he was hired expressly to be employed as they might choose in their business at the iron works. They moreover rely on their note stipulating for the payment of the hire, also for clothing the slave, and for allowing him two weeks' vacation from labor in the year, as being written evidence of the contract,"

Held: [129] "parol testimony is competent to prove terms of the hiring not contained in the note for the hire, . . [136] as his going into the pit was a consequence of that employment, they cannot, if the employment was a violation of their contract, and a misuse of the hired slave, rely upon his act as purging their own wrong, even if he had, by an instantaneous and willful suicide, terminated at once and absolutely the unauthorized employment." [T. A. Marshall, C. J.]

*McClain v. Esham*, 17 B. Mon. 146, June 1856. The slave of Mrs. Esham [153] "embarked upon the boat at Vanceburg, in Lewis county, in this state, on the 4th September, 1855, in company with Thomas and William Stricklett, proceeded with them to Portsmouth, Ohio, and had not returned or been heard of since. That he had at the time no written pass or authority from his mistress; and that the said Strickletts had not hired him from her, nor had any rightful control over him. It was likewise proved that his mistress lived in Nicholas county, and that the boy had been accustomed, without restriction of his owner, to hire himself out to whom and whenever he pleased. Two of the witnesses prove him to

have been a carpenter, and worth \$1,500. All say that he was obedient and subordinate; but some express the opinion that, in view of his habit of hiring himself without control, and the ease with which he could escape across the Ohio, where his recapture would be hopeless, he was not so valuable to his owner. That it was hazardous to keep slaves near the Ohio, and especially to permit them to go at large. The evidence likewise conduced to show that the escape of a slave to Ohio, was equivalent to a total loss to the owner." The clerk of the boat [152] "charged the negro full fare. If he had been taken as a servant, only half fare would have been charged." Witness proved [155] "that when the slave last worked for him, that he had a pass purporting to be from her, allowing him to pass to and from his work. . . this testimony was excluded . . very properly . . in cases where writings, passes and licenses, can and are so frequently manufactured for slaves, by evil and mischievous persons, aiding them to escape from their rightful owners." The jury [153] "returned a verdict for the plaintiff [Mrs. Esham] of \$1,500 in damages; . . judgment entered for the amount,"

Judgment affirmed: [156] "The value of the slave, according to the testimony in this case, was the best criterion of such damage. What that value was, considering his age, habits, vocation, health and character for subordination and obedience, as well as his locality, and the chances or inducements for escape from his owner, the jury were to estimate." [Stites, J.]

*Tunstall v. Sutton*, 17 B. Mon. 345, September 1856. Tunstall had captured [346] "George, a negro boy slave about six years old, who had been taken from the owners in Kentucky by his father [who was the slave of the plaintiff], and conveyed to Cincinnati . . where the plaintiff found him, and by authority of a warrant restored him to the defendant" and claimed the reward of one hundred dollars, [348] "allowed by the statute<sup>1</sup> for the apprehension of a runaway slave in a state where slavery is not allowed." The chancellor dismissed the petition.

Judgment reversed: [347] "according to the reason and spirit of the statute upon the subject of runaway slaves, the slave George should be regarded as a runaway, notwithstanding he was only about six years of age. He was, doubtless, taken away by his father, who was the slave of the plaintiff; but the plaintiff had no agency in the act of the father of George, . . He was of an age capable of voluntary escape, and, no doubt, exercised it. But, suppose a mother, who is a slave, should escape from her owner, carrying with her a sucking child not capable of an agency in the escape, ought not the child, in view of the statute, to be regarded as a runaway slave as well as the mother? . . [348] George appears to have been arrested as a runaway by the plaintiff, in the State of Ohio, under a warrant issued by the authority of a law of the United States, and, by this means, the plaintiff was enabled to take and deliver him to the defendant Emily A. Sutton. George, then, has been taken and treated, in view of the law and constitution of the United States, as a fugitive from

<sup>1</sup> Rev. St. 636.

service. And, if he was a fugitive from service, he was a runaway slave." [Crenshaw, C. J.]

*Edwards v. Woolfolk*, 17 B. Mon. 376, October 1856. By a deed of trust made in 1825, [378] "the grantors conveyed to the grantee a negro woman named Sylvia, in trust for the separate use of Elizabeth Edwards during her natural life, and at her death for the use and benefit of such children as she might then have living."

*Taylor v. Smith*, 17 B. Mon. 536, December 1856. [540] "Taylor made the purchase, and paid his money for the slaves; that . . he carried one away with him; and it being inconvenient to take away, at the same time, those that remained, they were left upon the premises, that Taylor might, the next morning, send a vehicle for them, and take them away, by which time Mrs. Menzies said she would have their clothing ready." In the meantime the sheriff arrived and attached the slaves left on the premises as the property of Menzies, who [539] "denied that there were any slaves there, but they were found there secreted."

Held: leaving the slaves with the vendor was not fraudulent in this case. [542] "The attachment . . ought to have been vacated. . . Whether the purchase of the slaves was fraudulent in fact or not, was a question for the jury," [Crenshaw, C. J.]

*Railroad Company v. Yandell*, 17 B. Mon. 586, December 1856. [593] "In August, 1855, Yandell hired his negro man, Henry, to the Louisville and Nashville Railroad Company, for the price of \$25 per month. . . the duty which was assigned him, was that of connecting the cars, one with another, and of connecting cars with the locomotive, and, also, of attending to the brake at the front end of the car nearest to the engine. In November, 1855, a train of cars left Louisville for Shepherdsville, under the superintendence of the conductor, Henry being aboard. . . [594] When the locomotive approached the first wood car, the negro man, Henry, as was his duty and business, got down from the train, and whilst it was stationary, fastened the first wood car to the locomotive. He then took his stand upon the pilot block, which is a part of the cow-catcher, and remained there until the train started and came in collision with the second wood car. This collision was so severe as . . to cause Henry to fall from his position on the pilot block, whereby, his leg was crushed from the knee down to the foot. The injury was so severe as to render it necessary to amputate the fractured part of the limb, and to reduce, greatly, the value of the slave, if not to render him valueless."

Held: The railroad company is liable for the injury to the slave: [596] "A slave may not, with impunity, remind and urge a free white person, who is a co-employee, to a discharge of his duties, or reprimand him for his carelessness and neglect; nor may he, with impunity, desert his post at discretion, when danger is impending, nor quit his employment on account of the unskillfulness, bad management, inattention, or neglect of others of the crew. Whatever may be the danger by reason of any of these causes, he must stand to his post, though destruction of life or limb may never be so imminent. He is fettered by the stern bonds of slavery—necessity is upon him, and he must hold on to his employment.



Slaves, to be sure, are rational beings, but without the power of obeying, at pleasure, the dictates of their reason and judgment. Whether, therefore, the doctrine which has been applied in other states, of the irresponsibility of railroad companies to their free employees, for casualties happening upon the road, through the carelessness of some of them—all being co-workers in a common business—we do not perceive the propriety of applying this doctrine to the present case, in which an injury to a slave is the complaint. . . [598] if . . . the slave, Henry, voluntarily took a perilous position, and thereby contributed to the injury, still, if it might have been prevented by the observance of due and proper care and caution by the conductor and engineer—that is, by the exercise of ordinary care and prudence by them, the defendants are not exonerated from responsibility.” [Crenshaw, C. J.]

*Barnes v. Edward (of color)*, 17 B. Mon. 633, January 1857. [633] “It is alledged that the plaintiff, Edward, was the slave of Wilcox, who, by his will . . . emancipated and set free the said plaintiff, and that Barnes and wife [the daughter of Wilcox] had destroyed said will a short time before Wilcox’s death, and after Wilcox’s death, had taken the plaintiff into their possession, and continue to hold him as a slave.” [638] “Doctor Hill, the attending physician, says Barnes came to Wilcox’s from two to four days before his death; that Wilcox was then incapable of doing any business . . . Smith . . . says he gave Wilcox his will and a pair of scissors, and he cut off his name, and chewed and swallowed it; that he handed the will and scissors to Wilcox, at the request of the defendant, Barnes;” [633] “The circuit court decided that the plaintiff was entitled to his freedom,”

Judgment [641] “reversed for the want of jurisdiction in the Larue circuit court to establish the will.” “The court, however, had jurisdiction to enjoin the removal of Edward from the country, and the injunction to this effect was proper; and the court should retain the cause upon the docket, and continue to control and hire out the plaintiff, until a reasonably sufficient time shall elapse for the probate or establishment of the will in the proper county.” [Crenshaw, C. J.]

*Graves v. Leathers*, 17 B. Mon. 665, January 1857. “the consideration paid [for the land] was a negro boy at the price of \$300.”

*Meekin v. Thomas*, 17 B. Mon. 710, January 1857. [714] “The suit was brought by Thomas against Meekin, who was captain . . . of the steamboat *Empire*, to recover the value of a negro boy, Lewis, hired to Meekin as a fireman, who made his escape from the steamer into the state of Ohio, whilst she was lying at the wharf at Cincinnati. . . [715] Thomas, had left the boy with . . . Sublett, a wharf-boat master at Columbus, in Hickman county, to be hired as a fireman on a steamboat—not to be hired on any particular steamboat . . . Not long after . . . the *Empire* hove in sight on her trip up the river from New Orleans. She was hailed from the wharf-boat, and was told by Sublett that he had a hand for the steamer, she then came up to the wharf-boat, and barely touched, . . . No directions were given, and no inquiries made, as to the points at which the boat was, or was not, to land . . . the crew was composed of negroes,



and that the sign-board of the boat pointed out Louisville as her place of destination" [713] "Captain Meekin was vigilant in preventing an escape, and after it had occurred used great pains, and spent \$140 in endeavoring to recapture the boy. . . it is not the custom for boats hiring slaves on board to iron them or confine them when they enter a free port. If that should become common, the practice of hiring slaves on steamboats would be at an end." [712] "The jury found \$900 which they regarded as his full value."

Held: Meekin is not liable: [717] "It may be, and we believe it is true, that it is more hazardous to land with slaves at Cincinnati, than at other points in free territory on the Ohio river.<sup>1</sup> Still the *Empire* did not go beyond her legitimate sphere, in making a voyage to that port, in the pursuit of her business and profession," [Crenshaw, C. J.]

*Easley v. Easley*, 18 B. Mon. 86, June 1857. [91] "The will was executed . . in 1854; the legal effect of the provisions of the will, . . must therefore be regulated . . by the Revised Statutes.<sup>2</sup> Since they took effect slaves are personal estate, and, upon the death of a testator, pass to his executor like any other personal estate, notwithstanding they are specifically devised. Suits may be maintained by the personal representative for their recovery, although he is expressly forbidden from selling them, unless, for the want of other assets, a sale of them be necessary to pay the debts of the decedent." [Simpson, J.]

*Richardson v. Hayden*, 18 B. Mon. 242, September 1857. Will of Jasper, 1850: [253] "he gave to his daughter, Mariah, a slave named Wyn, provided his real and personal estate were sufficient to pay his debts, otherwise Wyn was to be sold, . . and to Charles, a slave to be hired out until Charles arrived at age;"

*Commonwealth v. White* (free negro), 18 B. Mon. 492, December 1857. Charles White, a free man of color, was indicted for selling liquor, in violation of the statute.<sup>3</sup>

*Kitty v. Commonwealth*, 18 B. Mon. 522, December 1857. [526] "Know all men by these presents, that I, William T. Winston, of Boone county, Kentucky, for and in consideration of the sum of one hundred and fifty dollars . . have bargained, sold, and conveyed . . to Joseph Chambers, of the same county and State, a certain negro girl slave named Kitty, for and during the term and period of twelve years from this date, together with all increase which said girl Kitty may have during said term of twelve years, to have and to hold said girl Kitty for the term aforesaid, and her increase during said term absolutely and forever; and I hereby emancipate and set free the said girl Kitty at the end and expiration of said term of twelve years, should she so long live. Given under my hand and seal this 10th August, 1843. W. T. Winston." [527] "At the expiration of the term, . . in 1855, the girl Kitty claimed to be free, and was permitted to, and did conduct herself as a free woman of color until 1857,

<sup>1</sup> [714] "there were many people there who would aid slaves to escape."

<sup>2</sup> Ch. 93, art. I, sects. 3, 4, p. 627.

<sup>3</sup> Rev. Stat. 643, sect. 7.

when, by order of the county court of Boone, she was directed to be placed in the custody of a trustee, to be hired out until 'a sufficient fund was raised to defray the expense of her removal to some place out of this State, and to maintain her twelve months.' This order was resisted by Kitty, and from it she has appealed to this court."

Held: [528] "as Kitty's right to freedom accrued before the adoption of the present constitution, although its enjoyment was postponed until afterwards, that the provision of the Revised statutes<sup>1</sup> . . . requiring county courts, when the person emancipating a slave shall fail to provide for his removal out of the State, to direct such slave to be hired out until a sufficient fund shall be raised for that purpose, does not apply to her case," [Stites, J.] -

*Kyler v. Dunlap*, 18 B. Mon. 561, December 1857. [565] "Dunlap sued out executions . . . upon two judgments . . . against the appellant, Stephen Kyler, a free man of color. . . [566] a constable . . . levied them upon the appellant, Cynthia Kyler. Stephen and Cynthia Kyler filed their petition . . . and obtained an injunction inhibiting the sale of Cynthia under the executions. The petition averred . . . that one Joseph Kyler, who had once owned Stephen, and manumitted him, purchased Cynthia because she was the wife of Stephen, and being desirous to secure to Cynthia her freedom after his death, consulted a lawyer on the subject of emancipating Cynthia, who was unwilling to leave this State, and having been advised by the lawyer that under the existing constitution of Kentucky Cynthia could not be emancipated and remain in this state; and the lawyer having advised Joseph Kyler that the only way he could secure Cynthia to Stephen for a wife, whilst she remained in Kentucky, was to make a bill of sale or deed conveying her to Stephen to be held by him as a wife. A deed expressing a nominal consideration, was executed by Joseph Kyler to Stephen Kyler, conveying Cynthia to Stephen in fee, after reserving a life estate to Cynthia in the grantor, and the deed was regularly recorded." Stephen's [564] "debt was created while she belonged to" Joseph Kyler.

Burton, counsel for appellants: [564] "it is objected, that . . . it is a fraud on his creditors for him to claim her but as a wife. What, a fraud for a man not to make his wife a slave? Can the forbearance to do such an act, be tortured into a fraud upon the right of any one, . . . If this be so, we are of a certainty, realizing in the severest, and a practical form, one of the effects of that barbarous and piratical doctrine of the Dred Scott decision, 'that negroes have no rights that we are bound to respect.' Truly, then, has that African Adam, in his attempt at the forbidden fruit of freedom, brought worse than sin and death to the negro race."

Held: Cynthia is subject to execution for Stephen's debts. The statute<sup>2</sup> [567] "was never intended to protect slave property from execution; . . . [568] Cynthia has not been emancipated according to the laws of this state, and that any attempt to do so, by a pretended sale of her to her husband, to be held by him only as his wife, is a mere attempt to evade the statutes of this commonwealth on the subject of free negroes, and

<sup>1</sup> R. S. 644, sect. 4.

<sup>2</sup> Rev. Stat. 628, ch. 93, art. 1, sect. 6.

obviously at war with the policy of the laws of this commonwealth. The assumption that Stephen Kyler took Cynthia as a wife only, and held the title to her in trust, cannot be maintained. . . [569] Although the laws of this state give a recognition to marriages between free negroes, yet marriages between free negroes and slaves is not recognized but to very limited extent." [Wheat, C. J.]

*Martin v. Letty (of color)*, 18 B. Mon. 573, December 1857. "This suit was brought in January, 1853, . . . to recover a negro woman Letty, and her children and grand children, some sixteen in number, that had been set free by Andrew Barnett, by his last will and testament," [580] "Barnett acquired the possession of the slaves in 1819, and held them in his possession until he died in 1847. This action was not commenced until 1853, upwards of thirty years after the transactions occurred, which the plaintiffs have attempted to explain by parol testimony. The only writings exhibited show an indisputable title to the slaves in Barnett, and parol evidence has been resorted to for the purpose of establishing a secret trust, inconsistent with the face of the writings."

Held: [581] "the claim is not only stale, but it is barred by the statute of limitations." [Simpson, J.]

*Manion v. Titsworth*, 18 B. Mon. 582, December 1857. [596] "The intestate [a resident of South Carolina] owned at the time of his death a female slave named Kate, and her two children. A sale of the personal estate, including these slaves, was made . . . the slaves were purchased at the sale by the widow, at the price of \$730."

*Sasseen v. Hammond*, 18 B. Mon. 672, January 1858. [673] "George, of color, instituted a suit in the . . . circuit court against . . . Hammond, to recover his freedom. Hammond answered, denying George's right to freedom, and made his answer a cross-bill against Sasseen . . . alledging that he purchased George from Sasseen, and claiming a decree against Sasseen for the price given for George in case he should establish his right to freedom. Sasseen . . . denied that George was a free man, . . . At the fall term, 1855, or spring term, 1856, a final decree was rendered declaring George a free man, and also a decree on Hammond's cross-bill against Sasseen on his warranty of title to George."

The decrees were affirmed.

*Elisha (of color) ex parte*, 18 B. Mon. 675, January 1858. [678] "The appellant was emancipated by the will of Samuel Summers, and no funds having been provided for his removal from the state, the county court of Nelson county appointed a trustee to hire him out until his hire should produce a fund sufficient for that purpose, according to the provisions of article IX of the Revised Statutes, regulating the emancipation of slaves. Elisha, having been summoned to show cause why he should not leave the commonwealth without further delay, presented a petition to the Nelson county court setting forth, in substance, that the trustee had in his hands about \$216 as the proceeds of his hire under the former orders of the court, and that he elected to accept his freedom under the will of his late master; that Nathaniel Talbott was the owner of a slave named

Julia, and had, by his will, emancipated Julia and her children upon condition that they would go to Liberia; that many years previously the appellant and Julia had been married by the consent of their respective masters, and that they had a family of five or six children; that his master had emancipated him chiefly for the reason that his wife and children had previously become entitled to their freedom, and he did not wish the family separated; that his wife and children had established their right to freedom, (upon the condition stated) by suit in the Nelson circuit court, which court had directed them to be hired out for the purpose of raising a fund sufficient to transport them to Liberia; that this could not be accomplished under five or six years, and he therefore proposed that the proceeds of his labor should be united with that of his wife and children, as a common fund, to be applied to the transportation of all of them, at the same time, to Liberia, and that thereby they would be enabled to leave the state in less than half the time that would be otherwise required. The material facts stated in the petition were proved, but the court, on final hearing, refused the application of Elisha, and made an order directing him to depart from the state on or before the 1st day of July, 1857. From that order he has prosecuted this appeal."

Held: [679] "There is certainly nothing in the language of this enactment,<sup>1</sup> or in the obvious motives of policy as well as of humanity which dictated it, that restricts its application to cases in which the entire family are emancipated by the same person or by the same instrument. The relations of husband and wife, and of parent and child, are recognized by this section, and it is apparent that one of the objects of the legislature was to prevent the disturbance of those relations, by providing means of keeping the family together. It was also a part of the legislative policy to provide for the removal, from the state, of that class of persons with as little delay as practicable. Both of these objects will be promoted by extending the provisions of the section quoted to cases like the one before us; and a case can hardly be imagined in which either the rights or interests of the commonwealth, or of the parties, could be prejudiced by the equitable construction we feel constrained to adopt. We are satisfied, therefore, that it was the duty of the county court, upon the state of case presented by this record, to have made suitable orders for the hiring out of the appellant, and such of his family as are in condition to be hired, until the proceeds of the labor of all, united in a common fund, together with any thing they may receive from other sources, shall be sufficient for the removal of all, at the same time, to Liberia. The order of the county court is therefore reversed, and the cause remanded for further proceedings in conformity with this opinion." [Duvall, J.]

*Smith v. Adam (of color)*, 18 B. Mon. 685, January 1858. [687] "In January, 1854, Ormsby Gray, of Louisville, executed and delivered to his man Adam, a paper, purporting to be a deed of emancipation, but which had not been acknowledged by him, or proved in the county court as required by the Revised Statutes.<sup>2</sup> Adam continued to reside in Louisville,

<sup>1</sup> R. S. 645, art. 9, sect. 7.

<sup>2</sup> Rev. Stat. 643, ch. 93, art. 9, sect. 1.



doing business and acting as a free man from the delivery of the deed up to March, 1857, and during this period was occasionally in Indiana. In March, 1857, the appellants, who were creditors of Gray, caused executions against him to be levied on Adam, and were about to have him sold, when he filed his petition, asserted his freedom, and relied on the foregoing facts to establish it. The chancellor held that he was free, and not subject to the payment of Gray's debts, and from that decision the creditors have appealed."

Counsel for appellants: [686] "It is not enough that Adam, on several occasions, has breathed the air of freedom in the state of Indiana."

Judgment reversed: I. [688] "the deed of emancipation in this case is ineffectual to vest Adam with a right of freedom, because it has not been proved or acknowledged in the county court as required. . . [II.] the occasional visits of Adam to Indiana, since the execution and delivery of the deed," have not had the effect to make him a free man. [689] "Prior to the constitution of 1850, and the adoption of the Revised Statutes, . . The law then in force would have settled it at once in favor of the slave. But in our opinion the requisitions of the present constitution and the legislative enactments made in pursuance thereof,<sup>1</sup> have changed the law, . . the chief causes which led to the enactment of these stringent constitutional and legislative provisions was the rapid increase of that class of population [free negroes] within the state, and the evil to be apprehended therefrom. It was to prevent such increase that the constitution made it imperative upon the legislature to prevent slaves that might thereafter be emancipated from remaining in the state; . . [692] If a person desires to emancipate his slaves in Kentucky he must conform to the requisitions of the law; it can be done in no other way." [Stites, J.]

*Commonwealth v. Van Tuyl*, 1 Met. Ky. 1, June 1858. [2] "The defendant was indicted in Carroll county, in this state, for feloniously obtaining money, by false pretenses, of B. W. Jenkins. The facts proved upon the trial were, that the defendant was in the state of Ohio, and had along with him a negro named John, who he represented to be a runaway slave belonging to him, that he was trying to take back to a slave state; stating that he was a resident of the state of Tennessee, from which place the slave had, some three or four months previously, made his escape. That whilst he was in the state of Ohio, he sold and delivered said negro to B. W. Jenkins, at the price of five hundred dollars, which Jenkins was to pay him when they arrived in Kentucky, and the purchaser was to run the risk of taking the slave to that place. After the parties arrived in Carroll county, in this state, the defendant, not however, in his own, but in another name, executed to Jenkins a writing acknowledging the payment of the money as the price of the negro, in which he covenanted that he was the lawful owner of the negro, and that he was a slave for life; and thereupon Jenkins paid him the five hundred dollars. It was also proved that John was not a slave, but was free; that he and the defendant both resided in the state of New York, and that the latter never had resided in the state of Tennessee."

<sup>1</sup> Constitution of Kentucky, Art. 10; Rev. Stat. 647.

*Shumate v. Ballard*, 1 Met. Ky. 31, June 1858. [32] "In the year 1849 or 1850, Thomas Francis gave to Mrs. Ballard . . . his daughter, a negro boy named Fayette." Soon after she exchanged Fayette for two slaves belonging to her brother, John B. Francis. [33] "the following bill of sale was executed at the time of the exchange, by Francis, and delivered to Ballard, the husband: 'I have this day traded unto James D. Ballard a negro woman named Sarah, also a boy child [of Sarah], for and in consideration of one negro boy named Fayette. I warrant the girl Sarah sound at this time, in body and mind, and warrant her a slave for life.' In . . . 1856, the appellant became the purchaser of Zena, a son of Sarah, born since the year 1850, at a sale under an execution . . . against Ballard . . . at the price of \$315." In 1857 Mrs. Ballard brought suit, alleging "that the bill of sale to her husband was made without her knowledge,"

Held: [34] "the equity of the wife would not be recognized and upheld as against the claims of innocent purchasers from the husband, without notice, or of creditors." "especially after the lapse of more than six years from the date of the transaction, during the whole of which period the slaves remained in the possession of the husband, and by him claimed and controlled as his own" [Duvall, J.]

*Coffey v. Wilkerson*, 1 Met. Ky. 101, June 1858. [103] "The plaintiffs alleged . . . that their father had a life estate in two slaves, named Henry and Daniel, and that said slaves belonged to them after the death of their father, under a devise in the will of their grandfather. . . . Coffey, some years ago, purchased the life estate in said slaves, . . . and . . . [105] not only sold the absolute right and title to them, but he sold them to negro-traders, persons who follow the business of taking slaves to a southern market,"

*Ludwig (of color) v. Combs*, 1 Met. Ky. 128, June 1858. [129] "On the 4th of October, 1824, Alexander Adams executed the following deed, which on the same day was acknowledged and admitted to record in the Logan county court: 'I, Alexander Adams, of the State of Kentucky and county of Logan, am desirous to liberate my negroes after arriving at a certain age. Now I do by these presents, for and in consideration of the premises aforesaid and the sum of one dollar to me in hand paid, the receipt of which is hereby acknowledged, manumit, emancipate, liberate, and set free, and secure to her her freedom forever, one certain negro woman named Hannah, aged twenty-one years, from and after she shall attain and arrive to the age of thirty-one years, from which time she is to be free for life; and all the children which she shall have before she attains to the age of thirty-one years shall be slaves until they shall arrive to the full age of twenty-five years, and their children and grandchildren, etc., to the latest generation, are to be slaves until they shall respectively arrive to the full age of twenty-five years, after which time, as they shall attain respectively to said age of twenty-five years, they shall be and remain free for life. And whereas, the said negro woman has two daughters and a son, one of the daughters named Martha, aged five years, and the other named Eliza, aged four years, and the boy named Thomas J., aged one year: now I do by these presents emancipate and set free the

said three last named negroes forever, from and after they shall arrive respectively to the age of twenty-five years, and all their children which the two last named females shall have before they shall arrive to the age of twenty-five years, and their increase to the latest generation, are to be and remain slaves until they shall respectively arrive to the full age of twenty-five years, after which time they are to the latest generation to be free to all intents and purposes. It is the express understanding of these presents, that the said negro woman is to be free at the age of thirty-one, and that all her offspring are to be slaves until they shall respectively arrive to the age of twenty-five years to the latest posterity, or so long as there shall be one of the breed in being, and shall be free as aforesaid after attaining to said age of twenty-five years.' On the 6th June, 1831, the said Alexander Adams made his last will and testament, and shortly thereafter died; . . . [130] The third clause of the will is as follows: '3d. I give after the death of my wife a negro girl named Martha to my grand-children, heirs of Harriet Ragan. I also wish my daughter Harriet to have the use of said girl during her natural life, or until said girl arrives to the age of twenty-five years, at which time she is free, her increase until that time to go to the children.' . . . The 7th clause is as follows: 'I wish it distinctly understood that the increase of those negroes are to serve my heirs until they are twenty-five.' This action was brought by . . . a son of the negro Martha named in said deed and will; that before she arrived at the age of twenty-five years Thomas Beauchamp purchased the time she had to serve; that in March, 1839, and before she arrived at that age, the appellant was born; that he continued to serve said Beauchamp until October, 1855, when said Beauchamp sold him as a slave for life to the appellee for the sum of \$850, etc. He prays a decree securing to him his right to freedom under said deed and will, at the expiration of his term of service therein mentioned, and in the mean time for a restraining order against the appellee, requiring him to have appellant forthcoming to answer any decree of the court, . . . the circuit court . . . dismissed the petition,"

Judgment affirmed: [131] "The rule which prohibits the creation of perpetuities, either by deed or will, requires that the limitation shall be such as that it must take effect within twenty-one years after a life or lives in being, and the usual period of gestation. Tested by this well established rule, the provisions of the deed and of the will under which the appellant claims his right to future freedom, are obviously void. . . . [132] If Martha had died within a year after the birth of Ludwig, it is perfectly clear that the right of the latter to his freedom, as limited by the deed, could not have vested within the prescribed period, but could only have vested after the lapse of more than twenty-one years and nine months from the death of the mother. The circumstances that subsequent events have so transpired that the right to freedom devised by the will, will vest within the prescribed period, does not affect the operation of the rule, or obviate or cure the defect in the limitation." [Duvall, J.]

*Snoddy v. Foster*, 1 Met. Ky. 160, July 1858. [161] "The petitions . . . charge . . . that Foster [the sheriff] might and ought to have levied the

executions . . upon the slave, but negligently failed to do so, and that the slave was run away from the state, whereby the plaintiffs lost their debts. . . the jury found a verdict for plaintiffs of one cent in damages,"

*Griswold v. Taylor*, 1 Met. Ky. 228, September 1858. [229] "\$140. I have this day [February 2, 1857] hired of Aaron Taylor a negro man named Jim, from this date until the 25th day of December next, for which I am to pay . . the sum of one hundred and forty dollars," Griswold [the appellant] and his surety alleged "that the slave Jim . . was, at the time and before he was hired, 'unsound and diseased, and of no value; that said negro rendered said defendant Griswold no service, and finally died;' . . [230] judgment was rendered against them for \$140," Judgment reversed.

*Allan v. Vanmeter*, 1 Met. Ky. 264, October 1858. Will of Isaac Cunningham, 1842: [267] "as the others of my grand-children become of the age of twenty-one years, each one shall draw from the estate two hundred acres of my land, and the boys each to draw two negroes of the male part of my servants, equal in value to those I have given the other boys. The girls, each, shall have one woman and a girl, of as nearly equal value as they can be made."

*Kelly v. Smith*, 1 Met. Ky. 313, October 1858. [315] "the bill [of exchange] was drawn in the State of Louisiana,<sup>1</sup> that it was given . . as part of the price of a lot of negroes, and that the negroes, so sold and delivered in Louisiana, were guarantied by the act of sale against all the redhibitory vices, maladies, and defects prescribed by law. That several of the slaves were affected by certain of the vices, maladies, and defects thus guarantied against; that some of them were unsound and of no value;"

*Enders v. Williams*, 1 Met. Ky. 346, October 1858. In July 1835, [348] "a deed of gift from J. G. Williams to his two infant sons, conveying to them a slave named Jane, and a tract of land, was . . recorded . . [349] On the 26th of October, 1835, . . Williams, the father, sold the same slave, and her child born after the deed was executed, to Robert Enders, for the price of six hundred and fifty dollars, executed to him a bill of sale of that date, and delivered him the possession of the slaves. . . In 1844, . . Enders . . filed his bill . . alleging that he was a purchaser for a valuable consideration, without notice, and that the deed of gift was fraudulently made . . and prayed that the deed of gift might be set aside, . . which relief he obtained by the decree of the court."

*Woodcock v. Farrell*, 1 Met. Ky. 437, December 1858. [439] "For the sum of thirteen hundred and thirty-seven dollars and fifty cents, I have sold to R. Woodcock five negroes, one named Delila, aged 38 years old, one named Jane, aged 8 years old, one named Bill, 6 years old, one named George Ann, 3 years old, one named Belle, 1 year old, for which I warrant the above named negroes sound in body and mind, and slaves for life; also warrant the title good, this 2d day of June, 1857. Daniel

<sup>1</sup> "but payable in Kentucky, at the bank of Louisville,"



Farrell." "none of the purchase money was paid, but . . all the purchase money was to be paid on delivery of the slaves; that one of the slaves had then just recovered from measles, and as it was not known whether the other slaves would have that disease, defendant agreed to keep them until it could be known that they would have passed through that disease, . . [442] none of the slaves had the measles after the 2d day of June; that White [a partner in the purchase] was at the defendant's house on the 18th, examined the negroes, all of whom were well except one which White thought had worms, and he declined to take them—not because they were unsound, . . but simply and only because he had not the money to pay for them; that on the same day a letter was . . mailed to Woodcock, notifying him that he must . . receive and pay for the slaves on the 24th; but he failed to do so, . . and that on the 17th of August following the defendant sold two of the slaves, and sold the remaining three on the 13th September."

Verdict and judgment for the defendant.

*Worthington v. Crabtree*, 1 Met. Ky. 478, December 1858. [480] "the slave was ungovernable and insubordinate in his temper; was about to run away to a free state, and unless sold, would prove a total loss to the owners. . . the interests of the parties entitled in remainder were endangered by the course pursued towards the slave by Colston Crabtree, the owner of the life estate, . . [481] The slave and his owners lived in Daviess county, which borders on the Ohio river, and is only separated by that stream from a free state. One of the slaves belonging to the same estate had already escaped from service, and Henry had threatened to do likewise if he were restrained. The appellee had sold Henry his own time; had been contracting with him as free man; was permitting him to go at large and make trades for himself, did not keep or pretend to keep him in subjection, and was in various ways indulging him to an extent well calculated to render him insubordinate and valueless to the remaindermen. . . [482] It is difficult to conceive of any injury, short of an entire destruction of the property, more serious to the interests of the reversioners or remaindermen in slaves than such treatment by the tenant for life. Its inevitable tendency [is to] render them discontented, insubordinate, and disposed, whenever subjected to proper restraints, to seek such change of abode as will restore to them their usual privileges. Such acts on the part of the tenant for life certainly constitute 'good cause' for the exaction of the bond [for the forthcoming of the slave]." <sup>1</sup> [Stites, J.]

*Thompson v. Vance*, 1 Met. Ky. 669, December 1858. In 1824 George Thompson [671] "executed to his son, George C. Thompson, a deed for over one thousand acres of valuable land, and about fifty slaves. . . [In] [672] 1830, he also executed to his son a conveyance for about fifty slaves, which contains the following provisions: 'The said slaves and their increase to be had, held, and used by my said son . . during his natural life, and after his death to go to . . the children, . . or grandchildren of my said son, . . [673] as my said son shall . . choose

<sup>1</sup> Rev. Stat., ch. 93, art. 1, sect. 9, p. 628.

. . and if my said son shall choose . . to sell any one or more of said slaves, he is hereby authorized to do so . . or he may exchange any one or more of them for other slaves, . . And my son is also fully authorized to lend any or all of the slaves aforesaid, or of their increase, to any widow he may leave . . not exceeding the term of her widowhood, . . But it is clearly understood that in no event whatsoever, are any of the said slaves or their increase to be ever subject to a claim of dower by any widow which my said son may leave at his decease;’ . . recorded in March, 1851.”

*Maddox v. Allen*, 1 Met. Ky. 495, January 1859. [496] “By the will of Charles Masterson, admitted to record in 1836, such of his slaves as should be under the age of twenty-two years at the death of his wife, . . were directed to be hired out by his executor until they should attain to that age; the hires to be applied to the support of such of the slaves as might be infirm or disabled, except the last year’s hire, which was to go to the slaves hired out. Other slaves were to be free at the death of his wife. After some specific legacies, the testator devised one half of the remainder of his estate to be disposed of by his wife at her death as she might choose; . . The widow . . by her will recorded in March, 1843, devised to her niece, Jane Aynes, the negro boy James . . until he should arrive at the age of twenty-two years, when he is to be free; and Mrs. Aynes, by her will, recorded in August, 1855, devised said negro, with the same condition, to her daughter . . the boy to have his last year’s hire.”

*Wood v. Wood*, 1 Met. Ky. 512, January 1859. [517] “the testator was married in 1848, and that, after the marriage, the father of his wife gave to her several slaves, two of which, to-wit: a woman and her child, were sold by the testator . . His wife united with him in the bill of sale for the slaves, but did not acknowledge it before the clerk of the county court, nor was she privily examined by him.”

Held: the sale is of no validity and “does not of itself preclude her from asserting her right to the slaves.”<sup>1</sup>

*Commonwealth v. Thornton*, 1 Met. Ky. 380, February 1859. [381] “William Thornton, a man of color, was indicted . . on a charge of vagrancy. . . after the evidence was heard, the prosecution was dismissed”

*Davis v. Maria Reeves (of color)*, 1 Met. Ky. 589, February 1859. [590] “the will of Amos Davis . . recorded . . in 1835, provided for the emancipation of Maria when she attained the age of thirty years.” “The certificate of emancipation was granted in January, 1858.” “in conformity with the act of 1842,<sup>2</sup> and the order of court then made, she executed bond, with approved surety, that she would not become a charge upon any county of the state. The executor of Davis, however, objected to the granting of a certificate of freedom by the court, . . [591] ‘1. Because the constitution of Kentucky provides that slaves emancipated in this state shall leave the commonwealth; and 2. Because she had not

<sup>1</sup> Act of 1846.

<sup>2</sup> 3 Stat. Law 227.

had a trustee appointed to hire her out, and a sufficient fund had not accrued from her hire to remove her from the commonwealth, as prescribed by the constitution.' "

Order affirmed: [593] "in no aspect of the case has the estate of the testator been prejudiced by the order," [Stites, J.]

*Overfield v. Sutton*, 1 Met. Ky. 621, February 1859. Deed of gift of a female slave [662] "in consideration of the high esteem I have for my beloved grand-son." It was attested by one witness only, and possession was not delivered, [624] "the donor and the appellant residing together at the time of the execution of the writing,"

Held: no title passed.<sup>1</sup>

*Shouse v. Utterback*, 2 Met. Ky. 52, June 1859. In 1857 Shouse "sold a tract of land and some slaves for the purpose of paying some of his debts."

*Jane (a slave) v. Commonwealth*, 2 Met. Ky. 30, October 1859. [31] "The appellant was indicted for murder, tried and convicted of that offense, and has appealed . . the death of Jane Porter [a free white woman] was occasioned by the use of strychnine, . . a witness . . found the phial of strychnine . . hidden under rock in the corner of a fence near Porter's residence which had been so described to him [by the prisoner under a promise made by him that she would be pardoned by the governor if she would 'tell all about it'] that he went to it, and found the phial without any difficulty." New trial because of error in instruction. She was again tried and convicted, and again appealed "for the third time." <sup>2</sup>

Judgment affirmed.

*Jane (of color) v. Prater*, 2 Met. Ky. 453, December 1859. "the devise of the woman Jane to Edward Pines, a free man of color, contained in . . the will of Jeremiah Prater, (the 2d), was . . void . . [454] She now asserts a right to freedom under . . a will made by Jeremiah Prater (sr.) in 1812, and claims to have never been a slave, but free from her birth. . . 'It is also my wish and desire that negro Jinny shall be free on the day of my death. . . that negro Diner shall serve six years after the day of my death. Negro Bob to serve two years after the day of my death; and negro Tom to serve three years after my death. . . if the above named negroes can not be freed under the law of this State, they shall be sold for cash after the death of my beloved wife,' . . [455] Jane was a child of the woman 'Diner,' and that she was born before the expiration of the period of six years from the date of the death of the testator, J. Prater (sr.)"

Held: Jane is a slave, for [456] "Diner was a slave up to the termination of the period of six years from the day of the testator's death." [Wood, J.]

*Munford v. Taylor*, 2 Met. Ky. 599, December 1859. In 1857 the slave had escaped from his owner, Taylor, [602] "who lived in the State of

<sup>1</sup> R. S., ch. 24, sect. 3, p. 196; ch. 93, art. 1, sect. 7, p. 628; 2 Stat. Law 1480 (act of 1798).

<sup>2</sup> Same *v. same*, p. 441, *infra*.

Tennessee. The slave was arrested in Elizabethtown as a runaway, and was committed to the jail of Hardin county, where he remained until about the 1st of June, (a period of forty-seven days), when Taylor appeared, claimed and proved that the negro was his property, and having paid the expense incident to his arrest, had taken him into his buggy, and was about starting with him home, when the appellants, Munford and Larue, came up, and arrested the slave upon a charge of having stole a trunk from the mail stage in Barren county, and a horse from some person in Hart county. Taylor then proposed that he would take the slave to Hart county for trial, or that Munford and Larue might do so; but they declined. Munford proposed that if Taylor would pay \$60, the value of the trunk, so as to indemnify the owners of the stage from which it had been taken, Munford being the agent of the owners, he (Taylor) might take the slave. This the latter declined, upon the ground that two other negroes were engaged in the offense, and it would not, therefore, be right that he should pay the whole of the required indemnity, and that even were he to do this, his boy might be arrested on his way home through Hart. Munford suggested that he could take him home by a different route; to which Taylor replied, that 'he had never run from the laws of his country, and would not now.' Larue and Munford then took the slave from Taylor, against his will, and delivered him to the jailer, and on the night of the same day, the slave made his escape from the jail." "to parts unknown. . . [603] The value of the slave was variously estimated at prices ranging from \$1,000 to \$1,300." [602] "verdict and judgment for the plaintiff [Taylor] . . for \$1,135. . . [606] the offense charged [against the slave] was a misdemeanor only"<sup>1</sup> [605] "the arrest was made without legal authority, and in violation of the rights of the appellee."

*Commonwealth v. Anthony (a slave)*, 2 Met. Ky. 399, February 1860. "An indictment was found against Isaac, a slave, charging him with the offense of administering a deadly poison, called corrosive sublimate, to Isaac Robinson, and his wife and child, with the intention to destroy their lives. . . Anthony, a slave, was charged with the offense of being accessory before the fact to the crime thus committed by Isaac, by having previously incited, procured, counseled, and commanded him to do it."

Held: the punishment of Anthony extends only to the infliction of stripes not exceeding one hundred.<sup>2</sup>

*Arthur v. Green*, 3 Met. Ky. 75, June 1860. [76] "This action was brought by the jailer of Hardin county against Willis Green, for his fees as jailer, for keeping a slave of the defendant that had been committed to his custody, as a runaway, by the county judge of that county."

Held: this power belongs exclusively to justices of the peace.

*Maxwell v. Maxwell*, 3 Met. Ky. 101, June 1860. [103] "Maxwell returned to his home in Kentucky, . . He lived until March, 1858, when he was murdered, near his residence, by certain of his own slaves."

*Baum v. Winston*, 3 Met. Ky. 127, September 1860. [128] "judgment for the plaintiff for \$120" for the hire of a negro man for the year 1859.

<sup>1</sup> Acts of 1802 and 1806, sect. 3 (2 Stat. Law 1286).

<sup>2</sup> R. S., ch. 93, art. 7, sect. 6.



*Keller v. Bate*, 3 Met. Ky. 130, September 1860. "Keller sued Bate before a justice . . . for a bill for medical services rendered the slaves of Bate, and obtained a judgment for \$90—the amount claimed. Bate appealed to the county court, . . . judgment for Keller for \$6, and costs. . . . Keller has appealed," as his motion for a new trial was overruled. [132] "Dr. Marshall . . . proved that he, with appellant, had attended the slaves for twenty-two days, and left them in the exclusive charge of appellant, who continued to wait upon them, or two of them [eight days longer], until they finally recovered. . . . the slaves, to whom the services were rendered, were children, living with their mother in the city of Louisville, and that they all belonged to appellee, and were under his dominion; that appellee was in town several times a week during the time, . . . and also that he promised Marshall to pay his bill for services, although he, Marshall, was only called in by the mother of the slaves as a consulting physician with appellant. . . . one of the slaves died whilst both physicians were in attendance."

Judgment reversed, and cause remanded for a new trial: [133] "the facts demonstrate, very clearly, not only that Bate had notice of the condition of his slaves, and the fact that Keller was rendering them medical service, but also warrant the conclusion that he assented to such service by acquiescing therein," [Stites, C. J.]

*Jane (a slave) v. Commonwealth*, 3 Met. Ky. 18, October 1860. See same *v. same*, p. 439, *supra*.

*Commonwealth v. Lee*, 3 Met. Ky. 229, December 1860. [230] "The appellees were indicted . . . for an assault and battery upon George, Betsy, and Tabitha, three negro slaves the property of A. B. Watkins." The court below dismissed the prosecution.

Judgment reversed and cause remanded: an assault and battery committed on a slave is an indictable offense. [232] "many circumstances which would not constitute a legal provocation for one white man to commit a battery upon another, would justify it when committed upon a slave; but these circumstances must be judged of by the court and jury before whom such cases are tried, having a due regard to the difference between a white man and a slave, and the habits of society." [Peters, J.]

*Kentucky v. Dennison*, 24 How. 66, December 1860. "A motion . . . for a rule on the Governor of Ohio to show cause why a mandamus should not be issued by this court, commanding him to cause Willis Lago, a fugitive from justice, to be delivered up, to be removed to . . . Kentucky, . . . [67] The facts on which this motion was made . . . The grand jury . . . Kentucky, . . . 1859, returned . . . indictment against . . . Lago: . . . accuse Willis Lago, free man of color, of the crime of assisting a slave to escape, . . . A copy . . . authenticated, according to the act of Congress of 1793, was presented to the Governor of Ohio by the authorized agent of the Governor of Kentucky, and the arrest and delivery of the fugitive [Willis] demanded. The Governor of Ohio . . . refused to arrest or deliver up the fugitive,"

[110] "motion for the mandamus must be overruled." [109] "the language of the act of 1793 . . . implies an absolute obligation [to arrest

and deliver the fugitive] which the State authority is bound to perform. . . The performance of this duty, however, is left to depend on the fidelity of the State Executive to the compact entered into . . . when it adopted the Constitution of the United States, . . . But if the Governor of Ohio refuses to discharge this duty, there is no power delegated to the General Government, . . . [110] to use any coercive means to compel him." [Taney, C. J.]

*Clinkinbeard v. Clinkinbeard*, 3 Met. Ky. 330, January 1861. [331] "The plaintiff alleges . . . that she is a free woman of color, and the mother of two male children; that the defendant took the children from her possession and control, without her consent, and has ever since hired them . . . and has received . . . the sum of \$220, to which sum she claims to be entitled. The defendant . . . had been regularly appointed by the . . . court guardian of the two children"

Held: [332] "the plaintiff was properly denied any relief" <sup>1</sup>

*Townes v. Durbin*, 3 Met. Ky. 352, February 1861. In 1852 [353] "the parties went to Missouri, and took with them their slaves and personalty. In the spring of 1853 they left Missouri and took up their residence in Shawneetown, Illinois, . . . their slaves meanwhile remaining in Missouri."

*Tharp v. Tharp*, 3 Met. Ky. 372, February 1861. [373] "In 1858 Tharp sold the slave Sarah to Gentry for \$950. . . Soon after Gentry sold the slave to a trader, and she was taken from the State. . . In a few weeks after the sale of Sarah to Gentry, Tharp bought from Black a negro woman, named America, with three children, at the price of \$1,150"

*Tudor v. Lewis*, 3 Met. Ky. 378, February 1861. The slave Richard [381] "was charged with some public offense [stealing] . . . he was arrested and taken to Boone's on the same day." The constable, Lewis, [379] "allowed persons to talk and converse with said slave, and threaten him with hanging, and frighten him; . . . [381] There was some evidence of carelessness in watching the boy, both at night and in the morning;" About ten o'clock in the morning, he "made his escape, going towards the Kentucky river, which was only a short distance off. That his body was soon afterwards found in the river, near the crossing place, where it was supposed he was drowned. No one saw him drowned, and it did not appear whether the death was accidental or intentional."

*Williams v. McClanahan*, 3 Met. Ky. 420, June 1861. In 1830 [421] "of the slaves so assigned to her for her dower, a boy aged about 17 years, named Peter, was one." The widow married Williams in 1831 and Peter was [422] "sold for \$400 . . . [423] to a southern trader and removed from the State, . . . such removal was without the consent of the owner of the reversion [a daughter by the first husband of Mrs. Williams], because she was an infant and could not consent. The estate held by Williams and wife in right of her dower was by that wrongful act forfeited, . . . he permitted the price of Peter to be converted into other

<sup>1</sup> 1 R. S. 578, art. 2, sects. 6, 7, 14.

slaves." [422] "Shortly after the sale of Peter, two slaves, Polly and her female child Nora, were purchased at the price of four hundred and twenty dollars,"

Held: the owner of the reversion [423] "should be permitted to elect to take these remaining slaves instead of the price of Peter,"

*Hocker v. Gentry*, 3 Met. Ky. 463, June 1861. Will of Josiah Gentry who died in 1855: [467] "These slaves and their increase I direct my executor to hire out until the youngest of said children [grandchildren of the testator] attains the age of 21 years; then I direct my executor to sell all of said slaves and divide the proceeds equally among said children." The testator sold Daniel for \$900. [468] "Kelly and his wife sold Amanda and her child for \$1,250 on a credit,"

*Nall v. Proctor*, 3 Met. Ky. 447, October 1861. "in July, 1860, Nall, being a resident of the county of Ohio, (which is not a border county,) was the owner of a slave that ran away and was arrested by Proctor in the county of Daviess, which county borders on a State where slavery is not allowed; that Proctor lodged the slave, as a runaway, in the jail of Daviess county, telling the jailer to keep him there, and not to give him up until the fees were paid, whatever they were. That Nall afterwards applied to the jailer for the slave as his property, paid him twenty dollars, and thereupon the jailer delivered up the slave to the owner. . . [448] the circuit court rendered a judgment in favor of Proctor and against Nall for eighty dollars, in addition "

Judgment reversed: it was Proctor's duty, [449] "Either to deliver him to his owner, or the person from whom he escaped, or to 'the jail of the county where the owner resides.' " <sup>1</sup>

*Earle v. Couch*, 3 Met. Ky. 450, October 1861. In March 1851, Holland [452] "purchased the woman Esther and two female children . . at the price of \$1,000,"

*Commonwealth v. Garland*, 3 Met. Ky. 478, December 1861. [479] "an indictment under the act of 1858,<sup>2</sup> . . charges that the defendants engaged in a game of cards with one Dave Wright, a slave, in which game 'money . . of the value of \$5.00 was bet,' . . the evidence conduced to show that 'some money, about one dollar,' . . was played for."

*Nunnally v. White*, 3 Met. Ky. 584, December 1861. In 1834 there was allotted to Polly White [586] "by a parol partition . . a slave called America, who is now living as well as seven children she has since borne. Polly White married Durret White, . . Durret White . . purchased a slave, called Martha, who is now living as well as several children she has since borne. . . Polly White died in 1857, without issue, and Durret White died in 1858, leaving a will by which he declared America and Martha and their children free, and provided for their removal from Kentucky. . . [593] Durret White in right of his wife, owned three-fifths of said negroes [America and her children], viz: the interests of

<sup>1</sup> 2 R. S. 372, sect. 3; and appendix, p. 809 (act of Mar. 3, 1860).

<sup>2</sup> 1 R. S. 572, sects. 1, 2.

Jeremiah White, Mrs. Hill, and Mrs. Duncan [by a warranty made in 1833]. His will, declaring said negroes free, destroyed the tenancy in common between him and the Tribbles and Mrs. Huguely, and was a conversion, which deprived his former co-tenants of any right to the negroes, and turned their claim thereto into a money demand against Durret White's estate." <sup>1</sup> [Bullitt, J.]

*Dougherty v. Dougherty*, 4 Met. Ky. 25, June 1862. Paper offered for probate, dated 1857: [26] "as I intend starting in a few days to the State of Missouri, and should anything happen that I should not return alive my wish is, that all of my land and negroes, . . . be kept in the hands of the Bishop of the Diocese . . . as trustee,"

*Winn v. Sam Martin (of color)*, 4 Met. Ky. 231, June 1862. [232] "The appellee, Sam, was the slave of John Martin, who died in 1837, leaving a will, by which, after devising Sam and other slaves to his wife and children, he declared as follows: 'At the expiration of eight years after my death, all the negroes above bequeathed are to be offered to the colonization society (if they are of age), to be transported to Liberia, and those that are not of age to continue to serve the persons to whom they are allotted until they come of age, that is to say, the boys until they are twenty-one, and the girls until they are eighteen years of age, when they are also to be offered to the colonization society to be transported to Liberia. None of them are to be forced to go. . . . Those that do not go to Liberia are to continue to serve the persons to whom they are allotted until they are willing and do go. . . . Phil, Sam and Joe to be hired out the seventh year after my death, and the money arising therefrom to be given to those that first go to Liberia, ten dollars apiece, if there should be so much, and the balance, if any, given to those that next go.' Sam was allotted to Mrs. Taylor, who resided with her son-in-law, Morrison, who had the control of Sam. In 1846, Sam, being of age, applied to Winn to purchase him, expressing a preference to remain in Kentucky as his slave rather than go to Liberia, and his determination to go to Liberia if Mr. Morrison should refuse to sell to Winn. Winn tried to buy him, but Morrison refused to sell for the sum offered. Sam then expressed to John Martin's executors a wish to go to Liberia, and they delivered him to the colonization society to be transported thither. The society soon afterward sent him, with other emigrants, to Liberia to be colonized, but he refused to become a citizen of the colony, and came back to New York on the vessel that took him out. Soon after reaching New York he caused a letter to be written to Winn, expressing his desire to return to Kentucky if Winn would buy him. In August, 1846, Winn purchased him, and he came to Kentucky and continued in the service of Winn until 1859, when he sued for his freedom and the value of his services. From a judgment in his favor Winn prosecutes this appeal. The first question is, did Sam become entitled to freedom by going to Liberia? In our opinion he did not. . . . [233] We regard it [the evidence] as establishing beyond a doubt, that Sam never intended to become a Liberian colonist; that he

<sup>1</sup> *Tom v. Tingle*, p. 385, *supra*.



announced his intention to go to Liberia for the purpose of inducing Morrison to sell him at the price that Winn was willing to give; that he left Kentucky hoping that Winn would buy him before the sailing of the vessel on which he was to embark at New Orleans, and intending in that event to return without leaving the United States, and that being disappointed in that hope he went to Liberia intending to return as soon as possible to the United States, hoping that this technical performance of the condition of the will would induce Morrison to sell him to Winn, and intending in that event to return to Kentucky. The testator did not provide for the outfit and transportation of his slaves, but threw that burden upon the society. We perceive no reason to believe that he meant to put the slaves to the trouble of going to Liberia, and the society to the expense of transporting them thither, for the purpose of giving them a right to freedom. . . [234] His chief object was to promote the scheme of colonization, which many then regarded as giving promise of a peaceful and happy solution of the problem of African slavery. The object of the society was to colonize Liberia with negroes from the United States. The testator's object was to furnish Liberian colonists. Sam, in going to Liberia with a concealed design to return to the United States, did not comply with the will of the testator, but attempted to take an unfair advantage of his benevolent purpose, and committed a fraud upon the colonization society instead of promoting its success according to the testator's intention. If he had gone to Liberia in good faith, to dwell there, and had become a colonist and thus acquired a right to freedom, we do not suppose that he would have forfeited that right by afterward leaving the colony. But we need not decide that question now. . . [235] Morrison was informed that Sam was in the city of New York soon after his arrival there. And it is contended that the failure of his owners, during a period of about three months, to make any effort to bring him away from New York, gave him a right to freedom. . . his stay in New York did not give him a right to freedom. He went and remained there, not with the consent of his owners, but as a fugitive slave. We are not aware of any case in which it has been held that the failure of a master, during three months or any other period, to attempt to capture a fugitive slave in a non-slaveholding State, entitles the slave to freedom. . . It is also contended that Winn agreed to emancipate Sam after realizing from his services the sum paid to Morrison. If such an agreement had been made with Sam it could not be enforced. But it is not proved that Winn so agreed either with Sam or Morrison. . . Nor would Morrison's statement, that he did not consider Sam a slave, nor sell him as such, be sufficient to establish such an agreement, if conceded to be true. . . As Sam failed to allege that he now wishes to be placed in charge of the colonization society, to be transported to Liberia, he did not show himself entitled to any relief.

"The judgment is reversed, and the cause remanded, with directions to dismiss the petition." [Bullitt, J.]

*Skillman v. Muir*, 4 Met. Ky. 282, June 1863. "the appellants agreed to pay \$105 for the hire of a slave, and to furnish him winter and summer

clothing, and a blanket. . . no part of the hire had been paid . . and that 'the clothes said slave was entitled to, and not furnished with, and the blanket, were reasonably worth \$15.' "

*Broadwell v. Broadwell*, 4 Met. Ky. 290, July 1863. [292] "As the personal estate, including the slaves, was more than ample to pay off all the testator's debts, the court erred in subjecting the real estate descended to the heirs."

*Norris v. Doniphan*, 4 Met. Ky. 385, July 1863. In September, 1862, Rebecca Doniphan [386] "filed a petition seeking to recover from the appellant \$5,000 due upon his note to her, executed in the year 1860. The appellant filed an answer, alleging that when the present rebellion commenced, the said Rebecca resided in the State of Missouri, and became a secessionist, and actually joined the Confederate government, and moved to the State of Arkansas, where she could better have the protection thereof, and where she has continued to this time to assist and give aid and comfort to the rebellion by her means and money; that, on the 22d day of July, 1862, the President of the United States issued his proclamation, as required by section 6 of the act of Congress, approved July 17, 1862, . . [387] and that the said Rebecca has not returned to her allegiance to the United States, but still remains in Arkansas, assisting the rebellion,"

Judgment against the defendant, Norris, reversed: I. the act of July 17, 1862, is unconstitutional. [401] "If . . the act should be regarded, as we believe it must be, as an attempt to punish citizens for treason, or for aiding or abetting the rebellion, it is unconstitutional and void, because it authorizes a trial of those crimes in a mode different from that required by the constitution. If it should be regarded as an attempt, not to punish those citizens for crime, but to support the army of the United States with the proceeds of their property, it is unconstitutional and void, because it makes no provision for compensation. . . [II.] The fact that the government is not authorized by the constitution to confiscate the debt, does not prove that the appellee is entitled, by the common law, to recover the money, during the war, and take it to Arkansas, where it may be used against the government. . . [402] those principles of the common law, which suspend an alien enemy's right of action during the war, apply to this case, and forbid our courts from aiding the appellee to recover money which might be used by her to support the war against the United States. . . the petition should be dismissed without prejudice." [Bullitt, J.] [433] "This act of Congress not only, in contravention of the United States constitution, forfeits absolutely the personal estate of the rebels, but also declares his slaves free, in contravention of the legitimate constitution and laws of the seceded States, and also in contravention of the constitution and laws of the loyal States; thus perpetrating the double violation of the United States constitution and State constitutions, and destroying an essential and integral part of its own government. . . [439] the absolute forfeiture of the slaves, and freedom thereof of those convicted under the first and second sections of said act of Congress—although the conviction and judgment otherwise may be strictly in accordance with the constitution—is also unconstitutional and void, as being in

conflict both with the constitution of the United States and of this State; for, whatever may be the embarrassments growing out of the repugnance of those who may administer the Federal government to its holding slaves, or the use to which they may desire to dedicate them, in the exercise of the right and power of the government to forfeit for the life of the offender, on judgment of treason against him, yet this can not confer on the government power forbidden by the constitution of the United States and violative of the State constitutions." [Williams, J.]

*Goodman v. Boren*, 1 Duvall 187, September 1864. [188] "a proceeding to sell, on account of indivisibility, a slave or slaves belonging to joint tenants, should be conformable with the provisions of " "Article 2, chapter 86, of the Revised Statutes" <sup>1</sup>

*Maupin v. Wools*, 1 Duvall 223, October 1864. [224] "her old slave Simon managed much of her business on her farm, and, so far, seemed to possess her full confidence, and might exercise some influence. But there is not a semblance of evidence tending, in any degree, to show that he exercised, or could, if he would, have exercised any influence in prompting or moulding her will."

*Beverly v. Perkins*, 1 Duvall 251, December 1864. [252] "In May 1860, . . . Desmukes, as administrator of George Evans, sold to his mother . . . a male slave, Travis, aged sixty years, for the price of \$300,"

*Sarah v. Miller, etc.*, 1 Duvall 259, December 1864. "In the year 1854, Jane Miller, an unmarried woman, about sixty-six years old, residing in the family of her brother Josiah, and owning about twenty slaves and a small personalty, published a will, whereby she emancipated her slaves on condition that all of them would elect to emigrate to Liberia, bequeathed her personal property to her said brother, and, in the event of any of the slaves declining to go to Liberia, she devised all of them to him for life, remainder to his son William and daughter Virginia. In 1855, perceiving the incongruity of the devise of freedom, she added a codicil liberating as many of her slaves as should elect, in a prescribed time, in the county court, to go to Liberia. In the will, as published in 1854, she dedicated the personalty, as bequeathed to Josiah, to the purpose of an outfit, if they should all choose freedom on the condition of emigration. . . two successive juries having found against it, the court adjudged that it was not a valid will. . . [260] her mind was above mediocrity;"

Judgment reversed: [261] "the contested document . . . is her valid last will," [Robertson, J.]

*Lashbrook v. Patten*, 1 Duvall 316, February 1865. Lashbrook's [317] "minor son, whilst driving his two sisters to a 'picnic,' in his father's carriage, . . . ran against appellee's carriage, causing his horse to . . . run, . . . break his carriage, and throw out his daughter."

Held: "The son must be regarded as in the father's employment, discharging a duty usually performed by a slave,"

<sup>1</sup> 2 Stanton 303.

*Tuggle v. Gilbert*, 1 Duvall 340, February 1865. "the fraudulent or unfaithful conduct of the executors of Jesse Taylor subjected the slaves devised to his wife Lucretia to sale unnecessarily,"

*Hayden v. Stone*, 1 Duvall 396, April 1865. In 1835 [397] "a female slave Lucy, [was] appraised at \$500;" The widow married Stone about two years afterwards. He "retained and used Lucy until she had borne several children, and then sold her for \$462.50. He also had, until after the institution of this suit, the use of the descendants of Lucy, all of whom he sold *pendente lite*, for \$4,500."

*Jones v. Commonwealth*, 2 Duvall 81, June 1865. "On the 22d day of November, 1862, a justice of the peace . . . certified that a colored boy named William had been arrested and brought before him as a runaway, and thereupon he committed him to the jailer . . . On the 20th of April, 1863, the county court . . . on the jailer's report, ordered the sale of said boy by the sheriff, who sold him on the 18th of May, 1863, to . . . Jones, as highest bidder, and took . . . his bond . . . for \$285, . . . On the 18th of July, 1864, the appellants . . . moved the said county court to cancel the said bond, . . . charged that the commitment of William to jail was illegal, and the order of sale unauthorized and void, and that William had been taken by military power;"

Held: the commitment was illegal because the certificate on which the *mittimus* was indorsed, did not show that "the justice had adjudged that there was 'reasonable cause to suspect' that William was a runaway slave,"<sup>1</sup>

*Hughes v. Todd*, 2 Duvall 188, December 1865. In January 1864, Todd executed a note to Hughes "for the payment of \$150 for the hire of his slave Marshall for that year, without any express reservation or qualification. . . the slave, [in June] long before the expiration of the term of service, escaped, and was voluntarily enlisted as a soldier in the Federal army, whereby the hirer, Todd, lost the residue of his services,"

Held: the owner of the slave is not responsible for such loss, nor is the hirer entitled to any abatement of the price agreed to be paid for the hire. [191] "He, like the owner, must look alone to the government for reparation. And, if the government has neither paid him nor will pay him, its act<sup>2</sup> was unconstitutional and void as to him, and was, therefore, not a lawful eviction under title, but a wrongful abduction without title. . . [192] The only offer or promise to pay . . . limits the maximum to \$300, even though the slave may have been worth \$1,500. . . If the government has power to fix at \$300 the value of a slave worth \$1,500, it may as well fix it at one dollar or declare that it is of no value. . . If this be so, the boasted palladium of private property against arbitrary power is but a mockery, and the constitution itself may become a dead letter." [Robertson, J.] Williams, J., dissented. See *Corbin v. Marsh*, next page.

<sup>1</sup> 2 Stanton's R. S. 371, ch. 93, art. 6, sect. 1.

<sup>2</sup> Acts of Congress authorizing the enlistment of slaves into the Federal army, July 17, 1862, and Feb. 24, 1864.



*Sims v. Pearce*, 2 Duvall 202, December 1865. [203] "Sims executed his note . . . for \$300, November 30, 1863, payable December 25, 1864, for the hire of three slaves for the year 1864. The two men enlisted as soldiers in the national army, and the woman fled into the military lines, sought and obtained their protection, before the expiration of the year." Sims asks "an abatement of the hire for the services so lost." See decision in *Hughes v. Todd*, p. 448, *supra*. Williams, J., dissented.<sup>1</sup>

*Corbin v. Marsh*, 2 Duvall 193, December 1865. [203] "Marsh sued Corbin for a woman, Milly, whom he claims as his slave. Corbin put in for defense that she was the wife of a soldier of the United States, and, by the provisions of the joint resolution of Congress of March 3, 1865, made free, and, as a free woman, by her own voluntary consent was in his employment,"

Heid: the act of Congress was unconstitutional: [200] "the emancipation of the wives and children of enlisted slaves was not [a] necessary means to a constitutional end, . . . [202] there was, as to Joe's wife, neither any unavoidable necessity for her instant liberation, nor any compensation provided; but Congress negatived all purpose to pay or provide for paying her owner anything. We are clearly satisfied . . . that her owner's title was not divested by act of Congress. No martial law, properly defined, could have emancipated her. And there is no pretense of any such emancipation. . . . war . . . cannot legalize what the Constitution prohibits, nor destroy what it guarantees. . . . Joe's enlistment did not emancipate his wife nor divest her owner's title to her;" [Robertson, J.] Williams, J., dissented from the majority of the court, in the three preceding cases: [215] "Armies must consist of persons; but whether free or slave, white or black, has not been designated in the Constitution. The power to raise and support armies, provide and maintain navies, as to age, color, or condition of the soldier and sailor, rests as fully within the discretion of Congress as does the age, color, or condition of the arms and vessel with which the soldier and sailor is to be equipped. . . . [220] it may be safely asserted as a historical fact, that all nations have so used their slaves, and have as universally attended such use with emancipation." [210] "the insurgents, at the very commencement of the war, in all their States, employed vast numbers of their slaves in their military service, for many belligerent purposes, such as the digging intrenchments, erecting forts, breastworks, barracks, and such camp services as were necessary to the protection, efficiency, and support of their armies." He quotes the letter of General Robert E. Lee to E. Barksdale, February 18, 1865 [221]: "Under good officers and good instruction, I do not see why they should not become soldiers. . . . I think those who are employed should be freed. It would be neither just nor wise, in my opinion, to require them to remain as slaves." <sup>2</sup> Judge Williams gives [224] "The official statistics, obtained November 8, 1865, from the war department, at Washington City, [which] show that the colored population have furnished in this war 178,735 soldiers. Of these, Kentucky

<sup>1</sup> See the next case.

<sup>2</sup> McPherson's *History of the Rebellion*, p. 611.

has furnished 23,703. It may be safely estimated that, as teamsters, and in the quartermaster's and commissary, and various staff departments, that another hundred thousand have served. Of these soldiers, the free States and Territories have only furnished 34,549, leaving the rest to come from the slave States—nearly all of whom must have been slaves. . . [228] the policy of declaring those laws unconstitutional is . . unjust to the loyal slaveholder, . . The slave soldiers from Kentucky, even at the price of \$300 each, will amount to over seven million of dollars, the payment and fund being already provided for by law. The other slaves set free by the last enactment may be safely set down at 75,000, and at the price of \$300 each, would amount to over twenty-two millions of dollars. . . If these slaves of Kentucky, so freed, should perchance belong to loyal owners, their claims would amount to near thirty millions of dollars, . . [229] Should all these acts of Congress be pronounced unconstitutional, then these slaves have not been made free by law, but are still slaves, and will so remain until, by the adoption of the constitutional amendment, now pending, they shall be declared free; and being so declared by constitutional amendment, no compensation will ever be granted by Congress."

*Robinson v. Hicks*, 1 Ky. Op. 152, December 1865. Elam hired the slave Fanny to Mrs. Price, and "in January, 1861, he permitted Price to remove Fanny from . . Ky., to New Orleans, first taking from Price a bond to indemnify him against loss for permitting him to remove said slave from Kentucky. It does not appear that she has ever been returned . . her value . . is proved to be \$1,200,"

*Joe Henry (of color) v. Graves*, 2 Duvall 259, February 1866. Peter Matthews [260] "went to Illinois in the fall of the year 1855, for the avowed purpose of seeing the country and of buying land; that, after his return home, he went again, carried the appellant with him, bought or rented land, left Joe, the appellant, there, to raise a small crop and cultivate about two acres of garden vegetables—came back to Kentucky to marry, and in May, 1856, returned to Illinois with his wife—and remained there until the succeeding August, when, becoming dissatisfied, he came back to Kentucky with his wife and Joe, where he remained until his death, a short time afterwards—having said more than once that Joe was free."

Held: [261] "Joe, being a minor, cannot be affected in any of his resulting rights by his return to Kentucky, even if voluntary. Such a continued residence of Joe, as a slave, was, in our opinion, interdicted by the spirit, as well as the letter, of the ordinance [of 1787]; and, therefore, he became, *ipso facto*, free. Wherefore, the judgment of the circuit court dismissing his petition is reversed," [Robertson, J.]

*Allen v. Shortridge*, 1 Ky. Op. 361, February 1866. "a judgment . . for the recovery . . of a negro boy, valued in the judgment at \$460,"

*Parish v. Hill*, 2 Duvall 396, June 1866. Will of William Parish, who died in 1860: [397] "I give and bequeath to my beloved wife . . all my estate . . during her natural lifetime or widowhood. After the death

of myself and beloved wife I will that all my negroes, young and old, to be set free, and to have two hundred dollars given to each one, to be paid to them out of my estate; and they, the said negroes, when freed, to be conveyed to any place where they can enjoy the right of freedom." The widow married again. "In 1864 the appellants, as the negro devisees, filed a petition . . . asserting that they were free, claiming that they were entitled to their pecuniary legacies, . . . and to hire, and also an outfit for migration to some other country. . . the circuit court, considering the petition premature in the lifetime of the testator's widow, dismissed it without prejudice."

Decree affirmed: [398] "But the amendment of the Constitution of the United States abolishing slavery has made them free and legally capable of taking and enjoying their legacies. . . The anticipation of the time cannot be deemed essential or contrary to his wishes. His leading purpose was their emancipation and the payment of their pecuniary legacies whenever they became free. . . but [they are entitled] to no outfit for removal, as the avowed purpose of the testamentary provision on that subject has become useless. . . and as, moreover, they manifest no intention to transplant themselves from their native country, where they may now enjoy their freedom as fully and securely as elsewhere." [Robertson, J.]

*Miller v. Miller*, 1 Ky. Op. 174, June 1866. "the man Nick, after he had come into the hands of the administrator, was drafted, and put into the military service of the United States; that before he left the encampment an agreement was made by the administrator and appellant that if he could put William, a negro man then the property of said appellant, into the service as a substitute for Nick, that he should have Nick. William was substituted for Nick,"

Held: "the price of Nick" must "be paid over to appellant,"

*Daniel v. Bank*, 1 Ky. Op. 402, September 1866. Downing, by "his last will, . . . admitted to record, . . . had emancipated said slaves," "The sheriff . . . by virtue of an execution . . . against the estate of . . . Downing and others, sold the slaves of said Downing . . . two of whom . . . Daniel purchased" who [403] "urged the sale notwithstanding [the will] and became the purchaser to speculate on the chances." He "executed his bond for their price," and sold them before instituting this action.

Held: the appellants are entitled to no relief. The contract cannot be rescinded "on the ground that they had by the alleged purchase acquired no title to the slaves."

*Commonwealth v. Palmer*, 2 Bush 570, October 1866. John M. Palmer was indicted for [571] "aiding Ellen, a slave of Womack, to escape from her owner in Kentucky to the State of Indiana. On the trial the parties agreed that, at the time of the admitted escape as charged, martial law had been proclaimed in Kentucky; that Palmer, as a major general of volunteers in the army of the United States, was commandant of the Department of Kentucky, and stationed at Louisville, and that the slave went to Jeffersonville, Indiana, under cover of a passport issued for that pur-

pose by a provost marshal, in obedience to the following order: 'Headquarters Department of Kentucky, Louisville, Ky., May 11th, 1865. General Order No. 32. Whereas, it has been represented to the general commanding the Department of Kentucky, in an official communication from the Hon. Philip Tompert, mayor of the city of Louisville, . . . [572] that large numbers of negroes, most of them women and children (and the numbers are increasing daily) have flocked to said city, claiming to be free, and looking to the military authorities for protection and assistance; and that such colored persons have been compelled to seek shelter where they could find a place; and by reason of the crowded state of the city, and the scarcity of houses, they have crowded together in numbers so great at each place as to render disease almost certain; and that small-pox is now, from the cause aforesaid, prevailing in several localities in the city among these people; . . . As an effectual co-operation with the city authorities, and to prevent the spread of disease among the people, all colored persons in the city of Louisville are advised at once to seek employment; and such as are unable to find sufficient employment for the support of their families in the city are advised to seek it elsewhere. To enable them to do so, it is ordered that the provost marshal of the post of Louisville, upon the application of any colored person who may report him or herself as unable to find sufficient employment in the city of Louisville, will issue a pass to such colored person and for his or her family, specifying the number of persons to be passed, and their names, and the point to which they wish to go to engage in or in search of employment. Conductors and managers of all railroads, steamboats, ferry-boats, and other means of travel out of and from the city of Louisville, will, upon the presentation of such pass and the payment of the usual fare, transport the persons named therein. . . . [573] By command of Major General J. M. Palmer.' . . . martial law had been abolished before the grand jury found the indictment 'a true bill,' and that the foregoing order 'was issued by General Palmer, by the authority of the War Department.' "

Held: [577] "Palmer was guilty of the felony well-charged in the indictment." [574] "President Lincoln's proclamation of emancipation, whatever else might be said of it, excepted Kentucky from its operation, and applied exclusively to the seceding States. That portentous document, therefore afforded no semblance of pretext for a claim to freedom by the slaves of Kentucky. The unlawful intermeddling of General Palmer inciting a spirit of servile insurrection, and encouraging escapes from servitude, by assuring military protection, invited slaves to 'crowd' Camp Nelson and other encampments of his army; . . . [575] until but few were left at home, and farmers generally, and many residents of cities and towns, were suddenly left without their accustomed and necessary help, the long-established system of labor terribly disturbed, and citizens excited almost to revolution. . . . [576] Aiding Kentucky slaves to run away from their owners was not a belligerent act justified by the war. . . . [578] the judgment dismissing the indictment . . . is reversed, and the cause remanded " [Robertson, J.]



*Smith v. Payne*, 2 Bush 583, October 1866. Will of James Robinson, admitted to record in Virginia, 1820: [585] "The rent of my negroes, together with the price of John, are to be equally divided among my three daughters," [586] "When the family removed [in 1838 or 1839] to Kentucky, the slaves . . . with their children, were brought along; . . . [587] the land was paid for by money arising from the sale of the slaves, Mildred and Hambleton, . . . Mildred . . . was sold in 1848, for six hundred and fifty dollars or six hundred dollars, . . . and Hambleton some years thereafter, at one thousand five hundred dollars,"

*Agnew v. Williams*, 1 Bush 4, December 1866. Hicks [6] "attached a negro slave man who had been purchased by Telotson, but conveyed to his wife. . . the mother of Mrs. Telotson, advanced over three hundred dollars in obligatory notes to Denton to assist in relieving the negro from the attachment; Denton with these, and his own note to Hicks for \$260, paid the debt and released the slave from the attachment; whereupon, Telotson and wife conveyed the slave to Denton, who, on the same day, re-conveyed him to Mrs. Telotson, reserving a lien for his liability of \$260, and reserved the right to hire out the slave until reimbursed."

*Jones v. Commonwealth*, 1 Bush 34, December 1866. Jones was indicted in 1865 [35] "for unlawfully (but not with a felonious intention) taking . . . from . . . Oxley one negro woman, named Mariah, and her three children, . . . of the alleged value of one thousand dollars,<sup>1</sup> . . . Oxley proved that the appellant came to his residence in July, 1864, and said he was directed to take Mariah and her children to the headquarters of [Samuel] the provost marshal of the district, in Covington, and read . . . [36] a letter from . . . Samuel; . . . appellant, on the next morning, came to his house, bringing an armed soldier with him, and demanded Mariah and her children; and that either Jones or the soldier went near to where the negroes were, who then came to them, and they went in company with the negroes to the Kentucky Central railroad, and were put on board and sent in company with the soldier to Covington. That he, Oxley, went on the same train . . . with a letter to Samuel, to try to get the negroes; but Samuel refused to let him have them. . . there was a military force stationed at the time at Cynthiana sufficient to enforce . . . [Samuel's] order, . . . The woman Mariah was obedient and quiet, and not inclined to leave home if she had not been induced to do so. . . Oxley offered to execute bond with surety that he would not send the negroes outside of the Federal lines, . . . [37] Jones introduced evidence . . . that, in July, 1864, such negroes . . . were of little marketable value in Cynthiana; that such a negro as Mariah, if not inclined to leave her master, was of considerable value to him; that slavery then in that part of Kentucky was nearly destroyed. The presence of United States troops, the recruiting of negroes into the army, and the illegal acts of persons such as Jones, had so demoralized the negroes that they were of little value. . . A verdict and judgment for two hundred dollars were rendered against Jones,"

<sup>1</sup> 1 R. S. 411, ch. 28, art. 25, sect. 7.

Judgment affirmed: Samuel [40] "had no discretionary power over private property." His order to Jones "was without excuse . . . to deprive Oxley of his property, produced, doubtless, by his opposition to the laws under . . . which Oxley held that property, and affords no defense to appellant against this prosecution." [Peters, C. J.]

*Estill v. Rogers*, 1 Bush 62, December 1866. [63] "Joseph Rogers and Sally Ann Estill, both slaves until emancipated by the constitutional amendment on the 19th of December, 1865, claimed to be husband and wife by cohabitation and recognition, for more than fifteen years preceding, and until her death, in April, 1866. Early in May, 1866, her brother, Harvey Estill, without notice to Rogers, was appointed her administrator by the county court . . . Three days afterwards Rogers notified Estill that he would move the said court to revoke his appointment and substitute himself as the administrator, which the court accordingly did;" The circuit court confirmed that judgment.

It was reversed by the court of appeals: [64] "had the cohabitancy . . . been initiated by free persons, their marriage would have been sealed as legal, before the enactment of the Revised Statutes," which repealed the common law as to *de facto* marriages. "But as long as they were slaves, their union . . . could never have become a legal marriage; nor could their cohabitation and recognition, after they became free, have legalized their union as husband and wife" (as the Revised Statutes then applied to their case), unless they had complied with the act of February 14, 1866, as to free colored persons.<sup>1</sup> [65] "the appellee and Sally Ann, never having made the required declaration since they became free, were never husband and wife;" [Robertson, J.]

*Foster v. Grigsby*, 1 Bush 86, December 1866. Deed, 1855: [91] "I also sell to the party of the second part the slaves Flandus and Howard, which I have on hire for the present year."

*Turley v. Johnson*, 1 Bush 116, December 1866. [124] "The deceased [Lillard] was a farmer, and a minister for many years in the Baptist Church. . . the title to quite a number of his slaves was in litigation;" [121] "In 1860 he said he could not give in a list of his blacks;" [124] "He continued to manage his estate after April, 1860, and up to his death [in 1861], without an overseer;"

*Thompson v. Harris*, 1 Ky. Op. 18, December 1866. In 1858 Harris sold Thompson "a slave Nancy and her two children for the price of \$1,300, warranting the soundness of Nancy and one of the children in body and mind." Thompson "alleged that the woman Nancy . . . was unsound with syphilis, and . . . had died of tubercular consumption,"

*Righter v. Forrester*, 1 Bush 278, February 1867. Will of George Palmer who died in 1843: [279] "my daughter . . . is to have Charles, a black man, about twenty-five years old, and Martha, a black girl, about thirteen years old, . . . If my daughter . . . die and have no child or children, all my negroes and their offspring is to return to my wife, . . . if she

<sup>1</sup> 2 Rev. St. 4 (ch. 47, sect. 2).

is living, to free all or any part of them. If she is dead before the death of my daughter, and she die and have no child or children, all my negroes, and their offspring is to be free."

*Corbin v. Mulligan*, 1 Bush 297, February 1867. [298] "prior to the year 1833, the lot [in Lexington] . . . was owned and occupied by Solomon Brindley, a free colored man, under a deed . . . 1808; but that a slave of the late Hon. William T. Barry, named Peter, died in the occupancy of the property in 1833, and, for over two years before his death had occupied it;"

*Martin v. Curd*, 1 Bush 327, February 1867. [333] "he gave to his daughter, Mrs. Curd, in August, 1830, \$1,000, to be laid out in negroes for her and 'the use of the family.' The slaves were purchased by the husband, taken into his possession, and remained under his control until his death;"

*Berry v. Hamilton*, 1 Bush 361, February 1867. (For facts see same *v.* same, p. 393, *supra*.) [363] "On the return of the cause to the circuit court, the colored persons, appellants herein, for themselves and nearly one hundred other colored persons, came by their counsel, and in open court filed . . . their petition, . . . setting out . . . that they were interested in sustaining Miss Hamilton's will, because, by a devise therein, they were set free, or some of them were entitled to a chance of being set free, and were entitled to one hundred dollars each if they elected to go to Liberia, or fifty dollars each if they elected to go to any free State, and that they were also entitled to all their earnings, over and above their necessary expenses, after a named date, and these earnings they alleged to be at that time thirty thousand dollars. . . . [364] the court overruled the motion of the appellants to be made parties to George Hamilton's suit,<sup>1</sup> . . . they appealed to this court."

Held: [366] "the negroes had a right to appeal. . . . [367] the devise under which they claim conferred freedom on none of them. There had been no partition amongst the heirs of Archibald and Maria Hamilton, either of negroes or lands. They had all lived together and kept the slaves in common, . . . Miss Hamilton owned but an undivided interest of one fourth in the slaves, her three brothers owning the other three fourths. . . . she could not convert the slaves by any disposition of her one fourth into a state of freedom. The greater interest must be held as controlling.<sup>2</sup> . . . Each negro in the hundred or more negroes under the devise would have precisely the same right to go free, and as all cannot go free, none can. . . . the devise was void" [Lindsey, J.]

*Hines v. Jones*, 1 Ky. Op. 219, February 1867. "May 7, 1833, Berry Stansberry conveyed the lot of ground in contest to Henry Smith, a free colored man and minister of the Baptist Church, for the valid 'consideration of the good opinion which he (vendor) entertains of the said Henry's piety and usefulness as a Baptist preacher and one dollar. . . . the

<sup>1</sup> 14 B. Mon. 31.

<sup>2</sup> *Davis v. Tingle*, p. 385, *supra*.

better to enable the said Henry to devote a sufficient portion of his time from his domestic labors to the preaching of the Gospel of Jesus Christ to his black brothers and for the purpose of erecting a house of worship for the regular negro Baptist association.' . . [221] a majority of the original congregation had abandoned the use of the lot and house in controversy, and removed to the house on Fifth street, having left some of their original members still to worship in the old house,"

Held: the former, "after more than twenty years absence from said house," can not oust "the present congregation having regularly organized and continuously worshipping there from ten to fifteen years, and being of the same persuasion "

*Johnson v. Waddy*, 2 Ky. Op. 98, February 1867. "a covenant executed . . on the 2d day of January, 1865, for the hire of two negro boys for the year 1865, at the price of \$200, . . The appellants filed an answer alleging, . . That on the day the slaves were hired, and before they had rendered any service, 'two white men, dressed in the uniform of the Federal Government,' 'who,' the answer alleges, 'were negro kidnappers,' together with a company of negroes, forcibly took said slaves out of the possession of the appellant Johnson, . . That said slaves . . were taken to the city of Paducah, where the appellee, being the owner of them, obtained and had possession and control of them, but failed to return them to appellant Johnson,"

*Railroad Company v. Young*, 1 Bush 401, March 1867. Young, of Elizabethtown, Kentucky, "owning two young slaves, Orville and Alfred, who had only about one fourth of negro blood in them, brought this action against the appellant for wrongfully carrying, or permitting them to be carried without his authority . . to parts unknown, whereby Orville had escaped to Illinois, . . the jury . . found a verdict for \$1,150 in damages for both slaves, . . [402] judgment against the appellant for the damages so assessed."

Judgment reversed, and the cause remanded: "Alfred had returned to Elizabethtown, where he had been for months, and still was, working for himself with the appellee's knowledge. . . [403] the appellee had no right to recover, on account of Alfred's temporary escape, more than the value of his services while he was gone from home." [Robertson, J.]

*Baker v. Wright*, 1 Bush 500, April 1867. Baker charged [501] "the appellees, all non-combatant citizens, . . with aiding the [Confederate] army [in 1861, when they fortified 'Baker's Hill' overlooking Bowling Green], by the labor of their slaves and otherwise, in the spoliation complained of."

*Faucett v. Faucett*, 1 Bush 511, April 1867. Will of Robert Faucett. "The slaves he directed to be sold to his children only."

*Flournoy v. Flournoy*, 1 Bush. 515, April 1867. [518] "the will of John J. Flournoy, published . . 1813, . . 'I recommend Nancy Grant, John J. F. Wills, Lucy Flournoy, and John Fowler, to the tender consideration of my wife, . . hoping she will try to assist them as much as



she consistently can, having respect, unfortunately, to the numerous and heavy debts that I owe," A codicil [519] "authorized the wife of the testator to emancipate four favorite slaves by name, and give them a small stock of cattle and some other things of little value," The testator died in 1835.

*Pettit v. Johnson*, 1 Bush 607, June 1867. [608] "Pettit died in 1856 possessed of . . . forty-four slaves. . . [610] The court having adjudged a sale of the property, . . . the slaves, 44 in number, appear to have produced the aggregate price of forty-seven thousand five hundred and fifty-five dollars."

*Branham v. Commonwealth*, 2 Bush 3, June 1867. "Lewis, the slave of Branham, was indicted and put on trial for murder, . . . 1864, . . . The jury having failed to make a verdict, the court made an order admitting him to bail in the sum of three hundred dollars, which, however was not given, and Lewis was remanded to jail. After the adjournment . . . the county judge admitted Lewis to bail;" He did not appear to answer the indictment.

*Cook v. Redman*, 2 Bush 52, June 1867. Redman and his wife sold a slave, Allan, to Cook, in 1858, [53] "for sixteen hundred dollars, and . . . covenanted that he was sound and a slave for life. On the 19th of March, 1861, Cook brought this action for a rescission of the contract . . . 1st, that the slave was deaf; and 2d, that the vendors had only a life estate,"

Held: Cook "may be entitled to some relief, even though the constitutional amendment abolishing slavery may have made Allan a free man, and the appellee's wife being still alive, his title had never otherwise ceased than by the slave's emancipation by law. . . [54] although the loss of Allan by a legal, as much as if it had been by a natural death, deprived the appellant of his value without the appellee's fault, yet, as the appellant, to some extent, paid for more than he got, he may be equitably entitled to restitution *pro tanto*," [Robertson, J.]

*Stewart (of color) v. Munchandler*, 2 Bush 278, October 1867. Frances Stewart, a woman of color, on January 8, 1866, executed her [279] "note for three hundred and eighty-four dollars . . . due one day thereafter." Being sued on the note, she "pleaded, that, at the date of said note, and for many years previous thereto, she was, and still is, a married woman, the wife of Henry Stewart, both colored persons. . . [They] were married by a colored preacher more than sixteen years before that time, without any license therefor from the county court; that they have ever since continued to live together as husband and wife; that they were slaves at the time of their marriage, and continued to be slaves until manumitted by the adoption of the amendment of the Federal Constitution; and, on the 19th of April, 1866, they went before the clerk of the Jefferson county court and took the following certificate from the said clerk: 'This day Henry Stewart and Frances Tompkins, free persons of color, appeared before me, in my office, and stated that they had lived

together as husband and wife for the period of about sixteen years, and that they desire to continue to live together as husband and wife.' "

Held: [281] " As between themselves and for all purposes enumerated in the act of February, 1866,<sup>1</sup> their marriage will relate back to the commencement of their union. But the effect of such marriage upon the rights of others, acquired in the interim between their emancipation and their legal marriage under said statute, is quite a different question. . . at the date of . . the execution of the note sued on, appellant was not under the disability of a feme covert, but was in legal contemplation a single woman, able and competent to contract; and the statute subsequently enacted, with which she has complied, and under which she now claims protection, can not operate so as to impair the obligation of a contract entered into by appellant when she was free, and laboring under no legal disability," [Peters, C. J.]

*Monohon v. Caroline (of color)*, 2 Bush 410, November 1867. [411] " Mrs. Lucy Fine, by her last will gave freedom to her slaves, and directed that her brother, Nathan Mardis, should take them to Cincinnati, Ohio, or other suitable place, and execute deeds of manumission. She also made some specific bequest to each of them, and directed her residence to be sold, and its proceeds to be divided among them or their descendants. The slaves John and Matt had belonged to her deceased husband, and fell to her for life only. Caroline was not to enjoy freedom until the death of an aged negro named Milly, who had been a faithful slave to the testatrix. . . John and Matt were taken to Cincinnati and there manumitted, and the heirs of Jacob Fine, the testatrix's deceased husband, recovered of her estate their value; "

Held: [414] " We know of no statute nor public policy which forbid a testator, as has frequently been the case, from directing the freedom of his slaves in future, after serving a given time, and when so freed, to be paid out of his estate a given sum, or to have a given piece of property. There is nothing unjust in a testator's securing to his freed people a portion of their own earnings, or in his compensating them for their faithful services rendered, or in donating to them by way of mere gratuitous bounty. We concur with the chancellor, that the appellees were entitled to receive this legacy." [Williams, J.]

*Magowan v. Everitt*, 2 Ky. Op. 119, November 1867. " said executors about the 1st day of January, 1859, sold . . to . . Calk a slave named Edmund . . at the price of \$750, . . That after the delivery of the slave to Calk he allowed him to return to his former home for his clothing and thereupon the slave ran off and secreted himself, and shortly thereafter Calk sold his claim and chance of recovering the slave . . for \$800," The executors " subsequently recovered possession of the slave, and sold him " for \$1100 or \$1150.

*Park v. Park*, 2 Ky. Op. 133, December 1867. Held: " Though the testator certainly contemplated an equal division of his estate amongst his two classes of devisees yet, choosing, as he did, the specific property

<sup>1</sup> Myers's Supp. 734.

to be distributed to each subject to all contingencies, the emancipation of the slaves allotted to one class did not entitle those devises [*sic*] to any portion of the land devised to the other class, any more than the death of the slaves after the termination of the estate of the devise [*sic*] for life, would have entitled them to it."

*Rice v. Johnson*, 2 Ky. Op. 158, December 1867. About 1858 he "hired out her cook at \$75 to \$80 per year,"

*Jardon v. Williams*, 2 Ky. Op. 186, December 1867. "the appellee's slave was bought by the appellant for \$1,000 assumed to be paid on condition that the slave should be accepted as appellant's substitute as a drafted soldier in the Federal army, and that he was so received and thereby exonerated the appellant."

*Noland v. Golden*, 3 Bush 84, January 1868. "Golden and Adams executed their promissory note to John Noland for two hundred and seventy-five dollars, for the hire, for the year 1865, of his slave Allan, a blacksmith, qualified by the stipulation, that if Allan should voluntarily leave their service during the term of hire, they were to pay only for the time he served. Allan served until May, 1865, when he went to Maysville, volunteered as a Federal soldier, but was rejected as unfit, procured a certificate of freedom from a provost marshal, returned to Golden and Adams, and served them until December, 1865, under a contract between him and them to pay him, instead of his owner."

Held: [85] "an actual enlistment into the Federal army would not have made Allan a free man; and certainly the felonious certificate of the intermeddling provost had no liberating effect. When, therefore, Allan returned to his hirers, he was still Noland's slave, and he continued a slave until the 20th of December, 1865. Consequently, the contract made with him by Golden and Adams was illegal and void;" [Robertson, J.]

*Hanna v. Guy*, 3 Bush 91, January 1868. [92] "an execution was levied on a female slave named Laura, who was sold by the officer . . . on the 1st of January, 1864. On the 18th of February, 1864, Laura died of some pulmonic disease, manifested only a few days after the sale . . . the testimony leaves the character and commencement of the fatal disease vexatiously doubtful."

*Wilson v. Commonwealth*, 3 Bush 105, January 1868. Wilson had been sentenced "to the penitentiary for two years on an indictment charging him with wounding Francis Fryrear, in January, 1864, with a ax, willfully and maliciously, with intent to kill him." Wilson and others [106] "meeting Fryrear, a stranger, carrying slaves, and apprehending, or pretending to apprehend, that he was, as others had often done during the war, running off slaves that he had no right to, attempted to stop him, and that he, not heeding them, went on with the slaves, all of which he owned; and, aiming to go to the house of Wm. Davis, about two miles off, he traveled briskly to elude his assailants, who pursued him. The appellant, traveling with more speed than his associates, overtook him at Davis' gate, and both entering at the same time, the appellant seized an

ax at Davis' 'woodpile,' and each of them struggling for the ax, the appellant held it, and striking Fryrear more than once with it, wounded his head and cut a thick neckerchief protecting his throat."

[108] "judgment of conviction . . affirmed."

*Milton v. Gaither*, 3 Bush 152, January 1868. [153] "In an action by the appellee against the appellant on a promissory note for seven hundred dollars, dated October 1st, 1864, the appellant answered that the only consideration of the note was a sale by the appellee to him of a slave, Henry, sold and bought only for a substitute of the appellant, who had been drafted as a soldier into the military service of the Federal army; that Henry, not being present or seen at the time of the trade, was represented by the vendor as suitable for a substitute; that the vendor not only guaranteed the adaptableness of Henry to the purpose for which the appellant needed him, but, knowing that he was under the standard height, breadth, and age, fraudulently made the false representation; that Henry was offered as a substitute, and rejected as too low and diminutive, and was worth nothing as a slave. . . a jury found for the appellee the amount of the note, and the court overruled a motion for a new trial."

Judgment reversed, and the cause remanded: [154] "Henry had been previously rejected as a substitute, because his form was too slight and his height under five feet two inches; and it was also proved that the appellee knew that the appellant's only motive for buying Henry was to relieve himself from the draft by substitution. The sale . . and purchase . . for that sole purpose implied a warranty of his suitableness to the end contemplated by both parties to the contract; . . and if . . Henry was worth nothing as a slave, there may have been an entire failure of consideration"

*Thomas v. Porter*, 3 Bush 177, February 1868. "If . . the order for one hundred dollars was drawn by Thomas on Proctor, in consideration of the price of a slave sold to Thomas by the appellee, which, shortly afterwards, became free by the amendment of the Federal Constitution, that contract did not import a guaranty of the service the slave might render; and the abolition of slavery, by the action of the government, was a contingency, like that of the death or escape of the slave, to be risked by the purchaser;" [Hardin, J.]

*Duhme v. Young*, 3 Bush 343, May 1868. Appellants alleged [345] "that Young and wife . . had in their possession [in 1860] a valuable negro woman and children . . worth between four thousand dollars and five thousand dollars, and of value sufficient to pay their debts; . . [347] Neither Mrs. Young, before her marriage with Young, nor herself and husband since then, sold any more of the slaves of intestate than were necessary to pay debts of which they had notice. . . [348] The negroes were a breeding woman and her children,"

*Finnell v. Meaux*, 3 Bush 449, May 1868. In 1861 Sally Meaux, a free woman of color, bought her husband, William Henry, a slave, from Finnell, his owner, and gave her note for nine hundred dollars. Her father, Humphrey Meaux, a free man of color, [451] "went her security



for the payment of the money. . . She died in 1863, and that soon after William Henry was at work at plaintiff's house; . . The only evidence of Finnell's assertion of ownership consists of his listing William Henry to work on railroads, under the military orders of General Fry, in the year 1863; . . [452] said slave ran away and escaped,"

Held: "as Finnell became executor in his own wrong, to the extent he illegally interfered with the assets of decedent Sally's estate, the amount and value of such assets in his hands should be regarded as a payment on the debt he holds against her and her father,"

*Whitmer v. Nall*, 2 Ky. Op. 361, May 1868. "on the 10th of November, 1865, . . Whitmer bought the man Martin at the price of \$225, . . Bidwell purchased one of the women, and her child, at the price of \$151, . . The other woman sold for \$50, . . [364] At the date of the sale, the adoption of the amendment to the Constitution of the United States was not only most probable, but was regarded generally as an event certain to take place within a short period, whereby the slaves in the United States would be emancipated. None could buy slaves then in ignorance of the precarious tenure by which such property was held, indeed there was no intrinsic or real value in slave property, and none could buy such property with the hope that there was any more than a contingent, speculative value in it. But even if there was no value *per se* in the slaves that fact did not destroy the legal obligation of the bonds given by appellants." [Peters, J.]

*Lewis v. Commonwealth*, 3 Bush 539, June 1868. [540] "Appellant, a freedman, having been adjudged by the . . county court, . . 1867, to be the father of the illegitimate freed child of Julia Martin, a freed woman, which was born December 25, 1864, when both the mother and putative father were slaves, and required to pay fifty dollars annually for its support, until it should arrive at ten years of age, appealed "

Judgment reversed: [543] "When this child was born, the owner, and not the putative father, was responsible for its support. Afterwards, it and its parents were freed; but no statute has provided that the slave putative father shall be responsible for the support of his illegitimate slave child, . . for, legally speaking, all persons born in slavery were born out of lawful wedlock." [Williams, J.]

*Shirley v. Landram*, 3 Bush 552, June 1868. [553] "action . . against the owners of the steamboat *General Lytle*, and H. Godman, the captain of the boat, to recover damages for the loss of a slave . . who . . was taken on board of said boat at Warsaw, . . and thence conveyed to Cincinnati, Ohio, without the plaintiff's written or verbal consent, . . whereby the slave escaped . . the judge . . rendered a judgment against the appellants for five hundred dollars."

*Brown v. Hawkins*, 3 Bush 558, June 1868. In 1865 Brown brought an action "against the executrix of E. C. Hawkins, for the recovery of five hundred dollars on the following written contract: 'For and in consideration of one thousand dollars, I have this day sold to Mason Brown my negro man slave, Pete, aged thirty-three years. I warrant that I have

good title to him; that he is a slave for life, and sound and healthy. As the said boy has heretofore run away, I covenant that, in case he runs away and escapes from the said Brown, I will refund five hundred dollars of the purchase money, without interest, as witness my hand this 16th of October, 1858. E. C. Hawkins.' The petition alleges that in August, 1864, Pete ran away from Brown, and neither returned nor could be recovered again. On a proper issue, the jury found a verdict for the defendant, and the court rendered a judgment in bar of the action."

Judgment affirmed: [560] "The fact that Peter remained in the service of Brown six years shows that his flight, with two others of Brown's slaves, was prompted by motives common to all of them, and to many other slaves who ran off about the same time, and was apparently not actuated by any morbid or unusual passion for running away peculiar to Peter when Brown bought him; and, consequently, Peter's escape, when and as it occurred, can not be rationally ascribed to the fugitive disposition which had prompted his flights before the sale to Brown; and, according to the only consistent construction of the contract, was not such a flight as the parties contemplated and intended to provide for." [Robertson, J.]

*Bailey v. Howard*, 2 Ky. Op. 294, June 1868. "an action on a note executed . . . on the 15th of February, 1861, . . . for the price of a slave Caroline,"

Held: "The purchasers of slaves, whilst slavery was an institution of the state, took them subject to any change in the laws by which such property was held that the people of the United States, or their legally constituted agents might make, unless they expressly provided in their contract for the contingency,"

*Payne v. Richardson*, 4 Bush 207, October 1868. Richardson alleged "that, in 1864, he loaned to Stuart Payne fifty dollars," Both [208] "were enlisted and put into the army of the United States in October, 1864, by their then masters [as substitutes], or with their consent, they then being slaves, and were, at the date of the transaction, which caused this litigation, colored soldiers, mustered into the service of the United States;"

Held: [209] "it cannot be said that they were taken from their owners in disregard of their rights; and by putting them in voluntarily, they thereby waived their right to compensation for their value, and emancipated them by their own acts; consequently, at the time the contract was made, the parties thereto were free and able to contract." [Peters, J.]

*McGehee v. Ditto*, 2 Ky. Op. 614, October 1868. "Ditto . . . was in 1864 in possession of two slaves named Sally and Scott, which by reason of his marriage and the death of his wife belonged to him as tenant for life, . . . he received \$900 for the services of Scott for one year from one Richardson, who used him as a substitute, and that he gave Scott \$50 of the money, and that he sold or hired said Sally to Armstrong, conditionally for a term of two years for \$200,"

Held: "the disposition made of the slave Scott was equivalent to an absolute sale for \$850, and was a substantial conversion of the estate

in him in remainder, but at a time when the property in him as a slave had, in consequence of the civil war, become prospectively of little or no value; . . . under all the circumstances the money so realized should be equitably apportioned between them [the owners of the slaves in remainder] and the defendant Ditto, according to their relative and respective rights;" [Hardin, J.]

*Lewis v. Watson*, 4 Bush 228, December 1868. [229] "In the year 1832, when colored Methodists, mostly slaves, were under the charge of the white Methodist Church then on Fourth, now on Fifth street, . . . a lot of ground on Centre street," was conveyed to trustees to build "a house of worship, for the use of the Methodist Episcopal Church of the United States; . . . [230] In the year 1845, . . . an additional and adjoining lot . . . to . . . white 'trustees of the Methodist Episcopal Church, South, for the use and benefit of the African members of said church,' to hold forever in trust 'for the use of the African members of the Fourth Street former charge, and a part of the mission of colored people worshipping on Centre, now under the direction of the Methodist Episcopal Church, South,' . . . said board of trustees . . . always to consist of white members. About the year 1854, Mary H. McGinnis . . . sold and covenanted to convey to the same uses an additional and adjoining lot . . . and in 1865 she conveyed the legal title to appellant, Peter Lewis, and others, colored persons . . . claiming to be 'trustees of the Centre Street Methodist Episcopal Church,' and a part of the church building is on the grounds thus conveyed." These colored "trustees" belonged to the "ruling majority" who had [229] "recently seceded and joined the Methodist organization North," and had evicted the minority who adhered to "the Methodist Episcopal Church, South."

Held: the seceding members forfeited their right to the church property.

*Munday v. Robinson*, 4 Bush 342, December 1868. On August 7, 1865, Hawkins executed to Robinson a note for one hundred dollars "for the hire of a negro woman named Martha for one year from this date, and in addition agree to clothe and pay all physicians' bills during the year for said girl." The amendment to the United States Constitution abolishing slavery, [343] "was declared adopted and in force on December 18, 1865,"

Held: [344] "the hirer is entitled to an abatement of the promised price" because of the legal failure of title.

*Vaughn v. Edwards*, 2 Ky. Op. 490, December 1868. [492] "four valuable men slaves, over twenty, and under thirty, years of age," [491] "worth [in 1855] nearly \$1,200 each, and their annual hire . . . worth not less than \$500,"

*Mulligan v. Corbins*, 7 Wallace 487, December 1868. "Solomon Brindley, a free colored man, was the owner, in 1808, of a small house and lot of trifling value, on Upper Street, in the city of Lexington," which escheated to the state on his death [488] "without any known legal heirs,"

*Farmers' Bank v. Johnson*, 4 Bush 411, January 1869. "The original judgment, ordering a sale of Johnson's lands, slaves, etc., to pay his

creditors, and directing that the aged and infirm slaves, Nancy and Harry, should be sold to the lowest bidder—that is, to the one who would provide for them, and bury them plainly and decently, for the least sum—to be paid out of the assets of the insolvent debtor, was only providing out of his estate for both the legal and moral obligation resting on him to take care of his aged and infirm slaves. Had these slaves not been sold, Johnson would have been released from this obligation when the United States Government abolished the relation of master and slave; . . . [412] The bank got Johnson's legal rights to these aged and infirm slaves, and was entitled to their services, whatever may have been the value thereof, and became legally responsible for their maintenance whilst remaining slaves, and for decent burial if they should die in slavery; but when the right to control the service of these slaves ceased by the political action of the Government, the bank's legal liability to maintain and bury them was also abolished. . . . dismiss all proceedings against the bank to compel it to maintain said infirm negroes since the adoption of the Thirteenth Amendment to the United States Constitution." [Williams, C. J.]

*Robinson v. Johnson*, 4 Bush 433, January 1869. Will of Polly Ficklin: "In regard to the real estate placed in the hands of my executor and trustees for the benefit of my emancipated negroes, I direct that none of said negroes shall have a right to sell their interest in the same; and upon any one attempting such sale, or upon any one or more moving off, the whole property shall remain for the use of the others; nor shall said property be sold by said trustees unless it should become unlawful for colored free persons to remain in the State, when said trustees shall be authorized to sell the property and apply the proceeds towards establishing them in a new home elsewhere." The circuit judge dismissed a petition [434] "seeking a sale and partition of said property." Judgment affirmed.

*Miller v. Miller*, 4 Bush 482, January 1869. [483] "Charles Miller, a free man of color, previous to the year 1859, made his will, by which he devised to his two free sons two certain lots in Louisville, giving his wife a life estate in one of them, . . . He requested his two free sons, if they should see proper, to buy and emancipate his slave son Henry, then belonging to Isaac Sturgeon, of St. Louis. . . . Sturgeon had . . . emancipated Henry before the testator's death, in the fall of 1865, . . . [484] Henry complains, insisting that he is entitled to an equal share of all."

Held: "he had a descendable and distributable interest equal to his brothers;"

*Ferguson v. Landram*, 5 Bush 230, June 1869. Chambers [242] "had two slaves subject to draft. . . . Britt had a slave subject to the draft of 1864; . . . Howard . . . had slaves subject to conscription,"

*Patrick v. Swinney*, 5 Bush 421, June 1869. [422] "the note [for seven hundred dollars] was executed [in 1858] for the price of a female slave, . . . she was not sound in body, but had a tumor on her neck, and some disorder similar to negro consumption or 'cachexy.' "



*Bullitt County Court v. Troutman*, 5 Bush 573, September 1869. [574] "two runaway slaves were held in custody by the jailer in Bullitt county, until, according to the statute,<sup>1</sup> they were publicly sold; and the proceeds, when distributed, leaving a balance of \$128 of the jailer's fees unpaid, he moved the court of claims of Bullitt to . . . levy the amount on the county, which it refused to do;"

Held: "The statutory provisions for apprehending, keeping, and selling runaway slaves were enacted for the security of the owners . . . the county is not liable for the deficit." [Robertson, J.]

*Walters v. Ratliff*, 5 Bush 575, September 1869. Will of Barnabas Johnson, recorded 1867, [576] "purports to emancipate a number of slaves of the testator, and to devise to them most of his real and personal estate. . . [577] the plaintiffs [claiming to be his heirs-at-law] alleged that a number of said devisees, who, if really emancipated, were, at the time of the testator's death, . . . in 1862, required, as a condition of freedom, to assent to be removed from this State, had never done so, . . . The court . . . dismissed the action,"

[578] "judgment is reversed, and the cause remanded:" "the heirs-at-law . . . had such an interest in the estate . . . as would authorize them to maintain the action for its recovery;" [Hardin, J.]

*Pendleton v. Pendleton*, 6 Bush 469, January 1870. Two slaves were sold in 1858 for \$2035.

*Porter v. Ralston*, 6 Bush 665, March 1870. In 1857 Page sold [667] "a large number of slaves at the aggregate price of twenty-four thousand two hundred and fifty dollars;" payable twenty years after date. "The deed contained the following covenants by Page: first, that all the slaves except three were sound; and second, that 'he will warrant the property . . . when the principal of the debt . . . and the several notes . . . for interest . . . are all paid off'"

Held: [669] "as the persons sold were the property of the vendor, and were then slaves for life, their subsequent emancipation was not, any more than their death, a breach of the warranty of title,"

*Wood v. Goff*, 7 Bush 59, June 1870. In 1851 [64] "Sam might have been hired, in the ordinary way of hiring out slaves from year to year, for \$130 per annum,"

*Roberts v. Roberts*, 7 Bush 100, June 1870. [102] "about 1838 three of the slaves, named Joe, Milly, and Mary, being of vicious character or ungovernable, were sold to a slave-trader for \$1,225, . . . some time afterward a slave named Brice was also sold,"

*Faris v. Dunn*, 7 Bush 276, October 1870. [278] "Before the year 1852, William Hoskins . . . owned . . . seven valuable slaves, three of whom were excellent blacksmiths, . . . [282] by keeping two of the blacksmiths—proved to have been worth fifteen hundred dollars each as late as the year 1863—they lost three thousand dollars as a consequence of the emancipation of those slaves in 1865."

<sup>1</sup> 2 Stanton 373.

*Tipton v. Wright*, 7 Bush 448, December 1870. [449] "The appellant sold a female slave named Jane . . for four hundred dollars in 1860,"

*Ewing v. Bibb*, 7 Bush 654, May 1871. [656] "Being slaves in 1824, John and Esther could not have contracted under the laws of Kentucky a legitimate marriage, . . when the *quasi* husband and wife by their emancipation became competent to contract marriage, the highest duty which they owed to themselves, their children, and to morality was to consummate and make perfect a union which had hitherto existed only by reason of the consent and approbation of their owners. Esther became a free woman in 1836, and John was emancipated February 25, 1850. From that day forward for more than a year they continued to reside together as man and wife, and held themselves out to the world as such. . . [657] Under the laws of Kentucky at that time the consent of the parties . . might be inferred from continual cohabitation as husband and wife . . these circumstances, taken in connection with the confession or declarations of the parties, would so far render the first marriage valid as to make the second legally void, if not criminal. . . the pretended marriage between John and Jane Barnett, which took place in June, 1851, Esther being at the time alive, was void in law." A lot was bought with Jane's money in March, 1852, but [658] "through some mistake the conveyance was made to John."

Held: "as the purchase price was paid by Jane, who was a feme sole, and not the wife of John, a trust resulted in her favor, . . the judgment in favor of John's children [by Esther] . . is reversed,"

*Spalding v. Wathen*, 7 Bush 659, May 1871. [660] "John, a man of color, who was held in bondage by Stanislaus Wathen, and who claimed to be free, brought his suit . . in 1858, . . to recover his freedom. . . upon hearing, in October, 1863, John's petition was dismissed. In 1864 John became a soldier in the United States army, . . [661] he died at Paducah . . about the 1st of April, 1865. This fact, however, does not seem to have been known either to the attorney who had been conducting John's suit or to the appellee Wathen. In December, 1865, said attorney prosecuted an appeal to this court from the judgment dismissing John's petition; and . . said judgment was reversed, and the cause remanded . . with instructions to enter judgment declaring John a free man, and for such other proceedings as might be necessary to secure to him the value of his services since the institution of proceedings to assert his freedom. The mandate and opinion of this court were filed, John's death suggested, and the suit revived in the name of . . his administrator. . . a trial . . resulted in a judgment against appellee for several hundred dollars. . . execution was issued, and . . a tract of one hundred and fifty-six acres of land, the property of Wathen, was levied upon and sold," Not till then had Wathen heard of John's death. Thereupon, in 1867, he filed a petition claiming [662] "that said appeal and reversal, and all the subsequent proceedings . . based upon the same, were absolutely void, and that the original judgment dismissing John's petition and

adjudging him to be a slave remained unreversed, and in full force and effect."

Wathen's petition was dismissed.

*Emerson v. Herriford*, 8 Bush 229, September 1871. [233] "twelve hundred dollars, . . . the value of a negro girl," sold in 1857.

*Allen v. Allen*, 8 Bush 490, January 1872. Charles and Mary Allen, "formerly slaves, . . . were married, and lived during their bondage in the relation of husband and wife according to the recognized custom of negro slaves in Kentucky; but who, on becoming free, did not, by complying with the statute<sup>1</sup> . . . continue their assumed marital relations; but . . . Charles Allen abandoned the appellant and married another woman; retaining the control, however, of Henry Allen, the infant son of himself and the appellant, whom he hired out, and whose wages are now the subject of this litigation. It . . . [491] is now contended for the mother of Henry, that . . . the condition of Henry . . . was simply that of a bastard; and that she . . . was entitled to his services, as against the putative father;"

Judgment for defendant (Charles Allen) reversed.

*Grigsby v. Wilkinson*, 9 Bush 91, October 1872. In 1849, [93] "he did pay his father the sum of \$402.50 for a negro, Sylvia,"

*Neely v. Merritt*, 9 Bush 346, March 1873. Will of Thomas Neely, who died in 1854: [348] "It is my will and desire that my male slaves—to wit, Richard, born April 10, 1841; John Franklin, born March 28, 1848; Reuben, born May 24, 1850; and George Henry, born July 24, 1852—be free so soon as they respectively attain the age of twenty-five (25) years; and that my female slave, Malinda Ann, born October 10, 1844, be free so soon as she attains the age of fifteen years. It is also my will and desire that my negro woman Ellinder, be free if she feels disposed to go with my other slaves to the colony of Liberia, in Africa; and I hereby emancipate and set free my above-named slaves, in the manner aforesaid, upon the terms and conditions prescribed in the constitution of the state of Kentucky. And it is my desire that they be hired out by my executor until a sufficient fund is raised for their transportation to the colony of Liberia, in Africa; and that my said slave Ellinder, who is at present about thirty years of age, be free and accompany them if she desires to do so. It is also my will and desire that should the said Ellinder give birth to any child or children, that it or they be, and I hereby set them, free upon the terms and conditions prescribed above for my other slaves; that is, the males at the age of twenty-five and the females at the age of fifteen years; and that they be hired and transported as aforesaid by my executor. And it is further my will and desire that my said slaves be hired within the county of Logan aforesaid until the time for their said transportation, and that they be not hired out of said county. . . . [349] By way of codicil to this my last will and testament, it is my will and desire that all my slaves be sent to Liberia when the oldest boy named in said will arrives

<sup>1</sup> Act of Feb. 14, 1866 (Myers's Supp. 734).

at the age of thirty (30) years, which will be in the year 1870, according to the provisions and conditions expressed in said will." The slaves were hired out, or held to service by the executor [350] "up to the 18th of December, 1865, when the thirteenth article of amendment of the Federal Constitution became part of that instrument."

Held: [353] "They were free persons from the day the will was admitted to probate. . . [354] "that after December, 1865, these appellants were not only free people, but that the fund in the hands of their trustee was their joint property. They did not forfeit their right to it by declining to subject themselves to the control of the trustee after they became absolutely free, nor by declining to remove from the state in 1870, they having then the right to remain." [Lindsay, J.]

*Duncan v. Kennedy*, 9 Bush 580, June 1873. The will of John L. Martin, who died in 1854, [583] "provided for the management of his plantation of about two thousand acres in . . . Mississippi, with his slaves . . . thereon, until 1872, . . . [584] After providing . . . for the emancipation of his slaves on said plantation, and their removal and colonization at the expense of the estate, . . . provision is made for the care and maintenance of the testator's old and infirm slaves;"

*Bush v. Groom*, 9 Bush 675, October 1873. [678] "the master commissioner was directed . . . to report the value of the [twenty-one] slaves, where they were, . . . and whether they could be divided into 'legal parts' (judgment of December 20, 1865). This is the last order in the case touching the disposition to be made of these slaves."

*Newman v. Proctor*, 10 Bush 318, October 1874. "In 1858 Snead . . . conveyed a lot of ground in Danville to . . . in consideration of . . . three hundred and twenty-five dollars . . . 'in trust for the use . . . of the colored members of the Methodist Episcopal Church South,' . . . At the time the deed was made there was a church edifice on the lot which seems to have been built mainly by contributions made by the colored people, most of whom were then slaves and members of the same local organization with the white people in Danville, belonging to the Methodist Episcopal Church South. From the time of the erection of the church in 1849 or 1850 the colored members seem to have worshiped exclusively in this church, though they continued to be members of the same organization with the whites. In 1865, the Ohio Conference of the African Methodist Episcopal Church having extended its jurisdiction over that part of Kentucky in which Danville is situated, the colored members of the Methodist Episcopal Church South at Danville, by unanimous vote, attached themselves to the African M. E. Church,"

*Whitesides v. Allen*, 11 Bush 23, March 1875. [24] "These appellees are the children of Daniel Allen, who was a slave until after the war, and who, after his emancipation, became the owner of some real estate in the city of Lexington. Daniel and his wife Jane were married while slaves in accordance with the custom among negroes, and continued to live together as man and wife until his death in the year 1868, but never availed themselves of the rights and privileges granted by the act of



February 14th, 1866.<sup>1</sup> . . [25] The brothers and sisters of Daniel Allen are asserting a claim to this real estate against Daniel's own children,"

Held: the second proviso of the second section of the act shows "clearly an intention on the part of the law-making power to regard the children of these customary marriages born prior to its enactment as legitimate, although their parents may have neglected to make any declaration of record showing their recognition of the relation of husband and wife." [Pryor, J.]

*Tanner v. Skinner*, 11 Bush 120, April 1875. In 1856, [122] "One negro girl and child" were valued at \$700.

<sup>1</sup> Myers's Supp. 735.



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