REPORTS

OF

C A S E S

ARGUED AND DETERMINED

IN THE

Supreme Court of Appeals

OF

VIRGINIA:

WITH SELECT CASES

RELATING CHIEFLY TO POINTS OF PRACTICE,

DECIDED BY THE

SUPERIOR COURT OF CHANCERY FOR THE RICHMOND DISTRICT.

VOL. I.

BY WILLIAM W. HENING AND WILLIAM MUNFORD.

PHILADELPHIA.

1808.

Friday, 7th November.

HUDGINS *against* WRIGHTS.

Where *white* perfons or native American *Indians* or their defcendants in the maternal line are claimed as flaves, the *onus probandi* lies on the claimant; but it is otherwife with respect to native *Africans* and their defcendants, who have been and are now held as slaves.

It seems that no native American Indian could be made a flave under the laws of Virginia, fince the year 1691.

In fuits for freedom, a variance between the evidence and the cafe stated by the plaintiff will not be regarded by the court: but the decision will be according to the rights of the parties, and the cafe made out by the evidence at the trial.

THE appellees, in this case, which was an appeal from the High Court of Chancery, were permitted to sue *in forma pauperis.* The appellant being about to send them out of the state, a writ of *ne exeat* was obtained from the chancellor, on the ground that they were entitled to freedom.—In their bill, they asserted this right as having been descended, in the maternal line, from a free Indian woman; but their genealogy was very imperfectly stated. The time of the birth of the youngest was established by the testimony; and the characteristic features, the complexion, the hair and eyes were proven to have been the same with those of whites. Their genealogy was traced back by the evidence taken in the cause, (though different from that mentioned in the bill) through female ancestors, to an old Indian called *Butterwood Nan*. One of the witnesses who had seen her, describes her as an old *Indian*. Others prove, that her daughter *Hannah*, had long black hair, was of the right Indian copper color, and was generally called an Indian by the neighbors, who said she might recover her freedom if she would sue for it; and all those witnesses deposed that they had often seen Indians. Another witness, *(Robert Temple,)* whose deposition was taken on the part of the appellant, proves that the *father* of *Butterwood Nan* was said to have been an Indian, but he is silent as to her mother.

On the hearing, the late chancellor perceiving from his own view, that the youngest of the appellees was perfectly white, and that there were gradual shades of difference in color between the grandmother, mother, and grand-daughter, (all of whom were before the court;) and considering the evidence in the cause, determined that the appellees were entitled to their freedom; and, moreover, on the ground that freedom is the birth right of every human being, which sentiment is strongly inculcated by the first article of our "political catechism," the bill of rights,—he laid it down as a general position that whenever one person claims to hold another in slavery, the *onus probandi* lies on the claimant.

Randolph, for the appellant. The ground on which the appellees claim their freedom is, that they are lineally descended from a free Indian woman. On the other side it is contended, that they are descended from a negro woman by an Indian. Although the circumstance of their being *white* operated on the mind of the chancellor, who decreed their freedom; yet as the whole of the testimony proved

them to have been descended from a slave, the presumption on which that decree was founded must fail.

Whether they are *white* or not, cannot appear to this court *from the record*. They have asserted their right to freedom on very different grounds; and have not, in their evidence, made out the genealogy stated in their bill.

If they could derive their descent from Indians in the maternal line, still it will be found from the evidence that their female ancestor was brought into this country between the years 1679 and 1705, and under the laws then in force might have been a slave.

Judge TUCKER. Is not that a mistake? The act of 1705, in the clause which respects a free trade with all Indians whatsoever, is a literal transcript from an act of 1691; the title of which is preserved in the edition of 1733.*

Randolph. In all the cases decided by this court on the present question, the act of 1705, has been considered as restricting the right of making slaves of Indians: and those cases are authority with me.

If a *female ancestor* of a person asserting a right to freedom is proved to have been an Indian, it seems incumbent on those who claim such person as a slave to shew that such ancestor, or some female from whom she descended, was brought into Virginia between the years 1679 & 1691, and under circumstances, which according to the laws then in force, created a right to hold her in slavery.

Geo. K. Taylor, for the appellees. This is not a common case of mere *blacks* suing for their freedom; but of persons perfectly *white*. The peculiar circumstances under which the bill was drawn, will readily account for any inaccuracies which may appear in stating the genealogy of the appellees. But would it have been prudent or even necessary to delay the cause, by an amended bill?

He then took a circumstantial view of the evidence, and inferred that it clearly proved the appellees to have descended from an *Indian stock*: all the witnesses deposed to the fact that the female ancestor under whom they claimed, was "of the right Indian copper color," with long black hair; that she was called an Indian in her master's family, and by the neighbors generally, who said she might get her freedom if she would sue for it; and many of them had *often* seen Indians. What more than strong characteristic features would be required to prove a person *white*?

If, in *fact*, the appellees are descended from Indians, it is incumbent on the appellant to prove that they are slaves; the appellees are not bound to prove the contrary.

From the beginning of the world till the year 1679, all Indians were in *fact*, as well as *right*, free persons. In that year an act passed declaring Indian prisoners taken in war to be slaves: and in 1682, another, that Indians sold to us

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* *See Tucker's Black. Vol. 1, part 2, note to Appendix, pa. 47.*

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by neighboring Indians and others trading with us should be slaves. These acts remained in force (till 1691, as supposed by one of the judges, or at farthest,) till 1705, when it has been decided they were repealed.

As *all* Indians were free, except those brought into this country within the periods and under the circumstances just mentioned, the appellant must bring the appellees within those *exceptions* to be entitled to their services as slaves.—Not a case can be shewn from the books, where a person claiming under an exception, must not bring himself within it. This is the law with respect to the act of limitations, and many others.

Having proved the *descent* of the appellees to have been from Indians, as he conceived, he then undertook to prove, from the course of nature, and the early periods at which Indians, unrestrained by a sense of modesty, propagate their species, that the appellees, by *ascent*, could trace their genealogy back to Indians, who must have been bro't into this country since the year 1705.

Randolph in reply. The circumstance of the appellees' being *white*, has been mentioned, more to excite the feelings of the court as *men*, than to address them as *judges*.

In deciding upon the rights of *property*, those rules which have been established, are not to be departed from, because *freedom* is in question. The *allegata et probata* ought surely to be attended to; as the appellant has not had an opportunity of answering the pedigree stated in the bill. But if he were compelled to go into evidence, without regard to the allegations of the bill, he was prepared to shew that the weight of it was with the appellant.

He then endeavored to shew, from the testimony, that the original Indian stock from which the appellees descended, was derived from the *paternal* line. They are bound to prove that they are descended from a free Indian woman. It has been uniformly decided in this court, that the maternal line must be established before the *onus probandi*, is thrown on the other side.

Cur. adv. vult.

Tuesday Nov. 11th, the judges delivered their opinions.

Judge TUCKER.—In this case the paupers claim their freedom as being descended from Indians entitled to their freedom. They have set forth their pedigree in the bill, which the evidence proves to be fallacious. But as there is no Herald's Office in this country, nor even a Register of births for any but white persons, and those Registers are either all lost, or of all records probably the most im-

perfect, our Legislature even in a writ of *Praecipe quod reddat* has very justly dispensed with the old common law precision required in a Writ of Right, and the reason for dispensing with it in the present case is a thousand times stronger. In a claim for freedom, like a claim for money had and received, the plaintiff may well be permitted to make out his case on the trial according to the evidence.

What then is the evidence in this case? Unequivocal proof adduced perhaps by the defendant, that the plaintiffs are in the maternal line descended from Butterwood *Nan* an old *Indian* woman;—that she was 60 years old in the year 1755, or upwards;—that it was always understood as the witness *Robert Temple* says that her *father was an Indian*, though he cautiously avoids saying he knew, or ever heard, who, or what, her mother was. The other witness *Mary Wilkinson*, the only one except *Robert Temple* who had ever seen her, describes her as an *old Indian*: and her testimony is strengthened by that of the other witnesses, who depose that her daughter *Hannah* had long black hair, was of a copper complexion, and generally called an *Indian* among the neighbors;—a circumstance which could not well have happened, if her mother had not had an equal, or perhaps a larger portion of Indian blood in her veins. As the rule *partus sequitur ventrem* obtains in this country, the deposition of *Robert Temple* as to who was reputed to be the *father* of Butterwood Nan, *without noticing her mother*, is totally irrelevant to the cause. It could not serve the complainant, *a fortiori*, it shall not prejudice her. It was, perhaps, intended as a sort of negative pregnant. But it has not even the tythe of that importance in my estimation.

In aid of the other evidence, the chancellor decided upon his own view. This, with the principles laid down in the decree, has been loudly complained of.

As a preliminary to my opinion upon this subject, I shall make a few observations upon the laws of our country, as connected with *natural history*.

From the first settlement of the colony of Virginia to the year 1778, (Oct. Sess.) all negroes, Moors, and mulattoes, except Turks and Moors in amity with Great Britein, bro't into this country by sea, or by land, were SLAVES. And by the uniform declarations of our laws, the descendants of the *females* remain slaves, to this day, unless they can *prove a right* to freedom, by actual emancipation, or by descent in the maternal line from an emancipated female.

By the adjudication of the general court, in the case of *Hannah and others* against *Davis*, April term 1777, all A-

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merican Indians brought into this country since the year 1705, and their descendants in the maternal line are *free.* Similar judgments have been rendered in this court. (a) But I carry the period further back, viz: to the 16th day of April 1691, the commencement of a session of the General Assembly at which an act passed, entituled "*An Act for a free trade with Indians*," the title of which, (chap. 9.) will be found in the edition of 1733, pa. 94: And the enacting clause of which, I have reason to believe is in the very words of the act of 1705, upon which this court have pronounced judgment in the cases referred to. I will here mention those reasons. On the trial of a similar question on the *Eastern* shore, two copies of *Purvis's* edition of the laws of Virginia, were produced, At the end of both was added a manuscript transcript of all the acts of assembly subsequently passed for a series of years; the titles, number of chapters, &c. perfectly agreeing with the titles, number and order in which they are printed in the edition of 1733. In *one* of these copies (both evidently of ancient date, and as I think *both* attested by the *Secretary of the colony*,*) I found the enacting clause in the same precise words, as they stand in the act of 1705. In the other copy, the leaf on which that act must have been transcribed, was with one, or at most two others, *evidently torn out*: probably with a view to hide the act from the scrutinizing eye of a court. I think it highly probable, that at that period, the county courts were furnished with the laws of the colony in this mode; there being at that time no printing presses in Virginia,—*Purvis's* collection being printed in England. I have myself a mutilated copy of the same character and description,—but those in whose possession it had been, had torn out almost an hundred pages at the beginning, and so many at the end as not to leave the act in question, before I became possessed of it. These are my reasons for referring the commencement of the law in question to so remote a period: for the acts of 1705, were like those of 1792, a digest of the former laws of the colony, rather than a new

(a) 1 Wash. 123. *Jenkins* vs. *Tom.* Ibid 239. *Coleman* vs. *Dick* & *Pat.*

* *The* attestation *of these acts was stated from memory. Since delivering the above opinion, I have seen another copy of* Purvis's *collection of the Laws, to which is subjoined a continuation of the acts of Assembly,* in manuscript, *for two succeeding sessions, but not as far down as the act of* 1691. *The acts of each of those sessions are attested by the* Clerk of the Assembly; *which may probably be the case with those to which I have before alluded.*

code.—By an act passed in the year 1679, it was, for the better *encouragement of soldiers*, declared that what *Indian prisoners* should be taken in a war in which the colony was then engaged should be free purchase to the *soldier* taking them. In 1682, it was declared that all servants brought into this country, by sea or land, not being Christians, whether negroes, Moors, mulattoes, or Indians, except Turks and Moors in amity with Great Britain; and all Indians which should thereafter be sold by neighboring Indians or any others trafficking with us, as *slaves*, should be slaves to all intents and purposes. The General Court held, (and I presume this court, consisting nearly of the same judges, have done the same,) that the passing the act authorising a free and open trade for all persons, at all times, and at all places, with *all* Indians whatsoever, did repeal the acts of 1679 and 1682. I concur most heartily in that opinion; referring the commencement of that act to 1691 instead of 1705, for the reasons mentioned. Consequently I draw this conclusion, that all American Indians are *prima facie* FREE: and that where the fact of their nativity and descent, in a *maternal* line, is satisfactorily established, the burthen of proof thereafter lies upon the party claiming to hold them as slaves. To effect which, according to my opinion, he must prove the progenitrix of the party claiming to be free, to have been brought into Virginia, and made a slave between the passage of the act of 1679, and its repeal in 1691.

All *white persons* are and ever have been FREE in this country. If one *evidently white*, be notwithstanding claimed as a slave, the proof lies on the party claiming to make the other his slave.

Though I profess not an intimate acquaintance with the natural history of the human species, I shall add a few words on the subject as connected with the preceding laws.

Nature has stampt upon the African and his descendants two characteristic marks, besides the difference of complexion, which often remain visible long after the characteristic distinction of color either disappears or becomes doubtful; a flat nose and woolly head of hair. The latter of these characteristics disappears the last of all: and so strong an ingredient in the African constitution is this latter character, that it predominates uniformly where the party is in equal degree descended from parents of different complexions, whether white or Indians; giving to the jet black lank hair of the Indian a degree of flexure, which never fails to betray that the party distinguished by it, cannot trace his lineage purely from the race of native Americans. Its operation

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is still more powerful where the mixture happens between persons descended equally from European and African parents. So pointed is this distinction between the natives of Africa and the aborigines of America, that a man might as easily mistake the glossy, jetty cloathing of an American bear for the wool of a black sheep, as the hair of an American Indian for that of an African, or the descendant of an African. Upon these distinctions as connected with our laws, the burthen of proof depends. Upon these distinctions not unfrequently does the evidence given upon trials of such questions depend; as in the present case, where the witnesses concur in assigning to the hair of *Hannah*, the daughter of *Butterwood Nan*, the long, straight, black hair of the native aborigines of this country. That such evidence is both admissible and proper, I cannot doubt. That it may at sometimes be *necessary* for a judge to decide upon his own view, I think the following case will evince.

Suppose three persons, a black or mulatto man or woman with a flat nose and woolly head; a copper-colored person with long jetty black, straight hair; and one with a fair complexion, brown hair, not woolly nor inclining thereto, with a prominent Roman nose, were brought together before a judge upon a writ of *Habeas Corpus*, on the ground of false imprisonment and detention in slavery: that the only evidence which the person detaining them in his custody could produce was an authenticated bill of sale from another person, and that the parties themselves were unable to produce any evidence concerning themselves, whence they came, &c. &c. How must a judge act in such a case? I answer he must judge from his own view. He must discharge the white person and the Indian out of custody, taking surety, if the circumstances of the case should appear to authorise it, that they should not depart the state within a reasonable time, that the holder may have an opportunity of asserting and proving them to be lineally descended in the maternal line from a female African slave; and he must redeliver the black or mulatto person, with the flat nose and woolly hair to the person claiming to hold him or her as a slave, unless the black person or mulatto could procure some person to be bound for him, to produce proof of his descent, in the maternal line, from a *free female ancestor*.—But if no such caution should be required on either side, but the whole case be left with the judge, he must deliver the former out of custody, and permit the latter to remain in slavery, until he could produce proofs of his right to freedom. This case shews my interpretation how far the *onus*

probandi may be shifted from one party to the other: and is, I trust, a sufficient comment upon the case to shew that I do not concur with the chancellor in his reasoning on the operation of the first clause of the Bill of Rights, which was notoriously framed with a cautious eye to this subject, and was meant to embrace the case of free citizens, or aliens only; and not by a side wind to overturn the rights of property, and give freedom to those very people whom we have been compelled from imperious circumstances to retain, generally, in the same state of bondage that they were in at the revolution, in which they had no *concern*, *agency* or *interest*. But notwithstanding this difference of opinion from the chancellor, I heartily concur with him in pronouncing the appellees *absolutely free;* and am therefore of opinion that the decree be affirmed.

Judge ROANE. The distinguishing characteristics of the different species of the human race are so visibly marked, that those species may be readily discriminated from each other by mere inspection only. This, at least, is emphatically true in relation to the negroes, to the Indians of North America, and the European white people. When, however, these races become intermingled, it is difficult, if not impossible, to say from inspection only, which race predominates in the offspring, and certainly impossible to determine whether the descent from a given race has been through the paternal or maternal line. In the case of a *Propositus* of unmixed blood, therefore, I do not see but that the fact may be as well ascertained by the Jury or the Judge, *upon view*, as by the testimony of witnesses, who themselves have no other means of information:—but where an intermixture has taken place in relation to the person in question, this criterion is not infallible; and testimony must be resorted to for the purpose of shewing through what line a descent from a given stock has been deduced; and also to ascertain, perhaps, whether the coloring of the complexion has been derived from a negro or an Indian ancestor.

In the case of a person visibly appearing to be a negro, the presumption is, in this country, that he is a slave, and it is incumbent on him to make out his right to freedom: but in the case of a person visibly appearing to be a white man, or an Indian, the presumption is that he is free, and it is necessary for his adversary to shew that he is a slave.

In the present case it is not and cannot be denied that the appellees have entirely the *appearance* of white people: and how does the appellant attempt to deprive them of the blessing of liberty to which all such persons are entitled? He

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brings *no* testimony to shew that any ancestor in the female line was a *negro* slave or even an *Indian rightfully* held in slavery. Length of time shall not bar the right to freedom of those who, *prima facie*, are free, and whose poverty and oppression, (to say nothing of the rigorous principles of former times on this subject,) has prevented an attempt to assert their rights. But in the case before us, there has been no acquiescence. It is proved that *John*, (a brother of *Hannah*,) brought a suit to recover his freedom ; and that *Hannah* herself made an almost *continual claim* as to her right of freedom, insomuch that she was threatened to be whipped by her master for mentioning the subject. It is also proved by *Francis Temple* (perhaps the brother of *Robert*) that the people in the neighborhood said " that if she would try for her freedom she would get it." This general reputation and opinion of the neighborhood is certainly entitled to *some* credit : it goes to repel the idea that the given female ancester of *Hannah* was a *lawful* slave, it goes to confirm the other strong testimony as to *Hannah's* appearance as an Indian. It is not to be believed but that *some* of the neighbors would have sworn to that concerning which they *all* agreed in opinion ; and, if so, *Hannah* might, on their testimony, have perhaps obtained her freedom, had those times been as just and liberal on the subject of slavery as the present.

No testimony can be more complete and conclusive than that which exists in this cause to shew that *Hannah* had every appearance of an Indian.

That *appearance*, on the principle with which I commenced, will suffice for the claim of her posterity, unless it is opposed by counter-evidence shewing that some *female* ancester of her's was a *negro* slave, or that *she* or some female ancestor, was *lawfully* an Indian slave. As to the first, there is no kind of testimony going to establish it. *Robert Temple* is not only entirely silent as to the color and appearance of the mother of *Nan* the mother of *Hannah*, but also as to that of *Nan* herself. The testimony of this witness, (to say nothing of his probable interest in the question,) is not satisfactory. His memory seems only to serve him so far as the interest of the appellant required. If *Hannah's* grandmother (the mother of *Nan*) were a *negro*, it is impossible that *Hannah* should have had that entire appearance of an Indian which is proved by the witnesses.— If they tell the truth, therefore, *Hannah's* grandmother was not a *negro* slave. This is more especially the case, if the father of *Hannah* were other than an Indian , and it is not

proved nor can be *presumed*, that, in this country, at that time, her father was an Indian: in that case, *Hannah* would have had so little Indian blood in her veins, as not to justify the character of her appearance given by the witnesses. The mother and grandmother of *Hannah* must therefore be taken to have been Indians: but this will not suffice for the appellant unless they (or one of them) be shewn to have been Indian *slaves*.

This court in the case of *Coleman* vs *Dick and Pat*, (*b*) was of opinion that, since the year 1705, no American Indian could be reduced to a state of slavery: and if the act of 1705 had been previously enacted in 1691, as it would seem by the information of the manuscript act given by the judge who preceded me, the epoch on this subject would be carried back to that year; which would completely overreach the date of the birth of old Nan and exclude every *possibility* of doubt on the subject. But, even under the act of 1705, the calculations and inductions of the appellees' counsel have entirely satisfied me that *Nan could not* have been brought into this country *prior* thereto. The chancellor was and we are now in the place of a jury: we have more power than the court had in the case of *Coleman*, vs *Dick and Pat*, who were acting upon a special verdict; and I will not only presume that *Nan*, (if *brought into* this country, which, however, is not shewn to have been the case, was an *American* Indian, but was brought in *posterior* to the year 1705.

(*b*) 1 Wash. 233.

But this is taking a stronger ground than is necessary to sustain the claim of the appellees: the appellant to prevail in this cause must shew, on his part, that *Nan* or some other female ancestor was brought into this country at a time, and under *circumstances*, which created a lawful right, under the then existing laws, to hold her and her posterity in slavery.

As to the variance in this instance between the case made by the evidence, and that stated in the bill, there is nothing in it. The liberality admitted in suits for freedom by this court will certainly justify the appellees in meeting the appellant on the ground *he* has taken, which they contend, and will establish by the judgment of this court, will suffice to justify their claim to freedom.

I am therefore of opinion that the appellées, on these grounds, are entitled to their freedom, and that the decree ought to be affirmed.

Judges FLEMING, CARRINGTON and LYONS President, concurring, the latter delivered the decree of the court as follows:

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"This court, not approving of the chancellor's principles "and reasoning in his decree made in this cause, except so "far as the same relates to white persons and native Ame-"rican Indians, but entirely disapproving thereof, so far as "the same relates to native Africans and their descendants, "who have been and are now held as slaves by the citizens "of this state, and discovering no other error in the said "decree, affirms the same."

THE COMMONWEALTH *against* WALKER'S EX'OR.

The commonwealth is not responsible for the nominal amount of money paid into the Loan-Office in discharge of British debts; but only for its value according to the scale of depreciation.

The scale, in such cases, is to be applied at the time of the payments: not at the date of the governor's receipt for the certificates of those payments.

THOMAS WALKER on the 28th of November, 1777 and 3rd of April 1778, paid into the Loan-Office certain sums of money, and obtained the proper certificates; for which the governor gave him a receipt on the 25th of May, 1779, in discharge of a British debt. After the act of 1796, upon the subject of such payments, his executor applied for certificates for the said sums and interest; but the treasurer insisted upon reducing them by the scale of depreciation of May 1779. This was at first objected to; but as the treasurer persisted, the executor received certificates for the amount according to the scale; expressly declaring, however, that it should not prejudice his claim to the original sums and interest. He afterwards applied to the auditor for a warrant for the difference betwen the sum received and that to which he conceived himself entitled, but was refused it; in consequence of which he appealed to the High Court of Chancery; where it was decreed that the Auditor should issue warrants for the *value* of the sums according to the scale at the times when they were paid into the *Loan Office*; from which decree an appeal was taken to this court.

Attorney General, for the commonwealth. The question to be decided by this court is, whether the scale of depriciation is to be applied at the time the money was *deposited in the Loan Office*, or when it was *paid in discharge of the British debt*, by taking the governor's receipt for that purpose.

It will, indeed, be contended by the counsel on the other side, that the debt ought not to be scaled at all. This is an important question, but it is one on which all men seem to have agreed. During our revolutionary war the property of British subjects, in this state, was sequestered, and by an act passed in 1777, citizens of this commonwealth owing money to a subject of *Great Britain* were allowed to pay it into the Loan Office, taking a certificate in the name of the