

Judicial Cases
concerning
American Slavery and the Negro

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VOLUME I

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



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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 ambigui-

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 unbiassed, 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.

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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 servant¹ 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 order² 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");³ the Christian negro servants;⁴ Indian servants; mulatto servants (whose servitude was the penalty for having a white mother and an Indian, negro

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

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

³ "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 yeares 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.

⁴ Usually without indentures; but see p. 57, *infra*.

or mulatto father,⁵ or, after 1723, for being descended in the maternal line from such a combination of ancestors);⁶ 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.⁷

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."⁸ 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"⁹ relates, "came in a dutch man of warre that sold us

⁵ 3 Hening 87. Re-enacted in 1705.

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

⁷ 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 casual killing of slaves. Whereas . . . the obstinacy of many of them by other than violent means [cannot be] suppress," 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 negroes," *ibid.*, 406; inventory of Walker's estate, in 1655, "4 white servants with certain times to serve and 3 negroes," 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 Negroes, 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 Negroes 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.

⁸ Randolph MS., 15 Va. Mag. Hist. 405.

⁹ "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."¹⁰ Even then the Virginia colonists did not learn the ways of slavery from those twenty,¹¹ for, though they had been slaves among the Spaniards, their capture by the Dutch frigate, cruising piratically among the West Indies,¹² 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,¹³ 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."¹⁴ We have only the scant testimony of their names.¹⁵

Of the original twenty negroes brought in, in 1619, we know perhaps the names of eleven.¹⁶ 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),¹⁷ 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 1625.¹⁸ 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

¹⁰ Relation of J. Rolfe, incorporated in John Smith's *Generall Historie of Virginia*, Arber ed., p. 541.

¹¹ See p. 59, *infra*.

¹² 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.

¹³ See Ballagh, *White Servitude in Virginia*.

¹⁴ *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 negroes to serve *durante vita* . . . for the prevention of the dammage 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.

¹⁵ 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.

¹⁶ 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.

¹⁷ Hotten, p. 224; Brown, *Genesis*, p. 987.

¹⁸ 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,¹⁹ 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. Antonio²⁰ came in 1621, in the *James*; Mary,²¹ in 1622, in the *Margrett and John*; John Pedro²² in 1623, in the *Swan*. The name Mary, if not an anglicized form of Maria, might have been bestowed either in England²³ 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),²⁴ had not been baptized, unless "Brase" was a corruption of "Blas" or "Blaise,"²⁵ 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,"²⁶ and finally to Sir Francis Wyatt, governor, as his servant.²⁷

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 1644:²⁸ "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

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

²⁰ Hotten, p. 241.

²¹ *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.

²² Hotten, p. 258.

²³ As in the case of John Philip, p. 55, *supra*.

²⁴ 24 Va. Mag. Hist. 56, n. 1.

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

²⁶ *Ibid.*, 72.

²⁷ *Ibid.*, 73.

²⁸ York County Records, 17 Va. Mag. Hist. 211.

Virginia: Introduction

the inventory of 1644, though they bore Christian names, seem to have been, not servants as the early negroes were, but slaves; for by 1644²⁰ times had changed.³⁰

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 1664.³¹ 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."³²

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.³³

There are two cases which illuminate the transition period in Virginia. In 1641³⁴ "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

²⁰ 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.

³⁰ 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.

³¹ See note 14.

³² 2 Hening 260.

³³ Wheeler, *Law of Slavery*, p. 5.

³⁴ 11 Va. Mag. Hist. 281; McIlwaine 477.

woman⁸⁵ 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 negroes⁸⁶ 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."⁸⁷ They may have been slaves originally, or they may have fallen to that condition.

The other important transition case⁸⁸ 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.⁸⁹ 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,⁴⁰ the term⁴¹ is reserved for white servants, in

⁸⁵ 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.*

⁸⁶ That is, in the printed records at present available.

⁸⁷ Northampton County Records, 5 Va. Mag. Hist. 40.

⁸⁸ Randolph MS., 17 Va. Mag. Hist. 232.

⁸⁹ 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.

⁴⁰ "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.

⁴¹ 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.⁴²

During these transition years the negro servant of the old class which enjoyed approximate, though not complete,⁴³ 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."⁴⁴ So late as 1669 Hannah Warwick's case before the General Court was "extenuated because she was overseen by a negro overseer."⁴⁵ His authority over a white servant was evidently felt, in 1669, to be somewhat *outré*.

In 1661 occurs the first reference,⁴⁶ 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 act⁴⁷ 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 bene 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;" † 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.

⁴² The status of mulatto servants for a term of years was created by act of April 1601. 3 Hen. 87.

⁴³ "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.

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

⁴⁵ 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.

⁴⁶ Act of Mar. 32 [12], 1661, 2 Hen. 26.

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

† 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,⁴⁸ 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 1670,⁴⁹ in which the term "christian servants" is used as a synonym of "white servants," supports this view.⁵⁰ Another act of 1670,⁵¹ 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 girls, untill thirty yeares of age, if men or women twelve yeares and no longer." This act favored the Indian, who usually came by land,⁵² 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,"⁵³ sold by John Indicott [Endicott] of Boston in 1678 to Richard Medlicott, to serve "But for Tenn yeares"⁵⁴ 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 sume 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)."⁵⁵

⁴⁸ 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 faction by Addicion of Tyme." 1 Md. Arch. 489.

⁴⁹ 2 Hen. 280.

⁵⁰ As to terminology, see note 41, *supra*.

⁵¹ Act of Oct. 3, 1670. 2 Hen. 283.

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

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

⁵⁴ "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.

⁵⁵ 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,"⁵⁶ 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, 1682⁵⁷ (which repeals the act of 1670),⁵⁸ "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.⁵⁹ One of Bacon's laws, however, dated June 5, 1676, provided "that all Indians taken in warr be held and accounted slaves dureing life,"⁶⁰ and, though it was repealed in February 1677 (after his fall), the restored government ordered "that all such souldiers who either already have taken⁶¹ 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 . . . reteyne and keep all such Indian slaves . . . to their owne proper use."⁶² The act of April 25, 1679,⁶³ 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 1670.⁶⁴ No

⁵⁶ 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.

⁵⁷ 2 Hening 490.

⁵⁸ *Ibid.*, 283.

⁵⁹ 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.

⁶⁰ 1 Hen. 346.

⁶¹ 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.

⁶² *Ibid.*, 404.

⁶³ *Ibid.*, 440.

⁶⁴ 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,⁶⁵ 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,⁶⁶ 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,"⁶⁷ 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 Powhatan⁶⁸ wher unknowne to me he sould me to him for a towne caled Powhatan."⁶⁹

The early settlers not only bought Indians from other Indians, but from other Englishmen. A Maryland colonist deposes in June 1648, that "Mr. Sowth⁷⁰ [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],⁷¹ and hee would give him content. And upon these speeches they went with the Sloope."⁷²

Conversely, "Coll Francis Yardley⁷³ and Nathaniel Batt both of Virginia for a good and valuable consideracion to them in hand payed . . . became bownd [in 1653⁷⁴ or 1654⁷⁵] unto . . . Thomas Cornwaleys [of Maryland] . . . in the penalty of five thousand weight of Tob, with cask, for the delivery of Two Indian yowths."⁷⁶

⁶⁵ 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.

⁶⁶ 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 ransom 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 murder, which they daily before lived in." Brown, *Genesis*, p. 643.

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

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

⁶⁹ Spelman's *Relation*. Smith (Arber ed.), p. cii.

⁷⁰ 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.

⁷¹ Lancelett's deposition. *Ibid.*, 392.

⁷² Duke's deposition. *Ibid.*

⁷³ 41 Md. Arch. 82.

⁷⁴ *Ibid.*, 254.

⁷⁵ *Ibid.*, 186.

⁷⁶ "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.⁷⁷ Indians were also reduced to slavery in punishment for crime.⁷⁸

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 Maryland⁷⁹ 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.⁸⁰

Besides the traffic in Indian slaves between Virginia and Maryland colonists, mentioned above,⁸¹ 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 Satisfaccion of another Indian belonging to the plt. sould by order of the deft. unto the Queene of Portoback."⁸² Sometime in the 1670's, the Indians Mary and Bess (the ancestresses⁸³ of Tom and others who brought action in 1792 to recover

⁷⁷ "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 Provinciall Court shall think fit to dispose of any of them otherwise." 3 Md. Arch. 282.

⁷⁸ See case of Naughnongis, 41 Md. Arch. 186 (1658).

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

⁸⁰ See p. 76, *infra*.

⁸¹ P. 62, *supra*.

⁸² 4 Md. Arch. 444, 512; 41 Md. Arch. 190, 471.

⁸³ 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)⁸⁴ 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."⁸⁵

That Indians were brought in and held in slavery for many years subsequent to 1682,⁸⁶ 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 1772⁸⁷ "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,⁸⁸ in June 1772,⁸⁹ "the court . . . gave judgment against many descendants of Indians introduced and held as slaves between 1682 and 1705."⁹⁰ That many Indians were reduced to slavery between 1691 and 1705 is shown by Hening's assertion that "thousands of their descendants" were "deprived of their liberty"⁹¹ when they sued for it later on.

In the revisal of the laws in 1705, "An act"⁹² concerning Servants and Slaves" re-enacts chapter 1 of the act of 1682 in substance, but omits the word "Indian," and the special clauses respecting Indian slaves.⁹³

⁸⁴ 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.

⁸⁵ 1 Hen. 346, 440, 490.

⁸⁶ 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.

⁸⁷ Robin v. Hardaway, Jefferson 109; p. 91, *infra*.

⁸⁸ Cited in Gregory v. Baugh, 2 Leigh 665 (685).

⁸⁹ 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.

⁹⁰ "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*.

⁹¹ "Unjustly deprived;" 1 Hen. vii. Judge St. George Tucker, in Hudgins v. Wrights, 1 Hen. and M. 134, agrees with Hening; 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.*

⁹² Ch. 49. 3 Hen. 447.

⁹³ 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."⁹⁴ 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"⁹⁵—a re-enactment of a law passed in 1691.⁹⁶

In 1772 the court expressly held, in *Robin v. Hardaway*,⁹⁷ that the act of 1682,⁹⁸ 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 1705,⁹⁹ 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,"¹⁰⁰ 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;¹⁰¹ 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.¹⁰² 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

⁹⁴ 3 Hen. 462.

⁹⁵ Ch. 52, sect. 12. 3 Hen. 468.

⁹⁶ 3 Hen. 69.

⁹⁷ Jefferson 109 (122).

⁹⁸ 2 Hen. 490.

⁹⁹ 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.

¹⁰⁰ 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.

¹⁰¹ 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*.

¹⁰² *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 1806¹⁰³ 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”¹⁰⁴ 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*¹⁰⁵ 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.¹⁰⁶ 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 1831,¹⁰⁷ 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.

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

¹⁰⁴ 3 Hen. 468.

¹⁰⁵ “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*.

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

¹⁰⁷ 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,¹⁰⁸ 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,¹⁰⁹ 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, 1723,¹¹⁰ 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,¹¹¹ 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.¹¹² The friendly Indian

¹⁰⁸ 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.

¹⁰⁹ To receive hearsay testimony as to pedigree, but not as to race or status.

¹¹⁰ 4 Hen. 132.

¹¹¹ 3 Hen. 252.

¹¹² 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"¹¹³ as they were called in Maryland (in distinction from "enemy pagans") might come to the colonists as hostages in exchange for English hostages,¹¹⁴ might be employed as servants, the male Indians being particularly useful in eking out the food supply by hunting and fishing,¹¹⁵ or might be brought in as children by their parents to be instructed in the Christian religion.¹¹⁶ In 1618, an unknown person in England gave "£550 in gold for bringing up children of the Infidels."¹¹⁷ 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,"¹¹⁸ "in true religion and civility."¹¹⁹ 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

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*.

¹¹³ "Infidel" was the general term for Indian in Virginia.

¹¹⁴ 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.

¹¹⁵ "The Salvages hath bene . . . employed 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.

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

¹¹⁷ *Cal. St. Pap. Col.*, I, 23.

¹¹⁸ 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 necessaries 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 benefit use and profit" of his invention "for safe keepinge of any Indyans, which he shall undertake to keep for guides allways ready to be employed, 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 runawayes" 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 peece." 2 Hen. 299.

¹¹⁹ 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."¹²⁰ 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."¹²¹

The act of March 1655¹²² 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."¹²³

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."¹²⁴ By another act of the same session,¹²⁵ after a preamble, "Whereas divers informations have been given . . . of sundry persons who . . . have corrupted some of the Indians to steale and conveigh 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

¹²⁰ Smith (Arber ed.), p. 543.

¹²¹ McIlwaine 477.

¹²² 1 Hen. 410.

¹²³ *Ibid.*, 306.

¹²⁴ Act of Mar. 13, 1658, ch. 48, 1 Hen. 455.

¹²⁵ Act of Mar. 13, 1658, ch. III, 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 1662¹²⁶ 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.¹²⁷ 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 1670¹²⁸ 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."¹²⁹ 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,¹³⁰ 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."¹³¹

The act of 1705¹³² provided that "if any woman servant shall have a bastard child by a negro, or mulatto,"¹³³ "she shall for every such offence, serve her . . . master . . . one whole year after her time . . . shall be ex-

¹²⁶ 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.

¹²⁷ 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.

¹²⁸ Act of Oct. 3, 1670, ch. 12, 2 Hen. 283.

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

¹³⁰ "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.

¹³¹ 4 Hen. 133.

¹³² Ch. 49, sect. 18, 3 Hen. 453.

¹³³ 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.¹⁸⁴

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."¹⁸⁵ 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, 1722,¹⁸⁶ 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 judges¹⁸⁷ 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 Wythe¹⁸⁸ and John Randolph of Roanoke¹⁸⁹ to those who were too illiterate to sign their names,¹⁴⁰ who, by the provision of their wills, sought to

¹⁸⁴ P. 165, *infra*.

¹⁸⁵ 25 Md. Arch. 390.

¹⁸⁶ 4 Hen. 104.

¹⁸⁷ 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.

¹⁸⁸ Wythe xxxvii.

¹⁸⁹ *Coalter v. Bryan*, 1 Grattan 18; p. 204, *infra*.

¹⁴⁰ *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 1691¹⁴¹ 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,"¹⁴² and in 1723 an act was passed,¹⁴³ 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."¹⁴⁴ 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."¹⁴⁵ Other slaves were emancipated by the assembly in 1779¹⁴⁶ and in 1780;¹⁴⁷ 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.¹⁴⁸ "The quakers had long been petitioning the legislature to pass"¹⁴⁹ such an act, and for

¹⁴¹ Ch. 16, 3 Hen. 87.

¹⁴² Act of October 1710, ch. 16, 3 Hen. 537.

¹⁴³ Ch. 4, sect. 17, 4 Hen. 132.

¹⁴⁴ 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).

¹⁴⁵ 9 Hen. 320.

¹⁴⁶ 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.

¹⁴⁷ *Id.* 372.

¹⁴⁸ 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), 1830.

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 . . . completely 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).

¹⁴⁹ *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.¹⁵⁰

In 1805 an act was passed which prohibited the emancipation of negroes unless they left the state,¹⁵¹ 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;¹⁵² and later when the project of colonizing free negroes in Liberia met with favor, the choice is offered between Liberia and slavery.¹⁵³

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."¹⁵⁴ 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,¹⁵⁵ 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."

¹⁵⁰ 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.

¹⁵¹ 1 Rev. Code, ch. 111, 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*.

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

¹⁵³ 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.

¹⁵⁴ Elder v. Elder, p. 171, *infra*.

¹⁵⁵ Bailey v. Poindexter, p. 243, *infra*.

At the May term of the same year, Judge Moncure was again in the minority. Mrs. Hannah H. Coalter¹⁵⁶ 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*.¹⁵⁷ 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*,¹⁵⁸ which was henceforth followed in all the slaveholding states.¹⁵⁹ 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,

¹⁵⁶ *Williamson v. Coalter*, p. 246, *infra*.

¹⁵⁷ 92 Va. 590.

¹⁵⁸ P. 138, *infra*.

¹⁵⁹ 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.¹⁰⁰

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."¹⁰¹ 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."¹⁰²

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.

¹⁰⁰ 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.

¹⁰¹ Fairclaim *v.* Guthrie, p. 103, *infra*.

¹⁰² 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. ¹ 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 ² 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 ³ 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 frigett alongge with them." Andrew Poe ⁴ 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 Tobaccho 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 ⁵ 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

¹ Testimony of a negro in the trial of a white man.

² "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.

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

⁴ "Of Holte in Northfolke . . shipt in Flushing." McIlw. 68.

⁵ "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 answer—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 employed 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.”¹

¹ 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 477,¹ 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,² 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]³ 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's⁴ 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 1671.⁵

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

¹ See also *ibid.*, 483.

² "Geaween" in 11 Va. Mag. Hist. 281.

³ *Ibid.*

⁴ Jno: Graweere's?

⁵ McIlw. 277.

by the said orphants [English¹] Servants and a negroe weoman." The [277] "negro weoman was confest . . . to be produced out of² 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 Mazingo v. Stone, McIlwaine 316, October 1672. "Whereas it Appareth by Divers Witnesses . . . that Edward Mazingo 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: Mazingo and Doctor Stone who married Coll. Walkers Widdow, It is Adjudged . . . that the said Edw: Mazingo 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 Constable³ 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."⁴

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 367,⁵ 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."

¹ McIlw. 289.

² "To have produced"?

³ Act of October 1670. 2 Hening 277.

⁴ See McIlw. 367 (1674), *infra*.

⁵ 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 negro 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 negro 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 negro 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 Act¹ 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."²

Major v. Marsh, McIlwaine 401, March 1675. "Clame . . . 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 Invalld 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."

¹ Act of March 1662. ² Hening 116.

² 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 negro soe lost." As, in the foregoing case, the English servants are to serve only two yeares for "Ja: . . . (who was his Honors Servt)" and as "Ja: . . ." evidently had a surname, which "Jno a negro 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 Bowse v. Bennett, McIlwaine 437, March 1676. "Tony Bowse 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."¹

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. "I. 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 ist. 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."

¹ [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 1723¹] 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.² 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 Def't. 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.³ And it was reversed by the whole Court except one."

Churchill v. Machen, Rand. Sir J. 30, April 1730. "The Def't. 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 Def't. 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. 35,⁴ April 1730. "John Williams was possessed of two Negro Boys Arther and Bill and two Negro Women

¹ Rand. Sir J. 30.

² Affirmed. *Churchill v. Machen*, *infra*.

³ "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.

⁴ 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. 36,¹ 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 married 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. 39,² 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

¹ Also Jefferson 2.

² 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. 61,¹ 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"

¹ 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. 112,¹ October 1733. "to his Daughter Fitzhugh he gives 2 Negroes of 40£ value Sterling"

The King v. Moore, Barradall 38,² 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

¹ Barradall 34. *McCarty v. McCarty's Ex'tors.*

² 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 43,¹ 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 45,² 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. 109,³ 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 56,⁴ 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

¹ Jefferson 10.

² *Ibid.*

³ Barradall 52; Jefferson 37.

⁴ 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 Toter fort . . . And gave his Wife the Use of most of his Plate . . . during Life"

Spicer v. Pope, Barradall 232,¹ 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."²

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 67,³ October 1737. "Henry Haywood possessed of divers Slaves and other Estate by his Will *inter al.*

¹ Jefferson 43.

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

³ "Hayward," Jefferson 52.

devised the Guard'n'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 71,¹ 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 119,² 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."

¹ Jefferson 52.

² 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 afd 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 plaintiff¹ 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

¹ 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."¹ 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 1684.² . . . 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 1691,³ which repealed 'all former clauses of former acts of Assembly, limiting, *restraining,*⁴ 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 1705,⁵ if it was then subsisting." Colonel Bland, for the defendants, contended that the act of 1684, in repealing the act of 1679,⁶ 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

¹ "Chapter 1. Purvis 282." ² Hening 490.

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

³ "Chapter 9. Rolls of the House of Burgesses." ³ Hening 69.

⁴ Italics are presumably Mason's.

⁵ "Chapter 49." ³ Hening 447.

⁶ "Chapter 1. Purvis 229." ¹ 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 1691¹ repealed that of 1682, but that it was repealed by the act of 1705."²

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,

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

² 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.¹ The testator provides, [614] "In case the laws of the land will not admit of such freedom,² 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 1787,³ 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-

¹ 12 Hening 613.

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

³ 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.¹ 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*).²

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)³ 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 slaves.

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,⁴ 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

¹ "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.

² See p. 105, *infra*.

³ St. George Tucker, reporting the case.

⁴ 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).

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