REFERENCE

COLLECTIONS

Judicial Cases
concerning
American Slavery and the Negro

EDITED BY THE LATE
HELEN TUNNICLIFF CATTERALL
(MRS. RALPH C. H. CATTERALL)
WITH ADDITIONS BY
JAMES J. HAYDEN
Law School, Catholic University of America

VOLUME V

Cases from the Courts of
States north of the Ohio and west of the Mississippi Rivers
Canada and Jamaica

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PREFACE

This volume is the fifth and last of a series intended, as aptly stated by Dr. J. Franklin Jameson in his preface to volume IV,

> to furnish an unbiassed picture of American slavery as an actual institution, social and economic, by drawing off from the printed reports of cases in the highest state courts and those of the United States, all factual statements and quotations illustrating slavery and the life of the negro, and accompanying these by compressed versions of the law as pronounced by the respective courts.

Volume I of this series was published in 1926, and the succeeding volumes have appeared at intervals of two or three years since that date. The plan of making such materials available in condensed form may be credited to Dr. Jameson whose brilliant mind and gift for accomplishing large tasks are too well known to need restatement. The enormous bulk of case material condensed into five volumes of moderate size with perfect accuracy of form and substance will remain a lasting memorial to the vision of the man who made the original plan and carried it to a successful conclusion through a period of some twelve years.

In this final volume are presented the cases for the following states: Arkansas, California, Illinois, Indiana, Iowa, Kansas, Michigan, Missouri, Nebraska, Ohio, Texas, and Wisconsin, together with similar cases from Canada and Jamaica.

The privilege of completing this project over which Mrs. Catterall labored for the major portion of ten years prior to her death in 1933 has been thoroughly enjoyed. That pleasure has been increased by the confident belief that in future years students of history in this field will have available for convenient use such an accurate picture of slavery and the American negro as is rarely found among the volumes of source material in the history of this country.

The index has been prepared by Mr. David M. Matteson.

JAMES J. HAYDEN.

MAY 15, 1937.

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LIST OF ABBREVIATIONS

Am. Law J. = *American Law Journal.*
Am. Law Reg. = *American Law Register* (Philadelphia).
Am. Law Rev. = *American Law Review.*
Ark. = *Reports of Cases at Law and in Equity argued and determined in the Supreme Court of Arkansas.*
Bond = Lewis H. Bond, *Reports of Cases decided in the Circuit and District Courts of the United States within the Southern District of Ohio.*
Breese = Sidney Breese, *Reports of Cases at Common Law and in Chancery argued and determined in the Supreme Court of the State of Illinois.*
Brit. Stat. at L. = *British Statutes at Large.*
Cal. = *Reports of Cases determined in the Supreme Court of the State of California.*
Causes Célèbres = [François Gayot de Pitaval], *Causes Célèbres et Intéressantes.*
Dall. Dig. = James W. Dallam, *Digest of the Laws of Texas.*
Digest = [*See* Steele and McC. Dig.]
Digest of 1835, 1845, 1855 = *The Revised Statutes of the State of Missouri, revised and digested by the Eighth* [*Thirteenth, and Eighteenth*] *General Assembly.*
Douglass = Samuel T. Douglass, *Reports of Cases argued and determined in the Supreme Court of the State of Michigan.*
Fed. Cas. = *The Federal Cases, comprising Cases argued and determined in the Circuit and District Courts of the United States.*
Geyer = Henry S. Geyer, *A Digest of the Laws of Missouri Territory.*
Gilman = Charles Gilman, *Reports of Cases argued and determined in the Supreme Court of the State of Illinois.*
Gould Dig. = Josiah Gould, *Digest of the Statutes of Arkansas.*
Grant (Jam.) = John Grant, *Notes of Cases adjudged in Jamaica.*
Greene (Iowa) = George Greene, *Reports of Cases in Law and Equity, determined in the Supreme Court of the State of Iowa.*
Hagg. Adm. = John Haggard, *Reports of Cases argued and determined in the High Court of Admiralty.*
Hart. Dig. = Oliver C. Hartley, *A Digest of the Laws of Texas.*
Hempstead = Samuel H. Hempstead, *Reports of Cases argued and determined in the United States Superior Court for the Territory of Arkansas.*
How. and Hutch. Dig. = Volney E. Howard and Anderson Hutchinson, *The Statutes of the State of Mississippi of a Public and General Nature, with the Constitutions of the United States and of this State.*
How. Miss. = Volney E. Howard, *Reports of Cases argued and determined in the High Court of Errors and Appeals of the State of Mississippi.*
Howard = Benjamin C. Howard, *Reports of Cases argued and adjudged in the Supreme Court of the United States.*
Ill. = *Reports of Cases determined in the Supreme Court of the State of Illinois.*
Ind. = *Reports of Cases argued and determined in the Supreme Court of Judicature of the State of Indiana.*
Iowa = *Reports of Cases in Law and Equity, determined in the Supreme Court of the State of Iowa.*
Johns. Cas. = William Johnson, *Reports of Cases adjudged in the Supreme Court of Judicature of the State of New York . . . . together with Cases determined in the Court for the Correction of Errors.*
Johnson (N. Y.) = William Johnson, *Reports of Cases argued and determined in the Supreme Court of Judicature, and in the Court for the Trial of Impeachments and the Correction of Errors, in the State of New-York.*
Kan. = *Reports of Cases argued and determined in the Supreme Courts of the State and Territory of Kansas.*
L. T. Rep. = *Law Times Reports of all the Courts.*
La. = *Louisiana Term Reports or Cases argued and determined in the Supreme Court of the State of Louisiana.*
Law Rep. = *Monthly Law Reporter.*

Laws Mo. = *Laws of Missouri.*
McLean = John McLean, *Reports of Cases argued and decided in the Circuit Court of the United States, for the Seventh Circuit.*
Mart. La. = François X. Martin, *Orleans Term Reports or Cases argued and determined in the Superior Court of the Territory of Orleans.*
Mich. = *Reports of Cases heard and decided in the Supreme Court of Michigan.*
Miss. = *Reports of Cases decided by the Supreme Court of Mississippi.*
Mo. = *Reports of Cases argued and decided in the Supreme Court of the State of Missouri.*
Neb. = *Reports of Cases in the Supreme Court of Nebraska.*
O. and W. Dig. = Williamson S. Oldham and George W. White, *A Digest of the General Statute Laws of the State of Texas.*
Ohio = *Reports of Cases argued and determined in the Supreme Court of the State of Ohio.*
Ohio St. = *Reports of Cases argued and determined in the Supreme Court of Ohio.*
Pas. Tex. Dig. = George W. Paschal, *A Digest of the Laws of Texas.*
Peters = Richard Peters, *Reports of Cases argued and adjudged in the Supreme Court of the United States.*
Rev. Stat. = *Revised Statutes of the United States.*
Rev. Stat. U. C. = *Revised Statutes of Upper Canada.*
S. and M. = W. C. Smedes and T. A. Marshall, *Reports of Cases argued and determined in the High Court of Errors and Appeals of the State of Mississippi.*
Scammon = J. Young Scammon, *Reports of Cases argued and determined in the Supreme Court of the State of Illinois.*
Stat. at L. = *Statutes at Large of the United States.*
Steele and McC. Dig. = John Steele and James McCampbell, *Laws of Arkansas Territory.*
Stew. Vice-Adm. = James Stewart, *Reports of Cases, argued and determined in the Court of Vice-Admiralty at Halifax, in Nova-Scotia.*
Tex. = *Reports of Cases argued and decided in the Supreme Court of the State of Texas.*
Tex. Supp. = Supplement to volume 25 of *Reports of Cases argued and decided in the Supreme Court of the State of Texas.*
Thorpe = Francis N. Thorpe, *The Federal and State Constitutions, Colonial Charters, and other organic Laws of the States, Territories, and Colonies, now or heretofore forming the United States of America.*
U. C. R. = *Report of Cases decided in the Court of Queen's Bench.*
U. S. = *Cases argued and adjudged in the Supreme Court of the United States.*
U. S. L. = *United States Laws.*
Wallace = John W. Wallace, *Cases argued and adjudged in the Supreme Court of the United States.*
Wheeler Cr. Cas. = Jacob D. Wheeler, *Reports of Criminal Law Cases.*
Wis. = *Reports of Cases argued and determined in the Supreme Court of the State of Wisconsin.*
Wright = John C. Wright, *Reports of Cases at Law and in Chancery, decided by the Supreme Court of Ohio.*

JUDICIAL CASES CONCERNING SLAVERY

OHIO

INTRODUCTION

I

The state of Ohio was part of the Northwest Territory, and was bound by the Ordinance of 1787, Article VI of which provided that " there shall be neither slavery nor involuntary servitude in the said territory, otherwise than in punishment of crimes."

Probably the most bitterly contested litigation concerning the negro in Ohio revolved around the fugitive slave law passed by Congress in 1793, and amended in 1850. In the case of *Ex parte* Bushnell,[1] the defendants filed a petition for habeas corpus to test the validity of the Fugitive Slave Law of 1850, under which they were convicted and serving a term of imprisonment for obstructing the master of an alleged fugitive slave in the seizure of the slave. The attorney-general of Ohio delivered an impassioned argument running through some seventy pages of the report of the case and contended that under the federal constitution Congress had no power to enact the act of 1850, or the act of 1793, on the same subject; that the acts were in reality a violation of the constitution; and that the Supreme Court of the United States was a sectional court, favorably inclined toward slavery. The opinion of the Ohio Supreme Court was that the right of Congress to enact the legislation complained of had long been settled by the adjudications of the Supreme Court of the United States, and hence petitioners were remanded to the United States marshal to serve the remainder of their term. Judge Sutliff filed a vigorous dissenting opinion in which he expressed the conviction that the power to legislate on the subject of slavery " belonged originally to the states " and was never yielded up by them to the federal government, hence that the act of 1850 was unconstitutional.

A curious example of the application of the Fugitive Slave Act of 1793 occurred in 1831.[2] Defendant Daily bought his sister Kate, a slave, at a sale, for a small price by declaring that his purpose was to liberate her from slavery. Shortly thereafter he declared her free; Kate gave birth to plaintiff Tom soon afterwards. Later Daily bought a slave from defendant Desha, and as security gave him a bill of sale to Tom, who evidently believing that the best defense was to take the offensive, brought

[1] P. 32, *infra*.
[2] Tom *v.* Daily, *et al.*, p. 3, *infra*.

suit to enjoin the threatened interference with his liberty. Desha contended that he had a right to possession of Tom under the act of 1793, but the court took the position that the conduct of Daily amounted to emancipation of Kate, and that Tom was therefore born free, and that neither Daily nor Desha had any rights against his person.

Sentiment in Ohio during the early days of its statehood was highly adverse in the matter of social relations with the negro. The Ohio Constitution [3] restricted the voting privilege to whites, and statutes carefully restricted admission of children to the common schools to those of white blood. Notwithstanding these limitations, we find the Ohio Supreme Court in 1843,[4] ruling that a plaintiff was entitled to damages because his children were denied admission to the common schools attended by white children, although his children were found to be of negro, Indian, and white blood, but of more than one half white blood. However, the apparent pro-negro trend of this decision is effectively destroyed by a later case,[5] which denied relief to a plaintiff whose children had about five-eighths white blood, and three-eighths negro blood, and were refused admittance to the common schools for whites. The court held that the act of 1853, which provided for separate schools for white and colored, and for a division of the school funds on the basis of population of whites and negroes, was a statute of *classification* and not of *exclusion,* hence was a valid exercise of legislative power in recognizing the natural antipathy of white people for the black race in making separate provision for the educational facilities for each class.

II

The Ohio Constitution of 1802 provided for a Supreme Court of three judges, having original and appellate jurisdiction as arranged in detail by the general assembly, but also provided that after five years the assembly might add a judge. This was done by act of 1807. An act of 1810 reduced the number to three; an act of 1816 restored the fourth judge. The Constitution of 1851 arranged that the court should consist of five judges.

[3] Art. 4, sect. 1.
[4] Lane *v.* Baker, p. 9, *infra.*
[5] Van Camp *v.* Logan, p. 24, *infra.*

Gray v. Ohio, 4 Ohio 353, January 1831. " Polly Gray was indicted for robbery. On the trial, . . the prosecuting attorney called . . a negro, as a witness . . counsel for the prisoner objected to his admission, . . under the statute regulating black and mulatto persons. The prisoner appeared, . . to be of a shade of color between the mulatto and white. The court over-ruled the objection, and the witness was admitted. . . counsel for the prisoner excepted; . . judgment being against her, she brought her writ of error."

Judgment reversed: [354] " The witness was improperly admitted. The statute compels courts of justice to reject black and mulatto witnesses, where a white person is a party. . . the court has no alternative but to yield to . . the legislative will. Three descriptions of persons are designated, by name, in the statute,—white, black, and mulatto; and these . . are well known, . . in common life; . . We are unable to set out any other plain and obvious . . mark between the different races. Color . . is sufficient. We believe a man, of race nearer white than a mulatto, is admissible as a witness, and should partake in the privileges of white. . . a party of such a blood entitled to the privileges of white, partly because we are unwilling to extend the disabilities . . further than its letter requires, and partly from the difficulty of defining . . the degree of duskiness which renders a person liable to such disabilities."

Tom v. Daily et al., 4 Ohio 368, January 1831. " injunction to restrain the defendants from interfering with the personal liberty of the complainant; . . The bill, . . charged that Kate Daily, the mother of Tom, and sister of the defendant, Thomas Daily, was formerly a slave . . at a public sale . . Kate, . . ensciente with . . Tom, was sold to . . Daily, brother of Kate, . . Daily made public proclamation, that his sole object in purchasing Kate was, to liberate her from slavery, . . In consequence of this public declaration, Daily purchased Kate without opposition, . . pronounced her a free woman, . . Kate removed to plantation of James Dummit, . . where the [369] complainant, Tom, was born, soon after the purchase . . Tom always lived with his mother, until she placed him, . . under the protection of . . Orange Witt, . . Daily, purchased a slave of the defendant, Joseph Desha, and to secure . . purchase money, gave Desha a bill of sale of the complainant. . . at the time . . complainant . . was not delivered to Desha. . . Desha threatened to . . reduce him to slavery, but his mother, . . sent him to Cincinnati, . . the mayor of Cincinnati, . . issued his warrant, . . The bill charges that Desha, . . knew that his mother . . was . . emancipated, . . Desha answered . . but denied all knowledge of the declaration . . to emancipate Kate. . . Daily . . informed him that he never intended to emancipate complainant."

Held: [371] " This is a contest between the complainant, . . and . . Desha . . who claims the complainant, as a fugitive slave, under the act of Congress of 1793. The . . question . . seems to be whether the acts . . of . . Daily, . . constitute . . emancipation . . a court of equity will enforce. . . The conduct of Daily . . was a fraud. . . Will a court of equity now permit him to turn around and claim his sister and her offspring as slaves? . . [373] The mother, . . in equity, . . was virtually, if not actually and formally, free at the . . birth of the complainant. It . . follows . . complainant was free. . . being free born, . . not the subject of property, . . neither Daily nor Desha, who claim under him, have any rights as against the person of the complainant."

Lawson v. Perry, 1 Wright 242, April 1833. "Assumpsit, for wages as steward of the steamboat *Pioneer.* The plaintiff proved the service and the common rate of wages. The defendant proved certain payments, . . Wright, J. to the jury. The plaintiff claims for wages as steward . . If he has satisfied you of the service, the law raises the presumption that he was to have common wages, . . $25 a month. . . defendant is also to show you the payments, if any. You have nothing to do with the color of the plaintiff, except to take care not to be influenced. . . that he is not of your color. The relation of the parties is no otherwise material than to ascertain if . . plaintiff must . . rely upon the defendant's . . books for his accounts. . . Verdict for the plaintiff, $94.50. Defendant moved for a new trial, which was overruled and judgment entered on the verdict without costs."

Woods v. Green, 1 Wright 503, April 1834. [504] " Replevin for a sorrel horse. Plea . . notice that the property in the horse is in the plaintiff. . . Crediting the witnesses, there were two horses nearly alike— . . The defendant's horse had been wounded . . in the breast, in the flank, under the belly . . and on the hip. . . Scars were found on the breast, on the hip, in the flank, and under the belly near the sheath. . . When the defendant (a colored woman) came to . . claim the horse, she said her horse had a habit of leering his ears, and would obey her call. They went to the horse—his leering habit was noticed. He was then turned into a field—she whistled for him, and he immediately came . . from a distance. . . The horse was then placed in the stable yard. She spoke to him, called him Tom, ordered him into the stable, and he walked in—he had been before fed there. The horse was then bridled and brought up to the fence, . . He held off from the fence—she reached up . . and spoke sharp to him to come up, and he instantly obeyed. . . Wright, J. to the jury. Woods has taken the horse . . and now has it. The defendant . . claims property in herself. . . If you find the property in the plaintiff, your verdict will be that the defendant is guilty, and you will assess . . damages . . If the property is in the defendant, your verdict will be for her, . . [505] and give her damages . . for the value of the horse . . Verdict for defendant, and $58 damages . . for the injury."

Williams v. School District, 1 Wright 578, May 1834. [579] " Williams brought suit against Cilly, . . as directors of school district No. 6, . .

He declared . . that the plaintiff was a citizen . . had property taxable for schools, had five white children over four years old which he sent to said school, who were refused admission . . It was proven . . that the plaintiff was one-quarter negro, and his wife, . . a white woman; . . the court below gave . . their opinion that the plaintiff could not sustain his action, and the jury without retiring found for the defendants,"

Held: " The law provides that while the teacher is employed out of the common school fund, the school shall be free to all white children: . . The real question we are asked to decide is, whether the children of a white mother, and a father three-quarters white are white children within the meaning of the law? . . Mr. Van Matre and Mr. N. Wright, insist that we resort to the color or complexion to determine who are white persons and do not inquire of the blood. . . a resort to color would be un-[580] satisfactory, . . We think the term white . . describes blood and not complexion, . . The plaintiff's children, therefore, are white within the meaning of the law, though the defendants have had the shabby meanness to ask from him his contribution of tax, and exclude his children from the benefit of the schools he helped to support. . . the Common Pleas erred in determining otherwise . . our examination shows these proceedings have been so negligently conducted for the plaintiff, as to present for him no right to judgment; . . we decide the main question for the plaintiff in error, . . must affirm the judgment with costs."

Birney v. Ohio, 8 Ohio 230, December 1837. " plaintiff . . was indicted for harboring and concealing a fugitive female colored slave. . . The first count, . . was . . ' That James G. Birney, . . did unlawfully harbor . . a certain mulatto girl . . Matilda then being a slave and the property of one Larkin Lawrence, contrary to the form of the statute,' . . The jury found the traverser guilty on the first count, and not guilty on all the others. The court adjudged him to pay a fine [231] of $50,"

Reversed: [237] " The statute upon which the indictment is predicated enacts, ' that if any person shall harbor or secrete any black or mulatto person, the property of another, the person so offending shall, on conviction thereof, be fined any sum not less than ten nor more than fifty dollars.' We . . consider whether, . . the indictment is sufficient? . . every indictment shall have a precise . . certainty. . . [238] There is no averment that the plaintiff in error *knew the facts alleged,* that Matilda was a slave, and the property of L. Larkin [*sic*], . . the presumption is in favor of freedom. . . knowledge . . was an ingredient necessary to constitute his guilt. . . knowledge should have been averred in the indictment, and proved on the trial, . . We know of no case where . . action is held criminal, unless the intention accompanies the act, . . it can not be assumed that an act which, . . involves no moral wrong, . . should be made . . criminal, when performed in total unconsciousness of the facts that infect it with crime."

Jeffries v. Ankeny, 11 Ohio 372, December 1842. " suit . . by the plaintiff against the trustees of Zenia township, for refusing his vote. . . [373] The jury find the defendants presiding as judges . . that the

plaintiff tendered his vote, and offered to prove his qualifications, . . defendants rejected his vote, because, . . plaintiff was 'a person of color.' That the plaintiff was of the Indian race, without more than one-fourth Indian blood."

Held: [374] "no suit lies against an officer, for a mistake in the exercise of his judicial discretion; . . It is only in cases of intentional injury, . . that the jury will . . inflict a severe penalty. . . The other question depends upon the construction of that passage of the constitution, 'free white citizens,' whether it [375] excludes from voting all persons having the intermixture of any other blood than that of entirely white persons. . . many persons . . the offspring of whites and half-breed Indians, . . have exercised political privileges . . One is . . a clerk of this court, and two are now members of this bar, . . We regard this matter as clearly settled . . that all nearer white than black, . . entitled to enjoy every political and social privilege of the white citizen; . . Judgment for plaintiff." [Lane, C. J.]

Dissenting: "The words of the statute, . . excludes Indians and part Indians, and all persons not of the pure blood of the white [376] race. . . The Indians are a distinct people, governed by their own laws and customs. . . Indians are not designated as white men. . . If it be desirable to extend the benefits of the educational fund of Ohio to Indians, and part Indians, the statute must be altered; as it now stands, it excludes them." [Read, J.]

Thacker v. Hawk et al., 11 Ohio 376, December 1842. "action . . against the defendants, trustees . . for refusing . . plaintiff's vote at an election . . On the trial, the following bill of exceptions was taken: [377] . . the evidence . . being closed, some . . tended to prove that the plaintiff . . had some negro blood in him, . . the court did instruct the jury, that if the plaintiff had . . any negro blood . . he was not entitled to vote . . plaintiff excepted . . [379] No argument for the defendants in error came to the hands of the reporter."

Reversed: "This case presents the same question as in Jeffries v. Ankeny et al.,[1] and must be decided by the same principles. The court charged the jury, that if the plaintiff had any negro blood whatever, he was not a lawful elector. That charge was wrong, and judgment must be reversed." [Lane, C. J.]

Dissenting: "I can not concur in the opinion, that any person of less than half black or negro blood, has the right of an elector, under the constitution of Ohio. . . color is a constitutional qualification of an elector in Ohio, and that instrument confers the . . [380] franchise upon white persons only, and . . excludes all persons . . not white. . . The word 'white' means pure white, unmixed. . . A mixture of black and white is not white; . . The word white has never been applied to persons of any shade of black or negro blood, . . [381] Whether a man is white or black, is a question of fact; that the white man, only, shall have the right to vote, is a rule of law; . . [384] The two races are placed as wide apart by the

[1] Same *v.* same, p. 5, *supra*.

hand of nature as *white from black*; . . to break . . the barriers, fixed, . . by the Creator himself, . . shocks us as something unnatural and wrong. . . [385] It violates the spirit of the constitution, because, . . I see no difference in allowing a mulatto to vote, and a person little less than mulatto, or a full black, for the tint of black blood extends to them all, and this is the reason of their exclusion." [Read, J.]

Chalmers v. Stewart, 11 Ohio 386, December 1842. " The declaration avers that the defendant in error was ready and willing to teach, etc., . . and the refusal of the plaintiff in error to pay, . . the cause submitted to the jury, a verdict found for the defendant in error, . . it appears that the plaintiff . . offered to prove . . that the defendant . . was employed by the directors . . to teach a common [387] school, his salary to be paid in part out of the common school fund, and . . by subscription, and that he had, . . received . . youths who, . . were colored, . . plaintiff . . withdrew his children from school; . . evidence was objected to . . objection sustained . . did the court . . err in the rejection of this evidence? . . The school . . was a public school; . . Section 51 . . provides, that all white youth over four and under twenty-one years . . entitled to equal privileges. . . By law, white children, only, have the privileges of common schools. A teacher, . . If he does admit blacks, . . violates the obligation . . to keep a legal school; . . the evidence offered was the direct admission . . that he did receive . . youths, against . . the statutes. This evidence . . was [388], and if . . established . . a bar to a recovery. . . the obligation not to admit blacks is imposed by statute. . . Judgment reversed "

Jones v. Van Zandt, 13 Fed. Cas. 1040, July 1843. Action of trespass on the case, brought by Jones, a citizen of Kentucky, against Vanzandt, a citizen of Ohio, " under the act of congress, in regard to fugitives from labor.[1] . . Jones, a witness . . stated that the plaintiff owned nine negroes (naming them) and resided in Boone county, Kentucky. That the greater part of them were born his, and that he purchased the others. That on Saturday evening, the 23d April, 1842, about nine o'clock, he was at the house of the plaintiff, and saw the negroes; the next day, at about twelve o'clock, he saw the same negroes, with the exception of two of them, in the jail at Covington. The plaintiff lives ten miles below Covington. Jackson, one of the absent negroes, returned in a few days; but Andrew remained absent, and has not been reclaimed. The plaintiff paid a reward to the persons who returned the negroes of four hundred and fifty dollars, and other expenses which were incurred, amounting in the whole to about the sum of six hundred dollars. Andrew was about thirty years old, and his services were worth to the plaintiff six hundred dollars. That he could be sold in Kentucky for that sum. . . Hefferman, a witness, stated, that he lives in Sharon, thirteen miles north of Cincinnati, on the road to Lebanon. That on Sunday morning, a little after day-light, he saw a wagon which was rapidly passing through Sharon. It was covered, and both the hind and fore part of the wagon were closed; a colored man was

[1] Act of Cong., Feb. 12, 1793. 1 Stat. at L. 302.

driving it. He knew the wagon belonged to the defendant, and his suspicion was excited. The witness and one Hargrave, another witness, started, in a short time, in pursuit of the wagon. They overtook it near Bates', about six miles from Sharon. The defendant lives near Sharon. On coming up with the wagon, the boy driving it was ordered by Hargrave to stop; he checked the horses, but a voice from within the wagon directed the boy to drive over him. The wagon horses were then whipped, running against Hargrave's horse which threw him off. The horses were driven in a run some two hundred yards, but at length were overtaken by the witness, who seizing the reins of the horses drew him up into a corner of a fence. The driver jumped off and ran some distance; Vanzandt, the defendant, then came out of the wagon and took the lines, but the witness refused to let the horses proceed. Eight negroes were in the wagon; one of them called Jackson, and Andrew, the driver, escaped; the other seven were brought back to Covington and lodged in jail. Hargrave, accompanied the above witness in pursuit of the wagon, which he knew to belong to the defendant. Being acquainted with the defendant, he knew it to be his voice, which directed the colored boy to drive over the witness. . . the defendant said it was a christian act to take slaves and set them at liberty. . . 'they are, by nature, as free as you and I.' The witness heard the defendant say that, having been at market in the city of Cincinnati, he returned to Lane Seminary, a distance of two or three miles, to spend the night with Mr. Moore. That he left his wagon standing in the road, and, when he came to it, about three o'clock the next morning, he found the negroes standing near it; that he did not know how they came there, or where they wished to go. He had no conversation with them. He geared his horses, hitched them to the wagon, and the negroes got into it. . . That he rose early, to have the cool of the morning. Defendant said he had done right. That he would, at all times, help his fellow man out of bondage; and that, what he had done, he would do again." [1046] "The jury returned a verdict in favor of the plaintiff for twelve hundred dollars," [1047] "motion for a new trial, and also in arrest of judgment." A new trial[1] was [1054] "granted at the costs of the defendant:" [1052] "The damages found are double the sum which in any view the jury could take . . should have been given." [1057] "Pending this proceeding there was also an action of debt between the same parties for the penalty of $500, provided by the statute for harboring runaway slaves. The cases were heard by the supreme court upon [fourteen] questions duly certified,[2] which were determined

[1] [1054] "Note. The costs not being paid by the defendant, a new trial was not claimed, but was abandoned. Vanzandt, the defendant, in the meantime died,"

[2] Jones *v.* Van Zandt, 5 Howard 215 (1847). [224] "because the questions involved could not otherwise be brought here; and they possessed so wide and deep an interest, as to render it desirable they should come under the revision of this court. . . [231] 1st . . . the notice need not be in writing by the claimant . . [232] 3d. That clear proof of the knowledge of the defendant . . that he knew the colored person was a slave and fugitive from labor, though he may have acquired such knowledge from the slave himself, or otherwise, is sufficient to charge him with notice. . . 13th. That the act of Congress approved February 12th, 1793, is not repugnant to the constitution of the United States. And Lastly. That the said act is not repugnant to the ordinance of Congress adopted July, 1787," [231] "Before concluding, it may be expected by the defendant

in favor of the plaintiff." [1046n.] "The motion in arrest of judgment was not heard by the court until after the death of Vanzandt, and nearly eight years after the hearing of the motion for a new trial. At the April term, 1851, the circuit court overruled the motion in arrest, and entered judgment upon the verdict of the jury." [1]

Lane v. Baker et al., 12 Ohio 237, December 1843. "action on the case, . . against the defendants, as school directors. The plaintiff declared . . [238] Lane was a resident . . and was the father of . . three, white children, . . entitled to the privileges of said school; . . yet the . . directors . . did, . . turn the said children . . out of said school, . . [239] the jury returned the following special verdict: 'We, . . find, that Thomas Lane, and his family, were residents . . that one of his children, . . was not permitted to attend the school in said district . . We find said youth, . . to be of negro, Indian and white blood, but of more than one half white blood; and, if the law be with the plaintiff, assess his damages at six cents.'"

Held: [252] "This case depends upon the same principles with that of Jeffries v. Ankeny [2] . . The jury found, . . that the youth, . . 'was of negro, Indian and white blood, but of more than half white blood.' . . A majority of the Court find no cause to change the opinion they expressed in the case cited, in which they followed former decisions. . . Judgment for Plaintiff on the Verdict."

Greathouse v. Dunlap, 10 Fed. Cas. 1062 (3 McLean 303), December 1843. In August 1838 Mahan, a resident of Ohio, was indicted for [1063] "aiding and assisting a certain slave, named John, the property of . . Greathouse, to make his escape from his possession, to the state of Ohio, . . June, 1838, whereby . . Greathouse lost his said slave; . . a demand was made of the governor of Ohio, for the surrender of Mahan as a fugitive from justice, . . he was surrendered . . and committed to the jailor of Mason county [Kentucky] . . a civil suit was instituted against him by . . Greathouse, and upon such civil process issued . . Mahan was imprisoned in the said jail;" He was released from imprisonment in November 1838, on Dunlap's giving a bond to pay Greathouse, if the latter "shall finally succeed in the said suit . . the amount of the recovery so finally had . . including all legal costs." "in the case then pending there was recovered against Mahan the sum of sixteen hundred dollars in damages." Mahan avers that the bond was procured by the fraud of Greathouse, "that he was not guilty of the charges in the indictment, and was not a fugitive;" Held: the bond is good.

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that some notice should be taken of the argument, urging on us a disregard of the constitution and the act of Congress in respect to this subject, on account of the supposed inexpediency and invalidity of all laws recognizing slavery or any right of property in man. But that is a political question, settled by each State for itself; and the federal power over it is limited and regulated by the people of the States in the constitution itself, as one of its sacred compromises, and which we possess no authority as a judicial body to modify or overrule." [Woodbury, J.]

[1] See same *v.* same, 13 Fed. Cas. 1057.

[2] Same *v.* same, p. 5, *supra.*

Driskell v. Parish, 7 Fed. Cas. 1100 (3 McLean 631), July 1845; 1093 (10 Law Rep. 395), November 1847; 1095 (5 McLean 64), November 1849. Action "under the fourth section of the act of Congress of 1793." [1] Col. Mitchell testified: [1094] "Peter Driskell . . lives . . about a quarter of a mile from the river, and about six miles from Maysville, Kentucky. Jane and Harrison Garrison were his slaves, together with four other children of Jane Garrison. On the 26th of October, 1844, I was called upon by Mr. Driskell to go in pursuit of them. They had escaped on the preceding night. We followed them, but a rain coming on soon obliterated all traces of their path, and we who were pursuing returned home. I never saw those slaves afterwards until the 28th of February, 1845. I was then in pursuit of the six slaves, in company with Andrew Jackson Driskell, the son of the plaintiff. On the 26th of February, I saw the boy Bill (one of the slaves,) at Sandusky city, near the tavern where I stayed. I employed a sub-agent, a small boy, to play marbles with Bill, and through him ascertain where all the boys were. I found by this where all were but one. I then employed an Irishman to induce Bill to come to my room at the tavern, told him what he was then to do, and how he was to go immediately after the rest. I had understood that Jane and Harrison Garrison were at Mr. Parrish's, and a little after twelve o'clock on that day I made my way there. Near his house, I met Parrish, defendant. I accosted him, and asked him if a woman calling herself Jane Garrison, and her boy Harrison, were at his house. He said they were. I asked him if I could see them. He replied, if Jane wished it I could do so. We then returned toward the house, and I stood by the gate on the outside, whilst he went in. He came out in a very few minutes, with the woman Jane." [1100] "She recognized the witness, and spoke to him, and was approaching him, when the defendant interposed his hand, though he did not touch her. She called young Driskell 'Master Jackson.' Some conversation was had respecting the death of her young mistress, who had died, as she said, before she left Kentucky. The boy was then asked for, and he was brought out. He also knew the witness and Driskell, and by his approach seemed to wish to shake hands with the witness, when the defendant interposed his hand and said, it was not necessary to shake hands. The witness then claimed the right to arrest these two persons, to take them before some judicial officer, and show the right of the plaintiff to their services. The defendant asked by what authority; the witness replied by virtue of a power of attorney from the master, and laid his hand, upon the paper; the defendant objected to the authority and said, that nothing less than judicial authority was sufficient or would satisfy him. He then by words or signs directed the woman and her son to return into the house, which they did, and he followed them, shutting the door after him." The slaves left Parish's house that night. The jury disagreed. In 1847 Driskell brought an action of debt against Parish [1093] "to recover the penalty prescribed by the act of congress of February 12, 1793," The jury [1095] "returned a verdict for the plaintiff—finding the defendant guilty both of harboring the slaves and obstructing the

[1] 1 Stat. at L. 302.

master. The obstruction consisted in the conduct of Mr. Parrish at the gate; the harboring in permitting the slaves to remain in his house until nightfall—" On the new trial in 1849, the jury [1100] " returned a verdict for the plaintiff, on the count for hindering and obstructing the arrest—assessing the damages at $500, the proved value of the slaves in question at the time of their escape. On the count for concealing and harboring, the verdict was for the defendant." Judgment entered on the verdict.

Jordan v. Smith, 14 Ohio 199, January 1846. " agreed statement of facts. . . suit is brought on a bond for $115, . . Process served on Nancy Smith only, and not found as to Parsons. The plea . . by defendant, . . that she did not execute the bond. The deposition of Mary Shoemaker, the subscribing witness, was taken; the counsel . . objected to reading the same, for the reasons . . the plaintiff is a white [200] person, and the defendant, Nancy Smith, and the witness, are both black persons; . . testimony . . should not be received. The plaintiff then offered to prove the handwriting of the subscribing witness, by a person who merely saw her subscribe her name to the deposition. . . objection . . by . . defendant: 1. Because . . witness would not swear that he was acquainted with the handwriting . . 2. Because a black person was not a competent witness "

Held: " The agreed case shows that the plaintiff is a white man, the defendant a black woman. . . defendant swore to the truth of her plea . . plaintiff . . offered . . deposition of the subscribing witness, who was also a black woman. . . objection . . on account of her color. . . [201] it is supposed that . . the act of April 1, 1807, . . is broad enough to exclude a black person from swearing even to the truth of a plea . . the statute is . . ' no black or mulatto person . . shall hereafter be permitted to be sworn or give evidence in any court of record, . . in any cause . . where either party is a white person, or in any prosecution . . against any white person.' . . The object is to prescribe an additional rule as to the competency of witnesses. . . The truth shall not be received from a black man, . . where a white man is a party. . . [202] Suppose that we were to give this section the construction insisted upon by the plaintiff, what would be the consequence? It would . . put the black man in the power of the white. The white man may now plunder the negro . . he may abuse his person; he may take his life: He may do this in open daylight, . . and he must go acquitted, unless . . there . . be some white man present. . . [203] the defendant had a right to swear to the truth of her plea, and the plaintiff must prove the execution of the note. . .[204] there is no evidence to sustain the . . action. . . the only reason he can not prove it is, that his witness is . . incompetent by . . law . . its uniform effect has been to prevent justice, . . the plaintiff must be nonsuited."

Jones v. Van Zandt, 5 Howard 215, January 1847. See same *v.* same, p. 7, *supra.*

Woodson v. State, 17 Ohio 161, December 1848. " action . . was debt upon an administrator's bond. Letters . . were granted . . to . . Chase,

. . estate of John Woodward, a mulatto. . . [162] suit was brought in the name of 'the state' . . on the administration bond. . . The breaches . . are: 1. Not making and returning inventory, though $1000 of goods, . . came to his possession. 2. . . he did not . . administer the goods . . 3. . . made no return of his administration. 4. . . has not paid the debts . . [163] defendant . . called, as witnesses . . Bond and Phillips, who were sworn, . . This evidence was objected to . . the witnesses were mulatto persons. No evidence of the fact was adduced, and none that Borland, for whose use the suit was brought, was a white person; but the court determined the condition of all three by inspection, and rejected the witnesses. Judgment . . for the plaintiff, . . without . . a jury."

Reversed: [169] "The right to prosecute a suit . . is given by the 182d section of the act . . which provides that after a claim has been allowed by the administrator, if he shall neglect upon demand by the creditor to pay . . the bond . . may be put in suit by the creditor. . . several things are required to entitle a party to . . a suit . . Among others, neglect to pay upon demand made. The declaration does not allege . . any demand . . nor . . any excuse for the omission. This is a fatal objection to the declaration. It is . . a case of defective title, that is bad even after verdict . . demand . . is an essential element of the right of action against the obligors in the bond. It is . . a condition precedent, . . and therefore indispensable."

Steuart et al. v. Southard, 17 Ohio 402, December 1848. "Southard . . was resident, . . in which a common school was taught; that he had sons and daughters . . which he was desirous to have taught at said school; . . defendants . . were school directors . . contriving . . to deprive him . . of having his said children educated, . . wrongfully admitted certain colored children into said school, . . he . . has been put to great . . expense . . to be taught . . defendant demurred." "The court . . overruled the demurrer. The defendant plead the general issue. . . [403] judgment . . for the plaintiff for $25."

Reversed: "This is . . an action for misbehavior of a public officer . . The most that can be made . . of the declaration . . is, that [defendants] . . misjudged the law and acted erroneously. . . [406] If suit may be maintained for an error in admitting colored children . . it must be on a principle that will enable every member of the school district to maintain an action . . for any other mistake . . The 50th section . . provides that a common school may be continued by the directors, or funds . . by voluntary subscription, or at the expense of those sending scholars. How this school was supported does not appear. . . defendant . . waived all matters of . . form . . and agreed that his case shall be decided upon the constitutionality of the school law. . . we cannot admit that parties have the power to call for an opinion on a matter not thus presented, . . Judgment reversed and demurrer sustained."

Campbell v. Kirkpatrick, 4 Fed. Cas. 1174 (5 McLean 175), October 1850. Action "to recover a penalty under the fugitive slave act of 1850." [1]

[1] 9 Stat. at L. 464.

Held: [1175] "an indictment under the fugitive law, of which the district court has jurisdiction expressly given, and of which the circuit court has no jurisdiction under the act, cannot be transmitted to and tried by the circuit court."

State v. Cincinnati et al., 19 Ohio 178, December 1850. "mandamus was issued, . . against . . Cincinnati, . . and William Disney, treasurer of said city, . . The information . . is as follows: . . Your petitioners, . . [179] state . . that they constitute the board of directors of common schools . . for . . colored youth . . your petitioners rented . . rooms, . . established . . schools . . employed . . teachers . . that . . Disney . . received . . two thousand one hundred and seventy-seven and sixty-seven hundredths dollars, for the use of . . the common schools for colored youth, . . that . . there became due . . for expenses . . sums . . set forth, . . that . . petitioners duly certified . . said . . accounts, . . [180] that the . . city council, . . refused to pass any order . . to the payment of said accounts, . . that . . Disney, . . refused . . to pay . . that by reason of said refusal . . the schools . . have been suspended . . that they are . . without remedy . . unless . . by . . [181] this . . court; . . the court . . ordered that writs . . issue . . [182] To this writ, . . Cincinnati . . made . . return: [183] . . This respondent says, that the . . trustees . . passed a resolution that the city should be divided into two school districts, for the colored youth . . that the . . board should notify the colored adult male tax payers . . that an election for school visitors and trustees, would be held . . Soon after . . the said board passed another resolution to employ suitable persons to list the colored tax payers . . that . . the accounts . . were presented . . [184] the city council refused to order said accounts to be paid. . . an enumeration was made of the colored youth . . eight hundred and forty-five, . . the white youth . . were also enumerated . . thirty-three thousand five hundred and forty-eight. . . The auditor . . made a division of the school funds, . . The amount . . for . . schools for colored youth was . . ($2,177.61) [*sic*], . . [185] respondent prays the judgment of the court, . . that the court will make such order in the premises, as shall be required by right and justice; . . [186] a general demurrer was filed by the relators."

Held: [188] "The facts stated . . are, . . admitted . . [189] It is claimed . . that the return is evasive, . . The return, . . is somewhat evasive, but . . the city council do not . . controvert the right . . to this money, provided, it has been 'legally levied and collected.' . . [190] The only question . . seems to be, whether this money was properly levied and collected, and whether they have the right . . to give it the direction by law intended, . . neither the city . . nor their counsel . . have pointed out wherein this money was levied and collected in violation of law. . . [191] If the provision of the law . . is, . . unconstitutional and void, . . the general law remains, securing to colored youth the right of attendance in common schools with white youth, . . [195] This money is in the treasury of the city for the use of schools in those districts. . . it is claimed . . that this law . . is . . null and void. Before this court

will declare any law to be unconstitutional, that part of the constitution . . with which it conflicts must be pointed out, and the discrepancy . . clearly ascertained. So long as doubts remain, . . the law should be enforced. [196] . . This law of 1849 does not say any thing as to the color of a person to be elected school director. . . it was the intention . . that colored persons might be elected directors. . . [197] Another constitutional objection is, that these directors are elected by colored voters. . . [198] As a matter of policy it is . . better that the white and colored youth should be placed in separate schools, and that this school fund should be divided to them in proportion to their numbers. . . the relators have made a case which entitles them to relief, . . A peremptory mandamus will . . be ordered."

Smith v. Swormstedt, 22 Fed. Cas. 663 (5 McLean 369), October 1852. [Leavitt, J.]: [679] "the Methodist Episcopal Church . . from its origin in this country, . . has never ceased to bear testimony against the owning of slaves by the ministry. The legislation in the slaveholding states,—especially the stringent laws passed in most of them prohibiting emancipation,—led, in 1840, to the modification of the rule, so that the holding of slaves in states where such a law was in force, should not be a disqualification for any official station in the Church. . . [681] Prior to the year 1844, there had been some abolition movements in portions of the North, which were probably indiscreet and uncalled for. In 1842, a large body of Northern Methodists seceded, on the ground that the Methodist Episcopal Church was too lax in its discipline in regard to the ownership of slaves by ministers and members." [679] "The general conference [in 1844] had before it . . two cases . . Mr. Harding, a travelling preacher in the Baltimore conference, had become the owner of slaves by marriage. He was cited to answer for a violation of the law of the Church . . The Baltimore conference, upon hearing the case, entered a judgment of suspension against him. . . the general conference . . affirmed . . the judgment of the annual conference . . Bishop Andrew, after his election, had also become the owner of slaves,—one by testamentary bequest, and one by marriage. In the Northern portion of the Church there was a decided feeling of dissatisfaction toward the bishop, arising solely from his connection with slavery; . . By the discipline of the Church, a bishop is declared to be amenable to the general conference for improper conduct. The general conference of 1844 held . . it was competent to inquire into the fact alleged against the bishop. He . . made a . . candid statement of all the facts connected with his ownership of slaves. . . the conference adopted [by a large majority] the following preamble and resolution: 'Whereas . . Bishop Andrew has become connected with slavery . . and this act having drawn after it circumstances which, in the estimation of the general conference, will greatly embarrass the exercise of his office as an itinerant general superintendent, if not in some places entirely prevent it; therefore, Resolved, that it is the sense of this general conference that he desist from the exercise of his office, so long as this impediment remains.'" [673] "There had been some previous causes of excitement and ill feeling, growing out of the alleged

ultraism of some Northern preachers, in connection with the question of slavery. And it is not strange that, from the collisions of a warm discussion of the subject, some sparks of unholy fire should have been thrown off. . . the idea of a separation of the seemingly discordant elements took possession of some of the leading men of the South and Southwestern portions of the Church." On June 8, the general conference adopted [1] certain resolutions, in pursuance of which "the annual conferences in the slaveholding States met [at Louisville, on the 1st of May, 1845], and erected themselves into a separate ecclesiastical connection, . . to be known as the Methodist Episcopal Church South." [2]

Miller v. McQuerry, 17 Fed. Cas. 335 (5 McLean 469), September 1853. George McQuerry absconded from the service of Miller, a resident of Washington county, Kentucky [336] "A little more than four years ago, . . in company with three others, . . The fugitives were advertised shortly after they absconded, and a reward of four hundred dollars was offered for their return. They were pursued by different persons, but were not overtaken. One of them was arrested, at Louisville, and returned, but shortly after he again absconded. When Wash., as the fugitive was generally called, was lately arrested, at Troy, in Ohio, he said nothing about being free, but observed that he had no intention to run off an hour before he started; that he was persuaded to do so by Steve, one of the individuals who accompanied him. . . He told the witness [for the claimant] that he was sorry he left Kentucky;" A deputy marshal, residing at Dayton, "arrested the fugitive, who said that the claimant was his master, and that he had always been well treated. . . the defendant has resided four years in Ohio, and conducted himself well, being considered as a free man."

Held: [340] "no doubt can exist on the evidence, that the fugitive owes service to the claimant; and, under the law, I am bound to remand him to the custody of his master, with authority to take him to the state of Kentucky, the place from whence he fled." [McLean, J.]

Weimer v. Sloane, 29 Fed. Cas. 599 (6 McLean 259), October 1854. "This action is founded on the seventh section of the act of congress, of the 18th of September, 1850,[3] known as the 'Fugitive Slave Act,' and is brought to recover the value of three persons . . slaves of the plaintiff," The defendant is charged "with having aided . . in the escape of the . . fugitives," He was acting as counsel for them. Patton, "being at Sandusky city, in pursuit of some slaves who had escaped from his service, . . received at that place a power of attorney from the plaintiff, authorizing him to arrest the slaves named in the declaration; that on the 20th of October, 1852, the slaves arrived in the cars, and were seen by the witness at the depot of the Mansfield Railroad. They were conducted by a colored man, from the depot to the steamboat *Arrow,* then lying at the wharf of the city, and were put on board. Witness called on Rice, a police officer of the city, and one Hedges and another person to assist in the arrest of the negroes. They went on board the steamboat, and the witness Patton

[1] "by a majority of over three fourths of the body". 16 Howard 299.
[2] *Ibid.*
[3] 9 Stat. at L. 462.

saw and recognized them. He enquired of them, if they did not wish to return to Kentucky. George, one of the negroes, replied, that he did not care about going back. They were then arrested, it being about half after seven in the evening of the 20th of October, and, followed by a large crowd, proceeded to the mayor's office. The negroes were taken into the office, and took their seats on a settee on the south side of the room. The Mayor, Mr. Follett, was in the office; the room was crowded, and there was a good deal of excitement. Witness stated to the people present that the negroes were slaves, and informed the mayor that he wanted a trial, to prove property. The power of attorney under which he made the arrest, with some others in his possession, had been laid upon the table at which the mayor was writing, by Rice. After some time, the mayor said he doubted whether he had any authority to try the case, and refused to do so, at the same time referring witness to a magistrate. Witness said he was determined to hold the negroes. The defendant [whose services had been procured as counsel for the negroes] stepped out of the crowd, and said, who is it that detains these colored people? Witness replied that he did. Defendant then enquired if Marshal Rice was in the room, and Rice replied that he was. Defendant asked Rice if he had a warrant to arrest the negroes, who said he had no warrant. Defendant then asked witness if he had a warrant, and he was informed that he had none, and that he had arrested the negroes without any warrant, and brought them before proper authority, etc. Defendant said to witness, you should have had a warrant, and could not arrest without a warrant. Witness replied that he could arrest without a warrant, and intended to hold the negroes, and would hold every one responsible, if they were taken from him. Defendant smiled at this. Some conversation then followed about the value of the slaves, and witness said to defendant, he would hold him individually responsible, if he interfered with them, and that he might expect to pay $1,000 for each of the negroes, if he caused them to be taken out of his custody. . . [600] Defendant then took off his hat, and waved it over his head and said, Colored friends, arise, and take those colored friends of yours out of the room, with a row, or a rush. Witness is not quite certain which of these words were used. The crowd, of whom some twenty were colored men, some of them armed with clubs, rushed towards the slaves, and forced them out of the room, with a rush. Witness has never seen them since, and they have never been retaken." Leavitt, J. (charging jury): [602] "the authority is expressly given [1] to the owner . . or his agent or attorney, to arrest without warrant. . . the power of attorney under which he [Patton] acted as agent, was executed . . according to the requirement of the act of congress." Verdict for the plaintiff.[2]

Gibbons v. Sloane, 10 Fed. Cas. 294 (6 McLean 273), October 1854.[3] "Gibbons had executed a power of attorney in . . Kentucky, . . in which either no name was inserted as the agent of the plaintiff, or, if

[1] Act of Cong., Sept. 18, 1850, sect. 6. 9 Stat. at L. 462.

[2] In the case of Gibbons *v.* Sloane (*infra*) the power of attorney to Patton from Gibbons was held to be invalid, and there was a verdict for the defendant.

[3] See Weimer *v.* Sloane, *supra.*

any, that of some other person than Patton; and . . before the arrest of the fugitive by Patton, his name was inserted . . at Sandusky city, in . . Ohio, without any acknowledgment of the instrument in that state. The court instructed the jury, that under the act of 1850,[1] this was not a valid power to Patton, and did not authorize him to make the arrest. The jury returned a verdict for the defendant."

Ex Parte Robinson,[2] 20 Fed. Cas. 969 (6 McLean 355), April 1855. [970] " the colored girl Rosetta [Armstead] was taken by a habeas corpus at Columbus, in Ohio, while passing through the state with the agent of her master, before a judge of probate, who decided that she was free, and at the same time appointed Van Slyke her guardian. . . [972] The commissioner of the United States [on March 20, 1855] issued his warrant [commanding Robinson, marshal of the Southern district of Ohio] to arrest the supposed fugitive from labor on the application of the master." [970] " on the 24th . . he produced the said Rosetta before the commissioner, as commanded;" On March 29, while the case was pending, Rosetta was discharged from custody, by order of Judge Parker, of the court of common pleas for Hamilton county, " and immediately after the said minor was placed in the custody " of her guardian, Van Slyke, " Robinson again seized the said minor under the same " warrant of the commissioner, " and now [March 30] holds her in illegal imprisonment," Upon Van Slyke's affidavit to Judge Parker, a writ of habeas corpus was issued, to which the marshal made a return, in which he denied " the right and jurisdiction of the court of common pleas . . to compel him to produce the body of the said Rosetta before it, under the circumstances stated." He was [967][3] " arrested by a warrant issued by the judge as for a contempt. On application to Judge McLean," of the federal court, he " issued a habeas corpus to bring the marshal before him, and, after argument and full consideration, discharged him from the custody of the state officer, under the act of congress " of March 2, 1833, sect. 7:[4] [970] " The marshal omitted to do the act ordered to be done by the Honorable Judge Parker, because it would be in express violation of his duty under an act of congress.[5] . . [972] A sense of duty compels me to say that the proceedings of the honorable judge were not only without the authority of law, but against law, and that the proceedings are void, and I am bound to treat them as a nullity." [McLean, J.]

Ex parte Robinson, 20 Fed. Cas. 965 (1 Bond 39), April 1856. " on the 28th of January last, one Gaines, a citizen of Kentucky, on his affidavit that certain colored persons, owing him service . . had escaped to . . Ohio, obtained a warrant from . . a commissioner of the circuit court of the United States . . directed to the marshal . . requiring him to arrest said persons as fugitives from labor, . . while the investigation

[1] 9 Stat. at L. 462.
[2] The Rosetta Case.
[3] *Ex parte* Robinson, *infra.*
[4] 4 Stat. at L. 634.
[5] 9 Stat. at L. 462.

before the commissioner was pending, he issued his warrant to the marshal, requiring him to commit the alleged fugitives to the jail . . for safe keeping, to be produced from time to time as required; . . On the 21st of February, on the petition of . . Beckley, . . a writ of habeas corpus was issued by the judge of the probate court of Hamilton county, requiring the marshal to have them [the alleged fugitives] before said judge forthwith, . . On the 28th of February, the commissioner adjudged the said fugitives to be the property of said Gaines, and ordered them to be delivered to him, to be removed to the state of Kentucky. On the same day, the said Gaines made his affidavit that he was apprehensive that said fugitives would be rescued by force, and required that they should be delivered to him in the state of Kentucky by the marshal, pursuant to the provisions of the act of congress "[1] and they were so delivered. "On the 27th of February, the marshal appeared before the judge of the probate court . . and submitted . . a motion to dismiss the writ of habeas corpus . . and an order was entered by the judge that the marshal should not remove the persons named in the writ from the jurisdiction of the court till the final decision of the motion, which order was served on the marshal on the 28th of February. . . on the 7th of March . . the marshal, protesting against the jurisdiction of the probate judge, made his return to the writ of habeas corpus, . . that . . he held the persons named . . by authority of law, and that afterward, upon the demand of said claimant, delivered them to him in the state of Kentucky."[2] On March 18, the probate judge "decided that said return was insufficient" and [966] "adjudged the marshal guilty of a contempt of court," He was fined three hundred dollars and costs, and committed to jail. He petitioned the district judge, setting forth the facts, "and praying for a writ of habeas corpus directed to the sheriff," after the return of which, he moved for his discharge from custody. [969] "The petitioner is discharged." [968] "the obligation was imperative on him, under no circumstances to permit them [the fugitives] to be taken from his custody. . . There is no doubt as to the result if the marshal had placed these fugitives in the custody of the probate judge, in obedience to the writ of habeas corpus." For "he held that the proceedings before the commissioner . . were unconstitutional and void. . . obedience to this writ by the marshal would have resulted in the discharge of the fugitives." [Leavitt, J.]

Anderson v. Poindexter et al., 6 Ohio St. 622, December 1856. "action . . was assumpsit, . . to recover the amount of two promissory notes . . each for $100, . . Poindexter was the principal in the notes, . . was not served with process, and the suit has been . . defended by the sureties. . . [623] The first . . plea alleges that the plaintiff claimed Poindexter as his slave, and promised the defendants if they would execute said, that he would, by deed, manumit . . Poindexter; . . The second . . plea avers that the . . note was to obtain the freedom of Poindexter . .

[1] 9 Stat. at L. 465, sect. 9.

[2] [967] "In the Rosetta Case [*Ex parte* Robinson, *supra*] . . this same marshal refused to obey a writ of habeas corpus issued by a state judge, commanding him to produce the alleged fugitive"

whereas, . . plaintiff had permitted Poindexter to come from . . Kentucky into . . Ohio, . . by which act . . the latter was, . . set free by the laws of this state, and before the delivery of the notes . . was a free man; . . the parties submitted the cause to the Court, and, . . gave judgment for the defendants. A bill of exceptions accompanies the record . . it is shown that plaintiff, . . lived in . . Kentucky, . . that Poindexter had lived with him as a slave seven or eight years, . . [624] and worth one thousand dollars. Poindexter procured the execution of four notes of $100 each, payable to his master, . . Plaintiff . . let him go free on the . . notes, and as soon as . . paid he would give him free papers."

Affirmed: [626] "The plaintiff claimed that Poindexter was his slave, and agreed to set him free for four hundred dollars, secured by the notes of the defendants. . . He received . . these notes as the price of his manumission. This . . leads to the inquiry, whether Poindexter was, at the time, a slave, or whether that relation toward the plaintiff, . . had not been severed by the acts of himself? . . Poindexter had . . been sent . . into this state on business, and [627] afterward returned and continued in his service. . . His actual condition, at any time while he lived with the plaintiff, is not manifest from anything shown in the case. . . regarding him as a slave, . . what effect did that transfer of him from slave to free territory have? Some . . jurists in the slave states admit that if the master take his slave into a free state to reside permanently, that he thereby becomes emancipated, but, . . hold that if he go there with him for a temporary purpose, although he may, while in free territory, be suspended in his rights . . yet if the servant return voluntarily into the state . . the rights . . of the master re-attach . . [628] Slavery is entirely local . . and is repugnant to reason and . . natural law, . . The law of England abhors and will not endure the existence of it within the realm and the instant a slave lands there, he becomes a freeman. . . [630] In this state not only are our institutions . . opposed to, . . slavery . . but the ordinance of . . 1787, . . prohibits, . . its introduction here for any purpose . . To . . this ordinance, . . all of our laws, . . have conformed. . . [631] Kentucky can not, . . demand of this state an abrogation of its . . laws, to promote any of its own . . interests; . . Strengthened, . . by the clearest principles of natural law, and by the decisions of courts of high character, . . Poindexter, in coming into this state by the consent . . of his master, obtained . . the freedom of which he had been before deprived by local municipal legislation. His servitude, . . ceased, and there is no law which can bring into operation the right of slavery when once destroyed. . . [632] The court below properly gave judgment for the defendant for another reason. By the laws of Kentucky, no slave can make a contract with his master, or with any one else, for any purpose whatever. . . Slaves can be emancipated in no other way than such as is prescribed by law." [Bowen, J.]

Concurring: [633] "Two questions . . arise . . 1. It is contended . . that the case, . . is to be determined by . . the laws of Kentucky, . . Under the laws of Kentucky a slave is incapable of contracting. . . He has not a right to the child he has begotten, to nurture it, nor to the wife

he has chosen and cherished, to protect her. . . A contract of emancipation imparts to the slave no legal right, and imposes on the master no legal obligation. It is simply nugatory and void. . . [634] the note . . plaintiff now seeks to enforce here was invalid there. . . 2. But were it otherwise, could this note be enforced by judicial procedure in Ohio? . . the absolute . . freedom of all persons at birth is a fundamental principle . . This principle was, by the ordinance of 1787, impressed on the soil of Ohio . . The moment any person comes within . . Ohio, his personal rights are . . determined by the . . laws of Ohio [635] . . no exception . . save in the case of a person who, being held to service in another state, escapes into this. . . When, . . a . . slave . . escapes into this state he ceases to be, . . a slave. . . In Ohio, he is a man; . . In the case now before this Court, there was no escape from Kentucky into Ohio. Poindexter came . . [636] with the consent . . of the plaintiff. . . So coming, . . His . . status was that of a freeman. . . If a . . slave can be . . sent into Ohio for one hour, and still retain his status as a slave, then the same thing can be done for a day, a week, . . a lifetime; . . [637] it is said that the note was at least given in . . compromise . . of a doubtful claim, and . . valid. Not so; the promise was made by Poindexter, while under duress, . . and . . imposes no obligation either in morals or in law. . . [638] The enslavement, . . of a man once free, presents the monstrosity of a legalized wrong; . . The . . policy of Ohio is, to maintain the rights of men;" [Brinkerhoff, J.]

Concurring: [639] "Some states deem it good policy to subjugate one class . . to the other, . . This is slavery . . in men. It has never existed in Ohio. . . [640] That the constitution of 1802, . . acted, . . directly on the [641] status of a slave, sent here voluntarily by his master, dissolving the relation, . . [642] As to the constitution of the United States, it will be found, . . that its provisions, . . have no application to the question before us. . . [648] Whatever construction may be given by the Supreme Court of the United States to the constitutional provision relating to fugitives, whereby the laws of a free state are rendered inoperative, it . . is limited . . to, cases coming within that provision, . . in respect to escaping slaves. . . [671] Slavery is not authorized in England, but . . forbidden. . . [674] Poindexter, upon his return to Kentucky, was a slave by the law of that state. To relieve himself from this [675] condition, he entered into a contract for his manumission, . . By the law of Kentucky this contract was not obligatory upon the master." [Swan, J.; Scott, J. concurred].

Concurring in judgment, dissenting on reasoning: "Although I concur in the judgment . . I differ so essentially . . as to the main ground upon which the decision has been placed, . . I . . state my own views . . [677] That the contract in this case, . . made in Kentucky, must be governed by the laws of that state . . that Poindexter, . . being the slave . . had no . . capacity, . . to make a valid contract with his master . . and that the contract . . is without any validity . . are propositions to which I readily accede. And upon this ground I give my assent to the judgment in this case. But the main ground upon which the decision . .

is placed, . . is that Poindexter, by means of his having been sent into [678] Ohio by his master, on an errand, . . he returned voluntarily, . . to the service of the plaintiff, became a freed man, . . therefore the notes, . . were without consideration. . . he was simply in the state, *in itinere,* on business . . and, as far as residence is concerned, not distinguishable from that of a person *in transitu.* . . [681] Kentucky was . . the place of the contract . . also the place of the domicile of both the parties. . . laws of Kentucky recognize slavery . . the mode of manumission . . is . . prescribed, and can be effected only by a formal deed . . [695] It is argued, . . that the moment a slave, domiciled in Kentucky, is allowed by . . his master to step upon the soil and breathe the atmosphere of Ohio, he becomes a free man, and . . his status as a slave can not re-attach to him, even although he may return voluntarily . . There is nothing in the physical properties of either the soil or the atmosphere of Ohio which can have any such effect on the civil state and condition of the person." [Bartley, C. J.]

Ex parte Sifford, 22 Fed. Cas. 105 (5 Am. Law Reg. 659), September 1857. [106] " Sifford, the marshal of the United States for the Southern district of Ohio, presented his petition . . for a writ of habeas corpus, alleging . . that . . Churchill and nine others, being deputy and assistant marshals, were unlawfully imprisoned in the jail of Clark county, by a process issued by a justice of the peace . . A writ of habeas corpus was issued . . directed to . . Dayton, sheriff of said Clark county, . . The facts . . are, that on the 23d of May last, separate warrants were issued by . . a commissioner of the circuit court of the United States, for the arrest of Hiram Gutridge and three other persons . . on charges of having aided and abetted a fugitive slave in his escape, and having resisted . . the officers of the United States in the arrest of such fugitive. The persons named in the warrants were arrested by the deputy marshall and assistants; and when conveying them to Cincinnati, an attempt was made by the sheriff of Clark county to take said prisoners from the custody of the officers by a habeas corpus issued by the probate judge of Champaign county. . . [109] it is urged that the habeas corpus placed in the hands of Sheriff Layton [*sic*] was merely colorable, issued in fraud of the law, and was a part of a conspiracy by which to effect the rescue of the prisoners. . . It was issued under the Ohio act of 1856, . . while it provides for a writ, designated as a writ of habeas corpus, the writ has really none of the . . characteristics of the great writ of right. Whatever may have been the design of the statute, it seems admirably suited to effect the rescue of any prisoner in the custody of an officer of the United States." The sheriff [106] " was violently resisted and assaulted, and failed to execute the writ according to its command. . . on a complaint made before . . a justice of the peace of Clark county, . . the deputies and their assistants . . [107] were subsequently seized by a large armed force and taken before the said justice, and by him committed to the jail of Clark county;" The prisoners rescued from their possession " were taken by the sheriff of Greene county before the probate judge of Champaign, by virtue of the habeas corpus issued by him and were summarily discharged by his order.

and have since been at large. . . [109] The reason for this order . . was, that no one appeared to show by what authority the prisoners were arrested and held in custody. The truth was—whether known to the probate judge does not appear—that the deputy marshal named in the proceedings, and who was so solemnly called and defaulted for his non-appearance, was, at the time, a close prisoner in the jail of the adjoining county of Clark! . . [112] The deputy marshals are discharged." [110] " Sheriff Layton admits he was notified when the writ of habeas corpus was placed in his hands, that the persons having the custody of the prisoners were deputy marshals, and held the prisoners under the authority of the United States. It is very clear, . . even if the writ were valid, the power of the sheriff was at an end, and he was wrong in attempting the service. . . [111] there was a settled purpose, in at least a portion of the community in which these occurrences took place, to prevent . . the execution of a law of the United States. . . Great excitement prevailed, and crowds followed the officers in charge of the prisoners. From their excited bearing, there were reasons for the apprehension that an undisguised and forcible attempt at a rescue would be made. It does not change the real character of the views and purposes of these persons that they deemed it most expedient to effect their object by a resort to the forms of law." [Leavitt, J.]

Ex parte Bushnell, Ex parte Langston, 9 Ohio St. 77, May 1859. [78] " On *habeas corpus* before the judges of the Supreme Court of Ohio, . . separate applications were made, . . on behalf of Simeon Bushnell and Charles Langston, . . [79] it being made to appear, . . that said Bushnell and Langston were imprisoned and deprived of their liberty, . . without any legal authority. . . In obedience to the commands of said writs they were duly returned, and therewith were produced . . the said Bushnell and Langston . . [92] it was insisted by the counsel for Bushnell and Langston, . . that they were unlawfully deprived of their liberty and should be discharged. The counsel representing the . . United States, insisted that the relators should be remanded. . . [96] C. P. Walcott, attorney general, . . State of Ohio, insisting that the relators should be discharged, addressed the judges . . [97] ' Ohio, . . presented . . that they were . . restrained of their liberty by . . sheriff . . the sheriff . . returns that he holds them in custody by . . warrant . . by the marshal of the United States . . [98] it appears that the relators have been convicted of a violation of the . . fugitive slave act, . . 1850, . . and . . sentenced to . . jail . . This conviction . . being the cause of . . detention, the court are here called upon to inquire into the validity thereof. That validity is now challenged . . on the ground that the act . . is . . void. . . [102] If . . a state court may inquire whether a federal court had power to dispose of an ox or an ass, how much more, upon this great writ of *habeas corpus,* may it not inquire, whether that same court has power to dispose of the liberty of the citizen? . . [103] The right of the state to inquire into the validity of . . restraint upon its citizens . . results from the very nature of sovereignty . . [105] the right of the states to inquire into the validity of every imprisonment of persons held under federal authority has been constantly . . exercised by every state, . .

[106] Bushnell's conviction rests upon an indictment . . which, . . charges him with obstructing the master of the alleged fugitive, . . in the exercise of the right alleged . . of seizing his runaway slave . . and taking him back by force to the state from which he escaped. Langston's conviction rests on the indictment containing two counts; the first . . is . . similar to . . Bushnell's indictment; . . the second charges, . . that Langston had obstructed a deputy marshal of the United States, in the execution of a commissioner's warrant, commanding the arrest of John, an alleged fugitive from service. . . [107] it results that any man may come into one of the free states, and upon his mere claim that one of its . . citizens, . . is his slave, . . drag that citizen beyond the . . state . . and . . no one may interfere with this forcible capture, . . except on pain of fine and imprisonment, . . [111] The great question . . is: Does the constitution delegate to the master this right of recaption, and to Congress this power to legislate in aid or for the enforcement of this right? . . [116] 1. . . the general government has no power, save that . . delegated by the constitution; 2. . . all powers, not . . delegated, . . belong to the states . . 3. . . slavery is of so odious a nature, that the power to recognize its existence can be derived only from an affirmative, . . grant, . . lastly, that honored maxim . . requires every doubtful phrase to be construed in favor of liberty. . . [117] In all the constitution, the word slave . . is not there; . . [118] Vainly do you read the whole instrument in search of any . . express grant. . . [161] I do here and now emphatically declare, that this Supreme Court of the United States is a sectional court composed of sectional men, judging sectional questions upon sectional [162] influences. . . [164] the act of 1850 is, . . a violation of the constitution.' "

Held: [182] " The relators being brought before us on habeas corpus, our inquiry must be confined to such questions as are . . cognizable under that writ. . . The judgment of the district court is conclusive, and precludes all inquiry . . unless it is a nullity. . . [184] The only ground, . . upon which the relators can be [185] discharged is, to go behind the seventh section of the act, and maintain that Congress never had any legislative power, . . to provide punishment for a person who knowingly . . rescues an escaped slave. . . [186] It must be conceded that the power of Congress to legislate on this subject is as . . fully settled by the . . Supreme Court of the United States as any other constitutional question that has been presented for their determination. . . [188] I . . have been unable to find a single decision of any Supreme Court of any state in the Union, denying to Congress the power to legislate upon this subject. . . [198] The sense of justice of the people of Ohio has been shocked by some of the unjust provisions of the fugitive acts. It is not the authority of Congress to legislate that they deny, but it is the abuse of the power. That abuse may be remedied by Congress. . . All must admit that the owner of escaped slaves is entitled to their reclamation. . . As a citizen, I would not deliberately violate the constitution or the law by interference with fugitives from service. But if a weary, frightened slave should appeal to me to protect him from his pursuers, it is possible I might momentarily

forget my allegiance to the law . . and give him covert from those who were upon his track. . . and if I [199] did it, . . and brought by my counsel before this tribunal on a habeas corpus, and were then permitted to pronounce judgment in my own case, I trust I should have the moral courage to say, . . as I am now compelled to say . . bound . . to sustain the supremacy of the constitution . . 'The Prisoner Must Be Remanded.'" [Swan, C. J.]

[Dissenting]: [230] "We can only discharge the relators upon finding them *illegally* imprisoned. . . [231] the power to legislate upon the subject . . belonged originally to the states . . [233] The power is claimed to have been delegated by the states under the second section of article 4 of the constitution, which provides . . [234] 'No person, held to service or labor in one state under the laws thereof, escaping into another shall, in consequence of any law or regulation therein, be discharged from such service or labor, but shall be delivered up on claim of the party to whom such service or labor may be due.' No argument is needed to show that the power of legislation is not delegated to the federal government by the provisions of this section, as expressed in the language thereof. . . [237] It is well known that at the time of the formation of the constitution, it was the desire and expectation of the . . leading men in the slaveholding states that all the slaveholding states would follow the example of Massachusetts, Pennsylvania, and those other states which had then already passed acts of emancipation, looking [238] prospectively to the utter extinction of the system of slavery in the states. . . [253] I maintain, . . that the fugitive act of 1850 is unconstitutional, in that it is, in its provisions, repugnant to the express provisions of the constitution of the United States. . . [321] It is well known that Daniel Webster always entertained the opinion that this power belonged to the states, and not to the federal government, under the constitution. . . [325] While, therefore, I concede the largest discretion to the federal government in the exercise of its *incidental powers* 'to make all laws which shall be necessary and proper for carrying into execution' all *delegated* powers . . I am constrained to regard its exercise of power in passing the act of 1850 for the extradition from a state of persons 'owing service,' . . as strictly the exercise of a police power over the citizens of a state—a power unquestionably reserved by and belonging to the states . . It is, . . not a law 'of the United States,' . . I am . . clearly of the opinion, that the judgments under which the relators are imprisoned are utterly void, and that they ought to be forthwith discharged." [Sutliff, J.]

Van Camp v. Logan, 9 Ohio St. 406, November 1859. [407] "the plaintiff is a . . taxpayer, and . . has two white children . . that the defendants have . . five schools . . employing six teachers . . paid out of the common-school fund; that . . he applied . . to have said two children admitted . . the defendants refused; . . defendants . . admit these statements . . except that said children are *white*; . . they say that the plaintiff is a colored man, being of nearly one-half African blood, . . and so understood and treated . . that plaintiff's wife is a colored woman, . . their son is a colored child, . . that . . said . . apprentice is

also distinctly colored, having nearly one-half African blood, . . defendant's, . . deny that said children are white, but admit that they each have . . more white than . . African blood—say five-eighths white, and three-eighths African blood. The defendants also say, that the schools established are for white children alone; that the number of colored children in the district, . . has not . . exceeded ten, . . the money raised on all the colored persons, has been . . reserved . . for the education of said colored children; . . [408] no separate school for colored children has yet been instituted . . plaintiff demurred, . . judgment against the plaintiff for costs. . . petition in error was filed"

Judgment affirmed: "The only question . . is whether, since the . . act of . . 1853 . . 'children of five-eighths white and three-eighths African blood, . .' are, . . entitled to admission into the schools . . for . . white youth? . . plaintiff . . insists that his children, . . being more than one-half of white blood, are, . . to be regarded as white, and . . wrongfully excluded by . . defendants . . from the common schools of . . Logan. Prior to 1848 there was not any . . provision . . for the education of any but the white youth . . most of the previous statutes— . . exempt the property of blacks and mulattoes from taxation for school purposes, while some, . . exclude blacks and mulattoes [409] from the schools. The act of . . 1848 . . provided, for the first time in Ohio, for the education of colored children, . . directing . . tax . . upon the property of colored persons, . . to the support of separate schools for colored children, . . This law, . . was repealed in less than a year . . by the act of . . 1849 . . which . . provided for . . colored schools . . but . . appropriated no other funds . . save those collected from . . colored persons. . . The law of 1849, . . repealed by the law of . . 1853, which, . . not only provides for the education of colored children and imposes the duty or [of] organizing separate schools for them, . . but gives . . their full share, . . of the common-school fund, . . This act of 1853, . . makes provision for the education of all children within the state . . But in so doing, divides them into two classes, 'white' and 'colored,' and imposes the [410] duty of providing schools . . under different teachers, . . The law, then, is one of *classification* and not of *exclusion*. . . where the number of colored youth is too small to justify the organization or the continuance of a school for colored youth, such school must be . . delayed or suspended; but this is no more than might occur with the other class under similar circumstances. In determining . . the terms 'white' and 'colored,' . . we may look to the state of things existing at the time, the evils complained of, and the remedies sought to be applied. . . blacks and mulattoes had been a . . degraded race in Ohio. . . They were also excluded from our common schools . . incapacitated from serving upon juries, and denied the privilege of testifying in cases where a white person was a party. . . Whether consistent with true philanthropy or not, . . there . . still is an almost invincible repugnance to such communion and fellowship . . also . . a class had grown up . . which, though partly black, had . . a preponderance of white blood . . the courts, . . had held that such persons were [411] not only entitled

to vote . . and testify . . but were also admissible into the schools for white children. . . these decisions, . . did not receive the hearty approval of the state . . the act of 1853 was enacted. Three objects . . in view. To divide all the youth . . in two classes, to provide . . for . . both classes, and to require both classes to be separately instructed. To which of these classes do the children of the plaintiff belong— . . They are not in the ordinary, if they are in a legal sense, white. . . The demurrer admits . . they are, in fact, if not in law, colored children. . . A person who has . . admixture of African blood, is generally called a colored person. . . One of the evils . . was the repugnance felt by many of the white youths and their parents to mingling, . . with those who had any . . admixture of African blood. . . [412] If those a shade more white than black were to be forced upon the white youth against their consent, the . . law would be defeated. . . the words 'white' and 'colored,' . . were both used in their ordinary . . acceptation, and . . any other construction would do violence to the legislative intent, . . The colored population, . . affiliated with the blacks. . . it is claimed that the word 'white,' . . by a series of decisions of this court, been held to include all persons, though in part of African descent, who are more than half white, . . [414] These decisions . . have had their day, . . and we do not seek to disturb them. The statutes to which they apply, have been repealed, and the construction we place upon the act of 1853 does not conflict with them. . . [415] A majority of the court . . held that colored youth of the description stated in the answer of the defendants, are not, as of right, entitled to admission into the schools, organized . . under the act of . . 1853, for the instruction of white youth." [Peck, J.]

Dissenting: "I am unable to concur in the judicial construction given . . by my brethren, to the words 'colored children,' . . caste legislation, . . is inconsistent with the theory and spirit of a free . . government. . . [417] the word 'colored,' as used in the act of . . 1853, must retain the same construction as . . the act of . . 1849, . . [424] In the passage of the act of . . 1849, the legislature, . . evidently intended to express their approval . . of the . . uniform judicial construction given . . discriminating between 'black or mulatto' persons . . and white persons . . it is especially provided by section 5 that the term 'colored,' . . shall be regarded . . as the term 'black or mulatto.' And the act of 1853, . . uses the words 'colored children' in the same sense . . [425] it seems . . unwise . . to overrule all the decisions of the . . able . . judges who have preceded us, . . I utterly dissent from the opinion expressed by my brethren in this case." [Sutliff, J.; Brinkerhoff, C. J., dissented, without written opinion.]

Anderson v. Milliken et al., 9 Ohio St. 568, December 1859. "action . . by the plaintiff against the defendants judges of an election, for the refusal of his vote. . . submitted . . upon an agreed statement of facts, . . 'That the father of the plaintiff was a white man, without any admixture of African blood; that the mother of the plaintiff is a mixture of three-fourths white and one-fourth African blood; . . neither the plaintiff nor his mother ever were slaves or held as such; that . . plaintiff

for twenty-five years . . has been a resident of . . Hamilton, . . in Butler County, . . that, . . he was, . . a qualified voter . . unless disqualified on account of the admixture of African blood, . . plaintiff, . . offered to vote for electors of president and vice-president of the United [569] States, and . . defendants, . . judges of said election, refused to receive the vote of said plaintiff on account of his admixture of African blood, and for no other reason.' . . 'defendants were not actuated by malice . . but supposed themselves to be in the line of their official duty,' . . the court of common pleas rendered judgment for the defendants, . . a petition in error . . filed."

Reversed: "The constitution of 1802 contained the following provision . . 'In all elections, all white male inhabitants above the age of twenty-one years, . . shall enjoy the right of an elector;' . . The use of the word 'white,' . . necessarily excluded those inhabitants of the state, . . who were not white, and called for a determination of the question, who should be deemed 'white,' . . It was considered in view of blood or race, and the rule adopted to meet the . . difficulty [570] of a mixture of blood or races, was that the white race must predominate. There was a white race and a black race, and . . intent was, to exclude . . from the . . franchise. If an inhabitant . . had an equal portion of the blood of each race, the exclusion still applied; but if he had a larger proportion of the blood of the white race, he was . . regarded as white, . . [571] those who framed the present constitution knew what judicial construction the words . . had received. . . [572] 'a person having less than half black blood shall have the rights of a white man.' . . [573] In North Carolina, where before the adoption, in 1853, of amendments to the constitution of that state, it is well known that free blacks and mulattoes, under the general designation of free men, had the right of suffrage. . . [575] it is said in Bryan v. Walton, 20 Ga. 479-512, of a person having less than one-eighth of African blood, that 'he may exercise the rights and privileges of a freeman.' . . [576] it is useless to multiply . . authorities. We do not think one can be found which will countenance the idea that any the least admixture of African blood will preclude a person from being considered a citizen of the United States. . . [577] it seems too clear for argument that, had the phrase 'citizen of the United States' a then . . connotation . . that . . carried . . the attribute of [578] whiteness of color, and, . . of the absence of any admixture . . of blood or color, the word 'white' would have been applied . . [579] The simple question with us is, in what sense the word 'white' was used in the constitution, . . [580] We are unanimously of the opinion, that . . plaintiff, . . was entitled, . . to vote . . He is . . entitled to a judgment in his favor,"

Monroe et al. v. Collins, 17 Ohio St. 665, December 1867. [666] "action . . by Collins . . for rejecting his vote at an election theretofore held . . where the plaintiffs in error were judges of election. . . Collins alleges, . . having a 'visible admixture of African blood,' but a large preponderance of white blood; . . that . . he offered to vote, and his ballot was so rejected, . . that he had a large preponderance of white blood was . . known to said judges, . . The defendants interposed an

answer . . they admit . . that he was a person having ' a visible admixture of African blood,' with a preponderance of white blood, . . [667] But they allege that Collins, . . did not . . show that he was such white male citizen, . . That Collins, . . answered that his parents lived . . as husband and wife, but refused to answer whether they were married. . . That . . ' I associate with persons white and . . black, when agreeable to all parties.' . . That Collins, . . produced his father, who, . . refused to answer whether he and the mother of said Collins were married, . . That Collins called two other witnesses, . . one . . refused to answer some of the questions . . and the other . . refused to answer any of them. . . [668] respondents averred that, ' although said Collins had, resided in said ward more than thirty days ' . . he was not entitled to vote. . . Collins demurred . . The demurrer was overruled . . and judgments . . entered for defendants. . . in the district court . . the judgment . . was reversed; . . leave is asked to file a petition in error "

Held: [678] " The questions presented in this case involve, . . the constitutionality . . of the . . act of . . 1868, . . [683] As connected with this act, is to be considered also . . a proviso, . . in the . . act of the 17th of April, 1868, . . provides for penalties against judges of election who ' shall refuse to receive, or shall sanction the rejection of a ballot from any person, knowing him to have the qualifications of an elector,' . . ' provided that . . this act, . . shall not apply . . for refusing to receive the votes of persons having a . . visible admixture of [684] African blood,' If these enactments are constitutional, . . the district court erred in holding that none of the defences . . was a good bar . . That Collins refused to answer fully all the questions put to him; that either . . of the witnesses produced by him failed to answer the questions put . . that Collins failed to take the final oath . . that the evidence, . . failed to show that Collins was a white man—either of these defences was a good bar to the action, by . . the act of April 16, 1868. . . The whole case, . . resolves itself into a question of the . . constitutionality of these provisions of law— . . [685] suffrage is guaranteed by the constitution of Ohio to ' white male citizens.' By the constitution of 1802 . . to ' white male inhabitants ' . . It was repeatedly held by the supreme court of the state that men having an admixture of African blood, with a preponderance of white blood, were white men within its meaning, and had the same right to vote as persons of white blood. . . A colored man, . . having more white than black blood, is a white man within . . the constitution, and the legislature have no more power to deny . . his right to vote, than . . to intrench upon that of a man of pure white blood. As electors, . . both . . are regarded as white men. . . If the legislature have power to . . abridge . . suffrage of white men of visible admixture, then they can exercise the same power in regard to white men of black hair, of low stature, of small fortune, . . or of any other description. Between the legislative power and the legal elector, . . the constitutional provision stands as a bulwark for the protection of his right to vote. What the legislature cannot do directly it cannot do by indirection. . . [686] the law is partial, . . by imposing . . unreasonable burdens of proof, . . [687] black blood may be proven by reputation, . . but white blood must

be shown by direct . . testimony, . . [688] The law is also unreasonable, . . it is so framed as to be liable, . . to the construction that no man having African blood is a white man or has a right to vote. . . [689] The most objectionable feature . . is its unjust discrimination against him in regard to penalties, . . or against its abuse. . . [691] it cannot be supported as a law to facilitate and protect . . suffrage . . It discriminates . . it . . lacks . . fairness . . [692] the act is calculated to impair and defeat . . the colored man's . . right to vote, but . . such seems to be its leading, nay its only object. . . We therefore hold the act . . void."

Coolidge v. Guthrie, 6 Fed. Cas. 461 (8 Am. Law Reg., N. S., 22), November 1868. [462] " General Curtis alleged at the time of the seizure [in 1862] and sale of the cotton that his object was to apply the proceeds to the support of the starving negro population in the neighborhood of his camp.[1] A small part of the proceeds were so applied."

Garnes v. McCann, et al., 21 Ohio St. 198, December 1871. [203] " application for . . mandamus, . . to admit the children of the plaintiff to the privileges of a specific district school. . . the facts . . are . . plaintiff is a colored citizen having three children, and resides in school subdistrict . . nine . . There is but one public school in the subdistrict, . . but the teacher, under the direction of the local directors, . . refuses . . instruction to them, . . There are not twenty colored children in that subdistrict, . . but, . . there are more than that number of colored children in . . nine and the adjoining district . . The . . board . . has formed a joint district, . . for . . colored children, which . . affords . . all the advantages . . equal to those . . for white children, . . plaintiff and his children reside in the joint district . . which, . . is as convenient . . for the children of the plaintiff, as is that in . . number nine to some families of white residents . . The board . . have appropriated the full [204] share of all funds, . . for colored children, . . and is . . sustained each year for a longer period than the school for white children . . The defendants, . . acted in good faith, . . It is . . apparent . . that the proceeding is brought, . . to test the right . . to make a classification . . on the basis of color. . . The system of public education in Ohio is the creature of the constitution and . . laws of the State. . . [205] Amongst the numerous express powers confer-[206]red . . on boards . . is . . the 31st section, authorizing the establishment of schools for colored children. . . [207] it clearly appears that . . it did not operate to exclude the colored children . . from a common school education equal to that of the other youth. . . the only doubt . . is as to the . . validity of the law . . The constitution contains no restrictions upon the 'legislative discretion,' in regard to the classification . . for school purposes. . . the question of legislative power to authorize the classification . . for school purposes on the basis of color, has been determined by the supreme court of this State,[2] . . [208] It would seem, . . that . . the

[1] At Helena, Arkansas.
[2] See State *v.* Cincinnati, and Van Camp *v.* Logan, pp. 13, 24, *supra.*

right to classify . . for school purposes, on the basis of color, and to assign them to separate schools . . is too firmly established to be now judicially disturbed. [209] But it is claimed that the law . . contravenes the . . 14th amendment of the constitution of the United States, . . [210] The law in question . . does not . . deprive colored persons of any rights. . . [211] At most, the 14th amendment only affords to colored citizens . . equality of rights . . already secured by the constitution of the State. . . The plaintiff, . . cannot claim that his privileges are abridged on the ground of inequality of school advantages for his children. Nor can he dictate where . . instructed, or what teacher . . without obtaining privileges not enjoyed by white citizens. . . There is, . . no ground upon which the plaintiff can claim that his rights under the fourteenth amendment have been infringed. . . [212] Mandamus refused."

Townsend's Ex'rs v. Townsend, et al., 25 Ohio St. 477, December 1874. " action . . to obtain a construction of her will, and an order for the sale of real estate to pay legacies. . . Mrs. Townsend executed the will . . [478] The following is a copy of the will: . . [480] ' Twenty-second. I give and Bequeath to the Colored Orphan Assylum located in Cincinnati the sum of one thousand dollars. . . The balance of my estate shall be equally divided among all the heirs herein named ' . . The money legacies aggregate $138,000, and were about double in amount to the whole value of her personal estate."

Held: [486] " The principal question . . arises upon the residuary clause . . [489] the meaning . . is to divide the residuum, . . among all those persons named . . who might . . have stood in the relation of heirs . . It is also . . a question . . whether the real estate can be charged with the payment of the money legacies. We think the testatrix intended to make the charge. . . [490] The executors are . . entitled to an order for the sale of so much of the real estate . . as may be necessary for the payment of the legacies."

INDIANA

INTRODUCTION

I

Indiana began its history with a prohibition against slavery, but showed an early tendency to regret that such cheap labor was not available for its economic development.

Originally a part of the Northwest Territory, that area which in 1816 became the state of Indiana, was bound by the terms of the Ordinance of 1787, Article 6 of which provided that ". . there shall be neither slavery nor involuntary servitude in the said territory, otherwise than in punishment of crimes."

In 1796 petition was made to Congress to permit slavery in the territory. In 1800, a similar petition was presented to Congress by about 270 inhabitants, requesting that slavery be permitted under the guise of contract bondage, the children of such slaves to be free at certain ages.[1]

Prior to the Civil War, however, sentiment grew strong, not only against slavery but also against the mere presence of negroes. Under Article 13 of the 1851 Constitution of Indiana, negroes were forbidden to enter the state; contracts with them were declared invalid; and those who employed negroes were to be subject to fine. A statute carrying out these provisions was enacted in 1852. Its constitutionality was challenged in the case of Smith *v.* Moody,[2] in which a negro sued a white man; Smith had entered Indiana after 1851; judgment for defendant was rendered in the trial court. Upon appeal the Supreme Court of Indiana held that Article 13 of the state constitution and the statute in pursuance thereof were in conflict with the Fourteenth Amendment to the Constitution of the United States and therefore invalid.

The traditional disputes arising out of racial antipathy are found in Indiana. In 1850, James Lewis [3] sought mandamus to prevent colored children from attending the common school, where they paid their own tuition to the teacher. Relief was denied on the grounds that the application for mandamus failed to allege that there were colored children in attendance at that time, and that the trustees knew of it, and refused to remove such children. In Woodward *v.* State,[4] the defendant was tried for assault and battery with intent to murder a white man; a colored man

[1] Laws of Indiana Territory, Illinois Historical Collection, Introduction, p. xx.
[2] P. 42, *infra.*
[3] Lewis *v.* Henley *et al.*, p. 38, *infra.*
[4] P. 39, *infra.*

was offered as a witness for the colored defendant; on objection, the trial court rejected the testimony on the ground that the statute barred testimony of Indians and other persons having one-eighth of negro blood, in all cases in which a white person is a party; on appeal this decision was reversed, but only because the state, a party in this case, was not contemplated as a person of any particular color, and hence the statute did not apply. In Barkshire *v.* State,[5] the defendant was convicted of the crime of violating the act of 1852 prohibiting colored persons from coming into the state. The defendant, a colored man, brought a colored woman into Indiana and married her. In its opinion the Supreme Court of Indiana suggested that the wife might well be liable for similar punishment for coming and settling within the state.

II

The Indiana Constitution of 1816 instituted a Supreme Court of three judges, giving it appellate jurisdiction only, but providing that the general assembly might give it original jurisdiction in capital and in some chancery cases. An act of 1831 cut off appeals to it in criminal cases. The Constitution of 1851 provided that it should consist of not less than three judges nor more than five, and legislation gave it four throughout the remainder of the period covered by these volumes. An act of 1852 restored appeals to it in criminal cases.

[5] P. 40, *infra*.

In re Susan, 23 Fed. Cas. 444 (2 Wheeler Cr. Cas. 594), November 1818. Held: Act of Congress Feb. 12, 1793 [1 Stat. 302], providing a procedure for the reclaiming of a fugitive slave escaping into another state, is valid, and the remedy thereunder supersedes the remedy given by state laws.

Vaughan v. Williams, 28 Fed. Cas. 1115 (3 McLean 530), May 1845. McLean, J.: [1116] "Gentlemen of the Jury—From the evidence it appears, that the plaintiff purchased Sam, Mariah, and their child, from one Hendrick, in Missouri, 26th April, 1836, for the sum of eleven hundred dollars, five hundred dollars being paid down. He took the slaves into possession, and they remained with him until April, 1837, when they absconded. These persons formerly belonged to Tipton, a citizen of Kentucky, who, with the slaves, in October, 1835, removed to Illinois. He settled on military land, built a house, cleared ground, and made other improvements, declaring to different persons his intention to become a citizen of the state. Sam and Mariah were both employed in laboring in the fields and in the house, until April, 1836, when they were removed by Tipton to Missouri. Before this was done, there was much conversation in the neighborhood as to the right of the colored persons to their freedom. Tipton started with them before day-light, in the morning, being under some apprehension that they might, if discovered, be rescued. He sold them in Missouri, to the person of whom the plaintiff purchased. Tipton continued to reside in Illinois two years, and, on several occasions, exercised the right of suffrage. In the spring of 1844, the plaintiff heard that the slaves were residing in Indiana, Hamilton county. Taking certain persons along with him, to prove his purchase of the servants, and to identify them, he went to Indiana. Under the statute of that state, he procured a warrant to arrest the fugitives, and a constable to execute the process, and some two or three other individuals, to render assistance that might be necessary. They proceeded to the cabin occupied by the colored persons, in the morning, before daylight. Admission was refused them. They pried the door from its hinges, and threw down the chimney, when the inmates surrendered, acknowledging the plaintiff to be their master. Time was given to send for a neighbor, who, Sam alleged, was indebted to him fifty dollars. That neighbor arrived, and in a short time others, who expressed a strong interest in behalf of the slaves, and that they should not be taken from the neighborhood. The plaintiff alleged that he had no desire to take the fugitives by force, that they should have a fair trial, and if held to be free, he should be content. He agreed to pay Sam for his improvements, and other property. Some difference of opinion was expressed as to the justice before whom the fugitives should be taken; but the plaintiff finally decided that he would take them to Noblesville, a village some miles distant. They set out for that place, the company continually

increasing, until they arrived at Mr. Anthony's farm, where they stopped for breakfast. The plaintiff was averse to this, but yielded, of necessity. After some two or three hours' delay, the company, being greatly increased, set out again for Noblesville. A wagon from Mr. Anthony was procured, to convey the fugitives. They moved on at a very slow pace for a few miles, until they arrived at the forks of the road,—one road leading to Noblesville, and the other to Westfield. Here the company increased to about one hundred and fifty. There was great division of opinion which route should be taken. Mr. Bales addressed the assemblage, urging a submission to law, and saying, 'If the decision shall be against us, under our statute, we have a right to an appeal.' This pacified a majority, and there seemed to be a general acquiescence in the advice given. But there were some who refused to acquiesce, and among them was the individual who drove the wagon. Receiving some encouragement from persons in the crowd, he drove his horses on the Westfield road. The plaintiff and one or two others attempted to stop the wagon, but they were unable to do so; a shout was raised, and the wagon was driven rapidly. The fugitives escaped, and have not since been seen by the plaintiff. Owen Williams, the defendant, was in the company, at the cabin, at Anthony's, and at the cross-roads. He took an active agency in the proceedings, in behalf of the slaves, but was not seen near the wagon at the time it was driven off, nor was he heard to encourage the driver. . . [1118] But . . were not the colored persons entitled to their liberty? Having been brought to the state of Illinois, which prohibits slavery, by their master, from the state of Kentucky, and kept at labor for six months, under a declaration of the master that he intended to become a citizen of that state, and who actually exercised the rights of a citizen by voting, there can be no doubt that the slaves were, thereby, entitled to their freedom. . . A question is made whether the title to [of] the plaintiff is not good, if the colored persons voluntarily returned into slavery. This question does not arise in the case, as there is no evidence that they went voluntarily to Missouri. But on the contrary, from the manner in which they were removed from Illinois, there can be no doubt that they were forcibly abducted by Tipton. And it appears that they sought the earliest opportunity to escape from their new master. As the claim to the services of these persons is not sustained, if you believe the evidence, which is not contradicted, you will find for the defendant, however improper his conduct may have been. If the fugitives were free, he is not subject to the penalty claimed of him." "The jury in a few minutes returned a verdict for the defendant."

Ray v. Donnell, 20 Fed. Cas. 325 (4 McLean 504), May 1849. [326] "the plaintiff resides in Kemble county, Kentucky, was the owner of the woman Caroline and her four children, . . and that they escaped from his services on Sunday evening the 31st October 1847. They described the woman as about thirty-five years of age, of a dark color, and the children as of light complexion, . . On Monday evening the fugitives were discovered by Woodson Clark . . near Clarksburgh, Indiana, in a house nearly filled with clover hay, on Peyton's farm, . . His attention was drawn to the house by hearing someone coughing, and he there found

the woman and her children." Clark " took the fugitives to his own house, and from thence they were taken by his son, who lived near, and to secure them they were placed in a fodder house near the stable. The professed object in secreting the fugitives was, to detain them for their master, to whom Woodson Clark despatched a messenger. On the same evening the fugitives were removed from the fodder house, and by that means made their escape." Donnell and the two Hamiltons applied for a writ of habeas corpus which was allowed. Emry, a constable, accompanied Donnell to Woodson Clark's, about three o'clock in the morning of November 2. Not finding any one they went on to the son's house. The son swears that [327] " Between three and four o'clock on Tuesday morning," he " being on the watch, saw two men approach. . . The men entered the fodder house, and in a few minutes came out with the woman and her children, . . Donnell was carrying the youngest child. . . Donnell said . . that he carried victuals to the fugitives on Tuesday, who were then on the road between Brookville and some other place." The jury found for the plaintiff, and assessed his damages at fifteen hundred dollars.

Norris v. Newton, 18 Fed. Cas. 322 (5 McLean 92), May 1850. Action by John Norris against Leander Newton and others to recover damages for harboring fugitive slaves. " It is proved that the plaintiff is a citizen of Boone county, Kentucky, and that he held, as his property, the negroes—Lucy, Lewis, George, and James— . . these negroes absconded . . 1847. . . The witness and several other persons aided the plaintiff in his pursuit of the fugitives for more than one month, but were unable to find them. Certain articles of property, which were known to belong to the negroes, were found near Clarksburg, Indiana; but, not being able to trace them farther, the pursuit was relinquished. About two years after the slaves had absconded, the plaintiff was informed that they resided in Cass county, state of Michigan. He immediately set out, in company with several persons, to recapture them. On the 27th of September last, the company arrived at Casopolis, a village in the above county, about ten or eleven o'clock at night. The house where the negroes were found was entered. A guard was placed at the door to prevent the escape of any one, and the inmates of the house were charged to make no outcry or alarm. The plaintiff, finding his negroes among others in the house, informed them that he had come to take them back to Kentucky. They recognized him, and the younger boys were willing to return. Lewis, the eldest boy, objected, as he had recently been married. The plaintiff informed him that his wife might accompany them, saying that she should be well treated. She, however, declined going with her husband. Lucy, the mother of the children, interposed no other objection than that her husband would be left behind. David, her husband, had absconded with the others, but was not found when they were recaptured. The four slaves were put into a wagon, Lewis having his arms tied to prevent his escape. The plaintiff's party immediately set out on their return to Kentucky, travelling the remaining part of the night. They took a somewhat circuitous route, passing through the village of South Bend early in the morning of the 28th of September. Between one and two miles south of that village, they stopped

to take refreshments. While thus engaged, Crocker, the sheriff of the county, and others, rode up to them, and in a few minutes the company increased to one hundred and forty, or upward, some of them being armed, others had bricks, stones, or clubs. Some of the plaintiff's party observed that force was about to be used to take the negroes from them, and they must resist it. The slaves were directed to get into a wagon, and weapons were drawn. Crocker, one of the defendants, informed the plaintiff that the sheriff had a writ of habeas corpus, and that they had no other object than to ascertain whether the negroes belonged to him. The plaintiff replied that they might ask the negroes whether they were not his slaves. Crocker charged them to answer no questions, but said to the plaintiff that resistance would be useless, as there was force enough to take the negroes back to the village; but, if the plaintiff would agree to return, he should have a fair trial, and it would not detain him more than an hour or two. The plaintiff consented, and returned with the negroes to South Bend. As they approached the court house, a great number of people, black and white, joined them. Time was given to the plaintiff to procure counsel. . . [323] The counsel who appeared for the negroes moved the judge, who allowed the writ, and before whom it was made returnable, to discharge the negroes, on the ground of the insufficiency of the return; and the case was argued by the counsel on both sides. The court-house was crowded with spectators, and great numbers remained outside of the house, there not being room for them within it. Several of the persons within the house were armed with clubs. The crowd became much excited as the argument was in progress. Under the apprehension that the judge would discharge the fugitives, the plaintiff by the advice of his counsel, applied for, and obtained, a warrant to arrest the slaves as fugitives from labor, under a statute of Indiana. Hearing that such an application was about being made, Crocker, one of the defendants, who acted as counsel for the negroes, warned the state officer not to issue the warrant, as the supreme court of Indiana had declared the statute to be unconstitutional and void, under the decision of the supreme court of the United States in the case of Prigg v. State of Pennsylvania.[1] But the warrant was issued, and was held by the plaintiff to arrest the fugitives, should the judge discharge them. The judge supposed the procedure was under the act respecting fugitives from labor, of 1793;[2] and on the ground that the master had no right to arrest the fugitives to take them out of the state where the arrest was made, but for the purpose only of taking them before some judicial officer of the state, or of the United States, discharged the negroes from the custody of the plaintiff. While the judge was pronouncing his opinion, the plaintiff, holding the writ from the state officer in his hands, arrested the fugitives under it. The opinion being pronounced, Crocker exclaimed in a loud voice, three times, the negroes were discharged—that they were free; and some one said it was the time for action, and called upon those nearest the fugitives to hand them out. At this time, the plaintiff, touching each of the fugitives, arrested them under the

[1] 16 Peters 539.
[2] 1 Stat. at L. 302.

warrant he held, and his party drew their weapons—one or two revolvers and knives—and, standing near the fugitives, warned the crowd not to approach them. The excitement was intense. The plaintiff claimed the protection of the sheriff, and asked him if he would suffer the fugitives, who were his property, to be forcibly taken from him. The sheriff observed that he was doing all he could to pacify the crowd; and it was finally agreed that the negroes should be put into jail, for safe keeping. The plaintiff accompanied them to the jail door, declaring that he would trust no one with the possession of them. Crocker entered the jail shortly after it was entered by the plaintiff with the fugitives and the sheriff. On his coming out of the jail, Crocker pacified the crowd by informing them that the sheriff had assured him the negroes should not be surrendered from his custody without a fair trial. This was a short time after dark, on Friday. On the same evening, and the next day, warrants were issued against certain persons of the plaintiff's party, charging them with a riot and other breaches of the peace. One of them was fined by the justice. Civil process was issued against the plaintiff, claiming large damages, in the name of one or more of the negroes, on account of their arrest and imprisonment. Bail was required in the civil and criminal proceedings. On Saturday, the streets of the village of South Bend were crowded with people, the greater part of whom were colored. The latter entered the village in companies, some of them bearing firearms, and almost all of them had clubs. Through the ensuing day the crowd increased. The number of negroes was estimated, by different witnesses, from one hundred and fifty to four hundred. Many of them came from Cass county, in Michigan. The circuit court of the state met at South Bend on Monday, and the complaints for violations of the criminal laws of the state, against the plaintiff and his party, were made before the grand jury. No bills were found, and the persons charged were discharged from their recognizances. On Monday, another writ of habeas corpus was allowed by the judge, directed to the sheriff, commanding him to bring forthwith the negroes in his custody before him, etc. A notice was given to the plaintiff of the issuing of this writ, and of the place where the hearing would be had; but the plaintiff, under the circumstances, declined any further attempt to take the fugitives, and assigned as a reason that his rights had been violated, and that he should claim compensation from those who had injured him. The slaves were discharged by the judge, and, surrounded by a great number of colored persons, they proceeded from the court-house to a wagon, in which they were conveyed off. . . affidavits were made that the fugitives in question were free, and that they had been kidnapped by the plaintiff in the state of Michigan, with the view of making them slaves. An affidavit was made to this effect by a white person, a citizen of Michigan, and by one of the colored persons in the custody of the plaintiff. It is objected that a colored person, not being a competent witness in Indiana, could not make such an affidavit. I think differently. For this purpose, at least, he may be sworn. It has been so held in Virginia, and in some of the other slave states. . . [325] It appears that the plaintiff was an indulgent master—that he gave to David, the husband of Lucy, and father of the boys, a piece of ground to cultivate in vegetables for

their own use and profit. David was seen by several witnesses at Lawrenceburg at different times, selling vegetables; but there is no express evidence that the plaintiff sent him, or consented that he should cross the river." [327] "The jury returned a verdict for the plaintiff, for $2,850 in damages."

Lewis v. Henley et al., 2 Ind. 332, November 1850. [333] "*mandamus* issued . . upon the application of James Lewis, . . to the trustees of school district . . to show cause why they did not prevent 'colored children, . .' from attending the public school . . Lewis was . . white . . had children to send to school. Colored children attended . . but paid their own tuition to the teacher, . . The trustees answered . . final judgment for . . trustees, . . if colored children were admitted into the school and the trustees did not know it, . . or . . not know that any person objected, such a refusal . . did not exist as would authorize a mandamus. The application . . should have stated that . . negro children . . in attendance . . at the time of the application; that the trustees had been notified of the fact, and required to remove said children, . . and . . refused to do it. Without such statement, . . no necessity, . . for the writ. This application did not contain such a statement . . [334] question is, whether colored children may be permitted to attend our public schools, paying their own tuition, where . . parents of white children . . object. Chapter 15, R. S., . . makes the 'white inhabitants' . . a corporation, . . districts elect trustees . . trustees levy taxes for . . schoolhouses, but . . they omit 'all Negroes and Mulattoes' in forming the taxable list. And section 102, . . When any school is supported . . by the public school fund, . . such school . . open and free to all the white children . . 'within the district, . .' The effect . . is to limit the right of attending our district schools, . . to free white children. . . the colored children did not attend . . as sharers of the public fund, but by paying their own tuition; . . had they a right to do this? . . This has not been done because they did not need education, . . but because black children were deemed unfit associates of white, [335] as school companions. . . this reason operates with equal force against such children attending the schools at their own, . . expense. . . we incline to the opinion that this remedy is appropriate."

Norris v. Crocker, 13 Howard 429, December 1851. [430] "an action of debt . . to recover the penalty of five hundred dollars, upon the fourth section of the act of Congress, approved February 12, 1793 [1] . . respecting . . persons escaping from the service of their masters;" [440] "the suit was pending below when the act of September 18, 1850,[2] was passed,"

Held: "the act of 1850 has repealed, so far as relates to the penalty, the fourth section of the act of 1793 . . the repeal does bar this action,"

Polke et al. v. Harper, 5 Ind. 241, June 1854. "plaintiffs filed a petition for a mandamus against Harper, as trustee of a school district . . show

[1] 1 Stat. at L. 302.
[2] 9 Stat. at L. 462.

cause why he should not, . . remove . . colored children from the school, . . petitioners alleged that they were white . . and taxpayers . . that there was . . a . . district school, . . [242] taught by Miss Grey, under the . . supervision of Harper . . that . . petitioners had several children . . desirous to educate . . but were prevented by the . . attendance of . . colored children . . that they had served written notice on Harper to remove the colored children . . he had . . refused . . Harper made return, denying . . the school . . was a district school; denying . . there was any district school under his supervision . . that Miss Grey's school was a private enterprise, . . plaintiffs demurred; the Court overruled the demurrer; . . the petition was dismissed . . The return denies that there is any district school; . . the demurrer admits . . that Miss Grey's school, . . is a private school. . . Harper had, . . no right to interfere. . . judgment is affirmed with costs."

Woodward v. State, 6 Ind. 492, June 1855. "Woodward was indicted for an assault and battery with intent to murder. He is a colored man, . . the assault . . was upon a white man. On his trial he offered a colored man as a witness . . but the Court refused to hear the witness . . The statute . . is . . 'No Indian, or person having one-eighth . . of negro blood, shall be permitted to testify . . in any cause in which any white person is a party in interest.' . . Is a person upon whom a crime has been committed, . . a party to the cause . . against the criminal? If so, neither the state nor the defendant can call, in such cases, a colored witness, . . Suppose Woodward had been on trial for murder, would the dead man . . have been a party . . If not, shall the negro have . . testimony . . in killing, but not when he stops short of that point? We do not think the state was contemplated as a person of any particular color by the statute. . . The judgment is reversed."

Beebe v. State, 6 Ind. 501, November 1855. [548] "We have prohibited marriages between whites and blacks; . . and have made such marriages felony; . . Personally considered, such a marriage would be a mere matter of taste; but the state deems the product of such marriages, and of commerce in liquors, an undesirable class of persons, and will yield to no clamor in favor of unalienable rights which shall override the public good."

Freeman v. Robinson, 7 Ind. 321, November 1855. "Freeman brought an action against Robinson, . . marshal of the United States . . by virtue of his office having the plaintiff in custody upon a charge of being a fugitive from service and labor, did, . . assault the plaintiff, and strip him naked, and expose his naked limbs and body to divers persons . . against the plaintiff, and . . did expose the plaintiff to be carried into slavery for life by fraud and purjury. . . charges the defendant with having, . . extorted from the plaintiff illegally 3 dollars per day for the space of sixty days. . . defendant answered, denying the jurisdiction of the [322] . . Court, because, . . he was, . . a resident of Rush. . . final judgment for the defendant. . . Two questions . . jurisdiction of the . . action; . . jurisdiction of the . . defendant. . . It stands ad-

mitted, . . that the acts . . were done, but . . defendant . . was . . marshal . . Can the action be maintained in a State Court? We think it can. . . [323] The assault . . and the extorting of money were no part of his official duty, . . and were unlawful. We perceive no conflict between any provision of the fugitive slave law, and the common law right to maintain an action for a personal injury. . . On the question of jurisdiction of the person, we have . . statutory provisions. . . [324] The 29th section, . . contains exceptions . . It provides that certain actions must be commenced in the county where the cause . . arose, among which are . . 'Against a public officer, . . for an act done . . in virtue of his office;' . . the Court hold that the words 'public officer,' . . were intended to apply to officers of the state only, and not to those of the United States. The judgment is affirmed with cost."

Barkshire v. State, 7 Ind. 389, May 1856. "complaint against Barkshire, for bringing a negro woman into state . . and harboring her . . in contravention of the constitution and laws of Indiana. . . finding guilty, Barkshire appeals. . . defendant, is a man of color; . . resided in Rising Sun, . . for . . ten years; that since . . the constitution . . 1851, . . Arthur married a colored woman . . who now resides . . as his wife . . that the marriage was solemnized in this state; . . Elizabeth is a negro or mulatto; . . defendant . . harbored her as his wife . . before and at the time of information filed. . . does this evidence warrant the conviction? . . [390] The policy of the state is . . clearly evolved. It is to exclude any further ingress of negroes, and to remove those already among us as speedily as possible. The 13th article of the constitution, . . was . . submitted to . . the people, . . emphatically it was approved by the popular voice. . . Marriage, . . is but a civil contract. . . it is . . embraced in the constitutional provisions, . . which declares all contracts made with negroes and mulattoes coming . . contrary to . . the 13th article, void. . . A constitutional policy . . so . . conducive to the . . good of both races, should be rigidly enforced . . [391] Elizabeth . . seems . . liable . . to the same penalties for coming . . or settling here."

Weaver v. State, 8 Ind. 410, November 1856. "Information against Henry Weaver, alleged to be a colored man, for disturbing a common school. . . On the trial, the defendant offered two persons as witnesses, but the prosecuting attorney 'objected to their being sworn unless the defendant would admit that said witnesses were niggers, . . that the defendant was a [411] mulatto, . . defendant refused' . . witnesses were excluded. The defendant was convicted. The defendant had a right to have his . . witnesses admitted or rejected according to . . law, . . independent of any such conditions as were sought to be, . . imposed. . . Judgment is reversed with costs."

Graham v. Crockett, 18 Ind. 119, May 1862. "officers, had levied an execution upon a horse, . . of the appellee, who brought suit to recover the same, on the ground that it was exempt from sale, under the three hundred dollar act, . . trial and finding for the plaintiff; . . judgment on the finding. The main point argued . . is as to . . excluding the evidence of two witnesses . . who were not permitted to testify because

they were persons of color—mulattoes; the appellee being a negro, and the appellants white persons. It is insisted, that in a suit wherein one party is white, and the other colored, the white party may introduce a colored witness against the other party, but the colored party can not introduce the same or other witnesses of like color against the white party. The statute is, . . 'no person having one-eighth or more negro blood, shall be permitted to testify as a witness in [120] any cause in which any white person is a party in interest.' . . This statute, . . absolutely imperative . . where a party is white. . . The evidence, it appears to us, was correctly rejected. . . judgment must be reversed. . . nothing showing . . plaintiff demanded to have his property set off, or furnished a schedule, or proved the value thereof."

Riley et al. v. Watson, 18 Ind. 291, May 1862. [292] "action by Watson, . . against Riley and Davidson; . . During the trial one Sterret McClelland, . . testified . . 'I was going . . to . . Mr. Purcell . . I came near the railroad . . discovered five men on the track, . . when I got up . . close . . the three in front were . . Riley . . Davidson, . . Watson, . . the two behind were negroes. . . Davidson said, he believed the two negroes coming up were slaves; . . Riley . . pulled out an advertisement, and told the negroes that he believed they were runaway slaves. . . Davidson examined the negroes . . He discovered on the leg of one of them a scar, as pointed out in the advertisement. We all . . went to Carlisle, . . took the negroes to the . . Depot. . . Riley took one . . in his buggy, the other rode Watson's horse.' . . Riley and Davidson, took the negroes . . to . . Kentucky; . . [293] Watson proposed to go with them; but . . his going . . would . . increase the expense, he declined. . . no . . warrant . . authorizing the . . removal . . to Kentucky. . . expenses amounted to 20 dollars, . . they received a reward of 300 dollars. . . plaintiff, . . claims one-third, . . defendants moved . . instructions: . . the jury . . must be satisfied that the negroes were slaves. 2. . . plaintiff . . must show . . negroes were slaves, . . arrested and returned . . agreeably to the laws of the United States and of this State. 3. If . . negroes were taken . . in violation of . . the laws . . plaintiff can not recover any . . reward . . These instructions were, . . refused, . . defendants excepted. . . exception is not well taken. . . [294] were correctly refused. . . defendants, . . requested the Court to reduce its instructions to writing, but the Court refused to do so; and . . did . . instruct the jury orally. . . The Court in its refusal, . . to reduce the instructions to writing, . . committed an error, for which the judgment must be reversed."

Hatwood v. State, 18 Ind. 492, May 1862. "Mahon Hatwood, a mulatto, was prosecuted, . . for coming into and settling in this State. . . he offered . . the record of a former conviction for the same offense, but it was rejected. The record showed that . . the Court arrested the judgment and discharged the defendant. . . [493] it appeared . . that the act of coming into . . the state, . . occurred . . six years . . prior to the prosecution, . . statute of limitations may be taken advantage of

in criminal cases, under the plea of not guilty; . . We think the statute prohibiting the ingress of negroes constitutional, . . but . . defective in failing to provide for the removal . . upon conviction; . . Cause remanded to be dismissed."

Draper v. Cambridge, 20 Ind. 268, May 1863. "Complaint by the appellee against the appellant for a writ of mandate. . . judgment for plaintiff. Among the errors assigned, . . 'plaintiff complains . . and says that he is a resident in school district No. 6, . . that . . defendant, James Draper, is . . trustee . . and . . Hughes is now teaching a free public school . . [269] that the plaintiff, . . being the age of 21 years, and being neither a negro nor mulatto, nor the son of a mulatto, demanded admittance . . as a scholar, . . the defendants refused to admit . . Cambridge . . and refused to recognize him as a scholar . . We think Draper's demurrer . . should have been sustained. . . The complained should have averred that the plaintiff was over 5 years of age, and unmarried; . . It was as necessary to be shown that the plaintiff was over 5 years of age, . . and that he was unmarried, . . It does not appear . . that the plaintiff was entitled to admission as a scholar . . no ground is shown for the . . mandate. . . The judgment below is reversed,"

Smith v. Moody et al., 26 Ind. 299, May 1866. "Smith sued Moody . . upon a promissory note. . . plaintiff is a negro, . . and . . prior to . . 1851, he was a non-resident of . . Indiana, and . . settled in . . said State since that time; . . plaintiff . . filed . . reply: . . it is true he is a negro, . . but . . he was born free, . . in . . Ohio, and . . was . . a citizen of said State, and of the United States . . [300] final judgment . . against the plaintiff, . . The constitution of Indiana contains the following . . 1. No negro or mulatto shall . . settle in the State . . 2. All contracts made with any negro or mulatto . . shall be void; . . any person who shall employ such negro . . or . . encourage him to remain in the State, shall be fined . . The legislature of Indiana passed 'an act . .' as follows: . . 1. it shall not be lawful for any negro or mulatto to . . settle in, . . the State. . . 6. contracts . . with negroes . . who . . came . . subsequent to . . 1851, are . . void. . . 7. Any person who shall employ a negro . . or . . encourage such . . to remain . . shall be fined . . 9. Any negro . . who shall come . . in violation of, [301] . . the constitution, and . . of this act, shall be fined. . .' It is urged, . . that this article . . and this act . . are in conflict with the constitution of the United States, and . . void. The constitution of the United States provides . . 'The citizens of each state . . entitled to all the privileges and immunities of citizens in the several states.' . . [302] The . . constitution of Indiana, and the law . . to enforce the same, deprive all persons of African descent, not . . in the State at the . . adoption of the constitution, 1. Of the protection of the government; 2. Of the enjoyment of life and liberty. And not only do they deprive them of . . privileges and immunities secured . . by the constitution, but they denounce severe punishment upon . . persons who . . come into the State, regardless of . . skill, . . ability, . . worth, or . . services . . ren-

dered to the country. . . [303] question . . is: Are persons of African descent, . . born free within . . the United States, citizens thereof, within the meaning of the constitution? . . in the . . opinion of Attorney General Bates, . . he decides, . . correctly, that a 'free man of color, if born in the United States, is a citizen of the United States.' . . [304] Congress, . . declares such persons citizens of the United States, . . The Supreme Court, in the face of its own decision,[1] admits to its bar, as attorneys . . persons of African descent. . . [306] By the act of congress . . 'all persons born in the United States and not subject to any foreign power, . . are hereby declared to be citizens of the United States; . .' [307] no doubt of the power of congress to pass this act. . . The judgment is reversed, . . cause remanded, with directions to sustain the demurrer . . and for further proceedings."

Turner v. Parry, 27 Ind. 163, November 1866. "suit by the appellee against the appellant, for the specific performance of a contract for the conveyance of a lot in Richmond. . . Parry had the privilege of purchasing the lot at $1,500, within a year from October [164] . . 1864. . . Parry became the lessee . . for one year. . . alleged . . that . . plaintiff notified the defendant of his election to make the purchase; that . . he made a tender . . and demanded a conveyance, which was refused. . . that relying upon the performance, by the defendant, . . plaintiff made improvements . . value of $1,500. . . issue was tried by the court and found for the plaintiff, . . decree . . for plaintiff. . . A mulatto who had come into the State in defiance of . . the State constitution was offered by the defendant as a witness, and . . excluded, the plaintiff being a white man, and the defendant a mulatto. . . By the act of . . 1853, . . the witness . . incompetent. By the act of . . 1865, . . color as a test . . was removed, 'provided that no negro . . who has come, . . in violation of the . . constitution of the State shall, . . be competent to testify . .' . . By the act of Congress of . . 1866, . . 'all persons born in the United States, . . [165] are . . citizens of the United States; and . . shall have the same right in every state . . to make and enforce contracts, . .' I think that the article being void, the proviso, . . fails. . . Turner and Parry entered into the written contract set out . . The contract was drawn by . . Bell, . . employed by Turner . . as his agent . . Turner left . . and returned to Kansas, . . until December, 1865. . . [166] In April, 1865, Parry made permanent improvements on the lot . . to the value of $1,200. . . he notified Bell of his election to purchase . . Bell wrote to Turner . . Turner replied, that he would not make the deed, . . but . . keep . . it himself. . . Parry . . wrote . . to Turner . . Turner replied . . denying that he had ever made any such contract, . . Turner came to Richmond, . . Parry, . . tended him $1,500, . . Turner refused . . the conduct of Turner . . made . . tender to Bell immaterial, . . When a party . . gives notice . . of his determination not to perform the contract . . performance by the party receiving such notice is unnecessary. . . judgment is affirmed, with costs."

[1] Scott *v.* Sandford, 19 Howard 393.

Ex Parte Lindley, Executor, 32 Ind. 367, November 1869. "John Williams (a colored man) devised all his estate to appellant in trust, . . and apply the proceeds . . to the payment of his debts; . . the residue . . 'to the education of colored children in . . Indiana.' . . appellant was appointed . . executor as well as trustee . . Lindley, . . made his report, showing that . . there remained . . five thousand five hundred and seventy-seven dollars and fifty-eight . . to the trust. . . the court made an order directing the money to be paid in to court, . . declaring the trust closed. [368] The appellant, . . petitioned the court to have the money replaced in his hands, . . to carry out the trust. The court refused . . the executor appeals . . This is a charitable trust, . . a person . . to execute it, . . not void for uncertainty. . . The court below erred . . The judgment is reversed. Causes remanded, . . the money to be repaid to the appellant."

Grimes' Executors v. Harmon et al., 35 Ind. 198, May 1871. [201] "following facts are stated: that Samuel Grimes, . . executed his last will . . that he departed this life . . that . . he was a . . resident . . of Indiana; . . departed this life without issue, . . plaintiffs are his heirs . . decedent . . the owner of . . eight thousand dollars . . of personal property, and seized [202] . . of real estate, worth . . twenty thousand dollars, . . said will . . proved . . appellants, . . as executors . . qualified, . . converted the real and personal property . . into money; . . about thirty thousand dollars; . . that said will was void, . . 'Because, . . there existed . . when said . . will was executed, no organized . . body known as 'the orthodox protestant clergymen of Delphi,' . . also, because the terms . . 'colored children' and [203] 'colored race,' are so vague . . that it is impossible to ascertain who the testator intended . . the objects of his charity; wherefore, . . said will is void for uncertainty, . . [204] The testator, . . disposed of the residue . . as follows: '. . I give . . the residue of my estate, . . to the orthodox protestant clergymen of Delphi, and their successors, to be expended in the education of colored children, both male and female, in such manner as they may deem best, of which a majority of them shall determine; my object . . being to promote the moral and religious improvement and well being of the colored race.' . . It is maintained . . by . . appellants that the will . . was . . valid, and . . capable of being executed by the courts. It is maintained . . that the residuary clause . . is void . . First, . . there is no trustee . . competent to . . hold the property. Secondly, that the use is not clearly defined. . . Charitable uses, . . comprise a trust as well as a use. . . [205] when no competent trustees were . . appointed, . . no use was raised, and the court of chancery acquired no jurisdiction . . [207] at the time when the will was executed . . there did not exist . . an organized . . body known as 'The orthodox protestant clergymen of Delphi.' . . it . . results that there was no artificial trustee . . competent to execute the trust. . . It seems quite evident . . that the testator . . contemplated a perpetuity, by . . 'and their successors;' and . . he intended this his trust should be executed by associated action, . . [208] The ambiguity . . arises upon the face of the

instrument. It is . . a patent ambiguity, and the law is well settled that it cannot be explained by . . evidence debars the will, . . [229] We, . . hold that the residuary devise . . is void . . and cannot receive a judicial enforcement by a court of chancery . . It is admitted . . that the bequest . . would be sustained and executed in England. It is claimed . . that the courts of chancery . . possess all the powers of the court of chancery in England. . . It is also maintained . . that the statute of 43 Eliza-[230]beth created new rights . . [245] It has been, . . decided by the Supreme Court of the United States, . . that this statute created no new law . . but only provided a new remedy for existing rights. . . [253] where the beneficiaries are described, . . as the children, . . of the African race . . it will be impracticable to ascertain the beneficiaries, . . and where, . . the trustees have no discretionary power . . the devise and bequest are void for vagueness and uncertainty."

State v. Gibson, 36 Ind. 389, November 1871. "Appeal from . . Criminal Court. . . It appears . . that appellee was charged . . with having unlawfully . . married, . . Jennie Williams, a white woman . . he . . having one-eighth part or more of negro blood. The indictment was, . . quashed, and the State, . . prosecutes this appeal . . The indictment was based upon the . . act . . as follows: [390] . . 'No person having one-eighth part or more of negro blood shall be permitted to marry any white woman of this State, nor shall any white man be permitted to marry any negro woman, or any woman having one-eighth part or more of negro blood, and every person who shall knowingly marry in violation of the provisions of this section, shall, upon conviction thereof, be imprisoned . . not less than one, nor more than ten years, and be fined not less than one thousand nor more than five thousand dollars.' . . The . . question . . for our consideration and decision is . . the ruling . . in quashing the indictment. . . it is earnestly maintained that . . laws . . prohibiting the intermarriage of negroes and white persons were abrogated by the . . fourteenth amendment of the constitution of the United States, and the . . civil rights bill. . . appellee contends that . . 'marriage, . . being only a civil contract, . . the marriage specified in this indictment was lawful; and . . the judgment . . is correct.' . . [391] in placing a construction upon a constitution . . a court should look to the history of the times, . . also . . to the nature and objects of the particular powers, . . [393] The fourteenth amendment contains no new grant of power from the people, . . to the federal government. . . The only effect of the amendment . . was to extend the . . blessings of the constitution . . to a new class of persons. . . [394] It is claimed that the first section of the . . act which confers upon persons of the African race the right to make and enforce contracts has made it lawful for negroes, . . to . . enter into contracts of marriage with persons of the white race. . . [395] It, . . becomes necessary . . to inquire whether Congress possesses the power, . . to pass a law regulating . . marriage . . [396] The general government is one of limited . . powers, and it can exercise no power . . not expressly . . granted. . . [402] we . . deny the power of Congress to regulate, . . or . . interfere with the states in determining what shall

constitute crimes against . . the state, . . In this State marriage is . . a civil contract, but . . more than a . . civil contract. It is a [403] public institution established by God himself, . . [404] The people of this State have declared that they are opposed to the intermixture of races . . Why the Creator made one black and the other white, we do not know, . . The natural law which forbids their intermarriage . . is as clearly divine as that which imparted . . different natures. . . [405] judgment is reversed, . . cause is remanded, . . the court . . to place the appellee upon his trial for the crime charged in said indictment."

Shipman v. State, 38 Ind. 549, May 1872. [550] "Shipman was indicted . . for the murder of John C. Kelly. . . was put upon trial, and found guilty . . He moved for a new trial, on the grounds, . . of newly-discovered evidence; . . the defendant filed . . affidavit . . [551] 'on his oath says that . . he was attacked by said Kelly, . . with a knife, . . that since said trial affiant has discovered, . . that . . a knife was found in the pocket of said Kelly, . . upon the blade of which was discovered woolen lint, . . affiant alleges, it had been thrust through his coat-sleeve, . . that he can identify said knife . . as . . Kelly's, . . by one Moore, a colored washerwoman, whose given name is to affiant unknown, . . [552] We are of opinion that the application for a new trial, . . was properly overruled, . . the affidavits of the witnesses, . . were not filed. No good reason is shown why their affidavits were not or could not be procured. . . [553] judgment . . is affirmed, with costs."

Cary et al. v. Carter, 48 Ind. 327, November 1874. [329] "This was a proceeding by mandate, . . appellee, . . alleged that he was a citizen of . . Indiana . . and a taxpayer . . the father of two children, . . and the grandfather of Lucy and John Carter, . . that he was a negro of African descent, . . that his children and grandchildren were . . of the age that entitled them to the benefits of the common schools . . there was a common school for white [330] children . . his children . . were refused admittance by the appellants . . for the reason that the school was . . for white children, and not for negro children; . . that . . appellants . . have wholly neglected, . . and refused, . . to provide any school . . near enough for said children . . to attend . . and . . said children . . are denied all opportunity to attend any school . . no allegation that the trustee . . refused to provide the means of education . . to the extent of their proportion, . . of the school revenues of the . . district. . . appellants . . filed . . demurrers . . that it did not state facts sufficient to . . a cause of action, but the demurrers were overruled; . . [331] the court gave judgment for a peremptory writ of mandate. . . The question . . is, whether the court below erred . . the . . solution . . will depend upon the proper construction . . upon the constitution and statutes of this State and the Constitution of the United States; . . The act of . . 1865, provided for . . a tax on the property (except that owned by negroes . .), for . . common schools . . none but white children . . were entitled to its privileges. . . after the ratification of the fourteenth amendment . . an act . . [332] was approved . . 1869, . . as follows: '. . in assessing . . taxes for school purposes . . all property, . . shall

be taxed without regard to the race or color of the owner . . 2. All children . . without regard to race or color, shall . . be included in the enumeration . . but . . the officers . . shall enumerate the colored children . . in a separate . . list . . 3. The trustee . . shall organize the colored children into separate schools, . . But if there are not a sufficient number . . the trustee . . shall provide . . for said children as shall use their proportion, . . of school revenue to the best advantage.' . . [334] It is very plain . . that . . the legislature has provided for the education of the white and colored children . . in separate schools, and the question . . is, whether such legislation is in conflict with the constitution of this State or the Constitution of the United States. . . [338] It is essential to a correct interpretation . . of our constitution, . . that we should look to the history of the times . . at the . . ratification of our state constitution, . . [339] By sec. 7 . . of the constitution of 1816, it is provided . . neither slavery nor . . servitude . . otherwise than for . . crimes, . . [340] Other provisions . . excluded negroes and mulattoes from the elective franchise, from holding office . . and from participation in all of the privileges . . to . . active citizenship, making them a . . class of inferiors . . [341] It is unreasonable to suppose that the framers of the constitution, . . intended to provide for the education of the children of that race in our common schools with the white children of the State. . . [342] There is but one construction which will preserve the . . consistency of our state constitution, . . to hold that it was made and adopted by and for the exclusive use and enjoyment of the white race. . . It would be monstrous to hold that the framers . . intended that the common schools of the State should be open to the children of the African race, . . [344] the next step is to find . . its . . change by the Constitution of the United States. . . [347] The thirteenth amendment was . . ratified . . 1865. . . its obvious purpose was to forbid all shades and conditions of African slavery. . . [362] the legislature must provide for the education of the colored children . . we are required to determine whether the legislature may classify such children, by color and race, . . In our opinion, the classification . . involve questions of domestic policy . . within . . legislative discretion . . and do not amount to an exclusion of either class. . . [366] We are . . of the opinion that the act . . is constitutional, . . while it remains in force colored children are not entitled to admission into the common schools . . of the white children. . . the court below erred . . the judgment is reversed, . . the cause remanded . . with directions . . On petition for a rehearing. . . The petition is overruled."

ILLINOIS

INTRODUCTION

I

Illinois, as a part of the Northwest Territory, was subject to the Ordinance of 1787, Article VI of which provided that: "There shall be neither slavery nor involuntary servitude . . otherwise than in the punishment of crimes, . . Provided always, that any person escaping into the same, from whom labor or service is lawfully claimed in any one of the original states, such fugitives may be lawfully reclaimed, and conveyed to the person claiming his or her labor or service as aforesaid." The Constitution of 1818, in Article VI, reaffirmed this provision, and provided further that contracts of negro or mulatto indenture for a term exceeding one year, except in cases of apprenticeship, should be invalid. Provision was made, however, for recognition of indenture contracts existing prior thereto, but children of such indentured servants were to become free at the age of 21 for males and 18 for females. This Constitution limited the right to vote to white male inhabitants. Legislative acts in Illinois prior to the Civil War concerning slavery and the negro are similar to those of most states in the Union. The case of Nance *v.* Howard [1] illustrates the familiar principle that slaves and indentured colored servants were considered chattel property. An act passed in 1827 provided that county taxes could be levied on certain classes of property, including slaves, indentured or registered negro or mulatto servants. The status of indentured negro servants under the Ordinance of 1787, under the Constitution of 1818, and under the act of 1827, was considered in the case of Phoebe *v.* Jay,[2] and the court held that although a contract of indenture was in no real sense a voluntary contract, yet the state had been admitted by Congress under a constitution making provision for such contracts, and hence had in effect permitted a modification of the Ordinance of 1787, and further that it would be an unreasonable hardship to require the master to prove the validity of the indenture. In the field of criminal law, the case of Willard *v.* The People [3] established the principle that the prohibition of slavery within the boundaries of Illinois did not prevent a citizen of another state from passing through Illinois with slaves without emancipation of such slaves and the defendant, under the criminal code, was fined $20 and costs for secreting one Julia, a mulatto girl, who was being taken

[1] Breese 182 (1828).
[2] Breese 207 (1828).
[3] 4 Scammon 461 (1843).

through the southern part of Illinois en route from Kentucky to Louisiana. The conflict in authority between state and federal statutes dealing with the recapture of fugitive slaves was settled in Thornton's Case,[4] which held void the Illinois act dealing with fugitive slaves on the ground that the federal act of 1793 superseded all state laws on the subject.

II

With one exception, that of a case heard in a federal court, the cases which follow were heard in the Supreme Court of Illinois. Under the Constitution of 1818, the judicial power of the state was vested in a Supreme Court, consisting of a chief justice and three associate justices, with such inferior courts as the general assembly should from time to time create. It was however provided that the general assembly might increase the number of judges after the year 1824, and in 1825 it did so, adding five judges and requiring the nine to go on circuit and hold circuit courts, which however were legislated out of existence in 1829. In 1841, five additional judges were once more appointed, the nine to hold also the circuit courts. The Constitution of 1848 confined the Supreme Court to three judges and relieved it of circuit duties. The Constitution of 1870 arranged for a Supreme Court of seven judges, and this continued to be the system till the end of the period considered in these volumes, that is, to 1875.

[4] 11 Ill. 332 (1849).

Cornelius v. Wash, Breese 63, December 1825. "Belleville, Nov. 9, 1819. Whereas I have employed R. Wash in the suit instituted by George, a black man, against Robert Whiteside and F. Bradshaw, for the recovery of his freedom, I hereby promise . . [64] to pay to said R. Wash . . the further [1] sum of fifty dollars, . . Joseph Cornelius." The suit was "commenced . . in July, 1818, by the late Mr. Mears," "was tried in the St. Clair court at the June term, 1820, . . that Mr. Peck appeared for George and managed the cause with ability, that a verdict was rendered for George for more than $400, and that the verdict was set aside and a new trial awarded, and that the cause was removed to Randolph county, and there tried" "in the fall of 1820, and decided in favor of George, the black man . . and his right to freedom thereby established;"

Cornelius v. Cohen, Breese 92, December 1825. "an action of replevin . . for the recovery of Betsy, a negro girl. . . October, 1804, Rachael, a free negro woman, aged 23, entered into a writing (purporting to be an indenture) with the plaintiff [Cornelius], by which she binds herself . . to serve the plaintiff for fifteen years. . . the master binds himself to allow the apprentice, meat, drink, lodging, and wearing apparel fit for such an apprentice. The indenture is signed and sealed by Rachael *only*. . . Rachael was the mother of Betsy, who was born in the fall of 1805. . . On the 17th September, 1807, the territory of Indiana passed an 'Act concerning the introduction of negroes and mulattoes into this territory.' . . The 13th section . . was the only one relied on in the argument, as securing the services of Betsy to the plaintiff. . . 'That children born in this territory of a parent of color owing service . . [93] by indenture according to law, shall serve the master . . of such parent, . . the female until the age of twenty eight years.'"

Held: "the children of Rachael cannot . . be embraced by it. Because Rachael and the plaintiff did not go before the clerk, and agree for her services as the act directs, and the indenture admits that she was free before the passage of the act. The claim to the services of Betsey [Rachael?] . . is equally inadmissible. . . The indenture, to have been valid, as between Rachael and the plaintiff, ought to have been executed by plaintiff. It is therefore void." [Lockwood, J.]

Coles v. County of Madison, Breese 115, June 1826. "an action of debt brought by the county commissioners . . for the use of the county, against Edward Coles for $2000, as a penalty for bringing into the county, and setting at liberty, ten negro slaves, without giving a bond, as required by an act of the legislature of 1819. . . A verdict was found against Coles, . . 1824, . . [116] but no judgment was rendered upon it, till September,

[1] Cornelius had, on the same day promised to pay Wash sixty dollars [65] "to secure a fee in the same suit."

1825, . . In January, 1825, the legislature passed an act releasing all penalties incurred under the act of 1819, (including those sued for) upon which Coles was prosecuted. This act Coles plead . . but the court . . rendered judgment for the plaintiffs." Judgment reversed and the "proceedings" remanded: [120] "The law . . is not an *ex post facto* law, . . It impairs the obligation of no contract, . . All the rights of the county . . are secured . . This law required the bond to be given, which has been done, and all costs . . and damages incurred in any case to be paid, which the defendant has also offered to do in this case. . . [121] the legislature have the constitutional power to pass the act of 1825, releasing Coles, upon the terms prescribed in that act." [Wilson, C. J.]

Mears v. Morrison, Breese 172, December 1827. "I do hereby sell, deliver over, and transfer to William Mears, the time, that a negro girl named Harriet, and her children, had to serve William Morrison, she being a daughter of a servant of said Morrison, indentured under the laws of this territory concerning the indenturing of slaves, for the sum of three hundred dollars, . . 17th June, 1818."

Nance, a girl of color v. Howard, Breese 182, December 1828. [187] "Nance, upon being brought into the territory of Illinois, and being registered, became a servant to her master until she should arrive 'at the age of thirty-two years,'" [183] "The point . . in this case, is whether a registered servant is liable to be taken and sold on execution? . . [184] The legislature . . pursuing the dictates of an enlightened humanity, have . . reserved for the use of families, a variety of personal articles of the first necessity, from sale on execution. But registered servants, are not among the reserved articles. Are then registered servants, goods or chattels within the meaning of the statute? This is a question of mere dry law, and does not involve . . any thing relative to the humanity, policy, or legality of the laws and constitution, authorising . . the registering and indenturing of negroes and mulattoes." Three acts passed by the territorial legislature, September 17, 1807,[1] "can bear no other construction, than that the legislature considered this description of servants as property, for they rendered them liable to sale on execution, to be assigned by their masters with their consent, to pass to executors, administrators and legatees, and to taxation. . . The legislature . . have invariably taxed servants, not by poll, but 'by valuation.' I refer to the acts passed 27th of March, 1819,[2] 18th of February, 1823,[3] and the 19th of February, 1827.[4] The 15th section of the last . . [185] is . . 'Whenever . . the revenue . . from the tax on lands shall be insufficient . . the county commissioners' court shall have power to levy a tax . . upon the following . . *property,* viz.: . . on slaves and indentured or registered negro or mulattoe servants,' . . By this act, registered servants are expressly denominated property. Each of the execution laws, passed March 22d 1819,[5] and 17th

[1] Rev. Code [of 1807] 188; 2 *ibid.* 608; *ibid.* 647.
[2] Laws of 1819, p. 313, sect. 3.
[3] Laws of 1823, p. 203, sect. 3.
[4] Rev. Laws of 1827, p. 331.
[5] Laws of 1819, p. 181, sect. 13.

of February, 1823,[1] contain the following provision, to wit.: 'That the time of service of negroes or mulattoes, may be sold on execution against the master, . . immediately from which sale, the said negroes or mullatoes shall serve the purchaser . . for the residue of their time of service.' There is, however, no such provision in the act . . passed 17th of January, 1825,[2] and which act repeals all former acts; . . the omission . . cannot be deemed decisive of the intention of the legislature. . . All these acts ought to be taken together, . . By the 22d section of the act . . passed 24th of January, 1827,[3] authority is given to the sheriff, when he 'shall serve an attachment on slaves, or indentured or registered colored servants, or horses, . . to provide sufficient sustenance for the support of such slaves, indentured or registered colored servants and live stock, until they shall be sold or otherwise legally disposed of, or discharged from such attachment.' . . [186] no doubt can exist, that the legislature acted on the supposition, that registered servants were regarded as property which might be seized and sold. And no good reason is perceived, why these servants should be liable to attachments, and not liable to sale on executions obtained by the ordinary prosecution of a suit. . . I have, therefore, come to the conclusion, that indentured and registered servants must be regarded as goods and chattels, and liable to be taken and sold on execution. In support of this opinion, I refer to the case of Sable *v.* Hitchcock,[4] . . They [Nance and Sable] were both slaves in the states from whence they were imported, and their services were held in the same manner, that the services of absolute slaves are held, for the masters were entitled to all the fruits of their labour. The rights of the master had no reference to the benefit of the servants; hence they are in every essential particular, personal property, and subject to most of its attributes and liabilities. . . [187] the judgment of the circuit court must be affirmed with costs." [Lockwood, J.]

Fanny, a woman of color v. Montgomery, Breese 188, December 1828. " an action of trespass, assault and battery and false imprisonment, brought to try the plaintiff's right to freedom. The defendant plead in bar, that plaintiff and others, were taken before a justice of the peace in . . Bond county, as a person held to labour and owing service in . . Kentucky, to John Housten, and that the justice of the peace, upon proof to his satisfaction that the said Fanny, with others, did owe . . and . . were fugitives . . did . . grant a certificate to said Housten, or his attorney, to . . take said Fanny, . . Defendants . . assisted said Housten, or his attorney, to take said negroes, . . that no more force was used than necessary, . . the plaintiff demurred, and . . the circuit court sustained the plea, and gave judgment for defendants, . . [190] the judgment must be reversed, . . and remanded . . with liberty to defendants to amend their

[1] Laws of 1823, p. 173, sect. 9.
[2] Laws of 1825, p. 151.
[3] Rev. Code of 1827, p. 76. Also act of Feb. 12, 1833, sect. 21 (Rev. Laws of 1833, p. 91).
[4] 2 Johnson (N. Y.) 79.

plea," [189] " In order to give a magistrate jurisdiction [under the Fugitive Slave Act,] . . it ought to appear, that the person apprehended as a fugitive slave, had escaped from the state . . where the labour . . is due, into the state . . where he . . is apprehended, . . It does not appear from this plea, that Fanny had escaped, . . But the plea is still more fatally defective, in not stating that the proof was, that she *now* owes service . . in Kentucky." [Lockwood, J.]

Phoebe, a woman of color v. Jay, Breese 207, December 1828. " an action of trespass, assault, battery, wounding and false imprisonment, to which the defendant plead, that the plaintiff . . 1814, before . . clerk of the court of common pleas of Randolph county, Illinois territory, agreed . . with one Joseph Jay, the father of this defendant, . . to serve him as an indentured servant, for . . forty years, . . conformably to the laws of the Illinois territory, respecting the introduction of negroes and mulattoes into the same; . . that the said Joseph, has since departed this life, leaving this defendant, his only son and heir at law, and who is also his administrator—That plaintiff came to his possession lawfully, after the death of said Joseph—That in order to compel plaintiff to . . perform the duties of an indentured servant, in doing the ordinary business of him, the said defendant, and remain in his said service, he had necessarily to use a little force and beating, . . [208] To this plea the plaintiff demurred, . . The circuit court sustained the plea, and thereupon, the plaintiff obtained leave to withdraw her demurrer and reply. Several replications were filed, to which defendant demurred, . . demurrers . . sustained, and judgment given . . for the defendant. . . [214] reversed . . and that the proceedings be remanded . . with liberty to defendant to amend his plea," I. [208] " The first question presented by this case, is, whether the ' act concerning the introduction of negroes and mulattoes into this territory, passed 17th September 1807,' [1] by the territory of Indiana, and continued by the territory of Illinois, was not a violation of . . the ordinance of . . 1787, . . If the only question to be decided, was, whether this law . . conflicted with the ordinance, I should have no hesitation in saying that it did. Nothing can be conceived farther from the truth, than the idea that there could be a voluntary contract between the negro and his master. The law authorises the master to bring his slave here, and take him before the clerk, and if the negro will not agree to the terms proposed by the master, he is authorised to remove him to his original place of servitude. I conceive, that it would be an insult to common sense to contend, that the negro, under the circumstances in which he was placed, had any free agency. The only choice given him, was a choice of evils. On either hand, servitude was to be his lot. The terms proposed, were, slavery for a period of years, generally extending beyond the probable duration of his life, or a return to perpetual slavery in the place from whence he was brought. The indenturing, was in effect an involuntary servitude for a period of years, and was void, being in violation of the ordinance, and had the plaintiff asserted her right to freedom, previous

[1] 2 Rev. Code [of 1807] 467.

to the adoption of the constitution of this state, She would . . [209] have been entitled to it. But, by the third section of the sixth article [1] . . 'Each, and every person who has been bound to service by contract or indenture, in virtue of the laws of the Illinois territory heretofore existing, . . without fraud or collusion, shall be held to a specific performance of their contracts or indentures, and such negroes and mulattoes, as have been registered, in conformity with the aforesaid laws, shall serve out the time appointed by such laws.' . . if these indentures were originally void, can any subsequent act, and that without the consent of the persons most interested, make them good? I readily concede, that no subsequent legislative act, could have made the indenture valid. Can then, this constitutional provision make a void indenture, valid? . . whatever condition is assigned to any portion of the people, by the constitution, is irrevocably fixed, however unjust in principle it may be. . . [210] As it respects the territorial legislature, the ordinance had the same controling influence over their acts, as a constitution has over the legislature of a state. . . although the act of the territory, in relation to indenturing negroes and mulattoes, was originally void, yet it enumerated a description of persons, that the constitution of this state has undertaken to fix their condition in life, and the rights they shall possess in this community. It has determined, that they shall serve their masters, according to the provisions of the law before recited. . . The provision . . does not . . conflict with the constitution of the United States. . . The ordinance . . is no doubt still binding upon the people of this state, unless it has been abrogated by 'common consent.' . . The people of this state, by recognizing the validity of the indenturing and registering of servants, in pursuance of the act of 1807, . . gave their consent, to alter so much of the ordinance as was repugnant to the constitution of this state. When the constitution of this state was presented to congress, . . the attention of that body was called to that clause . . which requires, that registered, and indentured servants, shall be held to serve pursuant to said act, and which was contended, and if I mistake not, was conceded to be, a violation of the ordinance. Congress, however, admitted this state into the Union with this constitutional provision, and thereby, I think, gave their consent to the abrogation of so much of the ordinance, as was in opposition to our constitution. . . [II.a.] [211] it evidently appears from the constitution, that it does not intend to confirm every indenture. . . unless the indenturing was in conformity to the law, it is void. . . [212] But after a period of more than ten years . . and an acquiescence in the mean time of the plaintiff, I think it would impose . . an unreasonable hardship, to require the defendant, to plead and prove all the facts necessary to shew the validity of the indenture. . . it would certainly be competent for the plaintiff . . to state facts inconsistent with these presumptions, . . [b.] The second objection to the plea is, 'that by the death of Joseph Jay, the indenture ceased to have any operation.' . . by the third section of the act, entitled, 'an act concerning servants,' [2] passed on the . . 17th day of September, 1807

[1] Rev. Laws of 1827, p. 36.
[2] 2 Rev. Code [of 1807] 647.

[the same day on which the indenturing law was passed], it is declared that, 'the benefit of the said contract of service . . [213] shall also pass to the executors, administrators, and legatees of the master.' . . by a strict . . construction of the language employed in the first section of this statute, to which the word 'contract,' in the third section refers, it might be considered doubtful, whether the words 'negroes and mulattoes,' under contract to serve another, embrace the negroes and mulattoes, registered and indentured under the act 'concerning the introduction of negroes and mulattoes into this territory,'[1] . . But when it is recollected, that the convention supposed that there were several laws on the subject of indentured and registered servants, I have no hesitation in concluding, that the act concerning servants, embraced indentured servants. . . I have been informed, that the members of the bar, always understood the act concerning servants, had application to indentured and registered servants, and upon that opinion, the community at large, have supposed, that these persons might be sold, with the consent of the servants, and that they went to the administrator . . The first legislature, . . in the act . . passed 30th of March, 1819,[2] have adopted the third section of the 'act concerning servants'[3] *verbatim,* though . . it does not appear that any contract of service is before spoken of. This section of the act of 1819, cannot have any . . meaning, unless it have reference to the indentured and registered servants, mentioned in the constitution. . . consequently, upon the death of Joseph Jay, the plaintiff went to the administrator as assets. [c.] The third objection to the plea, is, that it is uncertain whether the defendant claims the service, in virtue of his being administrator or heir? . . If the defendant claims . . [214] as heir, there is no law to sanction the claim. . . Should the party claim . . as administrator, still, the plea would be bad, as an administrator would only have the custody of the plaintiff for safe keeping, until her time of service could be sold; . . he had no power to compel the plaintiff 'to attend to the ordinary business of him, the said defendant.' . . The plea is also defective . . for not answering the wounding." [Lockwood, J.]

Littleton v. Moses, a man of color, Breese (App.) 9, December 1831. "This was an action brought in the Union circuit court by Moses, a man of color, for a trespass, assault and battery, and false imprisonment; . . The court instructed the jury that the mere fact of the plaintiff's working for the defendants, and under their control, was not of itself sufficient (unconnected with other circumstances) evidence of his being restrained of his liberty; and further . . that in this form of action, the plaintiff could not recover for services rendered, unless the jury should be satisfied from the evidence, that there was restraint or force used to compel him to work, or to abridge him of his liberty. . . that if they should be satisfied from the evidence, that the defendants had exercised restraint or force

[1] 2 Rev. Code [of 1807] 467.
[2] Laws of 1819, p. 358.
[3] 2 Rev. Code [of 1807] 647.

over the person of the plaintiff, that they should find for the plaintiff a verdict." "The jury found a verdict for the plaintiff, for forty dollars in damages." New trial refused.

Boon v. Juliet, a woman of color, 1 Scammon 258, December 1836. "an action of *trespass vi et armis* brought by the appellee against the appellant, for an assault and battery on her sons, Peter, Harrison, and Enoch, being her servants, and restraining them of their liberty, *per quod servitium amisit.* . . . Boon, pleaded specially, that onē Gaston removed into this State, while it was a part of the Territory of Indiana, and brought with him Juliet, being the owner of her, then aged about nine years; and did on the 20th of July, 1808, register her name and age with Robert Morrison, clerk of the Court of Common Pleas of Randolph county, in said Territory, agreeably to the law of the Territory, entitled 'An act for the introduction of Negroes and Mulattoes into the said Territory,' passed Sept. 17th, 1807; . . Gaston . . 13th of July, 1819, transferred . . Juliet . . to one Alexander Gaston, Jr., by bill of sale; . . 7th of October, 1819, [he] . . transferred her . . to . . Boon, . . Enoch is 12 years and five months of age, born since the adoption of the Constitution, Peter 22, and Harrison 20 years of age; the two latter born before the adoption of the Constitution. The defendant, as Wm. Boon's administrator, entered plaintiff's close, and took said children, and detained them as part of his goods and chattels, which are the supposed trespasses, . . the plaintiff demurred, . . judgment on the demurrer for the plaintiff, and one cent in damages."

Affirmed: [259] "This action is confessedly instituted to ascertain the right of the children named in the declaration, to freedom. . . [260] the case of Phoebe . . *v.* Jay,[1] . . might be supposed to have left us little doubt in reference to the children of indentured servants, and their liability to serve out the time prescribed by the Territorial law, still it seems to my mind equally clear, that the provision of the 3d section of the 6th Article of the Constitution, could in no way alter, abridge, or change the condition of the children of registered servants. The Territorial laws had not in any way abridged their liberty, or rendered them liable to the performance of service to the owners of their parents; and it is in my judgment absurd and unjust to deduce such consequences from the proviso contained in that section of the 6th Article of the Constitution above quoted.[2] . . [261] this proviso was . . intended as a mere limitation on the imagined right of the master to the service of the children. As no such right existed at the formation and adoption of the Constitution, and as the proviso must be considered as an act intended for the benefit of, and enlarging the rights of a class of persons supposed to have been subjected to a period of servitude, when in truth and in fact, none such could be legally considered to exist, I am clearly of opinion, that the children of registered negroes and mulattoes, under the laws of the Territories

[1] P. 53, *supra.*

[2] "That the children hereafter born of such persons, negroes or mulattoes, shall become free; the males at the age of 21 years, and the females at the age of 18 years."

of Indiana and Illinois, are unquestionably free, . . It is also to be remarked that Peter and Harrison, two of the children, were born before the adoption of the Constitution, and are necessarily excluded from the terms of the 8th section of the 6th Article; and it is not pretended that any law of the Territory rendered them in any manner, whatever, liable to serve the owner of their mother." [Smith, J.]

Choisser v. Hargrave, 1 Scammon 317, December 1836. [318] "This action, for an *assault and false imprisonment,* was brought by . . Barney Hargrave, a colored man, against . . Choisser, (who claimed [him] . . as an indentured servant), to try his right to freedom. . . Barney 'was brought into the Territory of Illinois at or before 1816, but that he was not indentured or registered until . . 1818,' when he was indentured to Willis Hargrave, who transferred him to . . Wight, and he to Choisser."

Judgment in favor of Barney Hargrave, affirmed: [319] "The Constitution confirms only those indentures that were made in conformity to the act of 1807, and one of the essential requisites to the validity of an indenture under that act, was, that it be made . . within thirty days from the time the negro . . was brought into the Territory." [Wilson, C. J.]

Nixon v. The People, 2 Scammon 267, June 1840. [269] "The indictment charges . . Nixon, with an assault with the intent to commit murder on one Adam, a man of color, by . . throwing the aforesaid Adam from a certain wagon, . . upon the ground, . . frozen and very cold; . . did abandon . . him, . . lying on the ground, . . with intent him, the said Adam, by the means aforesaid, . . to kill . . Adam is a deformed person, and unable to walk or otherwise to move himself from place to place, and so deficient in his voice as to be unable to call aloud." [268] "The cause was tried . . 1839, . . The jury found [Nixon] . . guilty, and fixed the time of his confinement in the penitentiary at seven years." Judgment affirmed: [269] "This differs from most cases of assault with intent to commit murder; it is more malignant, . . But if one assault with intent to commit murder differs from another, it makes it no less a crime." [Browne, J.]

Kinney v. Cook, 3 Scammon 232, December 1840.[1] "an action of *assumpsit,* brought by Thomas Cook against William Kinney . . to recover a compensation for labor and services performed . . The defendant pleaded *non assumpsit,* and a setoff for board, washing, and clothing, goods, wares, and merchandise, sold and delivered to him. . . 1840, . . the cause was heard before a jury, . . it appeared in proof that the plaintiff was a negro, and was retained by the defendant as a slave, during the time stated in the declaration, although there was no proof that he was a slave. The plaintiff having proved the services, rested his cause, without having adduced any testimony whatever of his freedom, . . [233] whereupon the defendant's counsel moved the Court to instruct the jury as in case of a nonsuit; which motion was denied, and the defendant excepted." [232] "A verdict was rendered for the plaintiff for $285 damages, and judgment was entered"

[1] Opinion not delivered till December 1841.

Affirmed: [233] "With us the presumption is in favor of liberty; and the mere claim of the defendant to hold the plaintiff as a slave, and the fact of his having resided with the defendant during the time when the services were rendered, devolved no legal necessity on the plaintiff to prove his freedom. If the plaintiff was the slave, or indentured servant of the defendant, . . he should have pleaded such matter in abatement . . or in bar of the plaintiff's right of recovery. But there could have been, under the state of the proof in the case, no principle of evidence by which the judge would have been justified in advising the jury to find a verdict, as in the case of a nonsuit. The rule, in some or most of the slaveholding States, from considerations of public policy, is undoubtedly that the *onus probandi* . . lies with the party asserting his freedom. This rule, however, it is conceived is founded in injustice. It is contrary to one of the fundamental principles upon which our Government is founded: and is repugnant to . . natural right; nor can there be, in my judgment, sufficient grounds of public policy, to justify a departure from the well settled rules of evidence governing all other cases, and adopting one which inverts a rule drawn from the principles of natural justice. The arbitrary character of such a rule is repugnant to moral sense, and a violation of the fundamental principles of evidence, which requires him, who asserts a right, to produce the evidence upon which he seeks to maintain his claim." [Smith, J.]

Bailey v. Cromwell, 3 Scammon 71, July 1841. "The administrators of Cromwell brought an action of *assumpsit* . . against Bailey, upon a promissory note, . . The defendant . . states that the consideration has wholly failed, in this, that the said note was given in consideration of the purchase of a certain black or negro girl or woman, named Nance . . [72] which he [Cromwell] falsely . . warranted . . to be his property, slave, and servant, and lawfully bound, by the laws of the State of Illinois, to serve him . . seven or nine years, and that he had a right to sell her as his property, and that in a few weeks he would produce the title papers . . the title papers never were produced . . [73] the girl was in possession of Bailey . . for about six months, at the expiration of which time she left his service, and never since returned,—she asserting . . all the time that she was free. . . she was over twenty-one years of age, and had been a resident of this State for several years before the purchase, and . . had been in the possession of Cromwell since 1831. . . while the girl was living with defendant, she purchased goods at a store, and a regular account was kept against her." [72] "The Court found for the plaintiffs, and assessed their damages to $431.97, for which judgment was rendered, and an appeal taken" [71] "A. Lincoln, for the appellant, cited 10 Johns. 198; 10 Wend. 384; 3 Caines 325; Ordinance of Congress, Art. VI.; R. L. 57; Gale's Stat. 44; Const. of Ill., Art. VI.; 14 Johns. 188; 2 Bibb. 238; 2 Salkeld 666."

Judgment reversed: [73] "This Court decided at the last December term, in the case of Kinney *v.* Cook,[1] that the presumption of law was,

[1] P. 57, *supra.*

in this State, that every person was free, without regard to color. . . This presumption the plaintiffs did not attempt to rebut, . . Cromwell had warranted . . that he had a legal right to sell her, which the plaintiff did not show upon the trial. This want of title to her service is . . no consideration for the note. The girl being free, and asserting her freedom in the only modes she could, by doing as she pleased, making purchases, contracting debts, . . could not be the subject of a sale, . . The sale of a free person is illegal, and that being the consideration of the note, that is illegal also," [Breese, J.]

Sarah, alias Sarah Borders, a woman of color v. Andrew Borders, 4 Scammon 341, December 1843. [342] " an action of *trespass vi et armis,* brought by Sarah, a woman of color, to test her right to freedom. . . The defendant pleaded . . a special plea alleging ' that the said plaintiff . . owned by and owing service . . as a slave, to . . Padon, in . . Kentucky, and being above fifteen years of age, was, on the 2d day of December, 1815, brought by . . Padon into the county of St. Clair, Territory of Illinois; and . . on the 13th day of December, 1815, . . the said plaintiff did . . go with . . Padon, before one John Hay, clerk of the court of common pleas . . and did . . agree . . with . . Padon, to serve . . Padon, as an indentured servant, in conformity with . . an act of said Territory, . . passed September 17th, 1807, for . . the term of forty years . . and . . did enter into . . an indenture, . . recorded by the said John Hay, . . And . . November, 1816, . . the said plaintiff consented, in the presence of the said John Hay, he then . . being a justice of the peace . . that the benefit of said contract of service . . might be assigned . . [343] to . . Bradsby, . . a citizen of said Territory; . . which free consent of the said plaintiff was . . attested . . by the said justice of the peace.' . . 1818, . . Bradsby assigned said . . indenture to . . Kane, who . . 1825, assigned the same to Andrew Borders, the defendant. . . for the purpose of compelling the said plaintiff to . . perform the duties of an indentured servant, . . and in compelling her to remain . . in his service, he was necessarily compelled . . to use a little force, restraint, and beating, doing no unnecessary injury to the said plaintiff; . . To this plea there was a general demurrer . . The Court below overruled the demurrer, and gave judgment for costs against the plaintiff. . . March term, 1842, of the Randolph Circuit Court."

Judgment affirmed: [345] " This is a question of power, and not of policy. It is not the province of the Court to determine whether it was politic, just, or humane, but simply whether the people in Convention had the power to fix the condition of people of color, thus situated, at the adoption of our Constitution. This question came directly in judgment, in the case of Phoebe *v.* Jay,[1] . . we must affirm the correctness of that judgment. . . It is further argued, that, admitting the case of Phoebe *v.* Jay to have been correctly decided, yet the Constitution did not recognise the validity of the assignment of the indenture. The acts of the Territory did provide for the assignment of certain indentures of negroes, and which,

[1] P. 53, *supra.*

from contemporaneous practice, have always been understood as applying to these indentures. It needed not a constitutional recognition to give them validity." [Scates, J.]

[346] "Thomas, Justice, delivered the following separate opinion: I concur in the judgment of the Court, but not in all respects, in the opinion on which it is predicated, or in the opinion of the Court in . . Phoebe *v.* Jay; . . The counsel for the appellant [1] . . contend . . that as well the Territorial laws, under which the indenture was made . . as the 3d section of the 6th article of the Constitution of the State of Illinois, confirmatory of acts done under those laws, were . . in violation of the 6th article of the ordinance of 1787, and that, consequently, the indenture . . is void. In this position I do not concur. That the laws authorizing the indenturing . . of negroes . . within the Territory of Illinois contained provisions in contravention of the ordinance, and therefore void, I do not doubt. Nor do I deny that many of the acts of indenturing, and all of registering, done under those laws, were introductive of involuntary servitude . . and therefore legally insufficient to bind to service . . But I, at the same time, maintain that those laws were not in all respects void, and that indentures . . [347] were, in many cases, entered into under them voluntarily, and without 'fraud or collusion,' and that all such indentures were then, and are now, valid. . . these being good and valid, even under the compact,[2] as not imposing . . involuntary servitude. . . it [the state constitution] does not . . confirm indentures originally void. Between the constitutional provision in reference to indented servants, and the 6th article of the compact, there is therefore no incompatibility. . . the fact that the defendant . . may be able to prove, that the indenture . . was entered into strictly in conformity to law, may not always be conclusive of his right to such services. The replication may . . allege fraud, . . and under the Constitution, as he would have been under the compact, the plaintiff will, on sustaining such allegation, by proof, be entitled to a discharge from further servitude. It is, however, otherwise in regard to registered servants, and the issue of indentured servants. Their services were originally claimed without any contract . . they were therefore held in a state of involuntary servitude, under the Territorial laws, and, as I think, in violation of the compact. It does not however follow, that the constitutional requisition . . to serve out the time for which, under the Territorial law, they were bound to serve, is void, for repugnance to the compact. The Convention, when about to establish an organic law for the State, find, within its Territorial limits, a class of persons whom they do not choose to recognise as citizens, and who, consequently, will owe no allegiance to the State; and they claim the right, in the exercise of the police power incident to their sovereignty, to require such persons, for a specific time, to serve a certain class of their citizens; and Congress, having the sole power, if it existed anywhere, to repudiate their claim, affirm it. The people of the State, through their Convention, assert, and the original States, through Congress admit, either that the persons on whom this

[1] L. Trumbull and G. P. Koerner.
[2] Ordinance of 1787.

provision of the Constitution is to operate, are not thereby to be held in involuntary servitude, within the meaning of the compact; or else, that the condition of those persons may be fixed by the Constitution, the inhibitions of the compact to the contrary notwithstanding. . . [349] this is the 'common consent' required for such purpose, by the terms of the compact itself. . . their 'common consent' is clearly manifested to give full . . effect to the Constitution, and if it be repugnant, in any of its provisions, to the compact, *pro tanto* to repeal the latter. . . [350] the Constitution operates to confirm as well the assignment of indentures, as the indentures themselves, in cases where such indentures and assignments had been procured 'without fraud or collusion.' The only position of the counsel for the appellant remaining to be noticed is . . that . . the State legislature . . had no power to legislate further on the subject, and that consequently the law of 1819, and all acts done under it, are null and void. . . The Constitution of our State recognises the indentures . . as valid . . contracts, and neither that instrument, nor the Constitution of the United States, nor any treaty, nor law of Congress, made under the latter, imposes any restrictions upon the power of the legislature, to provide . . [351] for the assignment of such indentures, by the free . . consent of the persons bound thereby. . . Again: . . The law of 1819 . . considered as merely declaratory of the common law, and making the indentures . . assignable only by the consent of the servant, . . authorizes no act by which he can possibly be reduced to a state of involuntary servitude, but leaves his condition wholly unchanged. . . not one of the authorities relied upon by the counsel for the appellant conflicts in the least degree with any of the views hereinbefore expressed, except the case of Phoebe *v.* Jay, . . where the same conclusion is sustained by different reasoning."

"Caton, Justice, delivered the following separate opinion: I agree to this decision, but I do not concur in all the positions laid down by my brethren . . I think it was not the design of the framers of our Constitution to make indentures valid which were before void, and reduce to a state of involuntary servitude, those who were legally free, but only to continue those which were before obligatory. If the indentures were obtained by fraud or collusion, they were not legalized, and whether they were so obtained . . is a question of fact, and not of law."

Chambers v. The People, 4 Scammon 351, December 1843. [354] "The plaintiff was indicted[1] for . . harboring a negro woman named Sarah,[2] she . . being a slave, and owing service to one Andrew Borders, of Randolph County. . . The second count charged him with . . harboring a negro woman named Sarah, . . an indentured servant, and owing service to Andrew Borders, . . an indenture between Sarah and Wm. Padon . . entered into . . 1815, before John Hay, clerk of the court of common pleas of St. Clair county, to serve forty years, . . was offered to the jury in evidence, after proving the death and hand writing of John Hay; . . objection . . overruled, . . The prosecution also offered in evi-

[1] [352] "at the April term, 1843, of the Randolph Circuit Court,"
[2] See Sarah *v.* Borders, p. 59, *supra.*

dence a certain assignment of said indenture, . . made with the consent of Sarah, before John Hay, a justice of the peace of St. Clair county, after proving the hand writing of John Hay to the certificate of acknowledgment; . . objection . . overruled, and the same was read. . . Andrew Borders . . testified that Sarah had been living with him, as an indentured servant, since she was assigned to him in 1825, and until 1841, when she left." "Verdict of guilty rendered on the second count of the indictment." [352] "sentenced to pay a fine of $20 and costs." Judgment reversed and the cause remanded: [355] "it would . . be unnecessary to aver a *scienter* in charging such a statutory offence. . . [356] It was necessary . . to prove that John Hay was clerk, by some competent testimony, there being no seal of office to his attestation. . . when the official acts of justices of a foreign county are offered in evidence, they should be accompanied by certificate, from the proper officer, of his official character." [Scates, J.]

Wilson, C. J. delivered a separate opinion: "I concur in the judgment . . but not in the principles laid down in the opinion, which dispenses with an averment of a *scienter* in the indictment. . . If the defendant did not know that the negro girl was a slave, and owed service in this State, he was guilty of no crime."

Lockwood, J. also delivered a separate opinion: [357] "the indictment was clearly bad, . . contains no averment that Chambers knew that Sarah was an indentured servant. . . [359] If the offence . . is to be considered as consummated by harboring or secreting any . . colored person, who turns out to be a slave or servant, it will be dangerous for the people of this State to extend the most common offices of humanity to that unfortunate class of mankind, to whom God has given a skin colored differently from ours. It would be illegal to receive such persons into our houses, although they were perishing in the streets, with hunger, cold, or sickness. . . [360] The *gist* then of the offence of harboring or secreting a slave or servant consists, as well in the fact of harboring or secreting, as in the knowledge that the person so harbored or secreted was a servant or slave. The harboring or secreting and the *scienter* must both concur to constitute the offence, and to have a good indictment, both should be positively averred." Caton, J. dissented.

Willard v. The People, 4 Scammon 461, December 1843. Willard [462] "was indicted [1] at the March term, 1843, of the Morgan Circuit Court, . . for secreting" [468] "one Julia, . . a mulatto girl, . . who was a slave owing service . . to Sarah W. Liles, in . . Kentucky, . . [469] and in . . Louisiana . . in which latter State Sarah W. Liles resides; . . said slave escaped from . . the owner, without her knowledge or consent, while in . . Illinois, and passing from . . Kentucky to . . Louisiana, . . all of which facts were then . . known to . . Willard." [462] "Judgment was rendered against the defendant upon demurrer to the indictment, and he was sentenced to pay a fine of $20 and costs."

[1] Criminal Code, sect. 149.

Judgment affirmed: I. [469] "The 149th section of the criminal code . . [470] is a police regulation, and is not ancillary to the act of Congress [of 1793], or in violation of the Constitution of the United States." "If no regulation by a State is constitutional, which may incidentally afford protection to the rights of slave holders, no matter how essential it may be to preserve quiet and order in our community; to protect us from vagabond, or pauper slaves; to punish or prevent them from entering our territory, if we think proper; to forbid it, or punish those who may encourage them to come, or harbor or secrete them, while here, we are then, indeed, exposed irremediably, for hundreds of miles of contiguous boundary with Missouri and Kentucky, to heartburnings, criminations, and recriminations, quarrels, brawls, excitements, affrays, and breaches of the peace, arising from the influx of that unwelcome population, and the disturbances to which it may and does give rise. The power is so indispensable to our well being, and the good ordering of our own affairs, that I cannot doubt the power of the legislature to regulate it. The latter clause of the section does most clearly fall within the principles of that decision;[1] but the clause of the section under which the plaintiff is charged, neither gives the owner damages, nor apprehends, or restores the slave, nor in any way affects or furthers his claim or promotes his rights, unless it does so incidentally, by forbidding acts which may occasion disorders in our own society. . ."

"[II.] The remaining question is as to the repugnancy of this act to our own Constitution and the ordinance of 1787. . . [471] The demurrer admits that Julia is a slave owing service . . in Louisiana, . . and that the slave was brought into this State merely on . . her passage from Kentucky to Louisiana, . . The only question . . is, the right of transit with a slave. For if the slave upon entering our territory, although for a mere transit to another State, becomes free under the Constitution, then the defendant in error is not guilty of concealing such a person as is described in the law and in the indictment. . . The 149th section of the criminal code, for a violation of which the plaintiff is indicted, does most distinctly recognize the existence of the institution of slavery in some of these United States, and . . has provided by this penal sanction, that none shall harbor or conceal a slave within this State, who owes such service out of it. Every State or government may, or may not, as it chooses, recognise and enforce this law of comity. . . And to this extent this State has expressly done so. . . [472] England will not enforce the law of comity in relation to the institution of slavery in other countries. . . France has made a partial recognition of it only. . . But Louisiana . . , Kentucky . . , Missouri . . , Mississippi . . , Virginia . . , have recognised it, and held persons to be free, who had become so by the laws and Constitutions of free States. It would be productive of great and irremediable evils, of discord, of heart burnings, and alienation of kind and fraternal feeling, which should characterize the American brotherhood, and tend greatly to weaken, if not to destroy the common bond of union amongst us, and our nationality of character, interest, and feeling.

[1] Prigg *v.* Pennsylvania, 16 Peters 539.

Thousands from Kentucky, Virginia, Maryland, Tennessee, and the Carolinas, and other southern States have sought and found free and safe passage with their slaves across our territory, to and from Missouri. It would be startling, indeed, if we should deny our neighbors and kindred that common right of free and safe passage, which foreign nations would hardly dare deny. The recognition of this right is no violation of our Constitution. It is not an introduction of slavery into this State, as was contended in argument; and the slave does not become free by the Constitution of Illinois by coming into the State for the mere purpose of passage through it." [Scates, J.]

Lockwood, J. concurred in the conclusion, but "not in the views and reasoning . . [473] Julia . . was not a fugitive from labor, . . and being brought into this State by her mistress, where the presumption is in favor of her freedom, . . her case is taken out of the operation of the general rule by the law of comity, . . [474] Is the case . . of such a character as to appeal to the sound discretion of this Court to enforce the laws and institutions of a sister State? In answering this question regard should be had to the geographical position of Illinois, as well as to the relations we sustain to our sister States, confederated under the same General Government. First. In geographical position Illinois is situate between the States of Kentucky and Missouri, and by the laws of both these these two latter States slavery is permitted. The direct route of travel by land between these two States lies through the State of Illinois. The intercourse between many other of the slave States and Missouri, when carried on by land, must necessarily be through the State of Illinois. The State of Missouri has been populated principally by emigrants from Kentucky and other States. For upwards of thirty years past these emigrants, with their slaves, have been permitted, without objection, to pass through this State. While this free passage through the State, with their slaves, recognised as property in the States whence they emigrated, has been of great convenience to the slaveholding States, it has not been without its advantages to our own State. Being of mutual advantage it has been permitted for more than thirty years past. . . [475] If the owner of slaves emigrating through this State, without objection on our part, is not protected under this law of comity, it follows that all the slaves who have passed through this State to Missouri are free, and consequently unjustly held in bondage. The facts growing out of our geographical position, the past relations subsisting between this and neighboring States, the inconveniences to which we would subject them by a change of these relations, the loss of benefits to ourselves following a change of these relations, are such as appeal strongly to the discretion of this Court. . . [476] Should we refuse them the privilege of taking their slaves through our State, would there not be danger that such refusal would engender feelings on their part not favorable to a continuance of our happy Union? . . It is, however, said that it is contrary to our policy to tolerate slavery. This objection is too broad. . . By the act under which the defendant is indicted, and by numerous other acts, the relation of master and slave is recognised. Slavery, then, to a limited extent, is sanctioned by our policy.

But, in permitting emigrants and travellers the use of our highways, we do not thereby express any opinion upon the propriety of slavery. . . such refusal . . would not certainly tend in the slightest degree to emancipate [the slave] . . It would not prevent the master from emigrating . . [477] The master could still remove him to Missouri, by taking a circuitous and tedious route to that State, without passing through our State, and merely subjecting the slave to a long and toilsome journey, probably on foot. . . The 149th section of the criminal code . . has implicitly sanctioned the law of comity, and by so doing, the legislature has manifested a disposition to cultivate a spirit of harmony among the different members of the Union, which it well becomes the courts of justice to imitate."

Eells v. The People, 4 Scammon 498, December 1843. Eells was indicted in the Adams circuit court, in 1843, [508] " for harboring and secreting a negro slave.[1] . . owing service to . . Durkee, . . of Missouri, . . having secretly fled from such State," He was [498] " tried, and convicted . . sentenced to pay a fine of $400 and the costs of prosecution. The cause was heard before the Hon. Stephen A. Douglass."

Judgment affirmed: I. It is unnecessary to allege a *scienter.* [509] " It may be an act of humanity, in many cases, to afford shelter and succor to a slave, while knowing him to be a slave, and the property of another. The essence of the offence consists in the attempt to defraud the owner of his property; . . [II.] [510] the law upon which the indictment was framed is [not] in conflict with the third paragraph of the 2d section of the 4th article of the federal Constitution, . . [512] It neither aids nor impedes the owner in the reclamation of his property. . . it merely acts upon the citizens of our own State. . . [513] The police power of a State embraces the power of regulating the whole internal affairs of a State, and its civil and criminal polity. . . [514] If a State can use precautionary measures against the introduction of paupers, convicts, or negro slaves, it can undoubtedly punish those of its citizens who endeavor to introduce them." [Shields, J.]

Lockwood, J. dissented: I. From " the first section of the 6th article of the Constitution of this State, . . And . . the first section of the 8th article . . I deduce the following rule, that all men, whether black or white, are in this State presumed to be free, and that every person who claims another to be his slave, under any exception . . of the general rule, must clearly show that the person so claimed comes within such exception. . . [II.] [515] the indictment should aver that the accused had a knowledge . . that the person secreted . . was a slave . . [III.] the power of legislation, on the subject of fugitive slaves, is vested exclusively in Congress, . . [517] I am, however, of the opinion that the legislature of this State never intended to embrace the case of fugitive

[1] Rev. Laws 1833, p. 206, which re-enacts section 147 of the Criminal Code of 1827. Rev. Code of Ill., p. 156. A similar law had been passed, on March 30, 1819, by the first general assembly of the State of Illinois. Laws of Illinois, 1819, p. 355. The act passed in 1813 by the legislative council and house of representatives of Illinois Territory provided against the harboring of runaway negroes by free negroes or mulattoes. Laws of Ill. Territory 1813, p. 18.

slaves within the provisions of the 149th section of the criminal code. . . to what description of cases did they intend to apply its provisions, where interference took place with the rights of non resident owners of slaves? For a true solution of this enquiry, recurrence must be had to the situation of the State at and before the passage of the act. Illinois lies between Kentucky and Missouri. Emigrants and travellers from Kentucky and other slave holding States have, for years [*sic*], and men were passing through Illinois to Missouri, by thousands, and were accompanied by numerous slaves. The right thus to travel through the State was by common consent, . . by comity, universally conceded to the citizens of those States. To prevent persons who, from ignorance of the law, or from sinister designs, might feel disposed to interfere with the rights of masters thus situated, this section of the criminal code, it is reasonable to be presumed, was passed. . . [IV.] [518] To construe this section as being a mere police regulation [1] contradicts all my views of such regulations. . . [519] Wilson, Chief Justice, and Browne, Justice, concurred in the dissenting opinion." [2]

Williams v. Jarrot, 1 Gilman 120, December 1843.[3] [122] "Trespass *vi et armis,* . . the plaintiff, being a man of color, owned by, and owing service as a slave to John Beaird, in . . Tennessee, and being over fifteen years of age was brought by him into St. Clair county, in the Territory of Illinois, on the 10th day of October, 1814; . . [124] The defendants then introduced a book, . . 'Record of indentured servants for St. Clair county, beginning 3rd Nov. 1806, kept by John Hay, clerk of the Court of Common Pleas for St. Clair county;' and after proving by . . Kinney, clerk of the Circuit Court of said county, that the book was found amongst the old books . . of the county in his office, and by John Reynolds, the hand writing of John Hay, the defendants . . did read . . from said book, the following indenture: . . 'Be it remembered that on the 17th day of October . . 1814, personally came before me . . clerk of the Court of Common Pleas of the said county, John Beaird . . and Harry, a negro boy, aged near upon sixteen, and who of his own free will and accord, did in my presence, agree, determine and promise, to serve the said John Beaird, for the full space of time, and term of eighty years from this date. And the said John Beaird . . promises to pay him, said Harry, the sum of fifty dollars, at the expiration of his said service. . . Mark of X Harry. [seal.] John Beaird. [seal.] Signed and sealed in the presence of John Hay, C. C. C. P.' The plaintiff objected . . [125] and excepted to the opinion of the Court. The defendants proved by William A. Beaird, that John Beaird died in Dec. 1814, and then asked him who was John Beaird's administrator. . . plaintiff objected, the Court allowed the testi-

[1] Attorney-General McDougall states: [507] "At the time our law was passed, slavery existed, and it even now [1843] exists, to a limited extent in this State, but the institution, as well as a free negro population, was discouraged; penalties were enforced on those who employed negroes from other States, unless they complied with certain conditions; it was the policy of the State to prevent slaves or free negroes being brought here. . . it was . . [the] duty [of the legislature] . . to prevent the influx of a vagabond population,"

[2] See Moore *v.* The People, p. 73, *infra.*

[3] The opinion was not delivered until the December term, 1844.

mony, and plaintiff excepted." [123] "Joseph Beaird administered upon his estate, and as such administrator, came into the possession of the plaintiff, and . . about the fifth day of January, 1815, sold the benefit of said contract of service, . . to Joseph A. Beaird,[1] . . who took . . possession of plaintiff, as an indentured servant, until June, 1827, when he died. . . [125] Scipio Beaird administered on his estate. . . '10 negroes, defer [*sic*], sizes and sex' were sold to Scipio Beaird for $4000. . . plaintiff was one of the ten negroes mentioned in the bill of sale, and that Scipio Beaird purchased them all . . for the . . benefit of the widow and children of Joseph A. Beaird, . . plaintiff served them all nine or ten years and up to the death of Scipio [in 1837] . . Nicholas Boismenue . . and Cecile [Beaird], as administrators [*de bonis non*] of Joseph A. Beaird, sold plaintiff . . to the defendant Jarrot in 1837." [123] "plaintiff ran away from . . Jarrot, and . . so he . . justifies the trespasses, in his own right, and McAdams, as his servant, in compelling plaintiff to return to his service. . . the assault and battery, hand cuffing, and imprisonment were proven; . . [witness] [124] saw plaintiff in company with defendants and another man; that plaintiff was prostrate on the ground with his foot fastened to the stirrup, by which a horse dragged him along on the ground. On cross examination, defendants asked witness, 'Did Jarrot tell them, there, not to hurt him?' . . 'Yes,'" [123] "verdict for the defendants, Jarrot and McAdams."

Judgment reversed and cause remanded: I. [129] "parol evidence was inadmissible to prove who was the administrator of John Beaird." II. "The indenture set forth is, . . upon its face, conformable to the laws[2] then in force, and valid," "those records . . are in proper custody, in the hands of either the clerk of the Circuit Court, or County Commissioners' Court; . . no further authentication than is here shown, is necessary to make them admissible in evidence." [Scates, J.]

Hays v. Borders, 1 Gilman 46, December 1844. [47] "an action on the case brought by the appellee . . in the Perry Circuit Court, to recover damages for aiding, . . and enticing away his indentured servants. The trial came on at the April term 1844," [49] "The first count is for aiding . . four of plaintiff's servants to absent themselves . . whereby . . he lost their services from 15th Sept. to 1st Dec. 1842, and was put to great trouble and cost,[3] and expended a large sum of money, viz.: $200, in getting the servants back . . The second count charges the enticing away of Sukey, the plaintiff's registered servant, whereby . . his said servant was wholly lost to him,[4] and that he was . . [50] compelled

[1] Plaintiff's attorney set forth newly discovered evidence that [126] "plaintiff was sold to John Reynolds . . at the administrator's sale . . at Cahokia, on the 5th day of January, 1815; . . the first article mentioned in ['the sale bill'] . . is a negro boy, named Harry, sold to John Reynolds for $450."

[2] [123] "according to the Act of Sept. 17, 1807 concerning the introduction of negroes and mulattoes,"

[3] [65] "in . . . . making several long journeys to a distant part of the country [Knox County?], to which his servant and apprentices had gone, or been taken,"

[4] [68] "her term expired on the tenth day of January, 1844, after the commencement of the suit, which was on the eighth day of February, 1843, but before the trial, in April, 1844."

to expend . . $200, . . [51] The items of evidence offered to the jury by the appellee, and objected to by the appellant, . . consist of

1. The several indentures of Jarrott, Anderson, and Harrison, the apprentices named in the declaration, respectively entered into before two justices of the peace of Randolph county, . . with the consent of the probate justice of the peace of said county.

2. A paper, . . 'Registry of Negroes, Mulattoes, etc.'

Date	Person's name entered	Age	By whom entered	Color	Sex	For what length of time entered	From where last brought
1817, Jan'y 10th	Sukey	About five years	And'w Borders	Black	Female	Until 32 years of age	Georgia

with certificate by the clerk of the County Commissioners' Court 'that the foregoing is a true copy from the records of the registry of negroes and mulattoes, as the same exists . . among the records of the Court of Common Pleas, in . . the county of Randolph,'" [50] "The jury . . found the defendant guilty, and assessed the plaintiff's damages at $300. . . judgment rendered on the verdict."

Affirmed: I. [51] "the indentures . . are said to be defective, in not showing, in express words, that the persons bound were poor children, . . [52] and consequently void. In this view . . I do not concur. . . They, however, do describe the child bound out in each case, as a negro child, . . the natural child of Sukey, a registered servant, . . Could the indenture be required to furnish any other intrinsic evidence of the poverty of the children than is here done by describing them as the illegitimate offspring of a parent, herself in bondage, and, of course, destitute of the means of supporting them? . . [II.] [53] It is insisted that [the certified copy] . . was inadmissible in evidence . . *First.* Because no Court of Common pleas existed on the tenth day of January, 1817, . . *Secondly.* . . that act of registry was void, as it should . . have been made with the clerk of the Supreme Court of the Territory, within . . that county, . . the second objection requires the first and most thorough investigation. . . upon the determination of this, depend the rights of very many persons to much and valuable property. The authority for indenturing and registering servants . . [54] is found in the law of the Territory of Indiana, . . passed Sept. 17, 1807.[1] . . A separate government for Illinois Territory was established . . 1809; and . . by an Act passed by the Territorial legislature of Illinois, . . 1812, it was enacted that 'all laws passed by the legislature of Indiana Territory, . . in force on the first day of March, 1809, . . of a general nature . . and which are not repealed by the Governor and Judges of the Illinois Territory, are hereby declared to be in full force . . in this territory.[2] The law of 1807 . . thus con-

[1] Territorial Laws of Indiana, 467-469.
[2] *Ibid.* 33, 34.

tinued in force . . [58] By [the act of 1814] . . Courts of Common Pleas were made to pass quietly out of existence, and a new creature, styled County Courts, to supply their place, . . [62] The clerk of the Common Pleas of Randolph county kept the registry of negroes, . . until his office was abolished; the clerk of the County Court succeeded to its custody . . until he . . gave way to the clerk of the County Commissioners' Court, . . [who] [63] might, therefore, properly authenticate [this record.]" Lockwood, J. dissented: [69] "I think that the registry of a servant before the clerk of the Court of Common Pleas, after the Court of Common Pleas had been abolished, was void."

Joseph Jarrot, alias Pete, alias Joseph, a colored man v. Julia Jarrot, 2 Gilman 1, December 1845. [12] "an action of *assumpsit* commenced by the plaintiff in error . . in the St. Clair Circuit Court, at the April term 1843, for work and labor, and for service performed, but in fact for the purpose of trying his right to freedom. . . [13] the second special plea [filed by the defendant] . . sets up a claim to the services of the plaintiff as a slave by virtue of the laws of the State of Illinois." [12] "At the October term 1843, the Court overruled the demurrer to the second special plea, . . [13] Issue was then joined . . The cause was then submitted to a jury for trial, . . Vital Jarrot testified, that the plaintiff, Joseph Jarrot, had rendered services as the slave or servant of the defendant . . for the last five years,[1] and that his services were worth five dollars beyond his clothing and boarding;" [5] "The defendant proved Angelique, plaintiff's grandmother, was held as a slave at Cahokia in 1783, by one Joseph Trotier [reputed to be an old French settler of Cahokia as early as 1769], and afterwards by one Lebrun, a son in law of Trotier; that Lebrun sold Angelique in 1798, and her daughter Pelagie then four years old, plaintiff's mother, to Nicholas Jarrot, of Cahokia; . . that Nicholas Jarrot, by will dated Feb. 6, 1818, bequeathed to defendant all his personal property, including Pelagie, whom he held as a slave; that plaintiff is the son of Pelagie, born after the death of Nicholas Jarrot,[2] and while his mother was so held as a slave by defendant; and . . was about twenty five or twenty six years of age. . . The jury found for the defendant [in accordance with the instructions of the court]." [13] "A motion for a new trial was . . overruled . . and a judgment rendered in favor of the defendant for costs." [12] "The judgment of the Circuit Court will be reversed with cost, and the parties having consented in open Court, judgment will be entered here for the plaintiff, for the sum of five dollars with cost."

The opinion of the court was delivered by Scates, J.: [6] "The record does not show when the plaintiff was born, whether before or after the adoption of the State Constitution. . . So, it seems to me, that the question is legitimately presented by this record, whether the descendants of

[1] An action of *assumpsit* for services rendered more than five years before the commencement of the suit, would have been barred by the statute of limitations.

[2] "About the month of December, 1820, ... Nicholas Jarrot departed this life," Mills *v.* County, 2 Gilman 197 (213). His will was admitted to probate on December 18, 1820. Jarrot *v.* Vaughn, *ibid.* 132 (135).

the slaves of the old French settlers of the Illinois country, born since the adoption of the Ordinance and before the Constitution, or since the Constitution, can be held in slavery in this State. . . [7] I do not doubt but that the negroes possessed by the French settlers of the Kaskaskies and St. Vincents, while the Territory belonged to France, at its cession to Great Britain by the treaty of 1763, and at its conquest by Virginia during the Revolution, were held by them in slavery. It is an institution . . [8] dependent upon the municipal regulations of each particular Government; and although Great Britain and France would not tolerate it in those Kingdoms, they did, nevertheless, in their West Indian and American colonies, . . It is further evidenced and confirmed by an old edict of Louis XV. . . passed in 1723, authorizing it in the province of Louisiana, a copy of which has been preserved in the archives of Kaskaskia, . . But . . I cannot doubt the power of any of the sovereignties, which have had, or that now have . . jurisdiction over the Territory, to abolish it. . . After the conquest of this Territory by Virginia, she ceded it to the United States, and stipulated that the 'titles and possessions,' . . of the French settlers should be guaranteed to them. This, it is contended, secures them in the possession of these negroes as slaves, . . this case . . is not one of first impression, . . [11] After so many . . judicial determinations upon . . the application of the Constitution and Ordinance to facts . . like these . . I cannot allow my mind to doubt of the plaintiff's inherent and indefeasible rights,' to become 'equally free and independent' with other citizens,"

Young, J., delivered a separate opinion: [23] "were the descendants of Angelique free by virtue of the Ordinance of 1787? It cannot be ascertained from the evidence, whether the plaintiff was born before, or since the adoption of our State constitution, . . but the more reasonable presumption is,—and I adopt that presumption as the fact,—that he was born since. . . the matter to be determined is, whether all prior laws . . [24] which authorize persons of color to be held in slavery, the Virginia Act of Cession inclusive, were not abrogated by the sixth Article of the Compact, . . I think that such was the intention of Congress, and this opinion has been very much strengthened by an examination of the Act of 1789, and another in 1800, . . In neither of these is any mention made of any antecedent rights or privileges, either under the Cession Act of Virginia, or any prior law or custom, supposed to be in conflict with the provisions of the Ordinance. . . [29] while not a solitary case has been found, after the most laborious search, where it has been determined that the Act of Cession of Virginia . . had any controlling influence . . upon this subject, since the passage of the Ordinance of 1787, as an organic law for the government of the Territory. Does our State Constitution . . perpetuate . . the claim of the defendant, Julia Jarrot, to the plaintiff, Joseph, as a slave? . . It was evidently intended by the framers of our Constitution that this should be a free State, and yet it is contended . . that the French negroes and their descendants, though resident in this State, are slaves forever! As to the power of a State to emancipate the slaves of its citizens, there can be no reasonable doubt. . . [30] we cannot

resist the conclusion, that all persons of color, who were in this county before and since the passage of the Ordinance of 1787, and their descendants, usually known by the appellation of 'French negroes,' are free. . . [31] If the plaintiff was born since the adoption of our Constitution, . . that instrument, also, as well as the Ordinance of 1787, would entitle him to his freedom, as there is no saving clause in relation to the French negroes and their descendants, as in the case of indentured and registered negroes and their children."

Wilson, C. J.: [32] "The fact that the plaintiff was born after the adoption of the Constitution is fairly inferable from the case, and upon that ground, I concur . . But I am not prepared to say, that if the plaintiff was a slave before the adoption of the Constitution, that he could now assert his liberty. . . Justices Shields, Treat and Thomas dissent from the opinion of the Court."

Patterson v. Edwards, 2 Gilman 720, December 1845. An action of slander. [722] "the plaintiff proved . . the speaking of the following words by defendant, Maria Patterson: . . 'Mrs. Edwards has had children by a negro, and all her children are negroes.' . . The defendants then . . offered to prove that there was a report in circulation, that old Mrs. Edwards . . had children by a negro, . . that the words spoken were of old Mrs. Edwards, . . This testimony was objected to, and the objection sustained . . the jury found a verdict for plaintiffs for $220.00" Judgment reversed: [723] "the words spoken . . do not . . necessarily amount to a charge of fornication and adultery,"

Thornton's Case, 11 Ill. 332, December 1849. "Hempstead Thornton, a negro, presented his petition to this Court, representing that he was illegally restrained of his liberty, upon which a writ of *habeas corpus* was forthwith issued, made returnable instanter. The writ was served upon . . Jones, a constable of the county of Sangamon, whose return to said writ sets out, that he took possession of said Thornton, supposing him to be a fugitive slave, from . . Missouri; that he, . . Jones, had a dispatch . . from St. Louis, Missouri, stating that slaves had fled from said state to said county of Sangamon, and . . that he was, at the time said writ of *habeas corpus* was served on him, . . taking him before a justice of the peace, to have him placed in custody as a fugitive slave; and further, he had a writ from . . said justice . . 'You are hereby commanded to bring before me the body of one negro man, supposed to be forty or forty-five years old, with one leg off, rather dark complexioned, name unknown; also one negro man, supposed to be twenty-five or thirty years old, with one short leg, supposed to be occasioned by the white swelling, dark complexioned, name unknown; also one negro boy, supposed to be nine or ten years old, copper color, name unknown; also one negro woman, supposed to be forty or forty-five years old, copper color, name unknown; and also one negro girl, about five or six years old, copper color, name unknown; as it appears from an affidavit made before me that the above described persons are runaway slaves, and believed to be without free papers, and placed in the jail of said county. Given under my hand and seal, this 16th day of January, A.D. 1850.' . . [333] The foregoing writ

. . was issued under the fifth section of chapter seventy-four of the Revised Statutes, . . [334] Upon hearing the cause, Thornton was discharged by the Court. . . Opinion by Treat, C. J.: . . The manifest object of that section is to facilitate the recaption of fugitive slaves, found within the limits of this state. . . [335] Although the provisions of this section were incorporated into our statute as early as 1819, and seem to be dictated by a proper regard to the rights of citizens of other states, still we are constrained to pronounce them wholly inoperative. . . Congress, . . by the act of the 12th of February, 1793, prescribed the mode by which the master may retake . . his slave found in another state, . . The Supreme Court of the United States, in . . Prigg *vs.* . . Pennsylvania,[1] . . decided that all state legislation, intended either to impede or assist the master in the recaption . . was null and void, on the ground that the legislation of Congress on the subject was exclusive. . . [336] It follows that the arrest of the petitioner was without authority of law,"

Owens v. The People, 13 Ill. 59, November 1851. "The action was upon a bond executed to the people of the State of Illinois, by Thomas Hobbs, a man of color, and . . [60] Owens as his security. Which bond had the following conditions:—That whereas Thomas Hobbs, a colored man, was brought into this State by a woman calling herself Hobbs, and there left; and said negro . . is old, etc. Now if said Hobbs shall behave himself in a decent manner, and act as the law requires . . and shall not become a county charge, then . . this bond is to be void; otherwise to remain in full force . . The declaration contains but one count . . with breaches . . That the . . county of Massac was compelled to . . expend some $37 for the support, nursing, and maintenance of the said Hobbs, after the execution of said bond. . . The defendants filed four pleas. 2d. That at the time said defendants executed said bond, . . Hobbs . . did not produce any certificate of freedom authenticated as the statute[2] requires; and that he was, in fact, a slave brought to this State by his mistress, and the bond was therefore void. 3d. . . that soon after the execution of said bond, . . and before Hobbs became a county charge, . . Hobbs, was offered to be given up by the defendant, Owens, to the proper authorities, but that they refused to receive him. . . demurrers were sustained . . and the defendants electing to stand by their pleas, the Circuit Court of Williamson county, . . September term, 1851, rendered judgment for one thousand dollars, the penalty of the bond;"

Judgment reversed and the cause remanded: [62] "The statute in reference to negroes and mulattoes,[3] . . [63] was manifestly designed to discourage the settlement of negroes within this State. . . The legislature never intended this State to become a rendezvous for negroes . . of every description, who could give the required bond, but limited the privilege of residing here to such only as could furnish evidence of their freedom, and then give bond and security not to become a charge to the county

[1] 16 Peters 539.
[2] Rev. Stat. 1845, ch. 74, sect. 1.
[3] Rev. Stat., ch. 74.

as a poor person, and for their good behavior. . . [64] The first . . and second . . pleas, if true, which the demurrer admits, show, that the bond was taken in a case not authorized by law." [Trumbull, J.]

Ingalls v. Bulkley, 13 Ill. 315, December 1851. [316] "Bulkley had sent a colored or negro boy down after the horse, and also a white boy, . . but he would not let either of the boys have the horse; . . these boys were both minors." The second instruction given for the plaintiff was [317] "That the age or color of the plaintiff's agent . . can have no legal influence in the decision of this case." Held: "This instruction . . was erroneous."

Hone v. Ammons, 14 Ill. 29, November 1852. "This cause was heard at May term, 1849, of the Clinton Circuit Court, . . The action was founded on a promissory note. The second plea was, that the note was . . for the sale of a certain negro man, then running at large in the State, who was alleged falsely . . to be a servant for life, and that plaintiff had a good right . . to said negro; whereas . . said negro . . was a free man; and that said note was made . . for no good . . consideration." "a negro was seen in Clinton county the day on which the note was given; that Hone claimed that he was his runaway slave." "The verdict and judgment was for defendant in the circuit court."

Judgment affirmed: "The moment the defendant proved that the negro was on our soil, he established *primâ facie* that he was free. Not a shadow of evidence was adduced tending to rebut this presumption; . . [30] The bare claim of title by Hone was no evidence of slavery;" [Caton, J.] Trumbull, J. concurred "in affirming this judgment, on the ground that a contract made in Illinois, for the sale of a person as a slave, who is at the time in this State, and to a citizen thereof, is . . in the very teeth of the express provisions of the [state] constitution. . . I would as soon think of enforcing a contract to carry into effect the African slave-trade, as that under consideration. . . [31] The moment the master sold the slave in this State to one of its citizens, he ceased to be a fugitive from any other, . . By the very act of selling the slave here, his master must be considered as having consented to his coming and remaining here; and this made him free.[1] . . [33] If a private sale of this character is valid, then a public sale would be equally so; and the master of a slave who has escaped into this State, may expose him to public sale in any part of the same. . . and the courts of Illinois will be bound, when called upon, to aid . . Such an idea is not, in my judgment, to be tolerated for a single moment in a free State." Treat, C. J., "was clearly of opinion that the plaintiff in error was entitled to judgment on the note; and he dissented *in toto* from the conclusions of the other members of the court."

Moore, Executor of Eels v. The People, 14 Howard 13, December 1852. See Eells *v.* The People, p. 65, *supra.* [14] "This case was brought up from the Supreme Court . . of Illinois, by a writ of error" Judgment affirmed: [21] "we are of opinion [I.] that the act of Illinois,[2] upon

[1] Fish *v.* Fisher, 2 Johns. Cas. 88.
[2] Rev. Laws 1833, p. 206.

which this indictment is founded, is constitutional," [18] "The power to make municipal regulations for the restraint . . of crime, for the preservation of the . . morals of her citizens, . . has never been surrendered by the States, . . In the exercise of this power . . the police power, a State has a right to make it a penal offence to introduce . . fugitive slaves, within their borders, and punish those who thwart this policy by harboring, . . or secreting such persons. Some of the States, coterminous with those who tolerate slavery, have found it necessary to protect themselves against the influx either of liberated or fugitive slaves, and to repel from their soil a population likely to become burdensome or injurious, either as paupers or criminals. . . the results of such conduct as that prohibited by the statute . . are not only to demoralize their citizens who live in daily . . disregard of the duties imposed . . by the Constitution and laws, but to destroy the harmony . . which should exist between citizens of this Union, to create border feuds . . and to cause breaches of the peace, violent assaults, riots, and murder. . . If a State, in the exercise of its legitimate powers in promotion of its policy of excluding an unacceptable population, should thus indirectly benefit the master of a fugitive, no one has a right to complain that it has . . [19] fulfilled a duty . . imposed by its compact as a member of the Union. . . [II.] It has been urged that this act is void, as it subjects the delinquent to a double punishment for a single offence. . . The offences . . are different . . The act of Congress [1] contemplates recapture . . But the act of Illinois, having for its object the prevention of the immigration of such persons, punishes the harboring . . slaves, whether domestic or foreign, and without regard to the master's desire . . to reclaim . . them . . The fine imposed is not given to the master, . . but to the State, . . But admitting that the plaintiff in error may be liable to an action under the act of Congress, for the same acts of harboring and preventing the owner from retaking his slave, . . [20] Every citizen of the United States is also a citizen of a State or territory. . . The same act may be an offence or transgression of the laws of both. . . [III.] an affirmance of the judgment in this case will [not] conflict with the decision of this court in . . Prigg *v.* . . Pennsylvania," [2] [Grier, J.] McLean, J. dissented: [21] "It is contrary to the . . genius of our government, to punish an individual twice for the same offence."

Campbell v. The People, 16 Ill. 17, November 1854. "tried . . at June term, 1854, of Massac Circuit Court." [18] "The plaintiff in error, who is a negro, was indicted for the murder of . . Parker. The evidence . . tends very strongly to show that the deceased made an assault upon the prisoner, and that the homicide was committed in necessary self-defense. . . the deceased and three others went to seek the prisoner at his father's house, in the night time. . . deceased had a hatchet in his hands, . . There was no pretence that there was any sort of justification or legal cause for arresting or assaulting the prisoner. . . the defense offered to prove that on that day, and at other times shortly before . . the deceased

[1] Act of February 12, 1793.
[2] 16 Peters 539 (1842).

had made threats against the prisoner. . . evidence . . ruled out. . . In this the court unquestionably erred, . . [20] The thirteenth instruction asked for the prisoner, was this: 'It is the duty of the jury to consider the prisoner's case as if he were a white man, for the law is the same, there being no distinction in its principles in respect of color.' This . . was refused . . it was . . insisted on the argument, that the proposition is so . . universally . . recognized, that it would have been an insult to the understanding of the jury for the court to have instructed them on that point. The proposition is undoubtedly exceedingly plain and altogether undeniable, . . but it was still the right of the prisoner to have the law, plain as it was, declared to the jury by the court. But again it was objected, that the instruction asserts the absolute equality, in all respects, under our law, of the black man with the white. Even if the wording of the instruction was thus broad, it could only be understood as applying to the case upon trial, where the equality is admitted. . . [21] The judgment must be reversed and the case remanded." [Caton, J.]

Glenn v. The People, 17 Ill. 105, November 1855. "William Glenn, a negro, on the 31st day of January, 1855, was arrested under the third section of an act entitled, 'an act to prevent the immigration of free negroes into this State,' approved February 12, 1853. . . [106] The affidavit, which is the foundation of this proceeding, charges: 'that William Glenn, a negro, is now remaining in the town of Salem, where he has been so residing more than ten days, with the evident intention of residing in this State.'" [105] "He was tried before a justice of the peace . . found guilty and fined $50. Glenn appealed to the Circuit Court, . . a verdict of guilty . . [106] and judgment rendered against Glenn and Torrey, his security, for $50." Judgment reversed: "This charge amounts to no offence in law. . . The affidavit does not allege that the negro *came* into this State, and for aught that appears, he may have resided in this State at the time of the passage of the act of 1853, or have been born in this State." [Skinner, J.]

Rodney v. Illinois Central Railroad Co., 19 Ill. 42, November 1857. [43] "The plaintiff sued the Illinois Central Railroad Company [in 1855] . . for receiving as a passenger on their road, at Cairo, in this State, the negro slave of the plaintiff, held to his service under the laws of Missouri, knowing the negro was the plaintiff's slave, . . escaping from his service, and carrying the negro . . to Chicago, thereby . . aiding the fugitive to escape from service. The declaration also contains a count in trover for the conversion . . in this State, of the plaintiff's slave," "The defendant filed a demurrer . . and the court rendered final judgment upon the demurrer for costs of suit in favor of the defendant,"

Affirmed: [44] "The law of Missouri, under which the negro owes service to the plaintiff, being repugnant to our law and policy of our institutions, neither by the law of nations or the comity of States, can affect the condition of the fugitive slave in this State, or, within our jurisdiction, give the owner any property in or control over him. . . The Constitution of the United States, however, gives the owner the right of

reclamation . . [45] The federal courts . . are the proper forums[1] . . The count in trover cannot be sustained . . The plaintiff, under the local law, where the alleged conversion occurred, had no property in the negro," [Skinner, J.]

Wynkoop v. Cowing, 21 Ill. 570, April 1859. Letter from Cowing, of Yates County, New York, 1848: [579] "I . . have to work like an old Negro to git along,"

Bennett v. Waller, 23 Ill. 97, April 1859. [106] "Deposition of Timothy Webster [detective policeman], taken the 13th July, 1857: . . [167] Do you remember any occasion, when you were at Madison, [Wisconsin,] or Stoughton, that there was lecturing there upon abolitionism, . . a person by the name of Anderson, represented to be a free negro, and while there delivering his lecture, did you not take his cane and carry it away . . and exhibit it, stating . . that while a negro was lecturing you stole his cane; that you thought it was worth about $5; . . I was not in the hall where they said he attempted to deliver his lecture; I was also told by the landlord . . of the City Hotel at Madison, that this negro, during the time of his lecture in the hall, used language before ladies of a most degrading character, and for which, and for being drunk, the negro was locked up. . . the day after . . the lecture . . this negro . . came into the saloon of the City Hotel, and some one . . asked Anderson if he was going to lecture that evening; he was intoxicated at the time; he said he was if he had to use this, . . pulling a sword out of the cane. I took the cane . . while he was drinking, and handed it to the bar-tender; the negro looked round for his cane . . and pulled out a pistol, and said, that if he had not his cane, he had that to use; then some one . . told him that if he did not leave the saloon they would take that away from him, . . Professor Anderson, as he called himself, then left . . [168] about the time I was leaving, the bar-tender and others said to me, Professor Anderson, don't go away until you get your cane, . . the bar-tender handed me the cane, and I took it . . I told Kinzie what had been done to the negro at Stoughton and Milwaukee and Madison, what the landlord had told me; I told it in such a way that he would suppose that I was in the hall at Madison, at the lecture, and was one of those who threw rotten eggs at Anderson, and assisted in getting him to jail, . . I remember reading a piece . . in a democratic paper, commenting on Professor Anderson's course of lectures, setting forth how he had conducted himself at different places at which he had attempted to lecture, and how he had been dealt with by the authorities, and others while lecturing, and after his lectures; . . I showed this to Kinzie . . and have heard him read it to different democrats in town [Clyde], and . . using the words, 'the damn nigger ought to have been thrown into the lake at Madison.' Kinzie has told the story about the cane . . at Franklin, Dodgeville and Mineral Point, when he has been introducing me as a true democrat to his democratic friends and men that hold the highest office in that county by the gift of the people. Did you never reject this test of your democracy, or decline the distinction of being so introduced by Mr. Kinzie as one who

[1] Act of Congress of 1850.

had accomplished such a worthy exploit as to steal a negro lecturer's cane, wherewith he intended to protect his rights and liberty of free speech? I always corroborated Mr. Kinzie's statement about the cane, and have drank [*sic*] on the story several different times, . . [169] and Mr. Kinzie has said that . . he was glad that he was going to leave such a good democrat in his place on Otter Creek, to take care of the democratic party there. . . I don't remember exactly how the publication [in the newspaper] read, but I do know it was intended for a burlesque on Professor Anderson's course of lectures, to show the downfall of the republicans, at different places where he attempted to lecture, . . Was the discrepancy between your history, and the newspaper account of it, noticed . . by Kenzie . . It was, . . and I told him that it was after dark when it occurred, and the reporter did not see all. Kinzie told me that they had enough in to show what damned blackguards the republicans and abolitionists were, in having a nigger to run round lecturing for them. Kinzie has been to Madison with me, when I carried the cane spoken of, since his reading the article in the paper."

Nelson (*a mulatto*) *v. The People,* 33 Ill. 390, January 1864. [391] "Nelson, a mulatto, was arrested under the act of February 12, 1853, prohibiting the immigration of negroes and mulattoes into this state. . . The complaint . . was entered before a justice of the peace in Hancock county, and alleged that 'a tall, slim mulatto, about 55 years old, . . on the 25th day of December, 1862, . . came into this State . . and remained ten days and more, with the evident intention of residing . . That said mulatto person was not born in the State of Illinois, nor a resident thereof prior to 12 February, 1853, that he (the affiant) does not know whether he is a free person or slave, but that he is guilty of a misdemeanor under the law.' The trial . . resulted in a verdict of guilty, and a judgment assessing a fine of $50 upon the defendant, and directing that he be kept in the custody of the sheriff until the fine and costs be paid, or he be 'otherwise disposed of according to law.' The defendant took an appeal . . [392] to the Circuit Court of Hancock county, pending which the cause was removed, on change of venue, into the Circuit Court of Adams county. A trial . . also resulted in a verdict and judgment against the defendant, and thereupon he sued out this writ of error."

Judgment affirmed: [394] "It is first insisted that this enactment [1] is violative of the 16th section of article XIII. of our Constitution. . . In the case of Eells *v.* The People,[2] . . it was said, that a State has the power to define offenses and prescribe the punishment, . . In the rightful exercise of this power, the legislature has declared the emigration of persons of color to, and their settlement in, this State as an offense, . . the punishment by involuntary servitude, provided by the act,[3] is not unusual,

[1] Act of the 12th of February, 1853.

[2] P. 65, *supra.*

[3] "If said negro or mulatto shall be found guilty, and the fine assessed be not paid forthwith to the justice of the peace . . it shall be the duty of said justice to commit said negro or mulatto to the custody of the sheriff . . [58] or otherwise keep him, her or them in custody; and said justice shall forthwith advertise said negro or mulatto, by posting up notices thereof in at least three of the most public places in his district,

but is one of the common means resorted to, to punish offenses, as the State penitentiary, and the various houses of correction in our State, fully attest. Our legislature, at an early period in our history, . . declared that vagrancy in any of its citizens is a crime, punished by sale and involuntary servitude, in the same manner as the offense created by this statute. And we have yet to learn that the constitutionality of that law has ever been questioned. . . This does not reduce the person convicted to slavery, but it is a mode of punishment not prohibited by the 16th section of article XIII. of the Constitution. Under this proceeding, the person convicted and sold is only reduced for a limited period to the condition of an apprentice. . . The laws of all States of the Union authorize the relation of master and apprentice, and yet it has not been regarded as involuntary servitude within the meaning of our Constitution and others with similar provisions. . . [395] It is again urged, that this enactment is in violation of the fourth article of the Constitution of the United States. It declares that 'the citizens of each State shall be entitled to all privileges and immunities of citizens of the several States.' . . this record contains no evidence that the plaintiff in error is a citizen of any State. . . It is also insisted, that the provisions of this . . act apply to both bond and free persons of color, whilst article XIV. of our Constitution refers alone to free persons of that description. In the case of Eells *v.* The People,[1] it was held that the police power of the State embraces the authority over the whole of the internal affairs of the State, in its civil and criminal polity, and that it has the power to prevent the introduction of negro slaves into the State, and to punish those of its citizens who introduce them. It was likewise held that such a law was not in conflict with the third paragraph of section 2 of article IV. of the Constitution of the United States. . . [396] it follows that the State may, by the exercise of the same power, prohibit the slaves from coming to or settling in the State, and if they violate the prohibition they may be punished therefor. . . It is likewise insisted that the provisions of the 8th section of this act are in conflict with the act of congress, providing for the return of fugitives from justice and labor. . . [397] The placing the slave in the custody of the purchaser for the limited period, does not [obstruct the enforcement of the act of Congress], as the custody is declared to be subject to the act of congress. . . But when it declares that he shall pay the remainder of the fine, it would seem that such a provision may obstruct . . the execution of the act of congress. It imposes terms, . . additional . . to that act. . . But if these provisions are violative of the act of congress, the question does not arise in this case. When the master shall apply for his slave the question will arise, but he has not, so far as this record discloses, made such an application. Although the eighth section

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which said notices shall be posted up for ten days, and on the day and at the time and place mentioned in said advertisement, the said justice shall, at public auction, proceed to sell said negro or mulatto to any person or persons who will pay said fine and costs, for the shortest time; and said purchaser shall have the right to compel said negro or mulatto to work for and serve out said time, and he shall furnish said negro or mulatto with comfortable food, clothing and lodging during said servitude." General Laws of Illinois, passed 1853, p. 57, sect. 4.

[1] P. 65, *supra*.

of the act under consideration may be repugnant to the act of congress, still, the remaining portions of the law, not subject to the objection, and not violative of the national or State Constitutions, may be enforced. . . The fourteenth article of the [State] Constitution, was separately submitted to the people for adoption or rejection. After a full consideration of its provisions, the voters of the State sanctioned it by a majority of many thousand. . . the members of the general assembly . . had no choice but to give effect to its provisions, and when they have done so, it is for the courts to enforce the enactment according to its spirit, unless prohibited by the Constitution itself." [Walker, C. J.] "Mr. Justice Beckwith dissenting."

Farrell v. Patterson, 43 Ill. 52, January 1867. [54] "she had two negroes, a man and a girl, which were sold by her husband for her, he getting therefor $1,300. . . in the year 1858 or 1859. . . they came to Illinois from . . Missouri in . . 1859,"

Roundtree v. Baker, 52 Ill. 241, September 1869. [243] "an action of debt, brought . . on a writing obligatory, entered into [October 10, 1833] in . . Kentucky, . . given for the price of a negro girl . . the instrument sued on . . is for four hundred dollars, payable in equal annual installments of twenty dollars each, . . the girl, Eliza . . was a slave in . . Kentucky, . . That she was sold and delivered in . . [244] Kentucky by Dudley Roundtree to Turner Roundtree, who resided in this State, . . 1869, the cause was tried before the court, . . the court found for defendant; . . and a judgment was entered in favor of the defendant for costs."

Judgment reversed and the cause remanded: [247] "Our courts would not enforce a contract for the sale of a slave, whether made in this State, where slavery has always been prohibited, or in a State where such contracts are binding, because it is against public policy. But after the parties have fully executed their contract, and a note is given for the price, under this comity which exists between the States . . the note may be collected, and it is not for us, from caprice, or because we may abhor the system of slavery . . to refuse to lend the aid of the courts for the collection of the money. . . Under the laws of Kentucky the sale was authorized, and there was a sufficient consideration. . . [248] no language employed for the abolition of slavery can be construed to render notes given for the purchase of a slave inoperate and void." [Walker, J.]

MICHIGAN

INTRODUCTION

I

Somehow Michigan escaped the turmoil characteristic of Ohio and Wisconsin in the solution of slavery questions in the courts. The most serious litigation concerning the negro in Michigan centered around the voting privilege. In 1866 [1] was tested the constitutional provision restricting the voting privilege to "white male citizens." The defendant Dean was convicted of a violation of this provision. The testimony indicated that Dean had either negro or Indian blood in his veins, but the white predominated. The Supreme Court of the state granted a new trial on the ground that the lower court erred in charging the jury that a person of not more than one-sixteenth African blood was not a white person; that the true rule was that a person was white who had less than one-fourth African blood. Chief Justice Martin filed a vigorous dissenting opinion in which he expressed the view that a man who had a preponderance of white blood was a white man and hence entitled to vote.

A curious case [2] arose in 1872, involving the elective franchise. The plaintiff sought a writ of mandamus to compel the board of registration to register him as a voter. His application was denied on the ground that since his slave parents had escaped to Canada and settled there, neither the plaintiff nor his parents took any rights under the Fourteenth and Fifteenth Amendments to the Constitution of the United States; the plaintiff must therefore seek American citizenship like any other British subject, his color being no impediment to citizenship.

II

The Michigan Constitution of 1835 provided that there should be a Supreme Court, but left to subsequent legislation the details of its organization. An act of 1838 gave it a chief justice and three associate judges, and established a court of chancery, abolished in 1847. The Constitution of 1850 provided that for six years and until the legislature should arrange otherwise the Supreme Court should consist of the judges of the eight circuit courts; and that after the expiration of six years the legislature should have power to compose it of a chief justice and three associate justices, the court to have little but appellate jurisdiction. An act of 1857 established this system.

[1] People *v.* Dean, p. 85, *infra.*
[2] Hedgman *v.* Board of Registration, p. 87, *infra.*

Gordon v. Farrar, 2 Douglass 411, January 1847. "action on the case, . . by Gordon against [412] Farrar . . inspectors of election . . in . . Detroit, for refusing to receive the plaintiff's vote, . . Plea, not guilty. . . At the trial, the jury returned . . special verdict: 'The jury . . find for the plaintiff, and assess his damages at 12½ cents, subject to the opinion of the court upon the following facts, . . plaintiff is . . of Saxon and . . of African descent, but the Saxon blood in him . . predominates . . He is of a complexion as white . . or whiter than many persons descended from European nations; . . a mixture of African blood . . he has less than one-half.' The plaintiff offered his vote . . which was refused. He . . offered to take the oath . . which was also refused. . . [413] qualifications of electors . . are fixed by the constitution. Art. ii., sect. 1, . . provides . . 'every white male citizen, . . shall be entitled to vote . .' [414] no provision is made for testing . . the elector, as to his color, or descent. The inquiry is, . . confined to the qualifications enumerated, . . The duties of the inspectors . . are clearly pointed out. . . They . . make the . . inquiries, and if the party answers them fully, . . they are, . . required to administer another oath, . . and if he will take such oath they must receive his vote. . . But it is only white male citizens who are entitled to vote; . . If a colored person should offer his vote, and be challenged . . it would not be competent . . to receive the vote without determining, . . by inspection . . whether he came within the description of persons . . qualified. . . [415] The plaintiff relies upon the point that, . . the act complained of was . . a ministerial act. . . we think he is mistaken. . . Conceding, . . as the plaintiff . . does, to the inspectors, the right to adjudicate upon this inquiry, . . we cannot come to any other conclusion, than that the inspectors, in passing upon those facts . . acted judicially. This brings us to the question of judicial responsibility. . . [416] In this view . . it is unnecessary to examine the cases . . as we put the judgment of this court upon the distinct ground that the inspectors, . . acted judicially, and are . . not liable to this action."

Giltner v. Gorham, 10 Fed. Cas. 424 (4 McLean 402), June 1848. Action brought, under the act of 1793, sect. 3,[1] to recover the value of six slaves claimed by Giltner of Kentucky. The slaves absconded in August, 1843. In 1846 Giltner was informed that the fugitives were in Marshall, Michigan, and authorized Troutman, his grandson, [425] "to search for and arrest them and bring them to Kentucky, . . December 23d following, he arrived at Marshall, and finding the slaves there, he wrote to the plaintiff to send persons who could aid him, and who could identify the slaves. . . David Giltner, son of the plaintiff, William F. Ford, and

[1] 1 Stat. at L. 302.

James S. Lee . . met him at Marshall, and having procured the service of Dickson, the deputy sheriff of the county, early on the morning of the 27th [of January, 1847] they proceeded to the residence of the slaves. Dickson accompanied them to keep the peace. As they approached the house, Adam Crosswhite and his son Johnson, two of the fugitives, came out of the door and proceeded in different directions, apparently with the intention to escape. They were followed, and on being requested, returned to the house." [427] "On entering the house of the negroes, Troutman explained to them that he had come as the agent of Giltner to take them before a magistrate, to prove property, and then take them to Kentucky. Crosswhite consented to go—told the family to get ready—put a cloak round his little girl—said that it was cold, and that he did not wish to go without a wagon. Troutman said a wagon should be procured." Troutman [425] "permitted Adam to consult counsel, and he went to another part of the village, accompanied by Dickson, for that purpose. Witness [Troutman] remained in the house with the family. Before Adam's return, several colored persons and some white ones came to the house. Planter Morse, a colored person, and one of the defendants, entering the house, declared the family should not be taken. He was much excited, and pulling off his coat, declared he would go into the fight. He advised Adam, on his return, not to be taken, declaring that he and others would stand by him, and drive off the kidnappers. Adam then went to a drawer, took out of it something which witness supposed to be a knife and powder-horn. Morse drew a knife, and using it in a menacing manner, declared what he would do with it, if witness attempted to take the family away. About this time five other persons came to the house, one white man and a boy, the others colored. Hacket, one of the colored men, came near to the witness, who was standing in the door, and inquired what he was doing. Witness replied that he was doing what the law authorized him to do. Hacket said he would see about that, and attempted to pass into the house. Witness told him to stand back. Hacket's hand was in his pocket. Witness again told him to stand back, drawing a pistol which he retained in his hand, but did not present it in a firing attitude. Hacket retired, saying he would attend to witness. James Smith, a colored man, and one of the defendants, approached, and in an excited manner inquired where the Kentuckians were, who were attempting to kidnap the Crosswhite family. The witness was pointed out to him, and Smith with a club raised, approached within five or six feet of witness, when he was seized by Dickson, who, with the aid of one or two other persons, led him away. Smith, as he approached witness, threatened to smash out his brains. Charles Berger, a colored man, and a defendant, approached, and in an excited manner inquired where the Kentuckians were, and, as witness thinks, drew a knife, the handle of which he saw, and which he used in a threatening manner. Dickson interfered and led him aside, though he still remained on the ground. William Parker, a colored man, and also a defendant, came up with a gun, and declared he would risk his life to prevent the Crosswhite family from being taken. By this time one hundred or more persons, white and black, had collected. Threats against the

lives of the Kentuckians were made, if they persisted in taking the fugitives. They were denounced as kidnappers, and some proposed to tar and feather them—others to massacre them. About this time Charles T. Gorham, Herd and Combstock, defendants, came on the ground, . . This was about eight o'clock in the morning. A large crowd had assembled, who uttered a good deal of menace. The whites encouraged the blacks, . . Gorham said to the witness, 'You have come after some of our citizens.' . . 'You can't have them, or take them: this is a free country, and these are free persons.'" Giltner [428] "remarked, if by force they should be prevented from taking the negroes, that he would bring a regiment from Kentucky, and would take them." [429] "Gorham said they were not abolitionists—advised Troutman not to make an attempt to take the fugitives, as it would cause great excitement. Gorham evinced earnestness, but he was good natured. In one or two instances, Gorham exerted himself to allay the excitement." [426] "At this time the wagon to convey the family was driven near the house, . . Combstock, pointing to the crowd, said, 'You see that in making the attempt your lives will be endangered;' and added, 'You can't have them, or can't take them, by moral, physical, or legal force; and you might as well know it first as last, and the quicker you leave the ground the better for you.' Gorham took up the remark of Combstock, a short time after it was made, and offered the following resolution: 'Resolved that these Kentuckians shall not take the Crosswhite family by virtue of moral, physical, or legal force.' This was passed by general acclamation, and with much noise. Witness then said, taking a book from his pocket, that he wanted the names of all responsible persons who intended to prevent him from taking the slaves. Gorham said he came there by public sentiment, to prevent his taking the slaves; that public sentiment was above the law; that similar attempts had proved abortive; and we will not permit our citizens to be kidnapped and taken back to slavery. This was before he offered the above resolution. When witness called for names, he addressed himself to Gorham and Easterly. They both gave their names, and Gorham requested that his name might be put down in capitals; and he requested witness to bear it back to the land of slavery as a moral lesson; and he added, that he wanted to make an example of witness." Troutman "asked the privilege to offer a resolution: 'Resolved, that I, as agent of Francis Giltner, of Carroll county, Kentucky, be permitted peaceably to take the family of Crosswhite before Sherman, a justice, that I may make proof of property in the slaves, and take them to Kentucky.' Witness heard no votes for the resolution, at least not more than one or two. Witness then proposed that if they would permit him to take the slaves before the magistrate, and if he should prove the right of the plaintiff to their services, and obtain the certificate, he would give them time to raise money to pay for the slaves a reasonable price; and he proposed to contribute more than any other man. Gorham replied, 'You can't have a sixpence for them, and you can't take them.' Again witness requested Dickson to summon the above persons to assist in keeping the peace. . . Herd, standing outside of the gate, in the presence of Gorham, a few rods in front of the house, offered the following reso-

lutions: ' Resolved, that these Kentuckians leave town in two hours.' Here some one of the crowd added, ' Or they shall be tarred and feathered, and rode on a rail '—when Herd continued, ' Or they shall be prosecuted for kidnapping or housebreaking.' . . Dickson refused to execute " a warrant to arrest the slaves. A process was issued against Troutman for a trespass in breaking the fastening of Adam's door. The trespass case lasted through the next day and evening. "A judgment of one hundred dollars damages and costs, was entered against the witness [Troutman] by the justice in the trespass case. On the morning of the 29th, as witness and his Kentucky friends were about leaving, at the National Hotel, in Marshall, Herd, Gorham and others being present, witness said to Gorham, ' You have all got the advantage of me now,' but he could not tell how it would end. Gorham said, ' Yes, the negroes are gone, and you can never get them.' The witness estimates the value of the negroes at two thousand seven hundred and fifty-two dollars." [430] " The rescue of the slaves enabled them to escape to Canada, beyond the reach of the claimant," McLean, J. (charging the jury): [432] " This, gentlemen, is an important case. It involves great principles, on which in a great degree depend the harmony of the states, and the prosperity of our common country. The case has acquired great notoriety by the action of the Kentucky legislature, and of the senate of the United States. It is the first one of the kind which has been prosecuted in this state. . . However unjust and impolitic slavery may be, yet the people of Kentucky, in their sovereign capacity have adopted it. And you are sworn to decide this case according to law—the law of Kentucky as to slavery, and the provision of the constitution, and the act of congress in regard to the reclamation of fugitives from labor." The jury disagreed, after being out all night, and was discharged. "At the succeeding term a verdict was given for the plaintiff for the value of the slaves. Judgment."

Day v. Owen, 5 Mich. 520, October 1858. [521] " action . . against the defendant as a common carrier. The first count . . alleged that the defendant was the owner of the steamer *Arrow,* plying between Detroit aad Toledo, . . that . . plaintiff applied . . for a cabin passage from Detroit to Toledo, and offered to pay . . that, although there was room, the defendant refused to give the plaintiff a cabin passage, . . plaintiff was . . obliged to travel in the night a hundred miles out of his way to reach Toledo. A second count alleges that the defendant was a common carrier, . . of passengers in and by the cabin and deck of said steamboat, . . and was the proprietor of said cabin, or covered room, . . that the plaintiff . . demanded to be carried in said covered room to Toledo; . . plaintiff tendered the . . hire . . and said covered room was not full . . yet the defendant refused to carry plaintiff in said cabin, . . A third count alleged a refusal to carry generally, . . set up no ground of refusal, except that the plaintiff was a colored man. This count contained no averment that plaintiff . . was ready . . to pay the fare. The defendant pleaded the general issue, and appended . . three notices of special matter . . [522] 1. That the plaintiff was a colored man, . . that . . colored persons were not allowed the privileges of cabin passengers. 2. That by the

regulation . . of said boat, colored persons . . were not allowed to use the cabin as such passengers; . . 3. That the plaintiff, by his color and race, was excluded from ordinary social and familiar intercourse with white persons by the custom of the country, . . General demurrer by the plaintiff, . . overruled and judgment for defendant . . plaintiff brought error."

Affirmed: [525] "The last count is bad, as it contains no averment that plaintiff . . was ready . . to pay the fare. The second ground of defence, . . avers such regulations . . to be reasonable. . . The right to be carried, is a right superior to the rules . . of the boat, . . If defendant had refused to carry the plaintiff generally, he would be liable, . . the [526] accomodation of passengers, . . is subject to . . regulations . . provided they be reasonable. The right to be carried is one thing—the privileges of a passenger on board of the boat, . . is another thing. . . The refusal to allow plaintiff the privilege of the cabin, . . was . . denying him . . accommodations, while being transported, . . All . . regulations must be reasonable; . . [527] The notice states plaintiff is a colored person, . . The reasonableness of the rule, . . does not depend upon the color of the plaintiff, . . but on the effect the carrying of such persons in the cabin would have, . . As the duty to carry is imposed by law . . the law would defeat its own object if it required the carrier, . . to incommode the community at large. . . [528] The second defense . . is, . . a sufficient answer to the second count of the declaration. . . It states defendant refused to carry the plaintiff in the cabin, and not that he refused to carry him generally, . . judgment . . affirmed with costs."

People v. Dean, 14 Mich. 406, July 1866. [413] "Defendant was prosecuted for illegal voting; . . not being within the constitutional provisions regulating . . [414] voters. Two propositions were discussed . . first, whether a person of less than one-half of African blood was white, within . . the constitution; second, whether one of not more than one-sixteenth of African blood was white. The circuit judge charged against the prisoner on both points, . . exceptions . . to his rulings. . . The constitution . . gives the right of voting . . to 'white male' citizens . . when the present constitution was submitted to a popular vote, a separate proposition was submitted . . 'every colored male inhabitant' would have been . . upon . . the same footing, . . as if he were white. This proposition was rejected, . . the constitution, . . admitted none . . who were not 'white.' The origin of this regulation, . . is . . in the act of congress of . . 1819, authorizing . . a delegate . . from Michigan territory, . . the right of voting . . to 'free white male citizens,' . . [415] We are, . . to determine what was meant by . . 'white,' . . There was no . . prevalent legal meaning . . so attached to . . 'white,' . . of any governing weight in its adoption. . . The reasons for drawing distinctions . . between . . classes are notorious; . . the [416] course of events has, with the destruction of slavery, . . modified public opinions . . we cannot truly interpret . . our constitution upon . . voting, without . . consideration to the fact that it sprang from . . prejudice, . . Our state legislation has never sanctioned . . enactments which

put black men in the category of suspected criminals under bonds for good behavior, . . and we have never, . . attempted to make color a test of veracity in the witness box. . . it has never occurred to any one that different shades of color could afford . . ground of compromise. The mooted principle has been recognized as . . outside of any shades [417] and gradations of color or blood; . . no one has, . . advanced the . . notion that a preponderance of mixed blood, . . has . . bearing upon . . fitness . . to possess political privileges. . . The recognition of slavery, . . confirmed the feeling which has . . separated the white race into the . . dominant people . . [418] When the people of Michigan decided to retain their ancient system, and to allow none but white persons to vote, they . . intended . . only such as were commonly so called and received. Was a person in whom white blood . . predominated over negro blood thus regarded? . . it has never been the case that any one having visible tokens of African descent has been regarded . . as a white person. . . it is . . known that the associations of persons having visible portions of African blood, have . . been closer with each other than with those acknowledged as white. They . . live and act together. This mutual recognition, . . furnishes a commentary on the terms white and colored, . . [419] There are many decisions upon the subject, . . in all of them (except a class of decisions in Ohio) . . it has not been deemed proper to class as white any not of pure blood, . . the Ohio decisions . . have now being . . repudiated by the courts of that state, . . [422] there is not a court in the United States which holds that a 'colored person,' . . can be called 'white' without doing violence to language. In this state, . . the population of African descent has . . been divided into black, mulatto, and 'other persons of color,' . . [423] The constitution does not impose any restriction of color, except upon electors. . . [424] it seems necessary, . . that any general classification must be based upon the distinction between those who as classes are apparently white, and those who are not. . . [425] it should be considered, . . that persons are white . . in whom white blood . . preponderates that they have less than one-fourth of African blood; . . As the defendant came . . within this rule, . . a new trial should be granted." [Campbell, J.; Christiancy and Cooley, J. J., concurred.]

Dissenting: "Dean was . . convicted . . for illegally voting . . The bill of exceptions shows . . that Dean . . took the oath . . that he was a resident . . that he was of Indian descent, . . [426] counsel for the people introduced . . a witness . . who, . . testified . . that . . he regarded him as a mulatto, . . not . . a white man. . . other witnesses, . . testified that defendant was a mulatto; . . that he was born in . . Delaware; . . a witness . . testified that he was a . . surgeon . . for . . forty-three years; . . that he had examined the prisoner . . that there was some African blood in the defendant, . . not exceeding one-sixteenth part; . . that the only clear indication of African blood is a peculiarity in . . the nose, and this was an infallible indication; . . that his skin was not different from . . Europeans of bilious temperament; . . [427] that he was a white man, except such taint of African blood. . . defendant then introduced witnesses, who . . testified that they had known . . his

family in Delaware; that they were . . from the original Indians of Delaware; . . had no negro blood in them . . the . . judge did . . charge the . . jury that, . . if they believed, . . that he had . . African blood equal to one-sixteenth, . . [428] he was not a white man . . and was not entitled to vote. . . And . . if they believed, . . that he was . . of Indian descent, possessing, . . trace of . . African blood, amounting to one-sixteenth, . . he was not a white man, . . and was not entitled to vote . . If Dean . . had . . African blood . . not exceeding one-sixteenth, . . we are all agreed that he was a legal elector. . . This, . . is decisive . . another question was raised, . . they regarded it as the real question . . If the defendant had . . more than one-half, of the blood of the white race, was he . . a legal elector? . . [430] at . . the adoption of our . . constitution, I do not think this question of degree of blood entered into the consideration of voters. They . . determined that negroes should not vote, and this included, . . mulattoes. . . It has been left to freemen . . to excite this hatred of races, and deny to persons tainted with African blood the equality we boast all Americans are entitled to. [431] . . this prejudice is of northern origin; . . North Carolina, . . by law provided that all freemen who had paid a public tax—and free blacks were included . . might . . exercise the elective franchise. . . the same right is extended to free blacks . . No prejudice of blood existed in the slave states . . The negro, . . regarded as chattels, if slaves, . . the free negro, . . being regarded as a man. It was left to northern men to arouse that prejudice and excite that hostility toward the colored race, . . [432] This is the first occasion where the Supreme Court of this state has been called upon to construe the word ' white ' as used in the constitution, and I should regard myself . . derelict . . should I interpret it . . incompatible with . . progress, unless compelled to by . . evidence, that the people . . has the distinction of color . . however much diluted, active in their minds. . . They certainly had none that a person of less than quarter blood had . . a . . right to vote, over one possessing a preponderance of white blood; . . By what authority . . can we fix a strain of . . one-sixteenth, . . of African blood as a standard . . to make a man white or black, as he happens to have more or less, . . [434] I find . . no recognition of grade . . of admixture of blood, . . and . . preponderance of blood must control, . . [440] and that within the . . meaning of that instrument, [state constitution] Dean was white, . . had he possessed much more African blood than he is shown to have had." [Martin, Ch. J.]

U. S. v. Repentigny, 5 Wallace 221, December 1866. Letter of the Marquis de la Jonquière, the governor of New France, to the Minister of Marine and the Colonies, October 5, 1751: [220] " The said Sieur de Repentigny so much feels it his duty to devote himself to the cultivation of these lands [at the Sault St. Marie], that he has already entered into a bargain for two slaves, whom he will employ to take care of the corn he will gather upon these lands."

Hedgman v. Board of Registration, 26 Mich. 51, October 1872. " application for a mandamus to compel the respondents to register the relator

as a voter. The facts [52] . . his parents were . . of African blood, born in Virginia, . . as slaves; . . they . . went to Canada in 1834, . . where the father still resides; . . the relator was born in Canada . . and continued there until he was nearly twenty years of age, when he removed to this state, and now resides in said first ward. If these facts show him . . a citizen . . of Michigan, he is entitled to be registered; otherwise not. It is claimed, . . that he becomes a citizen by . . new amendments to the federal constitution. The . . point relied upon is, that by the fourteenth amendment all persons born in the United States, and subject to the jurisdiction thereof, are . . citizens; . . the laws of congress, which make citizens of the children of citizens born abroad, will apply to . . relator, and render him a citizen also. . . it is argued by the city counselor, . . that the laws of congress do not reach the case of one whose parents were not citizens at his birth, and that the parents of the relator were not, . . [53] The point in dispute . . is, whether the parents of the relator were citizens of the United States. The record shows that they were not free, but held in servitude, . . it is undeniable that those persons should never have been slaves, . . Slavery was the great ugly fact of our history; . . [54] The supreme court . . has recently been obliged to decide that contracts growing out of . . slavery, are not only valid . . but that the people . . have no power, . . to nullify such contracts . . state courts in the southern states are now, . . enforcing contracts made on the sale of men, . . [56] the parents of the relator were never citizens of the United States prior to . . the fourteenth amendment. That amendment, . . does not make them such. . . These persons are not subject to the . . United States. They have chosen another jurisdiction, and cannot have our citizenship forced upon them. . . The fifteenth amendment does not help the case. . . [57] The relator was never in a condition of servitude, and his color is no impediment to citizenship. He has the same rights with any native-born white British subject to become a citizen under the naturalization laws, . . the writ must be denied."

WISCONSIN

INTRODUCTION

I

Wisconsin was the battleground for one of the most bitterly contested series of cases involving the Fugitive Slave Act of 1850.[1] Booth was arrested by order of United States Marshal Ableman for aiding one Glover, a negro, to escape from the custody of Deputy United States Marshal Cotton in violation of the above-mentioned act. Booth petitioned for a writ of habeas corpus and it was granted by the Supreme Court of Wisconsin on the grounds that the act was void in that it purported to give judicial power to commissioners, and further, that it denied a jury trial to the alleged fugitive. Booth was again arrested by order of Ableman upon a warrant issued by United States District Judge Miller after indictment under the Fugitive Slave Act of 1850. On this occasion Booth's petition for habeas corpus was denied on the ground that the federal court had jurisdiction and that the state court would not attempt to prevent the court from trying a pending case. However, after Booth had been convicted, he again petitioned the state Supreme Court for a writ of habeas corpus, and it was granted on the ground that the counts upon which the petitioner had been convicted did not set forth an offence over which the federal court had jurisdiction. These cases were taken to the Supreme Court of the United States, and the decisions declaring the act of 1850 void met reversal as expected.[2]

II

The Wisconsin Constitution of 1848 provided for an appellate Supreme Court, arranging that for five years, and until the legislature should otherwise dispose, it should consist of the judges of the five circuit courts. After five years the legislature might compose the court of a chief justice and two associates. This was done by act of 1852, the new court to come into operation June 1, 1853, and the reports then begin.

[1] *In re* Booth, p. 91; *Ex parte* Booth, p. 93; *In re* Booth and Rycraft, p. 94; Ableman *v.* Booth, p. 95, *infra.*
[2] Ableman *v.* Booth, p. 95, *infra.*

U. S. ex re. Garland v. Morris, 26 Fed. Cas. 1318 (2 Am. Law Reg. 348), April 1854. " The relator, a citizen . . of Missouri, obtained a warrant upon affidavit, for the apprehension of Joshua Glover, . . his slave " who has escaped from him in Missouri. " The warrant was issued to the marshal, who arrested the fugitive, with the aid of the relator, in the county of Racine, . . the resistance by said Glover and others was great." The marshal " placed him in the jail of Milwaukie county for safe keeping, until the hearing. The same day . . a warrant was issued by the mayor of the city of Racine upon the affidavit of . . Clement, against the relator, for assault and battery upon the body of Glover. In the afternoon of the day of the imprisonment of Glover, a mob rescued him by forcing the jail doors; and at the same time the warrant for the arrest of the relator was placed in the hands of the respondent Morris, as sheriff of Racine county for service; and just after the rescue, it was executed by the arrest of Garland, the relator. Before the rescue, a writ of habeas corpus was issued by the judge of Milwaukie county to the marshal and also the Sheriff of Milwaukie county, to produce the body of the fugitive Glover; which writ was not obeyed." Garland applied to Miller, judge of the United States District Court, " for a writ of habeas corpus; which was allowed, and directed to the respondent to produce the body of his prisoner. The respondent made answer to this writ, that he held the custody of the relator, by virtue of the warrant of the mayor of Racine,"

United States District Judge Miller ordered that Garland should be discharged: [1319] " he was aiding the marshal in the service of a warrant, at the officer's request. . . The warrant for the apprehension of Glover, the fugitive, had not been fully executed by the arrest merely, . . it was in full force until the fugitive was brought before the judge, . . and an order made, . . Glover has been rescued and is now at large, and is liable to be re-arrested upon that same warrant. . . The relator and the marshal have a legal right to enter upon fresh pursuit of the fugitive. . . I cannot but consider the imprisonment of the relator, or of the marshal (who was also prosecuted in Racine,) a greater outrage than the rescue. The law under which the fugitive was apprehended, is a law of the United States, . . the judges, commissioners, marshals, or claimants are not to be interfered with, in its administration or execution, by state courts or officers."

U. S. v. Rycraft, 27 Fed. Cas. 918 (Milwaukee Daily News, Scrap Book, 178), no date. Indictment [919] " against John Rycraft for aiding, assisting, and abetting in the escape of Joshua Glover,[1] a fugitive slave." Cotton, a deputy marshal, had arrested Glover, a fugitive slave, owned by

[1] See *In re* Booth and Rycraft, p. 94, *infra.*

Garland of Missouri. [922] " Glover was lodged in jail, . . the defendant was present at the jail, working and assisting to break the door of the jail-yard and the door of the jail. . . [923] a committee of vigilance was organized on that morning," of which Rycraft was a member. Reed stated " that one of its objects was, that the kidnapper should not take Glover out of town before a trial; that the kidnappers were Cotton, the owner, and any others who took part."

Charge to jury: " The appellation of kidnappers applied to those men, under the circumstances, was to bring that jail down. . . This committee was probably the primary cause of that outrage," [Miller, J.] Verdict, " Guilty."

In re Booth, 3 Wis. 1, June 1854. [2] " 1854, in vacation, . . Booth, made application . . for a writ of *habeas corpus,* . . upon the following petition, . . that he, . . Booth, is restrained . . by . . Ableman, the marshal of the United States for . . Wisconsin, . . [3] Booth alleges that the restraint . . is illegal, . . that the said act of congress . . approved . . 1850, is unconstitutional . . [6] a writ . . was allowed, . . and . . Ableman, . . made return . . with the body of the petitioner, before the said justice, . . petitioner was discharged . . the following opinion . . delivered: [7] . . Accompanying the petition was a copy of the process, . . and recited that the petitioner . . ' unlawfully aided, . . a person named Joshua Glover, held to . . labor in . . Missouri, . . being the property of . . Garland, . . to escape from . . Cotton, a deputy . . [8] the petitioner alleges . . that the act . . of 1850, is in violation of the compact, . . in the ordinance of 1787, . . [9] The warrant, . . was not issued by a federal . . court, but by a commissioner of the United States. . . [10] It is not necessary here to inquire . . the . . effect of a warrant . . issued by a judicial officer of the United States. . . the States will never submit . . [11] that . . commissioners . . determine . . rights . . of their citizens, . . [12] The petitioner demands his discharge . . 1st. Because the law of congress, . . of . . 1850, . . is unconstitutional; and 2d. because the writ is defective. . . I entertain no doubt, that the writ is . . defective, . . But the petitioner has, . . expressed his desire . . to rest his case . . upon his objections to the constitutionality of the law . . [14] I do not admit the right of the citizen to complain . . of illegal imprisonment, . . and then waive . . his discharge except upon such grounds only as he shall see fit to prescribe. . . [15] The act of congress under . . which the petitioner is arrested, purports to have been enacted . . under the power . . of the fourth article of the . . constitution, . . ' No person held to service or labor in one state, . . shall, . . be discharged . . but shall be delivered up . . to whom such service or labor is due.' . . [17] the status of the fugitive is . . different in this state, from his status . . in the state . . whence he fled . . Here, he is entitled to the full . . protection of our laws; . . so long as he is unclaimed. . . So long as the owner does not choose to assert his claim, the cottage of the fugitive in Wisconsin is as much his castle—[18] his property, . . and person are as much the subject of legal protection, as those of any other person. . . This writ simply asserts,

. . that he ' aided, . . a person named Joshua Glover, . . [19] being the property of . . Garland, . . to escape from . . a deputy of the marshal . . [20] The gist of the offense . . is ' the aiding, . . the person so owing labor or service, to escape . .' There . . is no such charge in the warrant . . There is no allegation that Glover was in custody as a fugitive from labor, . . [22] The warrant, . . is clearly, . . insufficient, and the petitioner is . . entitled to a discharge. . . but it is . . urged that the act . . is . . void. . . [24] The judicial department of the federal government is the creature by compact of the several states, as sovereignties, and their respective people. . . [25] I solemnly believe that the last hope of free representative and federative government rests with the states. . . Without the states there can be no union; . . The constitution of the United States is a peculiar instrument, . . [26] It is an instrument of grants and covenants. . . [30] history . . demonstrates that the convention [constitutional] . . discriminated between grants of power to the government, and articles of compact between the states, . . was jealous . . in making such grants, . . [36] The law of 1793 was . . organizing the state authorities for the accomplishment of the . . duties devolved upon them. . . it is apparent that congress has no constitutional power to legislate on this subject. . . [37] It is equally apparent, that it is the duty of the respective states to make laws . . for the . . observance of this compact. . . The clause as finally adopted reads, ' but shall be delivered upon claim of the party to whom such service or labor is DUE.' . . [39] Here there is a fact, an issue, to be judicially determined, before a right can be enforced. . . What authority shall determine it? Clearly the authority of the state . . [41] Every person is entitled to his [42] ' day in court,' . . But the tenth section of the act of 1850, . . nullifies this provision of the constitution. . . the claimant may go before any court . . make proof of the escape, . . a transcript . . being exhibited to the judge or commissioner, must be taken . . conclusive evidence of the . . escape, . . that service or labor is due . . and may be held sufficient evidence of the identity of the person escaping. Here is a palpable violation of the constitution. . . [43] Other courts . . may pronounce this provision of the act of 1850 to be in conformity with . . the constitution . . but while I have a mind to reason . . and an oath to support the constitution . . resting upon my soul, I cannot so declare it, and for the price of worlds, I will not. . . [48] What, then, is to be done? Let the free states return to their duty, . . and be faithful to the compact, . . Let the slave states be content with such an execution of the compact as the framers of it contemplated. Let the federal government return to the exercise of the just powers conferred by the constitution . . [49] Afterwards, a writ of certiorari was applied for, and . . The cause came on for argument . . before a full bench."

Held: " The questions . . are of great importance. . . [51] The next question . . is, whether a justice of this court has the power to issue, in vacation, a writ of habeas corpus, and make it returnable before himself at chambers. . . [52] The act . . declares that the . . justices . . shall be subject to all the duties . . to which the judges of the former supreme court were subject. Among those duties was that of granting writs of

habeas corpus, . . we should be guilty of a gross violation of duty were we to refuse them . . because the case might be reviewed . . [64] We are of opinion that so much of the act of congress in question, as refers to the commissioners for decision, the questions of fact . . is repugnant to the constitution of the United States, and . . void for two reasons: First, because it attempts to confer . . judicial power; and second, because it is a denial of the right of the . . fugitive to have those questions . . decided by a jury, . . [70] We . . conclude that the alleged fugitive . . is taken back to the state . . without due process of law, . . we must affirm the order made in this case, discharging the relator." [Smith, J.]

Dissenting: "I . . designate . . the points upon which I dissent. . . [73] the question of greatest, . . relates to the constitutional power of congress to enact the law of 1850, . . [83] The right of trial by jury is highly . . esteemed, . . But suppose that a demand . . upon the governor . . has been made to surrender any citizen, . . upon a charge of felony . . There would seem . . no real difference between the demand of a fugitive from justice and the claim of a party to whom it is [84] alleged labor or service is due. . . [85] Assuming that the framers of the constitution had in view the cases of fugitive slaves only, . . it would seem obvious that if a trial by jury may be insisted upon, the determination . . might be protracted . . so as to defeat the very object of the . . provision." [Crawford, J.][1]

Ex parte Booth,[2] 3 Wis. 145, June 1854. "application made . . to the supreme court in term time for a writ of *habeas corpus.* The petitioner sets forth that he is restrained of his liberty, and imprisoned . . by . . Ableman, United States marshal; . . the cause . . of such imprisonment, . . is a warrant from Andrew G. Miller, judge of the district court of the United States, . . that the said indictment . . in said warrant is ground-[146]ed upon a pretended violation of the fugitive slave act of 1850, which act he represents is . . void, . . he prays that . . *habeas corpus* may be issued . . to have . . Booth before the supreme court."

Held: [147] "We think that this application must be denied. . . The warrant is tested in the name of the judge . . and signed by its clerk. In the case of Ableman *v.* . . Wisconsin ex rel Booth, . . we held that the issuing of a writ of *habeas corpus* by a state magistrate . . to bring before him a person who had been committed by a commissioner . . did not interfere with the juris-[148]diction of that court. But we said distinctly, that when a court had obtained jurisdiction . . no other court of concurrent jurisdiction would interfere, . . But the facts . . show that the petitioner is in confinement by . . a warrant issued by the court, . . These facts show that the district court . . has obtained jurisdiction . . and it is apparent that the indictment . . is for an offense of which the courts of the United States have exclusive jurisdiction. . . we are called upon to do an act which would prevent the court . . from proceeding to try . . a case now pending . . and of which it has exclusive jurisdiction; . . [149] it is further claimed . . that the district court . . can not ob-

[1] The Supreme Court of the United States reversed the majority opinion. See Ableman *v.* Booth, p. 95, *infra.*

[2] See Ableman *v.* Booth, p. 95, *infra.*

tain jurisdiction of a criminal proceeding when the facts show no offense has been committed. . . that court, . . is of necessity compelled to decide every question. . . No state court can . . interfere. The application must be denied."

In re Booth and Rycraft, 3 Wis. 157, June 1854. [158] "[These two applications are the same in all respects, and were made to the court, . . and were . . determined. But, as their subject matter bears so close a relation to the two preceding cases . . it is deemed more convenient . . to insert them here."][1]

Held: [175] " It will not be denied that the supreme court of a state, [176] . . has the power to release a citizen . . from illegal imprisonment. . . Were we to hold that we are without this power . . we should be obliged so to hold . . where not even the forms of law were observed; when, for instance, a citizen . . should be thrown into prison, by the arbitrary order of a judge . . of the United States, . . the state governments . . are not reduced to this humiliating condition. The petitioners must be discharged." [Whiton, C. J.]

Concurring: [179] " The simple question . . is, whether the district court . . had jurisdiction of the offense . . if it had such jurisdiction, it matters not how illegal, . . the proceedings . . may have been, . . if the court had jurisdiction . . it is by no means my duty . . to revise the decision . . That is the function of a superior federal tribunal, . . The district court . . is a court of special . . jurisdiction. . . [181] the return . . by the sheriff . . contains a record . . which . . shows, that the district court had no jurisdiction . . [182] The indictment . . contained three counts, the first of which . . charging an offense within the ' fugitive slave law.' The second and third counts, . . do not, . . set forth . . an offense punishable by any statute of the United States, . . The relator was found guilty as charged in the second and third counts . . but was not convicted of . . the first count, . . The second count charges that ' John Rycraft . . did aid, . . Glover to escape from . . Cotton, . . a deputy of the marshal of the United States . . ' [183] The third count is . . the same as the second, . . The intention, . . was to set forth . . an offense within . . the act of 1850, . . [184] it is not the aiding of any person to escape . . but it is the aiding of a person of a specified status . . who owes service or labor . . To constitute an offense . . every circumstance . . as defined by the statute, must be . . set forth, and . . Glover should have been described as a person owing service or labor . . [186] The indictment . . contained one count (the first) which charged an offense within the jurisdiction of the district court, . . Upon the first count . . no conviction, . . the sentence . . must be for an . . offense beyond the control . . of the court . . [189] I am of the opinion that the relator is entitled to be discharged from the custody of the sheriff . . the . . conviction . . presents no conviction . . of an offense which that court had jurisdiction over." [Crawford, J.]

Concurring: [190] " the subject matter . . has been considered with all the deep anxiety . . which the time would permit, . . [192] Has this

[1] See *In re* Booth and *Ex parte* Booth, pp. 91, 93, *supra.*

court the power to inquire into the . . authority by which . . the prisoner is, . . held in custody? . . [204] the federal government can only operate within the precise sphere marked out by the constitution; . . [208] The obligations of the state and federal governments are . . mutual and reciprocal. [210] It is . . our duty to grant this writ, to inquire into the cause of the prisoner's . . detention. . . [211] I have . . attempted to show that the act of congress, approved . . 1850, was not within the constitutional power of congress." [Smith, J.]

Ableman v. Booth and *U. S. v. Booth,* 21 Howard 506, December 1858. "Booth was charged before . . a commissioner duly appointed by the District Court of the United States for the district of Wisconsin, with having . . 1854, aided . . at Milwaukee, . . the escape of a fugitive slave from the deputy marshal, who had him in custody under a warrant issued by the district judge of the United States. . . the commissioner . . was satisfied that an offence had been committed as charged, and . . held him to bail . . But on the 26th of May his bail . . delivered him to the marshal, . . Booth made application on the next day, . . to . . one of the justices of the Supreme Court . . of Wisconsin, for a writ of *habeas corpus,* . . [508] alleging that his imprisonment was illegal, because the act of Congress of September 18, 1850, was unconstitutional and void; . . the justice . . issued the writ . . The marshal . . produced Booth, and made his return, stating that he was . . held in custody by virtue of the warrant of the commissioner. . . the justice decided that the detention was illegal, and ordered the marshal to . . set him at liberty, which was . . done. . . 9th of June . . the marshal applied to the Supreme Court of the State for a *certiorari,* . . allowed. . . The case was argued before the Supreme Court of the State" and it affirmed [509] "the decision of the associate justice discharging Booth from imprisonment, . . on the 26th of October, the marshal sued out a writ of error . . to bring the judgment here for revision; . . before the writ of error was sued out, the State court entered on its record, that, in the final judgment it had rendered, the validity of the act of Congress of September 18, 1850, and of February 12, 1793, and the authority of the marshal to hold the defendant in his custody . . were . . drawn in question, and the decision of the court . . was against their validity, . . the second case. At the [following] January term of the District Court of the United States for the district of Wisconsin, . . [510] the grand jury found a bill of indictment against Booth for the offence with which he was charged before the commissioners, and from which the State court had discharged him. . . a jury . . found him guilty. . . the court . . sentenced the prisoner to be imprisoned for one month, and to pay a fine of $1,000 . . and that he remain in custody until the sentence was complied with. . . three days after . . the prisoner . . filed his petition in the Supreme Court of the State, . . On the next day, the 27th [of January], the court directed two writs of *habeas corpus* to be issued—one to the marshal, and one to the sheriff of Milwaukee, to whose actual keeping the prisoner was committed by the marshal, by order of the District Court. . . [511] On the 30th . . the marshal made his return, not acknowledging the jurisdiction,

but stating the sentence of the District Court as his authority; . . On the same day the sheriff produced the body of Booth . . and returned that he had been committed to his custody by the marshal, by virtue of a transcript, . . annexed to his return, . . This transcript was a full copy of the proceedings . . in the District Court of the United States. . . The [State] court . . (February 3d,) . . decided that the imprisonment was illegal, and ordered . . that Booth be . . and he was . . forever discharged from that imprisonment. . . On the 21st of April next following, the Attorney General of the United States presented a petition to the Chief Justice of the Supreme Court, . . averring . . that the State court had no jurisdiction . . [512] and praying that a writ of error might issue. . . issued . . duly served on the clerk of the Supreme Court of Wisconsin, . . the district attorney of the United States . . when he served the writ . . was informed by the clerk, and has also been informed by one of the justices of the Supreme Court, which released Booth, '*that the court had directed the clerk to make no return to the writ of error, and to enter no order upon the . . records of the court concerning the same.*' . . the Attorney General moved . . for an order upon the clerk to make return . . no return having been made, the Attorney General, on the 27th of February, 1857, moved for leave to file the certified copy of the record of the Supreme Court of Wisconsin, . . [514] the supremacy of the State courts over the courts of the United States, in cases arising under the Constitution and laws of the United States, is now for the first time asserted and acted upon in the Supreme Court of a State. . . [521] This tribunal . . was erected . . not by the Federal Government, but by the people of the States, who formed . . that Government, . . engrafted it upon the Constitution itself, and declared that this court should have appellate power in all cases arising under the Constitution and laws of the United States. So long, therefore, as this Constitution shall endure, this tribunal must exist with it, deciding in the peaceful forms of judicial proceeding the angry and irritating controversies between sovereignties, which in other countries have been determined by the arbitrament of force. . . [524] No State judge or court, after they are judicially informed that the party is imprisoned under the authority of the United States, has any right to interfere with him, or to require him to be brought before them. . . [526] in the judgment of this court, the act of Congress commonly called the fugitive slave law is, in all of its provisions, fully authorized by the Constitution of the United States; . . The judgment of the Supreme Court of Wisconsin must therefore be reversed in each of the cases now before the court." [Taney, C. J.][1]

Ableman v. Booth, 11 Wis. 498, June 1859. [499] " the United States . . attorney . . asked leave to file . . two mandates . . one in each of the cases, from the supreme court of the United States. . . The mandates were also left . . to be disposed of as the court should direct . . The former is the title of a suit . . in the supreme court of the United States, . . that court . . reversed a judgment . . in a proceeding entitled . . ' petition of Sherman M. Booth for a writ of *habeas corpus,* . . ' The

[1] See *Ex parte* Hill, *in re* Willis, p. 255, vol. III., of this series.

latter is . . a like suit . . similarly entitled, . . in like manner . . reversed. . . [501] The only question . . is: Does the constitution . . confer on congress the power to provide . . for an appeal from the courts of the several states to the supreme court . . and to authorize that court . . to review and reverse the judgments . . in the cases specified in the . . act . . 1789? . . [502] Holding, . . that the affirmative . . is correct, my own embarrassments . . have . . increased, from . . the contrary decision of this court, . . by the refusal to make return to the second writ of error, . . [505] The 25th section of the . . act . . provides 'that a final judgment or decree . . in the highest court . . in a state . . where is drawn in question . . a treaty or statute . . under the United States, . . and the decision is against the validity . . may be re-examined and reversed or affirmed in the supreme court of the United States . . [521] In my opinion the motions should be sustained, and the mandate of the supreme court filed with the clerk of this court. . . [532] Second Note.—On the 6th day of March, 1860, Booth filed . . a petition for a writ of *habeas corpus,* . . alleged . . he was a prisoner . . of the United States, . . that he was arrested . . for . . aiding the escape of Glover, contrary to the fugitive slave act. . . the writ was denied but no opinion . . the chief justice stated orally . . his decision. . . The sentence of the United States court was executed in part upon Booth, when he was pardoned by President Buchanan."

Arnold v. Booth, 14 Wis. 180, June 1861. [183] "action commenced . . by the defendant . . for the purpose of recovering one . . printing press, and one . . steam engine . . which, . . had been unjustly taken . . by plaintiff . . In his answer, the plaintiff . . denied that the defendant . . was . . entitled to . . the property . . averred 'that he was, . . the lawful owner . . that the same was, . . duly seized by the United States marshal . . by virtue of an execution . . upon a judgment . . in an action . . in which . . Garland, . . was plaintiff, and . . plaintiff in this action was defendant, for . . twelve hundred and forty-six dollars; and . . the same . . advertised and sold by the . . marshal . . that . . defendant being the highest . . bidder . . same was sold . . to him . . Upon this issue the cause came on . . before the circuit court . . when the . . defendant below, . . read in evidence . . the record of a judgment . . [184] in favor of . . Garland, . . whereby . . defendant in error was convicted . . under the fugitive slave law of 1850, . . This record . . received in evidence, . . objection . . that they were invalid by reason of the unconstitutionality of the . . slave law. The . . court ruled that such record . . constituted no . . defense . . and gave judgment against the defendant, who prosecutes this writ of error. It is . . claimed . . that . . the circuit court, . . was correct . . [185] it is insisted . . that . . the constitutionality of the fugitive slave law is not involved . . because . . that act . . merely gave new right of action. . . that it might be admitted, . . that the fugitive slave law was void, . . that then, . . the district court erred . . but that the judgment . . though . . erroneous, is not void, but voidable, binding until . . reversed, and cannot be . . a nullity in a collateral suit. . . I

am unable to perceive why it is not sound and conclusive. . . [188] inasmuch as the district court has jurisdiction . . I think it could lawfully . . determine the action . . by Garland against Booth for a penalty given by the fugitive slave law. . . [189] in a collateral proceeding, such a judgment would not be . . a nullity . . So while holding that the fugitive slave law is an unconstitutional enactment, . . the district court had jurisdiction . . [190] and . . the judgment, . . is binding until reversed. I . . think that the circuit court erred in ruling that the . . judgment in that suit, and the sale . . constituted no defense to this action. . . new trial ordered."

In re Wehlitz, 16 Wis. 443, January 1863. [444] "Carl Wehlitz, . . was born in . . Prussia, and came to the United States in 1854, after which, and before his enrollment on the militia list . . he declared his intention to become a citizen . . but had not . . taken the final oath . . he was drafted . . into the military service of the United States, . . He . . obtained . . a writ of *habeas corpus,* directed to Col. Fritz Anneke. . . it appeared that the petitioner, . . had . . exercised the right of suffrage . . The commissioner, . . decided that the petitioner was not liable to be drafted . . and made an order discharging him . . The case came . . for review, on . . certiorari."

Held: [445] "The only question . . is, whether a resident . . who was a native of a foreign country, but who had declared his intention to become a citizen . . was liable to be drafted? The decision . . depends upon the meaning of . . act of congress, and the laws of this state, . . The act of congress . . approved . . 1792, designated . . 'every free, able bodied, white male citizen of the respective states, . . .' Prior to 1858, . . this state provided that 'every free, able bodied, white male person who has resided within this state one month, . . between . . eighteen and forty-five, shall be enrolled in the militia,' . . [446] The commissioner decided that it meant only those who were full citizens of the United States. . . it will be necessary to inquire whether the word has any other . . meaning, . . That it has such another meaning must be admitted. . . no state can confer . . citizenship upon an alien who has not complied with the laws of congress, so as to make him a citizen of the United States and entitled to the rights . . guaranteed . . by the federal constitution . . This doctrine has been . . stated . . in the Dred Scott case, in which the question was, whether a negro could be a citizen of a state . . so as to be entitled to sue in the federal courts. That [447] court said: '. . we must not confound the rights of citizenship which a state may confer . . and . . citizenship . . of the Union. . . He may have all the rights . . of the citizen of a state, and yet not be entitled to the rights . . of a citizen in any other state. . .' [448] further on in the opinion, . . the court says: '. . a person may be entitled to vote by . . a state who is not a citizen even of the state itself; . . the state may give the right to free negroes and mulattoes; but that does not make them citizens of the state and still less of the United States.' . . [452] If, . . the liability of this petitioner to be drafted depended upon the meaning of the word 'citizen' in our state law, I should have no hesitation in saying that he

was liable. . . [453] many foreigners who come here are not only unacquainted with our laws . . but . . our language; . . no . . reasons exist why these persons should not share the burdens of the common defense; . . [454] The . . act of 1792, . . provided for the enrollment of all 'able bodied white male citizens' . . whether the . . word 'white' as qualifying 'citizen,' for the purpose of excluding the African races, would indicate that . . the African race could not be citizens at all, may . . be . . questionable. . . assuming, . . that the African race could not be citizens . . as used [455] by the constitution of the United States, . . they might be citizens of the states . . And with this meaning, . . 'citizen' would include persons . . of the class to which the petitioner belongs. . . In this law, . . the word, 'white' is omitted, . . for the purpose of removing the prohibition against the African race; for the 12th section expressly authorizes the president to receive them into the military or naval service. . . [456] The order of the commissioner must be reversed."

IOWA

INTRODUCTION

I

Only a handful of cases illustrate the legislative and judicial history of slavery and the negro in Iowa. Prior to the Civil War only white males were permitted to vote,[1] or to act as witnesses.[2] The case of Clark *v.* The Board of Directors,[3] contains a very interesting history of the development of sentiment with respect to colored children in public schools. In 1868 it was established as a principle, based upon the state Constitution, that school authorities could no longer set up separate schools for colored children, but must permit them to mingle with white children in all public schools.

II

The first Constitution of the state of Iowa, that of 1846, provided for a Supreme Court of three judges, and that of 1857 made no change in this arrangement, except in providing that the general assembly might increase the number of judges, by one at a time. A legislative act of 1864 increased the number to four. All the cases named on the ensuing pages were heard in this court, except two cases reported from federal courts.

[1] Morrison *v.* Springer, 15 Iowa 304 (1863).
[2] Iowa *v.* Nash, 10 Iowa 81 (1859).
[3] 24 Iowa 266 (1868).

Daggs v. Frazer, 6 Fed. Cas. 1112 (2 Am. Law J., N. S., 73), January 1849. Action of trover against nineteen citizens of Salem, Iowa, by Daggs of Missouri to recover the value of the following slaves: "one negro man . . Samuel Fulcher, and of the value of $2,000; one negro woman, of the name of Dorcas, the wife of the said Samuel Fulcher, a tanner by trade, and skilful therein, and of the value of $1,000; one negro man of the name of John Walker, a skilful farmer and tanner, and of the value of $2,000; two negro women valued at $1,000 each; two negro children, [1113] each of the value of $500; two other male negro children, one aged three years, and one aged one year, and each of the value of $500;" The defendants demurred: "the laws and constitution of Iowa do not recognize men and women as property, and the subject of a suit;" Held: trover will not lie in Iowa to recover the value of slaves.

Wright v. Ross, 2 Greene (Iowa) 266, June 1849. "Is a pistol such property as may be sued for in an action of detinue? . . Detinue can only be maintained for the recovery of a personal chattel in specie. . . [267] A horse, a cow, a slave, etc., are objects that were commonly recovered in this action. . . It has been held, that detinue will lie for a negro woman by name without stating her complexion or age;"

Shields v. Thomas, 18 Howard 253, December 1855. [255] "Goldsbury died [in Kentucky] possessed of one male and one female slave, . . the widow . . [256] intermarried with . . Shields. . . Shields and his wife, after enjoying the services and hire of the male slave for several years, had ultimately sold him, and . . in . . 1818, they removed . . to . . Missouri, carrying with them the female slave . . together with her descendants, seven in number, . . and . . the slaves had by the son and son-in-law been secreted, carried off and sold, in parts unknown to the complainants,"

Reed and Co. v. Crosthwait, 6 Iowa 219, June 1858. [221] "The case of McGee v. Ellis, . . was upon the sale of a slave, which, . . is held as real estate in Kentucky. It was a bill in chancery, brought by the purchaser, . . against the . . creditor and debtor. The court of appeals held, that the purchaser was entitled to recover in equity from the debtor, because the debt being paid by the money of the purchaser, he would, in equity, be entitled to be substituted in the place of the execution creditor,"

Iowa v. Nash, 10 Iowa 81, December 1859. [86] "Section 2388 of the Code, enacts that every human being of sufficient capacity to understand the obligation of an oath, is a competent witness in all cases, both civil and criminal, except as herein otherwise declared. . . And what exceptions are so declared? They are those of Indians and colored persons; of persons having a direct, certain, and legal interest in the suit; of the

husband and wife; of cases of professional confidence, and of public officers."

Morrison v. Springer, 15 Iowa 304, December 1863. [325] "A white male person of the age of twenty-one years, . . may vote. . . a negro or black person, though twenty-one years old, cannot vote; "

Clark v. The Board of Directors, 24 Iowa 266, June 1868. [267] " Mandamus.—The petition sets forth, that plaintiff, Susan B. Clark, was born in . . Muscatine, . . that she is now twelve years of age, and sues by . . her father, . . who is a . . tax payer in . . Muscatine, . . that . . the defendants, the board of directors, have . . maintained schools . . that one of said [268] schools is designated as ' Grammar School No. 2,' and plaintiff resides . . within that portion of said district from which resident youths . . attend said school, and that she is duly qualified for admission into said grammar school, . . that it is the duty of said board, . . to so admit her; that, . . she presented herself, . . that said defendants refused to admit . . her . . but illegally excluded her therefrom. She asks for a mandamus to compel the defendants to so admit her. The answer, . . admits the statements . . as to plaintiff's birth, . . application . . etc. The defendants then aver, that the plaintiff is of negro extraction and belongs to the ' colored race; ' that . . they have . . a separate school for colored children, . . that plaintiff had attended said school . . up to the time she demanded admission . . that public sentiment in said . . district is opposed to the intermingling of white and colored children in the same schools, and the best interests of both races require them to be educated in separate schools. . . [269] the plaintiff demurred, . . The District Court sustained the demurrer, and the defendants appeal."

Held: " it would seem necessary, . . to justify a denial of such equality of right . . that some express sovereign authority for such denial should be shown. . . [270] we must look to the statute. And we can . . construe the statute when we examine it in the light of the legislative history . . [272] it will be seen that there have been three distinct phases of legislative sentiment . . First, the total exclusion of colored children from our common schools. . . Second, the allowance of . . inferior common school privileges, . . [273] Third, the allowance of equal common school privileges to all. . . [274] Now, under our Constitution, which declares that provision shall be made ' for the education of all the youths of the State through a system of common schools,' which . . has been effectuated by enactments providing for the ' instruction of youth between the ages of five and twenty-one years,' without regard to color or nationality, is it not equally clear that all discretion is denied to the board of school directors as to what youths shall be admitted? . . We conclude, therefore, that the law makes no distinction . . as to the right of children . . to attend the common schools, . . [275] The term ' colored race ' is . . but a synonym for African. . . if the board of directors are clothed with a discretion to exclude African children . . [276] they would have the same power and right to exclude German children . . require them to attend . . a school . . of children of that nationality, . . If the words ' colored race ' be stricken . . and the word ' English,' ' Irish,' or ' Ger-

man' inserted . . it would present precisely the same principle . . as is now presented. . . [277] it follows, that the defendants wrongfully refused her admission. . . The District Court did not err in making the mandamus peremptory. Affirmed."

State v. Keeler, 28 Iowa 551, June 1870. [552] "The defendant was indicted for the murder of a negro, whose name was . . unknown. He was acquitted, but upon the trial certain errors intervened, as is claimed by the State,"

Held: "The State insists that the court below committed two errors. The first relates to the admission of . . improper testimony. . . it is only necessary to say, that while the question asked the witness is given, the answer is not. The correctness . . of the ruling depends entirely upon the answer, and, . . we are, of course, not prepared to say that in its admission there was error. . . The record should show that the answer disclosed improper . . testimony, before error can be claimed. . . The court gave this instruction: 'The death of the negro, who fell into the river, as disclosed by the witness Rhodes, must be . . proved by direct and positive proof.' . . [553] while the proof should be clear and distinct, it is not necessary that it should be direct and positive."

Coger v. N. W. Union Packet Co., 37 Iowa 145, December 1873. [146] "Action . . to recover damages . . by plaintiff for an assault and battery . . by the officers of a steamboat . . as a common carrier . . while she was a passenger thereon, and for forcibly . . removing her from the dinner table of said boat, . . The defense pleaded . . that plaintiff is a colored woman, and that there was a custom . . of all boats of defendant, . . under which colored persons could not receive state rooms and first class privileges . . that she purchased a ticket which entitled her to the rights of a colored person . . that she purchased a ticket for meals, such as, . . were sold to [147] colored persons entitling them to meals upon the guards of the boat or in the pantry, but she returned the same and . . received back the money . . Afterward, by fraud, she purchased such a ticket as were sold to white persons; . . she seated herself at the dinner table with the white passengers . . the officers . . removed her from the table, . . There was a trial . . and a verdict for plaintiff. . . Defendant appeals."

Affirmed: "She is a quadroon, being partly of African descent, and was employed as the teacher of a school for colored children . . [148] Before the hour of dinner she sent the chamber-maid to purchase a ticket for that meal and one was brought to her with the words 'colored girl,' . . thereon. . . She returned the ticket . . and the price was repaid to her. After this she requested a gentleman to buy her a ticket for dinner, who bought her one without any indorsements . . When dinner was announced she seated herself at the ladies' table . . at a place designated for certain ladies . . She was then informed . . that she must leave the table . . She refused, . . the captain . . repeated the request, and, being denied compliance, he proceeded by force to remove her from the table . . [149] She resisted so that considerable violence was necessary to drag her out of the cabin, . . the covering of the table was torn off and dishes

broken, . . [152] the sole question . . is this: Had the defendant, . . the authority to establish and enforce regulations depriving an individual of color of the privileges . . accorded to white persons . . or . . are the rights and privileges of persons transported by public carriers affected by race or color? . . [153] In our opinion the plaintiff was entitled to the same rights and privileges . . notwithstanding the negro blood, be it more or less, admitted to flow in her veins, which were possessed and exercised by white passengers. . . If the negro must submit to different treatment, he is deprived of the benefits of . . equality. . . [154] It says to the negro, you may have inferior accommodations at a reduced price, but no others. . . The doctrines of natural law and of christianity forbid that rights be denied on the ground of race or color; . . [157] It is insisted that the rights claimed by plaintiff, . . are social, and are not, . . secured by the constitution and statutes, . . we are satisfied that the rights and privileges which were denied plaintiff are not within that class. . . [158] she was excluded from the table and cabin, . . because of prejudice entertained against her race, . . a prejudice, . . that is fast giving way to nobler sentiments, . . [159] It is also insisted that the treatment she received was justified by her bad language and improper behavior. . . [160] Whether her treatment resulted from the enforcement of such rules, or of others aimed at her exclusion on account of color, were questions for the jury. . . The judgment is therefore Affirmed."

MISSOURI

INTRODUCTION

I

The Missouri decisions [1] contain a solution of three prime problems in the history of slavery in America. The first of these is: can the descendant (in the maternal line) of an Indian woman be a slave? For Indians, unlike negroes, were presumed to be free, though the presumption might be rebutted by evidence of actual slavery; and the maxim of the civil law, *partus sequitur ventrem,* was accepted throughout the United States [2] as an axiom in the law of slavery. It has already been shown how the problem of Indian slavery was solved in Virginia.[3]

The first case in the Missouri Reports, which involves this question, was tried in 1806.[4] On May ninth of that year, "Joseph Tayon moved the general court for a warrant to apprehend" Celeste and her four children (Antoine, Paul, Sophia, and Margarette), "Catiche, Carmelite, Mazelite, La Couture, Zabelite, and another named Antoine, who, by said Tayon, were alleged to be his slaves, and running at large,[5] in the district of St. Charles . . one of the persons named . . was set free [6] from the custody of Pierre Chouteau,[7] and immediately claimed by Tayon." [8] Tayon had owned the ancestress of all these slaves, Marie Scipion, and had lent or given them to his children.[9] Celeste, who was born in about

[1] Including the federal decisions whose provenance is Missouri.

[2] Except in Maryland, 1664-1681.

[3] See introduction to the Virginia cases, I. 53, of this series.

[4] Catiche *v.* Circuit Court (p. 126, *infra*) contains a transcription of the case of Tayon *v.* Celeste.

[5] Not "runaway slaves" as Judge Tompkins calls them (*ibid.*). "neither Celeste, nor any of her children . . were ever known to have been out of the possession" of Tayon's daughter Helen Chevalier and her husband till the sheriff seized them for Tayon (Little *v.* Chauvin, p. 127, *infra*) nor could the "one named" who had been "set free from the custody of Pierre Chouteau" be deemed a runaway slave.

[6] Evidently by some judicial proceeding. See note 8, *infra.*

[7] The Chouteau family looms large in the Missouri Reports, "the first wife of Pierre Chouteau, senior, was the daughter or granddaughter [daughter is correct; granddaughter would have been too young] of Joseph Tayon, senior [8 Mo. 533]." Tayon lived at Fort Chartres, on the east bank of the Mississippi, until about 1770 [3 Mo. 570]. Chouteau came to St. Louis in 1764 [4 Mo. 583] ("about six months after the foundation of the same") [4 Howard 439], as did many of the French settlers in the present state of Illinois, after the cession to England by the treaty of 1763; and "attended Duralde . . as a student surveyor under him" at the surveying of Tayon's lots in 1770 [4 Mo. 469]. In 1800 "Peter Chouteau" ["Don Pierre Chouteau," "Don Pedro Chouteau"] is "lieutenant of militia and commandant of the fort of Carondelet, in the Osage nation," [2 Howard 346]. In 1837 he is commended as a witness by Judge McGirk: "Mr Pierre Chouteau, sen., a gentleman of intelligence, and entitled to great credit," [4 Mo. 588].

[8] "Where one has been declared free, the petition must be made by some claimant not a party to the former claim." 1 Mo. 608 (610), 1806.

[9] He could not sell them after O'Reilly's proclamation in 1769. See p. 107, *infra.*

1777, had been placed, when seven or eight years old, in the possession of his daughter, Helen Chevalier, and her husband, and in 1799 or earlier the rest of Tayon's eight children received their share.[10] In 1806, after one of these slaves has been "set free from the custody of Pierre Chouteau" and as Chouteau cannot claim the slave again,[11] Tayon construes his distribution of these slaves as a loan, not a gift,[12] to his children, for he does not wish them lost to the family. After filing security, [610] "conditioned to keep the said slaves subject to the order of this court, upon investigation," the warrant issued in these words: [627] "United States, territory of Louisiana—the United States to the Sheriff of the district of St. Charles, greeting: we command you that you apprehend Celeste, Catiche, Carmelite, Mazelite, La Cantue, another named Antoine, and Zebite, reputed slaves of Joseph Tayon, . . and them deliver into the custody of the said Joseph Tayon, there to remain and abide the determination of the general court of the territory of Louisiana: given under our hands and seals,[13] this ninth day of May, one thousand eight hundred and six, . . R. J. Meigs, (seal;) John B. C. Lucas,[14] (seal;)" The sheriff "took the said Celeste, together with her children, Antoine, Paul, Sophia, . . and Margarette, out of the possession" of Helen Chevalier [15] and delivered them to Tayon.[16] Catiche and the rest were likewise delivered to Tayon,—at least as many as were plaintiffs with Catiche in 1826.[17] They [612] "next appear in court as suitors"—a proceeding declared by Judge Tompkins, in 1826, to have been [613] "null and void," for after the slaves had been delivered to Tayon, the "force [of the warrant] is lost." [18] An attorney appeared for the reputed slaves and demanded a jury. [610] "A jury is summoned, and they find a verdict, in these words: . . 'that the persons claimed . . are really slaves, the property of the plaintiff,' . . [611] the court made an order,[19]

[10] In 1799 "Tayon presented a petition to the then lieutenant governor, representing that his wife was dead, and that he was aged and infirm and unable to manage his affairs, and wished to divide immediately all his property among his eight children," Little *v.* Chauvin, p. 127, *infra.*

[11] P. 105, note 8, *supra.*

[12] The court in 1826 was not satisfied with that construction. Little *v.* Chauvin, p. 127, *infra.*

[13] As the warrant did not [612] "bear teste in the name of the presiding judge" and was not sealed with the judicial seal of the court, it was held "not a judicial act, nor anything like a judicial act, and gave no authority whatever to the officer or person to whom it was directed." Little *v.* Chauvin, *ibid.*

[14] Judge Lucas testified in regard to these matters twenty years later. Marguerite *v.* Chouteau, p. 132, *infra.*

[15] Her husband had died in 1801.

[16] Shortly after, Sophia "was sold by the said Tayon, at the church door in the town of St. Louis" and came eventually into the possession of Little. In 1817 she was restored to the possession of Madame Chevalier, by virtue of a writ of replevin, and in 1826 the Supreme Court reversed the judgment of the lower court in favor of Little's administrator. Little *v.* Chauvin, p. 127, *infra.*

[17] Catiche *v.* Circuit Court, p. 126, *infra.*

[18] See note 7, *supra.*

[19] June 6, 1806.

that the plaintiff have the full benefit of his verdict," In this trial "the pedigree of the defendants in that court came directly in question." [20] They were "the children of Marie Scipion [21] . . Marie Scipion's mother was an Indian woman of the Natchez tribe; that she was brought [about 1731] to Fort Chartres" [71] "where she was sold as a slave" [73] "after the defeat of the Natchez Indians by the French, about the time of the massacre" [22] [71] "a negro man named Scipion was supposed to be the father of Marie Scipion;" Marie Scipion was bought by the mother of Mrs. Joseph Tayon and given to her daughter, so that she "belonged to and lived with Joseph Tayon . . from the time of his marriage" Sebastian Pratte who went to Fort Chartres in 1756 or 1757 and lived in Tayon's family [73] "observed in the family . . a Negro woman named Mary, an Indian woman called Marie Louise with her two children, and a girl called Scipion about ten or twelve years old of age, treated and well known as a slave, that he knew her in Tayon's possession for several years after his removal to St. Louis," Soon after his removal news came of a proclamation issued in December 1769 by the Spanish [23] governor O'Reilly at New Orleans, a proclamation which raised consternation in the hearts of the owners of Indian slaves. It ordered "that the actual proprietors of . . Indian slaves shall not dispose of those whom they hold in any manner whatsoever unless it be to give them their freedom. Awaiting the orders of his majesty on this subject we enjoin upon the said proprietors to go and make their declaration at the office of the recorder by giving the name and the nation of said Indians, and the price at which the proprietors shall value them." [24] Tayon's daughter "read the ordinance to her father, and conversed with him on the risk he ran of loosing his Indian slaves,[25] and that she remembered he sold one of these slaves and was compelled to take it back and hush it up, lest he should be fined under the ordinance; that she remembered to have heard her father say after the publication of the ordinance, that Marie Scipion and her children would be free at his death in consequence of that ordinance." Jean B. Reviere "understood

[20] Testimony of Judge Lucas, one of the signers of the warrant in 1806. Marguerite *v.* Chouteau, p. 132, *infra*.

[21] The testimony given in the various trials involving the history of Marie Scipion and her descendants is here given chronologically, irrespective of date of the cases in which it was reported.

[22] The Natchez tribe had massacred many of the French and had been nearly exterminated in requital. Three hundred of the tribe who survived were sent to Santo Domingo to be sold as slaves. Seville *v.* Chretien, 5 Mart. La. (O. S.) 275 (288). A few seem to have been left behind who were sold as slaves along the Mississippi.

[23] "the province of Louisiana was ceded by France to Spain, in 1763, by a secret treaty, but no effectual possession of the country was taken, until the arrival of Governor O'Reilly, in 1769." *Ibid.* p. 284. The secret treaty of Fontainebleau was signed November 3, 1762. The cession was confirmed in the definitive treaty of 1763.

[24] From the copy of O'Reilly's proclamation, furnished by counsel for Chouteau in Marguerite *v.* Chouteau, p. 132, *infra*.

[25] Aikin and Julien, the children of his Indian slave, Marie Louise, "ran away and passed for freemen at the commencement of the Spanish Government; that they went to New Orleans after the publication of an Ordinance of O'Reilly the Spanish Governor of Louisiana," Deposition of Madame Chauvin, Marguerite *v.* Chouteau, p. 132, *infra*.

Joseph Tayon to say that Marie Scipion lived in his family of her own free will and consent, because she was well treated and chose to remain with him, and that the said Marie Scipion and her children were at liberty to leave him at any time they pleased, but if they chose to remain till his death they should never serve any body." [26] But Tayon lived to a ripe old age. As the danger lurking in O'Reilly's proclamation passed with the recession of Louisiana to France, he saw no necessity of freeing Marie Scipion and her children at all. We know the dates of birth of three of her children: Celeste in 1777,[27] Catiche in 1782,[28] Marguerite in 1788.[29] As Catiche was born " at Pra[i]rie du Rocher, in that part of the late northwestern Territory which now forms part of the state of Illinois," [28] Tayon must have permitted Marie Scipion to return to the neighborhood of her old home,[30] or even encouraged her to stay there during the " troublous times " of the Spanish regime.[31] But after Congress passed the Ordinance of 1787, the Illinois bank of the Mississippi may not have seemed so safe for slavery as the opposite shore, and Marie Scipion was brought to St. Louis. In 1801 she was living in " the house of Mr. Chouteau, (where Tayon then lived,)" from which " she was removed sick " to the house of Madame Chauvin (a daughter of Tayon) " where she died in June 1802, aged about sixty years; " [32] The United States purchased Louisiana in 1803, and in 1806, a court of the Territory of Missouri (which had been carved out of the Purchase), having set one of the Indian slaves free from the custody of Pierre Chouteau, Tayon, as has been shown, decided to " round up " his family of Indian slaves who were " running at large " [33] and quiet his title to them. And it is quieted for many years, after the trial of 1806.[34]

In 1825,[35] " Catiche [36] and others " applied to the circuit court of St. Louis county " for leave to sue in that court, as paupers, for their

[26] *Ibid.*

[27] She was twenty-two years old in 1799, Little *v.* Chauvin, p. 127, *infra.*

[28] Theoteste *v.* Chouteau, p. 135, *infra.*

[29] Marguerite *v.* Chouteau, p. 132, *infra.* According to the first edition, which is printed " from a copy made out from the transcript of the Clerk, by one of the Judges of the Supreme Court." The transcript of the Clerk (followed in the second edition) gives 1778 as the date of Marguerite's birth.

[30] Prairie du Rocher is about four miles from the site of Fort Chartres which had been demolished in 1772. Tayon had declared that Marie Scipion was " at liberty to leave him at any time " she pleased.

[31] Tayon himself may have returned temporarily to the east side of the Mississippi: "A few years after the massacre [in 1780], the people generally left their lands [in and near St. Louis] for fear of the Indians." Hill *v.* Wright, p. 141, *infra.*

[32] Marguerite *v.* Chouteau, p. 132, *infra.*

[33] This must be a legal fiction as to some of them at least. See p. 105, note 5, *supra.* At any rate he had given them permission to go and come as they pleased.

[34] Pp. 105-107, *supra.*

[35] Catiche *v.* Circuit Court, p. 126, *infra.*

[36] Catiche (*alias* Theoteste) is the prominent member of this group of slaves. Her name heads the list of these slaves who are petitioners in 1825 for leave to sue for freedom, and plaintiffs in 1826 in the suit against the Circuit Court (*ibid.*). She is the only one of them all whom we know to have had two possible grounds on which to sue for freedom: descent from an Indian woman and birth in the Northwest Territory. Theoteste *alias* Catiche *v.* Chouteau, p. 135, *infra.*

freedom.[37] This leave being refused, . . a writ of *mandamus* was ordered to the circuit court, commanding it to admit the plaintiffs, or to shew cause." The circuit court declared that the records of the case of 1806 showed that "the absolute slavery" of the petitioners was established. The Supreme Court decided that those proceedings were [613] "without any legal authority, and consequently null and void. . . that a person held in bondage, should be compelled to come into court, and say he is free, and this to be done, too, at the instance of a person claiming his services, appears somewhat strange," says Judge Tompkins. "Let a peremptory *mandamus* go." The result of the leave to sue, so extorted, is seen in suits for freedom brought soon after by Catiche (*alias* Theoteste) and by Marguerite, the sister of Catiche and of Celeste.

Marguerite sued Pierre Chouteau [38] for her freedom on the ground of her descent in the maternal line from an Indian woman, the Natchez captive, who was her grandmother. There was testimony as to the enslavement of Indians by the French. One witness (Sebastian Pratte) deposed [74] "that there were at Fort Chartres [in 1756 or 1757] and elsewhere through the country a great many Indian slaves and but few blacks; that the Indians were universally acknowledged as slaves, and frequently sold as such before the Governor; that he himself sold several, one to . . the English Commandant at Kaskaskia; . . that a majority of the Indians held as slaves, were brought down the Missouri by the traders, and were of different nations; that there were many Indian slaves in St. Louis after its establishment, and but few blacks." [39] The judgment of the lower court was in favor of Chouteau, and Marguerite appealed to the Supreme Court of Missouri. Judge Tompkins was of the opinion that the judgment of the Circuit Court ought to be reversed. He bases his opinion largely on the histories of Du Pratz and of Raynal: [90] "all the posts established by the French in North America were designed to secure to themselves the commerce and friendship of the Indian tribes, and that an Indian slave population in Louisiana was unknown to the author [Raynal] cited by the appellee. I conclude then, that such a population was unknown to the laws and government of France. . . [91] Had it been in evidence that the ancestor of the plaintiff was one of the 300 Indians sent by Perier into St. Domingo as slaves, I should have thought the plaintiff was lawfully held in slavery." Judge Wash was of the opinion that the judgment of the lower court should be affirmed: [91] "I consider it as clearly settled by the testimony, that the maternal grandmother of the plaintiff was a Natchez woman taken prisoner by the French in the prosecution of an exterminating war against that tribe

[37] Under the statute of 1807 (Geyer 210), which was re-enacted in 1824. Rev. Code 404.
[38] Marguerite *v.* Chouteau, pp. 132, 143, *infra*.
[39] As late as 1807, Timothy Phelps writes from Louisville to Moses Austin: "I have it in contemplation to purchase a negro wench about 15 years old, . . You know there is no such thing as getting a servant of that kind in Louisiana." Barker, *Austin Papers*, pt. I, p. 142.

about the year 1731—that she was reduced to slavery, and that she and her descendants have been held in slavery ever since. . . [93] Indian slavery . . should be placed upon the same footing with negro slavery. . . There being a division of the court,[40] by operation of the law, the judgment of the circuit court [in favor of Chouteau] is affirmed." This is in 1828. Marguerite having been unsuccessful in obtaining freedom on the ground of descent from an Indian woman, her sister Catiche (Theoteste) brings her suit against Chouteau [41] on a different ground: her birth and residence in the Northwest Territory.[42] In the lower court there was judgment for Chouteau, and the Supreme Court affirmed this judgment in 1829. Judge Tompkins, whose opinions are usually on the side of freedom, declares that the right of property in Catiche is vested at her birth in 1782, and that "it cannot be supposed Congress [by the Ordinance of 1787] intended" to violate the provision of Virginia's act of cession "that the inhabitants [of the ceded territory] shall be protected in the enjoyment of their rights and liberties," [43] But all is not lost.

In 1833 the parties in the case of Marguerite *v.* Chouteau appeared before the Supreme Court by their counsel and "mutually agreed that the judgment in this cause before rendered in this court, should be set aside, and that it should be again argued before the court, consisting of all the Judges." [44] Judge Tompkins delivered the opinion of the court, Judge McGirk concurring. He amplified his former opinion that Indians were not slaves under the French and Spanish régimes, and criticized the decision in Seville *v.* Chretien,[45] the famous Louisiana case, which he "particularly examined," [46] consuming 27 printed pages in so doing. [571] "the decision of this cause [Marguerite *v.* Chouteau] is . . important in its consequences; and in deciding contrary to the opinion of the highest court of judicature of a sister State.[47] We have the misfortune not to be able to concur all [48] in the same opinion." The judgment of the Circuit Court in favor of Chouteau was reversed, and the cause remanded. Judg-

[40] Judge McGirk was absent.
[41] Theoteste *alias* Catiche *v.* Chouteau, p. 135, *infra*.
[42] "The plaintiff was born in the year 1782, at Pra[i]rie du Rocher, in that part of the northwestern Territory which now forms part of the state of Illinois;" *Ibid.*
[43] 1 U. S. L. 473.
[44] Marguerite *v.* Chouteau, p. 143, *infra*.
[45] 5 Mart. La. (O. S.) 285 (1817).
[46] 3 Mo. 544-571.
[47] Louisiana.
[48] Judge Wash dissented, holding to his former opinion: [574] "The evidence derived from the old archives of the country—the registers of baptisms and burials—the records of voluntary sales, and of the sales and distributions made of the estates of intestates with the clear and positive testimony of witnesses sworn in this cause, exhibit beyond doubt or question, numerous cases of Indian slavery commencing with the earliest settlement of the colony and continuing after the period when the Spaniards assumed the Government in 1769. . . [576] To regard the question then, as one to be settled by the laws which were in force prior to 1769 when Spain took possession of Louisiana, I can feel no doubt and the practice is shown to have been pursued and recognized by the Spaniards, under neither of the governments that have preceded us, could the plaintiff have asserted successfully her claim to freedom."

ment was rendered in favor of Marguerite, and Chouteau sued out a writ of error to the Supreme Court of the United States, but the writ was dismissed for lack of jurisdiction.[49]

After disposing of the question of Indian slavery in Louisiana under France and Spain the Missouri courts wrestled for seventeen years with another problem as distant in time and more remote in space: Did negro slavery exist in Canada in 1768?[50] In that year a negress, Rose, was born in Montreal. "about the year 1791, the said Rose was removed from Canada by a certain John Stock, an Indian trader, to [Mackinaw[51] and later to] his trading post at Prairie du Chien, in the northwestern territory . . where she was detained by him as his slave until his death, some time in the year 1793;"[52] or "1794, rendering service to him and his family."[53] "after the death of said Stock, she (Rose) was brought down to St. Louis by a certain Andrew Todd, a trader,[54] who sold her [in October 1795] as a slave to a Mr. Didier,"[55] [196] "curate of the parish of St. Louis, . . [199] by formal conveyance executed before the Lieutenant Governor of Upper Louisiana and authenticated by him,"[56] "Didier sold her and her children [in 1798] to the defendant's father, Auguste Chouteau."[56] "During the period of Rose's detention at Prairie du Chien, that post was in the possession of British subjects. . . The defendant below [Chouteau] gave evidence tending to show the actual existence of slavery in Canada in the year 1786 [1768][57]—that slaves were recognized as property and subject to be sold; that Rose, the mother of Pierre, was sold as a slave in Canada."[53] It was held, in 1845, in Pierre's case[53] that "the ordinance of 1787 . . never had any force or validity in the posts . . occupied by Great Britain. . . the mother of the plaintiff Pierre, was taken from Prairie du Chien to St. Louis before the period assigned for the surrender of the posts."[58] The court also declared that [8] "The

[49] Choteau *v.* Marguerite, p. 152, *infra.*

[50] The historical information contained in Charlotte *v.* Chouteau (p. 203, *infra*), concerning slavery in Canada in the eighteenth century, was considered of sufficient importance to cause the Lower Canada Jurist, in 1860 (III. 257) to print the whole report from a transcript certified by the clerk of the Supreme Court of Missouri, under the title "Slavery in Lower Canada."

[51] Charlotte *v.* Chouteau, p. 174, *infra.*

[52] Same *v.* same, p. 194, *infra.*

[53] Chouteau *v.* Pierre, p. 162, *infra.*

[54] "Andre Todd, a merchant of Montreal," [Charlotte *v.* Chouteau, p. 174, *infra*] "who had the monopoly of the Indian trade on the Mississippi." [Chouteau *v.* Molony, 16 Howard 203 (210)]

[55] Same *v.* same, p. 194, *infra.*

[56] Same *v.* same, p. 174, *infra.*

[57] Rose was about twenty-seven years old in 1795. Charlotte *v.* Chouteau, p. 174, *infra.*

[58] [10] "the northwestern posts were not, until after 1st June, 1796, surrendered by Great Britain—that her subjects within them owed no allegiance to our government—that they were protected in the enjoyment of their property," See also speech of George Washington, December 7, 1796. 1 American State Papers, Foreign 30.

statute under which Pierre sues, he being a negro, requires that he should prove his right to freedom. Then it would seem that it devolved on him to show the law forbidding negro slavery [in Canada]; for . . a court would not be warranted in saying, that institution was illegal in places where it actually existed, for want of a law expressly authorizing it." The judgment of the lower court in favor of Pierre was reversed and the cause remanded. Then Charlotte begins her fight for freedom. Rose's residence at Prairie du Chien is not stressed, as that fact was definitely settled in Pierre's case to be no ground for freedom; but in four volumes of the Missouri reports, beginning in 1847 and not ending till 1862, the battle of the lawyers, juries and judges rages over the question of the existence of slavery in Canada when Rose was born and lived there. The juries persisted in finding that slavery did not exist then and there,[59] in spite of the contrary evidence of treaties, proclamations, acts of Parliament, and the depositions of learned Canadian jurists.[60] All the judges in 1857 agreed that " negro slavery was sanctioned and permitted by law in the country called the province of Quebec (which includes Montreal) at all times from the year 1760 to the year 1790," but Judge Scott dissented from the decision of the other two (Richardson and Napton) to reverse the judgment of the lower court in favor of Charlotte and remand the cause: [484] "As the jury have found the fact,[61] whose exclusive province it was to do so, the practice of this court, now established for a number of years, forbids that a judgment should be reversed because a verdict is against the weight of evidence." The last trial in the lower court took place in 1859, resulting again in a verdict and judgment for Charlotte. Chouteau again appealed, and in 1862 Judge Scott's opinion (of 1857) was followed by the new bench of justices [62] which replaced the old,[63] whose members had forfeited their offices for failing to take the oath to support the Constitution of the United States.[64] The judgment in favor of Charlotte was affirmed. The court admitted that the judgment [201] " was founded upon a verdict which was rendered against the weight of the evidence. Notwithstanding that we might believe that the verdict should have been rendered for the defendant [Chouteau], yet the practice is so well established, not to reverse a judgment because the verdict appears to have been rendered against the weight of evidence, that we will not,

[59] " The existence of a foreign law was a question of fact, to be tried by a jury." Charlotte *v.* Chouteau, p. 216, *infra*.

[60] Same *v.* same, p. 203, *infra*.

[61] That negro slavery was not permitted by law in Canada from 1760 to 1790.

[62] Judges Bates, Bay, and Dryden.

[63] Judges Scott, Napton, and Ewing.

[64] Prescribed by the " People of the State of Missouri in Convention assembled." 31 Mo. iv.

for that cause, interfere in this case." [65] Charlotte won her freedom seventeen years after the Supreme Court had decided adversely to Pierre. In 1862 the question whether slavery existed in Canada in 1768 was becoming academic.

But the supreme question which agitated Missouri and which culminated in the Dred Scott Decision was the one which was settled in England in 1827 by Lord Stowell in his decision of the case of the Slave Grace.[66] Does a slave who sets foot on free soil [67] become free forever? [68] In Missouri, for many years, this question was answered: Yes, if his stay was such that the ordinance of 1787, the constitution of Illinois or the Missouri Compromise Act was violated.

The first case in the Missouri reports in this connection of which any detailed facts are given, is "an action of assault and battery, and false imprisonment," brought by "Winny, a free woman held in slavery," a unique description in the heading of a slave state report.[69] Near the close of the eighteenth century she had been brought by the defendant, Phebe Whitesides and her husband "from Carolina to Illinois, . . where they resided about three or four years, retaining the plaintiff, during the term of their residence in Illinois, in slavery, *in Illinois*." [70] From Illinois, the defendant and her then husband removed to Missouri, bringing with them the plaintiff in this action, and still holding her as a slave." The

[65] Same *v.* same, p. 216, *infra*.

To assist the layman in threading the maze of these cases, the following brief summary is given:

A. Pierre's case:
   1. Pierre wins in lower court; Chouteau appeals.
   2. Chouteau wins in the Supreme Court of Missouri, 1845 (9 Mo. 3).

B. Charlotte's case:
   1. Chouteau wins in lower court; Charlotte appeals.
   2. Reversed by Supreme Court in 1847 (Charlotte wins), and cause remanded (11 Mo. 193).
   3. Chouteau wins in lower court in 1853; Charlotte appeals.
   4. Reversed by Supreme Court in 1855 (Charlotte wins), and cause remanded (21 Mo. 690).
   5. Charlotte wins in lower court; Chouteau appeals.
   6. Reversed by Supreme Court in 1857 (Chouteau wins), and cause remanded (25 Mo. 465).
   7. Charlotte wins in lower court in 1859; Chouteau appeals.
   8. Affirmed by Supreme Court in 1862 with final victory for Charlotte (33 Mo. 194).

[66] 2 Hagg. Adm. 94.

[67] The soil of France as well as that of England was a specific for slavery. "Il [l'esclave] s'est toujours regardé comme libre, depuis qu'il a mis le pied en France." 13 Causes Célèbres 492 (ed. of 1747).

"Being free for one moment in France, it was not in the power of her former owner to reduce her again to slavery." Marie Louise *v.* Mariot, 8 La. 475 (1836). This virtue was denied to the soil of Illinois by the Missouri court, in Nat *v.* Ruddle, p. 143, *infra*.

[68] "Once free for an hour, free forever." See introduction to English cases, vol. I., p. 1, of this series.

[69] Due probably to Judge Tompkins (who delivered the opinion of the court), "that apostle of freedom at that day. Indeed, it is fair to presume . . that he was deeply tinged with sentiments and opinions dangerous to the existence of that 'peculiar institution' known as domestic slavery." Counsel for Mrs. Emerson in Scott *v.* Emerson, p. 185, *infra*.

[70] Italics in the original report.

circuit court gave judgment in favor of Winny in 1822 and the Supreme Court affirmed the judgment in 1824.[71] [474] " Congress had both power to acquire the [Northwest] territory, and to forbid the introduction of slaves. . . [475] We are clearly of opinion, that, if by a residence in Illinois, the plaintiff in error [Mrs. Whitesides] lost her right to the property in the defendant, that right was not revived by a removal of the parties to Missouri. It was urged . . that the slaves of persons settling in that country, do not thereby become free. The words of the ordinance are, ' that there shall be neither slavery nor involuntary servitude in the said territory.' We did not suppose that any person could mistake the policy of congress, in making this provision. When the states assumed the right of self government, they found their citizens claiming a right of property in a miserable portion of the human race. Sound national policy required, that the evil should be restricted, as much as possible. What they could, they did. They said, by their representatives, it shall not vest within these limits, and by their acts for nearly half a century, they have approved and sanctioned this declaration. . . [476] the person who takes his slave into said territory, and by the length of his residence there, indicates an intention of making that place his residence and that of his slave, . . does, by such residence, declare his slave to have become a free man." [72]

The next case based on the Ordinance of 1787 was a suit brought by John Merry against his owners, Tiffin and Menard.[73] His mother had been " holden as a slave, in the territory north-west of the river Ohio, in that part now called Illinois, and . . after said ordinance, . . was still holden in Illinois as a slave; and while so holden, and about 36 years past, in the Illinois, John was born; and that he was holden there as a slave, till lately." " John is free," declared Chief Justice McGirk in his opinion: " The ordinance is positive, that slavery cannot exist; . . it is contended by the counsel of the defendants, . . that when we look at the cession act of Virginia, and the whole of the ordinance, that there is much room to doubt if these general positive words, ought not to be understood as to admit those who were slaves in that country, at the adoption of the ordinance, and their descendants, to continue so; because the ordinance says, in another place, that the inhabitants shall be protected in the just preservation of their rights and property, and that, by the act of cession of Virginia, it is stipulated, that the inhabitants shall be protected in the enjoyment of their rights and liberties: [74] . . This man was not then born, and when he was born into existence, the law forbid slavery to exist; and

[71] Winny *v.* Whitesides, p. 125, *infra.*

[72] Judge Tompkins.

[73] John Merry *v.* Tiffin and Menard, p. 128, *infra.* See the similar case of Menard *v.* Aspasia, 5 Peters 505.

[74] 1 U. S. L. 473.

at the time of the making of the cession act, this man, John, was not property; and at the time of his birth, he could not be property. There is nothing in the cession act, forbidding congress to fix and point out things which might afterwards be the subject of property."

In 1828 it was held that "the owner of a slave, who is merely passing through the country with him, or who may be resident in Illinois and may choose to employ him in Missouri in mining, or as a sailor, or boat hand . . in boats or vessels that occasionally lade and unlade their cargoes at some port or place within the state [of Illinois], though he may not do much in 'extending the fundamental principles of civil and religious liberty' certainly, does nothing towards engrafting slavery upon the social system of the state. . . The ordinance was intended as a fundamental law, for those who may choose to live under it, rather than as a penal statute to be construed by the letter against those who may choose to pass their slaves through the country." [75]

Theoteste *alias* Catiche did not obtain freedom in 1829 as her birth in the Northwest Territory took place before the passage of the Ordinance of 1787.[76] Judgment in favor of Adam's freedom was affirmed in 1829 as he had lived in 1810 with his master "at the United States Saline in the state of Illinois;" [77] the master removing with Adam to Missouri in 1817. It was held in 1830 that Vincent, who "had been hired [by his master, a resident of Kentucky] to labor at the Illinois Saline near Shawneetown, from the year 1817 till the year 1825" when he "was taken and carried bound to Kentucky:" and later to St. Louis, was entitled to his freedom, because he "resided at the Ohio Saline [in Illinois] as a laborer in 1817, by the consent of his master,"—before the adoption of the Constitution of Illinois, which permitted the hiring from year to year of a slave to work at the Saline.[78]

"Ralph a man of color," formerly the slave of Gordon, "hired his own time, and went to the [Ohio] Saline [in Illinois] of its [his] own accord." He worked there "occasionally . . from the year 1814 or 15," till 1818 or 1819. In his suit for freedom judgment was against him in the Circuit Court, but reversed in the Supreme Court in 1833: [195] "The object of the ordinance of 1787, was to prohibit the introduction of slaves into the Territory of which the present State of Illinois constitutes a part, and the master who permits his slave to go there to hire himself, offends against that law as much as one who takes his slave along with himself to reside there," [79] A few months later Julia, a slave who was brought by her mistress from Kentucky in 1829 and kept in Illinois a few weeks (during which time she was hired out there for about two days) on her way to be hired out in Missouri, won her freedom on appeal to the Supreme

[75] Judge Wash in François Lagrange *v.* Chouteau, p. 129, *infra.*
[76] Theoteste *v.* Chouteau, p. 135, *infra.*
[77] Tramell *v.* Adam, p. 136, *infra.*
[78] Vincent *v.* Duncan, p. 137, *infra.*
[79] Judge (Tompkins) in Ralph *v.* Duncan, p. 139, *infra.*

Court.[80] Her claim was based [272] "on the 6th article of the constitution of the State of Illinois, . . the very introduction of slavery, works an emancipation of the slave, . . [273] yet it can be introduced so far as to permit persons passing through the State, as mere emigrants or mere travellers, to carry with them their slave property, . . otherwise there could be no emigration through the State with slave property, which is a thing it cannot reasonably be supposed the constitution of Illinois intended to forbid. . . Something more than the mere convenience . . of the emigrant ought to intervene to save him from a forfeiture. Something of the nature of necessity . . swollen streams of water . . serious sickness of the family, broken wagons, and the like . . would be a good cause of delay . . if the journey is resumed as soon as these impediments are removed, provided also due diligence is used to remove them. . . [273] Unless, therefore, the case can be brought within some reasonable and equitable exception, to be engrafted on the constitution of Illinois, the plaintiff will be entitled to exact the forfeiture of emancipation, . . in this case . . slavery is introduced and continued for the mere convenience of the owner." [81] Nat did not win freedom in 1834, because he "ran-away from Missouri" where he was hired out, and went to his master's home in Illinois. The court charged the jury "that there was nothing in the soil of Illinois as in England that would work the emancipation of a slave by mere setting foot thereon, and that if the plaintiff went into that State on a mere voluntary visit, or ranaway from Missouri to that State he would not thereby be entitled to freedom." [82]

The case of Rachel,[83] decided in 1836, was almost precisely like the case of Dred Scott which came up to the Supreme Court of Missouri sixteen years later. Stockton, an officer of the United States army, stationed at Fort Snelling, "on the west side of the Mississippi river, and north of the State of Missouri, and in the territory of the United States" sent to St. Louis in 1830 to purchase a slave. Rachel was bought for him and taken to him at Fort Snelling where she remained "till the fall of 1831, when he removed to Prairie du Chien [in the Michigan territory], . . at which place he held her in slavery, till about the spring of the year 1834, when he took her to St. Louis and sold her." The judgment of the Circuit Court in favor of Rachel's owner was reversed and the cause remanded for a new trial. Judge McGirk exclaims: [352] "It seems that the ingenuity of counsel and the interest of those disposed to deal in slave property, will never admit anything to be settled in regard to this question." He reviews the Missouri decisions, all of which admit [353] "that the people of the United States have a right to pass through any of the districts where slavery is prohibited with their slaves, and while they

[80] Julia *v.* McKinney, p. 141, *infra.*
[81] Wash, J.
[82] Nat *v.* Ruddle, p. 143, *infra.*
[83] Rachel *v.* Walker, p. 148, *infra.*

justly retain the character of emigrants passing through the country, the fact that they have in their possession, when so passing slaves, does not emancipate them under the ordinance; . . In the case of Julia [84] . . the court say there should be something like necessity existing, to justify the owner of a slave to keep such slave in the country, so as to save a forfeiture. The counsel insist on a necessity as regards the owner to stay . . in the Missouri territory and Michigan for more than two years, and during all that time to keep the plaintiff there as a slave . . [354] though it be true that the officer was bound to remain where he did, . . yet no authority of law or the government compelled him to keep the plaintiff there as a slave. . . In this case the officer lived in the Missouri territory . . sent to a slave holding country and procured her [Rachel] . . without any other reason than that of convenience, and he and those claiming under him must be holden to abide the consequence of introducing slavery both in Missouri territory and Michigan, contrary to law." Otherwise " the convenience or supposed convenience of the officer repeals as to him and others who have the same character, the ordinance and the act of 1821 admitting Missouri into the Union, and also the prohibitions of the several laws and constitutions of the non slave holding States." Judge McGirk hit the nail on the head. Chief Justice Taney, twenty years later, did not hesitate to drive it in, but in a different direction.

In 1837 Melvin who had removed with his slaves to Missouri from Tennessee in 1834 and on the way stayed nine months with his son in Illinois where he " made a crop of corn, and remained in the State to gather and sell it " forfeited his slave Wilson,[85] although he took the precautions not to unload his wagon for about a month after reaching Illinois, " till the negroes were taken to St. Louis, because the appellee [Melvin] was told ' if he did, and made any place their home,' the slaves would obtain their freedom." Judge Tompkins, delivering the opinion of the court reversing the judgment of the lower court in favor of Melvin, says: [598] " The only question to be submitted to the jury . . was, whether he [Melvin] had made any unnecessary delay? " [597] " Something of the nature of necessity should exist before he would, or ought, to be exempted from the forfeiture [of his slave]."

And so the matter rests for over ten years. In 1848 the first " small cloud " of the gathering storm is described. Dred Scott and Harriet, his wife, appear in the law reports for the first time, in two brief decisions on the same page, Harriet preceding with eleven lines,[86] Dred following with two.[87] Before the final curtain falls on Dred, over 250 pages of state and federal reports will have been devoted to his cause. The first decisions involve a technicality which is summarily disposed of. Mrs. Em[m]er-

[84] Julia *v.* McKinney, p. 141, *infra.*
[85] Wilson *v.* Melvin, p. 150, *infra.*
[86] Emmerson *v.* Harriet, p. 175, *infra.*
[87] Emmerson *v.* Dred Scott, *ibid.*

son's writs of error are dismissed as premature as the causes are "still pending in the court below." In the court below where Dred Scott had instituted an action "to try his right to freedom" he obtained a verdict,[88] in accordance with the instructions of the court, which followed the Missouri precedents, Dred Scott's claim to freedom being based on the fact that his late master, Dr. John Emerson, "held him in servitude in the State of Illinois, and also in that territory ceded by France to the United States, under the name of Louisiana, which lies north of 36 degrees 30 minutes, north latitude, not included within the limits of the State of Missouri. It appears that his late master was a surgeon in the army of the United States, and during his continuance in the service was stationed at Rock Island,[89] a military post in the State of Illinois, and at Fort Snelling,[89] also a military post in the territory of the United States, above described, at both of which places Scott was detained in servitude—at one place, from the year 1834, until April or May, 1836; at the other from the period last mentioned, until the year 1838. . . The defendant [90] moved for a new trial on the ground of misdirection by the court, which being denied to her," she again sued out a writ of error. The Supreme Court of Missouri, in 1852, reversed the judgment of the lower court and remanded the cause.[91]

The way had been paved, two years before, in the Supreme Court of the United States, for this overruling of the long line of Missouri decisions which had been made in accordance with the Ordinance of 1787, the constitution of Illinois, and the Missouri Compromise. In the case of Strader *v.* Graham,[92] Chief Justice Taney, in delivering the opinion of the court, had declared that [94] "the condition of the negroes [who had been sent by their master from Kentucky to Ohio for musical training], as to freedom or slavery, after their return [to Kentucky], depended altogether upon the laws of that State, and could not be influenced by the laws of Ohio. . . The Ordinance [1787] . . if still in force,[93] could have no more operation than the laws of Ohio in the State of Kentucky," Accordingly, Judge Scott, in delivering the opinion of the Supreme Court of Missouri, in the case of Scott *v.* Emerson,[94] declares:

[583] "No State is bound to carry into effect enactments conceived in a spirit hostile to that which pervades her own laws. . . [585] Laws operate only within the territory of the State for which they were made, and by enforcing them here, we, contrary to all principle, give them an extraterritorial

[88] Scott *v.* Emerson, p. 185, *infra.*

[89] "the officer goes to his post for a temporary purpose, to remain there for an uncertain time, and not for the purpose of fixing his permanent abode." Nelson, J., in Scott *v.* Sandford, 60 U. S. 393 (468). But see Rachel *v.* Walker, p. 148, *infra.*

[90] "Irone Emerson, the wife and administratrix of Dr. John Emerson."

[91] Scott *v.* Emerson, p. 185, *infra.*

[92] See vol. I., pp. 365-369, of this series.

[93] Judge Taney adds: "But it has been settled by judicial decision in this court [Permoli *v.* Municipality, 3 Howard 589], that the Ordinance is not in force."

[94] P. 185, *infra.*

effect. . . There is no ground to presume or to impute any volition to Dr. Emerson, that his slave should have his freedom. He was ordered . . to the posts . . In States and Kingdoms in which slavery is the least countenanced, and where there is a constant struggle against its existence, it is admitted law, that if a slave accompanies his master to a country in which slavery is prohibited, and remains there a length of time, if during his continuance in such country there is no act of manumission decreed by its courts, and he afterwards returns to his master's domicil, where slavery prevails, he has no right to maintain a suit founded upon a claim of permanent freedom.[95] This is the law of England, where it is said her air is too pure for a slave to breathe in, and that no sooner does he touch her soil than his shackles fall from him. . . [586] Times now are not as they were when the former decisions on this subject were made. Since then not only individuals but States have been possessed with a dark and fell spirit in relation to slavery, whose gratification is sought in the pursuit of measures, whose invitable consequence must be the overthrow and destruction of our government. Under such circumstances it does not behoove the State of Missouri to show the least countenance to any measure which might gratify this spirit. She is willing to assume her full responsibility for the existence of slavery within her limits, nor does she seek to share or divide it with others. Although we may, for our own sakes, regret that the avarice and hard-heartedness of the progenitors of those who are now so sensitive on the subject, ever introduced the institution among us, yet we will not go to them to learn law, morality or religion on the subject."

The case being remanded to the Circuit Court, it was " continued " in that court " to await the decision of the case " of Dred Scott against Sandford [96] to whom Mrs. Emerson had, in the meantime, sold Dred, Harriet, and their two children. This was " a fictitious sale " which had been " arranged by Mrs. Emerson (who had then become the wife of a strong abolitionist member of Congress from Massachusetts, Dr. C. C. Chaffee) to her brother, John F. A. Sandford of New York," [97] to enable Dred to bring a new suit in a federal court, on the ground of diverse citizenship. " In November, 1853, noted anti-slavery lawyers in St. Louis instituted in the United States Circuit Court, on his behalf, a suit for trespass " [98] *vi et armis.* Sandford appeared and filed a plea in abatement to the jurisdiction of the court, declaring that the court ought not to " take . . cognizance " because Dred Scott was not a citizen of Missouri, being a negro. Dred Scott demurred to the plea and the Circuit Court sustained his demurrer. [457] " The defendant then plead over in bar of the action . . and the cause went down to trial before the court and jury, . . and resulted in a verdict for the defendant, under the instructions of the court." The plaintiff excepted and the case was brought up, by writ of error, to the Supreme Court of the United States. On March 6, 1857, Chief Justice Taney delivered the opinion of the court: [427] " Dred Scott was not

[95] The Slave Grace, vol. I., p. 34, of this series.
[96] P. 198, *infra*.
[97] Charles Warren, *Supreme Court in United States History*, III. 3. See also Hodder, " Some Phases of the Dred Scott Case," in *Mississippi Valley Historical Review*, vol. XVI., no. 1.
[98] Warren, *op. cit.*, III. 2.

a citizen of Missouri within the meaning of the Constitution of the United States, and not entitled as such to sue in its courts;" [407] "In the opinion of the court, the legislation and histories of the times, and the language used in the Declaration of Independence, show, that neither the class of persons who had been imported as slaves, nor their descendants, whether they had become free or not, were then acknowledged as a part of the people, nor intended to be included in the general words used in that memorable instrument. . . They had for more than a century before been regarded as beings of an inferior order, and altogether unfit to associate with the white race, either in social or political relations: and so far inferior, that they had no rights which the white man was bound to respect; and that the negro might justly and lawfully be reduced to slavery for his benefit." It being decided "that the Circuit Court had no jurisdiction of the case," no more needed to be said, and the idea has been prevalent that the rest of Judge Taney's opinion is [427] "extra-judicial, and mere obiter dicta." He himself maintains that this "is a manifest mistake; there can be no doubt as to the jurisdiction of this court to revise the judgment of a Circuit Court, and to reverse it for any error apparent on the record, whether it be the error of giving judgment in a case over which it had no jurisdiction, or any other material error; and this, too, whether there is a plea in abatement or not. . . in a writ of error to a Circuit Court of the United States, the whole record is before this court for examination and decision; . . [430] We proceed, therefore, to inquire whether the facts relied on by the plaintiff entitled him to his freedom." The answer was No: I. [452] "neither Dred Scott himself, nor any of his family, were made free by being carried into" [432] "that part of the territory ceded by France, under the name of Louisiana, which lies north of thirty-six degrees thirty minutes north latitude, and not included within the limits of Missouri," for the Missouri Compromise act,[99] which prohibited slavery in that territory, was unconstitutional and void, since it [450] "deprives a citizen of the United States of his . . property,[100] merely because he . . brought his property into a particular Territory of the United States," Such an act, says Taney "could hardly be dignified with the name of due process of law . . [451] the right of property in a slave is distinctly and expressly affirmed in the Constitution." II. Nor was Dred himself free by reason of his removal to Illinois: [452] "As Scott was a slave when taken into the State of Illinois by his owner, and was there held as such, and brought back in that character, his *status,* as free or slave, depended on the law of Missouri, and not of Illinois. . . [453] we are satisfied . . that it is now firmly settled by the decisions

[99] It had been repealed in 1854, but was in force when Dred Scott resided at Fort Snelling.

[100] See E. W. R. Ewing, *Legal and Historical Status of the Dred Scott Decision,* ch. X., and Morris M. Cohn, "The Dred Scott Case in the Light of Later Events," 46 Am. Law Rev. 548 (556).

of the highest court in the State [of Missouri],[101] that Scott and his family upon their return were not free, but were, by the laws of Missouri, the property of the defendant;" [102]

Much as Chief Justice Taney's memory has suffered because of his treatment of the Dred Scott case, the decision itself, so far as Dred and Harriet were concerned, is unquestionably correct. The crucial fact in the case is not that Dr. Emerson took Dred to sojourn on free soil, but the fact that Dred returned to Missouri with his master, as the Slave Grace returned to Antigua with her mistress. Thirty years before the Dred Scott decision, Judge Story, who made the conflict of laws his special study, declared in a letter to Lord Stowell concerning the latter's opinion in the case of the Slave Grace: [103] "I entirely concur in your views, . . It appears to me that the decision is impregnable. In my native State, (Massachusetts), the state of slavery is not recognized as legal; and yet, if a slave should come hither, and afterwards return to his own home, we should certainly think that the local law would re-attach upon him, and that his servile character would be redintegrated." [104]

As to whether the opinion on the Missouri Compromise act was "extra-judicial," [105] it may be conceded that it was "clearly" so in the case of Dred and Harriet. Whether the territory in which they sojourned with their master was or was not a free territory, was immaterial. They were slaves because they went back to Missouri and their child Lizzie was a slave because she was born of a slave mother in Missouri. But there was Eliza, [398] "born on board the steamboat *Gypsey,* north of the north line of the State of Missouri, and upon the river Mississippi." Although she was not born in three states like Kim of the "Show Boat," one state (Illinois) and one territory (Wisconsin, which in 1838 included the future state of Minnesota,) might claim her as a native. Whether she was born east or west of the thread of the stream, who could say? But if both sides were free, Eliza, though born of a slave mother, was free.[106] Consequently the constitutionality of the Missouri Compromise act had to be decided in order to reach a determination of her case.[107] Nevertheless, it appears that it would not have been passed upon, if it had not been for the determination of Justices McLean and Curtis to

[101] Scott *v.* Emerson, p. 185, *infra.*

[102] "Sanford became insane before the case was decided;" Warren, *op. cit.*, III. 3n. "In May, 1857, Dred Scott was conveyed by Dr. Chaffee and [his wife, the former] Mrs. Emerson to Taylor Blow of St. Louis for the purpose of emancipation, and he was set free in Missouri, within three months after the Court denied him to possess any rights as a free man." *Ibid.,* p. 24n. "The Court costs were paid by Taylor Blow of St. Louis, son of [Capt. Peter Blow of Virginia] . . who sold Scott to Dr. Emerson." *Ibid.,* p. 3n.

[103] Vol. I., p. 34, of this series.

[104] W. W. Story, *Life and Letters of Joseph Story,* I. 558.

[105] John Lowell and Horace Gray, "A Legal Review of the Dred Scott Case," Law Reporter, 1857.

[106] Spotts *v.* Gillaspie, I. 156, and Bank *v.* Benham, III. 188, of this series; Merry *v.* Tiffin, p. 128, *infra.*

[107] See Ewing, *op. cit.,* pp. 107, 108.

discuss it in their dissenting opinions.[108] To this day the controversy as to which view was correct has not ended. Historians and lawyers continue to argue pro and con. If the question *had* to be solved, as it apparently had to be in the middle of the nineteenth century, Alexander's method was the only possible. The sword alone could dispose of it effectually.

II

The Missouri Constitution of 1820 provided for a Supreme Court of three judges, having appellate jurisdiction only, and for a chancellor having both original and appellate jurisdiction. The latter office was abolished by an amendment of 1822, though it was provided that the general assembly might thereafter establish a court or courts of chancery. An amendment of 1851 vacated the offices of all the judges of the Supreme Court, thus providing for new membership, but did not change the system of its composition. Similarly, the system of three judges continued by the Constitution of 1865 was not altered by an ordinance of that year vacating their offices; but an amendment of 1872 raised their number to five.

[108] Letter of Justice Grier to President Buchanan, Feb. 23, 1857: "The first question which presented itself was the right of a negro to sue in the courts of the United States. A majority of the court were of the opinion that the question did not arise on the pleadings and that we were compelled to give an opinion on the merits. After much discussion it was finally agreed that the merits of the case might be satisfactorily decided without giving an opinion on the question of the Missouri compromise; and the case was committed to Judge Nelson to write the opinion of the court affirming the judgment of the court below, but leaving both those difficult questions untouched. But it appeared that our brothers who dissented from the majority, especially Justice McLean, were determined to come out with a long and labored dissent, including their opinions . . on both the troublesome points, although not necessary to a decision of the case. In our opinion both the points are *in* the case and may be legitimately considered. Those who hold a different opinion from Messrs. McLean and Curtis on the power of Congress and the validity of the compromise act feel compelled to express their opinions on the subject, Nelson and myself refusing to commit ourselves." *Works of James Buchanan* (edited by John Bassett Moore), X. 107n.

Tayon v. Celeste and others, transcribed in 1 Mo. 608, June 1806. [610] "on 9th May, 1806, Joseph Tayon moved the general court for a warrant to apprehend Celeste,[1] Antoine, Paul, Sophia, Margarette, daughter of Celeste, Catiche,[2] Carmelite, Mazelite, La Couture, Zabelite, and another named Antoine, who, by said Tayon, were alleged to be his slaves, and running at large, in the district of St. Charles. The court then gives an opinion, 'that, in those cases where slaves may be claimed, and not heretofore decided upon by the court, that a petition may be presented, supported by affidavit, and that, thereupon, a warrant may issue for the before mentioned slaves, and that the claimant file security in this (court,) in the sum of four thousand dollars, conditioned to keep the said slaves subject to the order of this court, upon investigation. Where one has been declared free, the petition must be made by some claimant not a party to the former claim, and that the petition be supported by the affidavit of disinterested persons.' . . it appears, that one of the persons named by Tayon in his motion, was set free from the custody of Pierre Chouteau,[3] and immediately claimed by Tayon. It appears that Tayon filed a petition, supported by affidavit, in which he claimed the persons above mentioned, as we suppose. The petition is not set out." A warrant, signed and sealed by two judges, Meigs and Lucas,[4] was issued the same day, commanding the sheriff of the district of St. Charles to apprehend the "reputed slaves of Joseph Tayon," and deliver them "into the custody of the said Joseph Tayon, there to remain and abide the determination of the general court of the territory of Louisiana:" The slaves were apprehended and [612] "next appear in court as suitors." [610] "An attorney appears for the reputed slaves, and demands a jury. A jury is summoned, and they find a verdict, in these words: 'we of the jury do find, that the persons claimed by the petitioners as slaves, are really slaves, the property of the plaintiff, and so we find for the said plaintiff, the said persons in the two [5] petitions mentioned as slaves.' It appears from the transcript, that there was a motion for a new trial, and one in arrest of judgment, both of which were overruled. After overruling the motion for a new trial, the court made an order, that the plaintiff have the full benefit of his verdict, by the jurors between the parties aforesaid found. After overruling the motion in arrest

[1] Celeste was born about 1777, for she is said to be twenty-two years old in Joseph Tayon's inventory of 1799. Antoine, Paul, Sophia and Margarette were her children. Little *v.* Chauvin, p. 127, *infra.*

[2] Catiche was born in 1782. Theoteste, *alias* Catiche *v.* Chouteau, p. 135, *infra.*

[3] "the first wife of Pierre Chouteau, senior, was the daughter or granddaughter of Joseph Tayon, senior." 8 Mo. 533 (1844).

[4] Little *v.* Chauvin.

[5] There was probably a second petition for the slave "set free from the custody of Pierre Chouteau."

of judgment, the court again orders, that the plaintiff do have the full benefit of the verdict and of the judgment heretofore given." [1]

Irwin v. Wells, 1 Mo. 9, April 1821. Andrain married the daughter of General Samuel Wells in Kentucky in 1806. " in that same year, Andrain moved to Fort Wayne, and took the slave in question with him. . . Wells, the plaintiff, called on some of his family to bear witness that the slave Kate was only lent to Andrain, and not given." Kate was taken back to Kentucky by Andrain in 1807, and brought by him to Missouri in 1809. Before leaving Kentucky, Andrain " executed to Wells an instrument of writing, June 19th, 1809. For the hire of a negro girl, named Kate, . . the just and full sum of $42 per year, . . until I return the said negro girl. . . I am . . to clothe her, pay tax, and return her at any time when called on by Gen. Samuel Wells for that purpose." The sheriff sold Kate in payment of debts due by Andrain and his brother. " before the sheriff's sale, Wells had demanded Kate of Andrain."

Held: [12] " if the jury found this instrument of hiring was only a contrivance to cover some ulterior illegitimate object," [11] " for the mere purpose of preventing the said negro woman from being liable for the debts of said Andrain, . . then said instrument in writing was void,"

McKnight v. Wells, 1 Mo. 13, April 1821. " action of detinue by Wells, . . to recover the boy Dick,"

Susan (a blackwoman) v. Hight, 1 Mo. 118, September 1821. " This was an action of assault and battery, and false imprisonment, instituted by order of the circuit court of St. Charles county, in the name of the plaintiff, (Susan, who claimed her freedom,) against the defendant, (who claimed her as a slave.) . . the statute [2] puts the burden of the proof on the plaintiff; and, where the issue is found, for the plaintiff, directs a judgment of emancipation. This shews, that the object of the legislature was, to afford to plaintiffs of this description, all opportunity of having the question of freedom fairly put in issue between the parties. Upon the first error assigned, the judgment of the said circuit court [for the defendant] must be reversed and the cause remanded to that court, . . the appellant must recover of the appellee, the cost of this appeal."

Nash v. Primm, 1 Mo. 178, April 1822. Action of trespass. " In this case the declaration alleges, that the defendant . . shot and killed a negro slave of the plaintiff's." Verdict for plaintiff. Held: the private injury is not merged in the public offense.

Potter v. Gratiot, 1 Mo. 368, November 1823. " State of Louisiana, Parish of Feliciana, Jacksonville, April 15th, 1820. I do give unto my nephew, Jacob Potter, a bill of sale of seven negroes, . . *viz.*: three female negroes . . and four boys . . and also, two tracts of land, . . which I agreed to bequeath to said nephew, if he would reside in this county, with

[1] For testimony given on this trial see Marguerite *v.* Chouteau, p. 132, *infra.* The trial was declared null and void by the Supreme Court in 1826, in an opinion delivered by Judge Tompkins. Catiche *v.* Circuit Court, p. 126, *infra.*

[2] Geyer 210. Passed June 27, 1807.

me, to which said nephew did comply with. Justus Terrill." These negroes had been [369] "brought by Justus Terrill to Missouri, in . . 1819, and kept there and hired out as his own, till 1821, when said Terrill died, having made his will, and appointed the defendants his executors—that defendants sold said negroes." Held: the bill of sale to Potter is good.[1]

Winny (a free woman held in slavery) v. Whitesides, 1 Mo. 472, November 1824. "an action of assault and battery, and false imprisonment, commenced in conformity to the statute,[2] . . Judgment for the plaintiff, . . 1822. . . about twenty-five years before, the defendant [Phebe Whitesides], with her husband, had removed from Carolina to Illinois, and brought from Carolina with them, the plaintiff, to Illinois, where they resided about three or four years, retaining the plaintiff, during the term of their residence in Illinois, in slavery, *in Illinois.* From Illinois, the defendant and her then husband removed to Missouri, bringing with them the plaintiff in this action, and still holding her as a slave." Judgment of the circuit court in favor of the plaintiff Winny, affirmed.

Held: [474] "Congress had both power to acquire the [Northwest] territory, and to forbid the introduction of slaves. . . [475] We are clearly of opinion, that, if by a residence in Illinois, the plaintiff in error lost her right to the property in the defendant, that right was not revived by a removal of the parties to Missouri. It was urged, thirdly, that the slaves of persons settling the country, do not thereby become free. The words of the ordinance are, 'that there shall be neither slavery nor involuntary servitude in the said territory.' We did not suppose that any person could mistake the policy of Congress, in making this provision. When the states assumed the right of self government, they found their citizens claiming a right of property in a miserable portion of the human race. Sound national policy required, that the evil should be restricted, as much as possible. What they could, they did. They said, by their representatives, it shall not vest within these limits, and by their acts for nearly half a century, they have approved and sanctioned this declaration. . . [476] the person who takes his slave into said territory, and by the length of his residence there, indicates an intention of making that place his residence and that of his slave, and thereby induces a jury to believe that fact, does, by such residence, declare his slave to have become a free man. . . In our opinion, the measure of damages is the worth of the defendant's labor; and any ill treatment during the time of the defendant being held in slavery, might have been given in evidence, in aggravation of damages." [Tompkins, J.]

Rocheblave v. Potter, 1 Mo. 561, November 1825.[3] [562] "the executors of Terril, in pursuance of his will, and in conformity with the law, advertised in one of the newspapers of the city, and sold at public sale, the slave in question, who was purchased by Mrs. Mary Lisa, who sold to Beebe, who sold to the plaintiff Rocheblave in error. That the said bill of sale, from Terril to Potter, was never registered or recorded," and the

[1] See also Rocheblave *v.* Potter, *infra.*
[2] Geyer 210.
[3] See facts in Potter *v.* Gratiot, p. 124, *supra.*

purchasers had no notice of knowledge of its existence. Potter, " during the whole of said time, resided in the state of Louisiana, and never had possession of the slave in question." Judgment of the circuit court [for Potter] reversed, " and judgment entered up in this court for the defendant [Rocheblave]"

Todd v. State, 1 Mo. 566, November 1825. " On the 6th of Dec. 1820, the plaintiffs in error . . entered into a recognizance . . for the appearance of a slave . . at the then next term of the Washington circuit court, to answer an indictment of larceny; and that they failed in the condition of their recognizance;"

Catiche and others v. Circuit Court, 1 Mo. 608, May 1826. "At the March term of the year 1825, the plaintiffs applied to the circuit court of St. Louis county, for leave to sue in that court, as paupers, for their freedom. This leave being refused, at the last term of this court, a writ of mandamus was ordered to the circuit court, commanding it to admit the plaintiffs, or to shew cause. The plaintiffs now demand a peremptory mandamus on account of the insufficiency of the return of the circuit court to the writ of this court. The circuit court returned, that the prayer of the plaintiffs was refused, because ' it appeared by the records of the general court of and for the territory of Louisiana, that by a verdict and judgment rendered in said court, on 6th June, 1806,[1] the absolute slavery of said petitioners was established.' The petitioners, plaintiffs in this court, claimed their freedom as descendants from an Indian woman,[2] and set up no claim to freedom, of a later date than said judgment. The plaintiffs contend, first, that the court could not, agreeably to law, receive evidence against them, on their application to sue; secondly, that the said judgment will be found to be void."

Held: I. upon petition to sue for freedom, no evidence can be admitted on the part of the claimant; for if he [609] " were, on this application, to be permitted to come in, and disprove the matter contained in petition, and thereby prevent [the] institution of a Suit, [it is plain] that every object of the law [3] is defeated; for the applicant has neither counsel nor testimony, and having no means to procure either, may be removed from the jurisdiction of the court. . . [II.] We are not willing to admit, that the circuit court has a right to resort to the records of another court, for evidence in such a case." III. But even so, [611] " no judgment has been given. . . it was the duty of the court to enter up a judgment which would shew what benefit the plaintiff was to derive from his verdict." [IV.] " But even were there a judgment entered up, in due form of law, we should hesitate to allow it any effect. That the court had jurisdiction of the question of freedom or slavery, there can be no dispute; but whether it ever took jurisdiction of the particular case, is the question here. . . [612] the writ should bear teste in the name of the presiding judge, and be sealed with the judicial seal of the court. It was still necessary that the writ should shew for what purpose those persons were brought into

[1] Tayon *v.* Celeste, p. 123, *supra.*
[2] Marguerite *v.* Chouteau, p. 132, *infra.*
[3] Geyer 210.

court. But this writ, if it could be called one, commands the sheriff to take up some runaway slaves,[1] . . Plaintiffs purchase their writs, as a matter of right, and it is for themselves to see whether they choose the proper one. . . [613] The object of the warrant [2] is, to cause the slaves to be delivered into the possession of Joseph Tayon, and that being done, its force is lost. The appearance of those persons, then, in court, by attorney," was "without any legal authority, and consequently null and void. . . that a person held in bondage, should be compelled to come into court, and say he is free, and this to be done, too, at the instance of a person claiming his services, appears somewhat strange. Let a peremptory mandamus go." [Tompkins, J.]

Little v. Chauvin, 1 Mo. 626, May 1826. Action of trover against Chauvin (appellant) " for the conversion of a female slave, named Sophia. . . Sophia was the daughter of one Celeste, who, 35 or 40 years before the time of trial in the circuit court, was in the possession of one Joseph Tayon, and shortly thereafter, at 7 or 8 years of age, came into the possession of Helen, (the daughter of said Joseph Tayon,) who had intermarried with one Louis Chevalier; . . [627] on the 26th of June, 1799, Joseph Tayon presented a petition to the then lieutenant governor, representing that his wife was dead, that he was aged and infirm, and unable to manage his affairs, and wished to divide, immediately, all his property among his eight children, in equal portions, and to that end, that an inventory might be taken, and a sale made thereof; that an inventory of the said Tayon's goods was made out accordingly, containing, amongst other things, the following entry: '*Item;* a mulatto, Celeste, 22 years old, having a little boy, Antoine, 3 years old, and another called Paul, 15 months old, valued together at $400.' . . [628] in the list of the sales made of said Tayon's property, no mention is made of Celeste, or any of her children;" [626] " Celeste continued in the possession of said Helen, and her husband, until the death of the latter, in 1801, and after his death, remained in possession of said Helen, until some time in the year 1806, when she was taken out of her possession by the sheriff of St. Charles county; that Sophia . . was born some time in the year 1800, whilst the mother, Celeste, remained in the possession of said Helen and her husband; that neither Celeste nor any of her children, of whom she had several besides Sophia, were ever known to have been out of the possession of said Helen and her husband, from the time when Celeste first came into their possession, until sometime in the year 1806, when the sheriff of St. Charles county, by virtue of a warrant, in the following words, *viz.*: 'United States, territory of Louisiana—the United States to the sheriff of the district of St. Charles, greeting: we command you that you apprehend Celeste, Catiche, Carmelite, Mazelite, La Cantue, another named Antoine, and Zebite, reputed slaves of Joseph Tayon, if they be found in your district, and them deliver into the custody of the said Joseph Tayon, there to remain and abide the determination of the general court of the territory of Louisiana: given under our hands and seals, this ninth

[1] See introduction to Missouri cases, p. 105, note 5.
[2] Little *v.* Chauvin, *infra.*

day of May, one thousand eight hundred and six, and of the independence of the United States the thirtieth: R. J. Meigs, (seal;) John B. C. Lucas, (seal;)' took the said Celeste, together with her children, Antoine, Paul, Sophia, . . and Margarette, out of the possession of the said Helen, . . [628] the said Sophia, in the year 1806, and shortly after she had been taken from the possession of said Helen, was sold by the said Tayon, at the church door in the town of St. Louis, when one J. P. Cabbanie become the purchaser, who, in 1809, sold her to Madame Veuve Labbadie." Sophia came eventually into the possession of Little, from whose possession she was taken in 1817, "by virtue of a writ of replevin, and delivered into the possession of the said Helen, who kept possession until her death, when she came into the possession of Chauvin, Helen Chevalier's administrator."

Judgment for Little's administrator reversed and the cause remanded: [631] "there was no proof of a loan from Joseph Tayon to his daughter, Helen, to be left to the consideration of the jury; and . . the jury should have been instructed . . that if the possession of Sophia, by Madame Chevalier, was in good faith, and that she had acquired her by purchase, donation, exchange, or the like, that then her title by prescription would be good. . . [632] It is not at all necessary to decide whether the old general court, for the territory of Louisiana, had jurisdiction of the subject matter of the warrant or not. The act is evidently not the act of the court.[1] It is not a judicial act, nor any thing like a judicial act, and gave no authority whatever to the officer . . to whom it was directed." [Wash, J.]

Mann v. Trabue, 1 Mo. 709, April 1827. "Mann made his covenant to Trabue, . . On the first day of June next, I promise to pay C. C. Trabue, or order, two hundred dollars, and on or before the 25th of December next, two hundred dollars more, which two payments . . is to pay for his negro woman, Fanny. If the said payments are . . not [made complete], I am to pay him thirty-five dollars hire for the present year, . . and return her, with good clothes," She died, "and so he could not return her." The jury found that "her death was occasioned by cruel and unusual treatment on the part of the defendent" Mann. "the defendant offered in evidence the record of a trial and acquittal of the defendant, for the felonious killing of this slave."

Held: Mann is not excused for non-performance, as he disabled himself by his own act "to perform his covenant, . . it is insisted, that the death of the slave was occasioned by the act of God, and that, therefore he is excused. In this transaction it is difficult to discover any agency on the part of God; but we clearly perceive the agency of the defendant, . . The judgment [for Trabue] is affirmed, with five per centum damages, and costs."

Merry v. Tiffin and Menard, 1 Mo. 725, May 1827. "action of assault and battery . . brought . . by John, for freedom . . the mother of the plaintiff, before the ordinance of Congress, of 1787, was holden as a slave,

[1] Catiche *v.* Circuit Court, p. 126, *supra.*

in the Territory northwest of the river Ohio, in that part now called Illinois, and . . after . . and while so holden, and about 36 years past, in the Illinois, John was born; and that he was holden there as a slave, till lately."

Held: [726] "John is free." [725] "The ordinance is positive, that slavery cannot exist; and shall we, or any other Court, say otherwise. . . The express word in the cession act of Virginia, that the inhabitants shall be protected in the enjoyment of their rights . . are completely satisfied, by securing to them the enjoyment of such rights as they then had, . . at the time of the making the cession act, this man, John, was not property: and at the time of his birth, he could not be property. There is nothing in the cession act, forbidding Congress to fix and point out things which might afterwards be the subject of property." [McGirk, C. J.]

McDonald v. Walton, 1 Mo. 726, May 1827. "David Polk, alias Pogue, and Rebecca Walton, intermarried, in the state of North Carolina, in the year 1805; . . shortly after . . removed . . to Kentucky, and settled on an island in the Ohio river, taking [Polk's] . . slaves with them." Polk died intestate and his widow "removed to upper Louisiana, now Missouri, taking with her the aforesaid slaves," She soon married Chapman and "they removed to some place unknown, in the lower country."[1] About 1815 they returned to St. Louis, "bringing with them said slaves and their increase, . . on the 19th of June, 1826, the plaintiff obtained letters of administration of the estate of said D. Polk, or Pogue." Judgment of circuit court for defendant reversed, and this cause remanded for further proceedings.

Held: although the defendant [728] "had possession of the slaves five years, still if there was no person authorised to sue for said slaves, in right of Pogue, till 1826, that possession is no bar to the action. . . [729] The removal to upper Louisiana, (now Missouri) in a few weeks after the death of Pogue, the early marriage of the widow with Chapman, and the subsequent removal from these, then western limits of American settlements, to parts unknown, induce a strong suspicion of industrious concealment of these slaves from somebody." [Tompkins, J.]

François La Grange (alias Isidore) v. Pierre Chouteau, 2 Mo. 20, May 1828. Action of *trespass vi et armis* under the statute, "to try the right of said François to freedom. . . in the year 1816, one Pascal Cerre . . was desirous of selling said slave, and the said Pierre Chouteau, Jun. . . wished to purchase him. That Cerre declined selling the slave to Chouteau, because he, Cerre, wished to sell him to some person who would remove him from St. Louis. That one Pierre Menard, a citizen of Illinois, and then residing at Kaskaskia, proposed purchasing the appellant, and accordingly Cerre sold him to said Menard for the sum of $500, . . [21] Menard, never bought the appellant with the intention of keeping him, or making Kaskaskia his place of residence; but that the slave had been purchased by him for Chouteau, to whom he was to be delivered after a few months; the object being to get around Cerre's objections to selling

[1] "Either in the Mississippi or Orleans territory." For further facts see same *v.* same, p. 131, *infra.*

him in St. Louis." [20] " Menard immediately after said sale, took said appellant to Ste. Genevieve, and from thence, sent him to work at Mine a la Motte, in Washington county, in this state. That some time afterwards, the appellant was sent to Kaskaskia, where he was put on board a keel-boat, and after remaining about two days, went in said boat as a working hand to New-Orleans. That about the last of March, 1817, the said appellant returned in the same boat to Kaskaskia, where he remained a few days, (one witness stated 8 or 9) assisting to unload said boat. Then was sent in said boat to the big swamp in Cape Giradeau county; and after remaining there five or six weeks, returned in the boat to Kaskaskia, and after two or three days, he was sent to St. Louis and delivered to the defendant, where he has remained ever since—and that said Chouteau since said delivery in consideration thereof, has paid the sum of $500 to said Menard." Judgment for Chouteau affirmed.

Held: [22] "Any sort of residence contrived or permitted by the legal owner, upon the faith of secret trusts or contracts, in order to defeat or evade the ordinance [of 1787], and thereby introduce slavery *de facto,* would doubtless entitle a slave to freedom, and should be punished by a forfeiture of title to the property. In this case, it is most apparent that the object of Menard and Chouteau, was to get around the objections of Cerre, and not to evade or violate the ordinance. . . The owner of a slave removing to Illinois, and carrying his slave along with him to reside there permanently, must intend to introduce ' involuntary servitude or slavery ' against the express terms of the ordinance; but the owner of a slave, who is merely passing through the country with him, or who may be resident in Illinois and may choose to employ him in Missouri in mining, or as a sailor, or boat hand, upon the rivers or high seas, in boats or vessels that occasionally lade and unlade their cargoes at some port or place within the state, though he may not do much in ' extending the fundamental principles of civil and religious liberty ' certainly, does nothing towards engrafting slavery upon the social system of the state. . . The ordinance was intended as a fundamental law, for those who may choose to live under it, rather than as a penal statute to be construed by the letter against those who may choose to pass their slaves through the country." [1] [Wash, J.]

State v. Gardner, 2 Mo. 23, May 1828. [24] " The indictment charges that Gardner was a justice of the peace, and . . did . . unwilfully issue his summons directed . . to the constable of St. Ferdinand township, commanding the said constable to summon one John Spencer to appear . . to answer to a pretended demand in favor of one black Locker, a negro man slave, which summons was served—the said Gardner . . knowing that Locker was a slave and the property of him the said Gardner, to the great perversion of public justice,"

Milly (a woman of color) v. Smith, 2 Mo. 36, May 1828. " This was an action of trespass, etc. under the statute brought by Milly the app. against Smith the appll. to establish a right to freedom." In 1826 David Shipman of Kentucky mortgaged land and slaves (" a negro man named

[1] See same *v.* same, p. 137, *infra.*

Moses, . . one woman named Milly, about 25 or 6 years old," and five others) to Smith. [37] "soon after the execution of said mortgage [which was recorded in Shelby county, Kentucky], said Shipman being greatly embarrassed, took the said Milly with several other of his slaves, and secretly ran away with them to Indiana: That in Jefferson county, in the state of Indiana, he executed a deed of emancipation to said slaves, . . [38] and acknowledged the same before a justice of the peace of said state. . . that immediately afterwards, said Shipman carried said Milly to Peoria county in the state of Illinois, where he . . settled, hired a farm, stocked the same and declared that he intended to reside there permanently, . . in May 1827, . . [Smith] came thither, and took said Milly secretly away against her consent, and the consent of said Shipman, and brought her to St. Louis, where the present suit for freedom was commenced;" Judgment for the appellee, Smith, reversed and the cause sent back for further proceedings.

Held: "This court is not disposed to view the deed of Emancipation with much favour. The plaintiff cannot be regarded as a purchaser for a valuable consideration, a slave having nothing to give; but it has often been decided by the courts of the late Territory of Missouri, and of this state, that slaves carried into Illinois with a view to residence, and staying there long enough to acquire the character of residents, do by virtue of such residence become free. The plaintiff in the circuit court made out a *prima facia* case of freedom; but if Smith be the legal owner, and did not connive at the removal of the plaintiff from Kentucky to Indiana and Illinois, then we are of opinion that the plaintiff did not acquire her freedom by such residence. . . [39] some evidence of the laws of Kentucky ought . . to have been preserved on the record. If we are to construe the writing according to our own laws (which must govern us where the foreign law is not proved) we are inclined to think Shipman is the legal owner;[1] since by the contract the right of possession remained in him for an indefinite time and Smith had only a lien on her to secure the payment of debts; which lien Shipman might at any time have defeated by paying those debts." [Tompkins, J.]

McDonald v. Walton, 2 Mo. 48, May 1828.[2] "At the Nov. term of the cir. court [1827] . . judgment being again given for Walton [Chapman's executor], McDonald appealed to this court." Walton had hired one of the slaves to McDonald in September 1825, and the following June McDonald [49] "obtained letters of administration on Polk's estate, in St. Louis county. . . Chapman and wife, before they departed hence for the lower country, expressed much uneasiness lest these slaves should be set free under Polk's will, about which there was much talk. . . Polk had been heard to say, before he was married to Rebecca Walton, that he had no relations in America known to him; . . Rebecca, soon after Pogue's death, and before her removal from Kentucky, had been heard to say, 'that she was much afraid that said slaves would be taken away from her, as Polk had, in his life time, made some arrangements with a man

[1] See Milly *v.* Smith, p. 137, *infra.*
[2] For facts see McDonald *v.* Walton, p. 129, *supra.*

at the Red Banks about keeping or taking care of said slaves after his death,' and gave this as a reason for her removal from Kentucky with said slaves."

Held: by the laws of Kentucky, when Pogue died, the slaves are real estate and [51] "would descend to the wife; . . [but they] [54] may be taken in execution for the payment of debts: . . our own laws would give the administrator the disposition of any of Pogue's property which by the law of Kentucky is subject to execution to pay his debts. . . The judgment of the circuit court is reversed, and the cause must be sent back for further proceedings." [Tompkins, J.]

Marguerite v. Pierre Chouteau, 2 Mo. 71, May 1828. "an action of trespass, assault, and battery and false imprisonment, brought by the appellant against the Appellee to recover her freedom. . . Madame Chauvin deposed, that Marguerite . . was born in the year 1788,[1] that the name of her mother was Marie Jean, sometimes called Marie Scipion, who belonged to and lived with Joseph Tayon,[2] the deponent's father: . . from the time of his marriage until January 1801, when she was removed sick from the house of Mr. Chouteau,[3] (where Tayon then lived,) to the deponent's house, where she died in June 1802, aged about sixty years; that the deponent has heard from her father and mother, that Marie Scipion was bought by deponent's grand mother, and given to her mother; that she had heard from the same, that Marie Scipion was daughter—of an Indian woman captured by the French near Natchez, and brought to Fort Chartres, where she was sold as a slave; that a negro man named Scipion was supposed to be the father of Marie Scipion; . . that the deponent's father had an Indian woman named Marie Louise, who had two male children, Akin and Julien, who ran away and passed for freemen at the commencement of the Spanish Government; that they went to New Orleans after the publication of an Ordinance of O'Reilly the Spanish Governor of Louisiana [in 1769], 'declaring all the Indian slaves then in the province of Louisiana free at the death of their master, and those born after the publication, free at their birth, prohibiting any sales by any persons then in possession of such slaves;[4] that the deponent read the ordinance to her father, and conversed with him on the risk he ran of loosing [*sic*] his Indian slaves, and that she remembered he sold one of

[1] 1778, according to the carelessly made second edition of these reports, and according to the *errata* at the end of the first edition of 2 Missouri; but these *errata* themselves contain so many obvious *errata* that they cannot be relied on. After listing them, the reporter says: "The printer informs me that the type in the case of Margurite [*sic*] *v.* Chouteau, were set from a copy made out from the transcript of the Clerk, by one of the Judges of the Supreme Court, from which the printed sheet varies but slightly. This accounts in great part for the variance between that case as printed and the certified transcript filed in the office, with which the case was last compared." The copy which the judge of the Supreme Court made for the printer seems more worthy of reliance than the transcript made by the clerk, for it was evidently the judge's revision of that transcript, as shown by the omission of Judge Tompkins' sweeping assertion ending "all judicial tribunals, in my opinion, [should] set at liberty every individual who sues for their freedom." See *Errata,* 2 Mo. 241 (first edition). Furthermore, the *errata* are not followed in quotations from this case used by Judge Tompkins in his opinion in Marguerite *v.* Chouteau, 3 Mo. 540.

[2] See Tayon *v.* Celeste, and Little *v.* Chauvin, pp. 123, 127, *supra.*

[3] See p. 123, note 3, *supra.*

[4] This quotation is not closed in the first edition.

these slaves and was compelled to take it back and hush it up, lest he should be fined under the ordinance; that she remembered to have heard her father say, after the publication of the ordinance, that Marie Scipion and her children would be free at his death in consequence of that ordinance. Jean B. Reviere . . [72] had heard Joseph Tayon in his life time, say, that Marie Scipion was given to him by one Guyon, on condition that she and her children should be free at the time of the death of Tayon and wife. This witness also speaks of the publication of O'Reilly's proclamation, with this difference, that it was thereby declared that all Indians then held in slavery, should be forthwith set at liberty [1] in pursuance of this proclamation. . . he understood Joseph Tayon to say that Marie Scipion lived in his family of her own free will and consent, because she was well treated and chose to remain with him, and that the said Marie Scipion and [her] children were at liberty to leave him at any time they pleased, but if they chose to remain 'till his death they should never serve anybody. . . Marguerite Reviere . . also testifies as to the publication of O'Reilly's proclamation, and says, that Indians before held in slavery were immediately set free. . . [73] John B. C. Lucas . . testified that about twenty years ago, the witness being then a judge of the superior court of the territory of Missouri, there was a suit in that court betwixt the children of Marie Scipion and Joseph Tayon,[2] that the present plaintiff Marguerite was probably one of the parties; [3] that in this suit, the pedigree of the defendants in that court came directly in question. The question then was, whether the then defendants and others were descended in the maternal line from an Indian woman. The witness then heard Antoine Reviere state, that Marie Scipion's mother was an Indian woman of the Natchez tribe; that she was brought to Fort Chartres after the defeat of the Natchez Indians by the French, about the time of the massacre as it was called, that the father of Marie Scipion was a negro man, that when the mother of Marie Scipion was brought to Fort Chartres he was a very young man, too young to go to hunt or to war; . . Madame Cochon, a witness who testified on that trial on the part of Tayon, stated, that Marie Scipion was the daughter of a Negro woman. . . Sebastian Pratte deposed that in 1756 or 1757 he went to Fort Chartres in Illinois, and lived in the family of Joseph Tayon, . . he observed in the family a Negro woman named Mary, an Indian woman called Marie Louise with her two children, and a girl called Scipion about ten or twelve years of age, treated and well known as a slave, that he knew her in Tayon's possession for several years after his removal to St. Louis, that he did not know the mother of Scipion;—that there were at Fort Chartres and elsewhere through the country a great many Indian slaves and but few blacks; that the Indians were universally acknowledged as slaves, and frequently sold as such before the Governor; that he himself sold several, one to the

[1] "and be allowed to remain in the settlements or to return to their own country at their own option; he further states that many Indians then held in slavery were set at liberty." *Errata* and second edition.

[2] See Tayon *v.* Celeste, p. 123, *supra*.

[3] No, Marguerite was not one of the parties to the suit in 1806. The "Margarette" in that suit is specifically distinguished from her aunt, Marguerite, by the addition, "daughter of Celeste."

Commandant; that the commandant he speaks of, was the English Commandant at Kaskaskia; that from his belief of the character of Mr. Tayon, he is certain he would not have sold a person as a slave who was not so; that a majority of the Indians held as slaves, were brought down the Missouri by the traders, and were of different nations; that there were many Indian slaves in St. Louis after its first establishment, and but few blacks. . . [74] Madame Dubrieul, stated, . . that she knew an old Indian woman named Marie Louise, who remained a slave to Tayon 'till the Spanish government declared her free; that many Indian slaves remained with their masters after they were so declared."

Judge Tompkins gave his opinion that the judgment of the circuit court in favor of Chouteau ought to be reversed: [82] "Du Pratz . . had lived at the post of the Natchez, and gives a very particular account of the war and capture of that tribe." One of the conditions of peace was that they restore [86] "tous les negres, negresses, negrillons, et negrittes qu'ils avaient pris aux Francais." "Not one Indian slave is demanded. Had there been any, Loubois had the will and the power to enforce restoration. . . [90] all the posts established by the French in North America were designed to secure to themselve the commerce and friendship of the Indian tribes, and that an Indian slave population in Louisiana was unknown to the author [Raynal] cited by the appellee. I conclude then, that such a population was unknown to the laws and government of France. That the small number of Indians which might have been purchased by French traders, were either clandestinely sold to other Indian tribes or retained in the French settlements by the purchasers or their friends, under pretence that they remained voluntarily, and that under the French government of Louisiana, the holders of such slaves never would have asserted in a court of justice, a claim to property in an Indian. Accordingly we see those pretentions to property in Indians first ripening into claims under the Spanish rule, when the population of the province was disaffected to the court of Spain, and governors might be presumed to be disposed to do much to conciliate the rich and powerful at the expense of the weak and defenceless. . . [All men are by the law of nature free: and without some positive declaration of the sovreign power of the State to the contrary, all judicial opinions, in my opinion, [should?] set at liberty every individual who sues for his freedom].[1] On this point then, I am for the appellant [Marguerite]. . . [91] Had it been in evidence that the ancestor of the plaintiff was one of the 300 Indians sent by Perier into St. Domingo as slaves, I should have thought the plaintiff was lawfully held in slavery." Judge Wash's opinion was to the contrary: "I consider it as clearly settled by the testimony, that the maternal grand mother of the plaintiff was a Natchez woman taken prisoner by the French in the prosecution of an exterminating war against that tribe about the year 1731—that she was reduced to slavery, and that she and her descendants have been held in slavery ever since. . . Du Pratz . . says,[2] that when the French returned to N. Orleans with the Natchez slaves, . . [92] 'On

[1] *Errata*. 2 Mo. 241 (1st ed.).
[2] Vol. III., p. 326.

les mit en prison; mais comme elle etait trop petite pour continer long tems tout ce peuple, sans s'exposer a etre infecte de leur voisinage on mit les femmes et les enfans sur l'habitation du Roi allieurs. Peu apres on embarqua ces esclaves pour l'ile de St. Dominigue afin que cette nation fut eteinte dans la colonie.' This authority has been misunderstood, and standing alone, would justify the belief that some of these prisoners who had been 'placed upon the plantation of the king and elsewhere' might have remained in the country. Be that as it may, the testimony, as I conceive, establishes the fact clearly, that the maternal grand mother of the plaintiff was so captured and did so remain. . . [93] Indian slavery . . should be placed upon the same footing with negro slavery. . . There being a division of the court,[1] by operation of law, the judgment of the circuit court [in favor of Chouteau] is affirmed." [2]

Theoteste alias Catiche[3] *v. Pierre Chouteau,* 2 Mo. 144, April 1829. "an action of trespass . . to try the right to freedom; plea, not guilty; verdict and judgment for the defendant. . . the plaintiff was born in the year 1782, at Pra[i]rie du Rocher,[4] in that part of the late northwestern Territory which now forms part of the state of Illinois; that she was born a slave . . and there remained [5] as such till about the year 1809 when she was brought to St. Louis, in the then territory of Missouri, and sold as a slave; and that the present defendant derives his title through one Manuel Lisa, who purchased of a person [6] who held her in slavery in Illinois, and derived his title from the original owner.[7]

Judgment, in favor of Chouteau, affirmed. [145] "The defendant claims to hold the plaintiff in slavery, through another whose right was vested as early as the year 1782. It appears that either the general terms 'neither slavery nor involuntary servitude shall exist in the territory,' must yield to the provision in the act of cession,[8] or that the provision of that act must be violated. This it cannot be supposed Congress intended to do." [Tompkins, J.]

[1] McGirk, J., was absent.

[2] See p. 143, *infra,* "in which this decision was overruled, and the case decided in conformity with the opinion of Judge Tompkins."

[3] The name of this slave and the date and place of her birth indicate that she was the same Catiche who was the plaintiff named in 1 Mo. 608 (p. 126, *supra*). Therefore she was a daughter of Marie Scipion, and a sister of Celeste (Tayon *v.* Celeste, p. 123, *supra*), and of Marguerite (Marguerite *v.* Chouteau, p. 132, *supra*). The defendant is the same as in Marguerite's case, Pierre Chouteau, from the custody of whom Pierre, Senior, or Pierre, a child of Marie Scipion, had been set free in 1806. Tayon *v.* Celeste, 1 Mo. 608 (1806).

[4] Prairie du Rocher is about four miles from Fort Chartres, between Cahokia and Kaskaskia.

[5] Not necessarily every moment. Tayon allowed his Indian slaves, "Marie Scipion and [her] children . . liberty to leave him at any time they pleased," (Marguerite *v.* Chouteau, p. 132, *supra*). In 1806 Catiche was "running at large, in the district of St. Charles," (Tayon *v.* Celeste, p. 123, *supra*) in Missouri, where she was probably visiting her mother and sisters.

[6] Probably a son of Tayon, who remained in the present state of Illinois after Tayon moved to St. Louis.

[7] Probably Tayon. He divided his property among his eight children in 1799. Little *v.* Chauvin, p. 127, *supra.*

[8] The act of cession of the state of Virginia stipulated [144] "that the inhabitants shall be protected in the enjoyment of their rights and liberties, 1 U. S. L. 473."

Tramell v. Adam (a black man), 2 Mo. 155, May 1829. "This was an action of trespass and assault and battery and false imprisonment, instituted by Adam against Finley and Tramell to recover his freedom. . . [156] no petition for leave to sue [1] had been filed; and . . no leave had been given . . Tramell . . in the year 1810 resided at the United States Saline in the state of Illinois; and that the appellee who is a negro, lived there also in the possession of the appellant, and as his slave: that Tramell . . 1817 . . removed to the territory (now state) of Missouri: and that since that time the appellee has been in the possession of said Tramell and Finley as a slave."

Judgment for Adam affirmed, except for damages after the institution of the suit: [157] "the petition and leave to sue are benefits intended for the plaintiff, and that he may waive them,"

Hector (a slave) v. State, 2 Mo. 166, September 1829. "an indictment for burglary, . . [167] about half past ten o'clock at night, when the burglary was discovered, certain persons caught Hector and began to flog him to make him confess what he knew concerning the burglary and stealing of the money mentioned in the indictment. That they continued flogging all night, that he screamed under the lash, and said if they would release him he would find the money. The State then examined one McKinney, who said that about day break he was awakened by a loud hollowing [*sic*] or screaming in the rear of his house, that he arose, and on enquiry was informed by some persons there near his house, that certain persons were flogging the slave Hector, to compel him to discover. That when Hector heard the witness' voice he called on him to come to his assistance, that then the witness went to Hector, and told him if he took the money he ought to confess, and then asked Hector if he took the money. That Hector replied that he took the money, and that he would shew the witness where it was, but that he did not wish the persons who had been flogging him to accompany him. That the money was at Mr. Menard's his master's house, and that if the witness would go there alone with him he would find the money. That the other persons would not consent to that, unless they also would be allowed to go along, and then Hector, the witness, and the other persons went to the house of Mr. Menard and did not find any money. That witness conceiving that Hector had deceived him, gave him several lashes with a cowskin and then left him. . ."

[168] "Judgment reversed, and sent back for a new trial." The confessions of Hector should have been "excluded from the consideration of the jury." "Hector had been under the lash the greatest part of the night. This circumstance might of itself be sufficient to subdue him into any confession required. No doubt when he saw McKinney he hoped for some relief, and asked him for it, but he was told that if he was guilty he should confess, and then was asked if he took the money, to which he replied he had taken it and offered to shew where it was. This all might have been done, and most probably was, to gain a respite from pain; which view of the subject is strengthened by the fact that no money was found where the party and prisoner went to look for it." [McGirk, J.]

[1] Rev. Code 404.

Milly v. Smith, 2 Mo. 171, September 1829.[1] "There was a verdict and judgment against the plaintiff in the court below. . . [173]. When we only look to the facts in this case, we see on one side a man largely indebted, hiding his property, and in fact destroying it to prevent his creditors from reaping any benefit therefrom, and in this case, Shipman has been base enough to emancipate the slave to injure and ruin his security. We feel disposed to view him in a light but little below that of a felon. But . . Mr. Smith, perhaps once, that is, when he took the mortgage, had it in his power to have made such contract that Shipman could not have had the possession and management of the property. . . [175] Milly is free as to Shipman forever. For by the act of residence in Illinois that result is produced, and that as to Smith she has the same indefinite right to liberty that Shipman had to the possession of her, and until the lien is enforced by some mode known to the law, she ought to enjoy her freedom." [McGirk, J.]

Lagrange[2] (*alias Isidore, a man of colour*) *v. Chouteau,*[3] 4 Peters 287, January 1830. "The case was brought before . . [the supreme] court [of the United States] by writ of error to the supreme court of Missouri," [290] "It is not perceived that any act of congress has been misconstrued. The court is therefore of opinion that it has no jurisdiction of the case." [Marshall, C. J.]

Vincent (*a man of color*) *v. James Duncan,* 2 Mo. 214, September 1830. Action for freedom. Vincent [215] "had been hired to labor at the Illinois Saline near Shawneetown, from the year 1817 till the year 1825, when he was taken and carried bound to Kentucky: that he was the reputed slave of a family in Kentucky, by the name of Duncan. That John Duncan and sometimes the defendant were in the habit of going to the Saline aforesaid and hiring the plaintiff out and receiving pay for his hire. That the plaintiff after remaining there some time, became disobedient to James Duncan, and discovered an unwillingness to go to Kentucky with James Duncan, and on some pretence got permission of James Duncan to stay at the Saline to settle his affairs; that finally he was taken and carried by force as above mentioned. That in 1826 he was delivered by John Duncan to the defendant to be disposed of at the defendant's pleasure. That since the plaintiff had been in St. Louis he had admitted himself to be the slave of James Duncan."

Judgment for Duncan reversed and the cause remanded: I. [216] "By the Constitution of Illinois, negroes may be hired to work at the Saline if they be not hired for more than twelve months at a time. If a negro were really hired to work at the Saline for five years, the fact that the negro at the end of each year was removed over to Kentucky and afterwards brought back would not cure the fraud. We conceive then that if the negro were in good faith hired there for one year only that at the end of the first year he might be again hired another year without being taken across the line of the state. . . [II.] a slave is not capable of acquiring either a permanent settlement or regular domicil by residence."

[1] For facts see same *v.* same, p. 130, *supra.*
[2] See same *v.* same, p. 129, *supra.*
[3] Pierre Chouteau, jr.

III. [215] "the constitution of Illinois is not and cannot be controlled by the ordinance of 1787 as to the existence of slavery within that State. . . [IV.] [216] whether he be a slave or not is a conclusion of law from certain facts which may or may not exist. Such an admission made even by a lawyer would be no evidence." V. A slave who [217] "resided at the Ohio Saline [in Illinois] as a laborer, in the year 1817, by the consent of his master, . . [is] entitled to his freedom. . . The constitution of Illinois was adopted in Dec. 1818, and it was in evidence that the plaintiff was hired at the Saline in 1817 and remained hired there till 1825." [Tompkins, J.]

State v. Henry (*a slave*), 2 Mo. 218, September 1830. Henry, a slave, was indicted for larceny. Joseph Lee, a colored man, [219] "was alledged [*sic*] to be the owner of the property charged to have been stolen. He testified that he was a barber in the City of St. Louis, and kept a shop for carrying on his trade: That the prisoner had frequently been in his shop and knew the situation of the different articles therein, and in the absence of the witness frequently sold articles for him. He further stated that some time within a year before the trial a bottle of Cologne water of the value of one dollar had been stolen from his shop, and that he charged the prisoner with taking it: but the prisoner denying the taking the witness told him he could prove it. The prisoner then admitted he had taken the bottle of water, and offered to pay the witness one dollar for it. The witness refusing to receive the pay insisted on having the bottle returned, and it was accordingly delivered to him by the prisoner. No other evidence of the freedom of Joseph Lee was offered."

The prisoner was acquitted, writ of error dismissed: "the testimony was competent,—it does not appear that Joseph Lee was a slave. But his keeping a barber's shop and selling articles in that shop is such evidence of freedom as ought to have gone to the jury," [Tompkins, J.]

Foster v. Wallace, 2 Mo. 231, October 1830. Held: [238] "the fact of Simmons continuing in possession of the slaves after the sale, did *per se* constitute the sale fraudulent and void as to creditors,"

Jeffrie v. Robideaux, 3 Mo. 33, January 1831. "in the [year] 1822, Jeffrie the plaintiff in error by Rachel Camp his next friend, by Robert Wash Esq. an attorney at law, presented his petition to the circuit court of St. Louis county for leave to sue as a poor person for his freedom. The leave was granted; . . verdict and judgment were against Jeffrie. . . he was an infant under the age of twenty-one years. . . [35] The judgment is reversed with costs, and remanded." The act "respecting suits for freedom,[1] leaves the common law as it was before it, as to the rights of infants to sue."

Menard[2] *v. Aspasia,*[3] 5 Peters 505, January 1831. "Error from the supreme court of the state of Missouri. An action of assault and battery

[1] Act of Dec. 30, 1824. 1 Laws Mo. 404.
[2] Pierre Menard, who figures in Lagrange *v.* Pierre Chouteau, jr., p. 129, *supra.*
[3] Not reported in the Missouri Reports, but similar in facts to Merry *v.* Tiffin and Menard, p. 128, *supra.*

was instituted in the circuit court for the county of St. Louis, in the state of Missouri, by Aspasia, a woman of colour, to establish her right to freedom. . . [506] The mother of Aspasia . . was born a slave, and was held as such by a French inhabitant [Pierre Menard] of Kaskaskia, Illinois, previous to the year 1787; and after that year was held as a slave by the same individual, who was a citizen of that country before its conquest by Virginia, . . and continued to be such afterwards, and was such at the time of Aspasia's birth. Aspasia was born after the year 1787, and . . raised and held as a slave, till some time in the year 1821, when she was purchased by the plaintiff in error, who immediately after gave her to his son-in-law, Francis Chouteau, then and now residing in St. Louis, . . who held her as a slave till . . 1827, when he returned her to [Menard] . . in consequence of the claim she set up for her freedom. . . [507] the court decided . . that Aspasia was not a slave, but free." Affirmed by the supreme court of Missouri [511] " To reverse this judgment, a writ of error is now prosecuted;"

Held: [517] " this court has no jurisdiction of the case." The title of Menard " does not arise under an act of congress [1] . . It is not enough to give jurisdiction, that the act of congress [ordinance of 1787] did not take away a right, which previously existed. Such an act cannot be said to give the right, though it may not destroy it." [McLean, J.]

Jane (a mulatto woman, slave) v. State, 3 Mo. 61, April 1831. " Jane was indicted . . for the murder of her infant child " by poisoning and smothering with the bed clothes, and was convicted. [62] "A motion was made in arrest of judgment [because the indictment was defective] and overruled by the circuit court." The judgment of the circuit court was reversed.

Jim (slave) v. State, 3 Mo. 147, December 1832. "At the February term of the circuit court for Howard county for the year 1832, Jim was indicted for the murder of William B. Johnson and pleaded not guilty, . . Afterwards he filed a petition for a change of venue. . . he was the slave of D. Todd . . and that said Todd at the time of finding said indictment, was the judge of the circuit court of Howard county . . The court did not grant the petitioners prayer. . . being found guilty, a motion was made in arrest of judgment, and overruled by the court; judgment was then pronounced;"

Held: [178] " the statute law not only permits, but commands the circuit court to change the venue in a criminal cause, when an interest, such as is shewn in this cause, is shown to exist. . . its judgment passing sentence of death on him [the prisoner] is therefore reversed: and the circuit court is directed to remove the cause to some county where the same objection does not exist." [Tompkins, J.]

Ralph (a man of color) v. C. Duncan, 3 Mo. 194, May 1833. Suit for freedom. Steele testified " that he had heard John Gordon, the former master of Ralph, say in the year 1818 or 19, that he had been in the habit

[1] See judiciary act of 1789, sect. 25.

of hiring Ralph to work occasionally at the Ohio Saline from the year 1814 or 15," William Gordon, the brother of John, [195] "heard John Gordon say in his lifetime the negro hired his own time, and went to the Saline of its [his] own accord." "Much other testimony was given to prove a hiring of the plaintiff at the Saline and at the lead mines near Galena in Illinois,"

Judgment of the circuit court against Ralph reversed, and the cause remanded: I. "The object of the ordinance of 1787, was to prohibit the introduction of slaves into the Territory of which the present State of Illinois constitutes a part, and the master who permits his slave to go there to hire himself, offends against that law as much as one who takes his slave along with himself to reside there, and if we are at liberty to regard the moral effect of the act, it is much worse to permit the slave to go there to hire himself to labor, than for the master to take him along with himself to reside there under his own inspection or to hire him out personally to some person who will be bound to pay the master the hire; yet even this last act has been decided to be a violation of the provision of the ordinance. . . [II.] [196] for the purposes of self government, the constitution of Illinois might have been well in force from the time of its adoption: but for the purpose of the present cause, we incline to limit its effect to the time when Congress assented to the admission of the state into the union.[1] . . [III.] the evidence that the defendant gave his note to the plaintiff is certainly admissible to prove that the defendant treated with him as with a freeman. Nor is it necessary to prove that the assent either of Gordon the former claimant or of Duncan the defendant was expressly given to the residence in Illinois by virtue of which the plaintiff claims his freedom. This assent may be inferred from circumstances,[2] [Tompkins, J.]

Griffith v. Walker, 3 Mo. 191, August 1833. Williams died leaving a widow. She "had no children by him;" but he left children by a former wife. A negro man "came to Williams by his intermarriage" with the second wife. Held: [193] "the widow cannot have the slave absolutely . . but is only entitled to a third for life."

McGirk v. Chauvin, 3 Mo. 236, October 1833. "On the 28th day of August, 1816, Helene Chevalier the intestate executed to McGirk an obligation . . 'I promise to pay Matthias McGirk . . three fourths of all the damages and wages that I may recover in four actions of replevin to be by me brought, to wit, one against Pierre Chouteau, senior, for one negro boy named Paul, one against . . [237] Labadie for a negro boy named Antoine, one against Marie Antoinette Honey [Mrs. Little],[3] . . for a mulatto woman named Sophie, and one against John Pierre Cabanne for a mulatto girl named Clarisse,' . . Chauvin as administrator becoming the plaintiff compromised the suit with Chouteau; Chouteau surrendering the negro to Chauvin and Chauvin accepting one cent damages; . . Paul

[1] Dec. 3, 1818.
[2] See Ralph Gordon *v.* R. Duncan, p. 142, *infra.*
[3] Little *v.* Chauvin, p. 127, *supra.*

had been detained for several years from said Helene Chevalier and that his services during the time he was so detained, were estimated at several hundred dollars."

Hill v. Wright, 3 Mo. 243, October 1833. In June 1794 Lieutenant Governor Zenon Trudeau granted to Joseph Brazeau a "piece of ground situated in or near North St. Louis." It is described as bounded [244] "towards the S. S. E. by the concession granted to a free mulatress named Esther." Labuxiere [246] "cultivated there both before and after the massacre which was in 1780 . . Labuxiere was not a man who worked himself but his slaves worked it . . Witness says he knew Labuxiere's hands to work there 55 years ago. . . Joseph Labuxiere died at Cahokia in Illinois, 29th. of April 1791,"

Julia (a woman of color) v. McKinney, 3 Mo. 270, October 1833. [271] "an action commenced under the statute [1] for freedom. Verdict and judgment against Julia the plaintiff." McKinney bought Julia "as a slave from one Lucinda Carrington" who in 1829 lived in Kentucky; "that she then and there . . declared her intention to be, to remove and take with her Julia to the State of Illinois: that a witness in this cause applied to her to buy Julia, telling Mrs. Carrington that she could not hold Julia in Illinois as a slave; that if she took her there she would be free. Mrs. C. refused to sell Julia; said she would not keep Julia in Illinois, but intended to hire her out in Missouri. Accordingly Mrs. C. moved to Illinois, . . arrived in Pike county, Ill. about 27 or 28th. of October, . . purchased land, . . kept Julia there with her till about the 1st. of December the same year, exercising the ordinary acts of ownership and dominion over her, which are usually exercised by masters over their slaves: that in the mean time Mrs. Carrington hired Julia about two days to some person to work, which work was performed, and that she received pay therefor: that about the 1st. of December in the same year Mrs. Carrington sent Julia to Louisiana, Missouri, a distance of about 30 miles and hired her out: that Julia lived in Missouri some time, became sick and that Mrs. C. then sent for Julia, took her home into Pike county in Ill., where she was kept till she recovered her health: that then Mrs. C. took or sent Julia to St. Louis and sold her to S. McKinney the defendant. . . [276] The judgment of the circuit court is reversed, the cause is remanded for a new trial." [272] "The plaintiff's claim to freedom is based on the 6th. article of the constitution of the State of Illinois, . . the very introduction of slavery, works an emancipation of the slave, . . [273] yet it can be introduced so far as to permit persons passing through the State, as emigrants or mere travellers, to carry with them their slave property, . . otherwise there could be no emigration through the State with slave property, which is a thing it cannot reasonably be supposed the constitution of Illinois intended to forbid. . . Something more than the mere convenience . . of the emigrant ought to intervene to save him from a forfeiture. . . swollen streams of water . . serious sickness of the family, broken wagons . . would be a good cause of delay . . if the journey is resumed as soon as these impediments are removed, provided

[1] Act of Dec. 30, 1825. 1 Laws Mo. 404.

also due diligence is used to remove them. In the case before us the owner of the slave . . went into Illinois with an avowed view to make that State her home. . . kept the slave there for upwards of one month and treated the slave in all respects as slaves are treated in States where slavery is allowed. These acts . . surely amounted to the introduction of slavery in Illinois. Unless, therefore, the case can be brought within some reasonable and equitable exception, to be grafted on the constitution of Illinois, the plaintiff will be entitled to exact the forfeiture of emancipation. [274] in this case . . slavery is introduced and continued for the mere convenience of the owner . . [275] We believe the object of this prohibition [to hire in Illinois any person bound to labor in any other State] was to prevent slave labor from becoming a substitute for white or free labor throughout the State. The constitution makers have therefore prohibited the thing in every possible degree." [McGirk, J.]

Nancy, who sues by her next friend, v. Trammel, 3 Mo. 306, April 1834. An action for freedom. "After the action was brought, she [Nancy] filed a bill for a discovery alleging that she became entitled to her freedom by reason that some 24 years before the bringing the action, her grandmother was a slave in Kentucky and that her owner removed from Kentucky and took her with him to the N. W. Territory, and kept her there as a slave, . . That said Trammel during said residence purchased her grandmother in said Territory, that her mother was born in said Territory and Trammel claimed her as a slave, that he then removed to Missouri, where the plaintiff was born. That she has made search for proof of those facts and the defendant only knows them . . the defendant was ordered to answer, which he failed to do, the bill was then taken to stand confessed. On the trial of the suit for freedom this bill with the proceedings were offered in evidence. The court refused the evidence. The plaintiff suffered a non-suit, moved to set aside the non-suit, which was refused. . . [308] The circuit court erred in refusing . . The judgment is reversed and remanded." [McGirk, J.]

Sheriff v. Circuit Court, 3 Mo. 309, April 1834. "two accounts, the one for expenses incurred in the execution of Jacob Stewart . . 1830, the other for expenses incurred in the execution of Hampton a slave convicted of murder at the February term, 1832. . . The charges are for erecting a gallows, conducting the prisoners to execution, furnishing rope to hang them, coffins, etc."

Blanton v. Knox, 3 Mo. 342, April 1834. "action of debt . . for $42. . . on the 10th. day of Sept., 1832, Blanton hired to Knox a negro woman for one year, . . Knox was to clothe the negro."

Fulkerson v. Steen, 3 Mo. 377, June 1834. Steen "hired of Fulkerson three negroes, at the rate of two hundred and twelve dollars for one year, and the said Steen binds himself . . to find said negroes in sufficient clothing, bedding, to treat them properly, to pay the taxes, and at the end of the year to return them"

Ralph Gordon v. R. Duncan, 3 Mo. 385, June 1834. "Gordon brought an action of assault and battery against the defendant, . . a special verdict

. . finds, that in May, 1830, the plaintiff brought his action [1] under the statute for freedom . . that the court made an order and under that order the plaintiff was hired out during the pendency of the suit . . Robert Duncan kept and detained Ralph as the slave of Coleman Duncan [from April or May, 1831,] until March or April, 1832, and that the services of Ralph while thus kept were worth the sum of $100. . . in the spring of 1832, Robert Duncan hired Ralph to one Lawrence . . [386] at seventy-five cents per day till his wages amounted to $50, which sum was paid to R. Duncan for the hire of Ralph. . . in the suit commenced by Ralph against Coleman Duncan, . . judgment was rendered . . 1833, and . . Ralph was declared to be free,"

Held: " the whole question is this, was the plaintiff free at the time the defendant had him in possession, if he was, then he is entitled to recover. . . [387] false imprisonment is the right action as seems to us, . . this court . . do find the defendant guilty . . And . . this court find that said Ralph is not and was not a slave as alleged . . We assess the plaintiff's damage to the sum of one hundred and fifty-three dollars, etc." [McGirk, J.]

Nat (a man of color) v. Ruddle, 3 Mo. 400, June 1834. " Nat sued Ruddle for his freedom, . . Ruddle moved from Missouri to Illinois in the year 1829, and left the plaintiff Nat hired out in Missouri, and that Nat ran-away from Missouri and went to Illinois, and was frequently at his master's house on visits to the family. . . plaintiff hired himself out in Illinois; but there was no evidence that Ruddle received the hire. [401] The Court charged the jury . . that there was nothing in the soil of Illinois as in England that would work the emancipation of a slave by mere setting foot thereon, and that if the plaintiff went into that State on a mere voluntary visit, or ran away from Missouri to that State he would not thereby be entitled to his freedom." [400] " verdict and judgment for the defendant, . . [402] judgment . . affirmed." [401] " It has often been decided in this court, that to entitle a slave to recover in an action of this kind, the slave must abide in the State of Illinois by and with the consent express or implied of his owner long enough to induce a jury to believe, that the owner intended to make that country the place of the slave's residence." [Tompkins, J.]

Perry v. Craig, 3 Mo. 516, October 1834. In 1810 Craig executed to Bryan a deed of mortgage for [517] " one negro woman slave and child one year old, the woman about 27 years," Bryan had possession of the slaves till his death in 1820, and his widow [518] " continued on in possession of the same till her intermarriage with James F. Perry in 1825;" In 1827 Craig brought a bill in Chancery against Perry and his wife, and the circuit court [522] " made a decree, that Craig be let in to redeem the slaves," Decree reversed.

Marguerite v. Chouteau, 3 Mo. 540, October 1834.[2] [542] " The appellee puts his right to hold the appellant in slavery on the same ground whether she be descended in the maternal line from an Indian or a negro

[1] Ralph *v.* C. Duncan, p. 139, *supra.*
[2] For facts see same *v.* same, p. 132, *supra.*

woman. It was further contended for the appellee as evidence of the law of the land that the French commandant Bourgmont bought Indians for slaves on the Missouri and sent them down to New Orleans to work on his plantation . . [564] From the copy of [Governor O'Reilly's] . . proclamation furnished by the counsel of the appellee dated 7th. Dec. 1769 it appears that the Governor forbade any person whatever to acquire any property in any Indian whatever. We find in it these remarkable words, 'It is also ordained that the actual proprietors of said Indian slaves shall not dispose of those whom they hold in any manner whatsoever unless it be to give them their freedom. Awaiting the orders of his majesty on this subject we enjoin upon the said proprietors to go and make their declaration at the office of the recorder, by giving the name and nation of said Indians, and the price at which the proprietors shall value them' and the commandants of the several districts are commanded to make returns to the Clerk of the Cabildo at New Orleans of all the Indians whose names shall be entered with the recorders. O'Reilly probably intended to liberate them. . . Had not O'Reilly been removed from office, it is probable the will of the Monarch would have been made known to them [the colonists] . . [565] through a ministerial officer to summon the holders of those Indian slaves to appear before some judicial tribunal, to show by what authority they were held in bondage. It is in no part of the proclamation intimated, that the colonists should be confirmed in the possession of such Indian slaves, until the pleasure of the King in this respect could be known. . . [570] the appellees counsel took the trouble to bring in the register of Indian slaves made at Fort Chartres in obedience to an order made in the proclamation, by which it appeared that Tayon then residing at that place had not registered this woman. Whence it must necessarily be concluded that he did not regard her as *his Indian slave,* and that he declined registering her name, etc. as required by the proclamation under pretence that she never had been held in slavery. . . [571] *The Governor* O'Reilly's proclamation was the only public act; those who knew they had no right to hold Indians in slavery, might well dismiss them as by the proclamation they were allowed to do, and thus avoid a judicial investigation in which they had nothing to gain and by which they might lose, . . the decision of this cause is . . important in its consequences; and in deciding contrary to the opinion of the highest court of judicature of a sister State.[1] We have the misfortune not to be able to concur all in the same opinion. It is the opinion of a majority of this court, that the circuit court . . erred in instructing the jury, that if they found the maternal ancestor of the plaintiff was an Indian woman, and that she was held as a slave in the province of Louisiana while it was held by the French, she and her descendants ought to be taken by the jury to have been lawfully slaves. . . the judgment of the circuit court [in favor of Chouteau] is reversed. This cause was first argued before this court, at the May term, of the year 1828. This court being then composed of two Judges only, the decision of the circuit court was affirmed by a division in opinion of the two Judges then sitting: at the October term, of the year 1833, the parties by their

[1] The case of Seville *v.* Chretien, decided by the Supreme Court of Louisiana in 1817 (5 Mart. La., O. S., 275), was "particularly examined." Pp. 544-571.

counsel appeared in this court, and mutually agreed that the judgment in this cause before rendered in this court, should be set aside, and that it should be again argued before the court, consisting of all the Judges. The judgment of the circuit court being now reversed, two of the Judges concurring in opinion, the cause is remanded to that court, and it is required to proceed therein in conformity with this opinion." [Tompkins, J.]

Wash, J., dissented: [574] "The evidence derived from the old archives of the country—the registers of baptisms and burials—the records of voluntary sales, and of the sales and distributions made of the estates of intestates with the clear and positive testimony of witnesses sworn in this cause, exhibit beyond doubt or question, numerous cases of Indian slavery commencing with the earliest settlement of the colony and continuing after the period when the Spaniards assumed the Government in 1769. The proclamation of O'Reilly, at the time the Government was assumed by the Spaniards in 1769, and the decree of the Baron de Carondelet in 1794, are proof to the same effect and show expressly, that the existence of Indian slavery *de facto,* was not only known to, but tolerated by the Spanish Government. The case of Seville and Chretien[1] . . puts the question as I think, upon its true ground. It is clear from the testimony in the cause that the grand mother of the plaintiff was a woman of the Natchez tribe of Indians taken a prisoner at the time that nation was massacred, captured and exterminated by Perier in 1730. . . [575] the maternal ancestor of the plaintiff was one of those captured at the time of the massacre, and was not sent to Saint Domingo, or if so, was brought back and held in slavery in the province of Louisiana. . . [576] the Minister [M. Maurepas,] whose duty it was to make known the will of the sovereign, suggests[2] the propriety of selling the Indians, and the company to whom the colony had been transferred by letters patent, and who had charge of its settlement and government, in accordance with the suggestion, proceeded to sell the survivors as slaves. What recognition could be more full and explicit? The slavery in this particular case was expressly sanctioned and legalized, . . To regard the question then, as one to be settled by the laws which were in force prior to 1769 when Spain took possession of Louisiana, I can feel no doubt and the practice is shown to have been pursued and recognized by the Spaniards, under neither of the governments that have preceded us, could the plaintiff have asserted successfully her claim to freedom."

Hay v. Dunky, 3 Mo. 588, October 1834. "an action brought by Dunky . . against Hay . . to recover her freedom. . . [Dunky] about the year 1811, was brought by the agent of William Morrison from the State of Virginia to Kaskaskias in the State of Illinois, and was held as a slave by Morrison," The defendant gave in evidence [589] "a copy of the record of registry [of negroes brought into the Territory of Illinois, under the act of September 17, 1807] . . showing that the plaintiff in Nov. 1811, (she being then 16 years old) was indentured to William Morrison to serve forty years. . . [590] she came into this State without

[1] 5 Mart. La., O. S., 275 (1817).
[2] In a letter to the directors of the company Apr. 22, 1731.

the consent of the person claiming her services in Illinois, and that the defendant exercised no authority over her in this State, except what was necessary to remove her into Illinois, for the person claiming her services there, . . verdict for the plaintiff . . motion for a new trial was overruled, . . ."

Judgment of the circuit court affirmed: [592] " the act of the Territorial Legislature of 1807, . . was in violation of . . the ordinance [of 1787]. . . Yet it is contended that the 6th art. of the Illinois constitution, recognized the act of the Territorial Legislature of 1807, and legalised the qualified slavery or servitude provided for or imposed by that act. . . This court is prepared to go further . . than the Supreme court of Illinois have gone and we hold that it was competent for the convention in forming a State Government for Illinois, not only to have legalised the act of the Territorial Legislature of 1807, but to have provided for the introduction and existence of unconditional or absolute slavery. Such is now the sovereign right of every State in the Union." But the convention did not [593] " legalise the slavery provided for in the act [of 1807] . . The first clause [of article six of the constitution] . . provides, that 'each . . person who has been bound to service . . in virtue of the laws of the Illinois Territory heretofore existing, . . without fraud or collusion, shall be held to a specific performance of their contracts or indentures.' . . Such contracts or indentures were in fraud and violation of the ordinance [of 1787] and therefore could not have been reached and classed with contracts and indentures entered into, 'without fraud or collusion,' as described and referred to in this clause of the 6th. art." [Wash, J.]

Soper v. Breckenridge, 4 Mo. 14, May 1835. " an action commenced by Soper (who is appellee,) . . on a warranty of soundness in the sale of a negro girl." Bill of sale: " For and in consideration of the sum of two hundred and sixty-seven dollars and fifty cents, I have this day sold unto Benjamin Soper one negro girl named Dinah, sound in body and mind and slave for life. I bind myself to warrant and defend the right and title of said negro from all and every person or persons whatsoever, given under my hand this 7th day of September, 1833. Eddy L. Breckenridge."

Held: a warranty as to title only. Judgment of the circuit court in favor of Soper reversed. The circuit court erred also in refusing to instruct the jury [16] " that if they found from the evidence, that the slave was only slightly diseased, if at all, and that she came to her death by negligence or cruel treatment of the plaintiff [Soper], the defendant is not liable for the whole value of the slave, but only to the extent of the injury occasioned by the disease." [Wash, J.]

Relfe v. Jones, 4 Mo. 89, June 1835. Jones applied to Relfe " to buy the negro, that he informed Jones the negro did not belong to him, but was claimed by his father-in-law who lived in the State of Virginia, that he also informed Jones that the negro had some claim to freedom by reason of his residence in the state of Illinois, that the negro was a worthless fellow, and that he advised Jones to have nothing to do with him, that Jones then applied to Duff to purchase the negro, agreeing to run all risks,

and agreed to give Duff $250 for him, . . Jones . . took said negro, sold him for $500, and that he has since obtained his freedom."

Mayor v. Hempstead, 4 Mo. 242, October 1835. On June 6, 1835, [243] "the Mayor and board of Aldermen [of St. Louis] passed an ordinance" providing that "no slave shall be permitted to drive any licensed . . dray . . within the limits of this city . . under a penalty of ten dollars." Hempstead's "dray and slave . . were employed contrary to this ordinance."

Held: [244] "this ordinance, under the name of regulating drays, regulates slave labor, which is beyond the grant in the charter [of St. Louis]." [243] "Ever since the foundation of the city as a village, slavery, both in fact and law, have existed to a very considerable extent, and wherever slavery is known to exist in the United States, and . . drays are used, those who have had the care . . of the same, . . have been, and still are slaves, at least to a great extent;"

Stewart v. Dugin, 4 Mo. 245, October 1835. "in Oct. 1834, Dugin sold to W. Stewart a negro boy a slave, named Bill, for the sum of five hundred dollars, . . [246] one Partney owned the negro when a boy, that he bought him of some one in St. Louis, when Bill was about 15 years of age, that before he bought him he knew he had fits, and the boy had several after he bought him, that about three years after he bought, the fits ceased, he never put the boy to hard work. In 1818, he sold the boy to Dugin, and then supposed he was able for hard work, . . A witness testified that he had known the negro some eight or ten years, had worked with him in mineing [*sic*] while Dugin owned him, found him to be a good hand," Dugin's stepdaughter testified [247] "that after Stewart bought Bill he came to Dugin's house sometime in January 1835, said he was then on his way to sell Bill, . . that he, Bill, had swam the Merrimack river [in the depth of winter], it appeared to hurt him, that he had given Bill the pass to hunt a master, he had overstaid his time, burnt off his shoes, come home bare-footed . . [248] in the middle of the winter season . . shortly after this, Bill was found sick on the roadside and died in a day or two [in February 1835]. . . The circuit court seemed to be of opinion that Dugin was only entitled to four hundred dollars, instead of $500, and perpetually enjoined one hundred. . . The decree is affirmed" [McGirk, J.]

Richardson v. Adams, 4 Mo. 311, June 1836. Will of William M. Fullerton, who died in 1829, "whereby he divised to his wife Sarah, . . all his property . . during her life: and upon her death the one half of his said estate (except the slaves, Brister and Winney, who were to be free) was divised to one Jesse Frier, . . [312] Sarah Fullerton took possession of the whole estate, an inventory . . was . . returned, . . including the two slaves, Brister and Winney, who were valued at $762.50 . . that Sarah Fullerton died . . 1831, having made . . a will, . . whereby she devised . . to the negro man Brister . . who was to be free at her death, . . a horse worth forty-five or fifty dollars;—to the wife of . . Phineas Adams, she devised the negro woman Winney, for life,—remainder to . . Phineas,"

Rachel (a woman of color) v. Walker, 4 Mo. 350, June 1836. In 1830 Stockton "sent by [Langham] . . to Major Brant of St. Louis to purchase a slave; that the plaintiff was purchased for said Stockton, and was . . taken up to him to Fort Snelling at St. Peters in the same fall. That there said Stockton held her as a slave till the fall of the year 1831, when he removed to Prairie du Chien, taking the said Rachel with him as his slave, at which place he held her in slavery, till about the spring of the year 1834, when he took her to St. Louis and sold her. That Fort Snelling is on the west side of the Mississippi river, and north of the State of Missouri, and in the territory of the United States. That said Stockton before he bought said Rachel, had resided at Fort Snelling about two years, and was still residing there when he bought the plaintiff, having just married. That Stockton while he resided at Fort Snelling was an officer of the U. S. army attached to the troops there; that while Stockton was at Prairie du Chien he was also an officer in the service of the U. S. army; that Prairie du Chien is in the Michigan territory and east of the Mississippi. That Rachel was only employed in attendance on Stockton and his family. . . "

[354] "The judgment of the circuit court [in favor of Walker] is reversed—the cause is remanded for a new trial." [352] "It seems that the ingenuity of counsel and the interest of those disposed to deal in slave property, will never admit anything to be settled in regard to this question." Review of the Missouri decisions. [353] "In all the cases decided by this court, it is admitted that the people of the United States have a right to pass through any of the districts where slavery is prohibited with their slaves, and while they justly retain the character of emigrants passing through the country, the fact that they have in their possession, when so passing slaves, does not emancipate them under the ordinance; . . In the case of Julia [1] . . the court say there should be something like necessity existing, to justify the owner of a slave to keep such slave in the country, so as to save a forfeiture. The counsel insist on a necessity as regards the owner to stay and abide in the Missouri territory and Michigan for more than two years, and during all that time to keep the plaintiff there as a slave. . . [354] though it be true that the officer was bound to remain where he did, during all the time he was there, yet no authority of law or the government compelled him to keep the plaintiff there as a slave. . . In this case the officer lived in the Missouri territory at the time he bought the slave, he sent to a slaveholding country and procured her, this was his voluntary act, done without any other reason than that of convenience, and he and those claiming under him must be holden to abide the consequence of introducing slavery both in Missouri territory and Michigan, contrary to law." Otherwise "the convenience or supposed convenience of the officer repeals as to him and others who have the same character, the ordinance and the act of 1821 admitting Missouri into the Union, and also the prohibitions of the several laws and constitutions of the non slave holding States." [McGirk, J.]

[1] Julia *v.* McKinney, p. 141, *supra.*

Speed v. Herrin, 4 Mo. 356, June 1836. In 1823 Laperche [360] "bequeathed to his wife Marie, the negro boy . . for and during her life . . the said widow . . sold said slave to . . Herrin, in the year 1826; . . that said Herrin then lived in the southern country, and was at the time of the purchase by him of said boy, engaged as a negro trader in purchasing slaves in this country for the southern market; that said Herrin had been told before the purchase by him of said boy, that he could get no title to said slave; to which defendant answered, 'that the widow of Laperche, who offered to sell said slave, had a good title for her life, and that she would live as long as the slave, and it did not matter,' . . [361] The judgment [in favor of Herrin] . . reversed and the cause remanded" [Wash, J.]

Meechum v. Judy, alias Julia Logan (a woman of color), 4 Mo. 361, June 1836. [363] "Here a negro sues another for freedom, the defendant negro [Meechum] vouches a white man [Newton], for warranty of title, and then demands that no negro shall give testimony in the cause, because all the parties are not negroes." [1]

Judgment in favor of Judy affirmed: "It was his [Newton's] folly to sell a supposed slave to a negro who was under some disability. Another thing in this case is, the affidavit nowhere alleges that the verdict is unjust, nor that the defendant nor Newton, have any merits of any kind:" [McGirk, J.]

Paca v. Dutton, 4 Mo. 371, June 1836. "about the year 1787, one Josiah William Dallam owned . . the grand mother of the defendant in error, as a slave, and that said Dallam did by a deed under his hand and seal, attested by one witness, and duly recorded, emancipate said grand mother, to take effect in future;"

Held: the attestation of two witnesses is not necessary to a deed of emancipation made in pursuance of the act of Maryland of 1752, where the emancipation is to take place *in futuro.*

Amy (a woman of color) v. Ramsey, 4 Mo. 505, May 1837. "Amy . . brought an action of assault, etc., against Jonathan Ramsey . . for her freedom. . . the plaintiff was born the slave of one Josiah Ramsey more than twenty years before the trial, in the State of Kentucky, and that she had continued in the possession of said Ramsey till the time of his death, . . September, 1834; that Josiah Ramsey moved from Kentucky to Missouri, . . 1816 or 1817. . . a bill of sale [was read in evidence] under the hand and seal of the said Josiah to the said Jonathan . . 1807, expressing the consideration of thirteen hundred and twenty-three dollars, and conveying the plaintiff, and four others, to the said Jonathan. . . The bill of sale reserved the use of the slaves to said Josiah for his life. [506] The plaintiff then offered to give in evidence a deed of manumission, from Josiah Ramsey to her and others, duly proved, . . and recorded, . . the date of which deed is the 3d day of September, 1834. . . The court rejected the deed. . ."

[1] Rev. Code 600, sect. 2; new Rev. Code 624, sect. 19.

[512] " Judgment [in favor of Ramsey] affirmed, the defendant pays his own costs." [509] " We consider the deed of emancipation as entirely a voluntary deed, passing no more right to freedom than the donor had a right to slavery in the plaintiff. If Josiah had only a life estate in the slave, he could emancipate for life, and no more." [McGirk, J.]

Rhody (a woman of color) v. Ramsey, 4 Mo. 512, May 1837. [513] " The points in this case are similar to the points in the case of Amy *v.* Ramsey [*supra*]. . . the law in both cases is the same."

Russell v. Taylor, 4 Mo. 550, June 1837. [551] " Taylor was the captain of a certain steam-boat called *Utility,* which traded up the Mississippi and Illinois rivers; that the mate of the boat brought the boy on board . . at St. Louis. The boy did not shew any pass, nor did the defendant ask for any, but the defendant shipped the slave one trip up the river, and on that trip landed on the east side of the Mississippi at . . Alton, in Illinois, and when the boy was found on the boat at St. Louis, he was engaged to the defendant for another trip up the Illinois river."

Judgment for Taylor reversed: [552] " Transporting a slave across the Mississippi into a non-slaveholding State was the evil to be prevented by the act of 1822." [1] " Ferrymen are mentioned, because they have generally the means in constant readiness to do the act. . . The owner of a steam-boat . . if he does the act through the instrumentality of the boat, . . is not less guilty." [McGirk, J.]

Wilson (a colored man) v. Melvin, 4 Mo. 592, June 1837. Action for freedom. In March 1834 Melvin [593] " removed from the State of Tennessee to the State of Illinois, bringing with him two slaves, one of which was Daniel Wilson, the plaintiff . . [594] He arrived in the county of St. Clair . . where he remained till the fall of that year, and made a crop of corn on rented ground. Within the space of a month, some say a less time, after his arrival in St. Clair county, the appellee, Melvin, went to St. Louis, in Missouri, where he located the slaves above mentioned. The appellee brought with him from Tennessee a wagon and team;—the wagon stood in the yard of the son of the appellee, with whom he passed the summer, unloaded, till the negroes were taken to St. Louis, because the appellee was told ' if he did, and made any place their home,' the slaves would obtain their freedom. He appears to have been impressed with the belief that unloading his wagon would have been evidence that he had fixed a place of residence. . . before he took the slaves in question to St. Louis; that he spent his time in visiting his children, and that the slaves did little except to feed the horses; that the appellant did some work for one Ingle, and brought the money to witness [a son of Melvin], and said he had made something for the old man, and gave the witness the greater part of the money, and kept the rest himself. The witness passed the money to the appellee, but does not know that Ingle hired the appellant's services from the appellee.—The appellant assisted the witness to cut down some trees for rail timber, but had no orders to do so from the witness, or from any other person known to the witness. In the month of July,

[1] Rev. Code of 1825, p. 747.

of that year, while the cholera prevailed in St. Louis, the two slaves came over to Illinois, by permission, it is said, of the appellee, and were employed by the appellant [appellee], for one week, or perhaps more, in the harvest field, and the women in domestic business. . . [598] it is certain that defendant's journey was ended in St. Clair county, of Illinois; and that he only extended it to St. Louis at his leisure, to hire out his negroes, when he found he could not keep them in Illinois, by moving them out once a year. . . in a very short time, he returned and made a crop of corn, and remained in the State to gather and sell it." "leaving that State only towards the close of the year."

Judgment for Melvin reversed and the cause remanded: [596] "The present plaintiff claims his freedom because he was, as is alleged, held in slavery in violation of the constitution of the State of Illinois. . . this court has manifested its opinion [1] that the construction of the act of Congress of 1787, and that of the constitution of the State of Illinois, ought to be the same. . . [598] The evidence was, that he left home in Tennessee, with an intention of residing in Illinois. . . [But] [599] even admitting that it was in evidence, that the defendant had, when he left home, meditated a journey through Illinois to Missouri, it appears that the jury ought . . to have found for the plaintiff" for [598] "The only question to be submitted to the jury . . was, whether he [Melvin] had made any unnecessary delay?" [597] "Something of the nature of necessity should exist before he would, or ought, to be exempted from the forfeiture [of his slave]." [Tompkins, J.]

Stoner v. State, 4 Mo. 614, June 1837. "Seaton Stoner, on application for the writ of *habeas corpus,*" [615] "he was committed to jail by the Mayor of the city of St. Louis, under the 21st and 22nd sections of the act concerning free negroes and mulattoes, approved March 14th, 1835. . . the Mayor sentenced the petitioner to pay a fine of one hundred dollars, and to stand committed till the fine and costs are paid. . . [616] it is urged by the petitioner's counsel, that the prisoner is a citizen of the United States, and that, in violation of the 4th, 5th, 6th and 7th articles of the amendments of the constitution of the United States, he is deprived of his liberty. . . the Mayor . . must necessarily have found the prisoner not a citizen, before he could have passed sentence on him. And now, this court is called on to assume original jurisdiction, and inquire into the truth of the Mayor's finding in this summary mode of proceeding. Nothing is more plain, than that reason as well as law, forbids this court to discharge the prisoner on this writ." [Tompkins, J.]

Jennings v. Kavanaugh, 5 Mo. 25, September 1837. "a negro man belonging to Jennings . . was killed by another negro man belonging to Kavanaugh. . . they had been more than once fighting on the same day, within a short space of time; and that Kavanaugh's negro came up behind that of Jennings, and gave the mortal blow, a short time after the last encounter: that in a few days thereafter Jennings' negro died of the wound inflicted by that blow." The plaintiff [27] "took a non suit," and

[1] Julia *v.* McKinney, p. 141; Nat *v.* Ruddle, p. 143, *supra.*

motion for a new trial was overruled. Judgment affirmed: the 35th section of the 9th article of the act concerning crimes and punishments, does not extend to this case.[1]

Irving v. Irving, 5 Mo. 28, September 1837. [31] " witness testified that about fifteen or sixteen years ago, . . he resided in the Petit Osage (Little Osage) bottom, . . and that Joseph Irving, junior, . . came into that bottom to improve a place for his father, . . That in the spring of the year, Joseph Irving, senior, sent up a negro girl to cook and keep house for the laborers employed in making the improvement; that the girl so sent was of a dark color, supposed to be about fifteen or sixteen years old,"

Mary (a slave) v. State, 5 Mo. 71, September 1837. Mary was indicted [78] " for the murder of a child of a Mr. Brinker. There are two counts in the indictment; the first lays the killing to be done with a stick of wood by beating; the second charges the killing to be done by drowning. . . the jury found a verdict of guilty generally on both counts, and judgment of death was pronounced on the prisoner by the court." Judgment reversed for various reasons: [80] " the child could not come to its death by both these modes." [McGirk, J.]

Pierre Choteau, senior v. Marguerite (a woman of colour), 12 Peters 507, January 1838. " In 1825, Marguerite, a woman of colour, by her next friend, Pierre Barrebeau, filed a declaration in the circuit court for the county of Jefferson,[2] . . Missouri, alleging that Pierre Choteau, sr., had beat and bruised her, and unlawfully detained her in prison against her will, etc. The object of this proceeding was to establish that the complainant, the descendant of an Indian woman, Marie Scipion, was free," [3]

The judgment against Marguerite in the circuit court of St. Louis county [4] was reversed and the cause remanded.[5] After judgment in favor of Marguerite, Chouteau [509] " sued out the writ of error to the Supreme Court of the United States, under the 25th section of the judiciary act of 1789, to the supreme court of Missouri." Writ dismissed for lack of jurisdiction.

Ferguson v. Stephens, 5 Mo. 211, April 1838. In 1825 certain slaves were conveyed in trust: [212] " That the profits and emoluments accruing from said slaves shall be a fund to support and educate the said Eliza Susan Ferguson, and such other issue as the said Dugald Ferguson, junior, might thereafter have; and at his demise, to be equally divided among such of his children as might then be living."

Talbot v. Jones, 5 Mo. 217, April 1838. [220] " the supposed value of two negroes, one a fugitive in New Orleans, and the other in Baltimore; "

[1] Digest of 1835.
[2] The proceedings in the Supreme Court of Missouri are " In error from the St. Louis Court."
[3] See Marguerite *v.* Chouteau, pp. 132, 143, *supra.*
[4] The case would seem to have been tried in the circuit courts of three counties: Jefferson, St. Charles, and St. Louis. The report in 12 Peters however contains contradictions.
[5] 3 Mo. 540 (572).

Lane v. Price, 5 Mo. 101, May 1838. "On or before the twenty-fourth day of December, eighteen hundred and thirty-four, we promise to pay E. Price, or order the just and full sum of eighty dollars, lawful money of Missouri, for the hire of a negro man by the name of Hannible, with usual clothing."

Tindall v. Johnson, 5 Mo. 179, May 1838. [180] "A marriage between a white person and a mulatto was not void by our law until the statute of 1835; and, therefore, the instruction moved by the defendant, that declared the plaintiff illegitimate on that ground, was rightly refused." [Counsel for appellee.]

Trimsley v. Riley, 5 Mo. 280, June 1838. In 1836 two slaves, named Levi and George, were hired for one year, for the sum of one hundred and sixty-eight dollars, [281] "that is, one hundred and thirty-two dollars for Levi and thirty-six dollars for George, . . and we and each of us further bind ourselves to furnish said slaves with as good boarding, clothing, and medical aid as is usual for such persons, and to deliver said slaves at the expiration of said term"

Allen v. Brown, 5 Mo. 323, June 1838. [325] "Finney proved that he was present and bid for the girl; that she was offered for sale by the . . auctioneers, for cash, as sound, a good washer and ironer; and that he bid for the girl as high as $250, and that Cerre overbid him $5, and the girl was knocked down by the auctioneer to said Cerre; the said slave was present at the sale; appeared to be of the age of forty-five years, and apparently sound and healthy; but that the witness, on some one remarking that the girl was lame, desisted from bidding."

Erwin v. Henry, 5 Mo. 469, August 1838. Will of Malcolm N. Henry: [470] "It is my will and desire that my boy, Adam, Juno and Cynthia, be released from bondage, on condition that Juno serve my sister Mary one year; Adam and Cynthia to serve the executor of my estate, or serve them to whom he hire them. Adam to serve two years, and Cynthia to serve four years, each then to have their perfect freedom, provided my sister may quit her claim to Juno; otherwise, the property I will to her shall hereafter be equally divided between my brothers and sisters: my desire is to pay sister Mary well for her claim on Juno. My crop of grain, farming utensils, household and kitchen furniture, and stock, all of which I want valued and acted on according to law, after my affairs are settled; then, if there is a residue from hire of negroes, crop, etc. I wish it to be given to Eleanor Erwin." [471] "during the four years Cynthia, the female slave, was required to serve before her freedom commenced, she had borne a female child," Eleanor Erwin claimed "said child as residuary legatee after the payment of debts." The court below dismissed her bill.

Judgment reversed and cause remanded.[1] [475] "all property of a personal nature, of whatever kind, which he could call his at the time of his death, is to be taken as the residue, . . at any rate, the value of the slave, Adaline [the daughter of Cynthia], should be applied to ease

[1] See Clark *v.* Henry, p. 165, *infra.*

the residue, and that the chancery court should, if the debts and expenses have been paid out of the residue fund, order that exhaustion to be supplied by the value of the slave *protanto*." [McGirk, J.] Tompkins, J. dissented.

Mulliken v. Greer, 5 Mo. 489, August 1838. [491] "he had 9 or 10 slaves, *viz.*: a man, sickly and of very little value; three women and five or six children—all of one woman—the oldest child between ten and eleven years old; that of these he gave to his daughter, Mrs. Standifer, a woman and girl; and sent home with Mrs. Greer the woman and boy demanded by Greer in this action. . . [492] The jury found the value of each slave to be five hundred and fifty dollars,"

Reed v. Circuit Court, 6 Mo. 44, August 1839. "A slave, the property of Reed, was indicted in the Howard Circuit Court for arson, convicted, and by the judgment of the Court, was ordered to be sent out of the State for 20 years. Reed moved the court to tax up the costs against Patrick Woods, who had the slave in his possession, when the arson was committed, under a contract of hire for one year. But the court refused to do so,"

Fanny (a slave) v. State, 6 Mo. 122, October 1839. "an indictment for the murder of William Florence, against Fanny, a slave of William Prewitt. The indictment was found in Lincoln circuit court, the county in which the murder is charged to have been committed, . . [123] on the petition of W. C. Prewitt, the master, the court ordered a change of venue to the county of Warren." On the trial William Florence, the father of the two murdered children, testified: [131] "that on Saturday the 1st September 1838, I left home about 2 o'clock to go to the post office, before I left, my children asked my permission to go to Prewitt's orchard. I told them they should not go, that them negroes had threatened to kill them; and if they did go I would whale them. . . So soon as I got home . . my wife . . asked me if I had seen any thing of the two children; I told her no, and asked her where they were. She stated that they had left home about 30 minutes after I did, and said they were going to the orchard to get some peaches. . . I went to it but did not see my children. I then went to Mr. Prewitt's house and called out the prisoner Fanny. . . I asked for Ellick [her son]; . . I then discovered from their deportment that my children had been murdered by them. . . [132] The place where the children were found is about 2½ miles from the orchard." [125] "Mrs. Florence states . . that Aaron, a negro boy belonging to her husband, was never at any time, from the time her husband left home . . until he returned, out of her sight more than fifteen minutes;" [136] "Mark, a slave, a witness, says; I went on the Saturday evening, on which Mr. Florence's children were missing, to Mr. Florence's mill. I started about two o'clock in the evening. I passed Mr. Prewitt's orchard, on my way to the mill, and travelled the road from there to the mill on which the children must have gone, if they travelled any road to the orchard. I did not see them on the road nor in the orchard. When I got to the mill I saw nothing of Aaron, Mr. Florence's slave. . . Aaron did not come

according to my judgment for one hour and a half after I got there." Ellick, the son of Fanny, [124] " swore that, on the day the children were found, he and his mother Fanny and his father Ben and his uncle Green were all arrested and taken into custody, and that on the next day he was taken out from the rest by Mr. Sitton, the sheriff, and by Mr. Hammond, and they told him if he did not tell who killed the children, they would hang him; that if he would tell they would let him off; that he told them he knew nothing about it; that they then put a rope around his neck and hung him; that he then told them that his mother had told him that she had killed the children in the orchard, when they came for peaches; that after this, on the same day, the prisoners were taken to Mr. Lawrence Sittons, and he and Green were set at liberty; that a few days after he was taken up and sent to Troy to jail; that after he got there, Mr. Chandler, the jailor, told him that he knew more about killing the children than he had told, that he had helped to kill them himself; that Mr. Chandler then told him that Judge Hunt had hung his father Ben at Bowling Green, and had come by his masters, and hung Green, and had then just taken his mother out to hang her, and that if he did not tell all about killing the children, Judge Hunt would be there directly and hang him; that if he told they would let him off; that Mr. Chandler then put a rope on his neck, and that a man came in with a cloak on, who Mr. Chandler said, was Judge Hunt. He says the man they called Judge did not say anything. He also says that he then told Chandler that he helped his mother to kill the children; that he and his mother carried them off into the woods. He says he also told the same story before the grand jury, after he had been sworn on the book; that the reason why he told the grand jury so was, that he had once said it, and he thought he was bound to stick to it; that neither the story he told Sitton and Hammond, nor the one which he told Chandler and the grand jury was at all true; that he told both in consequence of the threats and hanging above mentioned, and states that he knows nothing about the killing of the children." Fanny was [123] " found guilty of murder in the first degree and sentenced to death. . . After verdict a motion was made for a new trial and over ruled by the court."

Judgment reversed and the cause [142] " remanded from the circuit court of Warren to that of Lincoln county:" I. the slave Fanny should have petitioned in person for a change of venue; II. "Abstracting from the evidence on the record the declarations extorted from the boy Ellick, there does not in my opinion remain any evidence to justify a jury in finding the prisoner guilty." [Tompkins, J.]

Dickey v. Malechi, 6 Mo. 177, September 1839. Bazil Simmino said that he would destroy the will of his brother Antoine, because [183] " the will was 'ungrateful' towards the family of Antoine Simmino; as it gave the greater part of his property to a half negro."

Fraser v. State, 6 Mo. 195, September 1839. [196] " defendant sold to a slave, the property of Mrs. Larrose, some whiskey, for which he received pay from said slave," " There was a verdict against the defendant and judgment for fifteen dollars." Judgment reversed.

Ellett v. Bobb, 6 Mo. 323, May 1840. On January 2, 1837, Bobb hired a negro boy from Ellett, and promised to pay him, on or before the following 25th of December, the sum of $165.50 for his hire, and to return the slave. [324] "on the 5th day of May 1837, without any fault of the defendant, the said negro ran away, and did not return"

Held: Bobb must pay the hire of the negro, but is not liable for the return of the slave: [325] "The defendant could not have the use of the negro without leaving him at liberty; and for the assurance of the negro's health and comfort, so much indulgence is necessary as to leave it in his power to escape, if he be so inclined. . . the bailee could not be reasonably required to use the extreme diligence that the owner might be disposed to use, to retake a runaway; nor to encounter as great expense, in case the negro should succeed in escaping into a distant country." [Tompkins, J.]

Plummer v. State, 6 Mo. 231, June 1840. [233] "Anna Barker [sister of the deceased and of the defendant], deposed, that on the Sunday before the homicide was committed, the children of Phil. Plummer, defendant, passed by her house, when a black child, a child of the negro woman Martha, snatched the bonnet of one of Ph. Plummer's children, and was running away with it; witness gave back the bonnet, and slapped the negro child. The children of P. Plummer went home and reported that one of them had been whipped by the negro child with a switch," Philemon Plummer, the defendant, declared a few days later [234] "that when his children went over to Jo's, Jo's children would ask if they were akin to them, to which their mother (Jo's wife,) would say no, they are negroes, or mulattoes; and Joe would sit there laughing like a fool. . . [235] Gale testified: that on . . the day Joseph Plummer was killed, . . Philemon Plummer came [to his father's] . . the old man and John being there, Philemon said, 'Daddy, you, or John, one, has to fight me; Marth (the negro woman) has been telling lies on my children, and Katy Plummer and Anna Barker made the black beat them with sticks;' the black woman came out and said something; Phil. shook a hickory at her, and told her to hush her mouth, or he would give her five hundred lashes. . . about two hours after . . he, defendant, looked down the road, and said 'there, Marth has got Katy and Anna to come and make a fuss;' he then told John to whip her, but John refused; he said he, defendant, would, and made some motion to that purpose, but was pulled back by his father;" in the ensuing scrimmage Philemon killed his brother Jo with a pitch fork.

Barker v. Pool, 6 Mo. 260, June 1840. [261] "a negro slave of Barker was ordered by him to burn a stubble field, and that in burning the stubble field he accidentally suffered the fire to be communicated to a stack yard,"

Kirk v. State, 6 Mo. 469, September 1840. Indictment for stealing a slave, and conviction.

Manning v. Cordell, 6 Mo. 471, September 1840. Cordell's slave was indicted for a felony. [474] "Cordell . . declined employing counsel, whereupon the court appointed Mr. Manning, who was an attorney"

Manning [473] "brought suit against the master, for professional services in defending his slave. . . ."

[474] "Verdict and judgment for defendant. . . The counsel acts in such case as an officer of the court, and for the furtherance of justice, and not upon any contract with the master, nor can any be implied." [Napton, J.]

King v. Bailey, 6 Mo. 575, September 1840. [576] "a mortgage executed [in 1837] . . by Jacob Hinton, by which Hinton sells to Bailey, in consideration of the sum of four hundred dollars . . a negro girl slave Joann, provided that if said Hinton should, within one year thereafter, pay the principal . . with interest . . then the mortgage to be void, . . after their execution of the instrument Hinton called the girl into the room, where he and the plaintiff Bailey were, and said here is the girl, she is yours, I deliver you possession of her; that said Hinton's wife then requested him to leave her the said negro until spring, as she had a young child and no nurse . . to which Bailey assented."

Loughridge v. State, 6 Mo. 594, September 1840. Loughridge "was indicted for aiding Perry and Hanson, two slaves, in committing . . an assault with intent to kill . . Cranmer. . . Loughridge did not shoot the gun, but that it was shot from the stable, . . Loughridge said he had sent the negroes Perry and Hanson to the stable to take care of his horses and hay, and that no man should search his stable; that he was responsible for what the negroes did," A gun was found in the stable which appeared [595] "to have been lately discharged." Loughbridge had, a few days before, threatened "that he would shoot Cranmer in less than ten days." Loughbridge was found guilty.

Held: a freeman, accessory to a felony committed by a slave, is punishable in the same manner as though the principal were a freeman.

George (a man of color) v. Craig, 6 Mo. 648, September 1840. In 1838 George "filed his petition . . with a view to institute a suit for the recovery of his freedom. The suit was accordingly brought by leave of the court in *forma pauperis,* and in pursuance of the 8th section of the act, . . the court directed the petitioner to be hired out by the sheriff. . . 1840, . . the court ordered the proceeds of the hire accruing from September 1838, to November 1839, to be paid over to defendant. . . plaintiff appealed." Appeal dismissed, as the main suit is yet undetermined.

Posey v. Garth, 7 Mo. 94, August 1841. [95] "Bird Posey was employed by Dabney Garth, as overseer, for one year, at the price of one hundred and seventy-five dollars; his term of service commenced on the 1st January, 1838, and he continued industriously employed for Garth until sometime in April following, when Garth told Posey that he must leave his service, that he had been negligent, and had maltreated and injured his negroes: Thereupon Posey left Garth's employment. It appears that Posey, the day before he was ordered to leave Garth's service, for some fault supposed to have been committed by one of Garth's negroes under his control, attempted to punish the negro by whipping; the negro . . [96] resisted by refusing to obey Posey's order. Posey thereupon

struck the negro with a handspike and knocked him down, and then beat him with the handspike in such a manner that in four days thereafter he died from the effect of the blows. Posey afterwards instituted an action against Garth for his year's wages, claiming the whole amount, and recovered sixty-one dollars, the costs being adjudged against him. A new trial was asked for by Posey, and refused, and he brings this cause here by appeal." Judgment affirmed: Garth [97] "not only had a right to discharge him, but it was his duty to do it." [Scott, J.]

Cato (a man of color) v. Hutson, 7 Mo. 142, August 1841. [144] "Memorandum of a race to be run on the Marion track, on the 13th day of May next, in Cole county, Missouri, is this, that Joseph Yount agrees to run Cato's sorrel mare against Isaac Hutson's bay horse, for the sum of three hundred and fifty dollars, . . 1837." [145] "the race was won by Yount, and that the stakeholder, by Yount's direction, paid over to Cato the sum of money put into his hands by Hutson and his partners."

Hawkins v. State, 7 Mo. 190, September 1841. Rebecca Hawkins [191] "had been arrested at the burial of her husband," and "a negro woman, accused with others of poisoning Hawkins" had also been arrested. Mrs. Hawkins "thus accosted the negro woman: 'Mary, do you say I know any thing about this matter?' Mary answered yes, we all know about it; I shall have to die, and I am not going to tell any more lies about it." At the sheriff's house Mrs. Hawkins "said to the negro woman, Mary, you have ruined us all: Mary replied, dont say I have, Mistress. The plaintiff in error then observed, well, we have ruined ourselves. The negro woman, continuing her conversation, remarked, Mistress, you know you sent Garster for the poison, and that you sent Ned to Garsters for it, and when it came, you told me to put some into a cup and bring it to you; I did so, and you poured some coffee in the cup on it; plaintiff in error said yes, but my heart failed me, and I did not then give it to him, but threw it out; but in consequence of some ill treatment during the succeeding night, she said the next morning she told Mary to put some more of that stuff in a cup, and bring it to her, and she would try and give it to him; that Mary brought the cup with the poison in a little coffee; she took the cup and poured more coffee into it, and gave it to Hawkins to drink at breakfast. Hawkins took the cup and drank its contents, and afterwards went out horse hunting, and returned home complaining that he had been sick. The poison used was ratsbane. It is contended that the court erred in permitting what the negro said to be given in evidence. That negroes cannot testify against white persons is clear; but this rule cannot be carried so far as to exclude the conversation of a negro with a white person, when the conversation on the part of the negro is merely given in evidence as an inducement and in illustration of what was said by the white person." [Scott, J.]

Rennick v. Chloe (a person of color), 7 Mo. 197, September 1841. Chloe [199] "instituted a suit . . to recover her freedom. . . [200] had a verdict and judgment. . . the plaintiff was a slave of one Nicholas Wren, of Warren county, Ken., who died sometime in the year 1809, at an advanced age, having made his last will and testament. The will con-

tained the following clause: 'It is my will, that in case Elizabeth, my wife, should die before the year 1820, Chloe, the negro girl, should be set free at the date of 1820. And it is my will that she serve out her time with one of my executors, (*viz.* my son Isaac Wren) in case I should decease before that time. And if the said negro girl, Chloe, should have any increase previous to the said year 1820, it is my will that my said son, Isaac Wren, should raise the children until they arrive to the age of twenty-one years, and then set them free also.' It appeared that Elizabeth Wren died in 1819, and that before the year 1820, the appellee, Chloe, had three children. . . Isaac Wren . . permitted the woman Chloe and her three children to be taken by William Rennick, one of the appellants, to Missouri, and a bill of sale was given by Isaac Wren, conveying his interest in Chloe's children until they arrived at the age of twenty-one years. . . Rennick . . was fully apprised that Chloe was a free woman, and that her children were to be free at the age of twenty-one. His acknowledgements to this effect both before he left Kentucky and during his residence in this state, were given in evidence."

Judgment for Chloe reversed and the cause remanded: [204] "The act of the Kentucky legislature, authorising persons of a certain age to dispose of their chattels, did not . . authorise them to emancipate their slaves, and the appellee having produced on the trial no such law, the court should have instructed the jury to find for the defendants. . . [205] if the plaintiff had shown that by the laws of Kentucky, a master could set his slave free by will, the admissions of the defendants could have gone to the jury to show a compliance with the will by the executor, supposing that by the terms of the will of Nicholas Wren, any act was necessary to be done by his executor, or by the plaintiff, before the plaintiff would have been by the will entitled to her freedom." [Napton, J.] Judge Tompkins dissented.

Lepper v. Chilton, 7 Mo. 221, September 1841. [223] "Chilton, on his way from Virginia to this State, reached Cincinnati, on the morning of the 16th of May, 1840, and applied to Lepper, the master of a steamboat then lying at the wharf, for a passage on his boat for himself, his family, slaves, etc. . . [Lepper] promised that his boat should leave the port of Cincinnati that evening, Chilton having represented to him, that upon no other terms would he consent to ship his slaves on the said boat. . . The boat did not start until the ensuing day, and during the night one of Chilton's slaves escaped, in the recovery of which he expended one hundred and ninety-five dollars. Verdict and judgment was for . . Chilton, . . [224] affirmed."

Desloge v. Ranger, 7 Mo. 327, April 1842. "a bill in chancery . . for the redemption of a negro girl [a family servant], conveyed to Desloge . . in 1830." The consideration was two hundred dollars, in which sum Ranger was indebted to Desloge. [329] "in the year 1835 the negro was sold by Desloge for eight hundred dollars . . two hundred dollars was a fair price for negroes of the description of the one sold, at the time of the transfer to Desloge" The bill of sale was construed as a mortgage by the majority of the court. Judge Tompkins dissented: [333] "I . .

believe that neither party ever thought that the bill of sale . . was to be construed as a mortgage, until, accidentally, the price of negroes rose very high, or rather until the price of money sank very low."

McNair v. Dodge, 7 Mo. 404, May 1842. In 1804 a marriage contract was made by which [405] "the slave Violette, the mother of the slaves sued for, was given to the wife during her life, and if she died without children, to revert to the husband, Israel Dodge and his heirs. . . [406] no child was born . . Mrs. Dodge claimed the negro woman, Violette, after the death of her husband [in 1806], . . in the year 1830, she sold and delivered the slaves" to McNair. Judgment in favor of Dodge's administrator affirmed.

Chouteau v. Hope, 7 Mo. 428, May 1842. "an action of trover, brought by Hope, to recover the value of a slave, alleged to have been converted by the defendants . . the boy . . was free . . [429] born in the state of Illinois, and raised there, . . plaintiffs in error [Chouteau and Keizer] had employed the boy on their boat, as a free boy, and had discharged him as such."

Judgment for Hope reversed and the cause remanded: "the subject matter of the suit was not property, . . Such defence is a complete answer to the action. Nor is there any thing contrary to the spirit and policy of our laws in allowing this defence; for the record of the judgment in this suit would not be available in an action brought by the negro for his freedom." [Napton, J.]

Christy v. Price, 7 Mo. 430, May 1842. A negro man was hired on March 1, 1837, for one year, for "the sum of one hundred and thirty-two dollars, . . and we bind ourselves not to remove the said negro out of this county, and to furnish him with good clothing, suitable to the season, and give him good medical aid, if sick, and pay doctors' bills, if any, created, and return said negro." He was put to work in a sandpit and killed by a cave-in. The jury found for Price, the owner of the slave, and assessed his damages at six hundred dollars.

Wade v. Scott, 7 Mo. 509, August 1842. [510] "Scott sold to Wade a slave [for the sum of $625], with a written warranty that he was sound, with the exception of a small defect in his hands. A very short time after the sale, the slave's hands were in such a condition as to prevent his making any use of them. They had lost their muscular action, and were incapable of grasping any thing. . . Wade saw the slave's hands before the sale, and examined them; and was told that the injury they had sustained proceeded from cold. The physician who examined the slave's hands after the sale to Wade, doubted whether the defect was real or pretended, they being full and natural in their appearance: and it was not until he had required the slave to use his hands in various ways, that he became satisfied that he was utterly unable to perform any thing with them." "Scott obtained judgment for the amount of the note."

Judgment reversed: [513] "although the vendee may have an opportunity of examining an article, yet if he requires a warranty, the vendor is answerable for any defect which is not obvious to the senses; . .

Whether the defect in the slave's hands was greater or not, than that excepted in the warranty was a question for the jury: and if they found it greater, it constituted a breach of the warranty, for which the party was answerable;" [Scott, J.] [515] "Judge Tompkins dissenting."

Singleton v. Fore, 7 Mo. 515, August 1842. Fore sued Singleton for breach of covenant. In 1838 Singleton sold Fore, for seven hundred dollars, "three negroes, to wit, Charlotte, Naomia, and Lucy, and did [in the bill of sale] warrant the said negroes to be sound and healthy, except that the said Charlotte had one eye out. . . [516] The evidence . . shows that Lucy, a child aged three or four years, was sick when she was delivered, and that Charlotte was frost bitten, and that this was known to Fore," Lucy afterwards died. [519] "Some of the witnesses said, this girl, if in good health, was worth $200. A witness for the defendant, who thought her to be in good health, thought her worth $300. The jury found only $275 damages for all the injury sustained by plaintiff, both on account of the unsoundness of Charlotte and of that of Lucy," Judgment of the circuit court [in favor of Fore] affirmed.

Perkins v. Reeds, 8 Mo. 33, July 1843. Perkins hired from Reeds for one year the slaves, Luke and wife and child, for two hundred dollars, promising to return the said slaves. Luke ran away and crossed the Mississippi River into Illinois. Verdict for the plaintiff, Reeds, reversed, and the cause remanded: [36] "Perkins could not have the same absolute control over the hired negro that a lessee of a house has over that inanimate property." The court adheres to the decision made in the case of Ellett *v.* Bobb.[1]

Offutt v. John (a mulatto), 8 Mo. 120, July 1843. John brought suit to establish his freedom. [122] "the plaintiff predicates his claim solely on the ground that his mother was a white woman." [123] "The defendant . . offered in evidence the record of a suit for freedom, in the Circuit Court of Logan county, Kentucky, between the appellee and one Eli Offutt, from which it appeared that a verdict and judgment was had against the appellee. The appellant purchased the appellee from said Eli Offutt. . . The verdict and judgment were for the plaintiff [John] in the Circuit Court."

Judgment reversed and the cause remanded: [128] "The instruction of the court below, which allowed the jury to disregard" the judgment of the Logan circuit court "was . . erroneous." [Napton, J.]

Vaulx v. Campbell, 8 Mo. 224, July 1843. [226] "the defendant was going to the South with some negroes and stock of his own, and that young Isham Sims went with him, taking along with him the negroes of the deceased, . . his father;" [225] "the six negroes which Isham [226] Sims, the deceased, took from his father, were brought back: but that a negro woman and her two children were not brought back, and that said woman and her children were worth one thousand dollars; . . after the defendant returned, he said he could have sold the negroes better, but Sims would not allow them to be separated."

[1] P. 156, *supra.*

Carpenter v. State, 8 Mo. 291, July 1843. Conrad Carpenter was indicted for the murder of his slave Minerva, whom he had whipped to death in 1842. He did not appear before the court to answer the charge, and the bail required of him was forfeited.

Robinson v. Campbell, 8 Mo. 365, January 1844. Action of trover. On January 14, 1839, Campbell executed to Morris a deed for a slave, Maria, [366] " upon consideration of $366.52 to him paid, upon condition that if the defendant [Campbell] should, on or before the 25th December following, pay to said Morris the sum of $366.52, then the right and title to said slave was to return and vest in said Campbell." As Campbell did not redeem the slave, Morris sold her, on July 7, 1840, to Robinson for sixty-one dollars. She was worth three hundred dollars. Judgment for Campbell reversed and the cause remanded.

Bright v. White, 8 Mo. 421, January 1844. Will of Joseph Diall, of Tennessee, 1827: [423] " Elizabeth Wilson has received $420 in a negro girl,"

Nathan (a slave) v. State, 8 Mo. 631, July 1844. Nathan [632] " was indicted and convicted for an attempt to commit a rape upon a white woman. . . The 28th section of the second article of the act concerning crimes and punishments,[1] declares the punishment for rape, or attempt to commit rape, by a negro or mulatto, to be castration. . . the offence . . is not a felony within the meaning of our statute, and therefore the prosecutor properly omitted the word ' feloniously,' in describing the offense. Judgment affirmed." [Napton, J.]

Randolph v. Alsey (a colored person), 8 Mo. 656, July 1844. "Alsey brought her suit for freedom . . on the ground of residence in the State of Illinois. . . The Circuit Court gave judgment for the plaintiff. The defendant filed a motion for a new trial," [I.] " because, holding a slave to service at the salt works, near Shawneetown, did not, of course, set him free.[2] [II.] . . . Alsey was held in the salt tract, and before 1825, and this [second] instruction precludes the jury from inquiring whether she was so held there, as to be protected by the second section of the sixth article of the constitution." Judgment of the circuit court affirmed.

Kennerly v. Martin, 8 Mo. 698, July 1844. [699] " The professional services . . were services rendered to the defendant herself and two slaves " by Dr. Martin.

Thompson v. Botts, 8 Mo. 710, July 1844. Held: [713] " a general warranty of soundness will not cover a defect visible to the senses; but the existence of a malignant disease, such as scrofula, is not a matter which can always be detected by mere inspection, even by the most skilful or scientific examiner." [Napton, J.]

Chouteau[3] *v. Pierre (of color),* 9 Mo. 3, January 1845. Suit for freedom. Pierre's [5] " mother, Rose, was a negress, and was born in Mon-

[1] Rev. Stat. 1835, ch. 170, sect. 28.
[2] Constitution of Illinois, art. 6, sect. 2.
[3] Gabriel S. Chouteau.

treal, in Lower Canada, about the year 1768.—That in the year 1791, or thereabouts, his mother was taken from Montreal to Prairie du Chien, in the North-west Territory of the United States, by one Stork [*sic*], where she remained until his death in and about the year 1794, rendering service to him and his family. That about the year 1795, Andrew Todd took Rose, his mother, from Prairie du Chien, and brought her to St. Louis, where she was sold in October of that year, to one Didier, a priest; and in August, 1798, she was sold by Didier to Auguste Chouteau, with her two children, . . During the period of Rose's detention at Prairie du Chien, that post was in the possession of British subjects. . . Pierre was born in St. Louis. . . [6] The defendant below gave evidence tending to show the actual existence of slavery in Canada in the year 1786 [1]—that slaves were recognized as property and subject to be sold; that Rose, the mother of Pierre, was sold as a slave in Canada."

Judgment in favor of Pierre was reversed: I. [8] "The statute under which Pierre sues, he being a negro, requires that he should prove his right to freedom. Then it would seem that it devolved on him to show the law forbidding negro slavery [in Canada]: for from [the history of the introduction of slavery into America] . . [9] a court would not be warranted in saying, that institution was illegal in places where it actually existed, for want of a law expressly authorizing it. . . [II.] [10] the ordinance of 1787 . . never had any force or validity in the posts . . occupied by Great Britain. . . the mother of the plaintiff Pierre, was taken from Prairie du Chien to St. Louis before the period assigned for the surrender of the posts." [2] [Scott, J.]

Wash v. Randolph, 9 Mo. 142, January 1845. [144] "Wash had sold to Randolph . . two slaves, covenanting that they were slaves for life; and it was in evidence that they had recovered their freedom by suit at law. . . the slaves had served said Randolph till the termination of the suit for freedom."

Robert (a man of color) v. Melugen, 9 Mo. 170, January 1845. "James Pharis, then deceased, who had claimed the plaintiff as his slave, . . had in his lifetime frequently said that he wished the plaintiff, Robert, to be free, because he had been a faithful slave; that he died from home, and that these declarations were made in his last sickness; and that he was prevented by those about him in his last sickness, from making a will. This evidence was excluded from the jury . . The plaintiff then asked a witness to state what he had heard Pharis in his lifetime say about the plaintiff being a free man. The defendant objected . . the court sustained the objection, . . Another witness was asked by the plaintiff to tell what he had heard any one say in the presence of Pharis in his lifetime, about the plaintiff having been in the State of Illinois. This question was objected to by the defendant, . . court sustaining the objection. The plaintiff then took a non-suit, with leave to move to set it aside, and afterwards

[1] Misprint for 1768. Rose had two infant children by 1798.
[2] See also Charlotte *v.* Chouteau, pp. 174, 194, 203, 216, *infra.* Charlotte was the sister of Pierre and won her freedom.

on the same day, did move to set it aside. His motion was overruled, . . [172] judgment of the circuit court . . affirmed."

Held: I. [171] " the act of emancipation must be in writing, executed " in accordance with the Act of 1835.[1] II. [172] " it does not appear from the bill of exceptions, that any pretence was made to prove a residence in Illinois by the consent of the intestate or otherwise. The questions could not then be put," [Tompkins, J.]

Holmes v. Fresh, 9 Mo. 201, January 1845. [209] " The negroes [three men] were worth from $1800 to $2000, and would have hired during the different years [1840-1844] for different sums . . one year for as much as $125 a piece, another for not more than $75." [Scott, J.]

Williams v. State, 9 Mo. 270, July 1845. [271] " The defendants with one Jesse Hines, were indicted . . 1844, . . [272] Jesse Hines, and the two Williams's, with others, on the night of the 27th February last, after midnight, left their neighborhood and travelled twelve or fourteen miles to the house of Joseph Brown, for the purpose, as alleged by them, of searching for a runaway slave, supposed to be in that vicinity. The company started with two bottles of whiskey, which they replenished on the route, and when they reached a branch three or four hundred yards from Brown's house, they halted and entered into a conversation respecting Brown's character and conduct. One of the company stated that Brown was a bad man, if rumor is true; and if what he had heard about him was true, he ought to be whipped—they would go to Brown's house to warm and to hunt for the runaway negro, and thence to Rice Patterson's field, half a mile off, where they expected to find the negro. They went to the house, rapped at the door, and demanded admittance. . . Brown was told that if he did not open the door and submit to have his house searched, they would procure a search warrant—he replied, that the negro was not there, nor had he seen him but once since he ranaway; that a few weeks previous some persons had searched his house for negroes and goods, as they said, and had pulled his house down. Brown got his gun, which being seen by Hines, he called for pistols, and directed two of the company to repair to the back door to prevent Brown's escape. The family of Brown were greatly alarmed. When the rioters were in the act of leaving the house, they informed Brown that a company of men would come from Cooper county, and drive him off; and when a short distance from the house they fired off a pistol." " Jesse Hines, not being found, a trial and verdict of guilty was had against the defendants, and a judgment entered thereon,"

Judgment affirmed: [273] " an outrage was perpetrated on the rights of Brown, by the defendants and others. If such conduct be tolerated by the juries of the country, and connived at by the courts, it will inevitably lead to fearful consequences. . . [274] If Brown had taken the life of any one, or all of them, he would have been justified by the moral sense of the community." [McBride, J.] [276] " Judge Napton absent."

[1] Digest of 1835, p. 587, art. 2, sects. 1, 5.

Clark v. Henry, 9 Mo. 339, July 1845.[1] Eleanor Erwin [340] "intermarried with one William Clark who is now a co-complainant; they filed their amended bill at the November term, 1838." In his answer the defendant, the executor of the testator, [341] "admits his present possession of said female child [Adaline]. . . [342] the negro man, Adam, would have hired for about ninety dollars during the years 1833 and '34—that the woman Cynthia, would have hired for about $25, with the incumbrance of a child, without such incumbrance she was worth more. . . the circuit court dismissed the bill, and the cause was brought here on appeal."

Decree reversed: the complainant [347] "had no claim or title" to the slave Adaline. The residuum [346] "is limited to personal property, and limited as we think, further, to such description of personal property, as would correspond in some degree, both in regard to its character, and its value, with the species of personal property enumerated. Certainly it cannot reach slaves, a species of property as distinctive in its character, as real estate." [344] "Slaves are by our law personal property, but of a distinctive, and peculiar character. In all, or nearly all of the slave-holding States, they are declared personal property, and are transferred as other personal property. In all of them, they may with propriety, be called personal property, as contradistinguished from land. Yet the laws of all these States, and the decisions of their courts, have recognized a value in this species of property, arising from circumstances independent of their mere pecuniary value in the market. The age, health and disposition of slaves, their aptitude for particular employments, the length of time during which their owners, or their owner's ancestors have possessed them, their matrimonial connexions, and other like circumstances, contribute to fix the degree of estimation in which their proprietors hold them, apart from the amount of money into which they can be converted in market. . . [345] neither our legislatures in enacting laws affecting this property, nor individual owners, in declaring their intended disposition of it, either by deed or will, have been apt to lose sight of the fact that they are also human beings, and therefore the intention to affect this species of property, under the general description of personalty, should appear manifest and plain, before a court could give such language, so broad an interpretation." As the testator evinced [346] "by his careful disposition of every slave he had, his intention of not confounding his slaves with the mass of his personal estate, it seems difficult, if not impossible, to arrive at the conclusion, that this slave was designed by the testator, either for the payment of his debts, or for the benefit of the complainant. . . [347] As to the hire of the negroes, the defendant admits that the amount actually received from this source was $194.31. Deducting from this, the sum of $77.31, that being the balance due him on final settlement, leaves the sum of $117, which defendant tendered to complainant in money and notes, but which was not received. The witnesses state, Adam to have been worth $90 per annum, and Cynthia $25—this would make the hire amount to $280; which after the deduction of $77.31, would leave a balance against the defendant of $202.69. For this sum we think the complainant entitled to a decree." [Napton, J.]

[1] For facts see Erwin *v.* Henry, p. 153, *supra.*

Maria (of color) v. Atterberry, 9 Mo. 369, July 1845. [372] "This was a suit for freedom brought by Maria, against Atterberry. Maria took a non suit, and after an unsuccessful motion to set aside, and for a new trial, has brought the case here by appeal. In support of her right to freedom, Maria offered in evidence a transcript from the record of the county court of Hart county, in the State of Kentucky, authenticated in pursuance of the act of Congress of the 27th April, 1804. The act of liberation in the record, is in these words: 'Thomas Atterberry, sen'r of Hart county, by Richard Atterberry, his attorney in fact and agent— a deed of emancipation from Thomas Atterberry, freeing a certain negro woman by the name of Maria, aged — years, five feet high, rather a yellow black, weighing about 120, investing the said negro woman with full freedom, which deed of emancipation is acknowledged in open court, and it is ordered that the clerk issue to said woman a deed of emancipation according to law.' Power of attorney from Thomas to Richard Atterberry: 'Know all men by these presents, that I, Thomas Atterberry, of Hart county, State of Kentucky, do . . appoint Richard Atterberry as my Attorney in fact, to alien, release and set free, my negro woman named Maria, and to assign my name as her security, that she don't become chargeable to the county aforesaid, and to do . . every act necessary for to be done for the emancipation of said slave, that I could do in my own person, which when done shall be as valid in law, as if I had done it in my own proper person. Given under my hand and seal this 9th day of April, 1837. Thomas Atterberry. [seal] *Teste,* Robert Dorsey and P. Wells.' The following is a copy of the deed of emancipation referred to in the before recited order of court: 'I, Thos. Atterberry, sen'r, of Hart county, Kentucky, have this day, and doth by these presents emancipate and forever set free, my negro woman slave, Maria, to go out and forever free, and to have and enjoy all the rights and privileges of a free woman of color. Given under my hand and seal, this 10th day of April, 1837. Thomas Atterberry. [seal] By Richard Atterberry, his Agent and Attorney in fact.' Both of the foregoing instruments were certified, and have been recorded. A certificate of emancipation made out by the clerk, in pursuance of the order of the court, follows in the record, the entry of these instruments. . . [373] The certificate of freedom granted in Kentucky, was recorded in Howard county, in this State, and a copy of this record in connexion with the testimony of the recorder, was offered in evidence, the original certificate having been lost. Testimony going to shew that Thomas Atterberry had frequently declared that Maria was free, and that he had liberated her in Kentucky, was also offered in evidence. Also a will of Atterberry, liberating Maria. This will was without probate, and no evidence was offered in proof of its execution by the testator. All this evidence was rejected on the trial, and the rejection thereof, is the error complained of. It was agreed that the laws of Kentucky,[1] in relation to the emancipation of slaves, might be read in evidence in this court,"

[1] Acts of Feb. 27, 1798, and of Dec. 15, 1800.

Judgment reversed and the cause remanded: [375] "where a proper order is made by the court, that order is a judicial act. . . if such an entry there [in Kentucky], would shew a right to freedom, the same entry properly authenticated would be as good evidence in our courts." [Scott, J.] [377] "Judge Napton did not sit."

Anderson v. Brown (*of color*), 9 Mo. 646, October 1845. [647] "On the 19th January, 1844, B. B. Dayton makes affidavit setting forth that on the 17th January, 1844, Squire Brown commenced suit, by consent, against Charles R. Anderson for his freedom in the St. Louis circuit court, and that an order was made by said court permitting said Brown to sue as a poor person, and that said Dayton be assigned as his counsel; that said Brown have reasonable liberty to see his counsel and attend the court, and that he be not removed out of the jurisdiction of said court, nor be subjected to any severity on account of his suit;—that the defendant appeared by his attorney, consented to the filing of the declaration and the order made in the cause, and filed a plea to the declaration, on the said 17th January, 1844. The affiant further sets forth that he is informed by John Paulding, a constable, that he, said Paulding, at the request of said Anderson, on the said 19th January, arrested said Brown and took him to the steam boat *Admiral,* for the purpose, as said Anderson told him, of sending said Brown south, and that said Brown was put on said boat, which was bound for New Orleans, and which with said Brown has departed for that place; and said Dayton believes, therefore, that said Brown is now about being removed out of the jurisdiction of this court. Thereupon the judge of the circuit court issued a writ to the sheriff of St. Louis county, in which it is recited that he is satisfied by the foregoing affidavit that said Brown is about to be removed, etc., and commanding said sheriff to seize said Brown and bring him before the judge on the 20th January instant, at 9 o'clock, A.M., at the county jail, and that he summon to appear, at the same time and place, any person claiming or having in possession the said Brown. The sheriff returned that on the 20th January, 1844, he seized said Brown, and had him before the judge, as required by the writ, and that he summoned Israel Morris, . . [648] the person who claimed said Brown, . . to . . appear at the jail . . Morris . . came not; whereupon it is considered by the [circuit] court, that said Morris and said Anderson pay the costs and charges in this behalf expended, . . [650] judgment . . reversed."

Eaton v. Vaughan, 9 Mo. 743, January 1846. [744] "Vaughan brought an action of trespass against Eaton, under the following circumstances: Vaughan resided at Glasgow in Howard county, and owned a slave named Charles, who was reared in that county by his father-in-law, Wm. Ward. On the night of the 22d August, 1844, Charles escaped from Vaughan, and as the steam boat *Wapello,* of which Eaton was captain, was then lying at the port of Glasgow, and a suspicion arising that Charles was on board the boat, early next morning diligent search was made for him, but he was not found. Charles was described to the officer of the boat who made the search. Eaton was very indignant that a suspicion should have arisen that the slave was on his boat. On the same day on

the return of the boat to St. Louis, she stopped at Boonville, and Charles who had stolen a horse, and taken the papers of a free negro to whom he bore some resemblance, presented himself to Captain Eaton, and asked if he could take passage on his boat to St. Louis, remarking at the same time to the Captain, that he supposed he would like to see his free paper. The captain replied he would; and a license to reside in this State, under the hand and seal of the clerk of the Howard county court was exhibited, examined and handed to Captain Nichols of Glasgow, a passenger, of whom the enquiry was made, whether it was genuine? Nicholas [*sic*] replied it was. Charles thereupon paid his passage money, and was admitted as a passenger without any questions. At this time a stranger stepped up and said he knew the boy, and that he was raised by Wm. Ward of Howard county. Pompey Spence, the free negro to whom the license to reside in this State had been granted, and from whom it was stolen, was described in said license as a mulatto boy, about 22 years old, five feet eight inches high, and straight hair, with his right hand having been broken. Charles was a mulatto boy about 24 years old, five feet eleven inches high, with sound hands and a scald head, having very little hair upon it, the top of his head being entirely bald. Charles called himself Pompey. A witness who had seen Charles on the boat, saw afterwards Pompey Spence whom Charles personated, and testified that they were very much alike in face, countenance and complexion; and that a person not knowing either boy, and not seeing them together, might easily mistake the one for the other. The officer who searched the boat for Charles at Glasgow, and heard a description of him afterwards, on their passage to St. Louis examined him and compared him with the description in the license, and was satisfied that he was the person to whom the license had been granted. On the examination, Charles extended his right hand, and made it appear as if he could not shut one of his fingers. Captain Eaton, near the mouth of the Missouri river, was informed by the cook of the boat, that he believed Charles was a runaway slave. This induced Eaton again to examine Charles. The examination took place in the presence of the officer who searched the boat at Glasgow, and resulted in conviction that Charles was the person he pretended to be. . . [746] Charles was taken to St. Louis, and has never been heard of since. But for his having a scald head he was estimated to be worth $600. The scald did not affect his capacity for service, and might reduce his value fifty dollars; he was otherwise a very likely boy." The court instructed the jury that it was not sufficient to excuse the defendant from liability, " that he in good faith believed the boy to be a freeman, and used reasonable diligence to prevent imposition by the boy. That the jury may, if they think proper, give smart money against the defendant, over and above all the damages actually sustained by the plaintiff. . . that the evidence disclosed mitigating circumstances in the conduct of the defendant. The plaintiff obtained judgment for nine hundred dollars."

Judgment affirmed. [748] " The greater portion of our eastern frontier, being only separated by a navigable stream, from a non-slaveholding State, inhabited by many who are anxious, and leaving no stone unturned

to deprive us of our slaves; our interior being drained by large water courses, by means of which its commerce in steamboats is maintained with the city on our frontier, render it necessary that the strictest diligence should be exacted from all those navigating steamboats on our waters, in order to prevent the escape of our slaves. Our citizens, aware of the circumstances by which they are surrounded, will not weigh in golden scales the damages that may result to the owners of slaves, from a relaxation of that degree of diligence which is necessary to secure them against losses. This determination they will carry with them in their jury rooms, and it is not for the courts, to weaken or destroy the force of a determination, necessary to protect a species of property which, whether for weal or for woe, has been entailed upon us by those who are now making the most clamor about it." [Scott, J.] Napton, J.: [749] "I am in favor of sending this case back for a new trial, upon the ground that vindictive damages were given by the jury, when the circumstances of the case did not warrant it. The value of the slave, when in Vaughan's possession, was about five hundred dollars, and that value must have been much diminished at the time he imposed himself upon Captain Eaton, by the fact that he was then a runaway, had stolen a horse, and was in possession of free papers which would very much facilitate his escape."

Freeman v. Freeman, 9 Mo. 772, January 1846. Moses Webb, by his will, bequested his property to his two daughters, [773] " in equal moities, upon the following conditions, to wit.: that . . [they] enjoy the benefit of his slaves during their natural lives, and at their death said slaves should go to their lawful heirs, if any; but if " they " should have no lawful heirs of their bodies, then the said slaves to be set free." The complainant, one of said daughters, charges that her husband, " Jonathan Freeman has on several occasions stated . . that he intended, upon a distribution of said slaves, to get them in his possession and ' run them out of the State,' and so to defeat the rights of the complainant, and the contingent rights of the slaves themselves. . . To this bill there was a demurrer, . . sustained by the circuit court."

Decree affirmed: " The complainant . . does not state that she even believes that he will ever carry his threats into execution, nor that he is not fully responsible in the event that he does. . . nor does the complaint aver that the property has any peculiar value, which would render *damages* no compensation to her for its loss." [Napton, J.]

Fulkerson v. Bollinger, 9 Mo. 838, January 1846. [840] " The note . . contained an endorsement of two credits, . . the other dated . . 1840, for one negro boy at $800."

Dudgeon v. Teass, 9 Mo. 867, January 1846. Held: if a person hire a slave for a year, and the slave died during the time, the hirer is bound for the hire only to the time of the death.

Mackay v. Dillon, 4 Howard 421, January 1846. [442] " Vasquez had formerly a cabin in the commons [of St. Louis], . . A negro man lived in the cabin, and had a small enclosure, and was called . . *la fontaine à*

Benéte. He lived there in 1788 and 1789. I don't know whether he had a concession."

Price v. Thornton, 10 Mo. 135, March 1846. An action on the case against the owners of the steamboat *General Leavenworth.* [137] "Joseph White was the Captain, and part owner of the steamboat *Leavenworth,* and whilst said boat was lying at Glasgow, two slaves belonging to the plaintiff applied to him for passage on his boat to St. Louis, and produced some papers which the witness thought did not have any seal affixed thereto. Capt. White was heard to tell them that their passage to St. Louis would be four dollars a piece, if they wooded. Capt. White's attention was directed once or twice . . to the propriety of investigating more closely the character of the negroes; but nothing was done, and the negroes after their arrival at St. Louis, escaped in another boat bound for Cincinnati—and were never recovered. . . The defendants had a verdict and judgment."

Judgment reversed and the cause remanded. [140] "This is not a crime or misdemeanor under our statute; but it may be a case of such gross negligence on the part of the Captain of the steamboat as to make the owners responsible for the damages which resulted." [Napton, J.]

Grove v. State, 10 Mo. 232, July 1846. Held: in an indictment for inhumanly beating a slave, it is not necessary to set forth the name of the owner of the slave. [233] "The provision of our statute[1] under which this defendant was indicted, evidently treats the slave as the party injured, and not his owner: . . in the offence set forth in this indictment, it made no difference whether the slave belonged to the defendant or to a third person. . . the statute punishes the offence. . . The judgment affirmed." [Napton, J.]

Kemp v. Holland, 10 Mo. 255, July 1846. In 1840 or 1841 the slave Sophia was sold for $506.

Markley v. State, 10 Mo. 291, January 1847. "Markley was indicted . . for dealing with a slave, without permission of the owner of said slave.[2] . . verdict of guilty found, and a fine of $20 assessed"

Judgment reversed. Defendant [292] "may have obtained the written consent of the master or overseer, either of whom may have had the exclusive right of giving such consent."

Trimble v. Hensley, 10 Mo. 309, January 1847. [311] "Mrs. Trimble was Nancy Bailey, and whilst sole and unmarried, the mother of the slaves in controversy was devised to 'her and her heirs forever,' . . At the date of the bequest, Nancy Bailey was of tender years, and the negro girl slave only about two years old. That subsequently, the girl came to the possession of Miss Bailey, and whilst in her possession, she intermarried with Thomas Clark, who acquired possession of the negro girl, and continued to enjoy that possession up to the time of his death, . . That Clark left children by his said wife; that Mrs. Clark intermarried with Trimble . .

[1] Rev. Code (1845) 406.
[2] Rev. Code (1835) 1018, art. 1, sect. 33.

who now claims the negro woman and her increase under the bequest aforesaid."

Held: [312] "When Thomas Clark died, his widow was entitled only to a dower interest in those negroes, inasmuch as they constituted as much a part of his absolute estate as any other negroes he may have been possessed of at his death." [McBride, J.]

Marr v. Hill, 10 Mo. 320, January 1847. [321] "a negro woman and her infant child, bought by said Hill at the administrator's sale. . . The verdict of the jury was, that the defendant, Marr, did request the crier to represent the negro woman . . as sound and healthy, . . [322] Upon the trial . . One Davis testified that he had boarded several weeks with Henry Marr, (the testator,) and had known Marr to chastise the woman frequently for her obstinacy and complaints. On being interrogated in relation to the character of these complaints, the witness answered, that he had heard the woman make complaints to her mistress about her health, and say her master put too much on her for her health. Another witness, Pavy, saw the woman at his house shortly before her sale at public auction, and told her he wanted to hire her, but she told him she would not suit him, as she was unwell more than people thought. The witness told her she was breeding, to which she replied, 'there was something else.' Mrs. Bryant, another witness, testified that she was laughing at and plaguing the negro woman, (in relation to her supposed pregnancy, it may be inferred) when the negro bursted into a cry, and said, 'no, Miss Mary, there is something worse the matter with me, but they all don't believe it.' . . a few months after the sale, the negro woman was found to be diseased with the dropsy, of which disease she died. The evidence detailed above was for the purpose of showing the existence of this disease before the sale, and the knowledge of its existence by Marr, the defendant."

Held: the declarations of the slave made to Pavy and to Mrs. Bryant are admissible in evidence as part of the *res gestae.* Decree of the chancellor perpetually enjoining so much of the judgment against Hill as covered the value of the woman, affirmed.

Montany v. Rock, 10 Mo. 506, March 1847. [508] "Received, St. Louis, Aug., 1843, . . the sum of $400, being in full for my slave Maria; the said Maria mulatto girl, aged 15 years; the said Mary slave for life."

Nat (of color) v. Coons, 10 Mo. 543, March 1847. [545] "Duty, the late master of Nat, executed a will in the year 1836, in the State of Mississippi, of which he was then a resident. By this will, Nat, with other slaves, were liberated after the payment of all the debts. Afterwards, in the year 1837, Duty, with his slaves, removed to the State of Missouri, where he resided until his death, in 1838. This will was admitted to probate in . . Mississippi, . . Nat contending that the debts of the estate were paid, or that there was a sufficiency of assets to satisfy them without selling the slaves, under leave, instituted a suit for his freedom in which judgment was rendered against him,"

Judgment affirmed: [546] "this was a Missouri will, and the original should have been proved in this State. . . If it was used as a will under the laws of Mississippi, it is clear that it could not confer freedom, as it appears by the laws in force then that the assent of the General Assembly was necessary to an act of emancipation." [Scott, J.]

Perry v. Beardslee, 10 Mo. 568, March 1847. [569] "Beardslee and wife brought an action on the case, against Perry and others, owners and officers of the steamboat *Harry of the West,* to recover damages for the loss of a slave, hired as a fireman on said boat. The plaintiffs obtained a verdict and judgment. The evidence on the trial conduced to show, that the slave belonged to Mrs. Beardslee, then Miss Smith—that he was white, with blue eyes and light sandy hair; that her agent, John Carlyle, hired the boy to Van Houten, captain of the *Harry of the West,* by the month and for no definite period. The boy made his escape at St. Louis [and was afterwards seen in Cincinnati]. A letter was addressed to Carlyle, by Mr. Sparr of the Virginia Hotel, where Carlyle usually boarded when in St. Louis, at the instance of Van Houten, which requested his presence in St. Louis on business, and when Carlyle arrived there from Alton, where he was at the receipt of the letter, he found that the negro had escaped, and he settled with Van Houten for the hire."

Judgment reversed and the cause remanded: [573] "this Court never designed to declare it a rule of law, that a bailee of a slave, for a month or a year, was bound to pursue him, after he had escaped, to Cincinnati or Canada. It is obvious that the ideas of escape and recapture, were intimately associated, and were designed to be limited by time and circumstances. . . A slave, for instance, is hired in the country, his master living in one county, and the bailee living in another and distant county. The slave disappears, and as frequently happens, he is concealed in some neighboring cabin or woods, and information of this is communicated to the bailee. . . the failure to retake the slave, before a final escape was made, would show a dereliction of duty on the part of the hirer, which might be productive of the greatest mischief to the owner. . . [574] The escape would in short, be a permissive one; it could not be regarded as having taken place, without the fault or negligence of the bailee. . . Where a slave is hired as a boat hand, we must presume that the owner is fully aware, that every facility for escape is afforded by the very nature of the service. He is apprised, that the boat will touch and be detained at the wharves of populous towns; that it passes near the banks, and will stop at the landings of States where slavery is not tolerated; and that his slave will be associated with free negroes, and others who will not be likely to leave him ignorant of the various opportunities which present themselves for escape. The owner is aware of all this, and must be presumed to contract with reference to it. He insures his slave, or indemnifies himself for the increased risk by the increased wages. Does the owner expect, that in case his slave escapes, whilst the boat is lying at a woodyard, or putting out freight at some intermediate landing, the captain and crew will relinquish the boat, or abandon the trip, for the purpose of hunting up the runaway? No such expectations are entertained. The captain or

master is expected to act with good faith; he is bound to do so; but he cannot be expected in circumstances like those described, to use even the same means of recapture, which a bailee under other circumstances might be required to exert." [1] [Napton, J.]

Maddin v. Edmondson, 10 Mo. 643, July 1847. [644] "during the year 1842, a negro boy, named Smith, came to his house with a verbal message from his master, wanting to know if witness had any hands to hire [to work in a lead mine]; and that he sent word by the boy to him that he would let him have Mrs. Field's boy Mace, for a year, at $145."

Adams v. Childers, 10 Mo. 778, July 1847. Moss [779] "hired a negro girl of Dedrick Hunor, for the year 1844; afterwards, during that year, Moss died, and his administrator [Childers], . . hired out the girl for the remainder of the year to the plaintiff in error [Adams], who, by his ill treatment and inhumanity, caused the death of the girl. The declaration was on the implied contract to take reasonable care of the slave. There was a judgment against Adams for the value of the slave," Judgment affirmed.

State v. Rector, 11 Mo. 28, October 1847. The indictment charged that Rector [a negro] "did entice, decoy, and carry away, out of the State" "a certain negro woman slave for life, named Mary, . . with intent then and there to procure and effect the freedom of the said slave," Motion to quash the indictment sustained in the lower court. Judgment reversed. Another indictment against Rector was [29] "quashed, on motion of the defendant. . . Judgment affirmed."

Dougherty v. Tracy, 11 Mo. 62, October 1847. [63] "In August or September, 1845, the steam ferryboat being about to leave the St. Louis landing for Illinoistown, Tracy went on board and informed the acting captain that there were two negroes in the boat whom he suspected to be runaway slaves, and desired him to wait until he could get some person to take them up. This the captain declined, but went to seek the slaves, whom he found secreting themselves, as he thought, and informed them that Tracy had authority to take them and that they must go with him. Tracy thereupon laid hold of one of the slaves by the shoulder, and, with the other, went off to the corner of Market square. Tracy immediately despatched a messenger to S. Mecham, who was a deputy of the defendant, Dougherty, the Marshal of St. Louis, to tell him to come down and take two slaves, whom he believed to be runaways.—Mecham went accordingly, but the negroes were gone and he and the plaintiff [Tracy] pursued them. They were found, and Tracy pointed them out to Mecham, by whom they were arrested and taken before the recorder, Tracy accompanying him. Tracy had no other agency in the transaction. The commitment of the slaves was procured by the affidavit of Mecham, who represented himself the apprehender, by virtue of which they were committed to prison. The defendant [Dougherty] received the reward [fifty dollars] allowed by law for the apprehension of the slaves, . . the half of which he gave to Mecham." Tracy sued Dougherty for the fifty dollars, and

[1] For additional facts, see Beardslee *v.* Perry, p. 182, *infra.*

obtained judgment for thirty dollars. Judgment reversed: [64] "The right Tracy may have acquired by the apprehension of the slaves on the boat was lost by their subsequent departure from his custody."

Charlotte (of color) v. Chouteau, 11 Mo. 193, October 1847. [196] "This was a suit for freedom, in which the defendant, Chouteau, obtained a verdict and judgment. The plaintiff claimed her freedom on two grounds. 1st, because her mother, Rose, was born in Montreal, and, 2nd, on account of the residence of Rose, about the year 1794, at Michilimacinack and Prairie du Chien. The plaintiff gave evidence tending to show . . that slavery never existed in Canada. The defendant gave evidence to show that slavery did in fact exist in Canada. No evidence was given of any law prohibiting or giving sanction to slavery in Canada. . . Rose was purchased by Didier, curate of the parish of St. Louis, in 1795 [[199] by formal conveyance executed before the Lieutenant Governor of Upper Louisiana and authenticated by him], from one Andre Todd, a merchant of Montreal, and that Didier sold her and her children to the defendant's father, Auguste Chouteau. . . Rose, about the year 1794 or '95, was living as a servant in the family of one Stark [*sic*] at Prairie du Chien, and that two years previous to this, she was seen at Mackinaw. . . [199] The point of fact mainly disputed on the trial, was the existence of slavery in Canada. This court had decided [in Chouteau *v.* Pierre][1] . . that slavery might in fact exist in a British or French province on this continent, without any legislative recognition, either by the colony or the mother country. Hence it followed, that where negroes were found in a state of slavery, the presumption would arise that the Government recognized this condition as legal and warranted by their laws and customs, unless some law could be shown prohibiting it. . . [200] It would require no particular familiarity with the history of the British provinces of Canada, to be assured that negro slavery never has been very extensively or generally introduced there. The nature of the climate would have presented insuperable obstacles to a dense slave population. But if negro slavery was introduced into that country in fact, although to a very limited extent, without meeting any opposition from the positive laws or established usages of the government or people, the defendant's rights, acquired in such a condition of things, deserve the protection of our laws and courts, as much as though they had originated in a country where the congeniality of the climate and the richness of the soil encouraged the general propagation of slavery and its recognition by the government." [Napton, J.]

Because of obscurity in the instructions given by the lower court, the judgment in favor of Chouteau was reversed and the cause remanded. Then the jury found that slavery did not exist by law in Canada "when the ancestress of the plaintiff was in that country,"[2] Chouteau appealed because the verdict "was flagrantly against law and the instructions of the court."[3]

[1] P. 162, *supra.* Pierre was a brother of Charlotte.
[2] Charlotte *v.* Chouteau, p. 216, *infra.*
[3] Same *v.* same, p. 203, *infra.*

Andrews v. Ormsbee, 11 Mo. 400, March 1848. "before Andrews had gotten possession of the slave as her owner, she had once been at his house, and that Ormsbee charged him with tampering with her, and exhibited symptoms of violent excitement, and made threats of actual violence against him. That after he had gotten possession of the negress, Andrews had expressed the purpose of sending the negress out of the State. . . Ormsbee had stated that his wife had complained that the girl had become saucy and disobedient, and that he had told her she might sell her."

Emmerson v. Harriet (*of color*), 11 Mo. 413, March 1848. "This is an action to try the right of Harriet to her freedom. There was a verdict for the defendant [Emmerson]. Afterwards, a motion for a new trial was made and sustained. An exception was taken by the defendant to the granting of the motion, which being overruled she has brought the cause here by writ of error."

Held: "it is clear, that there is no final judgment, upon which a writ of error can only lie. The cause is still pending in the court below.[1] . . the writ will be dismissed." [Scott, J.]

Emmerson v. Dred Scott (*of color*), 11 Mo. 413, March 1848. "This case is in all respects similar to that of Emmerson *vs.* Harriet, decided at this term,[2] and a similar disposition is made of it." [Scott, J.]

Murray v. Fox, 11 Mo. 555, July 1848. [560] "in February, 1837, [in Tennessee] he purchased the negro woman . . at the price of $700."

In the matter of Toney, alias William Morton—on habeas corpus, 11 Mo. 661, July 1848. [662] "In July, 1842, Toney, a slave, escaped from the service of his master, Thomas Williams, who resided in Montgomery county in the State of Tennessee, and came to St. Louis in this State. Whilst in that county, he committed four grand larcenies, for which he was severally indicted and tried at the July term of the Criminal Court of St. Louis county, and sentenced to eleven years imprisonment in the penitentiary. He was arraigned as a free person by the name of William Morton, and on his arraignment pleaded guilty to the several indictments. His master, who had not heard of him since his escape in 1842, being informed of his confinement in the penitentiary here, sent on an agent, Wm. H. Stuart, who identified the slave, and on his behalf, who freely consents to his proceeding, and as agent for his owner, applied to this court for a writ of *habeas corpus* for the discharge of the slave, as the law does not warrant his confinement in the penitentiary for the offenses of which he was convicted, he not being a free person."

Held: [663] "The error is one of fact. . . a writ of error *coram nobis* will lie to revoke the judgment,"

Smith v. Isaac (*of color*), 12 Mo. 106, July 1848. [107] "This was a bill to set aside a conveyance alleged to have been made fraudulently. . . By the will of Jacob Myers, executed in 1834, his slaves, William, Isaac,

[1] Emmerson *v.* Dred Scott, *infra,* note 2.
[2] *Supra.* In the court below Dred "obtained a verdict." Scott *v.* Emerson, p. 185, *infra.*

Jack, and ten others were liberated, and made the devisees of all his lands, except his town lots in Tully, and forty acres in the northeast quarter of S. 26, T. 62, R. 6. These last were devised to his nephew, Robert M. Easton, and the said Easton and William Duncan (who was son-in-law of Easton) were made trustees for the negroes. This will provided, that in case Jack, one of the liberated slaves, should wish to sell the lands and remove to other lands, the trustees should sell, and with the proceeds purchase other lands for the negroes, where Jack might prefer to live. The real estate thus bequeathed, consisted of about 464 acres of land, lying in the bottom of the river Mississippi, adjoining the town of Tully. On the 3rd of August, 1836, Jack signed a written paper, which stated that he (Jack) had made arrangements with Thomas Gray for the sale of the estate devised by Myers to his negroes, and desired the trustees to convey to said Gray. On the 3rd of September, 1836, Easton and Duncan conveyed to Gray for the consideration of $1,900. Within a week after this conveyance, it was agreed between Gray and Duncan, that the former should convey to the latter, upon the consideration of $2,600; but afterwards, and on the 4th of October, 1836, at the request of Duncan, the conveyance was made to Easton, who thereupon paid the seven hundred dollars (the advance in the sale from Gray) to Gray. Easton took possession, made improvements upon the land, and continued in possession up to the filing of the bill, excepting about 28 acres, which he sold to White, one of the defendants. In October, 1840, this bill was filed. Six of the negroes, beneficiaries under the will of Myers, are the complainants, making the trustees, Duncan and Easton, and White, the purchaser of 28 acres, and the seven runaway negroes, including Jack, defendants. The bill charges that the conveyances from the trustees to Gray, and from Gray to Easton, were fraudulent, and the result of a preconcerted arrangement; that the land was sold for less than half its value, and that Jack's signature to the written paper, requesting the trustees to sell, was procured by imposition upon his ignorance or imbecility. . . [108] The answer of Jack . . intimates that he was under duress, or misled and deceived, in signing the paper addressed to the trustees. . . Easton's answer denies all fraud, and relies chiefly upon the written order of Jack, who, he seems to think, was authorized by the will to control him as trustee. Duncan's answer is substantially the same with Easton's. White answered and insisted that he was a bona fide purchaser, for valuable consideration, without notice." At the hearing Munday testified that he " had a conversation with Easton shortly after Easton had purchased, which he thus details: 'Easton, I am afraid you have got into difficulty about that land, and you and your children will be lawing about it.' Easton thought not. 'You ought to help the old woman, Sally, who is sick and destitute, etc.' Easton replied that Myers did wrong in giving the property to the negroes, and 'damn them, I intend to cheat them out of everything they have.' This witness also heard Gray about the time of his purchase, say that he was not going to settle on the land, that he had bought on speculation, and had nearly completed an arrangement, by which he would make six or seven hundred dollars. Gray did not explain with whom this arrangement was made, but from the laugh of Gray at the time of the remark, the witness under-

stood him to mean Duncan. . . [109] The court pronounced the sales of Duncan and Easton fraudulent and void, and declared the land still subject to the trust, excepting the twenty-eight acres which had been conveyed to White. The bill was dismissed as to White, and his title declared valid. The court further decreed that the complainants recover $398.66 from the estate of Easton, that being the purchase money with interest of the land sold to White. . . The court directed new trustees to carry into execution the will of Myers, in relation to the trust lands."

Dean v. Davis, 12 Mo. 112, July 1848. In 1845 [114] "there was . . sold one negro man, named in the mortgage for about $50 . . one of the [other] negroes was worth from $500 to $700, and the other worth from $1200 to $1500"

Howe v. Waysman, 12 Mo. 169, July 1848. The slave Charlotte and her child were sold in 1831 [171] "for the price of $400, which was their full and fair value at the time,"

Carroll v. City of St. Louis, 12 Mo. 444, March 1849. Bill for legal services rendered the City of St. Louis in 1846:

To professional services and attention to two hundred cases before the recorder of St. Louis, of free negroes arrested for being in the State of Missouri without a license, at one dollar per case.	$200.00
To professional services and attention before the county court of St. Louis county for two weeks in cases of free negroes applying for license to remain in this State	100.00
To attention to the case of a free negro (Charles Lyons) in an application by him to judge of the St. Louis circuit court for discharge under the *habeas corpus* act	50.00

O'Bryan v. O'Bryan, 13 Mo. 16, January 1850. [17] "the plaintiff's negro woman informed her master, that during his absence, she had on one occasion, caught her mistress and Thomas Saunders together . . The plaintiff communicated this to his wife, who at first denied . . but afterwards upon being confronted by the woman at her own request, confessed."

Martin v. Martin, 13 Mo. 36, January 1850. [39] "W. R. Martin said he thought the way his father [Russell Martin] done was the best: his father loaned a negro to a child and paid taxes on it: if the negro died it was father's loss. . . if he had given them, . . some of the sons or sons in law might have spent them. . . [40] The old man said, if you don't want to take care of the negroes and raise them, send them home. . . [42] Capt. Jamison said, the old man's paying the taxes on the negroes interrupted the [five years peaceable] possession. W. R. Martin said, he would give in his own negroes, even if the old man did from that time." Oreton said: [43] "I was then in the negro trade and would have bought her [Sally] . . The old man said to me he wished Samuel would sell the negro, she was nothing but trouble to his wife and pox take the negro . . she was no account no how . . [Other witness:] [44] The negro Hanna came up and told me how-dy. I enquired who she was, and

the old man said she was Billy's Hanna. . . I always heard the old man speak of the negroes as Billy's Hanna, Samuel's Sally; . . [46] W. R. Martin said he had got the girl when he first went to house keeping, and when she was about 8 years old, and had raised her and her children, and considered them as his." The lower court decreed that the administrators of Russell Martin [39] " take into their possession the slaves in the possession of Wm. R. Martin, . . to wit.: Hanna and her children, Samuel, Sanford, Buford and Anthony;"

Decree reversed: [68] " the evidence competent to disprove the gift, which the law but re[a]sonably implies from such reception and possession as is established here, should be either of the clearest, most direct and uncontradictory character, or if in any sense conflicting, that the aggregate preponderance against the continued denials of the answer, and the *prima facie* title established by the law, should be overwhelming and conclusive to a degree which we are unable to deduce from the record before us." [Birch, J.]

Hawkins v. Ridenhour, 13 Mo. 125, January 1850. " the intimate friends of King, went to him and advised him to take his property to Louisiana or Mississippi, sell it for the best price he could. . ." [126] " there was a negro sold prior to King's taking away his property, under execution against King, and that Ridenhour purchased the negro at constable's sale, King having furnished him the money to do so; which he gave up to King a short time before he left, and he took her off with the rest of his negroes."

Ewing v. Thompson, 13 Mo. 132, January 1850. Anderson, the slave of Ewing, " was by law subject to work on a certain road district . . About eleven o'clock in the forenoon of Saturday, the slave Anderson, as well as the other laborers, were duly discharged from said road, . . The road . . extends . . to the steam boat landing . . at said landing, on the evening of [Saturday] . . and about twilight, he and the slave of the appellee engaged in a quarrel and fight, which resulted in the death of the latter. Thompson sues Ewing for the recovery of the damages . . His declaration . . is conceived in analogy to actions brought against owners, for injuries done by their animals of a dangerous and mischievous disposition. . . introduced testimony conducing to show that the slave Anderson was of a dangerous and murderous disposition [when intoxicated]," [137] " this slave, when suffered to go at large, was in the habit of beating and wounding other slaves "

" Verdict and judgment for the plaintiff below [Thompson]." Judgment reversed: " We understand the slave to be a responsible moral agent, amenable, like his master to the laws of God and man for his own transgressions . . that the law which regulates our dominion over the brute creation is not the one which governs the relation of master and slave . . that our municipal laws have not given to the master that absolute dominion over his slave which would enable him absolutely to prevent the commission of crime, and that the moral discipline which the law has entrusted to him, with a view to the prevention or reformation of bad habits, is but a modification or perhaps extension of that authority which is given to

the parent over the child, or the master over his servant. . . [138] He is not entrusted by our laws with the power of life and death, nor can he confine a slave as he might a vicious beast." " The power of the master being limited, his responsibility is proportioned accordingly. It does not extend to the wilful and wanton aggressions of the slave except where the statute has expressly provided. . . [139] He could not be held responsible for such remote consequences as the murder of another slave, should such a consequence be traced to a laxity of discipline not tolerated by our laws." [Napton, J.]

Peter (of color) v. King, 13 Mo. 143, January 1850. [144] " The plaintiff, an emancipated slave under the will of Jesse Evans, deceased, brought a suit . . *in forma pauperis,* against . . the administrator of Evans, to recover the value of certain alleged services performed by Peter, during the contest about Evan's will." " The account is for boarding, clothing, etc., of certain slaves said to belong to the estate." Writ dismissed.

Smith v. Newby, 13 Mo. 159, January 1850. Action of detinue to remove two negro boys. [160] " Taylor, in his life time, in . . Virginia, owned a negro woman named Louisa. About the spring of 1841, this negro woman disappeared—supposed . . to have run away with a strange white man, who had been in the neighborhood, and who disappeared about the same time. In the month of March, 1841, one Burgess, a resident of . . Missouri, and then on a visit to Kentucky, near the line which separates that State from Virginia, hearing that one Gowens, who was largely indebted to him, was just across the line, in Virginia, with a negro boy in his possession, determined to go and get the boy from Gowens, in the way of his demand, by the best means he could. He went across, found Gowens and the boy, and succeeded in inducing him to let him have the boy in the way of his indebtedness, at the extravagant price of $800. This took place from the 15th to the 20th March, 1841, . . Burgess immediately returned to Kentucky, and thence forthwith to Missouri, taking with him the negro. On his way to Missouri, he discovered the negro was a woman in man's clothing. After his return to Missouri, Burgess sold the negro woman to one Allen; Allen sold her to Tetherwoods, and he sold her to defendant. The two boys sued for are the children of Louisa, born after she came to Missouri." Taylor died in February 1846. " Suit was commenced 8th April, 1847. It was testified that it was not known where said negroes were until after the death of Taylor."

Held: the defendant [Newby] is protected by the statute of limitations.

Hamilton v. Lewis, 13 Mo. 184, January 1850. Taylor's will, 1842: [185] " I . . bequeath to my grand son . . one negro boy named Clark, (son of Nell) to be given into his possession when he arrives at the age of twenty-one years, . . There are yet three negroes not disposed of, to wit.: James, Nell and Tom. It is my will that they be hired by my executor, in the county of Ray, either at public auction or privately, . . every year . . until my grand son comes to the age of twenty-one years old; then it is my will that they be sold, and they are to be permitted to choose any master who will give the appraised value of them on that day, if any be there, and if not they are to be sold to the highest bidder,"

Major v. Hill, 13 Mo. 247, March 1850. In April 1842 the two negroes, Jackson and Henry, were sold at the constable's sale for $500. The constable [249] "says one 18 or 19 years old, and was worth $500; and the other $400."

Martin v. Henley, 13 Mo. 312, March 1850. "Mrs. Williams testified . . that the negro boy . . was the child of a negro girl named Eliza, a slave, which she had given to [her grandchild] . . Ann Elizabeth, when she . . was a little girl, in Virginia; . . when Walter Williams [the father of Ann Elizabeth] left Virginia [in 1829] she told him that he might bring Eliza . . to nurse one of his children, but upon condition that Ann Elizabeth was to take her as soon as she was old enough to need her services,"

Keeton v. Spradling, 13 Mo. 321, March 1850. Keeton came to Missouri [322] "some time in 1825, leaving his family . . in Tennessee, but bringing with him about twenty slaves." "some of whom he employed in mining for lead and others he hired out." [1]

Skinner v. Hughes, 13 Mo. 440, July 1850. [441] "plaintiff [Mrs. Hughes] was the owner of a slave, Willis, worth nine hundred dollars, and the defendants, Shepherd and Skinner, were the owners of a store in which they sold intoxicating liquors not less than a quart, and a mill, and Baker was their clerk. In January, 1849, the boy came to the mill with grain to be ground, and while there went to the store with a bottle, bought a quart of whisky, carried it to the mill and there drank it with the white hands about the mill—got drunk, started home about sun-down and was found early next morning lying on his face in the road not far from the mill speechless, his jaws locked and frozen nearly to death. He was taken to the mill immediately, received immediate medical attendance, lived 8 or 9 days and died. The whisky was sold to the boy without any permit from his owner, and neither Skinner nor Shepherd were present at the time. The clerk (Baker) was in the habit of selling whisky to the slaves without the permission of the owners and Shepherd was frequently present when this was done and made no objection. . . [442] The jury found a verdict for $900, for which the plaintiff had judgment," Affirmed.

French v. Campbell, 13 Mo. 485, July 1850. In 1821 Thomas Hardeman owned [489] "amongst other negroes, a family consisting of Manuel, his wife Harriet, and their two children, Julia Ann and Washington. That he had promised Manuel that he would not separate him from his family," He made a will giving these negroes to his son John, in trust for his daughter, Mrs. Campbell, but [492] "had not intended to give the possession of these negroes to Campbell, but that in the month of November, 1821, the complainants [Mr. and Mrs. Campbell] and their family came by his home on their way moving from Boone to Clay county, when John Hardeman, in view of their condition, suggested to him (respondent) the propriety of lending them Manuel and his family, in order to assist them in making a new farm in Clay—suggesting at the same time that it would be the means of ascertaining whether the negroes would be content

[1] Keeton *v.* Keeton, p. 193, *infra.*

and satisfied to remain with them, as well as to enable him to judge whether the complainants were worthy of his bounty; and that being thus influenced, he loaned the negroes to complainants, and took Campbell's bond for their return to him whenever required by John Hardeman," In June 1822 Mrs. Campbell wrote her father: [495] "I very much fear that I shall not by any means be able to keep the negroes that it has been your pleasure to give me, as they both fight Mr. Campbell and me to the very last struggle. Manuel has bit Mr. Campbell's thumb, and Harriet has bit my thumb, and they say and bitterly swear that they never will stay with me. They both have threatened to take lives, and Manuel has made the attempt, and has once carried his butcher knife with the intent of murder, as he himself said. And as you, father, is getting old, and life is uncertain, the probability is that they may have to be sold, and if so, I wish them to be sold in your time, etc., and then you can, with your pleasure, and also your will, give to me in money, or in other negroes, such a portion as you think proper to do, and then I shall be satisfied;" In August 1822 [490] "Manuel ran off from them and went and communicated his dissatisfaction to John Hardeman, who thereupon" wrote to Campbell: [494] "it is certain you cannot derive any benefit from the negroes, and at the same time carry into effect my father's design in giving their use to my sister Sophia. His object was to have them kept together, and well treated, old and young. There now seems to be such a difference between you and them that they will not render you any service. It is therefore necessary for me to discharge my duty, and carry the trust into effect, by taking the negroes and hiring them out, and whatever sum of money their hire will produce, after having them well fed and clothed, and all expenses deducted, shall be paid to Sophia, as it shall from time to time be received by me. They will be put in a place where they can be together, and be well fed and well clothed in the first place, as this was the design and intention of my father in the origin of the trust." A few weeks later Manuel and his family were returned to Thomas Hardeman, who gave [493] "the property in question to other persons, in Tennessee." Bill of the Campbells dismissed.

Cathcart v. Foulke, 13 Mo. 561, October 1850. [563] "the said negro man went upon the said boat and served in the capacity of cook, and while thus employed he fell through a hole in the floor of the cook room of said boat into the Mississippi river and was drowned."

Judgment against Cathcart, part owner of the boat. In 1847 "by virtue of an execution issued on the said judgment" he paid and satisfied "said execution, amounting to the sum of $766.01, being the amount of said judgment, interests and costs,"

Landes v. Brant, 10 Howard 348, December 1850. [350] "Clamorgan, assignee of Esther, mulatress, assignee of Joseph Brazeau, assignee of Gabriel Dodier, claiming one by 40 arpents of land, . . adjoining the town of St. Louis, produces . . a transfer from . . Dodier and . . Brazeau to Esther, . . 1793: from Esther to claimant, . . 1794." Will of Clamorgan, 1814: [351] "he devised all his estate to his natural children, St. Eutrope, Apoline, Cyprien Martial, and Maximin," [354]

" There were also in evidence three deeds of emancipation from Jacques Clamorgan to his four children, . . all dated 16th September, 1809, in which it was recited that St. Eutrope was born in April, 1799; Apoline on the 7th of February, 1803 [*sic*]; Cyprien Martial on the 10th of June, 1803 [*sic*]; and Maximin in the beginning of the year 1807."

Peake v. Redd, 14 Mo. 79, March 1851. In 1839 [82] " commissioners estimated the value of the slaves at $5000, and allotted one-third to the widow as her dower." In 1841 commissioners appointed to make partition " reported the slaves not divisible in kind."

Beardslee v. Perry, 14 Mo. 88, March 1851.[1] [92] "At first it was her impression that the boy had not ran away; that he was somewhere about and would return again. She had owned the boy but a short time, and had herself hired him to the *Ben Franklin* [before he was hired to the *Harry of the West*]. The boy had never hired his own time. Miss Smith, through me, purchased said boy at New Orleans from a trader of negroes from Kentucky." Judgment for Perry affirmed: [94] " The plaintiffs must show a *prima facie* case [of negligence] at least."

Coleman v. State, 14 Mo. 157, March 1851. [158] " The defendant was a free negro and indicted for leasing a house to be kept as a bawdy-house. The witness Coleman co-habited with her as man and wife, and the witness was a slave. The court refused to permit him to testify. . . [159] Judgment reversed and cause remanded." " We know that marriages *de facto* exist among this class of persons, but as to the policy of applying the rules of evidence which by the law regulates the relation of husband and wife to co-habitations of this character, it may be safely left with the legislature." [Napton, J.]

Lee v. Sparr, 14 Mo. 370, March 1851. Action [371] " under the 31st section of the 1st article of the act ' concerning slaves,'[2] . . [Lee] was the owner of the slave, . . [and Sparr] [372] was one of the owners of the *Bates.* The witness, who was the plaintiff's agent for hiring his slaves also testified, that . . 1848, . . he missed the slave in question, and hearing that he was on board the *Bates,* a packet boat running between St. Louis and Keokuk, repaired to the wharf, found the boat about starting with the slave on board, and took him off. The clerk of the boat told witness that the slave had been thus on board the boat for two trips, and offered to pay the hire, which witness declined to receive. . . that the slave was worth six hundred dollars; . . that he had never authorized the hiring of him on said boat, . . the court . . instructed the jury that the plaintiff could not recover in this action."

Held: " a mere part owner, . . who was absent, and who it is not pretended either knew of, counseled or consented to the commission of the act complained of, . . should not be rendered liable beyond the actual damage sustained, and for that, of course, in an action different from the present one." [Birch, J.]

[1] See Perry *v.* Beardslee, p. 172, *supra.*
[2] Rev. Code 1018.

Swearingen v. Taylor, 14 Mo. 391, March 1851. Will of William Christy, dated 1839, " authorized his executors to sell any of the slaves at the request of his wife and supply their places with others more suitable,"

Lee v. Sprague, 14 Mo. 476, March 1851. [477] " The plaintiff [Sarah Lee], who is an infant of color, brought a suit for freedom," In 1833 William W. Waite of Baltimore, Maryland, sold Sarah Lee's mother to John Hunter for one hundred dollars, " to serve ten years from the 19th of October, 1833, and no longer; . . ' then the said slave shall go free, and be manumitted forever.' Hunter sold the mother of the plaintiff to Mosher and Mosher to Blatchfield. While Blatchfield thus owned her, being before her time of service expired, she gave birth to the plaintiff," whom Blatchfield sold to Sprague.

Judgment for the defendant affirmed: Hunter and his assigns had " an absolute property in the mother of the plaintiff during the period covered by her birth, and that the mother was, during that period, as much a slave as though no future manumission had been arranged or provided in her behalf," The plaintiff is not exempted from the operation of a rule which so early and so naturally glided into our jurisprudence from that of Justinian, . . that a person born of a slave is a slave." [Birch, J.]

Kanada v. North, 14 Mo. 615, March 1851. [616] " North furnished Kanada . . [617] eight hundred and fifty dollars [for the purpose of purchasing negroes for him]. Shortly after . . Kanada purchased two negroes of one Bennet—a man and a woman, one of them of doubtful health, and both somewhat older than North was in the habit of purchasing for the southern market—for the aggregate sum of five hundred and seventy-five dollars. These negroes he afterwards . . passed over to North for the sum of eight hundred and fifty dollars. The finding of the jury was for two hundred and seventy-five dollars . . [618] the negro man ranaway from Kanada's the night after he was sold," Judgment affirmed.

Harney v. Dutcher, 15 Mo. 89, October 1851. In 1849 a slave, Nat, was hired for $84 for one year. [90] " We are to feed and clothe said slave and afford and furnish him medical attendance during the whole of said term; not remove him from the county of St. Louis during said period and to return said slave, if alive " at the expiration of the term. The slave ran away. He was worth $700.

Spraddling v. Keeton, 15 Mo. 118, October 1851. See Keeton *v.* Spradling, p. 180, *supra;* and Keeton *v.* Keeton, p. 193, *infra.*

Garneau v. Herthel, 15 Mo. 191, October 1851. Held: [193] "A person who employs the slave of another, without the master's permission, to employ labor for him which exposes the life of the slave to danger, must bear the consequences of such engagement; and if the slave is killed by the effects of the business or employment . . the person so employing him must pay his value to the master." [Gamble, J.]

Dugans v. Livingston, 15 Mo. 230, October 1851. Will of Stephen Dugans, who died in 1843: [233] "All the balance of my perishable property, excepting my negro boy Jack, will have to be sold according to law, and the proceeds . . equally divided amongst my four first mentioned children," Before his death, " he acquired a negro woman and child, which, with the boy Jack, he sold. He then purchased another woman and child; that he sold the woman and kept the child, and this child is the boy, Toney, sued for."

Held: [234] " the testator supposed these words ' perishable property ' did include and embrace his negroes, for he expressly excepts ' Jack,' the only slave he then owned,"

Davis v. Foster, 15 Mo. 395, January 1852. [396] " her father gave her Dice; . . she sold her, and that the negroes sued for still remained in her possession and are the children of Dice."

Yeldell v. Stemmons, 15 Mo. 443, January 1852. [445] " action of replevin . . for three slaves and a ferry boat,"

Dennis v. Ashley, 15 Mo. 453, January 1852. " in the fore part of the year, 1847, . . Ashley left said negro slave Harriett with . . Curl, in the city of St. Louis, to be by him sold . . Curl followed the business of selling negroes in St. Louis for every body who chose to employ him for said purpose; . . that said negro was left . . without any direction from said Ashley as to whether he should or should not warrant the soundness . . Curl, . . August, 1847, as such agent of Ashley, sold said negro woman to said Dennis for $410, (which was at the time a fair price for said negro if sound and healthy) and gave Dennis a written warranty, both as to the soundness and title of said negro, in the name of Ashley, his principal. That he offered to sell said negro to Dennis for twenty dollars less if he would purchase without warranty, but that Dennis refused to purchase at all without warranty. . . Dennis, after discovering . . unsoundness, had procured said negro to be sold after having given public notice of said sale, and the highest price she would bring was $150."

Held: Curl [458] " was acting fully within the line of his usual employment in . . giving a warranty of the slave, as to her soundness . . and his acts are binding on his principal."

Robinson v. Robards, 15 Mo. 459, January 1852. [462] " he owned ten slaves, not valuable, being mostly children, . . 1848, he executed to Wm. A. Robards, a bill of sale for eight slaves, a man and his wife and six of their children, and also a bill of sale to his son John for a boy Martin and a man Sharper: that he was indebted to his son William in the sum of $600, which he was unable to pay without a sale of a portion of his slaves, and being unwilling to separate a family, he induced his son William to take it and pay him the balance in money: . . that the man slave he sold to his son John was of little value, being badly ruptured:"

State v. Swadley, 15 Mo. 515, January 1852. [516] " The indictment charges that the defendant ' did . . unlawfully sell to a negro man, a slave . . one pint of whiskey of the value of ten cents, without . . a written permit from the owner, overseer of said slave or any one having

legal authority over said slave authorizing said sale;'[1] The defendant . . plead guilty. The court assessed his fine to twenty dollars"

Scott (a man of color) v. Emerson,[2] 15 Mo. 576, March 1852. [582] "This was an action instituted by Dred Scott against Irone [*sic*] Emerson, the wife and administratrix of Dr. John Emerson, to try his right to freedom. His claim is based upon the fact that his late master held him in servitude in the State of Illinois, and also in that territory ceded by France to the United States, under the name of Louisiana, which lies north of 36 degrees 30 minutes, north latitude, not included within the limits of the State of Missouri. It appears that his late master was a surgeon in the army of the United States, and during his continuance in the service, was stationed at Rock Island, a military post in the State of Illinois, and at Fort Snelling, also a military post in the territory of the United States, above described, at both of which places Scott was detained in servitude—at one place, from the year 1834, until April or May, 1836; at the other from the period last mentioned, until the year 1838. The jury was instructed, in effect, that if such were the facts, they would find for Scott. He, accordingly, obtained a verdict. The defendant moved for a new trial on the ground of misdirection by the court, which being denied to her, she sued out this writ of error."

Judgment reversed and the cause remanded: [583] "No State is bound to carry into effect enactments conceived in a spirit hostile to that which pervades her own laws. . . [584] Some of our old cases say, that a hiring for two days would be a violation of the constitution of Illinois and entitle the slave to his freedom. . . [585] Laws operate only within the territory of the State for which they are made, and by enforcing them here, we, contrary to all principle, give them an extraterritorial effect. . . There is no ground to presume or to impute any volition to Dr. Emerson, that his slave should have his freedom. He was ordered . . to the posts . . In States and Kingdoms in which slavery is the least countenanced, and where there is a constant struggle against its existence, it is admitted law, that if a slave accompanies his master to a country in which slavery is prohibited, and remains there a length of time, if during his continuance in such country there is no act of manumission decreed by its courts, and he afterwards returns to his master's domicil, where slavery prevails, he has no right to maintain a suit founded upon a claim of permanent freedom.[3] This is the law of England, where it is said her air is too pure for a slave to breathe in, and that no sooner does he touch her soil than his shackles fall from him.[4] . . [586] Times now are not as they were when the former decisions on this subject were made. Since then not only individuals but States have been possessed with a dark and fell spirit in relation to slavery, whose gratification is sought in the pursuit of measures, whose inevitable consequence must be the overthrow and destruction of our government. Under such circumstances it does not behoove the State

[1] Digest of 1845, p. 1018, sect. 33.
[2] See Emmerson *v.* Harriet, p. 175, *supra*; same *v.* Dred Scott, *ibid.*
[3] The Slave Grace, vol. I., p. 34, of this series.
[4] See Introduction to the English cases, vol. I., pp. 1-6, of this series.

of Missouri to show the least countenance to any measure which might gratify this spirit. She is willing to assume her full responsibility for the existence of slavery within her limits, nor does she seek to share or divide it with others. Although we may, for our own sakes, regret that the avarice and hard-heartedness of the progenitors of those who are now so sensitive on the subject, ever introduced the institution among us, yet we will not go to them to learn law, morality or religion on the subject. As to the consequences of slavery, they are much more hurtful to the master than the slave. There is no comparison between the slave in the United States and the cruel, uncivilized negro in Africa. When the condition of our slaves is contrasted with the state of their miserable race in Africa; when their civilization, intelligence and instruction in religious truths are considered, and the means now employed to restore them to the country from which they have been torn, bearing with them the blessings of civilized life, we are almost persuaded, that the introduction of slavery amongst us was, in the providences of God, who makes the evil passions of men subservient to his own glory; a means of placing that unhappy race within the pale of civilized nations." [Scott, J.] Gamble, J., dissented.

Calvert v. Steamboat Timoleon, 15 Mo. 595, March 1852. [597] "action under the statute[1] . . for transporting [in 1849] from St. Louis, a slave, . . to the State of Illinois, without the consent of his master, whereby he was lost.[2] The defence was, that the slave was entitled to his freedom, and that he was permitted to go about and act as a free person. . . the mother of Carter, the slave in controversy, was detained in servitude in the territory (now the State of Illinois,) from the year 1812 to the latter part of the year 1818, by her master, who afterwards moved to this State, where, in the year 1824, Carter was born. This evidence was excluded by the court, . . The plaintiff obtained a verdict,"

Judgment affirmed: "The case of Dred Scott *vs.* Emerson,[3] decided at this term of the court, shows, that the facts offered in evidence, would not entitle the mother of Carter to her freedom. The case of Chouteau and Keizer *vs.* Hope,[4] cannot be sustained, to the length, that the right of one detained in slavery, who has never been actually free, may be asserted in a collateral proceeding. . . this is a personal privilege, and so long as he acquiesces in his condition, another cannot litigate his right to freedom." [Scott, J.]

Moore v. Insurance Co., 16 Mo. 98, March 1852. [100] "This is an action upon an open policy, to recover the value of a slave, who fell overboard and was drowned, during the voyage, without any disaster happening to the boat, or any unusual occurrence causing him to fall overboard. The policy covered such shipments as might be endorsed upon it. There were several shipments of negroes and horses endorsed upon the policy, the first of which had this memorandum attached to it: 'The horses and

[1] Rev. Stat. 1018.
[2] See Calvert *v.* Rider, p. 191, *infra.*
[3] P. 185, *supra.*
[4] P. 160, *supra.*

negroes entered above, are only insured against the dangers incident to navigation, drowning, blowing up, etc., but not against leaving the service of the assured, nor against death by ordinary sickness; they are not to be manacled or handcuffed, so as to prevent them from swimming.' The endorsement of negroes, including the one lost, has this memorandum attached to it: 'The said negroes only insured against the dangers incident to navigation, such as blowing up, drowning,' etc."

Judgment for the plaintiff affirmed: [101] "The company has agreed that drowning, happen as it may, is a loss for which the assured shall be indemnified."

McDermott v. Barnum, 16 Mo. 114, March 1852. Rogers and Company sold to McDermott, in January 1842, [115] "four negroes (among them Austin) for $2000, . . the negroes were present at the sale, . . and went to work for him [on the James River Canal in Virginia, McDermott and the former owners being contractors on the canal]: . . The negroes remained . . about two weeks in Virginia, and until they were sent off in charge of Janney . . to carry to Montgomery, Alabama, to sell, and to remit the proceeds to the plaintiff. . . Hugh Rogers overtook him in North Carolina, . . [116] Not selling all the negroes at Montgomery, because the prices offered did not suit him, and hoping to get better prices, he sent the rest by J. C. Rogers to Hugh Rogers at Mobile, with directions to sell . . and remit the proceeds to McDermott. Among them was Austin. . . Hugh Rogers at Mobile had blooded stock for sale, and with the stock went to New Orleans and thence to St. Louis, arriving here 10th of April, 1842; . . Austin attended on the horses. . . Hugh Rogers claimed Austin as his property; hired him out and offered to sell him; he also used him in a stable which he kept. The negro was subsequently, in the fall of 1843, taken on attachment, sold and purchased by Barnum and Moreland."

Garth v. Everett, 16 Mo. 490, July 1852. [491] "an action for a slave, Jacob, a child. . . Garth brought an action of trespass against Everett, for taking and converting to his use a negro woman slave, the property of Garth" and "recovered damages equivalent to the value of the slave. There was an execution on this judgment, which was satisfied. During the pendency of the action . . the woman slave . . was delivered of a child, and Garth has now brought this suit to recover the value of the child which was taken and converted by Everett to his use. The slave was estimated to be worth $150."

Judgment for the plaintiff reversed and cause remanded: in assessing damages [493] "the jury may, at their discretion, award them according to the value of the property at its conversion, or at any subsequent time."

Hays v. Bell, 16 Mo. 496, July 1852. [498] "I, the said Williams, have this day [April 13, 1841] hired to . . Hays . . a negro man, named Peyton, for which said . . Hays . . accommodate said Williams with the sum of seven hundred and fifty dollars, for the use of which, said negro is to serve the said . . Hays . . for the term of twelve months from this date; said . . Hays . . further agree to furnish said negro

with summer and winter clothing." [499] "Peyton served Carson and Hays for seven or eight years; that he was an excellent hand, and that such hands were worth one hundred and fifty dollars per year, and that hemp hands in the year 1842, hired from $150 to $200 per year."

Giboney v. Bedford, 17 Mo. 56, October 1852. [57] "The court found . . 'that the said negro boy [in 1850] . . was worth five hundred and fifty dollars;'"

Kingsbury v. Lane, 17 Mo. 261, October 1852. "Cabanné married in North Carolina, and brought the said slaves along with his wife, home to Missouri,"

Carter v. Feland, 17 Mo. 383, January 1853. In 1831 or 1832 James Carter was given possession of the slave Charlotte and her child Winny, [386] "to keep for plaintiff [his brother] until his return, . . but if he never returned, the said negroes were to become the property of said James Carter; that plaintiff then left the state of Tennessee, and did not return, until after the negro Winny was brought to Missouri" in 1844, where she was sold in the same year for $400.

Sylvia (a slave) v. Kirby, 17 Mo. 434, January 1853. "It was alleged in the petition that the claimant, Sylvia, a free person of color, was held in slavery against her will by Joel Kirby; that in the year 1834, she was unlawfully taken by Kirby, her master, a citizen of the United States, as a slave, into the territory ceded by France to the United States, under the name of Louisiana, which lies north of thirty-six degrees thirty minutes north latitude, and not included within the limits of the state contemplated by the act of congress entitled 'an act to authorize the people of Missouri territory to form a constitution and state government, approved 6th March, 1820;' that said Kirby went into the said territory with the intention of residing there, and held the claimant within it as a slave for at least one year, who was guilty of no crime and had not been convicted of any offence, but was detained solely on the ground that she was a slave; that this was in violation of the act of congress above referred to, by reason whereof, she became entitled to her freedom."

Judgment for the respondent [Kirby] affirmed: Scott *v.* Emerson[1] "is decisive of this." After returning with her master to Missouri, Sylvia cannot maintain a suit for freedom in the Missouri courts.

Caldwell v. Dickson, 17 Mo. 575, March 1853. [576] "Caldwell, after insulting the family of Dickson . . by ordering away a servant in their employ, [whom they had hired from Caldwell] . . should not be permitted to come into a court of justice, apportion his contract, made necessary by his own wrong, and award to himself the compensation he deems just. Many persons hire slaves in preference to other laborers, because they believe the contract confers an absolute right to their services during its continuation, and that if the owner takes away his slave, without just cause, he will forfeit the hire for the whole period of the contract. . . [577] Of course the master should protect his slave against the inhumanity

[1] P. 185, *supra.*

of those to whom he may be hired . . and take his slave from the employment of those who are guilty of such conduct." [1] [Scott, J.]

Davis v. Evans, 18 Mo. 249, March 1853. Ranney [250] "testified that he purchased Margaret [the plaintiff] in 1835, and the girl, Patsey, was born soon after; that on the 2d day of March, 1835, he executed a bill of sale of both mother and child to Augustus H. Evans; that the child, Patsey, had been in possession of the plaintiff ever since her birth, being now about seventeen years old; . . that Margaret raised her, supported her, fed and clothed her at her own expense; that about the year 1845, he heard Evans say he claimed her and ought to have possession of her, but never knew of his interfering to claim or take Patsey away from the plaintiff until 1850. . . Margaret was emancipated by Oliver Bennet, in 1842. Bennet testified that the girl, Patsey, had been in the possession of the plaintiff from 1840 to 1851; that he had her in his employ some ten years ago, and some five or six years ago hired her to go east; that a year ago Margaret came to him to hire Patsey to go east; that he always paid the plaintiff for Patsey's services, . . [251] Dr. Martin testified that he attended Patsey when she was sick in 1848, and was paid by the plaintiff for his services."

Held: [252] "The circumstances, as detailed in evidence, are such as forbid all idea of an adverse possession of the slave in controversy by the appellant. It would be hard, if Evans' humanity, in permitting a mother to retain her infant child, should be tortured into an abandonment of his claim of right; . . In my opinion, a negro, under our laws, cannot hold slaves. It is against their policy, and in its tendency is subversive of all the police laws for the government of slaves. The other judges concurring, the judgment [for Evans] will be affirmed. [Scott, J.] Gamble and Ryland, Judges. We do not concur in the opinion, that a free negro may not legally hold slaves."

Stone v. Stone, 18 Mo. 389, July 1853. Suit "to recover her dower in certain slaves which had belonged to her deceased husband . . in his lifetime." A few days before his death he [390] "had executed a conveyance of them . . in trust for the use and benefit of . . his children by the former marriage, through whose mother they had come to him, . . at the time of executing the same, he said he was convinced he had the consumption and could not live long." Judgment for the defendant reversed.

Stearns v. McCullough, 18 Mo. 411, July 1853. [414] "In October, 1851, McCullough sold a negro girl to Stearns for $500, with a warranty of soundness. Soon after the sale she was known to be unwell, and in May following died. . . [415] the slave, for several months after the sale, was engaged attending to the ordinary duties of a domestic servant." Held: the measure of damages is "the difference between the value of the slave, if sound, and her value with the disease or unsoundness" at the time of the sale.

Roberts v. Stoner, 18 Mo. 481, October 1853. A portion of the slaves of which Roberts was possessed at his death in May 1835 was set apart

[1] See same *v.* same, p. 205, *infra.*

to his widow as her dower. Her second husband, [482] " Stoner, although he only had an estate during the life of his wife, was treating the slaves as his absolute property, . . that two of them had been sold and removed beyond the state " Held: [484] " he should have been required to give security for their forthcoming at the termination of his estate."

State v. Joe (a slave), 19 Mo. 223, October 1853. " The affidavit charges that the slave stole a fiddle of the value of one dollar, and a whip, of the value of one dollar, and some clothing, with many other articles of merchandise." He " was tried and convicted before a justice of the peace, of larceny, and sentenced to be whipped. From this proceeding he appealed " Appeal dismissed.

State v. Henke, 19 Mo. 225, October 1853. [226] " The defendants were indicted . . for dealing with a slave." They had hired Anderson, the slave of Wilkinson, " to maul rails, and did . . pay said slave one dollar and eighty cents for said mauling . . and without the consent in writing of the master, owner or overseer of said slave first obtained,"

Held: " ' The mauling of rails ' . . is not the commodity contemplated by the legislature, nor is it embraced by the statute.[1] . . [227] It does not include the manual labor of the slave, however wrong it may be [to] hire or to induce a slave to work or labor for a person without the master or owner's knowledge and permission."

State v. Chunn, 19 Mo. 233, October 1853. " sale of a negro woman . . for $600,"

State v. Anderson, 19 Mo. 241, October 1853. "Anderson, a negro slave, was indicted for an attempted rape upon a white female. . . At the close of the testimony for the prosecution, it had been proved that the defendent was a slave, but no witness had testified that he was a negro man, or that the prosecutrix was a white female. Two negroes were called as witnesses by the defendant. The State objected to the competency . . [242] on the ground that they were negroes, and one of them was a slave. . . overruled, . . The following instructions . . were given . . ' If the jury believe, from seeing the witness, Rebecca, in court, upon the witness stand, that she is a white female, or from seeing the defendant in court, or from the testimony of his being a slave, that he is a negro, these facts are sufficient to support the allegation . . in relation to the color, sex and race . . you cannot acquit the defendant, because you may believe the witness, Rebecca, is of bad character for virtue, or that she associated with negroes.' . . The jury returned a verdict of ' guilty ' . . he was sentenced to be castrated," Judgment affirmed.

Austin v. Watts, 19 Mo. 293, January 1854. Austin died in 1839 and " three slaves valued at $950," were " delivered over to the widow." [297] " one, a woman of forty years, with her child of some four years old; the third, a boy, of about fifteen years of age," [294] "About the year 1840, G. Patrick purchased of the widow two of the slaves, and in 1841, S. C. Major purchased the third, and sold her to some person . . who removed her out of the state."

[1] Rev. Code (1845), p. 1018, sect. 33.

Steel v. Brown, 19 Mo. 312, January 1854. Bill of sale: "January 6, 1852. I . . have this day bargained and sold . . a negro woman . . for a slave during life, aged forty-one or two years, stout and healthy, for the sum of three hundred dollars," Held: the words "stout and healthy" constituted a warranty of soundness.

Woodson v. Pool, 19 Mo. 340, January 1854. In 1845 Pool owned a negro woman and [341] "her child, two or three years old," He "sold the woman for $400."

McCarty v. Rountree, 19 Mo. 345, January 1854. "Robert Noll, in the state of Tennessee, in 1836, gave the slave Mary to the plaintiff, Mary Ann, his grand-daughter, who was then an infant, residing in the family of her father," who shortly afterwards removed with his family to Missouri, and in 1838 sold the slave without his daughter's consent. Judgment in favor of the defendant reversed.

State v. Leapfoot, 19 Mo. 375, January 1854. Indictment [376] "for selling spiritous liquors to a slave, . . the jury found the defendant not guilty."

State v. Soot, 19 Mo. 379, January 1854. [380] "indictment of a white person for being found at an unlawful meeting of slaves" [379] "the meeting was at the house of Thomas Plemmons, in the night of a particular day, and that it continued for two hours."

Held: [380] "The present indictment is defective, in not alleging that the meeting was an unlawful meeting, in the language of the twenty-fourth section" of the act concerning slaves.[1]

Bowen v. Bower, 19 Mo. 399, March 1854. [400] "The negroes, at the time of the death of the testatrix, were in Tennessee, and were subsequently brought to Missouri."

Gregory v. Cowgill, 19 Mo. 415, March 1854. Robert Sinclair devised all of his estate to his wife [416] "with the exception of Eden, his black man, whom, for his fidelity, he emancipated."

Halbert v. Halbert, 19 Mo. 453, March 1854. "He made a will . . giving to . . his widow, a female slave," Held: [454] "The bequest of the slave does not . . bar her dower in the real estate,"

Polk v. Allen, 19 Mo. 467, March 1854. Action to recover damages for the conversion of a slave. Held: the measure of damages is the value with interest. The plaintiff cannot recover the value of the hire by way of damages.

Livingston v. Dugan, 20 Mo. 102, October 1854. Action "to recover money paid for medical attendance upon a slave, and for services in nursing."

Calvert v. Rider, 20 Mo. 146, October 1854. "an action against Rider, the master, and Allen, the clerk, of the steamboat *Timoleon,* to recover damages for a trespass in transporting a slave of the plaintiff out of the state of Missouri, whereby the slave was lost. . . In the fall of 1849, the

[1] Rev. Code 1017.

plaintiff slave came on board the steamboat, took passage for some point on the Illinois river, paid his passage money to Allen, the clerk, and went up the river to the point of his destination. . . Before this suit was begun, the plaintiff brought a suit *in rem* against the steamboat for taking the slave, and recovered judgment for his value,[1] which had been satisfied. . . [147] The court below gave judgment for the plaintiff for the value of the slave,"

Affirmed: [148] "The recovery against the steamboat was no bar to the recovery against those who committed the trespass," "The statute [2] was designed to make those who are engaged in the navigation of the waters of our state, and who have peculiar facilities for removing slaves, liable to a penalty for such removal in their vessels; while they remain liable, in common with all other persons, for damages occasioned by trespasses." [Gamble, J.]

West v. Cochran, 17 Howard 403, December 1854. Concession made June 10, 1794, to Joseph Brazeau: [409] "land . . bounded by the land granted to the free mulattress Esther." "The application of Esther . . was made October 2, 1793. She petitioned for a piece of land lying on the borders of the Mississippi; . . On the 3d October, 1793, the governor granted the land to Esther, . . On the 5th of October, 1793, the governor certifies that he had in person put Esther in possession of the land granted,"

Robinson v. Rice, 20 Mo. 229, January 1855. [230] "About 1836, Lowe sold and delivered Emily, [and her two children] Mary and Charity to . . Clendenin, for the sum of $650. Afterwards, Emily gave birth to Matthew and two other children. In 1842, Clendenin sold Emily and her two youngest children to one Overton. . . About 1849, William Morrison and his wife, Mary, daughter of . . [231] Clendenin, removed to Texas and took Charity with them,"

Held: [255] "Where the vendor is in possession of personal property, and sells it for full value, the law implies a warranty of title. Whether Lowe sold the slaves absolutely, or only his life estate in them, was a question to be determined by the evidence in the cause."

Fackler v. Chapman, 20 Mo. 249, January 1855. "Certain goods were stolen from the store of the plaintiff, one night in October, 1850. . . About two weeks after the larceny, the plaintiff received information which led him to go to the house of Davison, who had hired the slaves from their owner, the defendant, to make a search. . . Young accompanied him. They found a portion of the goods at the house of Davison, in a box under a bed in which the slave slept. The slaves stated where the other goods could be found, . . [250] McDearmon . . afterwards made search and found portions of the goods at the places specified. He found Mr. Palmer's negroes in possession of some of the goods, and Mr. Stanley's of others."

Held: [252] "If three slaves belonging to different masters unite in a theft of property of the value of one hundred dollars, each one of the

[1] Calvert *v.* Steamboat *Timoleon,* p. 186, *supra.*
[2] Rev. Code (1845), p. 1018, art. 1, sects. 31, 32.

slaves, in the judgment of the law, has stolen one hundred dollars' worth of property," and "the owner of one of the slaves will be liable for all the damages resulting from the wrong."[1] . . The declarations of the slaves, showing where the stolen property might be found, were evidence, in connection with proof that the property was found at the places mentioned by them."

Tally v. Thompson, 20 Mo. 277, January 1855. "Petition by Tally and wife to enjoin the sale under an execution against Tally, of a slave, given to Tally's wife upon her marriage." Judgment for Tally reversed.

Gibbons v. Gentry, 20 Mo. 468, March 1855. In 1829 Gibbons, then residing in Kentucky, executed a deed of trust, transferring eighteen slaves and their future increase. [469] "Gibbons remained in possession of the slaves after the execution of the deed, and in . . the same year, removed with them to . . Missouri."

Keeton v. Keeton, 20 Mo. 530, March 1855.[2] The slaves were sold in Tennessee [532] "by the administrator at public auction, for cash, . . 1830, [533] at the farm of John Keeton, . . It was in evidence that much dissatisfaction was expressed by the persons present, because the sale was for cash, instead of on the usual credit, and that many persons were prevented from bidding in consequence; that the terms were not known until the day; and that the slaves would have brought better prices if they had been sold on the usual terms. . . all of the slaves [but two] were bid off by William Keeton [the administrator], . . [who] not long afterwards removed a portion of them to Missouri," they had been removed previously, in 1824 or 1825, by John Keeton.

Kingsbury v. Lane, 21 Mo. 115, March 1855. [115] "an action of replevin . . for two negro women."

Halbert v. Halbert, 21 Mo. 277, July 1855. "action brought by James Halbert, in 1852, to recover a slave claimed by the defendants as belonging to the estate of Nathan Halbert, their intestate." Nathan was the son of James, and "the slave was given to him by his father, and remained in his possession up to the time of his death, some ten or fifteen years afterwards. . . [278] the plaintiff, upon the marriage of his children, put in their possession a slave, 'which was to be theirs upon the condition that they should have issue,' . . Nathan Halbert never had any children. . . [He] frequently complained that his father had not done right by him, in not giving him an absolute right to the slave." Held: the slave reverts to the donor.

Chiles v. Bartleson, 21 Mo. 344, July 1855. "I will . . unto my beloved wife . . my negro man, Charles, his wife, Clara, and their four children,"

Major v. Harrison, 21 Mo. 441, July 1855. Harrison hired a slave who [442] "shortly after Harrison took possession of him, . . from sickness, became unable to work and continued so until he died." "the slave

[1] Rev. Code (1845), art. 9, sect. 35, act concerning "crimes and punishments."
[2] See Keeton *v.* Spradling, p. 180, *supra.*

was well known to Harrison, and that the slave's wife belonged to and lived with him;"

State v. Harlow, 21 Mo. 446, July 1855. [450] "a negro man, (the ferryman,)"

Charlotte v. Chouteau,[1] 21 Mo. 590, October 1855. [591] "This was a suit by the plaintiff suing as a poor person to establish her right to freedom. It is averred in the petition for leave to sue, that the petitioner 'is entitled to freedom by being born of a negress named Rose, who herself was born at Montreal, in Canada; that about the year 1791, the said Rose was removed from Canada by a certain John Stock [*sic*], an Indian trader, to his trading post at Prairie du Chien, in the northwestern territory . . where she was detained by him as his slave until his death, some time in the year 1793; . . after the death of said Stock, she (Rose) was brought down to St. Louis by a certain Andrew Todd, a trader, who sold her as a slave to a Mr. Didier (a priest), . . and was afterwards sold by him . . to one Auguste Chouteau, . . [593] This case was previously on error,"[2] and the cause remanded. "The trial was had at the April term of the Circuit Court, for the year 1853." [591] "The plaintiff offered to read in evidence certain copies of papers found among the Spanish archives, . . copy of a bill of sale . . [592] executed by Andrew Todd . . to Mr. Didier, curate of the parish of St. Louis, of a negress named Rose, a slave, aged about twenty-seven, . . This conveyance was executed October 28th, 1795, before, and authenticated by Manuel Goring Moro, commandant of St. Louis. The second paper . . purported to be a copy of a conveyance of the same negress, Rose, and two infant children, made August 8, 1798, by said Didier to Auguste Chouteau, executed before, and authenticated by, Zenon Trudeau, lieutenant governor, etc., of Louisiana. This instrument of transfer purported to convey 'a negress named Rose, a native of Montreal, government of Canada, aged about thirty years,' . . the copies were rejected. . . [593] the plaintiff took a nonsuit, with leave to move to set aside the same . . The court refused to set aside the same, and the plaintiff brought the case to this court by writ of error." The counsel for Chouteau argued that it was immaterial whether slavery ever existed as a fact in Canada. [594] "We have no right to inquire whence the inhabitants of this country, under the Spanish government, acquired their slaves. It makes no difference, in point of law, whether they captured them in Canada or Africa. . . [595] That the slave or his ancestors were originally born free, in some country, is probably true in every instance."

Judgment in favor of Chouteau reversed, and the cause remanded, [598] "in order that the fact may be tried whether Rose was lawfully a slave in Canada." [595] "The copies of the archives, offered in evidence, should not have been excluded. . . [596] they would have showed that Rose, the ancestor of the plaintiff, was born in Canada, and consequently the question would have arisen whether slavery, in fact, did ever exist in that province, . . For if Rose . . was ever lawfully a slave, though the law afterwards gave her a right to freedom, yet, if she failed to assert it

[1] See same *v.* same, p. 174, *supra,* pp. 203, 216, *infra.*
[2] P. 174, *supra.*

there, and came with her master here, neither she nor her descendants will be permitted to assert it now. We cannot yield to the argument that the plaintiff has no right to go back and show that her mother was free, in order to establish her right to freedom, . . [597] Negroes were captured in Africa, brought to America and held in servitude. But when any of this race, who were then reduced to slavery, acquired their freedom under the laws of the country in which they lived, we are aware of no law by which they, except for crime, could be again subjected to bondage. The principle that there is no prescription against liberty, applied to them as well as to those of any other color." [Scott, J.] On the new trial in the lower court, there was a verdict in favor of Charlotte, and Chouteau appealed.[1]

Jones v. Covington, 22 Mo. 163, October 1855. Bill of sale, in 1838, to Nathan Jones, of " two black children, slaves, one called Jane, a girl, seven years old, the other called Lewis, a boy, four or five years old, for and in consideration of the services and parental affection existing towards Sarah Jones, wife of the aforesaid Nathan Jones," Howdeshell, the father of Sarah Jones, " retained possession of [his] said slave, Lewis, until his death in 1853," Held: [165] " The transaction . . was an imperfect gift, . . altogether ineffectual to effect a change of legal ownership,"

Pemberton v. Pemberton, 22 Mo. 338, January 1856. A verbal gift in 1842: [339] " I then gave Susy Pemberton, my daughter, Abigail and her increase for life, and at her death, for her and her increase to be equally divided among her children." " I sent Abigail the next morning to Susy Pemberton." Held: [340] " Such a gift needed no writing, . . The delivery of the possession to the mother, the tenant for life, was a delivery, *pro hac vice,* to her children."

West v. Forrest, 22 Mo. 344, January 1856. [345] " an action of assault and battery, . . The defendant denied having assaulted the said Alvira E. West [wife of Francis A. West], but stated that he was whipping a negro woman, whom he had hired of Francis A. West, and who had left his house and gone back to her master's house; that he went after her and found her, and ordered her to go back to his house; but, instead of obeying him, she attempted to go up the steps to the room where her mistress, Alvira B. [*sic*] West, was; that he commenced whipping her with a cowhide; that Mrs. West came down the steps, and the negro woman ran and caught her around the waist, and with great force conveyed her back into the house; that if Mrs West was struck, he did not know it, and did not intend it. . . [346] The evidence clearly shows a very severe beating of the negro woman; . . and . . leaves little doubt that the defendant did not stop his blows when the negro woman caught her mistress, but he continued to inflict them. One witness says, he saw his arm in motion up to the door as though he were striking. Is it strange that Mrs. West, the owner of the negro woman, should have been (even in her situation, some seven or eight days after child-birth) drawn to the steps of her door

[1] Charlotte v. Chouteau, p. 203, *infra.*

by the severe whipping and hallooing of her own servant?—the blows inflicted by the defendant, and the screams of the negro woman, raising the indignation of the witnesses who were a block and a half distant, and prompting them to stop work and go and see the cause of the terrible whipping and hallooing. No wonder, under such circumstances, that Mrs. West should step half way down the steps leading from her room to the yard; and no wonder she should by her presence try to save her servant. The plaintiff's case was clearly made out before the jury, and by their verdict of four hundred dollars damages they exhibited their sense of such a wrong, and properly vindicated the injuries and wounded feelings of the plaintiff." [Ryland, J.]

Morgan v. Cox, 22 Mo. 373, January 1856. [374] "The suit was for the negligent shooting of the plaintiff's slave, . . The defendant . . had been out with his gun, and was asked by the plaintiff to aid him and his servant in driving an unruly cow across the Osage river; and while doing so he punched the cow with his loaded gun, and in replacing it across his horse, the hammer struck the saddle as he supposed and caused it to fire, by which the plaintiff's servant was shot and killed." Verdict and judgment for the plaintiff.

Hudson v. Garner, 22 Mo. 423, January 1856. Action for slander. The slanderous words were in part: [424] "tell your mother [an unmarried woman] to send you down to the south, to see your father Tom (intending . . to charge the plaintiff with having been guilty of the crime of adultery with negro Tom). . . Damn your black soul (speaking to plaintiff's son John); . . you'll get to the south directly to your father; any how, Tom is your father." "Upon the trial, the jury found the defendants guilty, and assessed the plaintiff's damages at the sum of three thousand dollars." Motion for new trial overruled. Affirmed.

Phillips v. Hunter, 22 Mo. 485, March 1856. A negro boy, aged about sixteen years, was sold for five hundred dollars, in January 1851.

Boggs v. Lynch, 22 Mo. 563, March 1856. [564] "a negro servant, then in the employment . . of defendants [keepers of a livery stable], . . engaged in driving a carriage and horses of defendants,"

Lovelace v. Stewart, 23 Mo. 384, March 1856. In 1854 "the plaintiff was of opinion that she had only a dower title, and would take $1200 for the woman and child." Her son told Stewart he [385] "would procure the relinquishment of the heirs . . He said then he would give my mother $1000 for the negroes. . . and would give me $100 to warrant the title against the children."

Barksdale v. Appleberry, 23 Mo. 389, October 1856. The defendant [390] "says the slave belonged to his father's estate, and . . was in possession of . . the mother of plaintiff, and of defendant, as dower property . . when their mother moved to this state, she left the slave with the plaintiff in Virginia, as a loan . . that said slave ran away . . 1850, and was taken up as a runaway in . . Virginia, and put into jail, where he was kept for several months; that defendant went to Virginia

and took him out of jail, and brought him with him to this state, having paid the reward, fees and expenses, . . The court found " that the slave was the property of the plaintiff, that when the sheriff, in 1851, went to defendant's house [391] " to take possession of the negro boy, . . he . . could not be found, but had made his escape, perhaps, into Illinois, . . The boy was of the value of $800."

Schropshire v. Loudon, 23 Mo. 393, October 1856. Suit for freedom, based on [396] " a written paper, in the form of a will," dated 1846: [394] " I, Elizabeth Schropshire, . . give and bequeath unto Titus my black man, Ellen my black woman, the wife of the said Titus, with all their children, *viz.,* Monroe, Randolph, Wilson, Mary Jane and Josephine, with each and every child that may hereafter be born, their freedom at my death;" This paper was signed and sealed; and was attested by three witnesses. In 1847 " Elizabeth Schropshire appeared in the Circuit Court . . and acknowledged said instrument of writing as her deed of emancipation of the plaintiffs;" and it was seconded in 1850. It was never probated as a will. The lower court [395] " rejected all the evidence offered on the part of the plaintiffs, and the case being submitted to the jury, a verdict was rendered for the defendants."

Judgment reversed and the cause remanded: [397] " while the paper is inefficacious as a will, we see no reason why it is not an instrument in writing within the meaning of the law." [1] It " should have been received in evidence as a valid act of emancipation." [Scott, J.]

Hayden v. Hayden, 23 Mo. 398, October 1856. Held: [399] " The right of the widow to a share in the slaves [which belonged to her deceased husband], equal to a child's part, does not depend upon any act to be done by the widow; . . The law [2] confers on her a child's part; . . [400] She must do something indicative of casting off this right, otherwise it attaches and remains fixed."

Phillips v. Towler, 23 Mo. 401, October 1856. " an action [3] against Edward Towler to recover compensation for injuries sustained in consequence of the act of . . [his] slave . . in setting fire to and burning a stable, . . certain confessions made by her were admitted in evidence . . A witness also testified as follows: ' Mr. Robert Towler, son of Edward . . entered the room where Mr. Edward Towler and I were, and, with a smile on his countenance, said, " does it not beat any thing in the world? that negro burnt Phillips' stable, and has confessed it." Mr. Edward Towler made no reply; seemed to be cut down, and went out of the room.' Defendants excepted to the admission of this testimony."

Held: [402] " The slave's confessions were improperly admitted. . . [403] The court also erred in allowing the remarks of Robert Towler . . to go to the jury." Judgment in favor of Phillips reversed, and the cause remanded.

Johnson v. Steamboat Arabia, 24 Mo. 86, October 1856. " The slave was being transported on the defendant from Kentucky to St. Louis, and

[1] Rev. Code (1845), p. 1019, art. 2, sect. 1.
[2] Rev. Code (1845), p. 430, sect. 2.
[3] Under Rev. Code (1845), p. 414, art. 9, sect. 45.

during the voyage an officer of the boat put him to 'wooding' without his master's permission, and while so engaged he fell overboard and was drowned." Judgment for plaintiff affirmed.

Dred Scott v. Sandford,[1] 19 Howard (60 U. S.) 393, December 1856. [396] "action of trespass *vi et armis* instituted in the Circuit Court" "of the United States for the district of Missouri." [400] "The declaration . . contains the averment . . that he is a citizen of Missouri, and the defendant a citizen of New York." [396] "The declaration . . contained three counts: one, that Sandford had assaulted the plaintiff; one, that he had assaulted Harriet Scott, his wife; and one, that he had assaulted Eliza Scott and Lizzie Scott, his children. Sandford . . filed the following plea: . . this court ought not to . . take further cognizance . . because . . cause of action . . accrued . . exclusively within the jurisdiction of the courts . . of Missouri, for that . . Dred Scott, is not a citizen . . of Missouri, . . because he is a negro . . [397] there was a demurrer . . argued in April, 1854, . . sustained. . . In May, 1854, the defendant . . pleaded in bar . . The counsel . . filed the following agreed statement of facts, *viz.*: In . . 1834, the plaintiff was a . . slave belonging to Dr. Emerson, who was a surgeon in the army of the United States. In that year, . . Dr. Emerson took the plaintiff from . . Missouri to the military post at Rock Island, in . . Illinois, and held him there as a slave until . . April or May, 1836. . . Dr. Emerson [then] removed the plaintiff . . to the military post at Fort Snelling . . on the west bank of the Mississippi river, in the Territory known as Upper Louisiana, acquired by the United States of France, and situate north of the latitude of thirty-six degrees thirty minutes north, and north of the State of Missouri. . . Dr. Emerson held the plaintiff in slavery at . . Fort Snelling . . until . . 1838. In . . 1835, Harriet . . was the . . slave of Major Taliaferro, who belonged to the army of the United States. In that year . . [398] [he] took . . Harriet to . . Fort Snelling . . and kept her there as a slave until . . 1836, and then sold . . her . . unto . . Dr. Emerson . . In . . 1836, the plaintiff and . . Harriet . . with the consent of . . Dr. Emerson . . intermarried . . Eliza and Lizzie . . are the fruit of that marriage. Eliza is about fourteen years old, and was born on board the steamboat *Gipsey* north of the north line of the State of Missouri, and upon the river Mississippi. Lizzie is about seven years old, and was born in the State of Missouri, at the military post called Jefferson Barracks. In . . 1838 . . Dr. Emerson removed the plaintiff and . . Harriet and . . Eliza, from . . Fort Snelling to . . Missouri, where they have ever since resided. Before the commencement of this suit, Dr. Emerson [2] sold . . the plaintiff, . . Harriet,

[1] "Sanford" is the usual spelling. For personal details see Warren, *Supreme Court in United States History,* III. 23n.; Channing, *History of the United States,* VI. 188, 189; and Hodder, "Some Phases of the Dred Scott Case" in *Mississippi Valley Historical Review,* vol. XVI, no. 1.

[2] Dr. Emerson died in 1843. "Mrs. Emerson . . in 1850, married Dr. C. C. Chaffee, a radical anti-slavery member of Congress from 1855 to 1859. Possibly to avoid involving Dr. Chaffee in the case, Scott was transferred by a fictitious sale to Mrs. Chaffee's brother, John F. A. Sanford, . . Mr. Sanford had married a daughter of Pierre Chouteau, had made a fortune in the fur trade, and removed to New York City." Hodder, *op. cit.,* p. 7.

Eliza and Lizzie, to the defendant . . [who] laid his hands upon [them] . . It is agreed that Dred Scott brought suit for his freedom in the Circuit Court of St. Louis county [state court]; that there was a verdict and judgment in his favor; that on a writ of error to the Supreme Court [of Missouri], the judgment was reversed,[1] and the same remanded to the Circuit Court, where it has been continued to await the decision of this case. In May, 1854, the [present] cause went before a jury, . . [399] 'instructed, that upon the facts . . the law is with the defendant.' The plaintiff excepted" Verdict and judgment for the defendant. The case was [396] "brought up, by writ of error, . . [399] argued at December term, 1855, and ordered to be reargued at the present term."

[454] "judgment . . reversed, and a mandate issued, directing the suit to be dismissed for want of jurisdiction." I. [427] "upon the facts stated in the plea in abatement, Dred Scott was not a citizen of Missouri within the meaning of the Constitution of the United States, and not entitled as such to sue in its courts; and, consequently, . . the Circuit Court had no jurisdiction of the case, and . . the judgment on the plea in abatement is erroneous." [407] "In the opinion of the court, the legislation and histories of the times,[2] and the language used in the Declaration of Independence, show, that neither the class of persons who had been imported as slaves, nor their descendants, whether they had become free or not, were then acknowledged as a part of the people, nor intended to be included in the general words used in that memorable instrument. . . They had for more than a century before been regarded as beings of an inferior order, and altogether unfit to associate with the white race, either in social or political relations; and so far inferior, that they had no rights which the white man was bound to respect; and that the negro might justly and lawfully be reduced to slavery for his benefit. . . [II.] [427] it has been said, that as this court has decided against the jurisdiction of the Circuit Court on the plea in abatement, it has no right to examine any question presented by the exception; and that anything it may say upon that part of the case will be extra-judicial, and mere *obiter dicta*. This is a manifest mistake; there can be no doubt as to the jurisdiction of this court to revise the judgment of a Circuit Court, and to reverse it for any error apparent on the record, whether it be the error of giving judgment in a case over which it had no jurisdiction, or any other material error; and this, too, whether there is a plea in abatement or not. . . in a writ of error to a Circuit Court of the United States, the whole record is before this court for examination and decision; . . [430] We proceed, therefore, to inquire whether the facts relied on by the plaintiff entitled him to his freedom. . . [a.] [431] Was he, together with his family, free in Missouri by reason of the stay in the territory of the United States hereinbefore mentioned? . . [432] The act of Congress,[3] upon which the plaintiff relies, declares that slavery and involuntary servitude, except as a punishment for crime, shall be forever prohibited in all that part of the

[1] See Scott *v.* Emerson, p. 185, *supra*.

[2] "at the time of the Declaration of Independence, and when the Constitution . . was framed and adopted."

[3] Act of Mar. 6, 1820, sect. 8. 3 Stat. at L. 544.

territory ceded by France, under the name of Louisiana, which lies north of thirty-six degrees thirty minutes north latitude, and not included within the limits of Missouri. . . [450] an act of Congress which deprives a citizen of the United States of his liberty or property, merely because he came himself or brought his property into a particular Territory of the United States, and who had committed no offence against the laws, could hardly be dignified with the name of due process of law. . . [451] the right of property in a slave is distinctly and expressly affirmed in the Constitution. . . [452] it is the opinion of the court that the act of Congress which prohibited a citizen from holding and owning property of this kind in the territory of the United States north of the line therein mentioned, is not warranted by the Constitution, and is therefore void; and that neither Dred Scott himself, nor any of his family, were made free by being carried into this territory; even if they had been carried there by the owner, with the intention of becoming a permanent resident." b. [432] "is Scott himself free by reason of his removal to Rock Island, in the State of Illinois, . . [452] it is contended, on the part of the plaintiff, that he is made free by being taken to Rock Island, . . independently of his residence in the territory of the United States; and being so made free, he was not again reduced to a state of slavery by being brought back to Missouri. . . As Scott was a slave when taken into the State of Illinois by his owner, and was there held as such, and brought back in that character, his status, as free, or slave, depended on the laws of Missouri, and not of Illinois.[1] . . [453] we are satisfied . . that it is now firmly settled by the decisions of the highest court in the State [of Missouri],[2] that Scott and his family upon their return were not free, but were, by the laws of Missouri, the property of the defendant; and that the Circuit Court of the United States had no jurisdiction, when, by the laws of the State, the plaintiff was a slave, and not a citizen." [Taney, C. J.] Wayne, Nelson, Grier, Daniel, Campbell, and Catron, JJ., concurred. McLean and Curtis, JJ., dissented.

Douglass v. Ritchie, 24 Mo. 177, January 1857. The defendant allowed [181] "his slave to set up a shoemaker's shop and deal as a free man;" and the plaintiff sold him the goods, "the price of which he now seeks to recover against the master."

Held: both parties had violated the laws.[3] "no obligation arises under our law out of such a transaction against the master to pay the price, even if the slave use the goods for the master's benefit and with his assent." [Leonard, J.]

Hayden v. Stinson, 24 Mo. 182, January 1857. Stinson, in 1847, gave to his daughter for life, remainder to her children: [183] "Green, a boy aged about two years old, and Jane, a girl aged about thirteen years old, with her future increase."

Layson v. Rogers, 24 Mo. 192, January 1857. Hannah Layson sold to her grandson, for one dollar "a negro boy named James Washington,

[1] Strader *v.* Graham, vol. I., p. 368, of this series.
[2] Scott *v.* Emerson, p. 185, *supra.*
[3] Rev. Code (1845), tit. Slaves, p. 1014, art. 1, sect. 7; *ibid.,* p. 1018, art. 1, sect. 33.

commonly called Washington. Said boy was born my property, and is a slave for life . . reserving to myself the use and benefit of the labor of said boy during my lifetime," Held: this deed, being unrecorded and unaccompanied with possession in the donee, was void, as against a subsequent purchaser, though with notice.

Withers v. Steamboat El Paso, 24 Mo. 204, January 1857. Proceeding "to recover damages for the wrongful transporting . . of a slave of plaintiff, named Ann, from the city of Lexington to the city of St. Louis."

Held: [211] "In order to exempt the master from the penalty of the statute,[1] the law does not exact from him the greatest possible diligence—all that we may imagine could have been done to have prevented the escape of the girl—but only such care as thoughtful and prudent persons would have taken in navigating a boat in the midst of a slave population, to prevent the escape of slaves upon it, if the property endangered had belonged to themselves instead of belonging to others." [Leonard, J.]

Blue v. Peneston, 24 Mo. 240, January 1857. Deed of gift of [241] "my negro woman Ellen and her infant child, and negro woman Sarah, . . in trust . . for the sole . . benefit of my daughter"

Terrill v. Boulware, 24 Mo. 254, January 1857. [255] "Conner, in the year 1784, died intestate in . . Virginia, possessed of the family of slaves . . He left him surviving his widow, Sarah, and two children, Paul . . and Lucy . . Lucy Conner afterwards married . . Terrill, . . Lucy died in the year 1812, leaving her surviving her husband . . and several children, . . The slaves in controversy were assigned to Sarah" (who died in 1816), as her dower. "After her death . . an allotment of the slaves in controversy was made to the children of said Lucy; and their father . . with said slaves into his possession, and afterwards, upon his removal to the state of Missouri, brought them with him"

Held: by the law of the state of Virginia in 1784, said slaves descended to and vested in Paul and Lucy Conner, subject to the widow's dower; Lucy's interest passed to her husband, although she died before the doweress, and not to her children. [259] "Had the state of facts presented in this case arisen in Missouri our determination would have been different." [Scott, J.]

Lawrence v. Lawrence, 24 Mo. 269, January 1857. Edward Lawrence conveyed and delivered a negro boy to Rice, in trust; [270] "said negro slave is to be . . hired out, and the proceeds of said hire to be applied to my benefit during my natural life, and immediately after my death said slave is to be . . delivered over to my said son James" Later Edward Lawrence "resumed possession of said slave as his own property," Judgment in favor of James Lawrence affirmed: the possession of Rice [272] "was the possession of the plaintiff, who was the remainder-man."

Bozarth v. Bozarth, 24 Mo. 320, January 1857. Will of Jonathan Bozarth: [321] "I give to my wife, during her life or widowhood, . .

[1] Rev. Code (1845), p. 1018, art. 1, sect. 32.

[322] a negro woman named Winney and her child, a boy named Ben, about eight years of age. I also . . direct that said Winney's two other children be kept with her, with any others she may have, until such time as my daughter Elizabeth shall arrive at the age of twenty-one years, when they may be divided by general consent of my heirs,"

Stratton v. Harriman, 24 Mo. 324, January 1857. Action by Stratton to recover damages for the destruction of his property, [325] "A bay stallion . . of the value of three hundred dollars," which perished in the burning of Licklider's barn and stable, by a slave of Harriman, in 1855.

Judgment in favor of Harriman, affirmed: [328] " the offence charged as committed by the slave John is arson in the third degree, and is against the barn and stable of Licklider; not against the horse of a third person, happening to be therein at the time. This statute is a highly penal one, and must be construed strictly." [Ryland, J.]

State v. Goode, 24 Mo. 361, January 1857. Goode was indicted in 1855 for buying five deer skins from a slave belonging to Jones, [362] " without having the master's, owner's or overseer's permission in writing therefor."

State v. Gilbert (a slave), 24 Mo. 380, January 1857. " The defendant, a slave, was indicted [1] . . for wilfully and maliciously cutting the throat of a mare . . whereby she was killed. After a trial and conviction, a motion was made in arrest of judgment," and overruled. Judgment reversed: [381] " The indictment was for a felony, and was clearly bad for want of the word ' feloniously,' " [Scott, J.]

Jones v. Briscoe, 24 Mo. 498, March 1857. [499] " Jones married Artemesia, the youngest daughter of John Briscoe, sr.; that when Jones and his wife moved home to house-keeping, Mrs. Jones took the negro woman Amanda along with them." She died five or six years later. " The negro girl Tabitha, the child of Amanda, was born at Jones', and after the death of Amanda, she (the girl) being some six or eight months old was taken to Mr. Briscoe's to be taken care of. . . After the death of Mrs. Jones, her daughter Mary Jane Jones, then about five years old, went to her grand-father's and was reared by her grand-parents. John Briscoe, sr., after this, . . some four years before his death made a gift of the negro girl Tabitha, in writing, to his grand-daughter Mary Jane Jones." Judgment in favor of Jones, affirmed: [505] " a jury might well find the gift of the woman from the father to the daughter and son-in-law."

Beale v. Dale, 25 Mo. 301, July 1857. A negro girl was valued at $900.

Houck v. Camplin, 25 Mo. 378, July 1857. " The mother of the complainant, Margaret Houck, had an interest by way of remainder in certain slaves. Pending a suit for their distribution in the court of Kentucky, the mother died [in 1830] leaving her husband as survivor." Held: [379] " by the law of Kentucky [in 1830] the interest of the wife on her decease passed to her surviving husband."

[1] " under the 57th section of the 3d article of the act concerning Crimes and Punishments." Rev. Code (1845) 364.

Edwards v. Welton, 25 Mo. 379, July 1857. Will of Unice Harness, of Virginia, admitted to probate in 1823: [380] "I give to my daughter Elizabeth Welton five hundred dollars, the price of my negro boy Phil, which my son Adam Harness is to have, . . to be laid out in negro girls by my executors for my daughter Elizabeth Welton and her daughters forever;" A negro girl named Tomar was bought. Two of her children were sold, [381] "Essex for $300, Ellen for $210," A jury found the value of Jerry, another of her children, to be $1100, in 1855 to 1857.

Folden v. Hendrick, 25 Mo. 411, July 1857. In 1855 a constable [412] "had apprehended a negro man belonging to one Huralston for supposed offences, and while the negro was in his custody a company purchased him for the purpose of carrying him off; . . [Hendrick] went to the negro man's wife [Folden's house-keeper and servant] . . to get the negro man's clothes, and she gave them to him; . . the negro woman handed him the watch . . as the property of the negro man, . . defendant took the watch and offered it to the negro man, . . but the negro man did not take the watch," Folden brought suit to recover the value of the watch. [413] "The jury found for plaintiff."

Judgment affirmed: [414] "if masters do not interfere nor object to the disposition that their slaves may make of the property which they are willing should be owned by them, it is not for strangers to interfere and deny the validity of any transfer of his property which a slave may make. The watch being the property of the negro man, he gave it to his wife. . . What possible inference can be drawn from the refusal of the man to receive the watch, but that it was his wish that his wife should have it? The master of the slave not objecting to this disposition of the property, who else shall gainsay its validity?" [Scott, J.]

Calhoun v. Buffington, 25 Mo. 443, July 1857. "Edmund, a slave . . was indicted for murder in the first degree, committed to jail, and before trial he escaped therefrom, and has not been retaken." In the case of the State *v.* Peter, a slave, "defendant was indicted for murder in the first degree and committed to jail to await his trial at the April term of the court. Previous to that term defendant was taken from the custody of the sheriff . . and hung. . . The fees in both cases accrued under the act of 1845." [1]

Held: [444] "The State is only liable to pay the costs in a prosecution against a slave when the slave has been convicted and executed capitally. Conviction alone and escape before execution will not put the costs on the State. . . The lawless violence of a mob, in its impatience to inflict punishment, taking the life of a slave, is not the execution contemplated by this statute, even if the slave had been convicted before he was hung by the mob." [Ryland, J.]

Charlotte (of color) v. Chouteau,[2] 25 Mo. 465, October 1857. [466] "The plaintiff asserts her right to freedom on the ground that her mother,

[1] Rev. Code (1845), p. 250, art. 2, sects. 13-16.

[2] Printed in full (from a transcript certified by the clerk of the Supreme Court of Missouri) in 3 Lower Canada Jurist 257, under the title "Slavery in Lower Canada."

a negress, was born in Montreal, in Lower Canada, about the year 1768,[1] and that her mother was not born a slave, because slavery did not exist in Canada at the time of her birth. On the trial the plaintiff gave parol evidence tending to prove that her mother was born in Montreal about the year 1768, and that slavery did not actually exist and was not tolerated by law at that time in Canada. The defendant, on his part, gave parol evidence tending to prove the actual existence of slavery in Canada in the year 1768; that slaves were recognized as property, and that Rose, the plaintiff's mother, was held and sold as a slave in Canada. The defendant also gave the following documentary evidence: First, The articles of capitulation of the surrender of Montreal . . [467] to the English forces, signed . . 1760, . . 'The negroes and panis of both sexes shall remain in their quality of slaves' . . Second. The definitive treaty of peace . . 1763, . . [468] Third. The proclamation of George III, . . 1763. . . [469] Fourth. The act of the British parliament of 1774,[2] . . [470] Fifth. The act of the British parliament of 1790,[3] . . [471] if any person . . a subject . . of . . the United States of America—shall come from thence . . to any part of the province of Quebec . . for the purpose of . . settling there, it shall be lawful for any such person . . to import into the same, in British ships . . any negroes . . free of duty; . . all sales . . of any negro, . . so imported, which shall be made within twelve calendar months after the importation of the same (except in cases of the bankruptcy or death of the owner thereof) shall be null and void . . [472] Sixth. The act of the principal parliament of Upper Canada . . 1793.[4] . . forbids any negro . . slave from coming or being brought into the province . . to be subject to the condition of a slave. . . nothing in the act should be construed to extend to liberate any negro subjected to service . . who should have been brought into the province in conformity to the conditions of the act of 1790, or should have otherwise come into the possession of any person by gift, bequest or purchase. . . that in order to prevent the continuation of slavery within the province, every child thereafter born of a negro woman who was a slave, should remain with his or her master or mistress until such child should arrive at the age of twenty-five years, and then be free. . . At the request of the defendant, the court gave the following instruction: '1. If negro slavery existed by virtue of the laws and ordinances of the French government in Canada prior to the acquisition of that country by the English, and if the articles of capitulation, the treaty of cession, the acts of parliament of 1774 and 1790, and the king's proclamation of 1763, be correct copies of the genuine documents, then negro slavery was sanctioned and permitted by law in the country called the province of Quebec (which includes Montreal) at all times from the year 1760 to the year 1790.' Other instructions were given to the jury, among which was the following, given at the plaintiff's instance: 'Whether Rose was lawfully a slave in Canada is a question for the jury to decide from the evidence on the trial.' "

[1] See Chouteau *v.* Pierre, p. 162, and Charlotte *v.* Chouteau, pp. 174, 194, *supra.*
[2] 30 Brit. Stat. at L. 549.
[3] 37 *ibid.* 24.
[4] Rev. Stat. U. C., ch. 8.

Verdict in favor of Charlotte. Chouteau appealed. Judgment reversed and the cause remanded: "These two instructions are incompatible, and both can not stand. . . [476] The plaintiff read the depositions of the two learned and intelligent witnesses—Judges Reed and Gale—each of whom held high judicial positions for many years in Lower Canada. The former testified that slavery existed in Canada to a certain extent while under the dominion of the French, . . [477] Judge Gale, the other witness, . . replied: 'I believe that a modified system of slavery respecting negroes and some others was *de facto* exercised in Canada, in various instances, while the country remained under the French dominion; but I can not undertake to say that such *de facto* exercise of slavery was justifiable under sufficient legitimate [legislative?] enactment and a correct interpretation of the laws as they then stood.' My [Richardson, J.] opinion is to the contrary. . . [481] The act of 1790 is only consistent with itself on the idea that it assumed the existence of slavery in Canada. . . [483] in our opinion, if slavery existed in Canada under the French government, before the English acquired the country, it continued to exist and was lawful until it was abolished; and after a careful examination of the documentary evidence in this cause, . . we have arrived at the conclusion which the circuit court announced in the first instruction [1] given for the defendant. The last instruction for the plaintiff is inconsistent with the first for the defendant, and was therefore improperly given. . . By omitting to notice the other instructions given for the defendant, our silence is not to be construed into an approval of them. The third instruction is very objectionable, for it implies that the plaintiff must make out her case by a higher degree of evidence, and that she must connect every link with more conclusive proof than is ever required in civil cases of other persons. If a negro sues for his freedom he must make out his case by proof like any other plaintiff, but the law does not couple the right to sue with ungenerous conditions;" . . [Richardson, J.] Scott, J. dissented: [484] "From the fact that there were laws and documents, in which reference was made to slaves, or which contemplated a state of slavery, it was to be inferred that slavery lawfully existed in Canada. That inference was one of fact to be made by the jury. As the jury have found the fact,[2] whose exclusive province it was to do so, the practice of this court, now established for a number of years, forbids that a judgment should be reversed because a verdict is against the weight of evidence." Judge Scott's opinion was followed in 1862.[3]

Caldwell v. Dickson, 26 Mo. 60, October 1857. Dickson, on December 25, 1850, hired of Caldwell [61] "a negro girl named Annie . . until the 25th day of December, 1851, at which time said girl to be delivered up to said Caldwell. For the hire of said girl I am to pay fifty dollars in cash and her doctor's bill, and also to clothe her comfortably according to the season, and return her in the same condition. I am also to pay her taxes."

[1] [472] "negro slavery was sanctioned . . by law in . . the province of Quebec at all times from the year 1760 to the year 1790."

[2] That negro slavery was not permitted by law in Canada from 1760 to 1790.

[3] Charlotte *v.* Chouteau, p. 216, *infra.*

Held: if the plaintiff, Caldwell, before the end of the year, [62] "took the slave from the defendant's possession without his consent, or without the right to do so secured by contract with the defendant, he can not recover for any portion of the hire." [1]

State v. Guyott, 26 Mo. 62, October 1857. "Indictment for selling a commodity to a negro. . . '1856, . . one gill of whisky, for five cents, without permission in writing from the master, owner or overseer' . . [63] The defendant was found guilty and fined twenty dollars."

Sallee v. Chandler, 26 Mo. 124, October 1857. Mrs. Garnett removed from Kentucky to Missouri in 1832, [126] "bringing the slaves . . [127] and retained the possession of said slaves (excepting the slaves Charles and Major manumitted by her) up to the time of her death, . . 1856; that prior to her death Mrs. Garnett made her will, duly executed and admitted to probate, by which she manumitted the slave Mary and devised the slaves in controversy," Mary's children, to her nephew.

Collins v. Hough, 26 Mo. 149, January 1858. In 1855 a jury assessed the value of a negro woman at $500.

Birch v. Benton, 26 Mo. 153, January 1858. Action of slander. A witness testified that Benton said, in 1849: [157] "the Platte City clique had caused him to be insulted at his stand in a private grove; had sent for a dog, a d—d sheep-killing dog or cur, Jim Birch, to answer his speech—a man who had whipped his wife and caused her to fly to a neighbor's house with the marks of his violence upon her; that his wife was a decent and intelligent lady, and that the cause of the difficulty was on account of Birch preferring to sleep with a d—d negro wench to his own wife." In the petition on which the case was tried, the words in regard to the last fact mentioned, were: [156] "all for keeping his own negro wench." Judgment in favor of Birch, reversed and the cause remanded: [163] "the words that contain the poison to the character and impute the crime must be proved as laid;" [Richardson, J.]

Suggett v. Cason, 26 Mo. 221, January 1858. In 1846 Suggett made a verbal contract with Cason [222] "that he, plaintiff, should repair a certain log house belonging to Cason, and make certain additions thereto; that in consideration thereof Cason agreed to give . . to plaintiff a certain slave named Jim;"

Durham v. Durham, 26 Mo. 507, March 1858. "an action for partition of certain premises in the city of St. Louis," which had been conveyed to Matilda Durham by Buckingham. The plaintiff is Hilary Durham, brother of Matilda, and the defendant is their mother, Henny Durham, both parties being free persons of color. Henny Durham [508] "denies that said Matilda died seized of the premises, and alleges that said Matilda was her slave. . . introduced evidence showing that said Matilda . . had been bought by her mother. Plaintiff, to prove an emancipation of said Matilda by her mother, introduced one Smith as a witness, who testified that the defendant 'had told him that Matilda Bartlett had been a slave,

[1] See same *v.* same, p. 188, *supra.*

but she, defendant, had bought her and set her free.' This was before the sale by Buckingham to said Matilda. . . also . . he [Smith] had paid rent of the premises to defendant as agent for her daughter Matilda. . . [509] The jury found for the defendant."

Judgment reversed and the cause remanded: "It is generally true that a slave can only be manumitted by pursuing the course adopted by the statute. If one is detained in slavery, and claims his freedom on the ground of his having been manumitted, that act should be proved with the necessary formalities in order to establish his right to freedom. . . [510] But the question as to the status of colored persons arises in various other suits than in those for freedom. We have free colored persons among us. . . They acquire property and contract as free persons. . . no policy is subserved in suffering those who deal with them, when a resort to litigation becomes necessary, to exact strict proof that they have been freed in conformity to law." [Scott, J.]

Helmes v. Stewart, 26 Mo. 529, March 1858. Helmes, a person of color, "had leased the premises in controversy to one Heitzig in 1846. Defendant admitted that he was in possession thereof under and by virtue of said lease. Plaintiff claimed that there was a forfeiture of said lease. . . The court, at the instance of defendant, gave the following instruction: 'It being admitted that the plaintiff is a person of color, this fact is presumptive evidence of slavery, and in the absence of proof showing his freedom, the plaintiff can not recover.' The plaintiff thereupon took a nonsuit, with leave, etc."

Judgment reversed and the cause remanded: [530] "The instruction . . should not have been given. . . the defendant's admission that his possession was held under a lease from the plaintiff precluded him from denying the title, and it did not lie in his mouth to say that the plaintiff was a slave." [Napton, J.]

Smith v. Sweringen, 26 Mo. 551, March 1858. Will of William Christy, who died in 1837: [553] "I give and bequeath to my beloved wife . . all the slaves I may own at my death; and . . authorize my executors . . to sell or otherwise dispose of any of my slaves, at the request of my wife, and to supply their places with others more suitable; and it is my will . . that my wife shall . . bestow my slaves at the time of her death to any one of my children, or make equal division thereof amongst them, or otherwise as she may think best."

In the matter of Duty, 27 Mo. 43, March 1858. In 1850 "letters of administration were granted to . . Harney upon the estate of Milton Duty. . . 1856, the probate court revoked the letters for the reason that a will was produced and admitted to probate. . . The will provided for the manumission of certain slaves, who, by their counsel, appeared and contended for the revocation of said letters and the establishment of the will."

Andrews v. Lynch, 27 Mo. 167, March 1858. "Plaintiff states that he was the owner of a slave named David, aged about twenty-three years, a slave for life and dark copper color; that . . 1854, the plaintiff delivered

said slave to the defendant [1] for safe keeping, and for which the plaintiff agreed to pay the defendant thirty cents per day, including the board of said slave; . . said slave was worth $1,200 in cash, and his hire per month $25," The slave escaped. [168] " a negro boy belonging to the defendant watched at the outer door, and opened the same to admit persons," " The jury found for plaintiff." Judgment reversed: [169] " no cause of action whatever . . is stated in the petition." [Napton, J.]

Wadlow v. Perryman, 27 Mo. 279, July 1858. " This was an action on a warranty of soundness of a slave. At the trial, the plaintiff offered in evidence the declarations of said negro slave with respect to her symptoms, made when she was sick to those in attendance upon her. The court refused to permit the evidence to be introduced. The plaintiff took a nonsuit, with leave to move to set the same aside." Judgment reversed and the cause remanded: the evidence was admissible.

Moore v. Winter, 27 Mo. 380, October 1858. " Carter hired a slave to . . Brown for one year from the 1st of January, 1857. Carter gave his note for the hire—one hundred and seventy-five dollars "

Herndon v. Herndon, 27 Mo. 421, October 1858. Held: " on the death of the husband without children, the increase of the slaves that come to the husband by the wife, remaining undisposed of at his death, go with the mother to the widow. . . [422] if during a tenancy for life the mother has children, they go with the mother to the person who has the remainder or reversion. A difference has thus been adopted between slaves and other property, founded upon motives of humanity and having regard to the moral as well as legal relations between master and slave. . . it is no violent presumption to suppose that the legislature intended, by the general terms which they have used in the dower law,[2] to embrace the increase of slaves, as well as the slaves themselves, as property coming by the marriage." [Napton, J.]

Ridgley v. Steamboat Reindeer, 27 Mo. 442, October 1858. Action " to recover the value of a slave alleged to have been transported out of this state in said steamboat."

Fath v. Meyer, 27 Mo. 568, October 1858. [569] " Many farmers own shops entirely under the superintendence of a negro blacksmith." [Napton, J.]

Riggins v. McClellan, 28 Mo. 23, January 1859. Will of Mrs. McCutchen, who died in Kentucky in 1842: [25] " I give and bequeath to my daughter Margaret Dean, a negro girl named Hannah for to be at her disposal during her natural life, then to go to the benefit of her heirs."

McManus v. Jackson, 28 Mo. 56, January 1859. " an action to recover damages for slanderous words . . [57] ' he (meaning plaintiff) once gave a negro a free pass ' . . In the third count . . the negro referred to is averred to have been a slave, but it is not averred that he did not belong

[1] See Russell *v.* Lynch, p. 210, *infra.*
[2] Rev. Code (1845), p. 430, sect. 3.

to the plaintiff." Held: [60] "The demurrer was properly sustained and the judgment [in favor of defendant] will be affirmed;"

State v. Peters, 28 Mo. 241, March 1859. "This indictment [1] . . [242] charges that Lewis Peters, Mary Peters and John Peters, . . 1857, . . a certain slave, the property of . . said Lewis Peters, with a goad and whip, which they . . in their right hand had and held, the said slave aforesaid then and there did cruelly and inhumanly torture, beat and abuse. A *nolle prosequi* was entered as to Lewis Peters, and Emily and Ludwig Peters were convicted and fined and imprisoned."

Judgment reversed: "When slaves are cruelly used by those who do not bear to them the relation of master or quasi master, such offences stand on the same ground as when white persons cruelly use each other. . . as the slave was not alleged to have been the property of . . the other persons indicted [in addition to the master of the slave], they could not be convicted under the indictment, as it did not appear that they had abused the relation of master and slave." [Scott, J.]

Beaupied v. Jennings, 28 Mo. 254, March 1859. "an action for the possession of a slave called Eliza and her three children." Will of John Howdeshell, proved in 1853: [2] "I give and bequeath unto my daughter Ann my negro girl named Eliza at the valuation of four hundred and fifty dollars. . . all that portion of my estate . . which may fall to Ann . . shall be placed in the hands of George Hall for her special use and benefit," Codicil, dated 1852: [255] "It is my further will that the negro girl Eliza . . shall have the privilege to choose some person to buy her in case she [shall] not be satisfied with my daughter Ann, and the proceeds of the sale of said negro girl Eliza shall go in the hands of George Hall, or his legal representatives, for the benefit of my daughter Ann." Hall testified "that in a conversation had in the presence of Beaupied (plaintiff) and of himself, the negro Eliza stated that she would not live with Ann (the plaintiff's wife), and elected to choose a master; that time was given her for that purpose; and that afterwards she said she had elected John C. Jennings, the defendant, to buy her. . . It also appeared in evidence that the administrator of Howdeshell delivered the said Eliza to said George Hall as trustee under the will."

Judgment for Jennings affirmed: [258] "This will is not to be understood as making an absolute bequest of a specific slave to the testator's daughter. The legal title to the slave is put in a trustee, and that trustee is authorized, and indeed required, in a certain contingency, to sell the slave and hold the proceeds for the benefit of the legatee. The trust has been complied with, and as the trustee had, beyond doubt, the power of sale, the purchaser acquired a good title. There is nothing in the institution of slavery as understood in the slaveholding states inconsistent with the concession of a privilege of this kind to a slave. The practice is very common and commendable, and the courts will respect the humanity and kindness by which such arrangements are dictated, and will assuredly not

[1] "founded on the forty-eighth section of the eighth article of the act concerning crimes and their punishments," Rev. Code (1855) 634.

[2] See Hall *v.* Howdeshell, p. 217, *infra.*

interfere with them when voluntarily carried out. Slaves are not mere chattels, nor do our laws or usages so regard them; nor, as human beings, are they regarded as incapable of volition or choice;" [Napton, J.]

Russell v. Lynch, 28 Mo. 312, March 1859. "A slave was placed in a private jail-yard for safe keeping." [314] "a negro boy opened the gate of the prison-yard on two or three occasions, when it was visited by the plaintiff's agent," The slave escaped, and the owner brought action to recover damages for the escape of the slave through negligence on the part of the jailer.

Judgment for the plaintiff affirmed: "the casual circumstance that a negro boy opened the gate . . can never be the foundation for an assent on the part of the owner of the slave that such boy should be the keeper of the prison during the confinement of her slave." [Scott, J.]

Prince v. Cole, 28 Mo. 486, March 1859. "This was an action to recover six hundred and eight dollars for the board, lodging, washing and clothing of a certain slave boy, named Richard, belonging to the estate of Presley N. Ross. The defendant Cole was one of the administrators of said Ross. Said Richard was a son of the plaintiff. Ross died in 1845. Plaintiff also belonged to the estate of Ross. He and his wife were sold at an administrator's sale in 1849 to one Baker, who immediately emancipated the plaintiff. Immediately after this administrator's sale, Cole, the administrator, took away two of the children of plaintiff, but left the boy Richard with him. There was evidence tending to show that Cole told plaintiff to take the boy Richard and take care of him. One Yosti was introduced as a witness on behalf of the defendant, who testified that he became entitled to Richard in 1854 in right of his wife, who was a daughter of Ross; that he talked with plaintiff frequently about the boy Richard; that plaintiff requested him to leave Richard with him as long as he could possibly do without him; that he did do so to his own inconvenience; that plaintiff applied to witness to purchase Harry, an older brother of Richard; that he sold Harry to plaintiff at less than his value, because he was his father and because he said he had raised Richard at his own cost and expense; that plaintiff paid nine hundred dollars for Harry. Harry was sold to plaintiff before Richard was taken home by Yosti. The court refused to permit the witness to state what the value of Harry was at the time of his sale. The jury found for plaintiff."

Judgment reversed and the cause remanded: [487] "The evidence of Mr. Yosti tended to show . . that the plaintiff had no just claim whatever on the administrator for taking care of his own child,"

Long v. Gilliam, 28 Mo. 560, July 1859. A slave was stolen and sold for $826.

McCune v. McCune, 29 Mo. 117, October 1859. McCune, by his will, gave his slaves to his wife [118] "during her life or widowhood, with power to dispose of all or any of the slaves should they become disobedient; and at her death said property was to be divided among the three children, . . the executor of the will . . proposed to respondent [the widow] that she should reserve such of the slaves as she wished, and consent to a

division of the remainder among the heirs; that she at first objected, saying that it was the request of the testator that the negroes be kept together during her life, and that she had promised him to do so, but finally consented, reserving the right to take them back at any time she chose to do so; that among the slaves selected by the widow was an old woman, and upon witness advising her to take a younger one, she declined, saying she could take any of them back whenever she desired. . . [119] in the distribution an old and decrepit slave in respondent's possession . . was to be taken care of and supported by the three legatees; . . one of the legatees had since removed to California taking the slaves allotted to him"

Naylor v. Moffatt, 29 Mo. 126, October 1859. [127] "Naylor died in the state of Virginia in 1840, leaving a will . . that the slaves in controversy should be [free] upon attaining to certain ages therein specified; . . the widow . . 'for a part of her dower . . took the slaves' . . and brought them to Missouri, and kept them . . until her death in 1849, when the said slaves passed into the possession of her son . . who hired them out until his death in 1853 for the executor of his father's will, . . that after this . . defendant got possession of said slaves;" Held: [129] "If there are no debts, the property will be disposed of according to the will of the testator, or it may be transmitted to the executor in Virginia."

Salmon v. Davis, 29 Mo. 176, October 1859. [179] "the widow brought the slave Milly and her children from Kentucky" about 1836.

Peers v. Davis, 29 Mo. 184, October 1859. Sebastian sold to Davis for two hundred dollars [185] "a negro woman, slave for life, called and known by the name of Katty, now about the age of fifty years old, . . and the said . . Sebastian . . does hereby covenant . . that said negro woman is a slave for life." "at the time of the sale the negro woman was between seventy and eighty years old, and was quite worthless as a slave. . . Several witnesses . . 'severally testified to a conversation in which Luke Davis, in a grocery, about a year ago, stated that he told Sebastian, at the time the bill of sale was being written, to put the age of the negro at about fifty or fifty-five years, and not to make her too damned old, as he might want to sell her again.' . . [190] judgment [for plaintiff] will be affirmed."

Caldwell v. Dickson, 29 Mo. 227, October 1859. "This was an action on a note given for the hire of a slave for a year. After eleven months of the year had expired, the plaintiff had taken the slave from the possession of the defendant, and had sold her." Judgment for defendant, affirmed.

Berthold v. McDonald, 22 Howard 334, December 1859. "Under the Spanish Government, there was a common field near to the town of St. Louis, . . In this common field were two lots, owned respectively by two negresses, one of whom was named Florence Flore, and the other named Jeannette," [338] "a free negro woman. . . Jeanette had occupied this land for many years before her death [about 1803]."

Chism v. Williams, 29 Mo. 288, January 1860. Will of Colden Williams who died in 1832: [289] "I will and bequeath to my daughter Charity a certain negro woman by the name of Chaney. . . if my daughter Charity should die without issue, then and in that case . . to my daughter Mahala," "Charity died in January, 1858, without issue. Said slave Chaney died before said Charity. The slaves in controversy are her children." Judgment for defendant affirmed: as the bequest was made prior to the statute of 1845,[1] the limitation over to Mahala is void for remoteness. [299] "This case . . is one of the first impression in this state." [Napton, J.]

Tucker v. Tucker, 29 Mo. 350, January 1860. Held: a deed of gift of slaves made by a husband in anticipation of death and with a view to defraud his widow of her dower in such slaves will be held void as against the widow.[2]

Pemberton v. Pemberton, 29 Mo. 408, January 1860. Will of Edmund Pemberton, 1853: [409] "I also will my wife . . my negro boy Lewis; . . at the death or marriage of my wife . . to belong to my three youngest children . . [410] All the tobacco on hand, negroes, . . not heretofore named is to be sold at public auction, . . to pay all my just debts, the balance to be equally divided between my six oldest children," [410] "The widow . . seeks . . to have dower assigned her in the proceeds of certain slaves, Abigail, Rachel, Sanders, and Martha, that had been sold by the executor" Held: she was "barred of dower in the personalty by her election to take under the provisions of the will."

Smith v. Hutchings, 30 Mo. 380, July 1860. In 1846 Bright, then living in Kentucky, "executed a deed conveying . . a slave named Fanny to . . Smith, . . in trust for the wife and children of said Bright. . . After the execution of said deed the said slave Fanny gave birth, in Kentucky, to a boy named Ben, . . In 1850, the said Bright and his family moved to . . [381] Missouri, bringing said slave Fanny and the boy Ben along with him. . . 1854, Bright and his wife . . joined in a bill of sale under seal of the said boy Ben to Hovey Hutchings." After the death of Bright Smith, as trustee, brought this action "to recover possession of said boy Ben."

Judgment for plaintiff, affirmed: [384] "Here, the defendant, purchasing a negro boy from Bright, . . requires the wife to join in the bill of sale. This circumstance shows that the wife was believed to have an interest, and that was sufficient to put the purchaser upon inquiry."

Ross v. Barker, 30 Mo. 385, July 1860. Suit for a breach of warranty of soundness in the sale of a slave girl.

Baldwin v. Dillon, 30 Mo. 429, July 1860. A slave was valued at $800.

McLaurine v. Monroe, 30 Mo. 462, July 1860. "In the year 1825 Madison McLaurine, who lived in Tennessee, executed a deed by which . . he conveyed" to the children of his brother, William, [463] "a negro

[1] Rev. Code (1845), p. 219, sect. 5.
[2] See same *v.* same, p. 215, *infra.*

woman named Nancy and her child Sophia, . . ' that the aforesaid property . . is to remain with the wife of the said William McLaurine for the use and support of herself and the aforesaid children . . during her life,' " or widowhood. In 1829 " Nancy and her children [1] . . were seized and levied on by a constable under a judgment against William McLaurine as the latter's property; that said slaves were, against the will and consent " of McLaurine's wife, sold to Braden " to satisfy said execution; . . Braden took possession of said slaves, and . . 1830, . . sold . . them to . . Monroe, who . . [464] secretly . . brought said slaves to . . Missouri; that about the year 1836 said Monroe delivered said slaves to . . Harley; that said Harley has since appropriated . . the hire, labor and services of said slaves; that both Monroe and Harley had notice of the rights . . of complainants," The slaves were valued by the court in Tennessee, in 1838, at $2100. Held: [470] " the deed of Madison McLaurine conferred no such interest on the wife of William McLaurine as was subject to execution."

Gowan v. Gowan, 30 Mo. 472, July 1860. About 1837 [477] " Gowan, then a resident of Tennessee, brought to this state the negro woman . . with the avowed intention of opening or improving a farm "

Anderson v. Kincheloe, 30 Mo. 520, July 1860. Gratz hired of Kincheloe [522] " four slaves for the year 1859, . . in May, 1859, Gratz, being indebted to plaintiff, transferred the unexpired term of the hire of said slaves to him, and delivered possession thereof; that afterwards, in May, 1859, Dickenson came to Lexington and requested plaintiff to give up the possession of the slaves for Kincheloe, which being refused, it was . . agreed to that the matter be submitted to arbitrators; . . and the slaves [were] awarded to plaintiff for said unexpired term, . . that on the night of the following day on which the arbitration was had, . . Dickenson . . secretly decoyed said slaves out of plaintiff's possession, and took and delivered them to . . Kincheloe; " Kincheloe answers that [523] " it was expressly stipulated in said contract of hiring that said slaves should be kept by said Gratz in the town of Berlin, Lafayette county, and not elsewhere, and that, in case they were removed from Berlin and especially to Lexington, Kincheloe might terminate the hiring and reclaim them; " There is no evidence of such an agreement. [527] " the obvious motive to regain them " by Kincheloe, was " the admitted insolvency of Gratz," Judgment for Anderson, affirmed.

Redmond (of color) v. Murray, 30 Mo. 570, October 1860. " This was a suit by one Redmond, a man of color, against Edward C. Murray and Edward B. Osborn. Plaintiff set forth in his petition that on the 10th of January, 1855, he and his then master, Osborn, entered into a contract and agreement in writing, whereby said Osborn promised and agreed that if said plaintiff would pay said Osborn the sum of five hundred and fifty dollars and interest at ten per cent. from the date of a bill of sale held by said Osborn from one Conroy dated July, 1852, he (Osborn) would give said plaintiff his freedom; that, at the time of entering into said

[1] Two more had been born.

agreement in writing, plaintiff paid said Osborn the sum of five hundred and one dollars; that in August, 1855, he, through another, made Osborn a tender of the balance of said sum and the interest up to that date; that Osborn, disregarding his agreement, sold plaintiff to one Wigginton; that Wigginton sold him to the defendant Murray; that he is willing and ready to pay the balance to whomsoever may be entitled to the same; that in consideration of said agreement said Osborn gave him (plaintiff) his freedom for the space of some two years and six months; that plaintiff during that time was free to go wherever he desired; that therefore he was and is a free man, and that he is holden as a slave. Plaintiff asks 'judgment for his freedom, and liberation, and for further relief,' etc. The following instrument accompanied and was made a part of the petition: 'Lagrange, Mo., January 10, 1855. Received of Elijah Dehart and Remond [*sic*] the sum of five hundred and one dollars, it being a part of a sum of five hundred and fifty dollars, bearing ten per cent. interest from date of bill of sale held by said Osborn, which being paid he is to have his freedom. [Signed] E. B. Osborn.' The court sustained a demurrer to this petition."

Judgment affirmed: [575] "Manumission is a mere gratuity under our laws, and a mere intention or promise by the master, not consummated in the manner pointed out by law, however solemn the form in which such promise may be made, can confer no power or capacity on the slave to have it enforced; it endows him with none of the attributes of a freeman; his condition or *status* is not in the least changed or affected in its legal relations; and there is nothing, therefore, of which the law can take cognizance, nor any ground on which the plaintiff can base his claim to relief, however strongly it might appeal, under circumstances of apparent hardship, to conscience or the moral sense." [Ewing, J.]

Milton (of color) v. McKarney, 31 Mo. 175, October 1860. [176] "will of John McKarney, which was made in August, 1833: 'As to the residue of my slaves, to-wit., Marietta and her five children, Sam, Phebe, Nance, George, and her young child, with all her increase, I will and bequeath them to my beloved wife Margaret during her natural life, with a request that she attend strictly to their morals, and instruct them all to read the English language; but I expressly prohibit the sale of them under any circumstances; and after the death of the said Margaret, all of them that are twenty-one years of age are by me set free, on condition that they will enter under the care of the Colonization Society and emigrate to the American colony in Liberia, and as fast as they or their increase arrive at the said age of twenty-one years and comply with the above condition, I hereby set free. All of them that prefer remaining with any of my children, after the death of my said wife, to complying with the foregoing condition, are permitted to do so; but I am to be distinctly understood, that they are not to be bought or sold even amongst my own children, much less to strangers.' The plaintiff is a son of Marietta, the woman named in the above provision, and is twenty-one years old. He alleges the death of the widow Margaret McKarney, and avers that by these provisions of the will of John McKarney he is free. He declares his

willingness to comply with the conditions of said will and prays a judgment of liberation. To this petition there was a demurrer, and it was sustained."

Judgment affirmed: [180] "The court should be satisfied, not merely in reference to the plaintiff's wishes, but that means are provided for accomplishing them, if his choice is to emigrate to Liberia." [179] "There is no averment that the Colonization Society have the means or the inclination to promote the purposes which the testator had in view. There is no averment even that the Colonization Society has any existence now, although, as a matter of history, we believe the society still has an agent in this state. This will was made more than twenty years ago, and the condition and prospect of that society may have undergone great changes. . . [180] this action is misconstrued; there is no foundation for a judgment of immediate liberation." [179] "If they prefer remaining in Missouri, they are not liberated by the will, although the testator attempts to impose restrictions upon their owners incompatible with the laws. Such restrictions are merely nullities; . . His intention was that they should remain slaves, but that they should not pass out of his family by sale, or from one member of the family to another. This latter intention can not be carried into effect, because it is against the laws of the state." [Napton, J.] Judge Scott dissented: [180] "The slave, under his master's will, has elected to be free, and to put himself under the direction of the Colonization Society, and, according to the will, has a right thereby to be free. This court has no authority by law, nor by virtue of any thing contained in the record, to look behind it, and inquire whether the slave will be sent to Africa or not."

Cabanné v. Walker, 31 Mo. 274, October 1860. [275] "Reed testified that he knew Devolsey, who died about forty years before; (this evidence was given February 15, 1833;) that he knew that one of Devolsey's negroes cultivated a small field in the Little Prairie [in the lower part of the city of St. Louis], but does not remember exactly the place; that said negro cultivated tobacco, melons, and other articles of produce."

Armstrong v. Marmaduke, 31 Mo. 327, January 1861. The petition alleges that the slave of Marmaduke [329] "set fire to and burned a barn and stables then in the possession . . of said plaintiffs, and did thereby . . destroy the same together with the contents thereof" [1]

Hambleton v. Lynch, 32 Mo. 259, March 1862. [260] "The slave had been seized in execution . . by constable Watson, who deposited him with Lynch, who was keeper of a negro yard, merely for safe keeping. . . the plaintiff in the executions gave indemnification bonds, as provided by the statute, and required the constable to sell the slave."

Tucker v. Tucker, 32 Mo. 464, July 1862. See same *v.* same, p. 212, *supra.*

Adderton v. Collier, 32 Mo. 507, July 1862. In 1859 the value of a negro girl was assessed at $800.

[1] Rev. Code (1855), p. 645, sect. 37.

Sallee v. Arnold, 32 Mo. 532, July 1862. [538] " Plaintiff brought suit . . to recover possession of seven slaves . . Prudence, Greene, Creed, Amanda, Laura, Margaret, and an infant, name unknown . . of the value of thirty-two hundred dollars." The first three " originally belonged to the estate of Thomas Swearingen, . . who died in the year 1850. . . in 1854 . . [539] were assigned to Lydia Ann Swearingen, a daughter of . . Swearingen. . . Arnold , . was the guardian . . of the said Lydia Ann, . . and took possession of said slaves, . . The other slaves mentioned are the children of Prudence, born since Arnold took possession. On the 1st of January, 1855, Arnold . . hired said slaves to Nunnelly . . for one year, for their victuals and clothes. On the 15th of May, 1855, the plaintiff married the said Lydia Ann, and on the 29th of August following she died."

Judgment for plaintiff affirmed: [540] " the right of Lydia Ann in the slaves was a chose in possession, and not a chose in action. . . the possession of Donnelly [Nunnelly], in contemplation of law, was the possession of Arnold, the guardian, and the possession of the guardian was the possession of Lydia Ann, his ward; and upon the marriage of Lydia Ann her possession was transferred to her husband," [Bay, J.]

Pratte v. Coffman, 33 Mo. 71, October 1862. By the will of Joseph Coffman twenty-seven slaves are given to his daughter, [76] " for . . her natural life, and after her death to the heirs of her body living at the time of her death; but if she should die leaving no such heirs of her body surviving her, or if surviving her they shall die before arriving at the age of twenty-one years, leaving no issue capable of taking, . . then the property . . is to revert to . . the testator's own right heirs."

Young v. Woolfolk, 33 Mo. 110, October 1862. The administrator in 1850 filed " a petition for the sale of real estate to pay the debts of the estate, and that the slaves be reserved from sale." The court so ordered, but in 1852 some of the negroes were sold to pay the debts of the estate.

Charlotte (respondent) v. Chouteau (appellant), 33 Mo. 194, October 1862. On the reversal of the judgment in favor of Charlotte,[1] a new trial was had in 1859. Ten days before the case was reached for trial, Chouteau [195] " moved the court to grant him a special *venire* " because " a jury collected from the city [St. Louis] will necessarily include many who, from prejudices of birth and education, are not a fair or unprejudiced jury for the determination of the issues in this cause," The court overruled the motion. The trial resulted in a verdict and judgment in favor of Charlotte. Chouteau appealed.

Judgment affirmed: [200] " The court did not err in refusing the application of the defendant [Chouteau], that the court should hear and consider the testimony in the cause relative to the legal existence of slavery in Canada at the time when the ancestress of the plaintiff was in that country, prior to the empannelling of a jury. The existence of a foreign law was a question of fact, to be tried by a jury. . . [201] The most plausible objection to the judgment is, that it was founded upon a

[1] See same *v.* same, p. 203, *supra.*

verdict which was rendered against the weight of the evidence. Notwithstanding that we might believe that the verdict should have been rendered for the defendant, yet the practice is so well established, not to reverse a judgment because the verdict appears to have been rendered against the weight of evidence, that we will not, for that cause, interfere in this case." [Bates, J.]

Brennan v. O'Driscoll, 33 Mo. 372, January 1863. [373] "Brennan sued . . O'Driscoll by attachment, and a negro slave was seized by the sheriff as the property of . . O'Driscoll."

Hall v. Howdeshell, 33 Mo. 475, March 1863. Will of John Howdeshell, dated 1849: [478] "I give and bequeath unto my daughter Malinda . . my negro man named Edmund, at the valuation of four hundred dollars. . . unto my daughter Mary . . my negro boy named Antrim, at the valuation of five hundred and fifty dollars. . . unto my stepdaughter Sarah . . my negro boy named Lewis, at a valuation of five hundred and fifty dollars. . . unto my daughter Ann, my negro girl named Eliza, at the valuation of four hundred and fifty dollars. . . unto my daughter Wineford . . my negro boy named Powell, at the valuation of three hundred and fifty dollars. . . unto my daughter Malinda . . my old negro woman named Lucy, without any valuation, as I consider her not worth more than her victuals and clothes. It is my will that all the aforementioned negroes shall not be sold to any person who will convey them to the south." [1]

Lewis v. Hart, 33 Mo. 535, March 1863. In 1859 [538] "plaintiff [Louisa Lewis] filed her petition . . alleging that defendant, as administrator of the estate of Lizzie, alias Elizabeth Dickson, deceased, claimed her and her son George, a minor, as slaves of said estate. The petitioner further alleges that about seventeen years previous to the filing of her petition she was purchased by her mother, the said Lizzie, a free negro, on the condition that she should be emancipated, and that she was emancipated by said Lizzie at the time of the purchase aforesaid; that during the time intervening between said purchase and the death of said Lizzie, a period of about seventeen years, she and her child George, who was born after her emancipation as aforesaid, were considered and regarded as free persons, and so conducted themselves with the knowledge and consent of said Lizzie. The petitioner prays that her right and that of her child to freedom may be established by the judgment of the court. . . [539] Manning . . testified that . . Louisa, for many years, lived in an alley between Carr and Biddle, and Twelfth and Thirteenth streets, and kept house for herself. Her mother never lived with her. . . She took in washing, and managed her own affairs. Her son George, who is nearly white, lived with her. John How . . stated . . She had a husband who formerly belonged to witness, but had been freed by him. Her husband lived part of the time in Chicago, and he and his wife kept up a correspondence; the letters passed through the hands of witness. Plaintiff applied to witness, who was mayor of St. Louis, for a permit to live in St. Louis as a free woman. Witness granted it, but first required and

[1] For codicil, see Beaupied *v.* Jennings, p. 209, *supra.*

obtained from her mother Lizzie, a writing for that purpose. Witness also gave her a pass to cross the ferry as a free person. . . [540] knows of her having five hundred or six hundred dollars; knew of her having a deposit account in her own name at the Boatman's Savings Institution. Witness had made deposits for her, and all her transactions were in her own name. . . Lizzie [Louisa's mother] died in July, 1859, and owned the house she died in. . . plaintiff went to Chicago eighteen months or two years ago, and returned to St. Louis after the death of her husband; plaintiff always passed as a free woman; heard Lizzie say, about three weeks before she died, that plaintiff and her son George were free at her death, and they should not serve anybody after she died. . . at her death, her grandson George should have all of her property. Martha Brown had often heard Lizzie say that Louisa was as free as she was, and that she had not bought her to be a slave for any person; witness knew Lizzie well; lived in same house with her five years; she always spoke of plaintiff and her son George as being free, and that the property she had was George's; plaintiff and her mother visited each other, and her mother knew of her going to Chicago, and of her acting and living as a free person; heard Lizzie say that she bought Louisa to be free, and not to be the slave of any one."

Judgment for the plaintiff affirmed: [541] "a deed of manumission may be, and ought to be, presumed by the jury, when the testimony adduced establishes a sufficient ground for such a presumption. . . [542] no good reason can be given why the general doctrine of presumption, as applied to deeds, patents, etc., should not be extended to deeds of manumission." [Bay, J.]

Joshua (a man of color) v. Purse, 34 Mo. 209, October 1863. "The 'Act to enable persons held in slavery to sue for their freedom,' in its first section, provides that 'any person held in slavery may petition the Circuit Court, or judge thereof in vacation, for leave to sue as a poor person, in order to establish his right to freedom, and shall state in his petition the ground on which his claim to freedom is founded.' In the present case, upon the petition so filed, an order was made that the petitioner be allowed to sue; but no pleading was filed by the plaintiff as a legal statement of his cause of action against the defendants. Instead, thereof, it seems that the petition for leave to sue was regarded as the plaintiff's declaration or petition stating his cause of action; and a demurrer to it was filed and sustained."

Judgment reversed and the cause remanded: "The petition for leave to sue, and the petition as a declaration, are distinct things, and must be kept so. The petition for leave to sue is wholly *ex parte* and preliminary to the suit, which must be commenced by a petition under the general practice act. In remanding the case that a proper petition may be filed, it is thought proper to state, that the petition must show upon what ground the plaintiff claims a right to freedom." [Bates, J.]

Smith v. Denny, 34 Mo. 219, October 1863. [223] "the value of said slave Sarah . . on the 1st. of January, 1857, was . . one thousand and thirty dollars."

Bruce v. Sims, 34 Mo. 246, October 1863. Davis executed [249] "a bill of sale to Pullis of the negro, which . . expressed the consideration to be twelve hundred dollars,"

Parker v. Waugh, 34 Mo. 340, January 1864. [341] "1862, Waugh, the sheriff . . had in his hands five executions . . which . . he levied upon twenty-one slaves of Laforce. . . [342] the same slaves . . were advertised and sold under all the executions, on the 24th day of March, 1863, for $4782.50"

State v. Rohlfing, 34 Mo. 348, January 1864. [349] "The appellant was indicted . . for dealing with a slave, . . without permission in writing from the master, owner or owners of said slave.[1] . . two notes had been found in the possession of the slave, . . signed by the appellant, and that the appellant admitted . . that he had borrowed the money of the negro, and given him his note of it." He was tried and convicted. Judgment affirmed: "A single transaction may well be a *dealing* with a slave within the meaning of the act which forbids such dealing." [Bates, J.]

Welton v. Railroad Co., 34 Mo. 358, January 1864. Suit against a railroad corporation for transporting a slave without the consent of his owner.[2]

Lewey v. Lewey, 34 Mo. 367, January 1864. Adam Lewey bequeathed a negro boy to his wife during her life or widowhood. [369] "she sold the negro for his full value; that the purchaser was a negro-trader, who was reported to have taken him to Arkansas; that she told him before the sale that she had only a life estate, and he replied that when he wanted a better title he would buy from the heirs." Held: "the proceeds of the sale should be considered as substituted for the slave."

Rogers v. Railroad, 35 Mo. 153, July 1864. [157] "This was an action based on the act of 27th February, 1855,[3] . . to recover double the value of a slave of the plaintiff, alleged to have been transported on the respondent's railroad, in violation of the provisions of said act. Pending the suit, the act of 1855 was repealed by an act approved February 6, 1864." Held: the repeal did not affect actions already commenced.

McClure v. Railroad, 35 Mo. 189, July 1864. Suit "to recover double the value of a slave . . alleged to have been transported on the plaintiff's railroad" in violation of the act of 1855.[4]

Moorman v. Sharp, 35 Mo. 283, October 1864. In 1852 a negro boy sold for $310.

Alexander v. Helber, 35 Mo. 334, October 1864. In 1859 the defendant, [335] "ex-officio collector of taxes . . [336] sold the boy in question at public sale, at the courthouse door in St. François county . . that plaintiff [owner of the boy] was present at the sale and forbade the

[1] Rev. Code (1855), p. 1477, sect. 33.
[2] Sess. Acts 1855, p. 169.
[3] Sess. Acts 1855, p. 169.
[4] Sess. Acts 1855, p. 169.

sale; he told the by-standers to beware, they would get no title; that the whole thing was illegal; that at the time of the sale the boy was worth from $800 to $1,000."

Curry v. Lackey, 35 Mo. 389, January 1865. Exhibit "A": [393] "I promise to make up any difference in value that may be fixed by Gen. J. B. Gardenhire, between negro boy 'Ned' conveyed to me by Wm. A. Curry, and negro boy 'Aaron' conveyed by me to said Wm. A. Curry, as per two bills of sale . . 1858. R. J. Lackey," Exhibit "B": "1858. Gentlemen: I have examined the negro boy Aaron, delivered to Dr. Curry by Mr. Lackey, and think he is worth eight hundred dollars. The value of Ned being fixed at one thousand dollars, the difference therefore in their values is two hundred dollars. Respectfully, Jas. B. Gardenhire."

State v. Edwards, 36 Mo. 394, October 1865. Indictment: "that a certain slave named Garrison, the property of . . Montery, . . 1859, . . did . . steal . . a certain sack of wheat, . . the property of . . [395] Montery, . . Edwards . . did receive and have [the sack of wheat aforesaid] . . well knowing the said sack of wheat to have been unlawfully stolen," Held: the indictment is bad: [396] "The statute under which the indictment appears to have been framed [1] had no application to such a case. The possession by a slave of the property of his master, is the possession of the master."

Smith v. Denny, 37 Mo. 20, October 1865. See same *v.* same, p. 218, *supra.*

Harris v. Railroad, 37 Mo. 307, February 1866. Harris, [308] "being in St. Louis, wrote to his wife at Macon to send to him his slave Isaac, and . . Mrs. Harris wrote and delivered to the negro a pass, directed to the conductor of appellant's road, requesting him to take charge of and pass the said slave to Hannibal, and deliver him to one of the boats of the Keokuk Packet Company, and not allow him (the slave) any liberties. . . [309] The slave made his escape, but whether before or after he reached Hannibal, does not appear." Harris claimed [308] "damages in the sum of two thousand dollars . . [309] The jury found a verdict for the respondent, on which judgment was rendered" Reversed, and the cause remanded.

Peters v. Clause, 37 Mo. 337, February 1866. Held: the owner of a slave may recover damages of a bailee, for an injury done to the slave by an inhuman and cruel beating, in consequence of which [338] "The slave found refuge with his master" before the time for which he had been hired had expired.

Minor v. Cardwell, 37 Mo. 350, February 1866. [353] "slaves which were held by a married woman in Kentucky, under the operation of the law of 1845-6, and which were invested with the character of real estate by local law," were brought by her to Missouri.

Held: [356] "Slaves being regarded by our law as merely personal property, as soon as they were brought here, they were remitted to that

[1] Rev. Code (1855), p. 580, art. 3, sect. 43.

condition, without considering the nature or character of the laws by which they were held in the country whence they came."

Phillips v. Evans, 38 Mo. 305, July 1866. In 1857 Phillips [312] "sold and delivered to the appellant, Evans, a certain negro girl named 'Clara,' for the consideration of one thousand and fifty dollars, for which he gave his promissory note, . . at the time of the sale . . [Phillips] made and delivered to Evans his written bill of sale of said negro, whereby he . . warranted said negro 'Clara' to be a slave for life, and also . . agreed 'to warrant and defend the title of said negro "Clara" to said Evans forever.' . . but that thereafter, to-wit., on the 11th day of January, 1865, by virtue of an ordinance abolishing slavery in Missouri, passed in convention on that date, the said negro 'Clara,' and all her children or issue, were manumitted and declared free."

Judgment for Phillips affirmed: [314] "The Ordinance of Emancipation caused a complete annihilation . . of all property in slaves. . . clearly the covenant to warrant . . the title to the negro, and that she was a slave for life, cannot, by any just construction, be made to apply to such an occurrence." [Wagner, J.]

State v. Moseley, 38 Mo. 380, July 1866. "Hall, a negro, testified that the defendant took . . from him . . the property mentioned in the indictment; that the trunk contained one twenty dollar bill and three five dollar bills, . . He stated that he could neither read nor write, but that he knew twenty dollar greenbacks from fives . . and that he got those bills in pay when he was paid off as a soldier;"

Darrett v. Donnelly, 38 Mo. 492, October 1866. In October 1859 [493] "defendant . . agreed to purchase said boy . . at the price of twelve hundred dollars, provided that if upon examination first to be made of the said boy, he should be found to be sound and free from all such blemishes and defects as would injuriously affect his sale in the market." Bird, having [495] "testified that he was in company with the plaintiff, defendant and negro boy from Bloomington until they took the cars at Bevier, the defendant offered to prove by him that just after the cars had started from Bevier east, and before the escape of the boy, the defendant said to the witness (the plaintiff being absent in another car at the time) that 'plaintiff was a careless man; that, by the terms of the sale, the negro was the plaintiff's until he was stripped and examined and delivered at Monroe City, which had not been done;'"

Williams v. Evans, 39 Mo. 201, October 1866. [203] "Williams, the appellant, sued Evans, the respondent, . . for the alleged non-delivery of the two slaves, named Isham and Judy Ann, which he alleged he had purchased of the respondent for the sum of nineteen hundred and fifty dollars cash paid for the same. . . the slaves had been arrested by order of respondent and committed to the custody of the jailor of St. Louis county as his property. Whilst they were in jail the appellant purchased them from the respondent for the sum of nineteen hundred and fifty dollars, twelve hundred dollars of which was paid to respondent and seven hundred and fifty dollars was paid to two men by the name of Newcomb

and Duvall, by direction of respondent, for their services in hunting up and procuring the arrest of the slaves. When the money was paid, the respondent executed and delivered to the appellant a bill of sale conveying the slaves; and afterwards, both respondent and appellant together with Newcomb and Duvall went to the jail where the slaves were confined, to settle with the jailor and pay him his fees for keeping them. When the jail fees were paid, the respondent informed the jailor that he had sold the slaves to appellant, and ordered him to deliver the same to him (the appellant) whenever he called for them, to which the jailor assented. The slaves were in another apartment, and were not produced in the actual presence of the company or the parties. The appellant left them in the . . [204] custody of the jailor until he could engage passage on a boat to transfer them to his home in Nashville, Tenn. Having succeeded in finding a boat destined for Nashville, in a short time and on the same day he returned to the jail and demanded of the jailor possession of the slaves, but the jailor, acting under instructions of the sheriff, refused to deliver them. It seems that the slaves had instituted suit in the St. Louis Circuit Court for their freedom, and in pursuance of the law the court had made an order to have them hired out, and forbidding their being removed from its jurisdiction till the suit was determined. The order was not served till after the departure of the appellant for the boat, and, had it not been for that, the jailor states that he would have delivered the slaves to him on his return, when demanded. The appellant then commenced this proceeding against the respondent for non-delivery of the slaves. The court below, by its instructions, held that the delivery was complete, and that the property passed to the vendee;" Judgment affirmed.

Public Schools v. Schoenthaler,[1] 40 Mo. 372, March 1867. "a concession to Charles Leveille (or Leveiller), dated 1st of March, 1788, by which Manuel Perez, Lieut. Governor, upon the petition of Charles Leveille, a free negro, who had been the slave of the late Louis Robert, conceded to the said Charles Leveille, his heirs and assigns, in fee simple, 'a lot of ground sixty feet front only, by one hundred and fifty feet deep, situated in this town of St. Louis, bounded on the one side by the lot of Louis Ride's heirs, on the other by the king's domain, on its rear by the Mississippi river, and on its principal front by the road which leads from Second street to Prairie-à-Catalan,' . . [373] there were, before 1800, large fruit trees on the lot, some as thick as a man's body. . . Charles Leveille and his wife lived on this lot until the death of the old man, . . in 1809 or 1810. His widow lived on it until her death in 1826, or thereabouts;"

Magwire v. Tyler,[2] 40 Mo. 406, March 1867. [408] "on the fifth day of October, in the year 1793, the Spanish Government conceded or granted to one Esther, a free mulattress, a tract or parcel of land situate on the border of the Mississippi river, and between that and the earth-barn, La Grange de Terre, . . The concession to Esther had no definite location by the terms of the grant, but she took possession under such grant of a

[1] See The Schools *v.* Risley, p. 223, *infra.*
[2] See Maguire *v.* Tyler, p. 223, *infra.*

tract of land lying between the Big mound and the Mississippi river. . . [411] on the tenth day of September, 1810, Jacques Clamorgan, who claimed the Esther grant by deed from her, the 2d September, 1797, conveyed the same grant to . . Pierre Chouteau."

Jarrett v. Morton, 44 Mo. 275, July 1869. [276] "The plaintiff brings his *quantum meruit* to recover for the services of a slave who was taken by the defendant, in . . 1862, . . to Arkansas, and returned with him in 1864."

Maguire v. Tyler,[1] 8 Wallace 650, December 1869. [653] "the concession of the governor to Joseph Brazeau," June 25, 1794, [654] "a tract of land . . north of the town [of St. Louis] . . of which one end is to be bounded by the concession to one Esther, a free mulatto woman. . . [65] the terms of the concession to the mulatto woman, bearing date October 5, 1793, which . . has four arpents front," [670] "The court . . decided . . [671] That the tract as granted by the governor was bounded . . on the south by the concession to one Esther, a free mulatto woman,"

The Schools v. Risley,[2] 10 Wallace 91, December 1869. [96] "a concession by the Spanish governor, dated March 1, 1788, to the negro Leveille, for a lot in St. Louis of 60 by 150 feet, . . [97] the lot of the free negro called Charles," [112] "a tax sale of the lot occupied by the colored man, Charles Leveille, for the non-payment of the taxes for the year 1826,"

Johnson v. Johnson, 45 Mo. 595, March 1870. [597] "Demas, the appellant, was a slave in Virginia, . . whilst he lived there he married a negress, also a slave, by whom he had three children. His wife and children were sold to some person in Texas, and his master took him to Mexico, from whence he was brought to St. Louis. . . in . . 1849, he married the respondent, then a free woman of color, and in about one year thereafter he was emancipated by his master. . . he continued to . . cohabit with the respondent as his wife for about thirteen years, at the expiration of which time she left him" and "instituted a suit for divorce . . on the ground of cruel and inhuman treatment, . . a divorce and alimony were decreed. . . [601] The court awarded the respondent $1000." [597] "For the appellant it is insisted upon, in argument, that as the marriage took place when he was a slave, it was void,"

Judgment affirmed: [598] "In none of the States where slavery lately existed did the municipal law recognize the marriage rites between slaves. They had no civil rights except where the right to freedom was involved, in which case they could prosecute a suit by their next friend to vindicate their claim. By common consent, and universal usage . . they were permitted to select their husbands and wives, and were generally married by preachers of their own race, though sometimes by white ministers. They were . . recognized as husband and wife by their masters and in the community . . but whatever moral force there may have been in such

[1] See Magwire *v.* Tyler, p. 222, *supra.*
[2] See Public Schools *v.* Schoenthaler, p. 222, *supra.*

connections, . . there was nothing binding . . in law. . . [600] If, after the emancipation, there was no confirmation by cohabitation or otherwise, . . there would be no grounds for holding the marriage . . binding. But, as in the case of other parties incapacitated, we perceive no good reason for holding that the contract may not be . . ratified after the incapacity . . is removed. . . [601] as the appellant, when he was emancipated, . . constantly acknowledged her as his wife, the marriage should . . be deemed valid . . That in his earlier days he was previously married can make no difference. His first marriage . . had no legal existence; he was at liberty to repudiate it at pleasure; and by his continuing to live with respondent . . as his lawful wife after he had obtained his civil rights, he disaffirmed his first marriage and ratified the second." [Wagner, J.]

Carson v. Hunter, 46 Mo. 467, October 1870. [470] " the note [dated November 12, 1861] was given for slaves taken by the plaintiff from Missouri to Arkansas during the war, and sold to defendant . . [471] Under [the act of July 13, 1861] . . the president of the United States, on the 16th of August, 1861, declared . . Arkansas, to be in insurrection, and from that period all trade between citizens of Missouri and those of Arkansas became unlawful unless by special license. . . the note can not be collected. . . [472] During the late civil war many slaves were taken to the States in insurrection, and their whole labor became thereby directed to the creation of such supplies as alone could enable the enemy to keep the field. To hold such intercourse lawful . . would present the spectacle of a country lawfully fighting those whom its subjects were lawfully feeding." [Bliss, J.]

Jones v. Hook, 47 Mo. 329, January 1871. " The present suit was instituted . . 1855, . . for the purpose of recovering possession of certain slaves . . Seals was [in 1831] the owner of a slave girl named Chloe (the mother of the other slaves sued for); . . [331] the case remanded."

Cadwallader v. West, 48 Mo. 483, October 1871. [489] " His domestic affairs were managed by colored servants, one of whom, a woman named Leno, was the mother of an illegitimate son of his. . . In view of his advanced age and general situation, he concluded . . 1850 to readjust his domestic arrangements, . . [491] in . . 1856, . . Cadwallader conveyed to West his life estate and reversionary interest in the two hundred acres . . [492] for . . West's agreement ' to take care of and support at his residence on said farm, an aged free black woman named Leno, formerly the property of said Cadwallader, . . during Cadwallader's natural life,' but the support was not to include clothing. . . 1863 . . Cadwallader . . turned everything over to Dr. West, . . [493] ' in consideration that . . [West] provide suitable food, clothing, house-room and necessary medical attendance for the negro woman named Leno, so long as she should live; and for the further consideration of $100,' "

Tyler v. Magwire, 17 Wallace 253, December 1872. [275] " On the 25th of June [1794], . . the governor issued a concession to [Brazeau] . . one end is to be bounded by the concession to one Esther, a free mulatto woman."

Turner v. Timberlake, 53 Mo. 371, August 1873. Turner's will: [375] " It is my will that . . all my just debts be fully paid, and for that purpose I desire my wife to sell . . forty-five acres . . together with my black woman Hannah and her children, except her son Alexander and daughter Adeline: "

Acock v. Acock, 57 Mo. 154, July 1874. In 1864 the defendant " commenced her suit . . upon a contract . . made in 1861, . . signed by plaintiff and Robinson, stating that they had bought the distributive share . . of the defendant, in the slaves belonging to the estate of her husband, . . and they promised . . to pay defendant . . the appraised value of the slaves less ten per cent. . . The appraised value of the slaves was $17,100, and the defendant was entitled to one-sixth part of the same. It was also agreed that defendant might retain one slave valued at $800; "

Bryant v. Christian, 58 Mo. 98, October 1874. Will of James Buford, 1870: [101] " except the amount herein named to be given to my former slaves "

ARKANSAS

INTRODUCTION

I

The Arkansas cases limit with precision the application of an axiom of the law of slavery, and of a definition in her statutes on that subject.

1. The axiom of the slaveholding states, that a negro or a mulatto was presumed to be a slave,[1] is emphatically declared by Judge Fairchild, in State *v.* Alford,[2] in 1860, to be confined to suits for freedom. "The case is far different, when the condition of slavery is a fact to be ascertained, in order to define the crime . . charged, or to determine the punishment to be affixed . . according as the criminal may be a freeman or a slave." Then the negro or mulatto is presumed to be free, whatever the shade of his skin. If he is a slave, it must be so alleged in the indictment and proven at the trial.

2. The definition of "mulatto," in the act of 1843, forbidding free negroes or mulattoes to immigrate to Arkansas,[3] is: "every person, not a full negro, who shall be one-fourth or more negro." Consequently, in a suit for freedom, brought thereafter by Abby and her four children,[4] the judge instructed the jury to give a verdict in favor of their freedom, if they found them to have "less than one-fourth of negro blood in their veins . . unless defendant . . had proven them to be slaves . . by proving [their descent] . . from a slave on the mother's side, who was one-fourth negro or more," and he refused to instruct the jury that "if Abby's mother was always held . . as a slave, and was . . of negro extraction, and if Abby was so held . . this was prima facie evidence that she and her children were slaves, unless . . emancipated." They had a verdict in their favor, and judgment that they be liberated; but this judgment was reversed by the Supreme Court of the state in 1857 because of error in giving the former instruction and of refusal to give the latter. Chief Justice English declares that the legislature, in other acts [5] than that regarding immigration of free negroes and mulattoes, "have manifestly used the word [mulatto] in a more latitudinous sense, . . they meant to embrace . . persons belonging to the *negro race,* . . of an intermixture of white and negro, without regard to grades." The cause was remanded, and on the new trial, a verdict was again given in favor of the

[1] Embodied in the Arkansas act of 1839. Digest of 1848, ch. 74, sect. 12, p. 545.
[2] P. 260, *infra.*
[3] Digest of 1848, ch. 75, sect. 1, p. 546.
[4] Daniel *v.* Guy, p. 252, *infra.*
[5] See p. 253, note 2, *infra.*

plaintiffs. The verdict was allowed to stand,[6] "though it is possible that the jury found against the preponderance of the evidence, through reluctance to sanction the enslaving of persons, who, to all appearances,[7] were of the white race, and, for many years before suit, had . . been treated as such."

The Chief Justice stated, when the case came up in 1857, that "the following would be safe rules of evidence. 1. Where a person held as a slave, sues for freedom, and it manifestly appears that he belongs to the *negro race,* . . he is presumed to be a slave, . . 2. If it appear that he belongs to the white race, he is presumed to be free. 3. If it be doubtful, . . there is no basis for legal presumption, . . but it is safest to give him the benefit of the doubt." It was, perhaps, in reliance on Rule 2, that Thomas Gary, whose hair was "smooth and of sandy complexion, perfectly straight . . eyes blue, his jaws thin, his nose slim and long" filed a bill,[8] alleging that he was a white person, and praying for an injunction against the defendants, who claimed him as a slave, from commencing any suit to recover possession of him. But it was proved that his mother had always been held in slavery till her emancipation, and the Supreme Court held, in 1858, that the preponderance of the testimony was that he belonged to the negro race, and that "the presumption of law, that he is a slave, at once attaches."

Arkansas was the melting-pot. Her slaves came from Illinois, Kentucky, Louisiana, Texas, Georgia, Alabama, Maryland, South Carolina, North Carolina, Mississippi, Virginia, St. Domingo, Missouri, and the Creek Nation.[9]

II

The constitution of 1836 provided that the Supreme Court should be "composed of three judges, one of whom shall be styled Chief Justice;"[10] that of 1868, that it "consist of one chief justice, . . and four associate justices."[11]

[6] Daniel *v.* Guy, p. 252, *infra.*
[7] Even their feet were bared for the inspection of the jury. *Ibid.*
[8] Gary *v.* Stevenson, p. 255, *infra.*
[9] See Hynson *v.* Terry, p. 228; Brown *v.* Hicks, p. 228; Trapnall *v.* Hattier, p. 230; Cocke *v.* Chapman, p. 231; Dodd *v.* McCraw, p. 232; Smith *v.* Jones, p. 232; Adamson *v.* Adamson, p. 234; Gaines *v.* Briggs, p. 234; Whitfield *v.* Browder, p. 238; Tatum *v.* Hines, p. 243; Roane *v.* Rives, p. 244; Morine *v.* Wilson, p. 255; Moss *v.* Ashbrooks, p. 256; Atkins *v.* Guice, p. 258.
[10] Art. 6, sect. 2.
[11] Art. 7, sect. 3.

Hynson v. Terry, 1 Ark. 83, January 1838. "action of detinue . . Morgan Magness deposed, that about twenty years previous to the trial, in . . Illinois, his father, Jonathan Magness, gave to Terry and his wife, [Jonathan's daughter,] . . a negro girl . . Nancy, between eight and twelve years of age, with the express understanding that the first child she should have, should be the property of Eliza, [Mrs. Terry's daughter.] . . Daniel was Nancy's first child, about ten years old, and worth from three to four hundred dollars; . . [84] Jonathan . . also gave them a mare, with the express . . understanding . . that . . Eliza was to have the first colt"

Held: Daniel [89] "was not . . in being [at the time of the gift of Nancy], and . . no title . . could be passed . . without a deed or other instrument . . proved and recorded."[1]

Brown v. Hicks, 1 Ark. 232, July 1838. A mulatto slave, sold in Kentucky in 1822, was valued by an Arkansas jury in 1837, when she was about 35 years of age, at $750.

Moody v. Walker, 3 Ark. 147, July 1840. [148] "mulatto girl . . [149] and her increase, ten or eleven in number."

Porter v. Clements, 3 Ark. 364, January 1841. Instrument in writing, explanatory of a bill of sale: [366] "Clements . . and . . daughter . . have [about September 1829] . . sold and delivered me [Phillips] . . negro servants and slaves, . . Tony, Fanny, Harriet, Violet, and Milley, for . . four hundred dollars, to them . . paid. Now, should they, within two years and six months . . pay me five hundred dollars . . I obligate myself to re-convey . . with this proviso, that they do not die, run away, or be stolen;" Phillips, in September, 1829, [365], "sold . . to Porter, with the exception of one . . (Harriet), who had always remained in possession of Clements: . . [367] since his purchase, Fanny has had two children, Armstead and Charles: . . he promised Phillips, that if he . . should . . within *two years,* give to him, Porter, five hundred dollars, he would, *if the negroes were then in his possession,* return them to Phillips; but . . not bound *to keep* the negroes until that time; . . this agreement . . did not extend to any increase . . That when sold to him, Tony was worth $200; Fanny worth less than nothing, being sickly and drunken, and a continual expense, . . [368] that Violet and Milly were worth $200; that Armstead is worth $300, and Charles $200. . . during that year [1829] Violet died. . . [369] that the expenses exceeded the profits some fifty or one hundred dollars a-year, not including the increasing value of the children. That Fanny died . . 1832;" Held: not a mortgage.

Robinson v. Calloway, 4 Ark. 94, January 1842. Mordecai was appraised at $300, in 1835. [96] "plaintiff had hired the boy out, and lent

[1] Act of 1804, Digest, p. 527, sect. 24.

him . . to go to mill; . . worth six or seven hundred dollars [in 1841, when about fifteen or sixteen years of age]. . . The Sheriff . . proved that he would hire for ten dollars a month."

Sumner v. Gray, 4 Ark. 467, July 1842. "1835, . . [Sumner] purchased . . two negro children, for which he was to give four hundred dollars; . . early in . . 1836, one . . died, at Sumner's house; . . then said that he had lost a little negro girl, for whom he would not have taken five hundred dollars;" The other died a few months later. Held: the vendee must pay the purchase money.

Pyeatt v. Spencer, 4 Ark. 563, July 1842. "Spencer . . alleged that Pyeatt, . . 1839, . . for . . $650, . . sold . . to Spencer, . . negro woman, . . and warranted her to be sound . . the slave was not . . but . . mentally deranged, and that Pyeatt well knew her to be so, . . The evidence . . A few days after Spencer bought the slave, he was found whipping her. He had her *stripped,* and *staked down* on the ground; her feet and hands extended, and fastened to stakes; and her face downwards. He appeared calm . . [564] and was whipping her at intervals, using a cowhide, with a plaited buckskin lash about fifteen inches long. He asked her what made her do so [run away?], and she said that Bedford and Buchanan told her, that if she staid there, she would be whipped to death. . . Spencer had drawn some blood, but not a great deal. *He took salt and a cob, and salted her back.* This witness . . thought her deranged. . . Another witness . . worked in the field" [with her] "at Pyeatt's, . . He kept her about two months. She was . . of vicious . . disposition, but not deranged as far as the witness could know. . . She frequently talked to herself, and would laugh without any one . . being near her. . . heard Pyeatt say, that if justice was to take place, Buchanan (of whom he bought the negro) ought to lose her. . . She was raised by [another] witness' brother, . . a kind, indulgent master . . at all times sound of mind," "an obedient, good house-servant. . . had run away from Pyeatt, and witness found her in the wood, and took her home. She seemed obstinate, walked very slow, and when he threatened to whip her, or she feared she would be ridden against, she walked faster, and looked wild, as negroes usually do, when threatened. She said that she had run away because she wanted to go to her children. . . when her mistress gave her time, would make clothes and knit for them . . [565] after Spencer had bought her, . . she ran away, and came to [another] witness' house. Spencer caught her, and chained her. Witness then, for the first time, discovered that she was deranged. He again met her, . . 1839, when she had run away from a person to whom Spencer had sold her. . . afterwards saw her at another place, cutting wood. . . Another witness . . 1841 . . examined her, and believed her deranged. . . might have been produced by severe whipping; but such whipping as was described in this case, would not produce it in one case in a thousand. Strong attachment for her children, and grief at being separated . . with severe chastisement, would be more likely to produce it." [563] "The jury . . assessed the plaintiff's damages to the sum of $716;"

Judgment thereon reversed, and a trial *de novo* awarded: [570] " no liability resting on the defendant. It is with pain . . that the court feels itself constrained to remark, that whatever seeming wildness . . might be perceived . . it is but reasonable to suppose, was caused by grief, and the excessive cruelty of her owner." [Dickenson, J.]

Irvin v. Bank, 5 Ark. 30, January 1843. " The negro was attached . . 13th of February, A.D. 1841, and remained in [Sheriff] Irvin's possession until Nov. 21, 1842. He charged for her board 50 cents per day [and $15 for clothing]. . . kept her at her own house, where she sometimes worked. Some witnesses thought . . her services . . worth her food and clothing. One . . that her services would be worth 6 or 8 dollars a month, her board 75 cents a week, and her clothing $24 or $25 a year. Another . . that, to board such a negro, was worth $100 or $125 a year—as much as a white person's;" " the charge for board and clothing [was] reduced [by the court] to $83 25."

Pool v. Loomis, 5 Ark. 110, January 1843. On November 1, 1842, a negro girl was replevied, [111] " of black complexion, about eight years of age, . . value . . $250 "

Dennis (a slave) v. State, 5 Ark. 230, July 1843. [231] " indictment against . . Day, a white man, and Frank and Dennis, negro slaves, for rape, . . committed . . 30th September, 1842. Verdict of guilty as to all, and motion in arrest of judgment, . . Motion sustained as to Day, and overruled as to Frank and Dennis, . . Sentence of death "

Affirmed: [233] " death . . had always been [the punishment] . . upon conviction of a slave, by all the statutes "

Johnson v. Clark, 5 Ark. 321, January 1844. In 1834 [334] " he was to pay $700 each, for Bob and Ned;"

Hynson v. Dunn, 5 Ark. 395, January 1844. [396] " that the plaintiff falsely represented . . that a certain slave . . was a first rate mechanic, a brick-mason and brick-layer, and . . H. was induced to purchase . . and executed the two bonds " of $400 each.

Hill v. Mitchell, 5 Ark. 608, July 1844. Lacy, J.: [616] " While slaves with us, in one sense of the term, are peculiarly personal property, yet in another they have all the sacredness and value, nay even more than real estate. . . [617] the lands and slaves the law casts upon the heir or devisee, and requires them to . . assign dower in them," [1]

Crabtree v. Crabtree, 5 Ark. 638, July 1844. " petition to have dower assigned in certain lands and slaves "

Haynes v. Tunstall, 5 Ark. 680, July 1844. " a negro woman with four or five children . . worth $12 or $1400. . . a negro man, with wife and three or four children, worth $15 or $1800,"

Trapnall v. Hattier, 6 Ark. 18, January 1845. Act of replevin. [23] " Hattier had the negro . . in New Orleans and held him by a good title; the negro ran away . . sold at auction in Natchez, . . bought by

[1] Rev. Stat. ch. 52, sects. 20-25, 29-31.

Brown, . . sent to Little Rock and . . sold to Trapnall . . who supposed he was purchasing a good . . title." Held: no tortious taking.

Gullett v. Lamberton, 6 Ark. 109, July 1845. Action of replevin for a woman slave, worth about $500 in 1842.

Held: [117] "By the act . . of 1840,[1] slaves . . descend to the heir . . and are to be . . held by the same title as real estate. . . not intended to deprive the owner of the common . . remedies . . for the recovery of the possession of such property when unjustly deprived . . or for the recovery of damages for injuries inflicted upon it."

Bank v. Williams, 6 Ark. 156, July 1845. In 1843 a boy, about eleven years old, was [158] "sold, under an execution in favor of the bank, . . and purchased by the bank,"

Bailey v. Starke, 6 Ark. 191, October 1845. In 1841 a negro girl was worth $600.

Couch v. McKee, 6 Ark. 484, April 1846. [485] "August 1839, at Memphis . . [Couch] re-sold to . . McKee a negro [man] slave . . for $1100, which . . [he] had before . . bought of said [McKee and another] for . . $1100"

Pendleton v. State, 6 Ark. 509, April 1846. "indictment against John Pendleton, a free negro, . . under the 3d section of the act of [January 20,] 1843, 'to prohibit the emigration . . of free negroes . . into this state,'[2] . . convicted, and appealed"

Judgment affirmed: the act is constitutional. [511] "nothing beyond a kind of quasi citizenship has ever been recognized in the case of colored persons. . . [512] The protection of their persons and the right of property is provided for to a humane and just extent. . . The [U. S.] constitution was the work of the white race; . . The two races differing as they do in complexion, habits, conformation and intellectual endowments, could not nor ever will live together on terms of social or political equality. . . Those who framed in constitution, were aware of this, and hence their intention to exclude them as citizens within the meaning of the clause"[3] [Cross, J.]

Cocke v. Chapman, 7 Ark. 197, July 1846. [199] "Johnston, . . of Texas, was the owner of a negro man that had run away, and before his apprehension, or having ascertained where he was, sold him [for $600] . . to Cocke, . . Cocke, 'agreeing to take the responsibility of getting said negro upon himself.' Johnston executed a bill of sale . . 8th . . of October, 1845. On the 20th . . the negro was . . committed to the jail . . as a runaway slave. Chapman . . having a debt against Johnston, brought suit . . the 27th, and on the 30th, . . before Cocke had obtained possession, caused the negro to be seized by the sheriff"

Held: [201] "the title to the negro . . was vested in Cocke . . 8th of October, 1845."

[1] Act of Dec. 28. Acts of 1840, p. 118.
[2] Acts of 1842-1843, p. 61.
[3] U. S. Constitution, art. IV., sect. 2.

Carr v. Crain, 7 Ark. 241, January 1847. Maria, aged twelve years in 1832, had two children by 1841. In 1842 [244] "the hire of the slaves was worth five dollars per month."

Aramynta v. Woodruff, 7 Ark. 422, January 1847. Aramynta and others filed a petition in the probate court, alleging [423] "that Cynthia Robinson . . had by her last will . . set them at liberty; . . that she left more property than . . required to pay all her debts, . . will . . proven . . and bond given to prevent them from becoming a charge upon the county, . . prayer that the petitioner and her children, and her future children, if any, may be decreed to be manumitted and . . discharged forever from all liability for the debts . . final decree in favor" of the petitioners.

Held: [424] "the probate court could exercise no jurisdiction touching the question of freedom[1] . . the decree . . is a mere nullity."

Blakemore v. Byrnside, 7 Ark. 505, January 1847. [507] "negro boy, aged about twenty-two years, . . was worth [in 1844] six or seven hundred dollars."

Menifee v. Menifee, 8 Ark. 9, July 1847. Ten slaves, [10] "men, women and children . . valued . . at $5,200 [in 1842]. . . [11] The hire . . for the year 1842 was $624 50; for . . 1843, $717, . . [14] (Amelia) was sent from Kentucky by [Mrs. Menifee's] . . mother . . in the care of Doctor Menifee, to her sister [in Arkansas], . . to assist and wait on her; . . unhealthy . . and during the Doctor's life-time, was sometimes taken to his house to be 'administered to;' . . value . . about $400, and her yearly hire about $40."

Dodd v. McCraw, 8 Ark. 84, July 1847. "At least 20 years ago, in . . Georgia, I gave the negro girl . . to my daughter, . . when they were both small children." They moved to Arkansas about 1835.

Smith v. Jones, 8 Ark. 109, July 1847. "1840, when . . John, was about starting from his father's in Alabama to Arkansas, . . [his father] told him . . he might take choice [of one of three negro boys] . . to be re-delivered when called for, . . [111] after . . John came to Arkansas, he sold the slave,"

Bank v. Byrd, 8 Ark. 152, July 1847. "The attachment was levied on . . Isaac, his wife . . and Abram, . . 1842, the Bank of the State . . filed an interplea . . alleging that said slaves belonged to her,"

Costar v. Davies, 8 Ark. 213, July 1847. In 1846 [218] "Costar called the boy into the bar-room of his hotel; . . [Byers] looked at him, . . the boy then retired; . . he agreed to give . . $750, and a bill of sale or memorandum . . was made, . . he handed to Costar their note, which they had executed to the appellees," [214] One . . went out after the slave and soon returned saying that the negro objected to leaving his wife. The slave ran off." Held: [219] "the sale had been fully . . consummated."

[1] Rev. Code, ch. 66, sect. 1.

Ferguson v. Collins, 8 Ark. 241, January 1848. [246] "carrying on a farm and wood-yard, using the labor of the negroes, . . at the time of the death [in 1835] . . there were twenty-four negroes . . sixteen of whom were good able-bodied working hands . . [247] They [complainants] . . charge . . that the administrator claims a most extravagant allowance for keeping, clothing and feeding the negro children, . . in some instances . . when the negroes . . would have hired for a considerable amount, . . [254] [administrator] is charged . . with the hire of several male servants . . for . . 1836, 7, and 8, . . $5002 50, and for the same time with the hire of women servants . . $2880 00, . . [256] assets . . for the payment of the debts, . . not . . exorbitant,"

Lindsay v. Harrison, 8 Ark. 302, January 1848. In 1835 Paulding of Alabama conveyed to Harrison a negro woman, [310] "upon trust, that he . . should permit said slave and her increase to remain in the possession and under the control of Harriet Kelly, her heirs . . to her and their sole use . . for ever. . . Harriet . . removed to . . Mississippi, . . intermarried with . . Jeffries . . [311] removed to Arkansas [1837 or 1838], . . [negro] taken by the sheriff . . under an execution against . . Jeffries, . . 1840, . . purchased" by Lindsay. Held: his title is valid.

Joe Sullivant (a slave) v. State, 8 Ark. 400, January 1848. Indictment, 1847: "The Grand Jurors . . present that . . Joe Sullivant . . (a slave, the property of Eccanah Sullivant) . . [401] in the . . county of Dallas . . did feloniously attempt to commit a rape on . . a white woman; . . On the trial, [she] . . deposed . . 'About the 11th hour of the night . . I awoke, and upon extending my hand felt some person . . in the act of committing a rape. . . his shirt was very coarse, and a knife scabbard suspended at his side. When I touched him, he sprang from the bed: . . I ran to the door . . the person ran out at the other door. . . I then did not know who to charge with the offence. [I thought it might be a certain white man, but recollected that he] . . was sick. . . On the next day . . two young Kellums and young Evans came to my house: I had found a scabbard . . [402] when I found it had been removed, I charged the young men with the offence. . . On Monday . . Joe, was brought. I told him that was the shirt I felt. He said . . he was not guilty. . . I saw his foot placed in the track—he *crimped* up his toes—his master told him to place his foot in . . fitted . . exactly. He was then whipped by my husband, and then confessed he was there. I saw the feet of the young Kellums and Evans placed in the tracks on Sunday . . Joe . . had been frequently hired by my husband . . My husband had loaned [him] . . his gun to hunt with . . his master . . also . . Defendant did not claim the . . scabbard . . my husband owned no slaves.' . . examination . . before . . justice of the peace, at the house of . . prosecutrix; . . [403] 'Did you come into the house? . . I did. . . was some one with you? . . Mr. Collier was with me. . . told me that Mrs. . . sent for me.' . . one of the guard . . asked him if he was guilty, and he said he was, . . Another witness . . heard defendant tell . . that he went . . to steal a little." [401] "found guilty and condemned to be

hung. His counsel moved for a new trial . . also moved in arrest of judgment, . . The court overruled both motions,"

Reversed: [404] "The indictment . . [405] utterly fails to charge any assault whatever. . . She did not detail the facts, but simply stated a conclusion of law. . . not shown by any witness that the offence, if committed at all, was committed within . . Dallas county." [Johnson, C. J.]

Belfour v. Raney, 8 Ark. 479, January 1848. [480] "Sloan and Belfour, partners in the practice of medicine, . . claimed $102 75 . . for services and medicine rendered . . to Orange, a slave of . . intestate, . . [481] [latter] died . . January, 1844, . . Dr. Belfour attended upon him . . After the death . . Orange was left upon his place, by the administrators, to take care of the stock, goods, house, etc." [480] "February, . . taken very sick with the winter fever, . . ill for at least a month and a half. . . taken sick at Mr. Holderman's, in Smithville, . . removed to the house of his mother, [who] . . [481] kept a cake shop" "in the village, where he remained until his recovery, . . the mother . . came for the doctor to go and see him." [480] "Witness saw him administering medicine . . once in the presence of . . administratrix . . The slave recovered."

Held: [482] "after having received his services without objection, . . [administrators] will not be permitted to say they were rendered without request."

Beebe v. De Baun, 8 Ark. 510, January 1848. [514] "my attorney . . intimated . . that the only course left for me [to prevent a levy on my slaves] . . was to put the property out of the way. . . decided . . to send them by land to Pine Bluffs, and thence by water to New Orleans, in the custody of an agent"

Adamson v. Adamson, 9 Ark. 26, January 1848. [27] "his mother . . hired to [him] defendant two negro boys [in Maryland] in . . 1836 or 1837, which he took to Arkansas. . . for the first three years defendant paid his mother $100 each . . [28] and from that time to the 15th January, 1844, . . at $125 each. . . partly in money, and partly in merchandise, . . fall of 1843, he had informed [her] . . that he would not hire the slaves for another year at $125 each, but at . . $100 each per year. . . The court . . instructed . . [31] 'in the absence of testimony to show what amount was to be paid . . 1844, . . a proper criterion . . would be the price paid . . the year previous'"

Held: "no correct criterion" "The price of negro hire is quite fluctuating,"

Gaines v. Briggs, 9 Ark. 46, January 1848. In 1827, a negro girl, Rose, was given by a father to his daughter in South Carolina. She married, and [47] "moved to Arkansas, bringing Rose . . [husband] died . . 1846 . . a short time after," Rose and her children were "run out" of the state, at the widow's request.

Humphries v. McCraw, 9 Ark. 91, January 1848. [99] "1844, he went with old man Humphries on White river . . the old man said he

was taking some negroes down below to sell . . had started them on ahead to overtake and get on board a flat boat—he said he was taking them off to avoid an unjust debt" [96] "sold them, and . . brought back another negro . . also a stock of goods, . . [98] After the trial, all . . got mad . . McCraw threatened to whip one of the negroes, but old man Humphries swore he should not do it."

Merrill v. Dawson, 17 Fed. Cas. 86 (Hempstead 563), October 1848. [103] "the court . . doth find the said negro slaves . . to be of the following value, Old Jim [fifty-one years old], five hundred dollars; Governor [thirty-three years old], eight hundred and fifty dollars; Sandy [thirty-two years old], eight hundred dollars; Connell [thirty-one years old], eight hundred dollars; Tom [thirty years old], eight hundred dollars; Phoebe [twenty-eight years old] and her . . child Jackson, one thousand dollars; Beverly, another child of said Phoebe [born since 1841], fifty dollars; Catharine [twenty-nine years old], eight hundred dollars; Mary [twenty-six years old] and her . . child Henry [born since 1837], seven hundred and fifty dollars; Maria [twenty-seven years old] and her . . child Frances [born since 1837], nine hundred dollars; Eliza [twenty-nine years old], seven hundred dollars; Ransom [twenty-three years old], eight hundred dollars; Young Jim [twenty-two years old], six hundred dollars. . . the court . . doth find the value of the hire . . for Mary, seventy dollars; for Tom, one hundred dollars; for Maria, seventy dollars per annum; . . to be computed . . from . . 1842, . . the hire of Phoebe, . . seventy dollars per annum,"

Walworth v. Pool, 9 Ark. 394, January 1849. [395] "employed plaintiff to oversee his plantation . . for . . 1847, . . to pay him $500, and to furnish . . meat, meal, vegetables, etc." [397] "worth per month, six dollars, . . March, 1847, . . the Mississippi river overflowed . . and destroyed the crop: . . discharged"

Burton v. Lockert, 9 Ark. 411, January 1849. [412] "Burton, . . interested in a . . suit . . against . . Moody, . . 1836, for a family of negroes, . . and said family . . having been run off by . . Moody, . . Burton . . agreed to pay . . $250 if . . Lockert, would assist and get said negroes . . provided said Burton succeeded in said suit . . they were delivered to the sheriff"

Collins v. Woodruff, 9 Ark. 463, January 1849. [464] "Collins and Woodruff were engaged in running a saw mill, (by water power,) and . . boy was hired . . to assist them . . The negro, on the day . . he was drowned, was not engaged . . about the mill, but was left to employ his time as he pleased for the day."

Held: the hirer [469] "is entitled to a deduction for the residue of the term after his death."

Rose v. Rose, 9 Ark. 507, January 1849. Bill for a divorce, stating that the husband was [508] "in the . . practice of . . encouraging disobedience in his slaves [toward her]: . . [509] The witnesses . . testified that . . upon her complaint of disobedience and insolence on the part of the servants, [he] said she was a liar,"

Nunn v. Goodlett, 10 Ark. 89, July 1849. [91] Sam . . about thirty-eight years of age; Allen . . about thirty-eight . . Cinda . . about twenty-five . . Maria . . about sixteen" The owner avers that [92] "Sam was of the value of $720; . . Allen . . $300; . . Cinda . . $558; . . Maria . . $500."

Danley v. Rector, 10 Ark. 211, July 1849. [213] "In 1836, Col. D., my father bought . . and gave the negro boy [of dark copper color] . . to . . my brother . . in consideration of . . carrying the United States mail . . for . . route [for which] Col. D. was contractor. . . [214] about 17 years old [in 1843], . . [216] sold to . . Rector . . at sheriff's sale, . . 1844, . . for 508 dollars . . Henry was the third one sold, and he was put up on a table so that all could see him, was named and cried in a loud . . voice, so were each of the others"

Wilson v. Dean, 10 Ark. 308, January 1850. "Dean, a man of color, sued . . for his freedom, and obtained judgment. . . Wilson did not prosecute his appeal within the time prescribed." Judgment affirmed.

Jordan v. Foster, 11 Ark. 139, January 1850. "1846, defendant, . . for . . $1,000, conveyed to plaintiff . . Tom, . . about 11 years; Hannah, [[143] 'a likely mulatto girl'] . . about 8 years; Silve Amanda, . . about 4 years; and a girl about four years . . [140] warranted . . sound" Witness testified [143] "that, after she got large enough to walk, she always sucked her thumb; . . appeared to walk one-sided, held her arm crooked, . . Dr. Collins . . pronounced the disease paralysis, . . extremely doubtful whether she would ever recover; . . could be of little value to any one; . . [144] that persons . . not acquainted with the disease, might not notice it;" Held: damages may be recovered.

Pennington v. Yell, 11 Ark. 212, July 1850. [216] "1841, he levied on . . Dick, about seven years of age, and sold him . . 1842 [to Yell, the highest bidder,] for $180. . . charge of $67 50 for keeping . . 135 days, at 50 cents per day. . . [Yell] [218] sold the boy . . a day or two after . . for $5 less than he gave . . in order to pay costs . . for levying upon, keeping and selling said boy."

Prater v. Frazier, 11 Ark. 249, July 1850. In 1835 a resident of Tennessee deeded to his daughter a negro girl, seven or eight years old. She was brought to Arkansas. In 1848, the sheriff testified that she [252] "would hire for $100 without the child, $75 with it, per year. Child was about 2, woman 21 or 22 years old. . . [256] The woman was worth $600, child $100,"

May v. Jameson, 11 Ark. 368, July 1850. [369] "1844, . . Alabama, he recovered a judgment . . for a [man] slave [in Arkansas] . . assessed by the jury at $800,"

Charles v. State, 11 Ark. 389, July 1850. The indictment charged that Charles [391] "a slave, . . did . . a white female of about the age of fourteen . . assault, with the intent . . to ravish . . forcibly" Evidence of the prosecutrix: [392] "in company with four other school

girls, I went to Mr. Summerron's [to] stay all night. . . lying upon a bed in a row, on the floor, I lay on the outside. . . awakened by some one who took hold of my shoulder and tried to turn me over. . . I . . called for help" Summerron [393] "found . . mud on the window cill [*sic*] . . the person . . had escaped by the door . . found a foot track without shoes . . and . . a handkerchief . . belonging to prisoner, . . perfectly dry . . track was distinct . . to the prisoner's bedside in the cabin ['about twenty paces' away], and there lay the socks perfectly wet and muddy . . [394] I . . fastened the cabin door with a chain . . waked up Parson Kelly . . and my son . . to assist me to arrest the boy. . . called the prisoner out of his bed; . . sent for his master [from whom I had hired him] . . tied him to a post on the porch. . . [395] Dr. Conway . . found . . Charles chained . . his hands were tied with a rope, and his legs were chained. . . Charles . . said . . 'he had gone in there to wake master, as there was some person at the barn stealing something.' . . Witness brought him to town, and held the rope with which he was tied." He was [391] "convicted, and sentenced to be hung."

Judgment reversed, and the cause remanded: I. [404] "the act,[1] upon which the indictment was founded" is not unconstitutional. [405] "all that was designed to be understood by the provision in the constitution [2] was that, in case a negro should be convicted of a capital crime, he should not undergo other or greater punishment than . . a white man for an offence which would subject him to capital punishment." [404] "doubtless inserted . . [405] from a feeling of humanity . . to secure them against that barbarous treatment and excessive cruelty . . practiced upon them in the earlier period of our colonial history. . . [II.] [410] the accused used no force," [3]

Fowler v. Merrill, 11 Howard 375, December 1850. [379] "The valuation preparatory to the sheriff's sale [in 1841] was as follows:—

	Valued at	Sold for
Tom,	$800	$533.33
Phoebe and Jackson,	1,000	666.66
Mary and Henry,	750	500.00
Maria and her child,	700	600.00
Eliza,	700	466.66 "

Fowler, the purchaser, "answered, . . that, since the sale, the value of slaves generally, and these also, had depreciated at least one fourth; and that their hire, deducting necessary expenses, was worth, per annum, for Tom $70, Maria $50, Mary $40, Phoebe $40; and for the others, nothing. Badgett answers, also, that Phoebe was worth $400, Eliza $350, Jackson $65, . . and that their hire was not worth more than $40 per annum." [396] "the increase or offspring should belong to the owner of the mother;"

[1] Digest, ch. 51, pt. 4, art. 4, sect. 9.

[2] Art. 4, sect. 25. "any slave who shall be convicted of a capital offence, shall suffer the same degree of punishment as would be inflicted on a free white person, and no other;"

[3] Commonwealth *v.* Fields, vol. I., p. 169, of this series.

Cook v. Cook, 12 Ark. 381, July 1851. Bill for dower. In 1845, two years before his death, her husband conveyed fifteen negroes which [383] ["came from her, being hers at the marriage"] in trust, for the benefit of his children by a former marriage, "reserving to himself their use . . during his lifetime;"

Held: [388] "the husband's title to the slaves . . was . . absolute . . [389] Her rights were no greater in these slaves than in any others owned by her husband,"

Alston v. Balls, 12 Ark. 664, January 1852. On January 1, 1849, the defendants hired a slave for the year, promising, in writing, to furnish clothes, etc. and return the boy on January 1, 1850. In April "without . . any fault on the part of the hirer, [he] ran away and escaped; . . that the defendants exerted all reasonable means for the recovery"

Held: the hirer is bound for the hire and value of the slave.

Jones v. Mason, 12 Ark. 687, January 1852. [688] "Defendant says . . 'he did . . find . . rifle gun . . in the possession of . . [hired] slave . . in the employ of . . plaintiff, . . without . . having the written permission of . . owner[1] . . whereupon . . defendant did . . seize . . gun . . and having proved the fact . . before . . justice of the peace, . . justice . . did . . adjudge . . gun . . forfeited to the . . seizer'"

Held: the owner of the gun should have had actual or constructive notice of the proceedings.

Cornelius v. State, 12 Ark. 782, January 1852. "I got the information from the . . negro boy, . . I never offered the negro a bribe to give me information of any kind on his master, but told the negro I would not begrudge $10 or $20 if I could find out when there was a cow in the pen;"

Maulding v. Scott, 13 Ark. 88, January 1852. A negro girl was bequeathed to a daughter in Kentucky, in 1826, taken to Arkansas in 1830, and sold in 1834 for $500.

Scott v. Henry, 13 Ark. 112, January 1852. [119] "proposes [in 1847] to sell the [two] slaves . . for $1000, $250 to be paid . . hire them on boats until they earned . . the $750, with interest. . . [120] they could earn that sum in sixteen months or two years."

Whitfield v. Browder, 13 Ark. 143, January 1852. [148] "the negro was brought home to Stovall's [in North Carolina] every Christmas . . and thereafter sent back . . to Liggin's [in Virginia]." [143] "It was the belief . . in North Carolina, that possession of a year and a day would give title. . . [144] brought to Arkansas, with four children in 1835 or 1836,"

Allen v. Nordheimer, 13 Ark. 339, January 1853. [341] "Dick was originally the slave of Elizabeth Grierson [a Creek woman], . . she set him free, and they had cohabited together as man and wife for many years. This being prohibited by the law of the Creek Nation, east, they left the Nation, and settled among the whites, in Alabama. . . they followed the

[1] Digest, ch. 153, sect. 52.

Nation west, but had to leave it for the same cause, and went to live among the Choctaws. The marriage of an Indian and negro not being lawful among the Choctaws, they left . . and settled . . in Arkansas, . . They subsequently went among the Chickasaws, where Elizabeth died." In 1847, [340] " the General Council of the Kings and Warriors of the Creek Nation . . sanctioned . . a division of a large number of negroes among the brothers and sisters of the deceased, . . [341] declarations of Dick and Elizabeth that Dick had bought Dinah with his own money, . . but he had the title made to Elizabeth to keep . . his guardian, from taking the advantage of him."

Pleasant v. State, 13 Ark. 360, January 1853. [362] " a slave . . indicted . . for an assault with intent to commit rape upon . . a white woman." [371] " The offence is clearly made out, and all the material averments . . sustained . . unless it be the averment that she was a white woman." [363] " Prisoner's counsel . . asked [her] . . if she had not proposed . . to take from . . Milton $200, not to prosecute the prisoner, his slave: . . objected . . sustained . . Sanders . . testified that . . [364] had been . . living [with the prosecutrix and her husband] . . nor had he ever been caught in bed with her ' as he knows of,' . . [365] Yarborough . . testified . . that . . he saw . . Sanders, in a sliding position from the edge of the bed." Her husband told a witness that [364] " if Mr. Milton had given his boy up to be whipped, he should not have prosecuted . . that he would not have had it to have happened for $200. . . witness said, ' Would you take $200 not to prosecute ' . . consultation between [husband and wife and Sanders.] . . agreed . . Milton said he only gave $500 for the prisoner, . . could not afford . . $200 for his release, . . [365] they agreed to take $125,[1] which was agreed to be given, but was not done." [362] " convicted, and sentenced to be hung. . . [368] In support of the motion for new trial, affidavit of Milton . . that he could prove by several persons . . that [the prosecutrix] . . was an unchaste woman, unworthy of credit, . . affidavits of three persons as to the previous good character of the defendant,"

Judgment reversed, and a new trial awarded: [379] " For the error of the court, in refusing . . to allow the prosecutrix to answer the question . . if she had not proposed . . to take . . two hundred dollars not to prosecute . . also for the error in refusing to charge the jury, that . . they must be satisfied, from the testimony, apart from their individual knowledge or belief, that the [prosecutrix] is a white woman," [Watkins, C. J.]

Bingham v. Calvert, 13 Ark. 399, January 1853. [400] " one hundred and eighty dollars . . first . . of January, 1851, . . for the hire of the negro Jim."

Hooper v. Chism, 13 Ark. 496, January 1853. [497] " representing . . that she had lost her toes in consequence of their having been frost bitten, . . $330 00, the price agreed on, . . soon after . . [the purchaser] discovered . . that her legs were ulcerated, that she was deformed, one of

[1] " if he would run the boy off," same *v.* same, p. 244, *infra.*

her legs being shorter than the other, and owing to a malformation of the pelvis, incapable of bearing children without endangering her life, in consequence of which she was of little or no value. . . [498] the complainant . . was a practicing physican, had attended upon the girl previous to his purchase,"

Campbell v. Campbell, 13 Ark. 513, January 1853. Campbell's will, 1845: [516] "five thousand dollars . . to Viney, a yellow girl, . . I wish my sister Mary to take charge . . of her until she arrives to the age of fifteen years, when she is to be free and receive her legacy: . . Should . . Viney die before . . fifteen, . . that the legacy go to my sister Mary." "The testator died without any lawful issue. . . Viney was his daughter by one of his slaves, and at the time of his death was about three years old. . . [517] Campbell, while he was executor [1845-7], had removed Viney to parts unknown, and sold her . . she was declared to be a ward in chancery, and the court made a rule upon him to produce her . . he failing . . was imprisoned for contempt. The guardian ad litem . . being directed by the court to . . reclaim her, . . at length found her in Missouri, . . and recovered possession of her by *habeas corpus.* . . the bequest of five thousand dollars . . was virtually a bequest of the whole estate; . . [518] the court decreed that Viney was free by the will; that the . . five thousand dollars vested in her immediately on the testator's death;"

Affirmed: [521] "though the act of [January 20] 1843[1] implies a change of policy, as to the increase of free negroes, . . it is [not] a repeal by implication of the law authorizing emancipation,[2] . . Our statutes contain no . . prohibition [against emancipated negroes' remaining in the state], . . The act of 1843 was . . but a measure of self-defence, declaring that while this State will not be infested with the free negroes of other States, we will tolerate the evils resulting from the emancipation of our own slaves, until . . [522] the sense of the people may require an avowed change of policy." [Watkins, C. J.]

Jamison v. May, 13 Ark. 600, January 1853. [603] "the slave was brought . . to Arkansas [from Alabama]," before 1844.

Arnett v. Arnett, 14 Ark. 57, July 1853. Held: [58] "Dig. ch. 59, sec. 20, . . unlike that [section] which allows dower in real estate, . . cuts off all claim to dower where the slaves have been disposed of prior to his death, and this without her co-operation, or assent."

Abraham v. Gray, 14 Ark. 301, July 1853. [302] "action of debt . . for one thousand dollars. . . [303] October, 1850, . . negro Manual . . was delivered to . . the vendee . . [March, 1851] killed the vendee, and . . convicted of murder . . sentenced to death and executed," May 1851.

Held: "It does not divest the vendee of title, . . or affect it in any way."

[1] Digest, ch. 75.
[2] Act of 1839, Digest, ch. 63.

Lovette v. Longmire, 14 Ark. 339, January 1854. Held: [342] "the slaves [inherited by the wife], although . . exempt from the payment of debts contracted by the husband after the schedule of the slaves had been filed . . were nevertheless liable to the payment of . . a debt contracted before the passage of the act of 1846,[1] . . Independent of this . . Admit the slaves to have been the separate property of . . the wife . . that they were family slaves, valued on account of long and faithful servitude, above all reasonable compensation in damages, and that one of them was inhumanly separated from her infant child, still the sale . . by the sheriff would not deprive Mrs. Lovette of a full . . redress at law against the purchaser for possession of the slaves." [Walker, J.]

Ryburn v. Pryor, 14 Ark. 505, January 1854. [508] "action of *trover* . . instituted by Pryor . . for a negro woman and her two children. . . [509] Ryburn gave the negro woman to Pryor [his son-in-law] after the marriage [in 1826, in Tennessee]: . . 1836, . . Ryburn removed from Tennessee to Texas, and on his way received the negro . . from Pryor and took her to Texas with him, Pryor furnishing her with a horse to ride. . . 1838, Pryor and his father-in-law made a crop together, and the negro woman was put in as Pryor's . . 1843, . . Ryburn . . sent his son . . who came with a gun and took the negro forcibly . . Ryburn kept the negro . . till . . 1844, when he executed a bill of sale for her and her child . . for $750, . . [514] witness testified . . 1841 . . they were worth about $800. . . Another . . 1844, . . worth $1300. Another . . 1844 the negro woman was worth $650, or $700, and her child $300. . . [The son of] Ryburn testified that at the time of the trial the negro woman and her three children were worth about $1250. . . The jury . . 1852, rendered a verdict [for plaintiff] for $1875. . . sustained."

Austin v. State, 14 Ark. 555, January 1854. [558] "on the day before the killing, . . the slave talked improperly to his master [Watson], and . . when he returned from ploughing . . brought a club . . about the middle of the night the appellant walked out carrying a fire torch, and the stick . . Upon returning . . told his wife . . that he would not be taken by his master or any body else, and that he could knock the first man down that came into the room. The next morning, . . went to mill and returned, . . bundled up his clothes and took them away. . . went to the woods for . . poles . . as . . ordered . . by a witness, . . [559] Mrs. Watson . . had sent a message to her husband . . that the appellant had run away, . . he met the appellant . . with . . poles and an axe . . 'Watson and others advanced . . at the request of Watson, and for the purpose . . of correcting' him. . . he retreated, . . they . . ordered him to lay down his axe, . . he refused, and said he would not be whipped by Watson, or any body else, and that he would kill the first man that attempted to take him . . 'Payne, the slain, . . having in his hands a piece of pine plank . . drew his stick upon Austin. . . Austin warded off the blow . . with his left arm, and with his right struck Payne with the axe. . . [562] confessions . . obtained without . . having been prom-

[1] Digest of 1848, p. 713.

ised or threatened . . made to one of his guard . . when he was in chains and being brought to jail . . [563] the master . . was offered as a witness on the part of the prisoner; the State objected . . sustained" Austin was convicted and sentenced to death.

Scott, J.: [567] "when a slave is in rebellion . . whatever force may be necessary to bring him within the pale of subordination, graduated upon principles of law and humanity, let it come from what quarter it may, invades no right of the slave, . . [568] no . . excuse for the crime. For the error of the court below in refusing to allow . . the master, to testify, . . the judgment must be reversed, and the cause remanded" [566] "the matter of Watson's pecuniary interest lay to his credibility only and not to his competency as a witness."

Johnson v. McDaniel, 15 Ark. 109, July 1854. In 1849 Johnson and Grimes [113] "sent a number of negroes to the south in charge of . . their agent, for sale. On the way, he exchanged some of the negroes for Elijah [aged twenty-two] and the woman [aged twenty] . . and child [aged ten months], and not long afterwards he sold them to [McDaniel] . . for $1200, . . with warranty of soundness, . . Elijah was . . radically diseased, . . a negro of his age, etc., would have been worth . . from five to seven hundred dollars." The purchaser was put to the expense of [112] "three hundred dollars, for boarding, clothing, taking care of the slave, for medical attention bestowed upon him, etc. . . The Court found for the plaintiff [McDaniel], assessing his damages to $703 50."

McConnell v. Hardeman, 15 Ark. 151, July 1854. "The plaintiff . . sued the defendant in trespass, for the tortious act of his slave . . [who] [152] took, and rode off . . horse belonging to the plaintiff."

Judgment for the defendant, affirmed: [158] "the master's liability for acts of his slaves in which he did not participate, must be restricted to those trespasses which are indictable offences, or not being so, are specified in the statute.[1] . . In any future expression of the legislative will, it will be for that department to consider, whether the true interests of slave-holders would not be promoted by making them liable for all trespass committed by their slaves, thus removing many causes of jealousy and ill-feeling against the owners of that species of property, and at the same time protect them by limiting their liability, as at the civil law, to the value of the offending slaves." [Watkins, C. J.]

Ridge v. Featherston, 15 Ark. 159, July 1854. [160] "action of trespass . . the defendant had three negro men, all of whom frequently carried guns; that used by Wagoola, being a large rifle. A few days before the mare was [found] shot [in defendant's field], a witness heard Wagoola tell the plaintiff, that if he did not keep her away from the defendant's plantation, he, Wagoola, would kill her. . . a large bullet hole."

Held: I. [161] "The act of killing a horse, done wilfully and maliciously, is one of those indictable offences enumerated in the statute, . .

[1] Digest of 1848, p. 978, sects. 1-6.

for which, if committed by a slave, the master is made responsible in damages . . [II.] in a civil suit against the master, to recover damages for an unauthorized act of the slave, . . his statements . . explanatory of the act . . cannot be admitted against the master without indirectly making a negro a competent witness against a white man."

Hervy v. Armstrong, 15 Ark. 162, July 1854. [164] " the entire trespass . . was committed in the township of Marion, by the defendants, who composed a majority of the patrol, . . appointed . . for Jefferson township. . . [165] there was a patrol in Marion township, but they had never been on duty; . . The defendants proposed to prove that they had been invited over the line by some of the inhabitants of Marion township to attend and disperse what was reputed to be an unlawful assemblage of slaves. The Court below refused to admit such testimony, and properly so, . . The patrol of Marion township was the proper authority to be called . . The defendants arrested the plaintiff's slaves on their way home from a religious meeting, on Sunday, . . white persons present at the meeting, . . it was orderly and well conducted. The negroes were tied and whipped, not exceeding ten lashes each, . . [166] could not be said to be either cruel or excessive, though their cries and the sound of the blows were heard by persons at a distance. . . there is an implied license for them to attend religious meetings, when conducted in an orderly manner, on Sunday, and on that day it is an indictable offence [1] for masters to coerce them to labor. Altogether, it may be supposed the circumstances were such as to exasperate the plaintiff in a high degree. But he did not prove . . any special damage . . We apprehend the reason why the master cannot have a civil action for the battery of his slave without special damage, is, that it would encourage slaves . . to be insolent . . The elevation of the white race, and the happiness of the slave, vitally depend upon maintaining the ascendency of one and the submission of the other." [Watkins, C. J.]

Tatum v. Hines, 15 Ark. 180, July 1854. In 1848 the complainants removed with their slaves from Mississippi to Arkansas.

O'Neill v. Henderson, 15 Ark. 235, July 1854. In 1846 or 1847, the family removed with their slaves from Mississippi to Arkansas.

Folsom v. Fowler, 15 Ark. 280, July 1854. Stone, the owner of [283] " little Ben . . appears to have been averse to the sale [under execution . . and designed . . to run off the negro . . [285] The negro seems to have been very likely and of good habits, and an engineer and blacksmith, . . worth eleven hundred dollars, and his hire worth what it was fixed at by the Court [$36.25 a month]."

Daniels v. Street, 15 Ark. 307, July 1854. [309] " The complainant represents that . . George and Solomon were estimated at sixteen hundred dollars [in 1843, in Alabama,] though worth a thousand dollars each [in 1846], when Tann clandestinely obtained the possession of them, and the . . hire of each, was worth one hundred and fifty dollars a year from that time forward,"

[1] Digest of 1848, p. 369.

Roane v. Rives, 15 Ark. 328, July 1854. [329] " In . . 1838, Rives came to Arkansas [from Virginia], where he sold, among other slaves, . . Betsey and her child,"

Moss v. Sandefur, 15 Ark. 381, July 1854. [383] " Dunn . . had admitted he was the father of Eliza (daughter of Mourning, slave of heirs of Moss), and recognized her as his child, and . . had made application to the heirs . . to purchase . . Eliza, that he might manumit her. . . Dunn . . ' had . . placed in the hands of . . Mourning,' . . three hundred dollars, to be applied to the purchase and manumission of . . Eliza. That several months before the death of Dunn . . Mourning, . . hired to . . Dunn, brought to the respondent [Moss] . . three hundred dollars, and offered to leave the same in pledge . . as an indemnity against the death of . . Eliza, which respondent had refused to permit . . Dunn to take with her mother to Fulton, because, of the then unhealthiness of that place, . . That at the time of the death of Dunn, . . Mourning . . was in the service of respondent. . . That respondent went to Fulton . . five or six days . . after the death of Dunn, . . and that was the first time, after that event, he had seen . . Mourning; and [she] . . placed into . . [his] hands . . two hundred and eighty-two dollars, for safe-keeping."

Robins ex parte, 15 Ark. 402, January 1855. " The petitioner filed a motion for a writ of *habeas corpus,* to admit to bail his negro man, . . in the custody of the sheriff . . on an indictment for murder." Granted.

Wright v. Morrison, 15 Ark. 444, January 1855. [445] " was to oversee . . at the rates of five hundred dollars per annum. . . [450] The negroes, the teams, and the farm were committed to the care . . of the overseer,"

Dyer v. Bean, 15 Ark. 519, January 1855. [526] " 1848 . . removed to Arkansas [from Mississippi], . . with the negro woman . . and her children,"

Pleasant v. State, 15 Ark. 624, January 1855. See same *v.* same, p. 239, *supra.* [627] " The cause having been remanded, it was twice continued on the motion of the accused, . . June term, 1854, he applied for a change of venue, [so ordered] . . [628] convicted, . . [642] sentenced to be hanged."

Judgment reversed [655] " for the errors committed by the court, . . new trial," [644] " in this State, where sexual intercourse between white women and negroes, is generally regarded with the utmost abhorrence, the presumption that a white woman yielded . . without force, arising from a want of chastity in her, would not be great, unless she had sunk to the lowest degree of prostitution. . . [652] The court should have permitted the witness . . to answer . . questions . . as they referred to the *general character* . . for *chastity.* . . [654] The court excluded . . the owner . . from testifying in his behalf. . . In this, the court erred." [English, C. J.]

Pond v. Obaugh, 16 Ark. 94, January 1855. In 1839, Pond [95] " brought with him [Maria and her] . . increase . . (except Stephen,

who was mortgaged . . in South Carolina) . . 1844, . . sold . . [four] children of Maria, for $900, . . to prevent them . . from being sold in one of his drinking sprees, [he had previously] conveyed them . . in trust, for the sole use . . of his wife and children, . . [96] [The purchaser] had sufficient information to put him upon inquiry, . . [Pond's children] were clearly entitled to recover the slaves, or if made way with, their value."

Carter v. Cantrell, 16 Ark. 154, January 1855. In 1819, Harriet was sold, in Tennessee, for $500.

Hemphill v. Miller, 16 Ark. 271, July 1855. [279] " 1833, . . agreed . . that . . complainant would cause to be delivered . . in time to make a crop in . . 1834, a negro man slave, not under twenty, nor over twenty-three . . not having a trade, to be of the value of six hundred dollars,"

Reed v. State, 16 Ark. 499, July 1855. [504] " a party of Indians . . [505] encamped near Sexton's residence, . . The prisoner was prevailed upon by some white men, to go with them to the camp one night, to play the fiddle for them, that they might have a frolic . . The Indians . . were offended at the conduct of the white men, and drove them off, but insisted that the prisoner, who it seems was a negro, should remain, . . During the night he got into a difficulty with one of the Indian men, in whose tent he slept, and killed him." [500] " convicted of manslaughter, and sentenced to the penitentiary for four years."

Judgment reversed, and the cause remanded: there was no proof that the offence was committed in the county alleged.

Sadler v. Sadler, 16 Ark. 628, January 1856. [634] " sent for the boy Ben to come and wait upon . . [his master] Lucian, in his last illness. . . a negro boy . . came after Ben. . . said . . that his master . . requested witness to loan him his horse for Ben to ride over;"

Pryor v. Ryburn, 16 Ark. 671, January 1856. Ryburn got possession of slaves in 1843. In 1852, Abram, 26 years old, was alleged to be worth $1000. [676] " Jim, . . 21 years old, . . worth $800. . . George, . . 29 years old, . . worth $1000: Caroline, 25 years of age, and her [four or five] children, . . worth . . $1900: Leonard, 21 years, worth $1000: Tom, 50, worth $500: . . [1853, Ryburn] [684] avers the truth to be . . Tom, aged 69 years, value $150, hire . . deducting cost of clothing, medical attention and taxes, $30 per annum. Amy, 40, and sickly, worth $500, hire $40. William, 22, $900, hire $50. Jane died . . 1853, at 13, worth then $700, hire $30. Martha, 5, $400, hire nothing. Fanny, 2, hire nothing, and raising equal to value. . . [687] he purchased . . 1844, . . Julia and her child, . . at $750 in cash,"

Held: the adverse possession of slaves for five years, gives the party in possession the right of property thereto, by virtue of the act of December 19, 1846.[1] [694] " Ours was . . a new State, increasing its population by immigration mostly from the slave States. Slaves were being brought into our State for settlement or market, . . and changing owners among our

[1] Digest, p. 943.

own people. . . more numerous cases of hardship might have arisen had the statute been less comprehensive" [English, C. J.]

Price v. Notrebe, 17 Ark. 45, January 1856. [54] "That the . . plantation . . was actually overflowed three years out of four. . . that the slave property was in such a condition that it would have been detrimental to the estate to hire out the negroes,"

Ross v. Davis, 17 Ark. 113, January 1856. [115] "The defendant . . charges [in 1854] that . . Lucy was sorely diseased [in 1848] . . and was worth nothing in the way of hire for two years afterwards: . . that he paid out for medical aid . . $150; denies that she was worth over $500, and her hire for the four years preceding not more than $40 per annum;"

McNeill v. Arnold, 17 Ark. 154, January 1856. In 1840, [161] "Lizzy, aged twenty years; . . Thomas, aged twelve years; one girl, aged three years; . . Louisa, two years; . . Nathaniel, aged two months;" were bought, in Mississippi, for $900, for the separate use of Mrs. Burke and her children. [172] "Burke . . removed . . to Arkansas, in . . 1849 or 1850, bringing the slaves . . 1851, . . Burke sold the woman . . and her children, Louisa, Aga [about eight],[1] Eliza [about six], Phoebe [about four] and Ann [about two], . . for $2050,"

Machin v. Thompson, 17 Ark. 199, January 1856. In 1819, in South Carolina, Sarah and her increase were "conveyed to the separate use . . of Mrs. Machin for her life, and then to her children, . . [200] removed to . . Georgia, . . thence to Alabama, . . In . . 1843, . . Payne got possession of . . Celia [a daughter of Sarah], and without the . . knowledge of Mrs. Machin, took her to Memphis, . . where he sold her openly [to Thompson], . . in good faith, . . at her reasonable cash value . . he brought her to Arkansas, . . held the peaceable adverse possession" till 1853.

Held: the statute of December 19, 1846[2] vests the right of property in the possessor, as against all persons. The fraud of Payne does not prevent the operation of the statute.

Trammell v. Thurmond, 17 Ark. 203, January 1856. In Georgia, in 1810, [207] "his father . . also conveyed to respondent, . . Dave, (blacksmith,) . . 1812, . . removed . . to . . the Territory of Missouri, taking with them the slaves . . 1818 or 1819 . . removed with . . the slaves . . to Arkansas, . . [210] 1828, . . he took them to Louisiana, and hired them out."

Crabtree v. McDaniel, 17 Ark. 222, January 1856. [224] "two of the slaves . . were originally owned by . . McGhirt, a resident of the Creek Nation . . whose wife was a woman of that tribe." After their death, about 1841, their property was distributed among their children. [226] "the negroes . . came to the possession of McDaniel, his alleged wife . . being one of the distributees. . . 1842, McDaniel settled" in Arkansas. In 1853, [224] "he was about to remove to Texas, and carry the slaves . . with him;" See McDaniel *v.* Crabtree, p. 258, *infra.*

[1] 17 Ark. 183.
[2] Digest, p. 943.

Brunson v. Martin, 17 Ark. 270, January 1856. [274] " The overseer of the previous year had found it necessary to flog some of them for idleness and other faults common to negroes, . . had found them ' harder to manage than some negroes he had managed.' . . the day of the killing . . the plaintiff [Martin, the overseer,] said, at a store in the neighborhood [about 11 o'clock] . . that he ' had a rough and saucy set of hands to manage, and that, after that, if he ever overseed again, he would make the negroes obey him, or he would kill them.' . . he remained until two or three o'clock, and ' was drinking,' . . showed no signs of being intoxicated. . . The killing . . occurred . . soon after . . The plaintiff, having his whip in his hand, went into the field where the hands were picking cotton, . . said to Nath . . that he had ' come for his shirt: ' . . Nath replied, that he ' had pulled off his shirt to the last overseer.' The plaintiff, drawing a revolver, repeated . . [275] that he ' had come for his shirt, and intended to have it or hurt him.' . . Nath replied, ' shoot and be damned,' . . advancing upon the plaintiff, with some cotton in one hand, and nothing in the other, the plaintiff firing . . three or four times; until . . Nath was near enough to knock the pistol up . . himself falling down. . . proven, that Nath was a stout negro, weighing about 200 pounds, ' with bodily strength enough to crush the plaintiff down,' while the latter . . was at the time ' a cripple,' and that it was the general custom of overseers to carry weapons. . . the plaintiff . . rendered services as an overseer for the defendant, . . from about the first of March [1853], until he was discharged . . upon the killing of Nath, . . about the 15th of October: That they were worth from two hundred and fifty, to four hundred and fifty dollars; . . value of Nath . . from twelve to fifteen hundred dollars." Martin sued Brunson to recover the value of services rendered. He claimed only $250. [273] " the jury were . . instructed that a negligent killing of the slave authorized recoupment, . . that a killing without necessity would constitute such negligent killing." Verdict for the plaintiff, Martin, and judgment accordingly.

Affirmed: [273] " To determine from the evidence, whether the means used for overcoming the rebellion in this case, were graduated upon the principles of humanity,[1] was the appropriate province of the jury, . . [274] And although we cannot but say that we would be loath to subscribe to the verdict, it is still more difficult to say, that it is totally unsupported by the evidence, when we regard the legitimate province of the jury to judge exclusively of its weight." [Scott, J.]

Abraham v. Wilkins, 17 Ark. 292, January 1856. Will of Wilkins, who died in 1851, unmarried: [294] " that my negro woman, Sarah Jane, and her child, John, be emancipated . . as soon as John . . shall arrive at the age of twenty-one years; until which time he shall be in the charge of . . Abraham [executor], and be taught some trade, so as to never become a charge upon the community; but . . Sarah Jane shall be free from the time my debts shall be paid; and I request . . executor to see that . . Sarah Jane and John . . shall be . . provided for, in a . . suitable manner." Testator [297] " was a blacksmith, and afterwards an overseer:

[1] Austin *v.* State, p. 241, *supra.*

. . [Witness] Heard him say . . he intended to give Abraham all he had. Seemed to have more confidence in him, in relation to the management and care of his girl, Sarah Jane, by whom, he said, he had a child, and another, that died, than any one else. I told him, if he thought it was his child, he ought to free it himself, while living, and he said he intended to do so . . I told him these things were frequently neglected after a man's death, and referred him to a number of cases in this county. . . [315] the girl, Sarah Jane, and Bill, were given to him by John Lemay, with the express understanding, that they were to be set free at his death. . . John, was born . . after she had been given to testator." Dr. Purdom testified: [305] " He was not in possession of his mental faculties at the time will was signed." [319] " The jury returned a verdict against the validity of the will, and judgment was rendered accordingly." Affirmed.

Mooney v. Brinkley, 17 Ark. 340, January 1856. [345] " 1st of January, 1847, Mooney hired a negro man of Duncan for one year, to cook in the tan-yard, . . [352] the hire . . was $162. . . [355] The Master credited Mooney with: . . Hire of Hart's boy, for getting bark, etc., $18.75."

Lindsay v. Wayland, 17 Ark. 385, January 1856. [388] " that [defendant] Lindsay had the boy hired in the year 1853; that he ran off . . about the last of May, and was out between three and six weeks, and when he returned, he was much reduced in flesh, and looked feeble and emaciated. In a week or two after he returned from the woods, . . Lindsay . . purchased him of the plaintiff " " for $820, with a bill of sale, warranting . . sound . . He was kept employed on Lindsay's plantation during the summer, but not generally put at hard or heavy work, nor required to make a full hand, in consequence of his reduced condition. . . September . . Lindsay obtained a prescription, from his family physician, . . for the boy, saying he had a chill. Two or three days after . . the physician was called in . . found him sick in bed, with symptoms of typhoid fever, of which disease he died, about twenty-two . . days afterwards. The point in controversy, before the jury, seems to have been, whether . . the seeds . . of the disease . . were contracted while he was run off, by exposure, alternate hunger and excessive eating, anxiety of mind, etc., . . and consequently, existed in him at the time of the sale," [386] " the jury returned a verdict in favor of the plaintiff for the full amount of all the bonds," executed by the defendants, for the boy.

Judgment thereon affirmed: [389] " We are inclined to think that the weight of evidence is against the verdict, but it is not totally unsupported by the evidence,"

Bomford v. Grimes, 17 Ark. 567, January 1856. [568] " three others of the family sick [in 1853] besides Booth, . . in an adjoining room . . They were [[569] ' free '] colored [[570] ' yellow '] girls, . . and were said to be his daughters; . . had been raised in his family—were recognized as part of it by Booth, and he had supported them, . . [569] the remaining five [patients] were his slaves. . . all afflicted with flux, . . [570] for about fifteen days after the death of Booth; and one or the other of the plaintiffs [physicians] visited them every day "

Held: [571] "For medical services . . to minor children, after the death of the intestate, the physician must look to their guardians, . . [572] As to the slaves . . when the administrator finds it necessary to call in medical assistance . . it is his duty to do so, not only as a matter of humanity, but by way of preserving them as property"

Wells v. Fletcher, 17 Ark. 581, January 1856. "the administrator . . represented that lands were appreciating in value, and . . it would be most to the interest of all parties interested in the residue . . [582] after . . debts . . paid, that these slaves [mother and two children, appraised at $1900], rather than lands, should be sold." So ordered.

Hannah v. Carrington, 18 Ark. 85, July 1856. In 1843, [91] "Carrington [of Arkansas] . . executed a mortgage to . . Easely of Virginia, upon forty two slaves, among them Peter and Iverson, . . [93] worth $900 each, and their annual hire $125 each. . . [97] A portion of the slaves . . was still [in Arkansas] . . the others had been removed to a plantation . . on Red river, in Texas."

Bone v. State, 18 Ark. 109, July 1856. Bone, a slave, [110] "was indicted . . for an assault and battery upon Caroline Brown, a white woman." She testified that [114] "the conduct of Bone toward her was rude and insolent," He was found guilty, [110] "and his punishment assessed at three hundred lashes: but the Court regarding it as excessive, reduced the number . . to seventy-five. . . and judgment rendered against his master for the costs of the prosecution, etc."

Judgment reversed, and the cause remanded with instructions to arrest the judgment, etc.: [111] "Though inferior in mental and moral endowments to the white race, and occupying a subordinate position, in the order of Providence, yet they are rational beings, . . responsible for crimes committed . . [112] if the injured party would punish the slave [guilty of an offence less than felony], and subject the master to damages and costs by means of an indictment against the slave, the refusal of the master to compound,[1] etc., is a pre-requisite to the institution of the prosecution. . . [114] he no doubt deserved to be flogged . . but it was the duty of her, or her husband, or some one acting in her behalf, to complain first to the master, and give him an opportunity of compounding, etc., and of chastising his own slave:" [English, C. J.]

Sarah v. State, 18 Ark. 114, July 1856. [115] "Sarah, . . the property of . . Sims, was indicted . . for an assault and battery upon Mortica Brown . . son [child] of Mrs. Brown,"[2] "The facts . . are substantially the same as in . . Bone . . *vs.* the State, . . and for the same error, the judgment . . must be reversed, and the cause remanded with instructions to arrest the judgment, etc. But there is an additional question . . the master . . [116] was introduced as a witness . . and the counsel of Sarah . . proposed to ask him a question . . intended to draw from him the statement that his slave committed the assault and battery by his direction: but the Court ruled out the question . . [117] the slave cannot

[1] Digest, ch. 51, pt. 12, sect. 4, p. 379.
[2] See preceding case.

[thus] . . exempt himself from amenability to the law . . But . . [118] he ought not, in justice, to be punished so severely, as where the crime is voluntary on his part." [English, C. J.]

McRea v. Branch Bank, 19 Howard 376, December 1856. [377] " Bracy conveyed certain negro slaves to one Gale, in trust, . . The trustee afterwards sold some of the slaves . . to reduce the debt; but . . in . . 1846, Bracy privately left . . Alabama, and carried away with him the residue of the slaves, . . He appears to have been for a time in . . Mississippi. . . in 1847 he went to Louisiana; and in . . 1848 he removed with these slaves to . . Arkansas, where he employs them in making some improvements on a tract, where he and they resided."

Blackburn v. Morton, 18 Ark. 384, January 1857. A slave, aged about fifteen, was brought from Alabama in 1848 or 1849 to Arkansas, and was sold in 1849, to Blackburn who [389] " resided in the Cherokee Nation ". He was worth from $800 to $1000 in 1855, and his hire " was worth from $100 to $125 per annum."

Jackson v. Bob, 18 Ark. 399, January 1857. [402] " 1851, Bob . . commenced an action of trespass . . for his freedom, . . Brown . . deposed . . On the division of [his grandfather's] . . estate [in Virginia, in 1825,] . . Bob [about 10 or 12 years old] fell to witness. . . took him to Arkansas, [in 1834] and disposed of his claim to his services to . . Hamilton, . . for $600 in goods, . . after informing Hamilton . . what was the term of his service. Witness conveyed his claim . . by an instrument of writing, . . [403] 'I, . . Hamilton, do bind myself, heirs, . . to have . . Bob . . appraised six years after date [1835] by disinterested persons, and when said negro shall have worked out the sum . . to set him free, and in case of non-compliance . . I bind myself, my heirs, . . in the sum of six hundred dollars' . . [Another witness] [404] stated, that Brown said . . that Bob was left to him by his grand-father's will, and by it was to be free [at 21, 'after which he was to work out his value'] . . Whilst [another] witness was clerk of Sevier county, he was handed the original of the instrument executed by Hamilton . . to be recorded . . but on the next day Hamilton told him not to record it, that he would not pay for it. Witness kept the instrument until defendant got Bob, . . defendant asked him for it; . . never returned it. . . [405] His hire from . . 1840 would average $150 per annum. . . Bob was worth in 1836-7-8 $600 or $700. Negroes were then low. After Hamilton's death [1846], his negroes were brought to the court-house . . and sold under execution. Witness thought Bob had run off to Texas, and was not present . . [Hamilton's daughter] wanted her father to give her Bob, but he said 'he will do you no good, as by right he ought to be free.' Bob ran away in 1845, and . . Hamilton . . while whipping him [for it], said . . that though 'Brown said you were entitled to your freedom, I will not set you free, and will show those legs that they shall not run away from me.' . . Bob had run away . . once from Hamilton, once from his widow, and once from defendant. Was gone but a short while each time. . . sold under execution . . 1845, and bought by Brittin and Royston." Jackson " got

him of Brittin for fees due him as sheriff." [402] " 1853, verdict in favor of the plaintiff, and judgment . . that he be liberated,"

Reversed, and the cause remanded: I. [410] " the slave cannot establish his emancipation by the mere declarations of the master, . . [II.] [413] If the master contract . . that the slave shall be emancipated upon his paying to his master a sum of money, or rendering him some stipulated amount of labor, although the slave may pay the money, . . or perform the labor, yet he cannot compel his master to execute the contract, because both the money and the labor of the slave belong to the master and could constitute no legal consideration for the contract." [English, C. J.]

Redmond v. Anderson, 18 Ark. 449, January 1857. A negro man was sold in 1849 for $800.

Harriet and others v. Swan, 18 Ark. 495, January 1857. [499] " The appellants' claim to freedom is based upon the following . . instruments, . . [I.] ' I, Gilbert Barden, . . having the intention that my slaves . . Isaac, of a black complexion, about forty-six years old, and Harriet . . of black complexion, about twenty years old, and her two children, a girl . . of yellow complexion, about six months old, should be free at the death of my wife, . . do hereby give unto the . . slaves, . . after the death of my . . wife, . . their entire freedom, provided they continue faithfully and obediently to serve . . as dutiful slaves to her during her life;" Signed and sealed, 1838, in the presence of two witnesses; recorded January, 1839. II. [500] " I, Gilbert Barden, hereby declare that I . . give to . . Harriet, when she shall obtain her freedom under said deed, . . about twenty-nine acres, . . [501] and her heirs forever." Signed and sealed the same day as the deed. III. "Another instrument . . signed and sealed by [the wife] . . June, 1839, and referring to the two foregoing . . and the death of Gilbert Barden, declared . . that for the purpose of giving his intention effect . . [502] that they had been obedient and dutiful . . and that she desired that it should be taken that they had continued so up to the time of her death, unless, she should, before that time, demand a return of the instrument of declaration from . . Baker, . . held by him subject to her order. . . IV. last will [of the widow] . . made . . 1840, . . probated . . 1851, . . That . . Isaac and Harriet, should be emancipated . . immediately after her death, and that . . [five] children of Harriet, should be set free, as they . . arrive at the age of twenty-one years. That said children of Harriet and other children of hers, . . thereafter born, and the children of the children . . should be hired out until . . twenty-one . . and that, after paying the expense of raising said children, one-half of their hires . . to the trustees of . . [Methodist Episcopal] church, and the other half to the children." Her dower had never been set apart to her, nor had her administration of her husband's estate ever been closed up. [499] " the Chancellor found the issues, upon the question of freedom, against the appellants,"

Affirmed: I. the deeds were never proven or acknowledged in court as prescribed by the statute;[1] II. the appellants have no claim under the

[1] Steele and McC. Dig., sect. 20, p. 526.

will, because the widow [505] "was a trustee to preserve the estate for those beneficially interested." There was no adverse possession on her part, so that the statute of limitations cannot avail the appellants.

Biscoe v. Royston, 18 Ark. 508, January 1857. Between 1843 and 1851, [518] "none of the [twenty-one] slaves had died, but nine children had been born,"

Wilson v. Anthony, 19 Ark. 16, July 1857. [19] "Wilson went to . . Missouri and purchased [for himself and Anthony] twenty-three slaves . . 1839, they made a division . . Anthony receiving ten . . at the aggregate value of $6,437 50. . . [20] a very sorry lot of negroes."

Denson v. Thompson, 19 Ark. 66, July 1857. "1810, her father [in North Carolina] . . gave [her] . . three slaves, . . they removed to . . [67] Georgia, taking the slaves . . 1844, . . emigrated to this State,"

McLure v. Hart, 19 Ark. 119, July 1857. "action . . on a physician's bill . . for medical services . . $100 charged . . [120] evidence proposed to be introduced by the appellant . . that [Hart] . . so conducted himself as a physician in the treatment of the patients, being slaves . . as by his unskilfulness, to cause them to be lost to the appellant," Rejected, as "no notice was given that the defence of *recoupment* would be relied on." Verdict for appellee. Judgment thereon affirmed.

Daniel v. Guy, 19 Ark. 121, July 1857. Suit for freedom, brought by Abby Guy and her four minor children. [123] "The form of the action was trespass for false imprisonment,[1] . . Stanley testified, that several years ago, Abby spoke to him to move her and her children: he asked the defendant if he could do so, and he said he had nothing to do with her. . . Abby was working for herself, making and selling her own crops. Plaintiffs passed as free persons. The oldest girl boarded out, and went to school. They lived eight or nine years on the Bayon [Bartholomew], visited among white folks, and went to church, parties, etc.,—should suppose they were white. They lived part of the time with a man named Guy, and Abby passed as Mrs. Guy, . . Here the plaintiffs were personally presented in Court, and the judge informed the jury that they . . should treat their . . inspection of plaintiffs' persons as evidence; . . [124] Abby was never named in making the [tax] lists [of defendants' slaves]. . . when [Guy] . . died, he gave her a tract of land, etc. . . Oats testified . . he hauled some cotton for Abby. A year afterwards, she wanted him to move a fence. Having heard that defendant had control of her, witness . . asked him who would pay . . He said he had nothing to do with it. Witness told him they called her a negro. He said they could not prove it. That she could make her own contracts, and pay her own debts out of her property, and that witness could deal with her as he pleased. . . had lived in this State [since 1844] . . except a year or two past, they moved to, and lived in Louisiana. A short time before suit, defendant took possession of them as slaves, . . [125] [Witness for defendant] . . knew Abby's mother, Polly, . . a shade darker than Abby. Could not say whether Polly was of African or Indian extraction.

[1] Digest, ch. 74.

. . [Another] Knew . . both as slaves. Polly had dark straight hair—had a curl on the side of her head. . . wore her hair long, with a comb—was . . the cook, usually wore a cap, and took good care of herself . . Had seen persons darker than Abby without any stain of negro blood. . . [126] Abby came with defendant from Alabama to Arkansas. . . her mother . . was . . of the complexion of a dark white person. . . [127] Dr. Newton [for the plaintiffs] . . The hair never becomes straight until after the third descent from the negro, . . The flat nose also remains observable for several descents. . . The defendant introduced the will of his father, . . [probated] in 1821, . . devised Abby as a 'negro girl slave' to his daughter . . [128] bill of sale . . 1825, conveying to him, for . . $400, . . 'one negro girl named Abby, thirteen years old,' . . the Court . . instructed . . If the jury find . . that the plaintiffs had less than one-fourth of negro blood in their veins, the jury should find them to be free persons upon that fact alone—it being *prima facie* evidence of freedom—unless defendant . . had proven them to be slaves . . If . . less than one-fourth negro, . . defendant can only prove them to be slaves, by proving . . that . . plaintiffs are descended from a slave on the mother's side, who was one-fourth negro or more, . . [129] the Court refused to give . . [136] the *first, second* and *third* instructions moved by the defendant . . [that] if Abby's mother was always held and treated as a slave, and was of negro extraction, and if Abby was so held, treated and acted, etc., . . this was prima facie evidence that she and her children were slaves, unless they were emancipated." [123] "verdict in favor of the plaintiffs, and judgment that they be liberated."

Reversed, and the cause remanded: I. [130] "The 12th section of the act regulating suits for freedom [1] declares that: 'If the plaintiff be a negro or mulatto, he is required to prove his freedom.' . . [131] By the first section of *chap. 75, Digest,* a *mulatto* is defined to be a person . . not full negro, but who is *one-fourth* or more negro. . . [133] The legislature, in the acts [2] referred to, (except in *sec. 1, ch. 75, Dig.*), . . have manifestly used the word in a more latitudinous sense, . . [134] they meant to embrace . . persons belonging to the *negro race,* . . of an intermixture of white and negro blood, without regard to grades. . . the following would be safe rules of evidence. 1. Where a person held as a slave, sues for freedom, and it manifestly appears that he belongs to the *negro race,* . . he is presumed to be a slave, . . 2. If it appear that he belongs to the white race, he is presumed to be free. 3. If it be doubtful, . . there is no basis for legal presumption, . . but it is safest to give him the benefit of the doubt, . . [II.] [136] The Court should have given the *first, second,* and *third* instructions moved by the defendant. . . [137] If . . the Court had not erred in its instructions . . we should not . . disturb the verdict." [3] [English, C. J.]

Spence v. Dodd, 19 Ark. 166, July 1857. [167] "Received, . . 1853, six hundred and fifty dollars, . . for Henry, a negro boy, about 20 years of age." A month or two later he was sold for $900.

[1] Digest, ch. 74.
[2] *Ibid.,* pp. 331, sect. 9; 340, sect. 1; 378, sect. 1; 380, sect. 8; 576, sect. 8; 706, sect. 4; 1001, sect. 25.
[3] See same *v.* same, p. 261, *infra.*

Berry v. Diamond, 19 Ark. 262, July 1857. Diamond hired two slaves to Berry [263] " for the year 1854. . . That after . . the delivery of the negroes . . they ran off and went to the residence of [Diamond] . . who, before delivering them to [Berry] . . who sent for them, told the negroes, that if . . Berry, should hit them a lick, to come home again. . . July, . . the negroes again ran off, and went to the residence of [Diamond] . . who kept . . them, and when . . Berry, again sent after them, refused to deliver them up,"

Williams v. Cheatham, 19 Ark. 278, July 1857. [279] " California gold has so rapidly cheapened the price of money . . it requires fully double as much money to buy a negro, . . as it did [in 1851] . . [280] $1200 was [then] the full value of the slaves, . . [281] he gratuitously signified his willingness that the negroes might be redeemed within six or twelve months . . in order doubtless to minister to Mrs. Williams' natural distress of mind in parting from two girls she had raised in her family from their infancy." [Scott, J.]

Gray v. Adams, 19 Ark. 289, January 1858. [291] " the husband . . (by her consent) brought the slave from Mississippi to Arkansas, and sold . . him . . 1848."

Bob alias Robert Crow v. Powers, 19 Ark. 424, January 1858. Deed, signed and sealed by Eli Crow, August, 1853; acknowledged by him before the Circuit Court, September, 1853: [429] " in consideration of faithful services and attention rendered me by my slaves, . . and from motives of humanity and benevolence towards them, [I] . . hereby do emancipate . . Bob, aged about 37 years; . . Mariah, 34 years old; . . Patsy, aged about 33 years; . . Nancy, . . about 15 years; . . John, . . about 19 years; . . George, . . about 19 years; . . Lewis . . about 14 years; . . James, . . about 8 yèars; and . . Joe, . . about 6 years; . . and fully discharge . . from all slavery . . after my death." [435] "After the Court below refused to permit the plaintiff to read to the jury the deed . . the plaintiff introduced . . last will . . of Eli Crow, . . duly probated [1856] . . ' Having heretofore, by a deed of emancipation, manumitted . . all the negroes . . in my possession . . [436] and being desirous that said negroes . . shall, after my death, enjoy their freedom, . . I do hereby . . set [them] free . . and . . desire my executors to protect them, and while in this State, to become responsible by bond, or as the law . . may require for their safety, and if they . . desire to leave Arkansas, and emigrate to a free state, I will that my executors assist them in so doing.' "

Judgment in favor of the executor, reversed, and the cause remanded [442] " at the cost of the appellee." " The plaintiff is entitled to his enlargement under the deed, . . subordinate to the rights of creditors, existing when he was emancipated,[1] . . But in such case the Court will not decree a sale . . but will direct them to be hired until a sufficient fund will be raised to discharge the debts with . . interest." [Hanly, J.]

[1] Digest, ch. 63, sect. 3, p. 476.

Boyd v. Whitfield, 19 Ark. 447, January 1858. [457] "Stovall [of North Carolina] devised Peggy to his daughter [1819] . . for life, and at her death, to her children, . . had loaned [her to] his daughter [in Virginia] . . many years before his death, . . Peggy . . occasionally going to Stovall's at Christmas: . . [Stovall's son-in-law] died about . . 1821, and Peggy was sold . . to pay his debts, . . [to] Shelton, who . . sold her to Easley," [454] "1836, Easley sent from Virginia . . into Arkansas, . . Peggy and her four children, . . sold [them] . . to . . Vautier, . . upon credit, . . could not pay . . [455] the slaves were taken to . . Louisiana, . . and purchased by Williamson [his surety], at . . a sale made by the parish judge . . 1841, . . sold to complainant . . [456] without his suspecting that there was any adverse title to them, until . . 1847, . . [458] Peggy and her children were worth $3,850,"

Rheubottom v. Sadler, 19 Ark. 491, January 1858. [492] "a declaration, in assumpsit, . . [494] proven that in the winter of 1849, plaintiff's testator hired a negro man to the defendants, . . partners in the gold digging business in California; . . the defendants were to pay, and did pay . . in advance $500, for the hire . . for 100 days; after the close of which time . . to . . pay to testator, the one half of the negro's earnings, and bring him with them to Arkansas, on their return . . [495] That they arrived at the Isthmus of Darien, . . on their return home, with the negro, . . December, 1851, where . . [one] defendant . . started back to California, taking the negro with him, and the other defendants came on home. That the negro . . remained [in California] ever since. . . There was no proof . . that slavery was abolished in California during the period of the hiring." Judgment against all of the defendants. Affirmed.

Morine v. Wilson, 19 Ark. 520, January 1858. "that complainant owning certain slaves, and being a refugee from the Island of St. Domingo, ignorant of our language and laws, and uneducated, and of weak understanding, was induced . . to execute a deed of gift . . 1838, for the aforesaid slaves,"

Gary v. Stevenson, 19 Ark. 580, January 1858. "The complainant alleges . . that he is . . about sixteen . . 'a white person,' . . [582] prayed for injunction against all the defendants [[581] 'claiming him as a slave,'] from commencing any suit for the recovery of the possession of him . . Stevenson, answered . . denying . . and insisting . . that he had African blood in him, . . born of a slave woman . . Susan, . . [583] Evidence for complainant. Dr. Brown . . could discover no trace of the negro blood in his eyes, nose, mouth or jaws—his hair is smooth and of sandy complexion, perfectly straight and flat, with no indications of the crisp or negro curl: his eyes blue, his jaws thin, his nose slim and long. . . Should suppose it would take at least twenty generations from the black blood to be as white as complainant. . . Doctor Dibbrell . . [584] would judge him to possess a small amount of negro blood; not more than a sixteenth, perhaps not so much; would not positively swear he had any at all, . . eyes grey and clear, upper lip rather thicker than

in the white race—temperament sanguine . . Evidence for defendant. Jesse Turner . . 1848 . . bought Susan . . from Holman, [who] . . informed [him that she was] . . a mulatto and a slave, . . about two years ago emancipated her in accordance with the laws of Arkansas. . . of very light complexion, has straight hair, . . rather thick lips and coarse features. . . [585] did not assert any . . claim to freedom, . . Susan always recognized [complainant as her son] . . and he, Susan as his mother. . . would not have taken him to be of African descent, but having so heard, . . he had concluded that he was very slightly touched. . . Holman . . proposed to sell [to Bishop] Susan and a child of hers, then about one year old, but did not offer to sell the complainant, saying . . that . . when he bought Susan and her other child, . . complainant was given in to him . . on that purchase, and that he had promised the former owner . . to let the complainant go free at twenty-one years old, . . [586] that, nevertheless, the complainant was a slave for life. He did, . . however, sell the complainant to Dr. Stevenson . . about . . 1850, in whose possession, as a slave, he has been . . until he absconded and instituted this suit." Bill dismissed.

Affirmed: "the preponderance of the testimony is, that he belongs to the [negro race.] . . the presumption of law, that he is a slave, at once attaches,"

State v. Cadle, 19 Ark. 613, January 1858. Indictment [1] [614] "That . . Cadle, . . a white person, . . 1856, . . did harbor certain slaves . . [615] without the consent of the owner, or the overseer" The indictment did "not specify the names of the slaves, or the name of their owner or overseer." Quashed.

Case v. Maffitt, 19 Ark. 645, January 1858. "steamboat . . indebted to him . . $17 50 for a half month's service of his boy Flan, as cook on said boat,"

Anderson v. Dunn, 19 Ark. 650, January 1858. [660] "in 1838 . . he had run all his father's negroes to Arkansas, . . and wanted to get his father there, . . [661] [who was] greatly involved in debt in Alabama,"

McDaniel v. Parks, 19 Ark. 671, January 1858. [672] "first of January, 1854, Finn employed the plaintiff to oversee his plantation [on Red River] for twelve months, for . . $350. . . April, . . discharged . . The witnesses state that the usual price for overseeing such a plantation, was from $300 to $400 per annum, . . [674] One . . testified . . That it was usual [on the River] to keep the same overseer the entire year. . . That he had known Finn to have four or five overseers in the same year."

Howell v. Howell, 20 Ark. 25, January 1859. [27] "1851, she purchased . . with $400 . . a negro woman . . and her child"

Moss v. Ashbrooks, 20 Ark. 128, January 1859. [131] "In 1843, . . he went to Missouri, received Caroline and her children from the administrator . . brought them to . . Arkansas,"

[1] Pamph. Acts, 1854, p. 38.

Ewell v. Tidwell, 20 Ark. 136, January 1859. In 1843 Jonathan H. Koen removed from Louisiana to Arkansas with his negroes. He died in 1853, and [143] "bequeathed to . . [thirteen] negroes (whom the will declares to be free), the *residium* [*sic*] of his estate; consisting of lands, the negro defendant, Charles, and other personalty." [142] "The negro defendant, Edmond, was neither emancipated nor disposed of by Koen's will. He claimed his freedom outside of it; and the proof shows him to be a slave;"

Held: free negroes in this state may hold real and personal property, except negroes, and make contracts; but [144] "the ownership of slaves by free negroes, is directly opposed to the principles upon which slavery exists among us," "slavery . . has its foundation in an *inferiority of race.* There is a striking difference between the *black* and *white* man, in intellect, feelings and principles. In the order of providence, the former was made inferior to the latter; and hence the bondage of the one to the other. . . The bondage of one negro to another, has not this solid foundation to rest upon. The free negro finds in the slave his brother in blood, in color, feelings, education and principle. He has but few civil rights, nor can have, consistent with the good order of society; . . civilly and morally disqualified to extend protection, and exercise dominion over the slave. . . Koen . . died intestate as to . . Charles" as well as Edmond. [Compton, J.]

Clinton v. Estes, 20 Ark. 216, January 1859. [247] "plaintiff [[249] 'over seventy . . and subject to fits'] . . 1849 . . told him that he had made the trade with his son John G., . . [who] was to pay him $1,800 . . furnish him a house to live in . . support him . . [249] and at his death to set old Milly free." [229] "had no white family living with him. . . [248] The bill of sale made no mention of the important considerations to be given . . in addition to the $1,800" A year later, [222] "John G. Estes, Clinton [to whom John G. had sold the negroes for $3200 or $3300] . . and others, took the negroes from plaintiff's, on the Osage river, in Missouri; . . [223] found them on the bank of the river, on Sunday evening. The negroes were going across the river to a meeting. . . nabbed six of them and put them in a room on the boat . . went up to the house, and got the old woman, . . [224] [Clinton] said that he knew he could not hold the negroes in Missouri, but that if he could succeed in getting them south, he would ask no odds. . . that it would be the means of separating plaintiff and old Milly." The plaintiff brought an action of replevin. Verdict and judgment for the plaintiff. Affirmed.

State v. Goff, 20 Ark. 289, January 1859. "indicted . . for laboring on the Sabbath, etc.[1] . . Goff was a poor man and had no cradle of his own, . . when his neighbor quit cutting on Saturday evening, Goff got the cradle and hired the negro to cut for him the Sunday following;" Acquitted. Judgment on the verdict, reversed, and the cause remanded.

[1] Gould Dig., p. 373, sect. 1.

Sanders v. Sanders, 20 Ark. 610, October 1859. The case of Lovette *v.* Longmire[1] overruled, so far as [611] "it was held that a Court of Chancery has no jurisdiction to enjoin the sale of slaves, held as the separate property of the wife, under an execution against the husband. . . the remedy at law by damages would be utterly inadequate, . . [613] from the very nature of the property itself, Chancery is authorized to interfere;"

Atkins v. Guice, 21 Ark. 164, January 1860. Will, executed in 1845, by Abner Chapman, [171] "a trader in the Creek Nation, where he resided:" [169] "considering . . of a promise made my negroes, when purchasing them, that I would not carry them from their native country, request my executor . . to suffer them to choose their masters, within their own country," [177] "the payment [to certain legatees] . . was not made in money, but in slaves belonging to the estate, . . And in order to comply in form with the provision of the will that the slaves should be sold in the Creek Nation, . . the three slaves were transferred, by bill of sale, from [the executor] . . to . . a resident of the Nation, and by him" to the legatees.

Bell v. Greenwood, 21 Ark. 249, May 1860. Held: a court of chancery has jurisdiction to enjoin the sale of slaves levied upon under an execution against another person.

Watkins v. Bailey, 21 Ark. 274, May 1860. [275] "that Mrs. Watkins, when a feme sole, hired a slave to Rogers for . . 1856. That appellee, . . a physician, was called in by Rogers, . . That the negro, at first, had a chill, but after appellee had attended him for some time, . . got worse, Rogers informed Mrs. Watkins, . . and she directed Dr. McRae to be employed, . . who . . was afterwards paid . . by Mrs. Watkins. . . [276] witnesses testified that there was no custom for owners to pay doctor's bills for attending servants whilst hired out; but mentioned similar instances of the owners paying . . without express contract for that purpose." Judgment in favor of appellee for $31 65. Reversed.

Tatum v. Mohr, 21 Ark. 349, July 1860. [351] "1856, . . an exchange of slaves. That plaintiff gave the defendant . . Alfred worth $1200, for . . [352] Henry, valued at $900, and his note for $300, . . [354] Several physicians who attended . . Henry . . before his death, gave it as their opinion that he was afflicted with hereditary scrofula, though . . they might be mistaken." [353] "Defendant proposed to prove . . that . . Alfred . . was of no value whatever, which the court excluded;"

McDaniel v. Crabtree, 21 Ark. 431, July 1860.[2] [432] "two of the [seven] negroes when taken were in the field, one was a cook, another a nurse, and others were children too small for field work. . . [435] he was delayed . . in sending his [thirty] other servants [[436] 'including twenty working hands'] to Texas . . in 1853,"

[1] See p. 241, *supra.*
[2] See Crabtree *v.* McDaniel, p. 246, *supra.*

Williams v. Miller, 21 Ark. 469, July 1860. [471] "that the obligation [for $450] declared on, with another for the same amount, . . which had been paid, were executed for the price of a female slave . . warranted to be sound, but . . by reason of . . unsoundness (a disease of the womb) her actual value was less than the amount . . which had been paid," Judgment for defendant, affirmed.

Phebe v. Quillin, 21 Ark. 490, July 1860. Nineteen negroes brought suit for freedom under the will of Joshua Averitt, 1853: [495] "It is my wish . . that all my slaves both in Louisiana and Arkansas, or wheresoever the same may be, should be set free at the expiration of seven years after my death, my nephew . . to have charge of said slaves, to receive the revenue arising from the same." The acts of Feb. 2 and 12, 1859[1] forbid further emancipation. Bill dismissed.

Held: I. [496] "Notwithstanding the broadness of the words of the acts of 1859, we do not understand them as affecting instruments of emancipation made before the acts, though the emancipation was not to be completed till after their passage. . . [II.] [498] That the words [in the will are] an actual gift of freedom to the slaves. [III.] And that a prospective emancipation is legal and effectual. . . [IV.] this suit . . was prematurely brought. . . [500] In the earlier cases, the general rule . . in . . slave States, seemed to be and was often so announced from the bench, that the courts would lean towards the grant of freedom, while, in the later decisions, there would seem to be reason to fear that the great reaction in public sentiment, in the southern States, relative to . . emancipation . . may produce a habit of construction so stringent as to endanger the even balance which should ever be extended to . . the white and the black, the free and the bond. The question of freedom should be determined . . solely upon its legal aspects, without partiality to an applicant. . . because he may be defenceless, and . . of an inferior race, and certainly without prejudice . . and without regard to the sincere convictions that all candid, observing men must entertain, that a change from the condition of servitude and protection, to that of being free negroes, is injurious to the community, and more unfortunate to the emancipated negro than to any one else. . . [501] decree . . affirmed, without prejudice to the rights of the plaintiffs to institute such further legal proceedings as they may be advised may be necessary to secure their rights." [Fairchild, J.]

Powell v. State, 21 Ark. 509, July 1860. [510] "that the witness had frequently seen John [Powell's mulatto slave] both serve customers, and receive the pay therefor; that he was frequently alone at the grocery in charge . . frequently, or generally, slept in the grocery, as the witness thought; that he brought water, swept the house, . . appeared to be kept . . to do anything . . wanted . . [511] By the verdict of the jury the defendant's fine was assessed at seventy-five dollars.[2] New trial denied.

[1] Acts of 1859, pp. 69, 175.
[2] Gould Dig., ch. 169, sects. 20, 21, p. 1052.

Edwards v. State, 21 Ark. 512, July 1860. [513] " indictment charging Edwards with selling ardent spirits to a slave, without the permission of his master,[1] . . found guilty . . The court fined him one hundred dollars,"

Carroll v. Wilson, 22 Ark. 32, October 1860. [36] " valuation [of plantation negroes] . . put in writing [in November, 1854] . . Five young negro men, and one man forty-five . . at one thousand dollars per head, . . One boy fourteen years of age, . . at eight hundred dollars. Two boys, one eleven and one nine . . at six hundred and fifty dollars per head, . . One girl thirteen . . at eight hundred dollars. One young woman and child, . . at nine hundred dollars. One woman thirty-five . . at six hundred dollars. One woman and five children, . . at three thousand dollars. . . [48] two negroes [the boy and the girl] in the original trade at eight hundred dollars each . . were worth some two thousand dollars [in October 1857] besides the value of their services, say fifty dollars a year; . . [51] although he had not got one negro which he was to have . . she being a favorite servant of Mrs. Wilson, he had consented "

Moore v. Clopton, 22 Ark. 125, October 1860. Held: a note given in Mississippi for the purchase of slaves, which is void under the decisions of her appellate court for want of the certificates prescribed by her laws,[2] is void when sued upon in this state. In the conflict of decisions, the Supreme Court of Arkansas follows those of Mississippi [3] and not those of the Supreme Court of the United States.[4]

State v. Alford, 22 Ark. 386, October 1860. [387] " 1859, the defendant was put upon his last [third] trial, on an indictment for murder. . . described as . . a negro, and no testimony . . that he was a slave. In some of the orders of the court, . . he is denominated . . a slave. In his motion for a new trial, after the first conviction, . . murder in the second degree, . . objected that the verdict was illegal, as the law recognizes no degrees of murder . . by a slave. After the verdict in the last trial, . . guilty of murder in the second degree, . . assessed to punishment by service in the penitentiary for eighteen years, . . before sentence was passed, the State moved that sentence of death should be pronounced, as upon a general verdict of guilty, upon the ground that the jury could not find the defendant guilty of murder in the second degree, and could not assess his punishment to confinement in the penitentiary as he was a negro, and not shown to be a free person of color."

Judgment affirmed: though " in a suit for freedom by one of the negro race, he is presumed to be a slave, . . [388] The case is far different, when the condition of slavery is a fact to be ascertained, in order to define the crime . . charged, or to determine the punishment to be affixed . . according as the criminal may be a freeman, or a slave. . . it is an essential part of a case against a slave, that allegation and proof of his condition shall be made, that, upon conviction, a slave may be dealt with according to the law providing for the punishment of slaves." [Fairchild, J.]

[1] Gould Dig., ch. 51, art. 4, sect. 1, p. 382.
[2] Miss. act of June 18, 1822. How. and Hutch. Dig., p. 156, sect. 4.
[3] 7 How. Miss. 14; 7 S. and M. 380; 27 Miss. 13; 30 Miss. 516.
[4] 15 Peters 449; 5 Howard 134, 141; 12 Howard 79.

Plant v. Condit, 22 Ark. 454, January 1861. The plaintiff received Daniel [457] " in exchange for a woman. . . [463] the defendant represented the boy . . to be sound, otherwise than that he was a dirt eater. . . also some evidence . . that he was afflicted with scrofula, softening of the brain, and otherwise diseased, before the exchange."

Strayhorn v. Giles, 22 Ark. 517, January 1861. [519] " In . . August or September, 1854, . . Houser . . obtained possession of a mulatto boy named Bill, in the Indian country; and . . placed him in the possession of . . Strayhorn, . . [giving him] a power of attorney, authorizing him to sell the boy, ' for any price whatever,' . . November, . . Strayhorn sold Bill to . . Giles . . for $1,000, taking a negro girl in part payment, . . warranting Bill to be a slave for life, etc. In the meantime Bill had commenced suit for his freedom against Houser, . . pending when Strayhorn sold him . . August, 1856, he obtained a judgment of liberation. . . [520] before [Strayhorn] . . sold him . . one of Bill's attorneys, wrote to Mr. Green, . . attending . . Circuit Court, that Bill was free, . . and requesting him . . to bring suit for his freedom. Whereupon, Mr. Green addressed a letter to Strayhorn, . . requesting him to bring Bill to court that he might institute suit for his freedom;" [519] " 1858, Giles commenced this suit, . . three counts, . . the third in *trover* for the negro girl . . the court found in favor of Giles on the *trover* count, and assessed his damages at $700." Judgment affirmed.

Cox v. Britt, 22 Ark. 567, January 1861. [568] " 1849, he, with . . most of the slaves, moved [from North Carolina] to Arkansas."

Graham v. Roark, 23 Ark. 19, January 1861. [20] " 1856, the slaves of the appellant, [in his absence,] acting under the direction of his overseer, cut down and carried away and destroyed the corn and peas . . upon . . land belonging to . . King, . . also threw down and carried away the rails with which the land was fenced."

Held: the owner of the slaves is responsible.[1]

Henry v. Harbison, 23 Ark. 25, January 1861. [27] " 1853, . . upon the plaintiff and his wife first commencing house-keeping, Martha was sent home with them because [the wife's father] . . wished to keep Phillis, who was older and a field hand, to assist him in the coming crop, . . 1855, . . moved [from South Carolina] . . to this state;"

Daniel v. Guy, 23 Ark. 50, January 1861.[2] [51] " On the remanding of the cause . . the venire was changed . . on the petition of Daniel, . . During the trial, the plaintiffs were brought into court for inspection, and were permitted to pull off their shoes and stockings, and exhibit their feet to the jury, against the objection of the defendant [Daniel]." " verdict and judgment of liberation in favor of the plaintiffs, motion for a new trial overruled, and appeal by defendant. . . [I.] The counsel for Daniel . . argues, with much warmth of expression, that the court committed a gross error in permitting them to . . exhibit their bare feet . . [II.] [54] It is submitted for the appellant, that there was a total want of evidence to support the verdict."

[1] Gould Dig., ch. 174, sect. 5, p. 1063.
[2] For facts, see same *v.* same, p. 252, *supra.*

Judgment affirmed: [I.] [52] "Physicians, whose testimony was introduced, . . state that the color, hair, feet, nose and form of the scull [*sic*] and bones, furnish means of distinguishing negro . . descent. . . No one, who is familiar with the peculiar formation of the *negro foot,* can doubt, that an inspection of that member would ordinarily afford some indication of the race . . [II.] [54] we cannot concur with the counsel [that there was a total want of evidence to support the verdict], though it is possible that the jury found against the preponderance of the evidence, through reluctance to sanction the enslaving of persons, who, to all appearance, were of the white race, and, for many years before suit, had acted as free persons and been treated as such." [1] [English, C. J.]

Hawkins v. Greene, 23 Ark. 89, January 1861. Will, 1854: [91] "The negroes . . were to remain on the plantation if they could support themselves and the testator's children from the proceeds of the farm and the stock, and if . . not . . the grown negroes were to be sold and the money put at ten per cent. interest"

Moren v. McCown, 23 Ark. 93, January 1861. [99] "Mrs. Moren was left with a family of nine children, the oldest . . young enough to be a charge upon her, with a parcel of negroes of such a sort as that, through helplessness from infancy and child bearing and age, the most of them served only to increase her cares and expenses. . . the negroes, that were useless and burdensome to her, by their growth and increase of price, have become a valuable estate to her children."

Christian v. Greenwood, 23 Ark. 258, January 1861. [267] "that Hundley had run off these [two] and four other negroes, all he owned, to Louisiana . . to avoid the debts"

Omey v. State, 23 Ark. 281, January 1861. Held: in an indictment for selling ardent spirits to a slave, without permission,[2] it is necessary to state the name of the master, and allege the sale to have been made without the permission of the mistress, overseer or person having charge of him, as well as of the master.

Morton v. Scull, 23 Ark. 289, January 1861. "Morton sued Scull in an action for deceit, . . the negro sold was an incorrigible runaway, . . he was taken from jail, where he had been placed for safe keeping by Scull . . [292] The damages sustained by Morton is the difference between the value of the boy . . as he was, addicted to running away, and as he would have been, free from that vice, at the time Morton bought, and at the place . . Jefferson county . . [but] with the comparative value of guaranteed and vicious negroes in New Orleans; with what Morton got for him there, . . Scull has no concern."

Curtis v. Daniel, 23 Ark. 362, May 1861. [364] "had 'peaceable possession' of said slaves . . from the time they removed from . . North Carolina to Arkansas, [about 1850.]"

Stone v. Stillwell, 23 Ark. 444, December 1861. [450] "1851, . . $1,100 for Ben, . . the value fixed upon him by the decrees, . . [455]

[1] See same *v.* Roper, p. 263, *infra.*
[2] Gould Dig., ch. 51, art. 4, sect. 1, p. 382.

'He is young, stout, and likely, and will sell for a fair price, independent of his mechanical qualifications,'"

Sessions v. Hartsook, 23 Ark. 519, December 1861. [520] "April, 1857, . . Sessions . . made . . note to Templeman and Richardson . . [521] negro traders, . . [for] seven thousand, one hundred and fifty dollars, with the right to return unsound ones, and have others for them, . . payable . . in New Orleans, . . [522] Templeman . . was in Pine Bluff much of his time, and kept a negro yard for the purpose of trading and selling negroes." [520] "all of the negroes were, when sold, suffering from an infectious cough, . . [522] Sessions would [like to] recoup against the note the damages he sustained from the communication of the whooping-cough to his other negroes"

Woodward v. Roane, 23 Ark. 523, December 1861. [525] "the night of the day that the slaves were found to be subject to the executions, . . they were run from the county,"

Thompson v. Bertrand, 23 Ark. 730, December 1861. [732] "overseer . . stated . . that the knees and ankles of the negro were . . swelled and scarred; . . for a year . . he had not done, and had not been able to do, a good day's work. . . if Albert did not complain of his knees, the disease fell into the small of his back; . . that management of negroes had been his business for sixteen years, and that he had been doctoring Albert all the year,"

Mary v. State, 24 Ark. 44, December 1862. [45] "The grand jurors . . present that Mary, . . slave for life, . . 1861, . . did set fire to a . . dwelling house" "convicted, and sentenced to receive five hundred lashes."

Judgment reversed and the cause remanded: [47] "The indictment . . is . . materially defective in not alleging that the house was burned."

Stroud v. Garrison, 24 Ark. 53, December 1862. "a wagoner, told Lephew that some runaway negroes passed his camp the evening before. Lephew told the defendant, a negro catcher; and he, with another person, started in pursuit . . Lephew and the plaintiff also started . . The pursuing party, then consisting of four persons, was soon upon track of the negroes, and their whole number, five, were soon caught by the joint effort of all . . and were delivered by the defendant to the jailer . . afterwards taken from jail by their owner, and the reward for their apprehension was paid to the defendant."

Held: [54] "He never bound himself to pay any part of the reward to the plaintiff, nor would the law raise an implied obligation to do so from the facts."

Daniel v. Roper, 24 Ark. 131, June 1863. [134] "the bill . . alleges she is the person whose case, under the name of Abby Guy, was twice before this court,[1] . . Abby Guy and her children claimed to be free persons solely from belonging to the white race." [132] "The bill . . charges that when the defendant reduced her and her children to slavery, he took

[1] Daniel *v.* Guy, pp. 252, 261, *supra.*

from her two mares and a colt, a yoke of oxen and a cart, . . that she sued for the property at the first court . . after the final decision of the supreme court; that this suit, an action of trover, . . [133] was then pending . . and that the defendant, after having kept her in slavery during the period of litigation [1856-1861], has the hardihood to plead the statute of limitations of three years to her action; . . she asks that he be enjoined from interposing the plea. . . the court awarded the injunction, . . the defendant . . prayed an appeal"

Held: [134] "taking the plaintiff to be what, throughout her protracted litigation . . she claimed to be, what the juries of two counties found her to be, a white woman and a free person, she was never under any disability to sue . . [136] The case must be remanded . . with instructions to set aside the order for an injunction and to dismiss the bill." [Fairchild, J.]

Gregory v. Williams, 24 Ark. 177, December 1866. [178] "filed . . three separate bills of items, the first for eighty dollars, and the second and third for seventy-five dollars each, for the hire of a negro girl . . for the years 1862, 1863 and 1864 respectively."

Dorris v. Grace, 24 Ark. 326, December 1866. [328] "Grace brought his action of debt . . upon the following instrument: 'One day after date I promise to pay . . Grace . . three thousand dollars, with ten per cent. interest . . August 29th, 1863. . . Dorris,' . . the consideration of a certain negro man . . [331] the enemy had not extended his lines to Pine Bluff. The negro had neither been within the federal lines, nor captured."

Held: "The title of Grace was . . as perfect as if no [emancipation] proclamation has issued," [330] "The proclamation was, evidently, intended as a war measure, . . It could only be made available to the limits of the federal lines . . [336] although we think it not improbable that the defendant, at a time when slave property was of very doubtful value, did not intend to pay $3000 in cash for the negro, yet he has, in reducing his contract to writing, used such terms as impart a purchase for cash . . a court of law cannot . . relieve him" [Walker, C. J.]

Rust v. Reives, 24 Ark. 359, December 1866. [360] "James H. Reives commenced his suit in attachment, . . 1866, upon the following instrument: . . 'Albemarle Co., Va., Sept. 20th, 1860. . . I promise to pay to George Reives or order . . in . . Richmond, Va., twelve thousand five hundred dollars, with interest . . for seventeen negroes . . the title to which he warrants, but makes no warrant as to health or constitution. . . Rust,' . . assignment: 'Oct. 20th, 1865. . . [361] to J. H. Reives, . . Geo. Reives.' . . judgment was rendered for the debt and damages," Affirmed.

Millwee ex parte, 24 Ark. 364, December 1866. "application for mandamus against . . judge . . to compel him to grant an injunction . . February, A.D. 1863, the petitioner purchased from . . McIntosh, . . a negro slave for . . fourteen hundred dollars, upon a credit of twelve months; . . executed three [notes] . . two for five hundred dollars each, and one for four hundred dollars, . . paid one of said five hundred dollar

notes, and two hundred dollars on account of the other; that McIntosh instituted his action of debt, upon the balance due . . [365] judgment was rendered against [Millwee.] . . mandamus . . refused."

Steele v. Richardson, 24 Ark. 365, December 1866. [365] "Steele, . . 14th day of April, 1865, . . was the . . owner of . . [368] property . . of the value of $10,000; which sum the defendant agreed to pay in . . six negroes, which he then warranted to be his . . slaves; . . [complainant] with his wife executed . . a deed . . ignorant of the fact that . . slavery had been . . abolished [February 22, 1865] . . by [the amendment to] the constitution of . . Arkansas. . . [369] the defendant demurred; . . sustained," Decree dismissing the bill, reversed.

Montgomery v. Ervin, 24 Ark. 540, June 1867. Her [541] "negroes had been abducted, run off and sold by the appellee,"

Haskill v. Sevier, 25 Ark. 152, December 1867. [154] "Smith, . . March, 1860, sold to . . Jordan, eighty-five negro slaves, for . . eighty thousand dollars, . . warranted . . that they . . were slaves for life." Jordan died in 1861, and his administrator refused to pay the balance due.

Held: [157] "It was not a false warranty, when made, . . [158] Jordan . . must . . bear the loss"

Atkins v. Busby, 25 Ark. 176, December 1867. Contract made in 1859, for the sale, by Busby to Atkins, of slaves worth $16,000, of which [181] "the title was not to pass" until all the purchase money had been paid; but "there was a delivery of the negroes" on the payment of the first installment, January 1, 1860. Two notes remained unpaid.

Held: "such delivery was . . a delivery for use, . . [182] the title to the slaves . . remained in Busby, . . at the time they were, by the provisions of the [State] Constitution, emancipated." [Walker, C. J.]

Johnson v. Walker, 25 Ark. 196, December 1868. [199] "March, 1863, purchased . . twenty-eight negro slaves, estimated at $28,000,"

Coolidge v. Burnes, 25 Ark. 241, December 1868. [242] "bills of exchange, . . October 10, 1860, [for $3,325,] . . [243] for four . . negroes, . . Aleck, Judy, Dock and Delia, . . the boy Dock . . of the value of fifteen hundred dollars, was so much diseased . . as to be of very little value,"

McWillie v. Martin, 25 Ark. 556, December 1869. [557] "some time after [January, 1861] . . took a negro woman at $1,300,"

Jacoway v. Denton, 25 Ark. 625, December 1869. [626] "that the obligation [for $4,500] sued upon was given in Arkansas [October 4, 1861], for three negro boys; that the appellee covenanted . . that said boys were all slaves for life;" "the appellee interposed a demurrer, . . [627] The court sustained the demurrer . . final judgment for the appellee"

Affirmed: I. [629] "The [emancipation] proclamation . . was direct authority to the armies of the Union to make free all . . slaves . . by them captured. . . [630] When the Confederate armies were overpowered, . . the entire territory . . of the rebellious States at once passed

under the military power . . of the Government, . . and all slaves, not before . . liberated, at once, *ipso facto,* became . . free. . . [631] the former slave does not trace his freedom to the amendments of the Constitution of the United States, or the enactments in the Constitution . . of Arkansas, . . [II.] [647] wherein our State Constitution declares a valid contract null and void,[1] we decide it to that extent contrary to the Constitution of the United States, and not binding" [Gregg, J.] Judge McClure and Judge Bowen dissented.

Kaufman v. Barb, 26 Ark. 24, December 1870. [26] "Barb, . . July, 1863, purchased a negro slave from Hirsch and Adler, for . . thirteen hundred and twenty-five dollars, and in payment . . executed his note . . payable 'twelve months after the expiration of the . . present war.' . . [27] the sale . . was made [in Independence county] . . when the Federal forces were in the occupation of the county"

Buchanan v. Nixon, 26 Ark. 47, December 1870. "a claim . . for $1520, founded upon a . . note, . . [given for] negro slaves, . . 1859," The claim "was allowed." Decree affirmed.

Pillow v. Brown, 26 Ark. 240, December 1870. [243] "December, 1860, he [Pointer] sold to Pillow eighty-five negroes . . for . . one hundred and nine thousand two hundred and six dollars and twenty-five cents, . . Pillow executed his four [notes] . . payable on the first days of January, 1862, 1863-4 and '65, and on the same day executed . . [244] a mortgage in favor of Pointer upon two of his plantations . . and forty-three of the slaves . . April, 1862, . . Pillow . . sold to Coolidge [these plantations and two others] . . together with all his slaves . . subject to this mortgage . . [245] Pillow . . alleged that Pointer covenanted that the negroes . . were slaves for life, . . failure of consideration . . that he was a confederate officer . . . [246] that Pointer resided in . . Tennessee"

Held: section 14, of article 15 of the Arkansas constitution is in conflict with the clause of the U. S. Constitution which provides that no state shall pass any law impairing the obligation of a contract.

Fleming v. Johnson, 26 Ark. 421, June 1871. [427] "a bill of sale for a negro woman and child, . . to . . Fleming, dated 8th of January, 1856, reciting $800, as the consideration. . . [428] Fleming sold [them] . . in two or three months . . for $1100."

Armstrong v. U. S., 13 Wallace 154, December 1871. "on the approach of the Union army [September 1863] she fled south with thirty or forty of her slaves to avoid emancipation."

Osborn v. Nicholson, 13 Wallace 654, December 1871. [655] "The plaintiff . . brought this suit . . 1869, . . upon a promissory note made to him by the defendants . . for $1300, dated March 1861, and payable . . December following, . . The defendants pleaded that the instrument . . was given in consideration of the conveyance of a certain negro slave for life . . and that at the time . . the plaintiff . . executed . . a bill

[1] Constitution of 1868, art. XV., sect. 14.

of sale . . ' For the consideration of $1300 I hereby transfer all the right . . I have to a negro boy named Albert, aged about twenty-three years. I warrant said negro to be sound in body and mind, and a slave for life; ' . . the said negro . . on the 1st day of January, 1862 [*sic*], was liberated by the United States government, . . [656] judgment for the defendants."

Judgment reversed and the cause remanded: "the constitution of Arkansas of 1868, which annuls all contracts for the purchase or sale of slaves, . . is [as to all prior transactions] clearly in conflict with . . the Constitution of the United States, . . [663] as the obligation here in question was valid when executed, sitting as a court of justice, we have no choice but to give it effect." [Swayne, J.] Chief Justice Chase dissented.

Anderson v. Mills, 28 Ark. 175, June 1873. [176] "February, 1859, . . Mills sold . . Anderson . . sixty-five slaves, . . valued at . . $54,000 . . The Andersons paid . . $20,000 in two drafts on the slaves and other personal property," and gave their notes for the balance. [182] "Mills . . delivered the slaves . . [183] the Andersons were in possession of the slaves . . until the close of the war, . . except such . . as had . . died, run off to the federals, or been impressed in the military service."

Held: "The loss by emancipation fell upon them . . [187] a misfortune for persons who bought slaves upon credit, and lost them by emancipation, to have to pay for them. . . But the warrantor [that they are slaves for life] is no more bound for the loss . . by such emancipation than if they had been destroyed by a flood or an earthquake." [English, Sp. J.]

Jones v. Johnson, 28 Ark. 211, December 1873. [216] "before . . Johnson left North Carolina [in 1858] he was employed as an overseer by wealthy cotton planters; . . that good overseers on large farms then obtained from $400 to $800 per annum;"

Parrot v. Nimmo, 28 Ark. 351, December 1873. [352] "In 1858, . . Nimmo . . brought this property [slaves] to . . Arkansas" from Alabama.

Campbell v. Rankin, 28 Ark. 401, December 1873. "In January, 1861, . . Rankin sold . . for $210,000, a large plantation . . with the slaves . . thereon."

Snow v. Grace, 29 Ark. 131, November 1874. [134] "Sheppard, . . was absent at his home in Virginia at the time of the Federal occupation of Pine Bluff, and . . his manager, had . . taken the negroes . . off the place, and had gone south; . . acting under Sheppard's instructions."

Tobin v. Jenkins, 29 Ark. 151, November 1874. [161] "a girl [given his daughter] for a nurse was when large enough, placed . . in the cotton field as one of his hands,"

Ober v. Pendleton, 30 Ark. 61, May 1875. In 1857, "Douglass was the owner of about twelve thousand acres of land . . 70 or 80 negroes."

TEXAS

INTRODUCTION

I

Judge Lipscomb declared in 1851 [1] that the question of slavery in Texas continued in a " state of uncertainty . . until the formation of the Constitution " of the republic. The constitution of Coahuila and Texas, adopted March 11, 1827, had provided that, from its promulgation in the capital of each district, " no one shall be born a slave, in the State, and after six months, the introduction of slaves, under any pretext, shall not be permitted." But it was " said never to have been published in the department of Texas. " [2] In 1829 the President of Mexico issued his decree abolishing slavery, but its constitutionality was " always questioned," [3] and it was " abrogated " in 1831. Meanwhile, the Secretary of State of Mexico reported to the congress of Mexico on March 4, 1830, " that such was the opposition to the laws in relation to slavery, in Texas, that any attempt to enforce them would be fruitless; that in consequence . . their operation had been suspended, so far as they related to Texas." This report, according to Judge Lipscomb, " no doubt, produced the 10th Section of the law of Mexico of the 6th of April, 1830, . . ' No variation shall be made in the Colonies already established; nor in relation to the slaves which may be in them. But the general government, and the special government of each State, shall, under the strictest responsibility, require the fulfillment of the law of Colonization; and that no slaves be thereafter introduced.' " Therefore, slavery [548] " had never ceased . . to exist [in Texas], *de facto* if not *de jure*."

Nevertheless, Judge Walker, in a decision of the Supreme Court, delivered during the term of 1872-1873,[4] declared: [706] " The institution of slavery, after the 11th of October [March] 1827, could not exist by law, until after Texas established her independence and declared herself a slave state." Consequently, Sobrina, a mulatto who came to Texas " as early as 1828 or 1830," was free; and the relation between her and Clark, a white man, who purchased her in " 1833 or 1834 " and lived with her till his death in 1862, speaking of her " as his ' wife,' " according to the negro witnesses, but with no " pretence that they were husband and wife," according to the white witnesses,—was adjudged a legal marriage. For [707] " there was no law of Mexico . . which prevented the intermarriage of different races. . . if . . married prior to 1837, no law subse-

[1] Guess *v.* Lubbock, p. 278, *infra.*
[2] Robbins' Administrator *v.* Walters, p. 274, *infra.*
[3] Guess *v.* Lubbock, p. 278, *infra.*
[4] Honey *v.* Clark, p. 321, *infra.*

quently passed could have . . dissolved the marriage without the consent of at least one of the parties." Though [708] "she could not legally have married him . . after . . 1837," [5] the twenty-seventh section of article twelve of the constitution of 1869 [6] "was intended to legalize the marriage of certain persons . . who, by law, were precluded the rights of matrimony. . . Clark and Sobrina were precisely such persons." Perhaps even the legislators of 1869 were surprised to see this application of their enactment. However, in 1875 this interpretation of the constitution was overruled in the case of Clements *v.* Crawford,[7] the court holding that "Section 27, Article 12 . . refers only to those persons who were both precluded, not from intermarriage with each other merely, but from marriage with any one else."

The date of the abolition of slavery in Texas was fixed by the "Emancipation Proclamation Cases," decided in 1868.[8] By "General Gordon Granger's order of the 19th of June, 1865 . . 'The people of Texas are informed that, in accordance with a proclamation from the executive of the United States,[9] all slaves are free.'" Judge Lindsay says: [532] "Until [General Granger's order] . . traffic in slaves was lawful in the local government. . . [533] slavery was not abolished on the 1st day of January, 1863." [531] "The [emancipation] proclamation could not *proprio vigore* liberate the slaves. . . [532] After the proclamation the slaves who were in the federal lines . . and those who . . got within these lines afterwards, were *ipso facto* free, because as mere chattels they thereby became captures in war. As soon as they came under the control of the national forces they as persons became . . freemen, because such was the declared will of that belligerent power, as expressed in the proclamation issued by the commander-in-chief . . by the authorization of congress, . . The liberation went on *pari passu* with the progress of the subjugation."

The state constitution of 1845 gave the legislature "the right to pass laws to permit the owners of slaves to emancipate them, saving the rights

[5] The act of June 5, 1837, declared it unlawful "for any person of European blood or their descendants, to intermarry with Africans, or the descendants of Africans."

[6] "All persons who, at any time heretofore, lived together as husband and wife, and both of whom, by the law of bondage, were precluded from the rights of matrimony, and continued to live together until the death of one of the parties, shall be considered as having been legally married, and the issue . . shall be deemed legitimate."

[7] P. 324, *infra.*

[8] Hall *v.* Keese; Dougherty *v.* Cartwright, p. 317, *infra.*

[9] In 1866 George W. Paschal asserted, in his report of Seal *v.* State (p. 313, *infra.*), that slavery ceased to exist in Texas by the proclamations of President Johnson, General Gordon Granger, and Provisional Governor A. J. Hamilton. In 1874 Judge Devine, in Garrett *v.* Brooks (p. 323, *infra*), declared more authoritatively and more explicitly: "The surrender of the trans-Mississippi department on the 27th of May, 1865; the proclamation of President Johnson, May 29, 1865, and the publication of . . 'General Granger's Order No. 3,' dated June 19, 1865, . . may be considered . . evidences that property in slaves had been abolished . . in Texas. The date of General Granger's order or declaration of the proclamation of Abraham Lincoln has been considered as the definite period from which the destruction of the right to hold slaves in Texas is to be dated."

of creditors, and preventing them from becoming a public charge." [10] Judge Lipscomb gives it as his opinion in 1854 [11] [166] "that the State Convention had in view the provisions of the Constitution of the Republic" prohibiting "any slaveholder . . to emancipate his . . slaves without the consent of congress, unless he . . shall send his . . slaves without the limits of the republic," [12] and of the act of the republic of February 5, 1840, "believed to be still in force, . . [which] forbids free negroes from coming into the country." He declares that [167] "the prohibition of emancipation, unless the . . slaves shall be removed from the State, is implied," and agrees with the Mississippi, Georgia, and South Carolina decisions upholding bequests of freedom which are [171] "not to be . . [perfected] until the slave is removed beyond the territorial limits . . [172] We must . . respectfully differ with the Supreme Court of Alabama,[13] on this question." Nevertheless, the astute attorneys employed by Betsy Webster in 1858 secured the dismissal of the suit instituted to contest the will bequeathing property and freedom to her, although she continued to reside in her [707] "white cottage embowered amid flowers and orange trees . . where she had lived with her former master, sustaining, perhaps, relations to him not sanctioned by law, but sanctified by all the sentiments of her nature." [14] Her effort to regain her remuneration to her attorneys, "one-third of the $22,000 worth of property secured to her by them," was unsuccessful in 1870, as to a lot conveyed by her to Heard [15] in accordance with her contract with them; but in the following term, in a similar case,[16] the court held that she [266] "was a slave [when the deed was made] and could not make a deed." [265] "A person who desired to emancipate his slaves . . must have provided for sending [them] . . out . . of the State; . . [266] The case of Webster *v.* Heard . . is overruled."

II

The constitution of the republic of Texas, adopted in 1836, provided that the Supreme Court should consist of "a chief-justice and associate judges;" and that "the district judges ['not less than three, nor more than eight'] shall compose the associate judges." [17] A joint resolution of February 1, 1844, provided for an amendment to the constitution establishing "a separate and independent Supreme Court of the Republic" [18] consisting of a chief justice and two associate justices. The same number

[10] Art. 8, sect. 1.
[11] Purvis *v.* Sherrod, p. 287, *infra.*
[12] 6 Thorpe 3539.
[13] See introduction to the Alabama cases, vol. III., p. 126, of this series.
[14] W. P. Ballinger, counsel.
[15] Betsy Webster *v.* Heard, p. 319, *infra.*
[16] Same *v.* Corbett, p. 320, *infra.*
[17] 6 Thorpe 3535.
[18] Dall. Dig. 267.

was required by the constitution of 1845; but two more associate justices were added by the constitution of 1866. "The useful judicial career of . . [the first five] gentlemen [elected] was closed by Major General Sheridan, who removed them . . on the ground that the proper administration of the reconstruction laws required it," [19] and they were replaced by "judges appointed by military authority under the reconstruction laws." [20] Only two associate justices were required by the constitution of 1869, but two were again added by an amendment of 1873.

[19] 29 Tex. v. Preface by George W. Paschal, reporter.
[20] 30 Tex. viii. Preface by the same reporter.

Harvey et al. v. Patterson, Dall. Dig. 369, January 1840. " the appellants are persons of color, . . one of the plaintiffs, offered . . [370] to take an oath that the plaintiffs were too poor to pay the fees, and too friendless and humble to be able to give any Bond and security for costs . . the Clerk, under sanction of the Court, refused to receive the . . oath . . It is argued in opposition that the plaintiffs being persons of color were, by the [26th section of an act organizing the district courts] . . prevented from taking an oath, in any case where a white person was concerned; and had the oath been taken, . . would not have thereby been exempted "

Held: " the appeal cannot be prosecuted, unless the Bond and Security . . is given,"

Hill v. M'Dermot et ux., Dall. Dig. 419, January 1841. [420] " Sledge and wife [' the female plaintiff '] emigrated from Georgia to Texas prior to August, 1835, in which month he died; . . they brought with them . . Priscilla, whose child . . was born in Texas, . . Sledge, . . 1834, made a deed to Chafin, for [Priscilla] . . to secure [debts, with usurious interest,] . . in 1836, Chafin, with force, took both slaves " " 1840, . . verdict finding the slaves to be the property of the plaintiffs [appellees], and assessing $900 as their value, and $350 the damages for their services;" [424] " no error, except that the judgment . . ought to have been for the restitution of the slaves, if to be had,"

Hall v. Phelps, Dall. Dig. 435, January 1841. " 1824, a grant issued to [Phelps] . . from the Mexican government for a League of Land . . [436] on the West bank of the Brazos, . . he [occupied] . . it with his family, composed of himself, a wife, children and slaves, . . [In] August, 1831, . . being . . absent with his wife on a visit to . . the United States, . . Hall, with violence . . expelled the overseer and the slaves . . driving them to some distant huts on the land; . . November . . drove them wholly from the land,"

Benton v. Williams, Dall. Dig. 496, June 1843. " Eli Williams sued . . Benton . . to recover damages for an assault and battery . . The defendant filed two pleas . . First, justification; and secondly, that . . [he] ought not to be held to answer the complaint . . because ' Eli Williams is of African descent, and not entitled by law to maintain his action, except by his guardian or next friend.' To this last plea the plaintiff demurred. . . [497] sustained . . verdict and judgment for plaintiff, . . defendant . . seeks to reverse . . on the ground of error in sustaining . . demurrer "

Affirmed: " The only grounds, upon which we suppose the counsel for the defendant could have based an argument, are to be found in the Constitution . . ' The descendants of Africans shall not be permitted to

remain permanently in the Republic without the consent of Congress;' nor . . entitled to the rights of citizenship. But we cannot conclude that . . injuries . . may be wantonly committed on their persons and property, and that . . they are to be told that the Courts . . are closed against their complaints. We cannot by sustaining the defendant's plea, establish a principle which we regard against law, contrary to the spirit of our institutions, and in violation of the dictates of common humanity." [Jack, J.]

Briscoe v. Corri et ux., Dall. Dig. 556, June 1844. "Briscoe avers . . that . . 1839, he purchased . . for . . $800 . . the slave . . 'on condition . . that the [vendor] . . should keep possession . . in . . Houston for one month, and at the expiration . . she should, on the payment of $100, have the privilege . . one other month; after which . . so long as she wished, on the month's payment in advance . . of $200, with the further trust, that on payment of the said hire, punctually in advance one month, . . [she] had the privilege of purchasing . . for . . $900;' . . had not complied . . except the payment of the first and second month's hire;" Baylor, J.: "We think that the written contract bears strong marks upon its face of hardship and oppression."

Langford v. Republic, Dall. Dig. 588, June 1844. "Langford had lived on the Attoyac . . in . . 1826 and 1827 . . and there had a family (a wife and children) together with some five or six negroes."

Carr v. Wellborn, Dall. Dig. 624, June 1844. [625] "alleges, that . . the defendant . . secretly and fraudulently conveyed away the . . slaves from . . Alabama to the County of Red River in this Republic,"

Bennett v. Gamble, 1 Tex. 124, December 1846. [132] "The execution was issued . . 1840; . . 'executed . . on . . Grace, about six years of age,'" The owner [131] "eluded the sheriff . . and ran off the negro, . . the deputy sheriff . . put up to the highest bidder, the chance of the girl, without appraisement; . . she was not present . . or under the control of the sheriff, . . and the chance of her was purchased . . for ten dollars."

Chevallier v. Wilson, 1 Tex. 161, December 1846. [163] "Dr. Irion proved, that the health of Caroline was very delicate all the while she was in possession of defendant; that in . . 1846, she gave birth to a child, and since that period she has been sick and requiring medical attention."

Crosby v. Huston, 1 Tex. 203, December 1846. [222] "his departure from Mississippi was sudden and clandestine, . . he arrived in Austin county, Texas, with the [fourteen mortgaged] negroes . . 1838;"

Paxton v. Boyce, 1 Tex. 317, December 1846. In 1842 a negro woman and her child were sold for $700.

Parks v. Willard, 1 Tex. 350, December 1846. "possessed of the slave as trustee to the use of his wife . . [351] by virtue of a deed of trust made [in 1832] . . in . . Tennessee, . . came to Texas, bringing . . the slave,"

Lambeth v. Turner, 1 Tex. 364, December 1846. [365] "levied on a large number of . . slaves belonging to Jones, in the possession of . . Turner; . . [366] that Turner . . secretly and fraudulently absconded from Mississippi with the . . negroes, in . . 1844, and came to the County of Red River in the Republic of Texas,"

Bryant v. Kelton, 1 Tex. 434, December 1846. "levied on a negro boy . . [bought] in . . Georgia."

Mims v. Mitchell, 1 Tex. 443, December 1846. [444] "averments that [in 1842] the defendant hired . . 'Mehala, between fifteen and sixteen' . . for two months' work . . has not returned [her] . . and that he (the plaintiff) 'is informed . . that . . Mehala is dead, caused by the . . inhumane treatment of . . Mitchell.' . . that . . he has sustained damages to the value of the . . woman, $500, and of her hire $200, . . testimony tending to show that the . . girl had come to her death on or near the way leading from the residence of the defendant to the plaintiff; . . [445] 'overseer' for the defendant, testified to having chastised the girl . . on two or three occasions . . and of also having seen the defendant correct her; but, as he says, 'not in a manner to injure her;' that . . defendant (about the time he chastised the girl) left for the army . . addressed a note to the plaintiff, which he left . . to be sent by the girl; . . testimony that the girl was sound, 'active, and sprightly, and headstrong.'" [1]

Pitts v. Ennis, 1 Tex. 604, December 1846. "Hermoso, Oct. 13th, 1842. On the first of December next, I promise to furnish Eliza P. Pitts a good Negro fellow, to work for her, until I pay her a thousand dollar note of mine . . or return her the Negro woman" for whom the note was given.

Cloud v. Smith, 1 Tex. 611, December 1846. "levied on a Negro woman and her two children."

Holliman v. Peebles, 1 Tex. 673, December 1847. [676] "Holliman received, as a colonist, one league . . 1824," [677] "was a single man . . owned a plantation and large number of negroes in Mississippi, only one of which he had ever brought to Texas, and that one he had subsequently sold."

Robbins' Administrator v. Walters, 2 Tex. 130, December 1847. "action brought by the appellee . . to recover a negro woman [[131] 'worth from seven to nine hundred dollars'], and damages for her detention. . . [131] 'defendant's counsel moved the court to instruct the jury that if they found that the property in the . . girl . . was acquired previous to the adoption of the Constitution [of Texas], they should find for the defendant; . . refused.'"

Affirmed: [134] "The appellant's counsel . . has referred the court to the Constitution of Coahuila and Texas, Preliminary Provision, Section 13, page 314. . . 'From and after the promulgation of the Constitution in the capital of each district, no one shall be born a slave, in the State,

[1] See Mitchell *v.* Mims, p. 282, *infra.*

and after six months, the introduction of slaves, under any pretext, shall not be permitted.' Whether the section . . ever was binding . . in Texas . . is wholly immaterial . . Because the claim of the property in the slave before the date of the promulgation [of the Constitution of Coahuila and Texas], or introduced within six months . . could be held in slavery. The Constitution of Coahuila and Texas was adopted 11th March, 1827. . . [135] it is said never to have been published in the department of Texas. But . . not material, because in the absence of proof to the contrary, we are bound to believe that the claim to her . . was not repugnant to law." [Lipscomb, J.]

Morgan v. Republic of Texas, 2 Tex. 279, December 1847. "levied upon a negro man . . as the property of Lee. Morgan . . replevied . . and . . introduced . . a bill of sale from . . Lee . . 1840 . . for the use and benefit of . . Hart of New York. . . ' evidence that the slave . . remained in possession of Lee after the execution of the bill of sale to Morgan, in trust for Hart,' "

Nels (a slave) v. State, 2 Tex. 280, December 1847. [281] "indicted and put upon his trial for murder . . 1846" Verdict of guilty. Judgment thereon reversed and the cause remanded: [283] "*it nowhere appears of record, that the jury . . were sworn.*"

Chandler v. State, 2 Tex. 305, December 1847. [307] "indicted for murder, charged to have been committed upon the person of 'one Claiborne, . . slave of . . Conner,' . . the court was requested by the defendant to charge . . ' that if a slave raises his hand against a white man, the white man has . . a right to use force sufficient to put down the opposition. And if the slave he unintentionally killed . . it is not . . murder or manslaughter. All of which the court charged . . except as to manslaughter;' . . charged ' that a white man could be guilty . . of manslaughter upon the body of a slave.' " Verdict of "guilty of manslaughter."

Judgment thereon affirmed: [308] "The Supreme Court [of Tennessee] . . [309] decided [1] that, by the Common Law, the felonious killing of a slave without malice, is manslaughter. . . The only matter of surprise is that it should ever have been doubted. . . It seems especially to have been the intention of our legislation . . to throw around the *life* of the slave the same protection which is guaranteed to a freeman." [Wheeler, J.]

Grinder v. State, 2 Tex. 338, December 1847. "a slave, belonging to the appellant, was indicted, tried and convicted, in the District Court . . [339] for the murder of a white man, and executed. . . judgment . . against the defendant for all the cost consequent"

Held: "there was nothing in law to authorize a judgment against him."

Jones v. Laney et al., 2 Tex. 342, December 1847. [344] "The petition sets out that Laney, was born a slave . . of . . James Gunn, in 1811, in the old Chickasaw Nation, now in . . Mississippi. That Gunn was an Indian, and married to an Indian woman, . . [345] The writing under

[1] Fields *v.* State, vol. II., p. 494, of this series.

which the appellees claim their freedom, is . . 'Chickasaw Agency . . 1814. . . I, James Gunn, . . have thought proper . . to enfranchise a mulatto female child, named Laney, two years and nine months old, . . borne [*sic*] and raised my own property, . . I hereby give to Laney her freedom . . She is no longer a slave.' . . when she was very young, her master said, that from the friendship he had for her father, she should never be a slave to any one:" [344] "Laney . . continued to live with her mother, who was the slave of . . Gunn, . . until . . [his] death . . in 1823, but not as a slave, . . then went to reside with . . Susan Colbert, also a Chickasaw . . Laney and . . her children and grand children . . emigrated with the family of Susan Colbert in 1842 to the Choctaw nation, and continued to live with her as free persons until . . 1846. . . [346] testimony of . . the widow . . Laney had two children after the death of . . Gunn, before she went to live with Susan . . [Gunn's] daughter . . told Laney to go home; but she replied that her husband would not permit her. . . The Judge charged . . 'that by the treaty entered into by the United States and the Chickasaws . . the same were recognized to be a separate . . nation . . that in the opinion of the court, neither, the laws of Georgia, Mississippi, State or Territory, nor those of Texas, can be the rule of decision in this case. . . that by the principles of the Civil Law, under which slavery, such as ours, existed, the owner could free his slave, provided no statute prohibiting . . [347] existed, by simply . . saying "*go, you are free.*"' . . in the absence of proof of any law, custom or usage of the Chickasaws, forbidding . . if the deed . . be . . by the jury believed to be . . authentic, the plaintiffs are entitled to their freedom." Verdict in their favor. Judgment thereon affirmed. "So far as the charge . . refers to . . Texas, it must be understood as applicable to the time when the rights . . accrued . . in 1814,"

Republic v. Fisk, 2 Tex. 449, December 1847. "resided in Texas anterior to July 1835. . . then . . owned two slaves"

Bason v. Hughart, 2 Tex. 476, December 1847. "That . . petitioner [Hughart] recovered judgment against . . Hampton and William D. Stuart—the latter a free man of color—for [$137.50 damages, and $182.50] . . costs of suit. . . That an execution was levied on . . [Stuart's] horse, . . sold for [$33.33 to Hughart] . . two-thirds of the appraised value . . that at the time . . Stuart was absent beyond the limits of the Republic—that . . Bason, wishing Stuart's return, to labor for him in his blacksmith shop, made a parol agreement with petitioner, that if he would permit . . Stuart to return . . and not trouble him by means of the judgment, and would allow [$80] . . for the hope . . he (Bason) would, in the course of the year, 1840, pay the balance . . agreed"

Lucketts v. Townsend, 3 Tex. 119, December 1848. [120] "1840 . . a negro boy [thirteen years old] worth $800,"

M'Clenney v. M'Clenney, 3 Tex. 192, December 1848. [195] "1840 . . without the knowledge . . of the parties to the trust, brought the negroes [from Alabama] to . . Texas:"

McGary v. Lamb, 3 Tex. 342, December 1848. [343] "It was in proof, that young slaves, not so large as the plaintiff's ward [aged ten], would hire at four dollars per month, and that a negro child five years old, would be furnished victuals and clothes for her services."

Warren v. Dickerson, 3 Tex. 460, December 1848. "Warren and wife arrived in Texas [from Mississippi] in . . 1840, bringing . . the slave"

Dunn v. Choate, 4 Tex. 14, December 1849. [16] "he . . with his wife and daughter . . removed from Tennessee to Texas in 1837, bringing the [negro] girl"

Blakely v. Duncan, 4 Tex. 184, December 1849. "Duncan [of Mississippi] employed Blakely, . . an attorney at law, to collect . . Blakely received from Tyler, in payment of the debt, . . Jenny, Nicey and her child Isaac. . . Blakely, instead of delivering the slaves to Duncan, brought them to Texas. This suit was brought to recover the slaves. . . verdict . . 'We find for the plaintiff . . [185] Jenny, worth three hundred dollars, Nicey and her child, worth five hundred dollars, if the negroes can be found; otherwise'" $1109.30. [186] "It is presumed that the jury made the amount assessed in the aggregate, by putting together . . their valuation and damages for detention. . . defendant had sold" Nicey and her child.

Judgment reversed and the cause remanded: [185] "the jury should find the separate value of each;"

McIntyre v. Chappell, 4 Tex. 187, December 1849. [188] "he arrived . . in this State [from Tennessee], in March, 1840, bringing . . some negroes: . . planted a crop, and after about three months, returned . . in March, 1841, he removed to this country with his wife,"

McGee v. Currie, 4 Tex. 217, December 1849. "This suit was brought by [Currie] . . [218] to recover the amount of an account for services rendered, as a physician, . . by attending on . . [McGee's] slave when wounded; . . McGee . . had hired him for one year to Hicks and Bailey," Held: the hirers are responsible.

Ingram and Wife v. Linn, 4 Tex. 266, December 1849. "1844 . . Nat, belonging to the estate . . (of which the appellee is administrator,) . . enticed away . . Jerry, the property of the plaintiffs, . . to the Guadaloupe river, . . with the aid of . . other slaves . . forced . . Jerry into the river, . . drowned;" Held: [270] "the master is not answerable"

Ingram and Wife v. Atkinson and Wife, 4 Tex. 270, December 1849. Suit against the owners of other slaves involved in the drowning of Jerry, who [271] "was . . plunged, and abandoned," Held: the owners are not responsible in damages.

Watts v. Johnson, 4 Tex. 311, December 1849. [312] "in proof . . [313] that the negro woman . . is worth five hundred and fifty, or six hundred dollars, and her hire, about ten dollars per month."

Randon v. Toby, 11 Howard 493, December 1850. [518] "the notes were given [by Randon] for the purchase of negroes imported from

Africa to Cuba and thence to Texas in 1835," Deposition of a witness for the defendant: [497] "Randon sent to McKinney all the African negroes he had, except two; I think he sent twenty-one;" A witness for the plaintiff testified that he had [501] "made two voyages to the coast of Africa, . . 1834, . . 1835, and remained . . each time about six months. . . slavery existed in all parts of Africa where he landed, except in Liberia. A large proportion of the people were slaves. Some masters held great numbers; the slavery which existed was a slavery for life, and was of the most despotic and arbitrary character. . . Knows nothing whatever of the Gold Coast or Lucame tribe of Africans; . . was in Liberia, and upon the Slave Coast, and upon the Grain Coast, . . It was sometimes the case that negroes who were captured in battle were brought from the interior of the country to the African coast and sold." [506] "The verdict and judgment were in favor of the plaintiff [Toby],"

Judgment affirmed: there was no want of consideration although [520] "the introduction of African negroes, both into Cuba and Texas, was contrary to law. . . Toby or his agent, McKinney, had no connection with the person who introduced the negroes contrary to law. . . The crime committed by those who introduced the negroes into the country does not attach to all those who may afterwards purchase them. It is true that the negroes may possibly, by the laws of Texas, be entitled to their freedom on that account. If the defendant had shown that the negroes had sued out their freedom in the courts of Texas, it would have been a good defence. . . But . . the defendant held and enjoyed the negroes, and sold them and received their value; and the negroes are held as slaves to this day, if alive, for any thing that appears on the record. . . [521] The defendant has bought these negroes in the condition of slaves *de facto*, with the *primâ facie* evidence of their *status* imprinted on their forehead; . . and he has no right to call upon the court in a collateral action, to which neither the slaves nor their present owners are parties, to pronounce on the question of their right to freedom," [Grier, J.]

Bennett v. Butterworth, 11 Howard 669, December 1850. "Butterworth, . . a citizen of . . New York, . . [670] was . . possessed [in 1846] of four negroes, slaves for life, . . Billy, a negro man of a dark complexion, aged about twelves years, of the value of five hundred dollars; Lindsey, a negro man, of a dark complexion, aged twenty-two years, and of the value of one thousand dollars; Betsy, a mulatto woman, of a light complexion, aged about thirty years, and of the value of eight hundred dollars; and Alexander, a boy of a very light complexion, aged about four years, and of four hundred dollars value," [1]

Guess v. Lubbock, Administrator of Smith, 5 Tex. 535, 1851. [536] "suit . . brought by the appellant . . to recover a . . lot of ground, and a negro girl." Defendant answered that plaintiff "was a slave . . and incapable of holding property; . . [544] It appears from the evidence . . that in February, 1836, the plaintiff was purchased by the defendant's intestate. . . not clear, whether she paid for herself, . . But the evidence is pretty full, that from the time of purchase, or nearly so, down to [1846,]

[1] See same *v.* same, p. 280, *infra.*

. . Smith lived with her as his wife; . . said, on all occasions, that she was free; that she . . exercised ownership, in her own right; that Smith always called it her property; . . [545] that she kept a boarding house; boarders always settled with her, and she bought and paid for the supplies . . that on some disagreement . . he told her to take her negro and go away, . . gave to her a paper . . 'The bearer, Margaret, a negro woman, about thirty . . is free and at liberty to go and do the best she can to make an honest livelihood, . . 1840. (Signed,) . . Smith.' . . [549] The Judge . . told [the jury] . . that 'before the 17th March, 1836,[1] there were three modes by which a person could manumit a slave: 1st. By writing, with five witnesses . . done before a Judge or elsewhere. 2d. By verbally manumiting [*sic*] him in the presence of five witnesses. 3rd. By will duly executed.' And he might have added another, by marrying his slave . . for such is the Spanish law. The means . . are taken from the Partidas;" The jury found that she [538] "was his slave at the time of his death."

Judgment for the defendant reversed and the cause remanded: [550] "We believe . . that in Texas, prior to the 17th of March, 1836,[2] a master could let his slave go free without pursuing either of the modes . . [551] Whether valid as laws operating on slave property in Texas, or not, . . ['various'] laws and decrees [of Mexico] show, conclusively, a determined hostility to the institution of slavery."[3] [547] "slavery . . [548] had never ceased . . to exist, *de facto* if not *de jure*. In this state of uncertainty, the question of slavery continued until the formation of the Constitution. . . if he . . did not claim to be her master . . when the Constitution was adopted, her *status* is not affected by it, in anyway prejudicial to her claim of freedom." [Lipscomb, J.]

Fowler and Clepper v. Stonum, 6 Tex. 60, 1851. [64] "The defendant gave in evidence an instrument executed to him by the plaintiff's vendor, Halstead, . . 1844, . . by which Halstead acknowledged that the title to the [sixteen or seventeen] negroes was in the defendant Stonum, . . 1845, Halstead made a sale . . to . . Fowler . . Clerk of the County Court . . on the same night, the plaintiffs and others ran off the negroes,

[1] [551n.] "the Court . . did not decide whether . . [the Constitution] was operative from that date, or from the date of its adoption."

[2] [546] "The ninth Section of the General Provisions of the Constitution of the Republic of Texas, contains . . the following provisions: 'All persons of color, who were slaves for life, previous to their emigration to Texas, and who are now held in bondage, shall remain in the like state of servitude; provided the said slave shall be the *bona fide* property of the person so holding the said slave as aforesaid.'"

[3] [547] "In 1829, the President of Mexico, Guerero, . . issued his decree abolishing slavery. The constitutionality . . was always questioned; . . It appears from a report made by Lucas Alamand, the Secretary of State, of Mexico, to the Congress of Mexico, . . 4th March, 1830, that such was the opposition to the laws in relation to slavery, in Texas, that any attempt to enforce them would be fruitless; that in consequence . . their operation had been suspended, so far as they related to Texas. This report . . no doubt, produced the 10th Section of the law of Mexico of the 6th of April, 1830, . . 'no variation shall be made in the Colonies already established; nor in relation to the slaves which may be in them. But the general government, and the special government of each State, shall, under the strictest responsibility, require the fulfillment of the law of Colonization; and that no slaves be thereafter introduced.' . . 15th February, 1831, . . the decree of 1829, abolishing slavery, was abrogated" on the ground of unconstitutionality.

starting for Louisiana to sell them; . . being overtaken, they brought back the negroes, and subjected them to levy by virtue of a writ of sequestration, at the suit of the defendant." [63] "bond . . given by Fowler . . for the forthcoming . . [64] 1846, the plaintiff Fowler offered . . Miller, five hundred dollars 'to go with the negroes [[65] "assist in running [them] off . . and making sale of them"]; . . ' declined" The negroes were [64] "taken from . . possession [of the plaintiffs and others holding under them] by the defendant accompanied by several armed men, on Saturday night, and early on the following morning, . . 1847; . . some of the negroes came to the party in the night, and the others were taken in the morning;"

Held: [73] "the lawless conduct of the plaintiffs . . in 1845 . . could have no effect to justify . . a subsequent trespass by the defendant, after having resorted to legal process and obtained the security which the law provides." [1]

Davis v. Loftin, 6 Tex. 489, 1851. Held: a bill of sale is not necessary to pass the title to a slave.

Peters et al. v. Caton, 6 Tex. 554, 1851. "a slave purchased at a succession sale; . . not made at the Court House, nor on the first Tuesday of the month," Held: void.

Nimmo v. Davis, 7 Tex. 26, 1851. [27] "The negroes appear to have been in possession of Mr. and Mrs. Nimmo [in 1817.] . . In 1833 . . [they] had removed from Virginia, and were residing in Alabama. . . [28] The negroes, consisting of a family, were divided into lots, as nearly equal as possible, and delivered to the children, except one negro girl . . retained by Mrs. Nimmo. . . 1835 . . they removed to Texas,"

Union Bank v. Stafford, 12 Howard 327, December 1851. [336] "this mortgage [to the Union Bank of Louisiana in 1837] included 102 slaves, with their increase. . . [337] The bill, alleges . . that these slaves remained in the possession of the respondents from the date of the mortgage till February, 1845, when they were fraudulently removed by them to the State of Texas for the purpose of evading the payment of this and other debts secured upon them; and that Stafford has threatened to remove them out of that State to Mexico if such a step should be necessary to prevent them from being seized to satisfy his debts. To prevent this, a receiver was appointed"

Bennett v. Butterworth, 12 Howard 367, December 1851.[2] Bennett claimed to hold the slaves [368] "by an absolute bill of sale, executed in . . 1845 . . The court made an interlocutory decree, that the bill of sale was a mortgage, . . Love was appointed to take an account of the amount due Bennett on the mortgage, and also to take an account of the hire of the negro slaves in the possession . . of Bennett; and the master [in chancery] was directed to credit him with any extraordinary expenditures which were necessary on account of the health of the negroes, and also

[1] Act of Jan. 27, 1842.
[2] See same *v.* same, p. 278, *supra.*

for rearing the children, etc. . . [369] In his report, the master says: 'It appears . . That Bennett treated the slaves with unusual indulgence and humanity, and in the manner that was pursued by Amis [father of Mrs. Butterworth, who had conveyed the negroes to her in April 1846.] . . He rented houses for them, furnished them food and clothing with great liberality, and proper medical attendance when necessary. That he sometimes hired them by the day, and sometimes by the month. . . that the negroes frequently hired themselves to others, and were paid by their employers.' . . [370] as there was considerable sickness at Galveston, where the slaves were situated, 'he allowed one hundred dollars as extraordinary expenditures for medical attendance, food, house-rent, and nursing.'[1] . . he allowed nothing for medicine or medical bills, except during the prevalence of the yellow fever, because the allowance for hire was made on a basis which covered all deductions for loss of time or other contingencies."

Held: "It is probable that the sum allowed by the master exceeded, considerably, the actual money received for the hire of the slaves. But the negligence . . by Bennett, in giving indulgence to the slaves, or in failing to have them suitably employed, should not excuse him from an equitable charge of what they could have earned." [369] "Bennett held them as a pledge, and he was not at liberty to indulge them in idleness, as their master may have done." [McLean, J.]

Porter v. Miller, 7 Tex. 468, 1852. [469] "the mother of . . George, was purchased with . . funds . . placed in trust [for the separate use of Mrs. Porter]. This deed was recorded in 1829, in . . Tennessee; . . in Texas, in . . 1840; . . 1847, the boy was sold by [the husband] . . to the defendant; . . [who] should have him at the expiration of his term of hire [to Jenkins], . . [470] Jenkins received a note from Mrs. . . Porter, directing him not to let the defendant have the boy; . . on the very night the month [of hiring] was out, the boy was missing, . . about a month after the negro went into the possession of the defendant, a written demand for his restoration, was made by . . [Mrs.] Porter." She brought suit for his recovery. [469] "The negro was drowned while in possession of the defendant, during the pendency of the suit;" Held: the defendant is responsible for the value of the slave, as well as the value of the hire up to the time of his death.

Clark et al. v. Davis, 7 Tex. 556, 1852. [557] "Davis hired the negro to Clark and Kilgore to do all kinds of work necessary . . in connection with their mill business," "disappeared, . . evidence tending to show . . [he] had been drowned" Davis brought suit to recover his value. Judgment for plaintiff affirmed.

Sims and Smith v. Chance, 7 Tex. 561, 1852. [562] "Chance sued . . for the value of a slave, . . [569] a conflict of testimony . . Morgan [testified] . . that Mr. Smith was informed that the boy was a good axe hand, . . agreed to hire the boy as an axe hand, until the end of the year. . . proven by John G. Smith, that . . [570] E. M. Smith replied

[1] The account is from November 1, 1847, to June 1, 1850.

that if he suited best as a chopper, he would put him in the woods, if not, . . in the mill, or wherever he suited him." [568] "The plaintiff . . alleged . . that the defendants . . caused the . . [569] slave to assist in putting the machinery in motion by putting his shoulder to the fly wheel, and . . permitted him to remain . . while the same was being put in motion by steam, . . received an injury terminating in death; . . [572] Morgan states that Smith admitted . . the death to have partly resulted from the carelessness of the engineer, . . But . . the boy had been frequently warned by [E. M. Smith] . . and others in his employment, against the danger" Verdict for the plaintiff.

Judgment thereon affirmed: [569] "I incline to the opinion that the conclusion drawn by the jury was erroneous; but . . not so manifest as to authorize their verdict to be disturbed." [Hemphill, C. J.]

Griffin v. Chubb, 7 Tex. 603, 1852. [605] "after the expiration of the time the defendant was to retain possession of the negro, he refused to deliver him to the purchaser [who] . . afterwards decoyed and carried him away in the night;"

Mitchell v. Mims, 8 Tex. 6, 1852.[1] [7] "verdict for the plaintiff, which was set aside; a new trial granted;" [9] "The questions, which the jury were required to decide, . . were, whether the treatment . . had been such as a prudent and humane master would observe towards his own slave; and whether the loss of the negro had been occasioned by the want of ordinary care . . on the part of the defendant." [7] "a second verdict and judgment thereon for the plaintiff;" Affirmed, [10] "though the evidence be not of an entirely satisfactory character." [9] "There was no evidence of any act which would amount to a crime, or a wilful trespass, on the part of either principal or agent."

Wofford v. Thompson, 8 Tex. 222, 1852. "in 1834 or 1835, . . Wofford, residing in Kentucky, . . sent by his son to Louisiana, a negro woman and her three children, in order to place them beyond the reach of creditors. . . left the negroes . . [with] Thompson, . . In 1836, the Woffords visited Thompson, who . . had removed to Texas, bringing the negroes . . [223] 1841, Wofford took possession . . 1843 . . he brought this suit . . to recover hire . . defendant answered, . . that their services were worth no more than their food and clothing, and interest upon the [$300] . . loaned to the plaintiff."

Horton v. Reynolds, 8 Tex. 284, 1852. "action . . brought by . . Reynolds . . for the recovery of two slaves, . . [285] 1840 . . the agent . . of . . Smith, a . . citizen . . of Mississippi, procured a warrant from . . Good . . for the . . arrest of . . Reynolds, on the charge of having . . stolen . . twenty-seven negroes . . property of . . Smith; . . Good at first refused the application . . because . . Reynolds had previously . . obtained a warrant against . . Smith and others, accusing [them] . . of attempting to rob him of his negroes; . . Sheriff . . was accompanied to the camp of . . Reynolds by an armed party, among whom was . . Horton, . . whilst under arrest . . Reynolds gave

[1] See Mims *v.* Mitchell, p. 274, *supra.*

to the party . . twenty . . slaves, they agreeing to release him from all further prosecution both civil and criminal. . . threats were made, that, if he did not deliver up the negroes, they would take him in irons . . on the charge of negro stealing. . . [286] Reynolds told [witness] . . that at the time he executed the bill of sale . . he believed if he had not signed it they would have taken his life; and that he acknowledged it for record, for fear of the persons in the office." Verdict " for the plaintiff, for the value of Tom four hundred dollars, and for the hire . . seventy-five dollars per year from . . 1840 . . to the present . . for the value of Ephraim three hundred dollars, and for the hire of Ephraim [$56.25] . . per year up to . . 1847."

Ables v. Donley, 8 Tex. 331, 1852. Suit on a note [332] " given for . . a negro woman . . September, 1850, and warranted sound, . . a few days after . . [she] showed symptoms of disease. In about two weeks, she had chills and fever; and in about two months she died. A physician who had seen the negro . . supposed her to have had ' typhoid fever; ' . . verdict for the plaintiff. The defendant moved . . for a new trial; . . filed . . affidavit . . that, in the winter or spring of 1850, the negro was sold in . . New Orleans, for $80, as a sickly and unsound negro;" New trial refused. Judgment affirmed: [337] " the truth of the disputed fact, . . the soundness at the time of the purchase, would be left still doubtful."

Thompson v. Chumney, 8 Tex. 389, 1852. Bill of sale: [390] " Received . . four hundred dollars [in February 1848] . . [for] Jack . . about sixteen or seventeen . . of yellow complexion, which I warrant to be sound of body and mind and a slave for life, . . further warrant that . . [he] will not abscond . . and should he become sick or die before . . June . . I agree to pay . . damages "

Womack v. Womack, 8 Tex. 397, 1852. [398] " January [1845] . . she and her . . husband . . upon the eve of emigrating [from Mississippi] to Texas with . . [her twenty-five] slaves, and needing the assistance of defendant, . . [399] agreed to pay [$500] . . for . . one year . . January, 1850, . . [they] did . . sell . . to . . defendant, the negro . . in part payment . . [400] Received [$400] . . for a negro boy . . aged about fifty years." [399] " The defendant averred . . a liberal price . . [401] admitted, ' that . . his hire per year is of the value of one hundred dollars; "

Givens v. Davenport, 8 Tex. 451, 1852. Davenport brought suit in 1847 [452] " for the foreclosure of a mortgage [on nineteen negroes] . . executed [by Givens] to him in trust, in . . Alabama. . . [453] 1845 . . Givens, without the knowledge . . of . . plaintiff, removed the . . negroes . . to . . Texas; . . refuses to deliver [them] up . . to be sold to satisfy the . . debt, . . [454] verdict for the plaintiff; and a decree . . for the seizure and sale " Affirmed.

McGehee v. Shafer, 9 Tex. 20, 1852. [21] " evidence, that the plaintiff, wagoning upon the highway . . stopped at or near . . [defendant's] house, to pass the night; that, in the night, he had a conversation with the negro man of the defendant; that, on the following morning, the defend-

ant collected some . . neighbors, pursued . . demanded a confession . . plaintiff refused, protesting that he had done nothing wrong, and offering to go before a magistrate; upon which . . [defendant] cut switches or sticks with which he inflicted blows upon the back . . for some time; . . At length the plaintiff confessed . . He was severely bruised; . . was, for some time, disabled . . The defendant proved that, since the whipping, the plaintiff, publicly . . had admitted having conversed with the . . negro . . about running away, and going to Germany, and being free, and had said that he would be along . . in two months, when he would take him . . But the plaintiff accompanied these admissions with the statement that he was but jesting . . verdict for the plaintiff for one thousand dollars damages," Judgment thereon affirmed.

Young v. Lewis, 9 Tex. 73, 1852. " March, A. D. 1849, petitioner hired to . . Lewis a negro woman . . by the month, of the value of five hundred dollars; . . [74] ' at twelve dollars per month; ' that the hire of the first month was paid; . . about ten days thereafter " [73] " petitioner, greatly apprehensive that said slave might fall a victim to the cholera then raging . . as hundreds were dying, demanded . . slave . . for the purpose of taking her home . . Lewis refused . . she died of the cholera within six days . . verdict and judgment for the defendant."

Affirmed: [76] " after another month had commenced to run, neither could terminate [the contract] . . without the consent of the other, until the month then running should elapse."

Winburn v. Cochran, 9 Tex. 123, 1852. [124] " the slave . . went into the possession of . . Winburn . . before . . 1842, by a loan from . . Jeremiah Cochran; . . 1847 . . Winburn died . . she was taken possession of by the executors, . . [In] 1851 . . she was clandestinely taken by the defendant [administrator of Cochran], in the night time. . . [125] the statute of limitations . . had completed the bar before the slave was captured " Held: " the statute . . vests the right "

State v. Sullivan, 9 Tex. 156, 1852. " the petitioner emigrated to the country in 1835; . . [157] a single man, owning negroes at the time," [156] " received a grant of one-third of a league . . had obtained . . a certificate for the additional two-thirds of a league of land and labor [177 1/7 acres], to which he conceived himself entitled . . [157] as the head of a family,"

Held: [161] " the plaintiff, on the facts, was entitled to recover."

Chappell v. McIntyre, 9 Tex. 161, 1852. [162] " came to Texas [from Tennessee] . . 1840, bringing . . some negroes; . . planted a crop, and, after about three months, returned . . 1841, he returned to Texas, with his wife," See McIntyre *v.* Chappell, p. *277, supra.*

McGreal v. Wilson, 9 Tex. 426, 1853. [427] " witness, accompanied the defendant [receiver] and . . a Deputy Marshal . . and aided in seizing about seventy slaves . . seven or eight other persons . . assisting; some of the company were armed; . . he was paid twenty-five dollars . . for his services " " The plaintiff proved that the defendant contracted

to let him have the use of two of the best negroes in the lot, . . if he would assist"

Held: [428] "a parol contract . . to do what appears on the face of the proceedings, to be an illegal act."

Ashworth v. State, 9 Tex. 490, 1853. "The appellant was indicted and convicted upon the following charge: 'that Henderson Ashworth, . . a free person of color, of African descent, laborer, and Lititia [*sic*] Stewart, . . *spinstress,* . . did . . live together in fornication,' . . the defendant asked several charges . . predicated upon the admission that some evidence had been introduced that the parties were married, and that no evidence had been introduced to prove the descent of Lititia Stewart." Refused. "no statement of facts; nor bill of exceptions. . . decreed that . . defendant be committed to jail until the fine and costs were paid." Affirmed.

Bryan v. Bridge, 10 Tex. 149, 1853. "The negro man having run away or been removed, the Sheriff made a special return, excusing his failure to sell,"

McClenny v. Floyd, 10 Tex. 159, 1853. [161] "evidence . . that McClenny owned the negroes . . in . . Alabama, . . conveyed the negroes in trust, in 1839, to secure the payment of . . debts; that, to avoid the payment . . he employed Knight to remove [them] . . to Texas in 1840, and gave him a bill of sale . . that Knight brought the negroes to Texas and delivered them to McClenny; . . in 1842, took them . . in the night, and proceeded . . in the direction of Louisiana. Floyd . . [McClenny's] son-in-law . . took from him . . [a] bill of sale . . the better to enable him to regain the possession . . overtook [Knight] . . had him arrested . . on a charge of negro stealing, and taken before a Justice of the Peace . . Knight exhibited . . bill of sale . . made in Alabama, . . arbitrators . . awarded the negroes to Floyd. . . in Floyd's absence . . McClenny removed the negroes . . [162] made a bill of sale . . to his co-defendant McGown" who [167] "admits his knowledge of the 'sham sale' as he denominates it, from McClenny to Floyd." [160] "The appellee's intestate brought suit"

Held: [166] "this was an executed contract; and though void . . as to third persons whose rights it was intended to defeat, it was binding upon [McClenny.] . . A party cannot defeat one fraudulent conveyance by another, made to a person cognizant of the fraud."

McKinney v. Fort, 10 Tex. 220, 1853. [232] "For four years previous to the purchase, the boy had had a wife at the plaintiff's house, whom he had visited every Saturday night, remaining until Monday morning, frequently visiting her on Wednesday night. The plaintiff also made inquiries of the overseer . . in relation to the health of the boy, previous to the sale; and a witness testifies, that, in . . 1846, on proposing to sell the plaintiff a slave, he replied that he intended to buy Dr. Fort's Wash: and on witness saying that Wash was a sickly, dropsical, negro, plaintiff stated that he knew as much about the health of the negro as Dr. Fort or any body else, and that he would rather have Wash than any two negroes

in the county. . . he did not seek the opinion of the defendant." [222] " the plaintiff came to defendant's plantation for the purpose of purchasing the boy, . . being about to remove to Collin county, he did not like to separate them . . The defendant proposed to purchase the girl; but the plaintiff refused to sell on the ground that she was a present to him and was not suitable for a plantation negro. . . agreed that the plaintiff should give . . [13,000 pounds of ginned] cotton . . to be delivered in some few weeks," [233] " The price of the negro [about twenty-two] was high;" [222] " overseer of the defendant . . was present at the delivery of the cotton [in December 1846] . . was to deliver the boy to McKinney that night, which he . . did. . . a witness for plaintiff . . heard [defendant] . . state . . that he . . expected to get ten cents per pound for [the cotton,] . . which would be enough to buy two good negroes; . . 'he was not a well negro, at that;' . . said in a boastful manner," The negro died the next May. [230] " No physician was called; and none of the witnesses could characterize the disease. . . at the time of removal . . through the prairies . . the weather was extremely inclement," Judgment for defendant affirmed.

Linard v. Crossland, 10 Tex. 462, 1853. " 1848, the defendants . . came to the residence of the plaintiff with four or five white men and four or five negroes; . . felled trees . . [463] Several of the men had guns "

Hagerty v. Scott, 10 Tex. 525, 1853. [526] " Benjamin and Rebecca Hawkins, . . members of the Creek Nation . . in the territory of Arkansas " " were married in 1830, and had two children, . . in September, 1833, . . [one] died . . [He] owned . . [eight] slaves; . . about December, 1833, . . Benjamin and Rebecca, removed to Texas, and brought . . said slaves and their increase;"

Philips v. Wheeler, 10 Tex. 536, 1853. [537] " a negro (Jack) had been employed by the defendant . . by the day; . . on Sunday . . a witness met the defendant going . . for a rope to draw the plaintiff's negro [Bill] out of his well ['recently cleaned out']; . . drawn out . . much injured . . died . . evidence offered by the defendant, to prove that it was customary for negroes to assist one another, in jobs undertaken by them about town; . . rejected. . . [538] verdict for the plaintiff." Affirmed.

Fowler v. Stoneum, 11 Tex. 478, 1854. [479] " the plaintiff purchased the negroes at Sheriff's sale, as the property of . . Halstead, in . . Alabama, in . . 1842; . . 1844, he made a conditional sale of the negroes to Halstead, . . in this State, [482] . . 'Jerry and wife Phebe; . . Jesse and wife Patsey; . . Charles and wife Judy; boy Solomon: girl Julia, boy Berry; . . Peninah and her four children, and negro man Base.' "

Cobb v. Norwood, 11 Tex. 556, 1854. [559] " alleges that after the commencement of the suit in Mississippi, . . Norwood removed to Texas, bringing the two slaves that had been sued for,"

Haley v. Villeneuve, 11 Tex. 617, 1854. Haley, a free man of color, " brought suit against . . Villeneuve, before a Justice of the Peace, and

. . 1850, obtained judgment for the use of one Howerton [a white man]. Execution issued, and was levied on a billiard table, which the wife of the defendant . . claimed . . Upon the trial of the right of property, the claimant moved the Court to quash the execution . . on the ground that the judgment was void, because rendered in favor of a free person of color, residing within this State in violation of law.[1] The Justice, who was the successor . . of the Justice who rendered the judgment, sustained the motion. Afterwards, the successor . . of the Justice who rendered the last mentioned judgment, on the motion of the plaintiff, set aside said judgment, . . the claimant . . petitioned . . for a *certiorari* to bring before the Court for revision, and . . annul the original judgment . . [618] On the return of the *certiorari,* the defendant therein moved . . to dismiss the petition, . . overruled"

Reversed and petition for *certiorari* dismissed: [619] "a defendant in a judgment rendered by a Justice of the Peace, cannot have a *certiorari* . . for matters, which might have been urged . . at the trial before the Justice."

Turner v. Smith, 11 Tex. 620, 1854. [621] "deed of trust, . . 1841, from Turner to Groce, of five negroes including the boy Jim, to secure the payment to Waller of six thousand dollars, . . [623] Defendants . . proved that Waller had possession of . . Jim . . 1842; . . claimed . . by virtue of a sale made under said deed of trust; . . The plaintiff then proved by a witness, that he saw Waller come . . with this negro and other negroes, in the night time, about daylight; . . said he had taken them, about eleven o'clock at night, from the place of Mr. Brown, where they had been for some time"

Peter (a slave) v. State, 11 Tex. 762, 1854. "indicted for arson, . . convicted, and motions for new trial and in arrest of judgment . . overruled, . . The basis of . . [latter] motion was, that the grand jury . . was drawn by a person purporting to act as the Deputy of the County Clerk, when . . not" Judgment affirmed.

Avery v. Avery, 12 Tex. 54, 1854. [55] "he ran the . . slave [off from Georgia] to . . Louisiana . . to prevent his being sold for his debts; . . afterwards paid his debts . . moved . . to this State, bringing . . his slaves"

Purvis et al. v. Sherrod, Executor, 12 Tex. 140, 1854. Will of William T. Weathersby: [141] "3rd. I give to my negro woman Charlott [*sic*] and her child Julian their freedom, because of Charlott's faithful services in aiding me to make all the property which I own in the world. I also give my boy George Washington his freedom, because of affectionate regard for him. And I wish the . . three . . to be left under the charge of my sister Lucinda Sherrod, to be settled near her . . and if the State of Texas, or any of my relations, should object . . I give my sister full power to send them to a free State, or to Liberia, as she and the negroes may agree." "4th. I give . . [142] Charlott, my horse Charley, two cows and calves, one plough and gear, and meal for one

[1] Hart. Dig., Art. 2553.

year, and . . three hundred dollars . . to fix her comfortably. In case this will should be contested by any of my legal heirs, . . I give the . . negroes . . to my sister . . believing she will carry out my will in the premises. And I further bequeath to my sister [$1600] . . in case this will should be contested by any of my legal heirs, for the purpose of carrying out my will." The executor brought suit [141] "for a construction of [the] two clauses . . and for instruction . . [142] Purvis and wife . . demurred; . . overruled; and the Court decreed that the State did object to the freedom . . on the conditions mentioned in the will; and that Purvis and wife . . did contest the will; that Charlott was not entitled, to the bequest of [$300] . . and that Mrs. Sherrod was entitled to receive the negroes and the [$1600] . . as special trustee, for the emancipation . . and that they should be sent to a free State, or Liberia, as she and they might agree; and, after paying the expenses . . they were entitled to the remainder . . and orders that if she should fail to [execute the trust] . . it should be done in the same manner by the executor."

Affirmed: I. [164] "the trust conferred on Mrs. Sherrod . . was a . . valid trust at common law;" "we . . yield our unqualified assent" to the opinion of the Supreme Court of Tennessee in Hope *v.* Johnson.[1] II. The trust was not "in violation of the Constitution and laws of the State, or repugnant to its policy. . . the only provision [2] in the [State] Constitution having any reference to . . emancipation . . [165] does not assume to be restrictive on the owner. . . [166] It is . . most likely that the State Convention had in view the provisions of the Constitution of the Republic,[3] and the Acts of Congress [of the Republic] still of force, on the subject of emancipation and free negroes, . . [167] as the Act [of February 5, 1840][4] is believed to be still in force, and it forbids free negroes from coming into the country, taken in connection with the old Constitution and the new, the prohibition of emancipation, unless the . . slaves shall be removed from the State, is implied, . . [171] The principles deduced from . . [Mississippi,[5] Georgia,[6] and South Carolina [7]] cases, are that although a State by its laws, may absolutely prohibit emancipation, or direct the particular mode in which it can only be done, yet a bequest of freedom not to be . . [perfected] until the slave is removed beyond the territorial limits . . is . . valid . . and . . a bequest to a slave is valid, if not to take effect until his removal . . [172] he must . . respectfully differ with the Supreme Court of Alabama,[8] arises from not

[1] Vol. II., p. 491, of this series.

[2] "The Legislature . . shall have the right to pass laws to permit the owners of slaves to emancipate them, saving the rights of creditors, and preventing them from becoming a public charge." Art. 8, sect. 1.

[3] "Congress shall pass no laws to prohibit emigrants from bringing their slaves . . and holding them by the same tenure . . nor shall Congress have power to emancipate slaves; nor shall any slaveholder . . without the consent of Congress, unless he shall send his . . slaves without the limits of the Republic." General Provisions, sect. 9.

[4] Hart. Dig., Arts. 2546-2550.

[5] Ross *v.* Vertner, vol III., p. 290, of this series; and Wade *v.* American Colonization Society, *ibid.*, p. 309.

[6] Vance *v.* Crawford, *ibid.*, p. 19.

[7] Frazier *v.* Frazier, vol. II., p. 359, of this series.

[8] See Trotter *v.* Blocker, vol. III., p. 143, of this series.

regarding the difference in where the bequest was made and the place it was to be consummated." [Lipscomb, J.]

Murphy v. Crain, 12 Tex. 297, 1854. "Action by [Crain] . . on a covenant of warranty . . Bill of sale from Murphy to Crain, . . February 18th, 1850, if 'a negro girl of dark complexion, aged about seventeen . . and her child . . aged about eight months, for [$800] . . warranted sound' . . [298] Dr. . . Young called for plaintiff: Was called to see the girl by . . Murphy, February, 1850; laboring under a severe attack of pleurisy . . was pregnant, appeared to be fourteen or fifteen . . in his opinion premature conception had stopped . . the development of her constitution, and . . her chest small . . recovered . . in consequence of the premature pregnancy she was unable to endure the usual hardship and labor incident to slave labor; . . he was called in . . to attend said girl in childbed, (August, 1850,) . . saw no symptoms of disease in her chest; was called in by plaintiff . . March, 1851, . . found her laboring under a violent attack of pleurisy; . . died, May, 1851; child died after the mother, was delicate, but not diseased previous to the mother's death; . . [299] Defendant called . . Hodges . . [who] testified . . March, 1851 . . negro girl rode Mr. Crain's horse part of the way [four miles] to where they were getting bark; . . bark roof leaked . . [300] the negro girl cooked for them . . she had plenty of cover and clothing, and . . the shelter . . was dry after they boarded it." [299] "remained there five or six days; on night 26th March, heavy snow came on, and they left next morning . . the . . girl with the other hands walked: she . . [carried] her child; . . was sick one night before they left . . Henby . . testified, he had managed Murphy's negroes in Tennessee . . up to the time Murphy brought [them] . . to Texas in 1850, . . she appeared sound . . saw her once . . [in] Texas . . before she had been sold, and she was then grubbing;" Verdict for the plaintiff.

Judgment thereon reversed and the cause remanded: [314] "the verdict was contrary to law and the evidence;"

Owen v. Tankersley, 12 Tex. 405, 1854. [408] "the husband being embarrassed with debts, run this property [negress and child] to Shreveport [from Alabama] in '48 or '49, to shield it from sacrifice," The negress had belonged to his father-in-law in Georgia.

Overton v. Crockett, 12 Tex. 509, 1854. [510] "came . . from . . Missouri in . . 1844, bringing . . his son and nephew . . [and] a negro, . . 1845 and 1846 . . bringing . . an additional portion of his household . . 1847 he brought his wife and daughters"

Alexander v. State, 12 Tex. 540, 1854. "Indictment for larceny of a slave, the goods and chattels of . . Coleman, . . evidence . . that Coleman having discovered the intention . . interposed no obstacle, and perhaps directed the slave to encourage the theft, and learning from the slave the road the defendant designed to take, intercepted [them] . . about a half hour after dark . . The defendant was convicted and sentenced to hard labor in the penitentiary."[1] Affirmed.

[1] Hart. Dig., Art. 2344.

State v. Wupperman, 13 Tex. 33, 1854. " indicted under the second Section of the Act concerning slaves, (Dig. Art. 2558,) which prohibits the buying of any produce of a slave ' without the written consent of his . . master . . or overseer.' "

Eccles v. Hill, 13 Tex. 65, 1854. " note . . for $150 . . the hire of . . Marian and Missouri, for . . 1853."

Cook v. Thornhill, 13 Tex. 293, 1855. [294] " the [two] slaves belonged to the plaintiff . . in . . Virginia, . . a lunatic . . in 1835 said slaves were taken by a brother of the plaintiff to Mississippi, . . sold . . in 1840 . . [to] defendant . . the plaintiff . . recovered judgment against him for the slaves . . This action was brought to recover the slaves, or their value, together with the amount adjudged in Mississippi "

Schrimpf v. McArdle, 13 Tex. 368, 1855. [369] " there were fifteen hands employed [in the brickyard]—six negroes hired by the month and nine Germans by the job "

Linney v. Maton, 13 Tex. 449, 1855. In a quarrel [451] " Julia Maton . . called Linney . . a negro; "

Nix v. State, 13 Tex. 575, 1855. " The evidence was that the defendant had committed a violent assault and battery ' upon a negro woman [the slave of another] . . with a knife, with which he cut her.' " [579] " unprovoked . . violence, committed in a fit of drunkenness," [575] " The jury returned, ' We . . find the defendant guilty, and assess the punishment at $25 fine, and ten days imprisonment in the county jail; ' and the Court rendered judgment accordingly." Affirmed: [579] " it was a crime against the law of nature and the laws of society; and equally within the spirit and intention of the statute, as if . . committed upon a free person." [Wheeler, J.]

Ford v. Clements, 13 Tex. 592, 1855. About 1830 [593] " Ford and wife removed [from Tennessee] to Mississippi, carrying . . [the slave] Narcissa with them. . . In 1845 Ford sold Narcissa her liberty and the liberty of one of her children. In 1848 Narcissa paid [Mrs. Ford's son-in-law] . . $100 and his expenses to carry her and her children to Ohio."

Calvit v. Cloud, 14 Tex. 53, 1855. [54] " The plaintiff derived title by a deed of gift . . made in the jurisdiction of Brazoria, in the State of Coahuila and Texas, in May, 1834. The defendant pleaded that at that date the property in slaves could not be legally held and transferred [there.] . . The Court adjudged the plea insufficient; . . rightly " " The suit was commenced . . 1848. Verdict . . 1853, for the plaintiff, for . . Emily, valued at $800; her child, valued at $200; for the hire of Emily . . at $130 per year,"

Parker v. Portis, 14 Tex. 166, 1855. [168] " Lydia, was purchased . . in . . South Carolina, in . . 1848, . . brought to this State "

State v. Barrow, 14 Tex. 179, 1855. In 1843 [180] " Mrs. Barrow's father announced his intention to give the slave . . to Mrs. Barrow . . for . . [her] separate benefit," "telling them . . that they must not per-

mit him to be sold; and . . when they were loaded up . . the slave was delivered . . they came directly on [from Tennessee] to Texas,"

Young v. Epperson, 14 Tex. 618, 1855. [622] " Matilda, was inherited by the wife of the defendant, from her father's estate, in . . Tennessee; defendant and wife removed . . to Missouri; . . the negro woman and several of her children were sold at Sheriff's sale; . . [defendant redeemed them, and] in . . 1841 or 1842 . . moved to Texas, bringing . . said negroes; "

Allen v. State, 14 Tex. 633, 1855. " The appellant was indicted under Art. 454, (Hart. Dig.) for selling liquor to a slave, . . The witness saw no money pass, . . The Court charged . . that whether the defendant gave or . . sold . . it was equally an offence against the law." Held: " erroneous."

Duffell and wife v. Noble, 14 Tex. 640, 1855. " Suit . . against . . Noble, administrator of Lydia Loving, for the recovery of a slave girl named Missouri, aged about fourteen years. . . a son of the plaintiff [testified that] . . Missouri . . was born at the house of his father and mother, in . . Alabama . . in . . 1838; he has frequently heard his grandmother, Mrs. Lydia Loving, say that she had given . . [641] Missouri to his mother . . before the child was dressed, after its birth; . . on account of his mother's attention and care in raising . . the other negro children; . . his mother had the control and trained the child; when, however, his grandmother left . . the mother of the child, who was an obstinate and high tempered old negro, made a great fuss . . and declared she would not leave her child; and . . it was concluded that the child and mother should go together with Mrs. Loving . . [who] moved off about nine miles, . . and [in 1845, about a year later,] . . to Texas. . . paid taxes on her . . [645] value of the girl $600 or $700; hire worth $7 or $8 per month. . . Mrs. Duffell sent clothes (dresses and underclothes) to . . [644] Missouri, . . Weatherrel . . said Mrs. Loving, about a year before she died [in 1850], offered to sell him the . . girl," Verdict and judgment for defendant. Affirmed.

Arcienega v. Riddle, 15 Tex. 330, 1855. " The plaintiff . . indebted to the defendant . . conveyed to him . . three . . slaves; . . [331] they . . eloped, and made their way into Mexico, where they remained; . . the probability is strong, that they had eloped with the privity, if not by the procurement, of the plaintiff, who was then in Mexico."

Rawles v. State, 15 Tex. 581, 1855. " indicted under the first Section of the Act of May 11th, 1846,[1] for permitting his slave to go at large and hire her own time for more than one day in a week, and found guilty, . . [584] motion in arrest of judgment " denied.

Judgment reversed and the prosecution dismissed: " It is very unfortunate that, on a subject of so much . . importance, in . . keeping under proper discipline our slaves, there should be such imperfect legislation." [Lipscomb, J.]

[1] Hart. Dig., Art. 2576.

Kesler v. Robson, 16 Tex. 119, 1856. [120] "the boy and the land [a quarter of a league] were exchanged for each other . . 1854; . . the land was then and now worth seventy-five cents per acre;"

Baker v. Johnson, 16 Tex. 133, 1856. "that the draft was given for a slave . . represented to be sound, but which was . . afflicted with hernia,"

Eccles v. Daniels, 16 Tex. 136, 1856. [139] "proposing to hire the boy at [$12.50] . . per month; . . the negro was hired . . for both 1844 and 1845."

Scranton v. Tilley, 16 Tex. 183, 1856. [184] "Suit by appellee . . commenced July 22d, 1854, for that the defendants, . . 6th . . of July, 1853, sold the plaintiffs three slaves, warranted sound, for . . $3,300, one . . died about the Fall of 1853, . . [185] witness for plaintiff, Dr. Weems, testified: . . Friday was put to picking cotton; . . October witness was called . . and found him in convulsions, . . epileptic fits; . . in four or five days was sufficiently well for witness to leave him to the care of his master with directions that he should not be exposed to the sun in the heat of the day, nor to the cold of the early morning, . . the boy was well treated, for he was evidently a favorite with his master; . . [186] witness's bill . . was about thirty dollars. Witness saw Friday the day he was brought home, and noticed a peculiar expression in his countenance, . . never saw that . . except where the brain was affected; . . [187] thought it might have been caused by dread that his new home might not be agreeable, but after witnessing his . . convulsions, and finding that the expression was a constant one, . . [he] was satisfied that . . [they] had a common cause; . . No *post mortem*" [186] "Friday was apparently about sixteen . . between mulatto and black; delicately formed; . . [188] Another witness . . heard Mr. Scranton . . [say] he would bring a negro boy to exchange for Friday, . . The defendants . . introduced . . [their] clerk; knew . . Friday for nineteen days . . brought here by defendants, for sale, . . employed when needed at work about the store; . . a smart, active boy, not very robust; seemed accustomed to the work of a house servant." Judgment for plaintiff affirmed.

Bailey v. Hicks, 16 Tex. 222, 1856. [224] "had their [sixteen] negroes brought out from Louisiana," in 1849.

Martin v. State, 16 Tex. 240, 1856. [241] "convicted upon an indictment charging him with harboring and concealing a negro," [1]

R. and D. G. Mills v. Ashe and wife, 16 Tex. 295, 1856. [296] "Suit by appellees . . for the value of a slave, hired . . as an ordinary boat hand . . [297] at the mouth of the Brazos river on her way down . . the captain took a yawl, manned by one white man and three slaves, . . and went out to sound the bar. . . rough. The yawl passed over the bar, and meeting a schooner . . in charge of the pilot, took a line, and was being towed in, when . . it took a shear and capsized; and two of the slaves, one being the slave of the plaintiffs, were drowned. . . the *Bell*

[1] Hart. Dig., Art. 460.

made upwards of thirty trips, and took the pilot every trip but one. . . gave five dollars a month more for hands than boats that did not run outside. . . [299] Verdict and judgment in favor of the plaintiffs," Affirmed.

Shelton v. Marshall, 16 Tex. 344, 1856. [350] "suit . . upon a promissory note . . given in . . Mississippi, for slaves introduced into that State [by Shelton] as merchandize" in 1836. [345] "The defendants gave in evidence the Constitution . . of Mississippi, . . Then they read the answers of plaintiff to interrogatories, . . [346] Did you not trade in slaves in Mississippi, by importing from Virginia and other States, . . Ans[wer] . . never . . after 1835; . . Did you not sell . . the slaves mentioned in the bills of sale . . (One bill of sale, dated Nov. 28th, 1835, for . . Mary, for $1,100; another, dated January 9th, 1836, for two men and three women slaves, for $4,200.) Ans[wer] . . my agent Samuel W. Shelton, sold the slaves." Verdict and judgment for defendants.

Affirmed: [355] "the . . note was . . void." [351] "The Courts of Mississippi had the right to determine the effect of the State Constitution." [1]

Robinson v. Varnell, 16 Tex. 382, 1856. Contract: [383] "Jan'y 27th, 1848. On the first . . of January next, I promise to pay . . Varnell [$150] . . in the hire of a negro boy . . for . . 1848, which I am to furnish with two suits . . and return to him . . first . . of January, 1849." [384] "It appeared from the evidence, that the defendant had cruelly treated and abused the slave, causing him to run away; and that in March, 1848, while a runaway, the slave had been killed, while resisting capture by a party which had pursued him for breaking into houses . . in the night time, and stealing. The slave was armed with a hatchet, and being come upon suddenly, attacked the person, who shot him. The defendant proved by a witness, that plaintiff offered the witness ten dollars if he would find the slave and bring him back; . . [385] The jury found for the plaintiff, the hire for . . 1848, and the value of the slave, with interest from the first . . of January, 1849. Motion for a new trial overruled," Affirmed.

Doty v. Moore, 16 Tex. 591, 1856. [592] "This suit was brought . . to recover damages . . for . . representing a negro, hired . . to him . . to be a first rate striker in a smith shop, and a pretty fair smith, and honest . . that he was in truth no workman, as a smith, and of bad character; . . had burned the fence . . and . . the smith shop . . and was a runaway . . judgment by default; . . and large damages assessed"

Reversed and remanded: I. "incompetent evidence was received, . . the confession of the slave [2] . . [II.] the statement of facts does not show the slightest proof that the plaintiff in error had made the representations charged"

[1] See introduction to the Mississippi cases, vol. III., p. 277, of this series.
[2] Hart. Dig., Art. 723.

McFarland v. Wofford, 16 Tex. 602, 1856. [604] "May, 1853, Wofford said he was going to Alabama for some money, and thence to Virginia to buy negroes, and that he might go to Philadelphia if negroes were high."

Hagerty v. Harwell, 16 Tex. 663, 1856. Lipscomb, J.: [664] "This suit was brought by the plaintiff in error, to recover her community share of a negro woman and her two children, conveyed by her husband [to his sister] . . after the plaintiff had commenced a suit . . for a divorce. . . [666] The highest estimate put on the [slaves] . . is about [$1500] . . [667] the community property worth over [$30,000.] . . In the argument of the plaintiff's counsel, an effort was made to impeach the alienation, on the assumed hypothesis that there was an adulterous intercourse between the mother alienated, and . . the husband of the plaintiff, and that one of her children, conveyed . . was the issue; and that the object of the husband in conveying . . was to secure their freedom. . . [668] not warranted by the evidence. But if it had been fully proved, . . it is natural that he should trust [them] . . to the kindness of his own sister, rather than leave them to the . . infuriated wife, who would possibly, yea, probably, inflict severity, cruelty and hardship on them, . . The judgment is affirmed."

Vardeman v. Lawson, 17 Tex. 10, 1856. "came to Texas in 1838 or 1839, and purchased the land . . paying therefor with the . . slaves," brought from Alabama.

Moore's Administrator v. Minerva and her children, 17 Tex. 20, 1856. [21] "Moore, . . of Alabama, in 1841 or 1842 took Mary Minerva, then between twelve and fourteen . . to Cincinnati . . and left her there at school, declaring . . his intention to educate and emancipate her. In Sept., 1842, he returned to Cincinnati and executed . . a deed of manumission . . and had it put upon record. Again, in 1843, he returned . . and took Mary Minerva away with him, telling witness that he was going to Mississippi . . 1843 or 1844, Moore immigrated to Texas, bringing . . Mary Minerva . . In 1844 he died, leaving a . . will . . in which he mentioned the deed of manumission . . and stating his desire that . . Mary Minerva should be free; and in case of opposition . . [22] bequeathed her to his brother, with the request that he would emancipate her. Mary Minerva has been hired out ever since," "This suit was brought [in 1852] . . to recover the freedom of herself and children, and to recover damages against the administrator" [21] "the ages of the children were then . . seven years, four years, and six months; a fourth . . born during the pendency of the suit, was made a party"

Verdict and judgment in their favor affirmed: [27] "The will was not a valid will to emancipate . . because not made in conformity with the laws of Texas, . . But it was legal . . evidence to prove the execution of his deed of manumission,"

Moore's Administrator v. Francis and her children, 17 Tex. 28, 1856. [29] "The children of Francis were Daniel, 17 years old, and Caroline Matilda, 15 years old, at commencement of the suit. Francis and her

children were manumitted by the same deed; the plaintiffs in the other suits, by different deeds. In all other respects the facts were the same as in Moore *v.* Mary Minerva, *supra.*" "The Court . . ordered the [cases] . . to be consolidated. No error. Judgment in their favor affirmed.

Hopkins v. Wright, 17 Tex. 30, 1856. [34] "She . . inherited a large number of negroes, some of which her husband sold, and he conveyed ten to his wife to induce her to sign deeds for the land, and left Virginia for Texas with forty-two slaves."

McLemore v. McClellan, 17 Tex. 122, 1856. "Suit for $125 . . for the hire of a slave for . . 1852. . . the slave died . . February, 1852. . . Verdict and judgment for plaintiff for $125." Affirmed. [123] "we think the better opinion is in favor of holding the hirer responsible for the hire only to the time of the death. The question, however, is not presented by the assignment of errors"

Gaines v. Ann, 17 Tex. 211, 1856. Lipscomb, J.: [214] "Lawful slavery is confined to the African race. The evidence . . was clear . . that the mother and grandmother of Ann were both slaves and of the African race; that the grandmother was a mulatto, or half breed; that the mother of Ann was a quarteroon, . . that the reputed father of Ann was a white man, . . The evidence of her being pure white blood, was that of two medical gentlemen, who testified that they had examined her, and could not detect any of the indicia of the existence of African blood . . but that a person who was only one eighth of the African blood, might not show any signs . . though in general, that degree of the blood would show itself; and that the appearance of the child, in cases of mixed blood, were much more likely to be in conformity with the father than the mother. . . [215] We are . . bound to conclude that the verdict . . finding Ann to be of the pure white race, is not supported by the evidence; . . This cannot fail to give rise to some grave reflections on the law as it now is, . . the third generation, one of each being white, . . is the last degree prohibited by law from giving evidence against a white person.[1] Her child, if by a white man, would be a competent witness against a white person, but following the status of its mother, it would be a slave . . Whether it is sound policy to permit the law to remain in its present state is a question . . [for] the Legislature,"

Sadler v. Anderson, 17 Tex. 245, 1856. [247] "removed [from Mississippi] to Texas in 1840 or 1841, with his family and slaves;"

Pierce v. Cole, 17 Tex. 259, 1856. "The note was given for money loaned by plaintiff to . . Pierce . . The defence alleged was, that . . Pierce had placed a woman slave in the possession of the plaintiff, whose work . . was to pay for the . . interest . . that the plaintiff hired her out . . [260] and . . she was so cruelly . . treated as to greatly injure her value . . so as to render her incapable of doing work which she was before able to do; . . was taken sick and remained so . . long . . without the necessary attention . . and that during a part of the time . .

[1] Act of May 13, 1846. Hart. Dig., Art. 2586.

Pierce had to furnish another slave to wait on her, which . . from great exposure in waiting on . . the first . . was taken sick and died,"

Grumbles v. Grumbles, 17 Tex. 472, 1856. [474] " 1846, these negroes [the property of Edward Grumbles of Alabama], together with others, were put into the possession of . . Howard, with written instructions to take them out to Texas . . to John Grumbles;"

Carter v. Marks, 17 Tex. 539, 1856. Marks brought suit against Carter on a note of hand. The latter " pleaded in abatement that he 'was . . a free negro man . . and not competent . . to contract or be sued,' . . the plaintiff excepted, . . sustained . . verdict and judgment for the plaintiff,"

Affirmed: [540] " the plea . . was properly overruled . . It should have shown that the defendant was . . within the prohibited degree.[1] And . . that he was not residing in Texas at the date of the Declaration of Independence of Texas, nor authorized by any Act of the Congress or Legislature of Texas to remain . . By the Act of Dec. 12, 1840, (Hart. Dig., Art. 2571,) the Act of 5th February, 1840, was so modified as to exempt from its operation all free persons of color, with their families, who were residing in Texas on the day of the Declaration of Independence. The presumption is, that the appellant was residing in Texas, at . . [that] date . . as he is residing here now, unmolested,"

Claiborne v. Tanner, 18 Tex. 68, 1856. [71] " Harris . . testified . . that . . [he] loaned the negro to [his daughter and her husband] . . in Alabama in 1838 or 1839, for the purpose of learning a trade; soon after . . [they] brought the negro to Texas without the knowledge . . of witness." [70] " he was thirty-five years old [in 1854] and crippled, which depreciated his value one-half;"

Cain v. State, 18 Tex. 387, 1857. " Indictment . . That . . Cain, . . yeoman, . . did . . entice away . . a . . [388] slave, . . convicted." Judgment reversed and the cause remanded: [389] " The word *feloniously* is essential to all indictments for felony,"

Townsend v. Hill, 18 Tex. 422, 1857. " Suit . . on a . . note, given for the hire of a slave for the year 1854. . . the slave died within two weeks . . without any fault on the part of the defendant. . . received proper attention and medical aid. . . not sick when he went into defendant's possession . . a jury being waived, judgment was rendered for the plaintiff for the full amount of the note."

Reversed and reformed: [427] " the Court erred in refusing to admit of an abatement of the price, on account of the death . . before the expiration of the term of hiring." [425] " The argument of public policy, drawn from considerations of humanity, is . . entitled to great weight. But it may admit of question on which side the argument lies: whether the humane treatment of slaves will not be best promoted by increasing the motive on the part of the owner to hire . . to none but a humane master." [Wheeler, J.]

[1] Act of June 22, 1846. Hart. Dig., Art. 2586.

Flack v. Haynie, 18 Tex. 468, 1857. [469] "proved . . that Dr. Posey had bought a plantation . . and placed some negroes on it, with . . overseer; . . returned to Alabama [in December, 1850], and would be back again next fall; . . requested Haynie to have an oversight . . [470] his overseer . . [being] young and inexperienced;"

Burnley v. Rice, 18 Tex. 481, 1857. [482] "1841, . . Love conveyed to . . Burnley one undivided half of his plantation in Brazoria county, and . . slaves . . 'to make him a full . . partner' . . Burnley resided out of the State. Love resided at Galveston, and superintended the plantation . . [489] Jackson . . testified that he had known the plantation . . since 1837; . . a cotton plantation until 1849; that then it was changed to a sugar plantation; . . knew but two men in the business at the time;"

Haynie v. Baylor, 18 Tex. 498, 1857. [502] "was but a small farmer; had but one field hand, a negro woman. . . [503] The wagon driver of defendant was . . a trusty negro and a good wagoner."

Cartwright v. Cartwright, 18 Tex. 626, 1857. "Plaintiff and defendant were married . . in 1834. The defendant owned, before marriage, . . Jane, and her child, Mary. . . [627] The grounds of divorce were that defendant in 1848 falsely accused plaintiff of infidelity . . abandoned the bed and board of plaintiff, and lived in improper intimacy with the negress Jane," [643] "obstinately persisting continuously to live in a negro house with his negro woman," [627] "The Court . . decreed a divorce, . . assigned . . Jane and Mary to the defendant, but decreed that their children should be equally divided . . with the other common property,"

Held: [643] "the children of . . Jane and Mary, are the separate property of the defendant, . . [644] they constitute no part of the community of gains;" [Hemphill, C. J.]

Montgomery v. Culton, 18 Tex. 736, 1857. [745] "proposed to prove . . that . . Terrill told witness that he would have to drive Stockton from the place; . . that, if he suffered him to remain, he would spoil all the slaves. . . [746] that . . Stockton . . frequently admitted . . that he . . had no capacity at all to manage slaves;"

Smith v. Talbot, 18 Tex. 774, 1857. [775] "The petition states . . that . . 1836 . . Talbot executed his . . notes . . payable . . 1838, and . . 1839; . . [776] and before the same became due . . removed from Alabama to Texas . . with . . a large number of . . slaves, . . had purchased a large number of these . . from the plaintiff, and these notes were given for the price"

Hedgepeth et al. v. Robertson, 18 Tex. 858, 1857. Hood's testimony: "The plaintiff's slave, . . John, . . [in 1852] was driving the plaintiff's team of five yoke of oxen and wagon, laden with six bales of cotton, . . [859] during the night . . got into a bog . . finding it impossible otherwise to extricate [the wagon] . . pulled down a portion of the fence [of Kirby], . . After failing to get his wagon out, . . it was too dark to put up the fence well, and John encamped there. Early next morning, . . Hedgepeth, Kirby's overseer, . . made a great fuss . . Witness told Hedgepeth that the pulling down was done innocently; . . [861] Hedge-

peth then said to John, 'I'll whip you, God d—n you. . . pull off your coat, I mean what I say, sir,' . . John replied, 'I spects you does sir.' . . [862] Hedgepeth spurred his horse . . but John ran out of the field . . Hedgepeth called to [two negroes] . . to catch him, and one . . made a pass at him, but John told him not to lay his hands on him; . . ran about thirty yards . . towards the ferry and stopped. As he was going off, . . Hedgepeth called out . . 'you can run, God d—n you, but I'll whip you or kill you before you get home, you d—d son of a B—h.' . . told one of the negroes . . to go . . after his gun and dog; . . I . . went to John, . . asked him if he intended to leave; he said that he did, and I then told him that he had better come back, . . and if they whipped him at all, they should not whip him much; but he refused . . and halloed to my nephew to bring him his horse, but Hedgepeth took hold of the horse . . John ran off towards the river. . . Col. Kirby and White [the other two defendants] . . came . . [863] Kirby handed him his gun" [859] "Hedgepeth and White, with the gun and dogs, immediately followed . . [863] I heard a gun fire" [859] "Hedgepeth returned and said he had seen nothing of John. . . [863] but that John had been to the ferry, and the ferryman refused to put him across" [859] "John was never heard of afterwards. He was an expert swimmer. . . [860] was an unusually valuable boy; between twenty-five and thirty . . worth from twelve to thirteen hundred dollars; services worth $180 per year." Verdict and judgment for the plaintiff for $1300.

[873] "Affirmed with damages." "It was an unwarrantable interference . . with the plaintiff's property, attended by circumstances of aggravation, which called for the imposition of damages, not for compensation merely, but also for punishment and prevention. There are scarcely any damages which an unprejudiced jury would give in such a case, which the law would deem excessive." [Wheeler, J.]

Allen v. Russell, 19 Tex. 87, 1857. [90] "instrument executed [by Mr. and Mrs. Allen] in Tennessee:" [88] "we . . have this day [October 12, 1850] received [from Mrs. Allen's father] three . . slaves on loan . . to take with us to Texas, for the purpose of raising and supporting our children, and to have the labor . . during our . . lives,"

Lovett v. State, 19 Tex. 174, 1857. "Indictment, one count for an attempt to steal a slave, another for an attempt to entice the slave away. . . Sheppard . . testified that about . . first of January, . . 1857, he was informed by his brother that a traveller . . had informed him . . that . . Sam . . the property of . . Brown, had . . told him that . . Lovett had promised to take . . [175] Jack, the property of Brown, away from the country. That . . witness and several other persons . . with the consent of . . Brown, took . . Jack some three or four miles to the ferry of Lovett, . . caused Jack to expose himself upon the bank . . with a light; . . Lovett came over . . that witness and another person had given . . Jack [$10.75] . . with instructions to show . . Lovett; . . Lovett said that all he had been waiting for was money to carry them off; Jack said that another boy, Mart, had lots of money; and it was agreed that Lovett, Jack and Mart should meet at the river the next

Saturday night, to make some arrangement about leaving the next Spring. . . arrested" [174] "convicted, and the punishment assessed at three years confinement in the penitentiary."

Reversed and remanded: [177] "The time proposed for consummating the crime was so distant as to render it very doubtful whether the accused had fully resolved upon the commission"

Brady v. Price, 19 Tex. 285, 1857. "Suit by the appellant . . on a contract of hiring . . defendant claimed [$1000] in reconvention. . . evidence that defendant hired plaintiff for the year 1854, to oversee her plantation, for . . $300. There being ten or twelve man [*sic*] slaves on the plantation, and no white person except the plaintiff, . . the son-in-law of the defendant . . [her] agent . . told plaintiff he might have some difficuty . . and in case he should, . . send word to [him] . . or to . . sons of defendant, . . [who] would come and assist him. . . [286] plaintiff made the following statement . . Miles . . said something impudent; . . plaintiff told [him] . . to hush and go about his business; . . Miles again said something impudent . . plaintiff then caught up a part of a fence-rail . . did not get a fair lick at him, . . clinched . . Miles choked the plaintiff; . . was then pulled off plaintiff by the other negroes, . . went . . to ploughing; . . plaintiff, in some hour or two . . got his gun . . found negro's horse tied, and . . negro gone; . . next Monday morning . . [he] heard that . . Miles was . . at work. . . took his double-barrelled shot-gun, having . . drawn out . . buckshot . . loaded both barrels with squirrel shot, . . When . . Miles reached the end of the row plaintiff ordered him to stop. . . did not . . [287] Plaintiff told . . other negro to take . . Miles' horse. . . did not . . Miles dropped his plough-lines and ran ahead of his horse, when plaintiff fired on him. . . negro ran on . . he fired on him again, hitting him both times; . . overtook him. When . . negro turned . . he had a knife in his hand. Plaintiff drew his knife and told the negro to put up his . . and . . negro immediately shut up his knife and put it in his pocket. . . proved by a physician that there were fifteen to twenty-five . . holes in Miles' back, . . so deep that witness did not attempt to extract them. . . Miles had been previously healthy . . worth about $1000; but . . since . . had been unable to work . . The plaintiff attempted to prove that Miles was impudent, malicious and rebellious, . . some evidence to that effect; but . . other . . that he was merely self-willed. In the same month of April, . . defendant . . discharged the plaintiff. . . [288] Verdict and judgment for the defendant for $516 67." Affirmed: [289] "he had no right to assault him with a deadly weapon, . . [290] If the plaintiff was unable to enforce due subordination, by . . reasonable and proper means; . . he ought to have applied for assistance, as . . instructed" [Wheeler, J.]

Love v. Wyatt, 19 Tex. 312, 1857. [313] "1849 . . he left Arkansas, came to Texas, . . bringing the slave"

Cooper v. State, 19 Tex. 449, 1857. Overseer of deceased [457] "told Mrs. Fortson . . that if I saw any one about the house, and if I called them and they did not answer, I would shoot them. . . I believed there

was some mischief going on among the negroes, . . I intended to keep the negroes from visiting each other as much as possible. . . [458] I did not see anything wrong among the negroes that night."

Allen v. Urquhart, 19 Tex. 480, 1857. " The [three] women were from twenty to twenty-three years of age in . . [481] 1838, when Mrs. Allen received them by inheritance from her father. . . defendant paid $1200 for them [in 1838] . . $400 in cash, $400 in cattle and $400 in a note; . . a fair price . . at that time; . . [482] witness had heard Mrs. Allen say she was very anxious that the sale should be made; . . that the slaves were calculated to ruin her children; . . she would not give that cow ['pointing to one . . they got . . in payment'] for the slaves, and . . raise them up with her children;"

Wheeler v. Hollis, 19 Tex. 522, 1857. [523] " Watson . . became the guardian . . and received her [three slaves] . . In 1834 or 1835, . . [he] removed with his wife and ward [from Mississippi] to Texas."

Howze v. Howze, 19 Tex. 553, 1857. Howze, a resident of Georgia, [553] " recommended to his executors to hire out one or two of his negroes every year on account of their being hard to govern."

Anderson v. State, 20 Tex. 5, 1857. [6] " prosecution instituted in November, 1856, for permitting a slave to hire his own time. There was a motion to quash the indictment, a trial by jury and conviction. . . reversed and case dismissed." See Rawles *v.* State, p. 291, *supra.*

Gamble v. Dabney, 20 Tex. 69, 1857. [70] " 1853 . . Dabney and his wife . . emigrated from . . Arkansas to Texas . . bringing . . negroes conveyed by . . deed of trust " executed in Mississippi in 1835. [76] " the deed expressly provides that the trustees shall sell any of the trust property except the slaves,"

Manly v. Culver, 20 Tex. 143, 1857. [146] " testified that negroes hired from 1846 to 1853 for from $15 to $20 per month."

State v. Stephenson and Cabler, 20 Tex. 151, 1857. [152] " indictment . . for an assault and battery upon a slave, Malissa, the property of . . Rucker, . . committed . . 1856 . . whipping " " Defendants filed an exception ' that it does not appear from the face of . . indictment, that any offence against the law was committed ' . . sustained "

Reversed and remanded: " slaves are to be regarded as persons in respect to the criminal law." " Upon the contrary hypothesis every white person would have *prima facie* the right to whip any slave; . . a principle not recognized either by the public opinion and usage, or by the laws of the country." [Roberts, J.]

Sloan v. Webb, 20 Tex. 189, 1857. Inventory: " 1 negro woman aged 27 years, $700; . . boy aged 11 . . $650; . . girl aged nine . . $400; and . . boy aged seven . . $500;"

Echols v. Dodd, 20 Tex. 190, 1857. [191] " The defendant was the owner of a saw-mill . . and the negro boy was hired [in 1856] for the purpose of being employed in . . mill. . . Williams . . superintendent

. . chastised . . negro for alleged misconduct, and beat him so severely that he died" Held: defendant is responsible. [194] "the chastisement . . was . . done [by Williams] in the course of his employment,"

Nations v. Jones, 20 Tex. 300, 1857. [301] "suit . . to recover on a note given for . . a slave warranted to be sound of body and mind. . . [302] It was in evidence by a physician . . that he had but little intellect, but that little was sound; . . in proof by an overseer of defendant, that the boy . . was about half a hand. On the part of the plaintiff, it was proven that the defendant, some months after the sale, said the boy was worth $1000, which was the price . . A witness had employed the boy in his brick-yard for six months previous to the sale, giving . . one dollar per day; . . proven that preliminary to the sale, . . plaintiff distinctly informed the defendant that the boy was a fool-headed negro; that he was a chuckle-headed fool, and would not suit; that he had sense enough to do any thing he was told. . . defendant . . replied, 'That was the kind of negro he wanted;' . . The Court charged . . that the jury should find for plaintiff, unless . . the boy was an absolute idiot . . Judgment for plaintiff" affirmed.

Carter v. State, 20 Tex. 339, 1857. "The law under which this indictment was found makes the offence to consist in the master knowingly permitting his slave to carry fire-arms, etc. (Acts of 1850, Ch. 58, Sec. 1, p. 42.) The Court instructed . . that 'the law presumes that every man is informed of any habitual . . acts of his . . slave, unless that presumption is rebutted by the proof.' . . error."

Mitchell v. Vickers, 20 Tex. 377, 1857. [380] "she wished her sister to have choice of her colored servants;"

Wade v. DeWitt, 20 Tex. 398, 1857. DeWitt brought suit "for breach of warranty of soundness . . The slave had been confined four or five days before his death. Thirteen hours after . . a *post-mortem* examination was made by several physicians, who . . found the heart obstructed by a fibro-adipose substance . . which must have been from six months to two or three years in forming, . . supported by six regular physicians, nearly all of whom had been present . . [399] Two . . had given defendant descriptions . . and defendant took the depositions of nine physicians in New Orleans, nearly all . . professors in the University of Louisiana, . . Their testimony was . . that the description . . was imperfect, . . impossible . . to say with certainty of what disease the slave died, or how long it had continued. Several stated . . that . . such an obstruction . . would form" in ten days. Judgment for plaintiff affirmed.

Trammell v. Trammell, 20 Tex. 406, 1857. The executor [409] "fled from . . Arkansas to . . Texas, bringing with him . . slaves belonging to the estate, . . some twenty-five or thirty,"

Sawyer v. Boyle, 21 Tex. 28, 1858. [29] "'ordered that the negro property . . be . . divided between the heirs . . [30] lot No. 3 to consist of Charlotte and . . her infant child, etc.;' . . approved . . and . . 'The Court ordered the names of the eight heirs . . to be placed in one hat . . and the eight lots in another,'"

McFaddin v. Vincent, 21 Tex. 47, 1858. "petition . . That . . 1853, plaintiff came to Texas . . and . . brought . . slaves . . bargained with . . McFaddin . . for his plantation . . [48] that during . . 1854 he failed in making a crop . . that he and most of his negroes were sick during a great part of the summer; . . November . . he reconveyed the plantation . . and also conveyed to him the . . slaves . . prays that the [sales] . . may be set aside on account of fraud in the defendant, and the incapacity of . . petitioner . . [50] answer . . that . . plaintiff . . March 1855 . . in the night time, broke open . . [respondent's] dwelling house . . chained and hand-cuffed [him] . . and forcibly carried away . . his . . slaves mentioned [and two others;] . . that . . respondent . . procured a warrant . . and overtook him . . had [him] . . arrested, together with . . said slaves" Verdict for plaintiff, the [57] "jury, believing . . that . . his mind was not sound," Judgment thereon affirmed.

Graham v. Gautier, 21 Tex. 111, 1858. [112] "Suit by appellee . . for $187 57, for medical attendance to the slaves . . Answer . . alleging that by reason of the unskillful and negligent treatment . . ten . . of the value of $10,700, had died," [118] "The testimony shows that these negroes were taken sick . . with typhoid fever, and then measles upon that, and were first attended to by Dr. Fisher, who is said to have pronounced it cholera. They were moved while sick to the McNeal place, where Dr. Gautier was called . . and while he was attending on them they were moved to Hinckle's place. The idea of their having some contagious disease caused them thus to be moved . . The houses . . were open, the weather was not good, they were not well provided with bedding and clothing, and were left in these outhouses mainly to themselves, apart from any white family to see that they were properly nursed . . (the white family being sick at another place at the same time.)" [114] "instructions were asked by defendant . . [115] If the jury believe . . that the . . slaves were laboring under an attack of measles . . when the plaintiff . . treated [them] . . for . . cholera, or pneumonia, . . by the want of skill . . plaintiff is liable . . for the value of said slaves." Refused. "Verdict for plaintiff for $166 57; remittitur of $24 57, and judgment for the balance."

Reversed and remanded: [119] "However improbable it might appear to the Judge, that an impartial jury would . . make the physician pay for the loss of these exposed and neglected negroes . . it was the right of the party to have the law charged, in its full extent,"

Hillard v. Frantz, Administrator, 21 Tex. 192, 1858. "Suit was instituted by appellee . . to recover a negro slave girl . . proved that . . the girl was the property of . . the intestate, and that he died . . 1855; that . . the slave . . was worth $700. On the part of the appellant it was proven that . . 1854 . . [the intestate] gave and delivered the . . girl to the appellant . . upon the understanding that she would raise the . . slave, who was of tender years and the reputed natural daughter of intestate; and that when the child arrived at such an age that she could support herself, . . [the appellant] would take [her] . . to a free State and

manumit her, and that the estate was solvent. That the delivery of said . . slave was made about the time of . . [intestate's] marriage, . . [193] The Court . . excluded the testimony"

Judgment reversed and the case remanded: [199] "Such a transfer of a slave may be made verbally, when possession is immediately given, . . Such a trust is not unlawful in this State." [Roberts, J.]

Williams v. Ingram, 21 Tex. 300, 1858. [301] "the plaintiff knew of the unsoundness of the negro before he made the purchase; . . had consulted a physician as to the practicability of effecting a cure," Held: "a general warranty of soundness does not extend to . . defects . . known to the buyer."

Bruton v. State, 21 Tex. 337, 1858. "indicted for the theft of a slave. . . [338] Dickson testified . . that . . Bruton told him that the boy Frank that formerly belonged to John Kuykendall was runaway and was staying about Robert Kuykendall's place . . and that he wanted to fix to take him off and sell him. That . . a month afterwards Bruton took a bill of sale . . before a Notary Public, and the witness, under . . [a fictitious] name . . acknowledged [it] . . and delivered it to Bruton, under . . [a fictitious] name . . [339] preparations were made, such as providing a horse and a mule, getting clothes, saddle bags, etc.; . . that . . after . . [Bruton's] return he saw a mulatto girl . . which Bruton told him he had . . swapped . . Frank for" [348] "Dixon [*sic*] went off afterwards with this girl to New Orleans, and thence to Shreveport, where he was arrested and brought back. He stated that . . he saw . . Frank in New Orleans. . . [349] afterwards found there by Lewis [Frank's owner], when he carried back the girl and reexchanged the negroes." Verdict of guilty. Judgment thereon affirmed.

Carothers v. Thorp, 21 Tex. 358, 1858. Carothers executed "one [note] . . for $137 50, for the hire of a negro boy . . [another] for $125 00, for the hire of a negro woman . . for the year 1855. . . [359] placed . . slaves . . in the possession of . . Rainey, according to contract" "to cultivate . . land in partnership . . [Carothers] to provide . . two hands; . . appellant then obtained a situation as overseer . . February, 1855, the . . plaintiff . . took said negro [woman] . . home, and . . he . . was compelled to abandon his situation . . that he might comply with his contract . . by laboring in the place of said negro, . . claimed that his crop would have been increased by the labor of said slave in the sum of three hundred dollars,"

Guffey v. Moseley, 21 Tex. 408, 1858. "proved that defendant . . agreed with witness to go fire-hunting; . . Moseley insisted on a negro boy slave of . . Tinnin going with them; that the slave at first refused, but at Moseley's persuasion at last consented; . . Moseley carrying the gun, and the slave the fire-pan; that negro said he shined a pair of eyes; that Moseley gave him the gun, and told him, the negro, to shoot, . . and plaintiff's mare was killed"

Berge and Hynson v. Wanhop, 21 Tex. 478, 1858. "Suit for the hire of a slave. Plea, that before the expiration of the time . . he was drowned without the fault of the defendant." Held: "a good defence."

Bumpus v. Fisher et al., 21 Tex. 561, 1858. " action of malicious trespass and false imprisonment, brought by appellant . . Appellees pleaded that Dupree was a Justice of the Peace, . . that Fisher made an affidavit before him, containing a charge against . . Bumpus, that 'he did . . 1856, lay violent hands on a . . slave, Alfred, a man [property of Fisher], and unmercifully whip and abuse said boy;' . . Bumpus was . . arraigned for trial; . . jury . . brought in a verdict finding him guilty . . and assessing his fine at forty dollars, . . ordered into the custody of the Constable until . . fine and costs were paid, . . The exceptions of plaintiff to this answer . . were overruled . . verdict for defendants,"

Judgment thereon affirmed: I. [563] " Fisher . . had a right to make the complaint . . [II.] So too the Justice . . was not liable . . [570] he had jurisdiction "

Little v. Birdwell, 21 Tex. 597, 1858. [599] " Ball started with his family from . . Alabama for . . Mississippi, in 1832, . . had the slaves " " the negroes were . . [his] property . . in Alabama, Mississippi and Louisiana." " placed upon the inventory of . . [his] estate " in Texas.

Eborn v. Chote, 22 Tex. 32, 1858. "Action . . by the appellee . . instrument, on which the suit was based: ' Twelve months after date, I promise to pay . . Wright, or bearer, [$120] . . for the hire of negro boy Jo, aged about fourteen . . and in case . . Jo should run away during [1857] . . Wright is to lose all his time. January 1st. 1857. Thomas Eborn.' The note was assigned by Wright to the appellee. . . [33] the negro ran away about Christmas, . . Judgment for plaintiff." Affirmed.

Hubby v. Stokes, 22 Tex. 217, 1858. " suit . . by Stokes . . for a fraud in the sale of a negro girl. . . at . . $400; . . The bill of sale . . contained a special warranty . . ' Which girl I warrant sound in mind, and in good health, to the best of my knowledge.' " " The petition . . charged that the diseased state of her body, of which she died in a few months, occasioned plaintiff to expend large sums . . for medicine, physicians' bills, etc." [219] " There is such a mass of concurrent testimony . . as to place it beyond any reasonable doubt . . that the negro was imbecile . . diseased, and utterly worthless; . . well known to the defendant; and that he . . practiced a flagrant fraud," [218] " the judge charged . . ' That . . the damages might be exemplary or vindictive.' . . The Jury returned a verdict in favor of the plaintiff, for [$778.50] . . for which . . judgment was rendered . . and the plaintiff entered a *remittitur* for the excess over [$613] . . the amount of the purchase money and interest."

Affirmed: [221] " The plaintiff's counsel very unnecessarily remitted "

Walker v. Walker, 22 Tex. 331, 1858. [332] " two . . negroes [hired from defendant] were under his charge, working on a meeting house "

Hawkins v. Lee, 22 Tex. 544, 1858. [545] " appellant and his wife removed [with the slave from Mississippi] to . . Arkansas in . . 1830; . . 1840, Mrs. Hawkins went on a visit to her father in Mississippi, and . . exchanged . . said negro boy . . for . . Zack, . . remained . . in Arkansas . . until his removal to Texas, in . . 1853,"

Greer v. State, 22 Tex. 588, 1858. "indicted . . September, 1856, for permitting . . January, 1856, a slave, owned by him . . to carry fire arms, at other places than on his premises." Held: [590] "the indictment does not allege any offence against the laws in force, at the time it was found"

Callihan v. Johnson, 22 Tex. 596, 1858. Bell, J.: [603] "the killing of the slave . . took place in . . April; . . in . . March . . Callihan was aware that the negro was in possession of a pistol. . . He ordered the negro to deliver [it] . . and the negro refused . . drew it from his pocket and held it in his hand. If he had been shot at that moment, the case would have presented a different aspect. Callihan's son brought a shot gun, which he had been sent . . [604] to procure . . The negro then retreated. These facts show . . the most flagrant insubordination . . but . . not . . a case of forcible resistance . . nor . . that a necessity existed, such as the law recognizes, for taking the negro's life. . . the discharge of the shot-gun was without effect, and . . Callihan fired his six shooter once without effect, . . the negro was sixty, or seventy or eighty yards distant, when the shot was fired that took effect" Verdict and judgment for the plaintiff, for the value of the negro and the hire for the entire term. Affirmed.

Powell v. De Blane, 23 Tex. 66, 1859. "In 1854 . . Marble and his wife, with her slaves, moved [from Mississippi] to . . Louisiana, where she died in 1855. Marble . . removed with the slaves to Texas, where he sold some or all"

Herbert v. Butterworth, 23 Tex. 250, 1859. "overseer, under a contract . . commencing . . October, 1855 . . to continue during . . 1856, at . . $300 per annum" was discharged in September: [251] "owing to . . his inattention and mismanagement of the hands and plantation, his crop . . was almost an entire failure."

Blythe v. Speake, 23 Tex. 429, 1859. [430] "suit . . brought . . for . . $1000, the purchase-money of a slave, . . and for $900 damages, for money expended for medical aid, medicines and care, in nursing . . also for $2000 damages, for the breach of warranty, and fraud" [431] "The bill of sale is drawn up in the form of a deed to land . . 'convey . . a negro man . . about twenty-eight or thirty years old, sane and healthy (except one finger stiff,)'" "The petition averred . . that . . a disease . . speedily . . developed itself, causing prostration, sickness affecting the stomach, shortness of breath, swelling of the body, palpitation of the heart and difficult respiration, so that he . . was confined to his bed . . from the delivery [of the bill of sale] . . to the institution of the suit." Held: [434] "Regarding merely the face of the instrument, we would understand it . . to be a warranty of soundness."

Bagby v. Birmingham, 23 Tex. 452, 1859. [453] "while residing in Alabama, he became . . embarrassed by security debts, to avoid the payment . . he ran off two negro men to Texas, and 'kept his other property

out of the way of the sheriff,' until . . 1844, when he secretly removed, with his family and negroes, to Texas."

Todd v. Dysart, 23 Tex. 590, 1859. [592] " heard him speak of selling Frank, if he did not behave himself;"

Faulk v. Faulk, 23 Tex. 653, 1859. [656] " she removed [from Louisiana] to . . Texas in . . 1854 " with ten slaves.

Boulware v. Hendricks, 23 Tex. 667, 1859. Roberts, J.: [668] " action by an administrator . . against a previous administrator . . for the recovery of effects left in his hands, . . most of the effects . . were the proceeds of the hire of negroes whose freedom has been established since he ceased to be administrator, by virtue of a will of the decedent, . . the proposition contended for [by defendant], is, that the judgment establishing the freedom of the negroes, fixes their *status* as free persons, by relation back to the death of the testator; and that, from that time, the negroes were entitled to the profits of their services. We do not think this is the law. . . [669] Another feature . . operating against this defence, is, that the negroes intervened in this suit, . . and claimed the proceeds of their hire. . . Their petition was . . dismissed . . and they have not appealed " Judgment for plaintiff affirmed.

Philleo v. Holliday, 24 Tex. 38, 1859. [39] "Abram J. Hill had . . made a will, wherein he bequeathed the negroes . . to his wife . . for life, and attempted thereby to give [them] . . their freedom, after the death of his . . wife;"

Held: [41] " the bequest of freedom is void, for the reason that no provision is made for the removal of the slaves beyond the limits of the state."

Armstrong v. Jowell, Executor, 24 Tex. 58, 1859. " By the provisions of . . will [of Alburtis Arnwine], the testator emancipated all of his slaves, and provided for their removal, by his executors, from the state." " the [Cherokee] County Court refused to admit the will to probate, and Maples declined to act as executor; the defendant in error removed the case, by *certiorari,* to the District Court . . and afterwards, by change of venue, it was removed to the county of Rusk, where . . there was a verdict and judgment sustaining the will." Affirmed.[1]

Tucker v. Willis, 24 Tex. 247, 1859. " in . . 1853, he moved [from Kentucky] . . to Texas, bringing the . . negro "

Hinton v. State, 24 Tex. 454, 1859. [454] " said . . that Whittaker should not run over him, because he had a few negroes, and he (defendant) did not have any."

Bradshaw v. Mayfield, 24 Tex. 481, 1859. [483] " we find his hire [in 1854] to be $150 per annum, and that the boy . . is worth $1000."

Smith v. State, 24 Tex. 547, 1859. [548] " Chalmers, while acting as captain of the patrol, found Isaac [the slave of Allen] with the whiskey, . . took the negro into the grocery, and charged Smith with having sold it to him, without permission of his master.[2] . . Smith said he . . gave

[1] See Purvis *v.* Sherrod, p. 287, *supra.*
[2] O. and W. Dig. 542, Art. 668.

it to the negro, but that another man paid for it. . . [549] Little . . stated that he owed Langham's negro fifty cents, for riding a wild horse for him; . . let [him] . . have the bottle of whiskey in payment . . does not know how Allen's boy got the whiskey. . . the defendant's counsel asked the court to charge the jury, that 'if they believed . . that Smith sold . . to Little, they must find for the defendant.' . . refused"

Held: [550] "this charge should have been given."

Westbrook v. Mitchell, 24 Tex. 560, 1859. "suit . . for the recovery of a negro, alleged to have been formerly a free negro, but who had . . sold himself [in Texas in 1855] to the plaintiff [[561] 'for . . $2500, . . for the use and benefit of the said negro' 'by reason of agreement . . entered into between the negro man and the plaintiff, in . . Mississippi'], and who had been enticed out of his possession, by the defendant. Exceptions to the petition were sustained by the court, and the cause dismissed."

Judgment affirmed: [562] "Until the passage of the Act of January 27th, 1858, authorizing free negroes, in this state, to choose masters, and to enter into the condition of slavery, the laws of this State did not recognize any persons as slaves, except . . the offspring of slave mothers. It has never been judicially declared, in this country, so far as we know, that . . any . . person, could sell himself into slavery; . . In the Act of . . 1858, the legislature evinced the greatest caution . . there are reasons of public policy, . . [563] Sometimes the negro might be the only sufferer, but at other times, the public might feel the bad effects of permitting negroes to reside amongst us, under the nominal protection of designing men." [Bell, J.]

Westbrook et al. v. State, 24 Tex. 563, 1859. "indictment against the appellants . . for imprisoning and kidnapping Lewis John Redrolls, a free negro, for the purpose of detaining him as a slave. . . evidence . . that Redrolls . . had made a contract to sell himself to . . Westbrook[1] . . and had, for a considerable length of time, . . lived with him as a slave, . . The district attorney asked the court to charge . . 'that a contract made with a free African person . . for . . [his] sale . . is null and void,' . . [564] given, with the qualification, 'that if the jury believe . . that the defendants exercised acts of ownership . . believing, in good faith, that they had a right . . they are not guilty,'" Judgment affirmed.

Hunt, Administrator v. White, next friend, etc., 24 Tex. 643, 1860. [644] "The decedent died . . leaving a written will . . admitted to probate . . 1852, . . 'I will . . to Elizabeth Sneida, one thousand dollars, in cash, my adopted wife; . . That my son Charles be purchased, and all the balance . . equally divided between . . Charles, my daughter Amanda, and my daughter Harriet, my daughter Mary Sneida and Robert Sneida, and Eliza Sneida;'" "At the time that the witnesses proved the will, they made oath . . to an 'explanation' . . 'Bracken died the next day after executing the . . will, . . [646] had three children which he acknowledged . . before us. . . Charles, Amanda and Harriet, who are

[1] See Westbrook *v.* Mitchell, *supra.*

part African blood; the two latter living with him . . the former, the property . . of . . Kerr, . . He emphatically directed his executors to purchase . . Charles, and to take him, and his two sisters to a state . . where they can be emancipated; that they provide for their education, and that when they are of legal age, they should have an equal share of his estate, with his other children; . . Mary Sneida and Robert Sneida and Eliza Sneida were acknowledged . . as his own proper children,' . . 1853 . . adjudged that that portion . . which bequeathed property to Charles, Amanda and Harriet, be set aside, . . [647] [They,] by . . their next friend, filed a petition in the District Court for a *certiorari,* to review the . . judgment . . alleged that . . the testator was . . unable to write; . . That words were unintentionally omitted, . . [648] adjudged that the decree of the County Court, so far as it affected . . the plaintiffs . . be . . annulled. And . . that the property . . devised to . . Charles, Amanda and Harriet, be . . placed in the hands of . . trustee . . to be . . paid over . . The decree made . . provision . . for the purchase of Charles, and his removal with Amanda and Harriet"

Reversed and remanded: [649] "This will contains no provision for the removal of the slaves out of the state; . . [653] The parol 'explanation' cannot be sustained as a nuncupative will, even if it were competent to emancipate . . by such a will."

Pridgen v. Buchannon, 24 Tex. 655, 1860. "suit . . on a . . note for $345, given . . for the hire of . . slaves . . and for the value of Biddy . . whose death was charged . . to have been occasioned by the wrongful act [of Buchannon] . . in removing her [to another county] . . 'in the fall of the year . . and there causing her to be employed in picking cotton, and in performing other labors in the swamps and sloughs . . a region . . notorious for being unhealthy, and particularly so to persons unacclimated . . and . . failed to use ordinary care . . in administering to the common wants . . of said slave,'"

Held: [657] "If Buchannon placed the slave in an employment . . more hazardous . . than that reasonably contemplated . . he would clearly be responsible for the death"

Barziza v. Graves, 25 Tex. 322, 1860. "the woman being very sick, her husband proposed to give [her] to her . . as her separate property, if she would nurse her until her recovery, and . . she did so"

Hines v. Perry, 25 Tex. 443, 1860. [444] "The defendant . . pleaded . . that he had purchased the negro . . without notice of the adverse claim . . brought . . from Mississippi . . 1850. . . proved . . [445] before defendant closed the trade he took the negro aside and asked him privately whether . . he really did belong to Hines? . . the negro answered . . 'I don't know, master, but I have heard the white folks say that I belong to his children.'"

Held: [452] "The law does not treat a slave as property merely, and incapable of doing any act which will affect others. . . A court of equity, therefore, . . could not treat as amounting to nothing a clear and unambiguous notice of a fact communicated by a slave." [Bell, J.]

Zembrod v. State, 25 Tex. 519, 1860. Testimony: [538] "not . . a man of a well balanced mind. . . [539] He would accuse the negroes of stealing from him, and chastise them without cause;"

Railroad Co. v. Dial, 25 Tex. 681, 1860. "1st . . January, 1857, . . the company hired the slave at twenty-five dollars per month, and agreed, in case of sickness, to inform the hirer [owner], or send the negro to him. The plaintiff [owner] bound himself to clothe the negro, and 'to do all the doctoring' . . The negro was to be returned when called for, in case he did not run away or die. . . [682] proved . . that the negro worked on Friday; complained of being sick on Saturday; . . company's agent . . testified that he would have notified . . if he had thought there was 'much the matter;' . . next morning found him much worse, and immediately sent a note . . the plaintiff took the negro home. . . dead on . . Tuesday"

Fowler v. Waller, 25 Tex. 695, 1860. [696] "April, 1857, . . the defendant agreed to pay him the one-twentieth part of the wheat, corn and cotton crops . . discharged him [in August] . . [697] testimony . . tended to prove . . [698] too familiar intercourse with the negroes under his charge."

Calvin (a slave) v. State, 25 Tex. 789, 1860. [791] "the first count . . charged that the appellant murdered 'a negro woman, . . the property of . . Smith,' . . The second count alleged . . 'the property . . of . . Winn.' The first . . charged that the murder was committed by striking on the head, with a billet of wood. . . The gentlemen appointed by the court to defend . . entered into . . written agreement with the district attorney . . 'the [letter] . . amends . . by striking out . . [792] "the property of . . Smith,"' . . the words . . were erased. . . the prisoner was found guilty . . The motion in arrest of judgment was overruled,"

Judgment reversed [797] "and defendant committed to await the action of the grand jury." [796] "the indictment . . has undergone such alteration that it will not support a conviction, . . The law . . is precisely the same as if the accused were a free white man, and we cannot strain the law even 'in the estimation of a hair,' because the defendant is a slave," [Bell, J.]

Sanders v. Devereux, 25 Tex. Supp. 1, April 1860. [2] "The petition alleged, upon the contract first set forth, that, in . . 1857, certain negro slaves, owned . . by the plaintiff, . . made crops of cotton, with her consent, on her lands, and with . . her further consent, that the proceeds . . should inure to the benefit of said slaves respectively, according to the amount . . each . . might produce. . . distinct from the crop made for . . the plaintiff. . . 1858, in consideration that said slaves, at the special . . request of . . defendant, would sell and deliver to him [20,158] . . pounds of said cotton, in the seed, at . . $2 per hundred pounds, . . agreed upon between said slaves and the defendant, with the . . approval of petitioner, . . defendant promised . . to pay them or petitioner . . whenever, after the delivery . . requested. . . The petition then set forth

a contract, made between the plaintiff and the defendant, for the sale . . at the same price . . of a like quantity . . The defendant demurred . . and assigned as a special ground, that the petition sets up a contract unauthorized by law. . . overruled. . . [3] proved . . that the defendant, with the consent of the plaintiff, purchased . . their . . cotton, . . that it was to be delivered at the plaintiff's gin, and the overseer was to receive it for the defendant. . . proved by the overseer that the . . slaves delivered. . . and that, according to the contract, he was to have given to each . . a memorandum to show the amount . . severally delivered, on the presentation of which to the defendant, the price due was to have been paid by him. . . verdict and judgment in favor of the plaintiff for . . $403 16. . . motion for a new trial . . overruled."

Judgment reversed and the cause remanded: [11] "The right of private property belongs, in this country, exclusively to freemen. . . the action cannot be maintained upon the contract first set out . . it being a void contract; nor upon the second alleged contract, because not supported by the evidence. . . [12] the owner can [not] adopt the . . void contract . . and . . give it vitality as to the person contracting with the slave." [Wheeler, C. J.]

Kingston v. State, 25 Tex. Supp. 166, October 1860. "indicted for . . buying five Shanghai chickens from a slave, . . of the value of $6 each, 'without the consent of the master,' . . The evidence was, . . that the slave . . was accompanied by a son of his master . . about eighteen . . who knew . . There was no proof that the chickens were of any value, nor was there any evidence introduced by the State to show that the slave did not have the written consent . . [167] The defendant asked the court . . to charge . . that it was incumbent on the State to show, affirmatively, that the defendant bought . . without the written consent . . and . . to prove that the articles . . were of some pecuniary value. . . refused" Judgment reversed and the cause remanded.

Nations v. Johnson, 24 Howard 195, December 1860. [202] "they got possession of the slaves in Tennessee, in violation of the rights of . . complainant, and removed them to . . Mississippi. . . removed [in 1850] to Texas, carrying the slaves with them,"

Jack (a slave) v. State, 26 Tex. 1, 1861. [2] "The appellant was indicted for the murder of his wife," "when the verdict was returned, one of the jurors . . remarked to the court . . that 'he did not think the negro ought to be hanged or punished with death.' . . [4] the jury found the value of the slave . . but did not find the additional fact ['to entitle the owner to receive compensation from the public Treasury'] that the owner had not attempted to evade or defeat the execution of the law."

Judgment affirmed: "the owner . . cannot now be heard upon this point in this court."

Ex parte Louisa Merry, 26 Tex. 23, 1861. Bell, J.: "We are of opinion that the present applicant is not shown to be a person of that class which can claim the privilege of residing within the State, either by virtue of the Joint Resolution of 1837, or the Act of the Congress of the Republic,

of the 12th December, 1840. We think those laws were intended to confer a privilege upon such free persons of color as resided in Texas on the day of the Declaration of Independence [of Texas], and upon the issue of such persons, born of parents who lived together as man and wife, in the manner usual amongst persons of their class. . . [24] not . . to confer privileges upon persons who might be the fruit of the merely casual sexual intercourse of their parents. We are of opinion . . that the applicant take no benefit from the writ . . The person filing the petition for the writ of *habeas corpus* will pay the costs."

State v. Asbury, 26 Tex. 82, 1861. "The indictment [found January 1, 1857] . . charged the appellee with unlawfully aiding . . and bringing within the . . State a free person of color . .[1] [83] on the 1st . . of January, 1855. The court below quashed the indictment" Affirmed: "The law required the offence to be prosecuted within two years after its commission. (Acts of 1854, p. 70, sect. 75.) . . Including . . the day of the commission . . the prosecution was not commenced in time,"

Scott v. State, 26 Tex. 116, 1861. "The indictment charged that the defendant 'did harbor and conceal' a . . negro woman, 'being . . a runaway slave;' but there was no averment that the defendant knew the slave to be a runaway. . . the defendant moved to quash the indictment, . . overruled." Held: [117] "the court erred"

Willis v. Harris, 26 Tex. 136, 1861. "suit . . to recover the value of a slave hired" [138] "to split rails and work on . . ranch" [136] "lost his life in cleaning out a well . . [137] evidence . . that the defendant 'bushed out' the well and tested the atmosphere with fire before the slave entered it. . . he had called for help, and seized a rope . . let down . . but soon let it go"

Thompson v. Berry, 26 Tex. 263, 1862. "alleged . . that in . . 1831 . . [264] Milly Berry removed with the . . slaves [from Arkansas] into the State of Coahuila and Texas; that by the laws of Coahuila and Texas, the . . slaves became, or were about to become, free; that in . . 1832 or 1833 . . Milly Berry smuggled the negroes into . . Louisiana, where they were seized as 'contraband;' and that about the time of their seizure, . . Milly . . [265] conveyed the . . negroes to . . Thompson . . [who] caused them to be brought . . to Texas" about 1855.

Gaines's Administrator v. Ann, by her guardians ad litem, 26 Tex. 340, 1862.[2] "Upon this trial, as on the former one, the jury found a verdict in favor of the freedom of the appellee. A new trial being refused to the appellant, he appealed again."

Judgment reversed and the cause remanded: [342] "the verdict is not supported by the evidence," [341] "The evidence . . [342] is stronger for appellant than it was for his intestate,"

Munson v. Hallowell, 26 Tex. 475, 1863. [476] "Ann and her . . children" "had been . . removed from . . Arkansas, in 1845, . . were purchased in New Orleans by . . Jones . . and were brought to Texas"

[1] Hart. Dig., Art. 2554.
[2] See Gaines *v.* Ann, p. 295, *supra.*

Lott v. Bertrand, 26 Tex. 654, 1863. [657] " In 1836 . . Lott and his wife removed [from Florida] to Texas, bringing . . slaves "

Clark v. Railroad Co., 27 Tex. 100, 1863. " alleged that she hired the slave to the appellee to be employed . . on the railroad only; but that . . the appellee put the slave to . . unloading railroad iron from a steamboat, whereby he was so injured as to cause abdominal rupture."

Reese v. Medlock, 27 Tex. 120, 1863. [122] " that it was the custom of land agents . . to exchange the lands . . for negroes and such other property as they considered it to the interest of their principal to receive . . and that negro property was much more readily convertible into money than land " in Burnet County.

Elizabeth (a slave) v. State, 27 Tex. 329, 1863. [330] " indictment . . against Ned and the appellant . . for the murder of . . child of . . Threatt. Ned was charged . . with the actual commission . . The District Attorney having suggested the death of Ned, the indictment abated as to him, . . evidence . . that the deceased, . . about three years of age, was missed . . Neighbors . . arrested Ned and Elizabeth, . . who inflicted punishment . . with a rope, for the purpose of obtaining a disclosure . . Elizabeth persistently denied any knowledge . . But upon Ned's stating that Elizabeth had put the child in the well, she . . said, 'he . . tells a lie; I can show you the child;' . . walked up a ravine . . into the water and brought out the child. . . Ned had belonged to Mr. Threatt only . . two or three weeks; . . Elizabeth for two or three years. . . verdict of guilty," New trial refused.

Judgment reversed and the case remanded: [332] " the evidence . . does not prove . . that she killed it, or was an accomplice in its being done."

Lafferty v. Murray, 27 Tex. 372, 1864. [373] " in 1840 or 1841, removed [from Kentucky] to Texas, bringing . . a negro woman "

Lewis v. Castleman, 27 Tex. 407, 1864. The purchaser [411] " brought the negro home . . and that night the negro ran off . . but next day was found . . at the house of [his former owners.] . . [414] the jury decided . . that the value of the boy [in 1857] was $1400, and his hire worth $200 per year,"

Debrell v. Ponton, 27 Tex. 623, 1864. [624] " she had let her husband take . . Sam to New Orleans, and . . he was sold for nine hundred dollars,"

Oustott v. Oustott, 27 Tex. 643, 1864. [644] " The jury . . stated [in 1860] . . that the girl was worth $1000, and her hires five dollars per month "

U. S. v. Dashiel, 3 Wallace 688, December 1865. " Major Dashiel, a paymaster in the army of the United States, . . claimed . . a deduction of $13,000 . . on the ground that while travelling in remote regions of Florida [before 1860], . . with the whole sum in gold coin to pay the army, he had . . been robbed of about $16,000; . . $3000, . . [689]

was discovered among negro slaves of the neighborhood, and got back. The jury made allowance" [698] "January, 1860, judgment was entered"

Bishop v. Jones and Petty, 28 Tex. 294, December 1866. George W. Paschal, reporter: [296] "Few records are more painfully suggestive than that which furnishes this precedent. . . As further security [for a note] . . Bishop . . executed his mortgage upon sixteen slaves, . . March, 1861, Jones and Petty, as indorsees and holders, sued the makers." [313] "The trial . . was had . . 15th April, 1861," [296] "The defendants . . plead that Jones and Petty . . held . . for the . . benefit of alien enemies . . [297] residing in the United States, . . incapable of suing in this court. . . [298] offered as evidence the public newspapers [pp. 301, 302] . . urged that the court should know judicially . . that . . Lincoln was elected . . November, 1860; that thereat the leaders and people of certain southern States resolved that they would not live under a government presided over by an abolitionist; . . [301] These facts . . Judge Terrell refused to notice judicially, . . [302] excluded all this newspaper evidence to prove the existence of war," [297] "the court . . rendered a judgment [for Jones and Petty] . . with . . an order to sell the land and negroes. . . [302] 16th of April the defendants moved for a new trial, and filed . . newspapers as evidence of the existence of war [pp. 302-307] . . [307] But Judge Terrell overruled the motion . . The defendants appealed, and the record was filed . . 27th of April, . . and there the case rested until the war ended. One of the plaintiffs fell in battle; the other commanded a regiment, and won the renown of a soldier, although he had most earnestly opposed the whole movement. . . Before the supreme court . . pronounced this decision [affirming the judgment] these chattels had become free citizens."

Blankenship v. Berry, 28 Tex. 448, December 1866. [450] "evidence . . that a negro came for the slaves . . that defendant would not let them go, but declared that, if plaintiff would . . send a white man, he would let the negroes go."

Seal (a freedman) v. State, 28 Tex. 491, December 1866. "Slavery ceased to exist in Texas by the proclamations of President Johnson, General Gordon Granger, and Provisional Governor A. J. Hamilton. They became free in the summer and autumn of 1865." [Paschal, Reporter.]

Maria (a freedwoman) v. State, 28 Tex. 698, December 1866. [699] "When the homicide . . occurred [October 28, 1863], both the slayer and the slain were slaves, residing upon the same plantation, . . As two years elapsed . . before any indictment was found, the probability is that the death had been attributed to some other cause, or else it was one of those cases where the master had taken the punishment into his own hands, and was unwilling to incur the additional loss of punishing the murder by law. . . [701] Angeline, a freedwoman, [testified:] . . Mary told Maria that her (Maria's) child had told a lie on her, (Mary,) and asked her to whip the child, and if . . Maria . . did not . . she (Mary) would. Maria replied, 'I will not . . and if you do it there will be . .

a big fuss.' . . deceased found the child . . and smacked [her.] . . [702] Maria rushed in and said, 'You whip my child, God drast your eyes! I will kill you! I will cut your heart-strings out;' and struck her with the butcher's knife, . . she was in bed about five weeks, and then died. . . was dressed . . on the single occasion when she went out . . the wound being cured up externally. . . [704] Dr. J. Houston, for the defendant, said . . [705] Deceased may have died from other causes;" [700] "verdict of murder in the second degree, and assessing the punishment at seven years in the penitentiary." Judgment reversed and the case remanded for error in the instructions.

Browne v. Johnson, 29 Tex. 40, January 1867. [41] "I delivered the negro to Browne, [the sheriff, for safe-keeping,] at least I put him in Mrs. Young's [slave-?] yard, and Browne took him. . . The negro was not dangerous; he was armed. . . He was crippled in one hand." The slave escaped.

Scranton v. Conlie, 29 Tex. 237, January 1867. [238] "The facts . . were, . . that he was subject to fits, and had been sold [to Scranton] in consequence . . that he had run off, and been committed to jail in 1858, . . the negro was crazy." "the owner . . failed to remove him" [237] "Conlie sued . . for $301 25, for keeping . . as jailor, and for necessaries . . under the law of 1841,[1] . . [238] The jury allowed [one dollar] . . per day [claimed] for keeping the slave. The law . . only allowed fifty cents a day." Held: [239] "no error in the judgment, except that it is excessive to the amount of $97 50," "The utter worthlessness of the slave . . is a sufficient excuse for the failure of . . sheriff, to offer him for sale at the end of six months from . . committal," [2]

Wilson v. State, 29 Tex. 240, January 1867. "the indictment was found in 1861, but the case was not tried until . . 1865. . . By the slave code of Texas, which perished with the other barbarisms of the institution, . . 'if any person shall . . cruelly treat a slave, . . [241] he shall be fined not less than $100 nor more than $2,000.' . . The indictment was against Wilson and . . McMorris, and had two counts: one for murder, in the ordinary form; the other ran, that the defendants did . . cruelly treat . . Nat . . by inflicting . . without just provocation, . . with a . . gutta-percha strap, . . six hundred stripes, by reason of which abuse . . Nat did, on the [same] day . . die; and so . . Wilson and McMorris . . Nat . . did . . murder. Wilson alone was put upon trial. . . The jury found the defendant not guilty of murder, but guilty of cruel treatment, and assessed the fine at $2,000. There was a judgment for the fine and to commit the accused until it be paid. The defendant moved to set aside the verdict . . [242] and arrest the judgment. . . overruled,"

[246] "The judgment is reversed, and the appellant discharged." "However unwilling we may be to . . arrest a judgment inflicting a penalty however inadequate . . we know of no warrant in the law to impose a pecuniary penalty on trial of a charge for murder." [Donley, J.]

[1] O. and W. Dig., Arts. 1869-1872.
[2] *Ibid.,* Art. 1870.

Warren (a freedman) v. State, 29 Tex. 369, January 1867. [371] "Perhaps it ought to be recorded, in favor of humanity, that under the slave code . . it was declared, that 'the confession of a slave shall never be used in evidence against him when made after . . chastisement . . inflicted or threatened, on account of the offense'[1] . . And it had generally been the rule to exclude all confessions made by a slave after his arrest. In this case, however, the offense was perpetrated when the same rules . . were applicable to the colored and to the white man." [Paschal, Reporter]

Williams v. Arnis, 30 Tex. 37, April 1867. [38] "suit . . on a . . note . . 'Twelve months after date, I promise to pay . . seven hundred dollars, for the hire of three negroes, . . to be paid in current funds. . . [dated] January 1, 1865.' . . [40] defendant . . [answered] that on the 28th June, 1865, said negroes were made free . . [42] the proclamation of President Lincoln declared the slaves in Texas and other rebel States free on the 1st day of January, 1863. They remained in slavery, however, until after the amnesty proclamation of President Johnson, the proclamation of General Gordon Granger, the universal amnesty oaths of the people, and the great practical revolution by which slaves all went free in Texas, in the summer of 1865. . . [43] a witness for the defendant, testified, . . [44] It was a general hiring-day of plaintiff's negroes, . . one of the negroes was hired for $50 in coin. . . The agent . . said he would take confederate money now. . . there was a good deal of grumbling by persons who hired negroes because the words current funds were used." [41] "Verdict and judgment for plaintiff $466 66 principal and $26 96 interest." Affirmed.

Timmins v. Lacy, 30 Tex. 115, April 1867. [117] "The *Reporter* [Paschal] takes this occasion, once again, to repudiate the 'great lie,' that to work was a degradation in the South, . . [118] while slavery had its great evils (and what civilization has not,) no system of property was better adapted to keeping families of deceased fathers together . . It was far more generally distributed than is usually believed. To own few slaves was the rule; many, the exception. Of the [350,000] . . slave-owners in the whole South, . . [160,000] owned from one to three, and . . [100,000] from three to ten. When the humane slaveholder died, (and all small slaveholders, as a rule, worked with their slaves and were humane,) none were so anxious about the children as the faithful slaves. These, with the aid of the widows and children, generally 'worked out the debts,' and the farms went along better than they had with thriftless masters. And among . . the six millions . . unconnected with slavery by ownership, to be busy laborers was the general rule. The 'poor white trash' was more a thing of imagination than reality. Next to the 'great lie,' that the white man never worked in the South, was the shameless one, that the family without slaves had no social or political influence in southern society. . . [119] the shock [of the 'sudden emancipation of four millions of illiterate people'] was a great one, and . . distracted the minds of many, and caused inventions, as to how the labor should be controlled

[1] Pas. Tex. Dig., Art. 3128.

for the benefit of the old masters. Although most men had long felt, few were willing to acknowledge, that slavery was a very expensive institution of [for?] the master. The legislature . . adopted an apprentice law as a remedy" [134] "This proceeding commenced . . by the application of appellant . . to have apprenticed to her . . Elkin Pope . . offspring of . . Sarah Lacy and Harry Pope, born . . while they cohabited as man and wife, having married . . 'after the usual fashion of marriages with slaves.' . . [135] but the connection . . had ceased some ten years before they were emancipated [[126] 'because she had a child by another negro'], and both . . had contracted other marriages," [126] "Harry had been . . long . . separated from . . [his] children . . having been sold . . [but] often visited [them.] . . after the war . . he contracted with Mrs. Timmins to let her keep [them] . . during . . 1866; also . . [127] after giving his [written] consent [signed by his mark] for said children to be apprenticed, he had made a contract . . to let said children remain with her during . . 1867, also . . 1868, if she desired it. That she was to pay . . Harry such price as he . . might think their labor worth" [135] "Elkin . . continued . . under . . control [of his mother] until he was taken by force to the residence of appellant by her son" [128] "with a double-barrelled gun, . . that at the end of . . 1866 . . [he and his brother] went back to their mother, and were again taken away . . January, 1867, under an order from the county court . . The [district] court found that . . the mother, was the natural guardian . . revoked the order of the county court"

Affirmed: [136] "the permitted cohabitation . . did not partake of lawful marriage."

Presley v. State, 30 Tex. 160, April 1867. "The indictment charged, that the accused 'did . . without just provocation, inflict unusual pain . . upon . . a negro slave, . . the property of . . Millings, . . murdering him,' . . The jury found the defendant guilty of cruel treatment, and assessed the fine at $240, for which there was judgment,"

Reversed and the cause dismissed, in accordance with the decision in Wilson *v.* State, p. 314, *supra.*

McLeod v. Board, 30 Tex. 238, April 1867. [240] "1840, . . removed [from South Carolina] to Texas" with their slaves.

Rogers v. Crain, 30 Tex. 284, April 1867. [286] "The witness . . was a practicing physician, and this statement was made to him while visiting . . the slave . . professionally" [285] "The negro woman informed me that she had been suffering from profuse hemorrhage." Held: [287] "admissible, though made by a slave. . . because it forms a part of the *res gestae.*"

Tippett v. Mize, 30 Tex. 361, April 1867. [362] "the administrator sold . . without any order of the probate court, . . Mize . . purchased one of the slaves . . July, 1863 . . The note was for $2,600, . . [363] Jerry had asserted his freedom . . 1st of May, 1865, and had left" Verdict for the defendant.

Judgment thereon affirmed: the sale was void, and [367] "by the act of government, the defendant was deprived of the power of returning the negro,"

Reavis v. Blackshear, 30 Tex. 753, January 1868. "On the first . . of January, 1865, we . . promise to pay . . $200 . . for hire of servant Norry. We also agree to give said girl two summer suits of clothes and one winter suit, consisting of a dress, underskirt, under-garments, sack, two pairs of shoes, and a blanket or quilt, pay doctor's bills, taxes, etc. . . in the currency of the Confederate States,"

Walton v. Cottingham, 30 Tex. 772, January 1868. "The plaintiff proved the warranty of soundness . . 1860, and a physician was called . . two months afterwards, who said she had been diseased (of the womb) . . 'months or years' . . to her injury $400. . . The negro-traders who had owned the girl thought her very healthy."

Barber v. Hail, 31 Tex. 161, April 1868. "The note called for $250, for the hire of a negro woman twelve months, dated 18th January, 1864, due . . 24th of December following. The defendant proved nothing about any promise to receive payment in Confederate money, but did prove that the value of the hire was not over $60. . . The jury found for the amount of the note." Judgment thereon affirmed.

Hall v. Keese and *Dougherty v. Cartwright* (*the Emancipation Proclamation cases*), 31 Tex. 504, October 1868. Geo. W. Paschal, reporter: [509] "These cases, . . in coming ages, will be referred to as a chapter in the history of great events. . . The secession movement was one avowedly in the interest of slavery. Deeper down . . there were motives in the minds of many to establish an absolute . . government. But the great masses had been educated up to the belief that the people in the nineteen states where African slavery did not exist were faithless to their obligations to the constitution, and . . some time . . would manumit all the slaves . . [511] The war came, . . the stone which had been laid as the chief of the corner was dashed to pieces; the fabric fell, and slavery was destroyed. . . Those who had been loudest to proclaim their purpose to perish in the defense of slavery were the first to reach the provost marshal's and the loudest in their responses to the manumission oath. Then they hurried back to contrive some plan to retain the services of those whom they had owned. The negroes stood aghast, not knowing whether most to trust their old masters or their liberators." [526] "In . . [one] case . . the vendor, in January, 1865, sold . . a slave to the vendee, who . . executed a promissory note . . In the other case, a slave, at the same time, was hired for a year, and a promissory note was given in consideration of the hire." [513] "all semblance of authority of the United States was withdrawn from Texas, with the mails, in June, 1861, and . . this condition . . except as to a margin of some counties along the coast, remained, until General Gordon Granger's order of the 19th of June, 1865. . . 'The people of Texas are informed that, in accordance with a proclamation from the executive of the United States, all slaves are free.' . . Practically . . slavery *in fact* continued undisturbed until Gen-

eral Granger's order. Generally it ceased after that time, though there were exceptional cases until the proclamation of the constitutional amendment."

Held: [532] "Until [General Granger's order] . . traffic in slaves was lawful in the local government. The owners . . were divested . . by a *vis major*, . . [533] slavery was not abolished on the 1st day of January, 1863," [531] "The [emancipation] proclamation could not *proprio vigore* liberate the slaves. . . [532] After the proclamation the slaves who were in the federal lines . . and those who . . got within those lines afterwards, were *ipso facto* free, because as mere chattels they thereby became captures in war. As soon as they came under the control of the national forces they as persons became . . freemen, because such was the declared will of that belligerent power, as expressed in the proclamation issued by the commander-in-chief . . by the authorization of congress, . . The liberation went on *pari passu* with the progress of the subjugation" [Lindsay, J.] [526] "The known . . effects of the . . proclamation are sufficient to pronounce it unparalleled as a war measure . . The announcement to the slaves . . caused them to desert their masters by thousands, and, by thus depriving the confederacy of their assistance, and transferring it to the army of the United States, doubly assisted the latter, and . . injured the former." [524] "But its effects were not upon the parties apparently most interested only. . . it was designed to counteract the efforts made by the Confederates in their attempts to enlist the sympathies and material aid in western European nations, then . . equally balanced, or perhaps slightly preponderating to the cause of the rebels, and . . it faithfully performed its mission, . . [525] Two of the first-class nations of Europe had long before abolished slavery . . and the autocrat of the Russias had recently followed their example, . . These nations were estopped . . from giving further . . encouragement to the Confederate States" [524] "By . . [the thirteenth] amendment, not only the slaves of the disloyal, but of the loyal also, were free, . . 18th of December, 1865," [Morrill, C. J.] Latimer, J., concurred; Hamilton and Caldwell, JJ., dissented.

Scherer v. Upton, 31 Tex. 617, January 1869. [618] "the note was given for the hire of a negro for one year, . . the negro ran away and took refuge with his mistress . . in May; . . the mistress and her son refused to deliver him to the hirer." Judgment for plaintiff affirmed.

Algier v. Black, 32 Tex. 168, 1869. "suit . . to set aside a contract made . . August, 1864, . . whereby the parties exchanged . . real estate for slaves." Judgment in favor of plaintiff reversed and the suit dismissed: [169] "As . . the contract was made . . when . . legal, the credulity of the purchaser of the slaves, that they would continue such, . . furnishes no cause of action." [Morrill, C. J.]

Tobler v. Stubblefield, 32 Tex. 188, 1869. "The note [for $525] was executed . . 28th . . of December, 1862, for the hire of two slaves for the year 1863."

McDaniel v. White, 32 Tex. 488, 1870. [489] "suit was brought . . in September, 1865, on a note for $4500, dated . . 1860, . . given for

the purchase money of . . negroes, . . warranted . . slaves for life." Held: [490] "This covenant was only a pledge . . of the legal *status* . . at time of sale,"

Betsy Webster v. Heard, 32 Tex. 685, 1870. Webster's will, dated 1856: [686] "I bequeath to Betsy, my servant, . . all the . . estate belonging to me in . . Galveston . . with all the horses, household furniture, . . and appurtenances . . to be held in trust for . . [her] use, . . by Mrs. E. J. Hardin, . . of Georgia, . . with all the rents, profits . . and debts accruing . . nothing opposing the power granted said trustee, from disposing of said property at the . . request of . . Betsy, . . I hereby manumit . . Betsy," The testator died a few days later and the will was admitted to probate. [687] "In . . 1857, Martha Greenwood, . . of New York [a cousin of Webster], instituted suit . . to contest the validity of the will . . so far at least as the bequests of freedom and property to Betsy were concerned. . . Betsy Webster employed . . Potter and W. P. Ballinger as her attorneys, . . and . . executed . . in consideration . . a conveyance of an undivided third of the property . . confirmed by Mrs. Hardin, . . The suit . . was dismissed [in 1858, and] . . a decree was obtained vesting in Betsy all the property devised to her . . She agreed . . her attorneys . . should take . . [seven] lots . . in part of their . . fee, which was one-third of . . $22,000 worth . . They negotiated a sale . . to . . Heard, . . The object of the [present] suit [instituted in 1866] . . was to annul . . deed to . . [688] Heard, . . impugned it as 'a base fraud' . . She was shown to be a very intelligent, careful and resolute old woman; . . going on eighty . . when this suit was brought." Judgment for the defendant. The plaintiff appealed. W. P. Ballinger, for the appellee: [706] "I look back to the day when it was almost the general professional opinion that she was *not* entitled to freedom or property, . . when to maintain the contrary, required one to face the prejudices of this entire community. I remember . . how faithfully I devoted myself to her cause, . . For what . . injury of her rights am I impeached? It is, that I did not procure . . her forcible extradition from Texas.[1] . . [707] I believed it only necessary if, and when, demanded by the rightful authorities of the State. . . A native . . of Florida—she had lived many years in this city in . . a white cottage embowered amid flowers and orange trees. All her affections clung to this island home, where she had lived with her former master, sustaining, perhaps, relations to him not sanctioned by law, but sanctified by all the sentiments of her nature. She declared . . that she would remain here . . a slave, if it must be so, but . . she would not abandon the home"

Affirmed: [710] "as a court . . decreed Betsy a free woman, . . [711] she was . . free to make a contract conveying her property. . . [As to the] charges of fraud against her attorneys . . we . . believe that no person of less legal ability . . of less influence . . of less legal, political and moral standing . . could have saved for her either the property or freedom devised."[2] [Morrill, C. J.]

[1] Slaves could not be emancipated without being removed beyond the limits of the state. Purvis *v.* Sherrod, p. 287; Hunt *v.* White, p. 307, *supra.*

[2] See Webster *v.* Corbett, *infra.*

Loggins v. Buck, 33 Tex. 113, 1870. [115] " he had allowed . . [the owner's] son to take [a negro hired to defendant] with him in the Confederate army as a servant, in the fall of 1862,"

Betsy Webster v. Corbett, 34 Tex. 263, 1870-71.[1] [264] " The conveyance of Betsy Webster and her trustee, Mrs. Hardin, to Corbett, was dated . . 1859,"

Held: [265] "A person who desired to emancipate his slaves, as the law stood . . 1856, must have provided for sending [them] . . out . . of the State; . . The slave could not go . . by his own free will . . and whilst he remained he could not take either his freedom or any devise . . but an estate devised in trust for his use would vest in the trustee, and there remain *sub modo;* and if, by any means, the slave could get to a free State, . . his right as *cestui que trust* attached, . . [266] The legal title . . is yet in [Mrs. Hardin] . . and she must be made a party . . A court . . might, perhaps, declare the trust executed, now that Betsy Webster has been made . . free . . When the deed to Corbett was made, Betsy Webster was a slave and could not make a deed. Nor does it help the matter that Mrs. Hardin . . joined . . She could not sell . . without an order from a court . . But there is evidence . . that Betsy Webster did receive the purchase money . . and if a jury shall so find, equity requires that she refund . . before she can be entitled to a reconveyance . . The case of Webster *v.* Heard . . is overruled." [Walker, J.]

Shearer v. Smith, 35 Tex. 427, 1871-2. [429] " January 2, A.D. 1863. Six months after a ratification of a treaty of peace between the Confederate States and the United States, I promise to pay . . $2200 . . with twelve per cent. per annum interest from date, payable in current money at that time. The consideration . . being . . man slave . . this day sold "

Bonds v. Foster, 36 Tex. 68, 1871-2. [69] " Foster . . resided in . . Louisiana, and . . was the owner of . . Leah . . [In 1847] he took the woman and several children of hers to . . Ohio, and established them in a home in . . Cincinnati, . . he also emancipated [them.] . . They remained . . four years, Foster spending a portion of each year with them, . . After the expiration . . Foster . . with them removed to . . Texas. . . continued . . habiting themselves as man and wife, . . [70] Leah became the mother of several other children by Foster, . . He not only devised his property mainly to this woman and children, but he provides . . that if Leah shall marry, she is to forfeit all her right " " The District Court adjudged [them] . . to be man and wife, . . and Leah, as the widow, entitled to a homestead."

Affirmed: [69] " By the laws of Ohio, . . the parties may have been legally married, or their conduct may have been such as to raise a legal presumption of a marriage; and if so, their coming to . . Texas . . did not, *per se,* operate a dissolution of the marriage, although, at the time, none of the marital rights . . could have been enforced . . [After] the law prohibiting such a marriage had been abrogated by the 14th Amend-

[1] See same *v.* Heard, *supra.*

ment . . [70] [a] marriage might then be presumed in . . Texas upon the same state of facts, . . [as] in Indiana or Ohio." [Walker, J.]

Morris v. Ranney, 37 Tex. 124, 1872-3. " action on a promissory note made for the hire of slaves after the proclamation of emancipation."

Held: [125] " The plaintiff in error is entitled to a judgment on the note . . whether the negroes were free or not. They performed the services . . but whether the plaintiff in error will hold the money in his own right, or as trustee for the negroes, is . . dependent upon . . whether the negroes were free . . We will not at this time disturb the previous rulings " [1] [Walker, J.]

Honey, Treasurer, v. Clark et al., 37 Tex. 686, 1872-3. [687] " Clark . . died . . in . . 1862. He left . . estate . . value of which . . approximated half a million of dollars. . . the administrators, considering that the estate had escheated, delivered the effects . . to the . . Treasurer of the State, . . This suit was instituted . . 1871 . . The plaintiffs . . claimed to be the children of . . Clark by Sobrina, a negro [[706] ' mulatto '] woman purchased by him . . in . . 1833 or 1834; and they alleged a marriage . . and . . claimed the benefits of the provision of the Constitution of 1869," article 12, section 27. [706] " Sobrina was here as early as 1828 or 1830." [690] " Clark came . . prior to 1830," [688] " witnesses . . introduced by the plaintiffs were nearly all negroes who had belonged to Clark . . Several . . testified that Clark and Sobrina habitually occupied the same bed, and ate at the same table; that Sobrina carried the keys and exercised the authority of mistress of the house. . . [689] that they had heard Clark speak of her as his ' wife,' and of the plaintiffs as his ' children; ' . . white witnesses testified for the defense. . . none . . had ever heard a pretense that they were husband and wife, . . Clark was a man of little or no education, . . He appears to have had no intimates of his own color. . . [697] Anderson testifies: . . ' In 1850, I took the census . . Sobrina [and her children] . . were numbered by Clark as his slaves ' . . Collier states: . . ' Heard him regret that he had never married. The general report . . was, that Clark kept a negro woman . . as men frequently did in those days. No one ever thought . . that they were married,' " [689] " a jury . . found that the . . plaintiffs . . ' are the legitimate children and lawful heirs of . . Clark and Sobrina; that . . Clark and Sobrina were legally married in 1833 or 1834,' " Judgment for the plaintiffs.

Affirmed: [706] " The institution of slavery, after the 11th of October [March], 1827, could not exist by law, until after Texas established her independence and declared herself a slavė state. . . [707] there was no law of Mexico controlling the people of Texas from 1828 to 1837, which prevented the intermarriage of different races. . . [708] she could not legally have married . . after 1837. . . if . . married prior to 1837, no law subsequently passed could have . . dissolved the marriage without the consent of at least one of the parties. But to return to the constitutional question. The section under consideration was intended to legalize

[1] See Hall *v.* Keese, p. 317; Algier *v.* Black, p. 318, *supra.*

the marriage of certain persons . . who, by law, were precluded the rights of matrimony. . . Clark and Sobrina were precisely such persons." [Walker, J.] See Clements *v.* Crawford, p. —, *infra.*

Becht v. Martin, 37 Tex. 719, 1872-3. [727] " In 1840 Peter Martin was the slave of Wiley Martin. . . had come . . with his master before the Revolution [of 1835]; . . [728] his master, being a member of the Texas Congress, obtained a special act, . . approved . . January, 1840. . . was permitted to manumit . . on condition of . . giving a bond in the sum of one thousand dollars, conditioned that Peter should not become a charge upon the republic, . . 1842, Mr. Martin by deed . . manumitted Peter, . . By his will, dated in 1833, . . probated . . 1842, he gave Peter his freedom. . . Peter had, long prior . . connected himself, in such marriage as slaves were permitted to contract, with Judith, . . Peter being . . eighteen . . and Judith but sixteen. They lived together as man and wife up to [his death] 10th . . April, 1863, hiring the time of Judith from her master, . . In 1856, Peter Martin purchased . . [four] lots . . on which he erected houses and other improvements. Supposing . . that he . . could not hold property in his own name,[1] he caused the title . . to be made to . . Ryon, who held the property in trust for him and his heirs. Very shortly before his death, Peter executed an instrument of writing . . 'I . . appoint . . [729] Sullivan my agent . . so soon as my homestead, the title to which is in . . Ryon, . . shall be sold, he shall take charge of the purchase-money . . and pay out . . to my wife, from time to time, such sums as she may need,' . . Ryon deeded the property . . August, 1863, to Sullivan; and Sullivan, on the day following, . . to . . Becht " for $2200 in Confederate money.

Held: [730] " although Judith and her children may have been slaves at the time, on their emancipation they became entitled to the bounty . . the trust became effective for their use. . . The property was sold . . for Confederate money. The sale was illegal; " [Walker, J.]

Lewis v. Nichols, 38 Tex. 54, 1873. [55] " Emancipation reduced the estate to insolvency."

Morgan v. Darragh, 39 Tex. 171, 1873. [173] " suit by Morgan . . 1857, to recover a negro woman. . . [174] Darragh . . brought her to the auction store of Ufford and gave him directions to sell her. . . not sold on . . [that] day . . but on the morning of the following day, she presented herself to the auctioneer in neat, clean clothing, telling him she had come to be sold. . . She was struck off to Morgan at . . $210. He . . took her home and returned . . tendered the money . . to the auctioneer, who refused to accept it; Darragh in the meantime having come . . protested against the sale, and . . angry words, followed by blows, . . passed between Morgan and Darragh. Darragh claims that it was not his intention to have the woman sold, but merely to frighten her into good behavior. It does not appear, however, that he advised Ufford of any such intention," Held: the sale is binding.

[1] But he was [726] " not affected by the act of February 5, 1840,"

Dowell v. Russell, 39 Tex. 400, 1873. [401] "suit . . on a . . note, given June 15, 1865, for the purchase money of a . . negro." Held: "African slavery had been abolished in the United States, and . . negroes were no longer the subject of legal traffic."

Garrett v. Brooks, 41 Tex. 479, 1874. "Suit on . . note . . for $400 gold, . . date April 1, 1865. Brooks pleaded a failure of consideration, and alleged . . that it was executed . . July, 1865, for . . a negro man . . sold as a slave, . . [480] Verdict for defendant."

Judgment thereon affirmed: [482] "Throughout the Confederate States . . [the Emancipation Proclamation] had neither respect nor force, only so far as the success of the federal forces and their occupation of the territory of the Confederate States gave it vitality. The surrender of the trans-Mississippi department . . 27th of May, 1865; the proclamation of President Johnson, May 29, 1865, and the publication of . . 'General Granger's Order No. 3,' dated June 19, 1865, . . may be considered evidences that property in slaves had been abolished . . in Texas. The date of General Granger's order or declaration of the proclamation of Abraham Lincoln has been considered as the definite period from which the destruction of the right to hold slaves in Texas is to be dated." [Devine, J.]

Wilson v. Catchings, 41 Tex. 587, 1874. [588] "Wilson applied . . for letters of administration on the estate of . . Catchings . . who died . . 1873, . . alleged that deceased . . left an estate of about [$6000] . . left no widow . . the court ordered that letters of administration issue to Wilson. On the same day, Sally Catchings filed objections: (1,) because she was the lawful wife" [590] "lived with deceased at the time of his death," Her attorneys filed [588] "a motion to revoke the order . . [589] Wilson filed an answer . . denying that . . [she] was widow . . alleging that she . . had been his slave; that deceased had hired her to accompany him to Texas, and to nurse his son, about 10 . . that deceased had purchased for her 250 acres . . worth [$1500] . . had given her a wagon and pair of mules worth [$500] . . that she . . had been paid in full,"

Castleman v. Sherry, 42 Tex. 59, 1875. "in November, 1864, Goodman delivered . . a negro woman, for which Sherry was to convey . . the tract of land,"

Short v. Abernathy, 42 Tex. 94, 1875. [96] "the notes [amounting to $150] were given [January 1, 1862] for the hire of . . negro man, . . to be paid in good middling cotton, . . well baled, at nine cents per pound, by the 25th of December, 1862, . . defendants offered to prove . . [97] that [they] . . on default of delivering the cotton . . might discharge the debt by paying the amount of the note in Confederate money."

Sorrel v. Clayton, 42 Tex. 188, 1875. In May 1864, [192] "Sorrel had one thousand acres under cultivation, and a hundred slaves . . [193] and the crop was about three hundred bales each year,"

Clements v. Crawford, 42 Tex. 601, 1875. Held: [603] "Section 27, Article 12, of the Constitution [of 1869] . . refers only to those persons who were both precluded, not from intermarriage with each other merely, but from marriage with any one else. Its object was to legitimate the offspring of those whose bondage had disabled them from legal marriage, but who had lived together recognizing each other as husband and wife, until the death of one . . or until the adoption of the Constitution. In the connection of such persons there had been no violation of either law or good morals. . . In so far as the case of Honey *v.* Clark [1] . . is at variance from this interpretation of the Constitution, it may be regarded as overruled." [Gould, J.]

Fitzgerald v. Turner, 43 Tex. 79, 1875. [83] "sold the land [320 acres] . . [in 1847] for a negro woman . . to wait on her;"

Ryan v. Maxey, 43 Tex. 192, 1875. [194] "the balance of the estate, including slaves, was . . in February, 1865, distributed . . acquiesced in by the heirs."

[1] P. 321, *supra.*

KANSAS

INTRODUCTION

I

Only one case appears to be recorded in the Supreme Court of Kansas dealing with slavery and the American Negro, prior to 1875. In that case,[1] it was brought out incidentally that the Kansas Constitution which limited the voting franchise to white males was modified by the fifteenth amendment to the Constitution of the United States, and that the effect of said amendment was to place the colored man on the same basis with the white man in the matter of suffrage. The ballots were rejected, not because the voters were colored, but because the petition failed to allege specifically that the voters had resided in their ward thirty days prior to the day of election, as required by state law.

II

The Topeka Constitution of 1855, the Lecompton Constitution of 1857, the Leavenworth Constitution of 1858, and the Wyandotte Constitution of 1859, all provided for a Supreme Court of three judges.

[1] Anthony *v.* Halderman, 7 Kan. 50 (1871).

Anthony v. Halderman, 7 Kan. 50, January 1871. [60] " This was an action . . to recover the office of mayor . . of Leavenworth, and to oust defendant therefrom. . . [61] Does the petition state facts sufficient to constitute a cause of action? It alleges that at the election . . plaintiff and defendant were the only candidates . . that by the returns of the judges of said election, . . it appeared that 1,453 votes were cast for John A. Halderman, and 1,406 for Daniel R. Anthony, . . that . . a certificate . . was issued to said Halderman, who took the oath of office, and has since been acting as mayor. . . that on . . the day of registration, . . 53 persons, . . ' that each of said persons was . . a free male person, over twenty-one years of age, a citizen of the United States, and had resided in said city more than six months next prior to . . March 30th, and was a colored person of African descent, . . but was, by reason of the premises, a legally qualified voter . . ' [62] It alleges that those ballots should have been received, and if received would have given plaintiff a majority. . . The constitution . . reads: ' Every white male person, . . who shall have resided in Kansas six months next preceding any election, and in the township or ward in which he offers to vote at least thirty days next preceding such election, shall be deemed a qualified elector.' The object and effect of the fifteenth amendment to the federal constitution were to place the colored man in the matter of suffrage on the same basis with the white. . . The colored man, to become a voter, . . must be 21 years of age, . . and 30 days a resident of the township or ward. . . Now, this petition alleges that these persons were over 21 years of age, . . but nowhere alleges that they had resided in the ward in which they offered to vote 30 days prior to such election. . . it fails to show that they were qualified [63] voters, or that they were improperly refused registration, or that their ballots were illegally rejected, . . For this reason the ruling of the court below . . was correct, and should be affirmed."

NEBRASKA

INTRODUCTION

I

The case of Brittle *v.* The People,[1] is the only instance in the annals of the Supreme Court of Nebraska up to 1875 where the negro question formed the basis of a judicial opinion. In that case it was held that a colored man could not lawfully be deprived of the right to sit on a petit jury because the Congress had rejected a proposed state Constitution which limited the voting franchise to white males, and had admitted Nebraska as a state upon the express condition that there should be no denial of the elective franchise, or of any other right, by reason of race or color.

II

Under the Constitution of 1867, the highest court of Nebraska was a Supreme Court of three judges.

[1] 2 Neb. 198.

Brittle v. The People, 2 Neb. 198. No date cited. "The plaintiff in error was indicted . . for burglary; . . the names . . summoned on the regular panel were called, and among them that of Howard W. Crossley, who was a colored man; for which sole reason the defendant challenged him as not competent to sit on a jury. The Court overruled the objection. [199] The trial resulted in a verdict of guilty. . . The ruling upon the challenge of the colored juror is assigned for error."

Held: [204] "Howard [205] Crossley, a colored man, was allowed to sit as one of the jury that returned a verdict of guilty . . Prior to the admission of Nebraska . . none but white males were allowed by the laws of the Territory to sit upon juries. As part of the Act . . admitting the State, it is declared, 'That this act shall not take effect, except upon the fundamental condition, that, within the State of Nebraska, there shall be no denial of the elective franchise, or of any other right, to any person, by reason of race or color, . . Two questions have arisen . . the first . . that the words 'any other right' do not include service on a jury: the second . . that this clause, . . the 'fundamental condition,' . . is not a part of the organic law of the State. . . Nebraska, . . was organized as a Territory . . in . . 1854, . . [206] In April, 1864, Congress passed an enabling act, . . The sentiment . . being opposed, . . to becoming a State, the delegates . . adjourned *sine die.* . . the territorial legislature of 1866 submitted a proposed constitution . . they declared the constitution adopted by a majority of a hundred. . . This constitution, . . limited the right to vote to white males. To this restriction Congress took exception, and, . . passed an act . .' . . for the admission of . . Nebraska . . [207] And be it further enacted, That this act shall not take effect except . . that . . there shall be no denial of the elective franchise, or of any other right, by reason of race or color, . . and . . that the legislature . . shall declare the assent of said State to [this]. . . [209] it is contended that the constitution . . is the one submitted . . when admission was asked, and does not include the fundamental condition . . that Congress was not competent to impose such condition, . . [222] If the rights of the black man are to be assailed, let it be done boldly, . . If the terms proposed by Congress were not acceptable, we had the high privilege of remaining a Territory, and staying out of the Union. But when, . . Congress raised us to the dignity of Statehood; . . it behooves us to keep faith, and abide by the terms of admission. I . . notice the objection . . that the fundamental condition does not include the right to sit upon juries. . . the right to sit upon juries is not a natural right; neither do I believe that the words 'any other right' were used with the purpose of extending only to these. . . it is evident . . that these other [223] rights . . mean rights of the same class,—rights attaching to a

citizen . . because of his relation to the government. . . That jury service is a duty, I admit. That it is a right also, I maintain. . . an honor and distinction as well as the subject of duty. . . To permit a jury of white men to sit in determination of his right to property when assailed by a white man, or his right to life or liberty, when he is regarded as but little better than a brute under the law, is rank injustice. . . [224] there is no right to discriminate because of color. . . then we say that black men shall not sit juries, it is because they are black, and is an insult to the race. . . [225] I conclude, then, that not only does the fundamental condition . . form a part of our organic law, but that the condition extends to the right to sit upon juries. . . judgment . . affirmed." (Crounse, J.; Mason, C. J., dissenting.)

CALIFORNIA

INTRODUCTION

I

The problem of slavery and the American negro at no time attained a position of importance in the history of California. The legislation and the judicial decisions of the state indicate neither the extreme views of the Southern slaveowner nor the idealistic attitude of the Northern abolitionist.

The general tendency was to favor the owner of slaves in disputes involving the matter of property rights, and to favor the white man in criminal cases where testimony of persons other than Caucasians was offered in evidence. Two instances of the former occur In the Matter of Perkins,[1] and *Ex parte* Archy,[2] while there are a number of illustrations of the latter, of which People *v.* Howard,[3] is typical. The case of Archy is an amusing example of the frontier practical viewpoint, but somewhat startling in significance when one realizes that the highest court of California reasoned one way and decided to the contrary merely because it was the first instance of the kind to come before the court.

II

The Constitution of 1849 provided California with a Supreme Court of three judges. Among the constitutional amendments of 1862 was one which increased the number of judges to five.

[1] 2 Cal. 424 (1852).
[2] 9 Cal. 147 (1858).
[3] 17 Cal. 63 (1860).

In the Matter of Perkins, 2 Cal. 424, October 1852. [429] "The petitioners were arrested under . . an act concerning fugitives from labour, . . upon . . evidence that they were slaves by the laws of Mississippi, . . and . . refused to return . . The magistrate . . delivered them to the . . owner, . . A writ of habeas corpus was . . sued out by the prisoners, . . was dismissed upon hearing; . . Application was then made to . . this Court . . for another writ, . . returnable on the first day of the term. . . [430] The statute never contemplated that a judgment upon one writ should be a bar to any further proceeding, . . The first position assumed by the prisoner's counsel, . . is, 'that the power to legislate upon the subject of fugitive slaves belongs exclusively to Congress, and the States have no concurrent power over the subject.' . . This argument is . . predicated upon the decision . . in . . Prigg *v.* The Commonwealth of Pennsylvania, 16 Peters, . . [432] The exclusive power of Congress to legislate . . has long been a fruitful source of political discord; . . [433] The 4th article of the Constitution . . provides: 'A person charged in any State with treason, felony or other crime, who shall flee from justice and be found in another State, shall, . . be delivered up, to be removed to the State having jurisdiction of the crime.' This declaration is . . almost identical with the one concerning fugitive slaves. Yet every State . . notwithstanding Congress has legislated . . has passed laws for the delivery of this class of fugitives. . . [435] To relinquish the right of legislation in every case, . . is to yield up the right of States altogether. . . [436] we are disposed to avail ourselves of this power, . . for the protection of the State from this obnoxious class of population. . . [437] It now remains . . to examine the fourth section, . . as follows: 'Any person . . held to . . service in any State . . who shall refuse to return . . shall be held . . fugitives from labour, . . and all the remedies, . . given to claimants of fugitives, . . are hereby . . conferred . . this section gives no claim to the owner, and vests him with no right except for the deportation of this class of inhabitants. Much embarrassment has been thrown around this case . . under the supposition, that the freedom of the prisoners was to be determined. This Court has no power to decide this question in the present form of proceeding. . . it is . . well established that the States . . may exclude any obnoxious class . . the fact that the Legislature, . . have committed this charge to those who owned these persons as slaves in other States, cannot add to or diminish the unconstitutionality of the act . . [438] The rights of these prisoners to their liberty is as safe in the hands of the Courts of the slaveholding States, as it possibly could be here. . . [439] it is said that slavery is a municipal regulation, . . that slavery was prohibited by . . the Mexican Congress, . . and consequently, slavery was expressly prohibited . . up to the time of the adoption of our State Constitution. . . [440] If the slaveholder possessed any authority to bring his slaves

here under the Constitution of the United States, that right could not be abridged, . . until the admission . . of California . . by Congress. . . [442] the fourth section of this Act assumes to control a certain class of citizens over whom this State has jurisdiction. . . With the wisdom of the law, or the question of slavery, this Court has nothing to do. . . The judgment of the court is, that the writ be dismissed, and that the slaves Robert Perkins, Carter Perkins and Sandy Jones be remanded to jail into the custody of the Sheriff . . and . . delivered to the master . . without delay or cost."

The People v. Hall, 4 Cal. 399, October 1854. "The appellant, a free white citizen . . was convicted of murder upon the testimony of Chinese witnesses. The point . . is the admissibility of such evidence. . . the Act Concerning Civil Cases, provides that no Indian or Negro shall be allowed to testify as a witness in any action or proceeding in which a White person is a party. . . The true point at which we are anxious to arrive, is the legal signification, 'Black, Mulatto, Indian and White person,' and whether the Legislature adopted them as generic terms, or intended to limit their application to specific types of the human species. . . [400] let us proceed to inquire who are excluded . . as witnesses under the term 'Indian.' When Columbus first landed . . he imagined . . that the Island of San Salvador was one of those Islands of the Chinese sea, . . he gave to the Islanders the name of Indians, which appellation was universally adopted, and extended to the aboriginals of the New World, as well as of Asia. From that time, . . the American Indians and the Mongolian, or Asiatic, were regarded as the same type of the human species. . . it will be necessary to go back to the early history of legislation on this subject, our Statute being only a transcript of those of older States. . . [402] We have adverted to these speculations . . showing that the name of Indian, from the time of Columbus to the present day, has been used to designate, not alone the North American Indian, but the . . Mongolian race, and that the name, though first applied probably through mistake, was afterwards continued as appropriate on account of the supposed common origin. . . [404] We are of the opinion that the words 'White,' 'Negro,' 'Mulatto,' 'Indian,' and 'Black person,' wherever they occur in our Constitution and laws, must be taken in their generic sense, and that, even admitting the Indian of this Continent is not of the Mongolian type, that the words 'Black person,' in the 14th section must be taken as contradistinguished from White, and necessarily excludes all races other than the Caucasian. . . The anomolous spectacle of a distinct people, living in our community, . . [405] whose mendacity is proverbial; . . differing in language, opinions, color, and physical conformation; . . and for them is claimed, not only the right to swear away the life of a citizen, but the further privilege of participation with us in administering the affairs of our Government. . . For these reasons, we are of opinion that the testimony was inadmissible. The judgment is reversed."

Ex parte Archy, 9 Cal. 147, January 1858. [161] "The petitioner, Charles A. Stovall, states, substantially, that he is a citizen of the State of

Mississippi; that he is the owner of Archy, a slave, and as such, entitled to his custody; that said slave has escaped . . and is now . . in the city prison of Sacramento; . . and that petitioner desires . . to remove said slave from this state to the State of Mississippi. . . The material facts . . were . . these: The petitioner had been in delicate health for some five years, and, in the spring of 1857, determined to make the trip to California, . . and to bring Archy, . . a family negro servant, . . The petitioner stated that he was going to California for his health; . . that he did not intend to remain . . but a short time, not more than eighteen months, . . The petitioner left his wagon and team in Carson Valley, because his oxen were not in a condition to cross the mountains. . . He and Archy arrived in this city about the 2d day of October last. . . he hired out Archy for upwards of a month. . . The petitioner opened and taught a private school for . . over two months, . . he often stated that it was his intention to return. . . After the petitioner and Archy had been here upwards of two months, the petitioner placed Archy upon one of the river steamers, . . for the purpose of sending him . . to Mississippi, . . The boy having escaped from the boat, the petitioner made affidavit before a justice of the peace, who issued his warrant commanding the officer to arrest Archy and [162] deliver him to the petitioner. . . Archy was arrested by a policeman . . who delivered him to Lansing, chief of police, who . . refuses to deliver him to the petitioner. . . [163] the right of transit through each State, with every species of property known to the Constitution of the United States, . . is secured [164] . . to each citizen, . . It remains, then, to inquire whether the petitioner was a mere traveler through this State. . . [165] The right of transit with slaves through a free State is secured to the owner; . . The traveler must pursue his journey with no unnecessary delay; and to excuse any delay . . something of necessity must exist, such as 'swollen streams, serious sickness in the family, broken wagons, and the like.' . . The question then arises whether the conduct of the petitioner as a traveler comes within the principles laid down. The theory of the petitioner is, that he was compelled to leave his wagon and team . . that he was short of means, . . the excuse alleged does not, in our view, come within the rule. . . [166] there is another important aspect . . to regard the petitioner as a mere visitor for health or pleasure. . . this question . . depends upon . . comity, and not upon constitutional right. . . [167] a citizen of a slave State will scarcely, . . wish to pass through this State with his slave, as a mere traveler, either for business or pleasure. But our position, climate, and productions, all naturally invite our fellow-citizens as visitors. . . this privilege should be confined strictly to mere visitors, and not extended to those who come for both business and pleasure. . . [168] a mere visitor is one who comes only for pleasure or health, and who engages in no business while here, and remains only for a reasonable time. If the party engages in any business himself, or employ his slave in any business, . . then the character of visitor is lost, and his slave is entitled to freedom; and we cannot admit of any exception to this rule, upon the ground of necessity or misfortune. . . [169] It is insisted . . that . . the . . first article of the Constitution of this State—that 'neither slavery nor

involuntary servitude, . . shall ever be tolerated in this State '—is merely directory . . [170] It is difficult to conceive how a negative . . provision . . can be merely directory. . . [171] the petitioner cannot sustain either the character of traveler or visitor. But there are circumstances connected with this particular case that may exempt him from the operation of the rules we have laid down. This is the first case that has occurred under the existing law; . . under these circumstances we are not disposed to rigidly enforce the rule for the first time. But in reference to all future cases, it is our purpose to enforce the rules laid down strictly, according to their true intent and spirit. . . ordered that Archy be forthwith released from the custody of the Chief of Police, and given into the custody of the petitioner, Charles A. Stovall."

People v. Elyea, 14 Cal. 144, October 1859. [145] "The defendant was convicted of murder in the first degree, and the errors assigned relate to the proceedings at the trial. . . The third . . point is, that the Court erred in permitting one Martin to be examined as a witness. It is claimed that he was incompetent under the provisions of our statute . . precluding negroes and indians from testifying either for or against a white person. The objection . . is based upon his color, and the fact that he is a native of Turkey, . . The indicium of color cannot be relied upon as an infallible test . . under the statute. . . [146] The statute itself, after declaring that no black or mulatto person, or indian, shall give evidence, etc. provides that persons having one eighth or more of negro blood, shall be deemed mulattoes, and persons having one half of indian blood, shall be deemed indians, thus rendering impossible the adoption of any rule of exclusion upon the basis of mere color. . . judgment . . affirmed."

Norris v. Harris, 15 Cal. 226, January 1860. [249] "In . . 1853, one Charles L. Dell, . . of Texas, died possessed of real and personal property . . and leaving a widow, Amanda, . . and two children, . . By his last will, . . he gave all his estate, . . to his wife and children, in equal interest . . and invested his wife with the 'sole and entire control' of the whole estate during her life, . . free from the control . . of the Courts . . and appointed her executrix . . and guardian of his children. The will was duly admitted to probate, . . In 1854, the widow . . intermarried with the defendant, Lewis B. Harris, and moved, . . to Sacramento . . In 1856, the plaintiff, . . entered into a contract with the defendants for an exchange of property, by which contract Norris conveyed to Mrs. Harris . . real estate . . [250] the defendants sold to him a number of slaves, . . horses; . . cattle, . . in . . Texas, and constituting part of . . the estate of Dell, . . At the date of these . . instruments, three of the slaves had been sold, . . [251] Norris proceeded to Texas . . and . . became impressed, . . with the conviction that the instrument did not pass a good title to him, and that the property was different, . . from the representations made . . He . . notified the defendants that he rescinded the contract, . . and demanded a restitution . . he instituted the present suit . . various charges are made of fraudulent representation . . none of which are supported by the evidence, . . The other grounds . . are the alleged want of power . . to convey the

property, and the alleged deficiency in the number of slaves, horses, and cattle . . [256] It follows, . . that the bill of sale passed a good . . title . . to Norris; . . three of the slaves . . had been . . sold, . . As to the slaves, the contract is clearly entire. . . [257] As to the horses and cattle, . . provision for compensation . . was provided to meet . . deficiency. . . the sale of the three slaves, and the consequent inability to deliver the whole number, would have that operation as to the item of slaves, were it not for the subsequent . . stipulation . . by which provision was made for the sales which might take place before the news of the transfer to Norris could be received by the agent of the defendants. That stipulation obviates the objection on that ground. . . [258] judgment must be reversed . . and the parties left to determine, by actions at law, their respective claims for . . deficiency."

People v. Howard, 17 Cal. 63, October 1860. [64] "defendant was convicted of the larceny of a gold watch belonging to a person of half negro blood, and the testimony of the negro was offered to establish the fact that the property was taken from him without his knowledge or consent. The question . . is, whether, in a criminal action against a white man, a black person—a mulatto in the present case—is a competent witness, where he is the injured party. . . the fourteenth section provides that 'no black or mulatto person, or Indian, shall be permitted to give evidence in favor of or against any white person.' . . The party injured may testify, in all cases, subject to this exception, that a black or mulatto person shall not be permitted to appear for or against a white person. . . [65] judgment . . reversed,"

Williams v. Young, 17 Cal. 403, January, 1861. [405] "Ejectment for a lot . . and house . . Plaintiff deraigns title through the Sheriff of Shasta county, . . on a judgment in favor of plaintiff against B. B. Young . . husband of defendant. . . [404] Young and wife occupied the premises as a homestead from 1855 until his death, . . and she has continued to occupy them ever since."

Held: [406] "She and her late husband were mulattoes; and the point was made below that the Homestead Act did not apply . . we think there is nothing in it . . If this property was the homestead . . it could not be sold at forced sale; . . if this purchase money . . was a lien on the property before the homestead character attached to it, neither the husband nor the wife could hold . . except in subordination . . the mistake is in supposing that the lien gives . . title; . . The Sheriff merely sells the interest of the defendant when that interest is a leviable estate; . . there must be a proceeding . . a chancery suit to settle the sum due, and have the lien declared and a sale decreed. This does not seem to have been done. Judgment reversed,"

Pleasants v. N. B. & M. R. R. Co., 34 Cal. 586, January 1868. [589] "the female plaintiff, (who is a woman of color,) being desirous to take passage on one of the street cars of defendant, hailed the conductor and requested him to take her on board; that he disregarded her signal and failed to stop, and . . she was unable to get upon the car. . . the Con-

ductor on being urged . . to stop . . for the plaintiff, replied: 'We don't take colored people in the cars;' . . there was ample room for the plaintiff, . . she was provided with . . tickets, . . no proof of any special damage; and the jury . . without any charge from the Court, returned a verdict for the plaintiff for five hundred dollars. . . [590] defendant appeals. . . The damages were excessive. There was no proof of special damage, nor of any malice, . . or violent conduct . . it was not a case for exemplary damages. . . It is unnecessary . . to decide . . whether . . it is necessary to aver . . malice and ill will . . to entitle the plaintiff to give evidence of such malice or ill will. There being no such proof in this case, the Court might well have denied this instruction . . Judgment reversed and . . new trial."

Turner v. N. B. & M. R. R. Co., 34 Cal. 594, January 1868. [596] "The plaintiff sues the defendant, a corporation owning a street railroad in San Francisco, to recover damages for having been ejected from one of the passenger cars of the defendant. . . the plaintiff is a person of color, . . her version . . was, that . . she hailed one of the defendant's cars . . the car stopped; that she . . proceeded to enter the car, and had gotten upon the platform . . when the Conductor put his hand on her breast, and saying to her, 'Madam, you must wait for the next car,' . . pushed her off the car; that she fell backward, and stepped upon her dress [597] . . that the car was only partially filled . . There was no proof that she suffered any personal injury, . . The Conductor . . testified that on being hailed by the plaintiff he stopped the car, and . . told her she had better wait for the next car; . . that she did not get on the . . platform, and he did not lay his hand upon her, and did not know whether she was a white or colored woman. . . the jury found a verdict for the plaintiff for seven hundred and fifty dollars. . . a new trial, . . was denied, . . defendant has appealed."

"We are unable to conceive it possible that a jury free from . . prejudice, upon so trivial a cause of action . . could have found a verdict for so large a sum. . . [599] There was no proof . . to show . . willful injury . . There was not the slightest proof . . to establish any complicity between the Conductor and the company in respect to any . . malicious injury to the plaintiff. . . the refusal of the Conductor to permit the plaintiff to enter the car proceeded purely from his own malice, . . in violation of the express orders of the company, . . if the act of the Conductor was wholly unauthorized, the company is liable for the actual damage, and the Conductor alone for the punitive damages, if any. . . Judgment . . reversed, and . . new trial."

People v. Washington, 36 Cal. 658, January 1869. [659] "The defendant was indicted for . . robbery. The person . . robbed was a Chinaman . . The indictment was found . . upon the testimony of Chinese witnesses, and for that reason counsel . . moved to set it aside. . . it was stipulated . . that the defendant was a mulatto, born within the United States, . . that all the evidence . . was the testimony of Chinese witnesses, . . born . . within the Chinese Empire. . . the indictment was set aside, . . defendant discharged. The case presents . .

the fourteenth section of the statute of this state . . [660] which provides that ' no Indian or person having one half . . of Indian blood, or Mongolian, or Chinese, shall be permitted to give evidence in favor of or against any white person,' as affected by the . . Thirteenth Amendment . . and the first section of the Act of Congress . . 'An Act to protect all persons . . in their civil rights, and . . all persons born in the United States and not subject to any foreign power, . . and such citizens, . . shall have the same right, . . to make and enforce contracts, to sue, be parties and give evidence, . . and to . . equal benefit of all laws . . as is enjoyed by white citizens, . . .'"

[664] " the Thirteenth Amendment was . . intended to make all men born in the United States, . . equal before the law with respect to personal liberty, . . [667] This provision prescribing a uniform rule of evidence . . bears directly upon the great right of personal liberty . . [668] It would be a remarkable anomaly, . . if the National Government, without the Thirteenth Amendment, could confer citizenship on aliens . . irrespective of race or color, and cannot with . . that amendment confer on those of the African race . . all that the Civil Rights Act seeks to give them. . . [670] It assures to all the citizens of any State the civil rights enjoyed by white citizens of the same State; . . it prohibits all discrimination . . on the score of race or color, in respect to their civil rights, but leaves their political rights, . . in the gift of the State, . . Our conclusion is that the portion of the Civil Rights Act now in question— . . was not repugnant to the Constitution of the United States . . and that the fourteenth section of the statute of this state . . so far as it discriminates . . on the score of race or color, . . [671] has, . . become null and void. . . The Fourteenth Amendment goes one step further than the Civil Rights Act, and . . contains a provision . . [672] ' Nor shall any State . . deny to any person within its jurisdiction the equal protection of the laws.' Judgment affirmed." [Rhodes, J.]

Dissenting: " The defendant . . is a negro, . . accused . . of robbing a Chinaman; . . The Court below ruled out the evidence on the ground that the testimony of a Chinaman was not admissible against a negro, . . The statute only disqualifies Indians, Mongolians and Chinese from testifying for or against ' any white person.' . . [673] the argument is that inasmuch as a foreign born Chinaman cannot, . . testify against a white person, ergo, he cannot testify against a native born negro, who, by the Act of Congress, is endowed with precisely the same civil rights that appertain to white persons. . . [674] the Government of the United States is one of limited . . powers, . . the several States . . retain all the mass of powers which a sovereign State can exercise, . . [675] it has been the practice . . for each State, . . to exercise these powers unquestioned, often discriminating between classes of its own citizens, . . [681] The Thirteenth Amendment is entirely silent as to the civil rights of any class of persons, . . [685] All that Congress was authorized to do was to see that the prohibition of slavery was not infringed. . . [687] In my opinion the judgment ought to be reversed." [Crockett and Sprague, JJ.]

Ward v. Flood, 48 Cal. 36, January 1874. [41] " This is an application . . for a writ of [42] mandamus directing the defendant to receive the petitioner . . in the school of which he is the principal. The petition . . is . . Harriet A. Ward, . . says: 'I am the mother of Mary Frances Ward, who is under the age of fourteen . . We are all of African descent . . residents . . of San Francisco, . . by law, and . . custom . . pupils . . have a right to be received . . at the public school nearest their residence, . . The nearest public school . . is . . Broadway Grammar School, . . in charge of Noah F. Flood . . I took . . Mary . . to the said . . School, . . [43] But the said . . Flood, . . politely, but firmly . . declined to entertain the said application, . . assigning, . . the fact that she was a colored person, and that said Board of Education had established and assigned separate schools for such colored persons, . . The answer of the defendant is . . Noah F. Flood, . . admits that he is . . Principal . . [44] that petitioner . . are of African descent, . . but denies that children of African descent have a right to be admitted into any public school . . and denies [45] that he had any right . . to admit her . . but . . avers that . . he acted . . in accordance with the rules and regulations . . one of which is . . 'Sec. 117. . . Children of African or Indian descent shall not be admitted into schools for white children, but separate schools shall be provided for them . .' And . . defendant avers that . . two separate schools . . are provided for colored children, with able and efficient teachers, . . under the same rules and regulations as those provided for . . white children. . . that the lowest grade in said . . School then was . . the sixth grade, into which the petitioner had not received sufficient instruction to enable her to enter; . . And . . that . . Mary . . did not present . . any certificate of transfer, . . [46] The case was submitted . . upon these pleadings . . It is averred in the petition, and admitted in the answer, that the . . School, . . is a graded school."

" It being, . . admitted for the purpose of this motion, that the attainments of the petitioner, . . were not sufficient to entitle her to be admitted in any class, . . it would hardly require an argument to show that the defendant, correctly denied her application to be received as a pupil. . . [48] Upon this view, the application . . must fail. . . But we do not intend to put the decision . . upon this point alone. We will, . . assume . . that the petitioner was sufficiently advanced . . to entitle her to enter some one of the classes . . and, also, that the only ground upon which she was denied admission . . was that she was a child of African descent. . . it is shown . . that . . separate schools . . are in fact maintained for the education of colored children, . . if the statute be itself free from objection . . it is evidently a sufficient authority for the . . rule of the Board . . [49] The argument is that the exclusion of the petitioner . . is contrary to the Thirteenth and Fourteenth Amendments . . We are, . . unable to perceive . . that the State law or the action of the respondent . . are in contravention of the Thirteenth Amendment . . Nor is it perceived that the State law . . is obnoxious to . . the Fourteenth Amendment . . [51] Under the laws of California children . . between . . five and twenty-one years are entitled to receive instruction at the

public schools, and the education thus afforded them is a measure of the protection afforded by law to persons of that condition. . . [52] the policy of separation of the races for educational purposes is adopted by the legislative department, . . [54] 'Conceding, . . that colored persons, . . are entitled . . to equal rights, . . the question then arises whether the regulation . . which provides separate schools for colored children, is a violation of these rights. . . [56] The Committee, . . have come to the conclusion that the good of both classes of school will be best promoted by maintaining the separate primary schools for colored and for white children, . . we cannot say that their decision upon it is not founded on just grounds of reason and experience, . . and honest judgment.' We concur in these views, . . we think proper to add that . . the exclusion of colored children . . cannot be supported, . . [57] except where separate schools are actually maintained for the education of colored children; . . Writ of mandamus denied."

CANADA

INTRODUCTION

I

There are but few slave cases in the Canadian reports. For the history of slavery in Canada in the eighteenth century it is necessary to have recourse to a case in the reports of the Supreme Court of Missouri, a case which came before that court in one form or another, in 1845, 1847, 1857, and 1862: Charlotte *v.* Chouteau. The opinion of the court, delivered by Judge Richardson in 1857,[1] was printed from a transcript certified by the clerk of the court, in the Lower Canada Jurist [2] under the title "Slavery in Lower Canada." As the gist of the controversy was whether slavery existed in Canada in 1768, it seems best to give here at the beginning of the Canadian cases that portion of the opinion which contains the documentary history of slavery in Canada (with Judge Richardson's interpretation of it) and the evidence of two of her eminent judges, omitting most of it from the Missouri section of this volume to avoid repetition.

II

The few cases found in Canadian reports come from various courts. Those of 1811 were heard in the Vice Admiralty Court of Nova Scotia, a court held, after the custom of British colonies, either by the governor as vice-admiral or by an admiralty judge appointed by the Lords of the Admiralty in London. That of 1860 comes from the Court of Queen's Bench of Upper Canada, established by an Act of 1794, with jurisdiction both civil and criminal. The case dated in 1871 comes from the same provincial court, which continued in existence after the Confederation of 1867.

[1] 25 Mo. 465 (466).
[2] Vol. III., p. 257.

Charlotte (of color), respondent v. Chouteau, appellant, 25 Mo. 465. October 1857. [466] " The plaintiff asserts her right to freedom on the ground that her mother, a negress, was born in Montreal, in Lower Canada, about the year 1768, and that her mother was not born a slave, because slavery did not exist in Canada at the time of her birth. On the trial the plaintiff gave parol evidence tending to prove that her mother was born in Montreal about the year 1768, and that slavery did not actually exist and was not tolerated by law at that time in Canada. The defendant, on his part, gave parol evidence tending to prove the actual existence of slavery in Canada in the year 1768; that slaves were recognized as property, and that Rose, the plaintiff's mother, was held and sold as a slave in Canada. The defendant [1] also gave the following documentary evidence: First. The articles of capitulation of the surrender of Montreal by the French to the English forces, signed . . [467] 1760, . . The 47th article is as follows: ' The negroes and panis of both sexes shall remain in their quality of slaves in the possession of the French and Canadians to whom they belong; they shall be at liberty to keep them in their service in the colony or to sell them; and they may also continue to bring them up in the Roman religion.' . . Second. The definitive treaty of peace . . between Great Britain and France . . 1763, . . [468] Third. The proclamation of George III, dated 7th October, 1763. . . [469] Fourth. The act of the British Parliament of 1774, (14 George III, chap. 83,)[2] . . [470] that all his majesty's Canadian subjects within the province of Quebec . . may also hold and enjoy their property and possessions, together with all customs and usages relative thereto, . . in as large, ample, and beneficial manner as if the said proclamation . . had not been made . . and that in all matters of controversy relative to property . . resort shall be had to the laws of Canada. . . Fifth. The act of the British parliament of 1790,[3] . . [471] if any person . . being a subject . . of the territories or countries belonging to the United States of America— shall come from thence . . to any part of the province of Quebec . . for the purpose of residing or settling there, it shall be lawful for any such person . . having first obtained a license . . from the governor, . . to import into the same, in British ships . . any negroes . . free of duty; . . all sales or bargains for the sale of any negro . . so imported, which shall be made within twelve calendar months after the importations of the same (except in cases of the bankruptcy or death of the owner thereof) shall be null and void. . . [472] Sixth. The act of the provincial parliament of Upper Canada, passed July 9th, 1793.[4] The first section of this

[1] The editor of the Jurist is mistaken in calling this an error. Chouteau was the original defendant, though the appellant in this case.
[2] 30 Brit. Stat. at L. 549.
[3] 37 *ibid.* 24.
[4] Rev. Stat. U. C., ch. 8, p. 18.

act recites that it is highly expedient to abolish slavery in the province, so far as the same may gradually be done without violating private property. It then repeals so much of the act of 1790 as enables the governor . . to grant license for the importation of negroes, and forbids any negro or other person subjected to the condition of a slave from coming or being brought into the province after the passage of the act to be subject to the condition of a slave. The second section provides that nothing in the act should be construed to extend to liberate any negro subjected to service, or to discharge him from the possession of his owner, who should have come or been brought into the province in conformity to the conditions of the act of 1790, or should have otherwise come into the possession of any person by gift, bequest or purchase. The third section declares that in order to prevent the continuation of slavery within the province, every child thereafter born of a negro woman who was a slave, should remain with his or her master or mistress until such child should arrive at the age of twenty-five years, and then be free. . . [476] The plaintiff read the depositions of two learned and intelligent witnesses—Judges Reed and Gale—each of whom held high judicial positions for many years in Lower Canada. The former testified that slavery existed in Canada to a certain extent while under the dominion of the French, although he could find no law by which it was introduced prior to the year 1709, when, by an ordinance of the intendant of the colony, permission was given to the colonists to purchase negroes and panis from the Indians, because they would be useful in the cultivation of the soil; that this ordinance would seem to have been made in order to confirm a practice which had previously existed, though there was no law of the French government authorizing slavery in Canada; that it had been doubted whether the intendant or any governor of a particular colony could establish therein such a general principle of public law as slavery; but, he says, 'it is certain, however, that from the time of this ordinance and before, slavery of negroes and panis, as therein stated, had been practiced and was still continued in the colony in 1736, as by an ordinance of Mr. Hoegnart, the then intendant, of the first of September of that year, a form for the emancipation of slaves was established and directed to be observed. So far the existence, if not the legality, of slavery would appear.' He also states that the ordinance of 1736 assumed the legal existence of slavery. Judge Gale, the other witness, in speaking of the ordinance of 1709, says, it declared that it would be useful to the colony to hold negroes and Indians of a distant nation, called panis, as slaves, and therefore the negroes and panis, who had been or might be bought, should be held by the purchasers as their slaves; and that the ordinance of 1736 required masters who emancipated their slaves to do so only by written documents passed before public notaries, and declared other forms of emancipation void. In answer to the question whether slavery of negroes or other persons was recognized and allowed by law in Canada while the country belonged to France, he replied: 'I believe that a modified system of slavery respecting negroes and some others was *de facto* exercised in Canada, in various instances, while the country remained under the French dominion; but I can not undertake to say that such *de facto* exercise of slavery was justifiable

under sufficient legitimate [legislative?] enactment and a correct interpretation of the laws as they then stood.' My opinion [Richardson, J.] is to the contrary. Both these gentlemen prove that slavery existed in Canada from a period at least as early as 1709 to 1760; and though they say there was no act of the French legalizing it, we know that France permitted slavery in her West India colonies, and it can not be supposed that she was ignorant of the state of things in Canada for so long a time. And it may be assumed that slavery existed in Canada under the French rule, not only *de facto* but *de jure*. Slavery existed in nearly all the North American colonies, though no law or royal decree has been found introducing it; but it was permitted, and afterwards sanctioned by laws concerning it, passed by colonial assemblies with the knowledge of the home governments. . . [478] the 47th article [of the articles of capitulation] is not only a clear recognition of the existence of slavery, but of the value of the interests connected with it. Only the most prominent objects seem to have engaged the attention of the retiring governor, for he secures nothing for his master's subjects but their religion and their slaves. . . [479] It is insisted that the royal proclamation of October 7, 1763, had the effect of abolishing slavery in Canada. . . [480] The judges whose testimony we have noticed say that this proclamation introduced into all the colonies mentioned in it the common law of England, and that the genius and spirit of the common law are so hostile to slavery that wherever it is introduced or prevails it operates *ipso facto* to abolish slavery. In 1763 the English acquired—besides Canada—Florida, Dominico, St. Vincent and Tobago, in all which slavery existed; and though the proclamation expressly applied to all, it is well known, and these gentlemen admit, that it did not have the effect of abolishing slavery in Florida and the Grenadas. It is strange that it was potential for the purpose imputed to it in one place and not in the others. . . [481] But . . it is certain that the act of parliament of 1774 repealed so much of the proclamation as related to the laws of England, and enacted that the Canadians within the province of Quebec might 'hold and enjoy their property . . together with all customs and usages relative thereto, . . in as large, ample and beneficial manner as if the said proclamation' had not been made, 'and that in all matters of controversy relative to property . . "resort" should be had to the laws of Canada as the rule for the decision of the same.' The act of 1790 is only consistent with itself on the idea that it assumed the existence of slavery in Canada. The mention of negroes is only in connection with other property which is exempted from the payment of an import duty; and the prohibition on the sale of negroes or furniture, imported under the act within twelve months, was to prevent frauds on the revenue, and it implied that sales of negroes were lawful after the expiration of a year from the time they were [482] imported. It is said that this act was for the benefit of British subjects whose homes were uncomfortable to them in the United States after our independence was achieved. This is doubtless true, but it is hardly probable that out of tenderness to them Parliament would have established in Canada, for their benefit alone, a system of slavery which had never before existed there, and which it is alleged is so repugnant to the genius of the common law. The province of Quebec

was divided into the provinces of Upper and Lower Canada by an order in council August 24, 1791, which took effect 26th of December following. The act of 1793, passed by the parliament of Upper Canada, not only repealed the immigration act of 1799, but provided for the prospective and gradual emancipation of the slaves born thereafter. It assumed that there were other slaves in the province than such as had been imported under the license granted by the act of 1790; for the second section provided that the act should not apply to slaves then in being, who had been brought in under the act of 1790, or to such as had otherwise come to the possession of any person by gift, bequest, or purchase. And if there were no other slaves than such as had been imported under the act of 1790, there was no reason for mentioning them. It is true that this law was the act of Upper Canada, which does not include Montreal; but it was passed very soon after the province of Quebec was divided, and if slaves were lawfully held in the upper part of the province before the division, it must be supposed that the law which permitted it operated uniformly throughout the whole province. The parliament of Upper Canada, at its first session in 1792, introduced the English law, quite as effectually as the king's proclamation could have done it, as the rule of decision in all matters of controversy relative to property and civil rights; and it could not have thought that the common law was effectual to abolish slavery, otherwise there would have been no necessity for the subsequent act of 1793. . . [483] in our opinion, if slavery existed in Canada under the French government, before the English acquired the country, it continued to exist and was lawful until it was abolished; and after a careful examination of the documentary evidence in this cause, and for the reasons which are here hurriedly given, we have arrived at the conclusion which the circuit court announced in the first instruction given for the defendant." [1] [Richardson, J.]

La Merced, Stew. Vice-Adm. N. S. 205, March 1811. [209] "This vessel and cargo are both claimed, as Spanish property, . . The present cargo was shipped at Philadelphia, from whence the vessel sailed upon the 17th of July last for Santa Cruz in Teneriffe, intending to proceed from that island to the coast of Africa to purchase slaves. . . [210] She was built at New York. . . [217] The present voyage . . was a new employment for the vessel, and so hazardous, that it appears that no insurance could be obtained. . . [219] this is a fraudulent transaction, and that the real property is still in Worth, an American citizen, and therefore this vessel is subject to condemnation, as having been engaged in the slave trade. Her cargo does not consist so much of mercantile articles, as of stores and outfit for the slave trade. . . As materially connected therefore with this illegal traffic, and likewise as belonging to the same owner, it must follow the fate of the vessel."

[1] [472] "1. If negro slavery existed by virtue of the laws and ordinances of the French government in Canada prior to the acquisition of that country by the English, and if the articles of capitulation, the treaty of cession, the acts of parliament of 1774 and 1790, and the king's proclamation of 1763, be correct copies of the genuine documents, then negro slavery was sanctioned and permitted by law in the country called the province of Quebec (which includes Montreal) at all times from the year 1760 to the year 1790."

The Severn, Stew. Vice-Adm. N. S. 284, October 1811. "The Master claimed for Nathan Bardine and Samuel Blake, of Bristol, in Rhode Island, in the United States, both ship and cargo; the latter, consisting of 7 or 8 hhds. of tobacco, 1300 gallons of rum, 2 barrels of currant wine, 10 or 15 casks of gunpowder, 8 or 10 casks of butter, 5 or 6 tierces of rice, 30 or 40 half barrels of beef, 2 of pork, 5 or 6 barrels of flour, 5 bales of dry goods, a few boxes of soap and candles, and several shook chests. He swore, 'that he was sent on a trading voyage to the coast of Africa, that he loaded at Bristol, was to proceed to Sierra Leone, and there dispose of as much of the cargo as possible. If not to sell the whole there, he was to proceed with the remainder along the coast of Africa, either to the southward, or the northward, and to barter the remainder with the natives. In return he was ordered to procure by barter from the natives, gum-arabic, ivory, bees'-wax, and other articles; but he was strictly forbidden to have any concern in the trade for slaves or to purchase negroes; and he had no intention whatever to engage in the traffic for slaves.' They had two iron guns (one-pounders) and four muskets, to protect themselves against the natives." Sentence: [285] "The African society has published a report, in which they have described seven characteristic circumstances of a slave voyage. Five of them occur here. There have been found on board a number of small arms, a great quantity of water, rice, and slaves' provisions, mess kits and shackles. The two other circumstances stated in the report, as being often found in such vessels, namely bulk-heads and main-deck gratings, would be unnecessary in a small vessel like the present. It must have been known to merchants, that the slave trade is considered in an unfavorable light. If the vessel was really going for gum, ivory, and the other innocent articles stated, what can account for their having on board so many things peculiar to the slave trade, but totally unnecessary for the other species of commerce? It would be contrary to all reason, and inconsistent with probable suppositions. I consider the fact to be sufficiently proved, and I condemn this vessel and cargo." [Dr. Croke.]

In re John Anderson, 20 U. C. R. 124, November 1860. "The prisoner, John Anderson, having been arrested upon a charge of murder committed in the state of Missouri, a writ of *Habeas Corpus* was granted, upon which he was brought up from the gaol of the county of Brant." [130] "S. B. Freeman, counsel for prisoner, consents that the evidence of Phil, a slave, shall be taken as evidence. Phil, a slave, the property of Frances A. Diggs, widow of Seneca T. P. Diggs, of lawful age, being produced, sworn, and examined, deposeth and saith: 'Next fall will be seven years ago [1853] a negro man came to us, (my master, Seneca T. P. Diggs, and the balance of the negroes,) in my master's field. My master asked him if he had a pass; he said he did not have a pass; master told him he could not let him go clear without a pass. He told my master that a man by the name of Burton raised him: that he now belonged to a man over the river [about thirty-two miles' distance from the residence of Burton] by the name of McDonald: that he had a wife at Mr. Sam Brown's,

[about two miles from Burton's] . . that he was then going to Mr. Givens [about six miles from Brown's, on a farm adjoining Digg's] to get Givens to buy him. Master told him he could not let him go on that way without a pass; that he must go up to the house and eat dinner, and then he would go with him up to Mr. Givens. He told master that his name was Jack. Just before we got to the house the negro broke and ran. Master told us negroes to run after him. We ran after him. Master said we should have the reward [five dollars] if we would catch him. While we was running him he took out his knife. We runned him around a good long while; master would halloo all the while and we would answer him; at last met the negro, and I saw him cut master twice with a knife. I saw him when he run at my master with a knife. While we were running after him he said he would kill us if we came near him. We ran after him some time after he stabbed master, but could not catch him.' Anderson [154] found his way to Upper Canada, where he was recognized and apprehended in the spring of the year 1860. . . [155] although he did profess to Diggs that he was anxious merely to change his master . . that was merely a pretence . . he had in fact escaped from his master, McDonald, and was bent on making his way out of the state, and had come to Howard county for the purpose of communicating with his wife, and arranging with her how she could follow him to Canada; and it was asserted in argument, in corroboration of this, . . that his wife did actually make her escape about the same time, and got to Detroit before himself." Prisoner remanded. Under the Ashburton Treaty of 1842, and under chapter 89 of the Consolidated Statutes of Canada (for giving effect to it), the prisoner was liable to be surrendered.

McLean, J. dissented: [183] "On the grounds, . . that the prisoner was arrested in the first instance on an insufficient complaint, and that he is now detained in custody on a warrant of commitment until discharged by due course of law for an offence committed in a foreign country; and on the further grounds, that the offence stated in the warrant of commitment is not one for which the prisoner is liable to be detained under the provincial act for carrying out the treaty with the United States for the surrender of certain fugitive criminals; and that the evidence, as given before the justice of the peace, is of too vague a character [1] to establish the offence of murder against the prisoner according to the laws

[1] [182] "the identity of the prisoner as the person who stabbed Diggs . . would be established beyond question, if an affidavit taken in Missouri, by a slave of Mrs. Diggs, of the name of Phil, could legally be received in evidence. . . I do not feel at liberty to reject that deposition, if otherwise legally receivable in evidence, because the individual who made it is a slave, and in the state in which it was taken is regarded as a mere chattel, and incapable of giving evidence generally;" but the [183] "affidavit or deposition in question does not come within [the second section of chapter 89 of the Consolidated Statutes] . . It does not profess to be a copy of any original deposition used for the purpose of obtaining a warrant. Indeed it does not appear that any attempt was ever made in Missouri to procure a warrant; but why should there be such an attempt when every white man is at liberty to arrest any coloured man whom he suspects to be a runaway slave. That deposition, then, taken in Missouri, and unsupported even by any testimony that it was ever sworn to, was improperly admitted before the justice of the peace, and though received by consent of counsel I [McLean, J.] think must be rejected, as the case of the prisoner, as it now stands before us, can only be decided on the consideration of such evidence as is strictly legal."

of this province, I am of opinion that the prisoner is now entitled to be discharged for custody."

[193] "Note.—After the decision of this case became known in England, a *Habeas Corpus* was applied for [on the affidavit of Louis Alexis Chamerovzow, secretary of the British and Foreign Anti-Slavery Society] and granted, with some hesitation, by the Court of Queen's Bench there. See 3 L. T. Rep. N. S. 622. Before that writ could be executed in this country, however, the prisoner obtained a similar writ from the Court of Common Pleas here. The case was there rested chiefly upon objections to the warrant of commitment and other proceedings, which were not urged in this application, and that court held these objections fatal, and discharged the prisoner, without giving any decision upon the main question. Much discussion arose in the legal and other journals, both here and in England, as to the jurisdiction of the court at Westminster thus assumed, but the discharge of the prisoner rendered it unnecessary to pursue the question further."

Harris v. Cooper, 31 U. C. R. 182, January 1871. "The plaintiff claimed the land as the eldest son and heir-at-law of John Harris, formerly of Richmond, Virginia, who under the name of George Johnstone, by which name he was known in Canada, purchased the land" in 1847. "George Johnstone was before the year 1833 a citizen of Richmond, Virginia. He was married in or before 1825, and had two or three children. His name there was John Harris; his wife's name was Sarah. They were looked on as married people; he was a slave there; he rented a house in Richmond; he was a painter. The greater portion of his earnings went to his master. His wife earned money by washing, and paid a portion to her mistress. He escaped from slavery in or about 1832 or 1833, and that caused him to change his name. His wife never escaped from slavery; she died at Richmond, but she survived him; . . It was customary for slaves to hire their time from their masters by giving them, say $100 a year. He came here in the spring of 1834, and died in February, 1851, without making a will." William Costello said: "I was present at the marriage in Richmond; his wife's name was Sarah Halloway; she was owned by Major Halloway; the marriage was at his house; they were married by Richard Vaughan, a Baptist minister; he was a free man. There was the same ceremony as any other marriage, but no license; a good many were present, both white and coloured, the house was full; they had a house of their own and had three children; they were considered man and wife by everybody. . . [184] if the master gave a license they would be free; when slaves married there was no license." Philip Anderson said: "I formerly lived in Richmond, Virginia; I knew George Johnstone there, and also in New York and here; . . I heard of the marriage in Virginia; I spoke to him of it; he said that was a slave marriage, what of that; he thought it was not a valid marriage; . . the second woman was a member of the Baptist church; they attended the church as man and wife; he could not be a member of the church in New York and live with a woman who was not his wife; . . I was a slave in Virginia; I did not consider his marriage there good; he and the last wife lived as man and wife here,

and were so considered among the people. I brought my wife from Virginia; she was a free woman, I was a slave; I married her again in New York, to make the former marriage valid; I was bound by Heaven by the first marriage, but not by the law of the land." The "Virginia wife died at Richmond, within the twelve months before April, 1870, and that she was a slave until the fall of Richmond," "she married a man by the name of Brown, after John Harris left her." Peggy Carter said: "I stood bridesmaid at the [first] marriage." Held: [200] "the plaintiff has not proved a full and valid marriage between his parents in the country where it took place, . . I regret, however, that we should be obliged to rest our decision on the recognition of slavery and on its bad code." [Wilson, J.]

JAMAICA

INTRODUCTION

I

Any study of slavery in the English American colonies should include the English colonies in the West Indies. This principle hardly holds after 1783, but down to that date it would be legitimate and instructive to include any cases concerning slavery and the negro which occur in any law reports emanating from the British West Indian islands. It happens that only from the courts of Jamaica have we such printed reports, and those only from one volume, now uncommon, John Grant's *Notes on Cases adjudged in Jamaica* (Edinburgh, 1794), which reports cases of the period extending from 1772 to 1787. The following excerpts have been taken from that book.

The history of slavery and the negro in Jamaica under English rule does not differ materially from the history of slavery and the negro in the Southern states under our Constitution. The English common law, as modified by a good many legislative enactments, was applied in much the same way in Jamaica as it was in our Southern states. The case of Cooke *v.* Bourke [1] illustrates the familiar principle that slaves were personal chattels, but by an act passed by Parliament in 1775, they were placed in the same category as real estate by the provision that slaves could not be devised without three witnesses. The case of Ellis *v.* Tyrell [2] brings out the principle that the slave in Jamaica could be manumised under certain conditions under the act of 5 Geo. IV, c. 21. It was necessary to file a formal application, to publish the same in a newspaper and to pay to the receiver-general the appraisal price of such slave. Thereupon the slave would be declared free by the certificate of the justices. In the case of Pinnock *v.* Newell [3] it was held that it was a violation of law to hide or conceal any slave suspected to be guilty of any capital offense and a penalty of £100 was provided as punishment. The value of information concerning the names and numbers of slaves held by each property owner for purposes of taxation was illustrated by the act of 57 Geo. III, c. 15, which required all the owners of slaves to furnish lists of the same to the clerk of the vestry once in three years and failure to do so was punishable by a fine of £100. The strain of humanity under English law is illustrated by 36 Geo. III, c. 15, which provided that a widow and family of a person of color or a free negro killed in militia duty should be paid a modest annuity.

[1] Grant (Jam.) 166, 1784.
[2] Grant (Jam.) 300, 1786.
[3] Grant (Jam.) 313, 1786.

II

In Jamaica, in the period to which Grant's Notes belong, the highest ordinary common-law court for both civil and criminal cases was the Supreme Court or Grand Court, held by the chief justice, and having jurisdiction corresponding to that of the courts of King's Bench, Common Pleas and Exchequer in England. Chancery courts were held by the governor as chancellor, the vice-admiralty court by an admiralty judge. It was possible to take an appeal from the Supreme Court to the Court of Error, presided over by the governor, in certain instances, and it was possible also in rare cases to appeal from the judgment of the Court of Error to His Majesty in Council. Assize courts were held quarterly in the three counties. Three-fourths of the cases from which excerpts are given in the pages which follow were cases in the Grand Court; the rest were cases in the assize courts, here included on account of their interest, by an exception to the practice followed elsewhere in these volumes, of confining their texts to cases in the highest courts of the respective colonies or states. Grant's volume contains some cases from the Court of Error, but none of them falls within the scope of this series.

Cuniffe v. Hurlock, Grant (Jam.) 8, November 1774. "the defendant's negro grounds encroached a little on the plaintiff's land;"

Cook v. Moffat, Grant (Jam.) 11, March 1775. "The defendant bought several negroes at a Deputy Marshal's sale in 1764, and having paid for them, he took Deputy Marshal Forbes's receipt by way of title; . ."

Stirling v. Miller, Grant (Jam.) 21, March 1776. "a replevin for negroes, devised by John Jones the 26th February 1763, to his wife Anne, in lieu and bar of dower, to his son William, and to his daughter Elizabeth, 'equally among them; and in case of death ensuing without issue, . . to the survivors [22] or survivor, their and his heirs for ever.' . . The plaintiff's title was for a third under the will of Jones, and the partition in right of his wife Elizabeth; and a deed from William Jones, dated 26th January 1773, for 26 negroes, devised by his father's will, and which survived to him in consequence of his mother's death: . . Consideration, 5 *s.*"

Cuming v. Walker, Grant (Jam.) 27, November 1776. "the execution had been returned levied on a negro, or a horse, as is almost invariably the case"

Reid v. Reid, Grant (Jam.) 27, November 1776. [28] "Mrs. Reid the plaintiff, was to accept of L. 1200 . . in lieu of these negroes devised to her, of dower, and of all claims whatever on her late husband's estate;"

Rex v. Fell, Grant (Jam.) 29, February 1777. "This is a remarkable case of an indictment against a white man, for beating a negro slave, and for taking from him a piece of meat, bought in the public market for his master, Mr. Welch. The facts were proved by white witnesses, with many circumstances of aggravation. . . it was questioned, Whether an indictment could lie in the case of a slave? The affirmative was satisfactorily established. Fell was convicted; and though a refractory turbulent man, on account of his poverty, fined only L. 20. Mr. Pinnock (formerly Chief Justice) told me after this trial, that he remembered two attempts of the same kind which had failed."

Stirling v. Littlejohn, Grant (Jam.) 35, June 1777. "Littlejohn had purchased at public sale the remainder of the lease [of forty negroes],"

Barrit v. Lousada, Grant (Jam.) 39, February 1778. "The replevin was brought for Judy and her child Shantee, Rosanna, and her child Cotta. . . Simon Booth senior, by deeds of conveyance and reconveyance in 1743, conveyed his estate in trust for Samuel Booth and Simon Booth junior with cross remainders. Samuel Booth was the father of Mrs. Barret [*sic*] heir in tail, and she married the plaintiff about the age of fourteen. Samuel Booth executed a mortgage in fee to his brother Simon Booth junior . .

[45] and the negroes were sold to satisfy this debt; and George Booth purchased them of a Deputy Marshal, under a writ of venditioni . . in 1763; and Booth sold them to the defendant['s Father]" [1]

[41] Held: "that [the] estate tail is *barred*; that the mortgage *in fee* operates as a *fine* and *recovery*;"

Rex v. Jones, Grant (Jam.) 45, June 1778. "an indictment at the instance of Mr. Harrison against John Jones, (Mr. Kemys's overseer), for an assault and battery on a negro slave named Neptune, a watchman at Mr. Harrison's mountain. . . It appeared in evidence, that Neptune having been found by Jones at Mr. Kemys's watchman's hut, about nine o'clock at night, he forced a cutlass from the negro, and cut him with it through the ear to the pericranium, (as Dr. Brodbelt proved), and afterwards dragged him to his house (the traverser's), where he flogged him. Mr. Harrison and Mr. Kemys's plantain-walks were contiguous, or so near each other, that the former's watchman must, to go along the common road, pass the hut of Mr. Kemys's watchman. It was intimated, that Mr. Kemys's watchman had, some time before, been flogged by Mr. Harrison; but no proof of it was brought. But, on the whole, there seemed to be bad neighbourhood between the proprietors. The case of Rex versus Fell, (p. 29.) and Rex versus Davis, were cited, to show that an indictment lies in the case of a slave for beating and wounding. So the Court held the law to be; yet the jury, governed probably by the generally received notions of slavery, returned their verdict *not guilty*. . . As I recollect [the case of Rex and Davis] it was for cutting off an ear, under some written law, and the traverser appeared to have acted otherwise barbarously, which doubtless weighed against him with the jury."

Rex v. Watson, Grant (Jam.) 48, March 1779. "a note of L. 400 . . had been offered to him for new negroes . . Aguilar . . would have taken it, had he had negroes for sale at the time,"

Rex v. Williams, Grant (Jam.) 50, March 1779. [51] "The writ [of escheat] was brought for Moreland estate, together with 239 slaves, also the mules, horses, cattle, and plantation, implements and utensils, of which George Williams died seised and possessed without heirs inheritable, being a bastard. . . The traverse set out a will by Williams, dated 24th January 1774, in which he devised his estate in trust . . for the use of his own seven mulatto bastard children, . . On the 13th of April following, he made farther devises and legacies to several natural mulatto daughters; and empowered and directed the trustees, to sell the greater part of his real estate, and to lodge the money for the use of his seven sons in the Bank of England. The Attorney General replied, stating the act of the island in 1761, for preventing exorbitant grants and devises to negroes and their issue; . . Mr. Baker [for the defendants] . . insisted . . that the act of 1761 does not give escheat to the King, only a forfeiture of the surplusage beyond L. 2000 to the heir. That . . some of the legacies

[1] As corrected in the Harvard Law School copy of Grant's Notes, and in that preserved in the Library of the Supreme Court of the United States, in both of which are numerous emendations made evidently by a contemporary of Grant who was thoroughly acquainted with the cases reported.

payable 11, 12, and even 20 years hence, there is no ascertaining that the devise to the mulattoes will exceed what is legal; . . " Mr. Browne *contra*: [53] " till lately negroes were deemed personalty; but an act passed in 1774 requires three witnesses to a de[v]ise of negroes," [56] The demurrer was over-ruled. " Judgment affirmed in error; also on appeal, in England."

Jacobs v. Allan, Grant (Jam.) 71, December 1782. " The plaintiff, a mulatto, made the common affidavit of *possession* three months before in the defendant. Browne objected to his affidavit because a mulatto, and white person affected. But the Court held him competent in this, and (perhaps) some other cases."

Prince v. Watt, Grant (Jam.) 77, February 1783. " covenants for a lease of negroes. It was on the alternative of a sale at the end of a lease, at the price fixed, . . or a re-valuation by two indifferent persons,"

Fearon v. Duke and Duchess of Chandos, Grant (Jam.) 78, February 1783. [79] " the negroes have all along gone with the possession of Hope estate . . the identity [of many][1] of the negroes not being proved, . . as there were several negroes of the same name, partly the old gang, and partly [bought] afterwards . . "

Horlock v. Rainsford, Grant (Jam.) 93, March 1783. " an action to recover rent of negroes hired by the testator,"

Dobson v. Macguire, Grant (Jam.) 97, March 1783. "An action of trespass on the case of an uncommon nature. Some negroes belonging to the plaintiff were hired to an estate, on which the defendant was only a book-keeper. The defendant, on a Sunday, having shot some teel in a pond, called out for some negro that could swim, to fetch the birds, on which Frank, belonging to the plaintiff, presented himself; but the overseer coming up, objected to it as dangerous, and the book-keeper, without saying more, went away in further pursuit of his game; but the negro, from his own eagerness, it should seem, went into the pond, and was drowned. Verdict, Not guilty."

Haughton v. Anderson, Grant (Jam.) 98, March 1783. " an action of trespass, brought by the proprietors of Orange Cove estate, against the overseer, for taking with him in a canoe two slaves to go a-fishing on Sunday, by which they were taken, and carried away by a privateer belonging to the enemy. . . pickeroons very much infested the coast then, and for some time before; that it was Mr. Haughton's general orders, not to suffer the negroes to fish on Sundays, but to keep them in their grounds, . . that there were fishermen for that particular purpose on the estate, when Mr. Haughton wanted to have the stein [sein] [1] at any time drawn. For the defendant it was urged, that it was impossible to prevent the negroes entirely; for that they frequently stole out in spite of what could be done. . . that one of these slaves was going by himself to fish in a canoe before the overseer applied to him; . . he hired them at three bits

[1] Emendation in the Harvard copy.

each, . . in replevin, negroes must be named, though not horses and cattle; . . [99] The jury . . found the defendant guilty, and gave a verdict for L. 200 damages."

Practice, Grant (Jam.) 99, March 1783. "Mr. Baker made a motion to bring up a negro-slave, suggesting that he was committed by a magistrate as a runaway, while attending a gentleman to whom he had been lent . . The Court refused to take cognisance of the matter in this uncommon way;"

Clarke v. Crowder, Grant (Jam.) 99, March 1783. "replevin brought for a negro-boy . . whom he had delivered up to Crowder, in consequence of a prosecution on the inveigling act some months ago, rather than abide the event of a trial. His title was under a bill of sale from Kelly Deputy Marshal, which, on the evidence, savoured strongly of collusion; as it was made at his office, instead of a tavern, which was the usual place, . . [100] it was not advertised, another suspicious circumstance."

Davis v. Kirton, Grant (Jam.) 105, May 1783. "A replevin for a negro who went in a vessel to Pensacola, and being there put in gaol as a runaway, he was, after a year and day, sold by the Provost Marshal for fees, and bought by the defendant. Verdict, Defendant guilty."

Rex v. Jacobs, Grant (Jam.) 106, May 1783. "This was an indictment against a free mulatto man, for violently assaulting Blancheflower a Deputy Marshal's deputy, while he was endeavouring to make a levy on the defendant's negroes about two o'clock in the morning, after he had entered a gate found open. The first count was for an assault with a cutlass, with an intent to kill; the second, for a common assault. The jury found him guilty on the second count. The Court committed him immediately to the last day of the term, and then fined him L. 20, and ordered him to stand further imprisoned for one month."

Carnes v. Dilworth, Grant (Jam.) 107, May 1783. "Mr. Baker, for the defendants, cited a treatise compiled by Wyscott, a broker, to show, that the life of slaves, cattle, etc. is not part of an insurance-risk."

Ireland v. Redwar, Grant (Jam.) 115, June 1783. "action of replevin for slaves mortgaged to the plaintiff in Barbadoes, but brought to this island by the mortgagor,"

Ellis v. Ellis, Grant (Jam.) 116, June 1783. "Old Ellis of Port Royal, by will, gave power to his widow, by her own will, to make distribution among their children of the negroes of which he died possessed."

Rex v. Sleater, D. M., Grant (Jam.) 123, September 1783. "an indictment against a Deputy Marshal . . for refusing to execute two slaves condemned in a court of magistrates and freeholders; . . [124] The defence set up was, that there was no established gaol in St. Ann's, but only a place hired by the Deputy Marshal for debtors and slaves: That the magistrate should have sent the felons mentioned to the county-gaol in Spanish-town, (which in fact he was obliged to do to prevent a failure in justice, at considerable expence and trouble) . . Three justices of St. Mary's proved, that the execution of slaves in that parish is usually done

by constables, but sometimes by the Deputy Marshals. This is accounted for: The Deputy Marshal is seldom in that parish, and is resident at St. Ann's bay, another part of his precinct. Balfour, Deputy Marshal of Trelawny and St. James's, swore, that he had formerly refused to execute slaves on a warrant from Magistrates, but, on taking advice, has since always complied when required. The jury found the traverser guilty; and the Court reprimanded him, his conduct to the Magistrates appearing very contumacious and offensive; but as this was the first complaint, and as he had in other respects always demeaned himself like a good officer, he was fined only L. 20."

Todd v. Sinclair, Grant (Jam.) 126, October 1783. Todd bought the sloop "at the Musquito Shore, . . and employed white carpenters to repair her,"

Rex to the Custos, etc. of Kingston, Grant (Jam.) 130, December 1783. "Proceedings having been removed by *certiorari* from the quarter-sessions, a motion was now made to quash them: 1st, Because Mary White, a quadron [*sic*], a free woman in the limited and ordinary acceptation, had been admitted to give evidence on an indictment against Ann Tingley and Frances Scott, who had a special act of privileges in 1773 made in their favour. . . The Court taking into consideration act 153. together with the private act giving special privileges to Tingley and Scott, were of opinion there was sufficient ground to quash."

Blair v. Murphy, Grant (Jam.) 134, December 1783. "in 1777 Mr. Blair's attorney had a small opening made on the land, [in the middle of woodland, without survey or notice to the neighbours,] and put a negro on it to keep possession. The negro was driven off some months after by the party from whom the defendant claims;"

Moor v. Cuniffe, Grant (Jam.) 137, January 1784. The defendant "pleaded an usurious consideration, and showed that Norman the intestate lent the money at an interest of 12 *per cent.* For the plaintiff it was said, that the interest was not strictly such, but a rent for slaves."

Rex to the Custos, etc. of Kingston, Grant (Jam.) 139, February 1784. "proceedings on the inveigling act against Samuel Barton, a captain in one of the corps of people of colour, . . [140] justification as recruiting officer was rejected."

Brown v. Minot, Grant (Jam.) 142, April 1784. "In a replevin for a negro named Goliah, alias Sampson, though he had been called Sampson for a long time except by negroes, who called him Goliah; and though it was proved that Cr[o]mpton,[1] [143] who mortgaged him in 1766, had two negroes named Goliah and Sampson, one of whom, supposed to be Goliah, had hanged himself, yet the jury, on evidence of the identity, (not very clear), found the defendant guilty, taking the negro to be Goliah; and the Court were satisfied with the verdict."

Rex v. Price and Hoffman, Grant (Jam.) 143, May 1784. "These men were indicted for feloniously taking from two negroes two baskets con-

[1] Emendation in the Harvard and Sup. Ct. copies.

taining roots and vegetables, the property of Robert Goutie, of the value of 40 or 50 shillings. No [144] white person was present when they robbed the negroes; but they were convicted on circumstantial evidence of two men who detected them on their coming to Kingston, in consequence of the information of the negroes. On the recommendation of the Court, the jury reduced the verdict to petty larceny. The Court sentenced them to be imprisoned for a few days, and to receive each 12 lashes on the bare back in the public market-place."

Rex to the Custos, etc. of St. Andrew, Grant (Jam.) 148, May 1784. "Mr. Redwood moved, on behalf of Mr. Wildman, for a *certiorari* to remove proceedings had before two justices and three freeholders, against a slave on a charge of *obeah,*[1] for which he was condemned to be transported. Application had been before made to me, but I thought it not grantable; and now the Court were of the same opinion. The tendency of such a practice would be dangerous, and repugnant to the whole [tenor of the][2] laws for the government of slaves, and establishing courts for trying them summarily for capital offences. If granted in this instance, application with equal reason might be made, while a rebellion might be raging throughout the country. It seemed to be the first attempt of the kind, and required to be discountenanced."

Cooke v. Bourke, Grant (Jam.) 166, September 1784. "By an act passed in 1775, an administrator is authorised to recover slaves of the intestate. . . slaves were personal chattels till act 38. (yes, as to the payment of debts), and might at all times be devised without three witnesses, till 1773, that an act was made requiring that solemnity. He [counsel] took notice of acts 10. 18. 95. and that passed in 1775, by which seven years possession under a deed gives title;" The Court: "though, previous to act 38, slaves seem to have been deemed personalty, yet act 39. declares them realty. Under the words of act 38. sec. 44. a toll is made good 'if the seller is lawfully authorised to sell or dispose of such slave or slaves;'"

Home v. Carhampton, Grant (Jam.) 168, September 1784. "Mr. Baker moved to quash a writ of enquiry for emblements, . . 3dly, That the jury did not *view* the slaves, works and utensils; . . The Court held, . . Thirdly, The jury had a right to judge on evidence,"

Drummond v. Jopp, Grant (Jam.) 172, October 1784. "An action of trespass for *mesne profits* of a slave recovered in replevin."

St. Pierre v. Skerret, Grant (Jam.) 186, December 1784. "a promissory note, in the words following: 'Bon pour 173,750 livres que nous payerons, etc. valeur reçue en 139 tetes de negres, negresses, negrillons, et negrettes, etc. dont je suis content pour les avoir vu, etc. Au Cape, le 5 ^{me} Julliet 1783. Nous devons la somme, etc. Skerret et Pacoud,' . . Skerret and Pacoud are merchants,"

[1] "The pretended exercise of witchcraft or sorcery, a crime which the new negroes bring with them from Africa, and which does infinite mischief among their fellow-slaves."

[2] Emendation in the Harvard and Sup. Ct. copies.

Smellie v. Grant, Grant (Jam.) 200, April 1785. "An action for funeral expences, also for mourning to servants, and subsistence to slaves of the intestate."

Gutsmer[1] *v. Whiteman,* Grant (Jam.) 211, June 1785. "Mr. Baker moved to discontinue this replevin, on which an *eloignment* was returned on an affidavit of the defendant, stating, that the negro for whom the action is brought is free, and hired by him. To the affidavit a manumission was annexed. The Attorney-General opposed it. The majority of the Court granted the motion. The Chief-Justice *contra,* because this was trying title on affidavit, and that, too, after the action had gone so far as an eloignment. The defendant should have suffered the negro to be replevied in the first instance, and brought *Hom. replegiando*; or perhaps *habeas corpus,* if the case were very clear."

Barry v. Fenn, Grant (Jam.) 226, September 1785. "Rule to show cause why this action should not be discontinued, the defendant being a *slave.* Mr. Glanville said, that on the arrest she gave bail; and he produced the affidavit of William Hurst, to show that by reputation she is *free.* Mr. Baker, *contra,* said, the bail was given by mistake of a free negro, her relation; and he showed, by the affidavit of one Cunah,[1] that she belongs to a Mr. Jenkins; and that one of the plaintiffs acknowledged to *him,* that he knew her to be a slave. The Court was averse to [try][1] freedom in this way; but as, by Cunnah's [*sic*] evidence, the plaintiffs knew she was a slave, the rule was made absolute."

Wedderburn v. Cuthbert, P. M., Grant (Jam.) 236, September 1785. "Colin Campbell and wife, by deed the 15th July 1782, for 10 *s.* consideration, conveyed to the plaintiff Campbelton estate, with the slaves, etc. thereon, for seven years, in trust: . . The trustee to buy new negroes and stock at his discretion, but not to erect new buildings."

Raynger v. White, Grant (Jam.) 271, March 1786. "a bill of sale to the defendant, who bought the negro at vendue, under a distress for the debt of . ."

Parry v. Kemeys, and *Deffell v. Eundem,* Grant (Jam.) 278, March 1786. [279] "he has heard Plantain Garden River estate and the negroes are under mortgage,"

Deffell v. Kemeys, Grant (Jam.) 283, March 1786. "Mr. Kemeys tendered him a list of 59 negroes, which he told him were his property, on Plantain Garden river estate;"

Beckford v. Pinnock, Grant (Jam.) 296, June 1786. "Replevin for two negroes mortgaged by Halsted to the plaintiff's father in 1749. Their names Kent and Cuffee."[1]

Ellis, a Free Black Man v. Tyrell, Grant (Jam.) 300, August 1786. "Assumpsit for money had and received, to recover L. 42, 10 *s.* given to

[1] Emendation in the Harvard and Sup. Ct. copies.

the defendant to buy the freedom of the plaintiff's son from a third person, which however the defendant did not do. It came out in evidence, that in 1763 or 1764, when the money was deposited, the plaintiff himself was not free, William Beckford Ellis who manumised him, having at the time only an equity of redemption; and it was not till 1777 or 1778 that James Borton, who took an assignment of the mortgage by a second conveyance, gave him *legal* freedom. Mr. Attorney-General therefore, on behalf of the defendant, contended for a nonsuit. Mr. Harrison and Mr. Baker, on the other side, argued, that if advantage was meant to be taken of the plaintiff's former slavery, it should have been pleaded in abatement; that a slave is capable of having a *peculium*; (*non constat.*) and that besides there was a recent acknowledgment of the debt since the plaintiff's freedom [301] became complete. . . the defendant about two years ago admitted he had received the money; . . Borton, even before the last manumission, paid hire to the plaintiff as a free man. . . "

" The Court observed to the Jury, that the freedom of the plaintiff being in this case brought under discussion incidentally to defeat a fair and just claim, ought to weigh with them considerably; though in strictness, as Ellis was a slave when the money was advanced, the right of action accrued to his legal owner; and being once so vested, could not, legally speaking, be divested and brought into the plaintiff, merely by the subsequent manumission. There was however something farther; the acknowledgment two years ago, connected with the original honest right, and therefore that the plaintiff was conscientiously entitled to recover. Verdict for the Plaintiff."

Fraser v. Fraser, Grant (Jam.) 301, September 1786. An estate was leased for eleven years " with a covenant, that if the negroes should, at the expiration of the term, exceed the valuation of [at][1] its commencement, the surplus should be paid to the lessee. There was a surplus accordingly, which was ascertained by a revaluation, and a judgment obtained for it "

Macleod v. Fraser, Grant (Jam.) 312, November 1786. [313] " Court. —The negro could not pass to the defendant, not being a new negro, without deed."

Pinnock v. Newell, Grant (Jam.) 313, December 1786. " This was an action brought to recover L. 100 penalty given by act 38. sec. 28. against any person ' who shall hide, conceal, or make away with any slave or slaves suspected to be [314] guilty of any capital offence, and who shall not on demand bring forth the slave or slaves.' A negro named Symon belonging to Mr. Fuller, having with others been sent as a party after runaways, killed a negro named Marcus, belonging to Murmurring Brook, in the possession of Mr. Pinnock . . the defendant [Fuller's overseer] refused to give him [Symon] up, without an order from his employer. Mr. Fuller contended, that his negro should be tried in St. John's, the parish where the offence was committed, and he carried him to the vestry there, and offered to have him tried. Many witnesses were examined;

[1] Emendation in the Harvard and Sup. Ct. copies.

and it appeared, that negroes for crimes in St. John's were sometimes tried there, sometimes in St. Dorothy's, and sometimes in Spanishtown. . . The Jury, without hearing the counsel to the end, found a verdict for the defendant."

Metcalf v. Fouracres, Grant (Jam.) 315, December 1786. "Replevin by a remainder man for a negro slave, who having run away from the tenant for life, (since dead,) was sold by a Deputy Marshal for fees, under the act, No. 91, Vol. III."

Bonnet v. Boscawen, Grant (Jam.) 316, December 1786. "the negroes had been taken on a writ of *venditioni;* that afterwards a Magistrate of St. George's granted a warrant of detainers for felony, and then a warrant to remove them back to St. George's from Kingston, which the gaoler could [not][1] safely obey, and therefore refused. The crime charged was killing the defendant's own cattle, yet he did not prosecute till after they were in custody of the Marshal, from which he inferred that the accusation is a mere colour to defeat the levy."

James Any, a Sambo man v. Edwards, Grant (Jam.) 329, June 1787. "*Homine replegiando.* The plaintiff claimed his freedom under a manumission, dated the 2d December 1751, from Mrs. Rodon, to his mother Mullato Bess. Mr. Bryen Edwards, who happened to be present in Court, and who is only a trustee, disclaimed the defence; but it appeared, that before his arrival, his brother had consented to let his name be used by the party claiming Any as a slave. The question was, Whether he was born before or after the manumission? Of this there was no direct evidence, but the witnesses proved that he had passed as a free man for 30 years; that he had as such been inrolled in the militia, paid taxes, and had even received payment for work as Carpenter, from Mr. Phipps, a former Attorney in the management of Morgan's estate, to which he is now said to appertain as a slave. Verdict, Guilty."

Dixon v. Pinnock, Grant (Jam.) 340, July 1787. Dukins "devised Greenwich plantation, and the negroes belonging to it,"

Bravo v. Douglas, Grant (Jam.) 341, August 1787. "Trespass for mesne profits of a slave recovered by replevin, from December 1785 to February 1787."

Hay v. Durrant, Grant (Jam.) 342, August 1787. "Ejectment on a mortgage from Sarah Durrant . . Mr. Sutherland proved her possessed of the premises from 1774 or 1775 to 1780. He said, he always understood her to be a free mulatto, and the premises were reputed to be her property. Mr. Pinnock, *contra,* objected to the reading of her deed till they proved her freedom, by producing a manumission of herself, or her ancestor. Mr. Browne, *contra.* The defendant having pleaded, and evidence of possession having been allowed to be given, the objection is too late."

Habeas corpora, Grant (Jam.) 344, August 1787. "*Habeas corpora,* to the keeper of the gaol of Kingston, removing hither the bodies of

[1] Emendation in the Harvard and Sup. Ct. copies.

Beneba alias Felicia, alias Mary Anne, and her eight mulatto children. The writ was granted by Mr. Justice Peete, on an affidavit of Edward Peter Sergeant, that these people are free. They were claimed as slaves by William Gale in an action of replevin still depending, to which Sergeant had pleaded, yet he shipped them away to Hispaniola; from whence however, on detection of the fraud, by the Governor of that island, they were sent back to Kingston, and there imprisoned by a warrant from a Justice of the Peace, which was returned by the gaoler as the cause of detention. Mr. Baker and Mr. Redwood contended, that the Magistrate acted without authority, for that he had no right to interfere in the determination of property. They offered to produce evidence of their freedom, which as to three of them, they said was established on *homine replegiando* in 1786. They cited the case of Mr. Anderson, where I discharged, on *habeas corpus,* a negro claimed as a slave by that gentleman.

The Attorney-General, Mr. Pinnock and Mr. Whitehorn, *contra.* The Court cannot go out of the return. The Magistrate was warranted to take them up, as there was an affidavit that they were harboured and concealed by a Mrs. Christian. [345] The presumption of slavery arises from their colour, and slaves are not entitled to the benefit of *habeas corpus.* It was granted in the case of Summerset, because in England slavery is not presumed, nor allowed. Freedom cannot be tried in this way; if they really have a right to it, the proper course is by *homine replegiando.* If they are discharged, as now prayed, Sergeant will be let loose from the rule under the replevin, which he would not have entered into had he considered them to be free. The affidavit of Stanhope shows, that he admitted they were slaves; if not, why did he ship them off? The punishing him by attachment will not restore the plaintiff in replevin to his right. These people are under his management, and his past conduct proves, that he is not to be trusted. Mr. Redwood replied, That their right to be discharged depends on the want of authority in the Magistrate to commit them. Evidence of freedom was produced to the judge, who issued the *habeas corpus*; and he thought it might in some instances lie for a slave.

The Court, consisting of Peete, Henckel, Batty, and the Chief-Justice, held the conduct of the Magistrate under the particular circumstances of this cafe warranted; and that the proper proceeding would be by *homine replegiando.* Motion denied.

September 3. *Homine replegiando* having been brought, Sergeant offered to enter into the usual security; but he was rejected, Mr. Whitehorne and Mr. Pinnock showing, that a letter of his own on the file proved that he designs to quit the island."

Edward v. Saunders, Grant (Jam.) 346, September 1787. "Assumpsit for money lent, and for goods sold and delivered. The plaintiff and the defendant being free people of colour, a black man, named Thomas James, was produced as a witness; [347] but Mr. Redwood objected to his giving evidence, unless he could show his manumission. Mr. Attorney-General called one Cohen, to prove that James was free. He said, his mother has been reputed free for upwards of 23 years, to his knowledge. The Attorney-General insisted, that evidence of freedom for 20 years is suffi-

cient to give title; and therefore, that though there was a manumission, he would not produce it. The Court inclined to this opinion; but before they had so determined, the witness produced the manumission, which removed the objection. Mr. Redwood attempted to prove a partnership between the plaintiff and the defendant in a huckstering shop."

Bonnett[1] *v. Boscawen,* Grant (Jam.) 350, September 1787. "Rule to show cause why the negroes mentioned in this motion should not be delivered over to the Marshal to be sold . . [351] after these negroes were in the possession of the Deputy-Marshal Buchannan, persons in the defendant's service rescued some of them, but they were retaken. A sale of them being advertised, the defendant procured a warrant from a magistrate on a criminal charge of killing his own cattle. The Deputy-Marshal, apprehensive of a second rescue, sent the negroes from St. George's to Kingston gaol. The defendant insisted, they should be tried for the crime, notwithstanding it appeared by his own affidavit that he had before pardoned some of them for the same crime. The magistrate's warrant not extending beyond the parish, Boscawen obtained a *habeas corpus* from Mr. Justice Elphinston for removing them to St. George's; but the gaoler of Kingston not thinking himself at liberty to comply with it, the return was stayed till the discussion of this order.

Mr. Redwood now showed cause. He urged the great inconveniences that would arise, if the sale should precede a trial for the offence with which the negroes stood charged. So circumstanced, they would sell at an undervalue; and whatever price might be given for them, would be lost to the purchaser, should they afterwards be capitally convicted.

Attorney-General *contra.* Humanity requires that Boscawen should not prosecute as owner, because he is interested in their conviction, being entitled to L. 40 for each that is executed. Having formerly forgiven them for similar crimes, it may well be inferred that the present accusation is raised to defeat the levy. If they are really guilty, public justice will not be prevented, by giving its regular course to the civil right of the creditors.

Rule absolute."

Atkinson v. Hannicker, Grant (Jam.) 356, September 1787. "Assumpsit for the labour of negroes employed to clear and *plant* land at L. 10 an acre;"

Ledwich v. Wright, Grant (Jam.) 357, September 1787. "This was a replevin brought by the representative of a mortgagee on Mr. Barrit's pen of Mile Gully, against the collecting constable for St. Elizabeth's, to recover negroes distrained on for taxes. . . [358] The Court observed to the Jury, . . Where an estate lies in two parishes, . . the proprietor gives in . . sometimes where his negro-houses are placed:"

Ogilvie v. Cuthbert, P. M., Grant (Jam.) 359, November 1787. "A private act of the Legislature of Jamaica passed in 1783 . . vesting Three Mile River plantation . . in James Kerr . . and for settling Moor-Park in lieu thereof, . . The act then recites, that Three Mile River having

[1] Emendation in Harvard and Sup. Ct. copies.

been injured by the hurricane in 1780, . . the said Kerr is disposed to sell it, and to substitute Moor-Park, with the slaves, etc. 'now belonging to it, . . [360] And be it enacted by the authority aforesaid, That all and every negro, or other slave or slaves, cattle and stock, as shall from time to time, or at any time or times hearafter [*sic*], be put upon and employed upon the said plantation, or sugar-work called Moor-Park, either by the said James Kerr in his lifetime, or either of the other persons, who, for the time being, shall be entitled to the possession of the said last mentioned estate by virtue of this act, together with the future offspring and increase of the females of such negroes, etc. shall become and remain as part and parcel of the said last mentioned plantation,' "

Rex v. Ripley, Grant (Jam.) 363, December 1787. " Rule to show cause why this writ of escheat, and the inquisition taken thereon, should not be quashed. Three reasons assigned, . . 2d, That all the negroes were not produced to the Jury; . . [364] Act 18. sect. 3; act 99. sect. 6. require the negroes to be present."

Cosens v. Davidson, Grant (Jam.) 365, December 1787. " Case by the proprietor of Sheerness against the overseer of that estate, . . that having negroes, and a place of his own, he had occasionally used for them provisions and utensils belonging to Sheerness, which it was not clear that he duly replaced. He also employed some of the estate's slaves on his own place, without returning adequate labour."

Malcom v. Taylor, Grant (Jam.) 365, December 1787. "Assumpsit . . to recover back a sum of L. 313, 16 *s.* . . for negro hire on Sir John Taylor's [366] estate,"

Richards v. Lutterell, Grant (Jam.) 369, December 1787. " Rule *nisi,* the plaintiff to show cause why the writ of enquiry of emblements, and the inquisition taken thereon, should not be quashed. . . 4th, That the Jury have not valued the hire and use of the slaves and implements,"

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