

Jeff. 109
General Court of Virginia.

Robin et al.
v.
Hardaway, et al.

April, 1772.

SELECTED TOPICS

Rights of Property of Slaves

[Slave Acquire Money or Property](#)

West Headnotes (1)

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1 **Slaves**  [Who Were Slaves](#)

The act of assembly of 1682, in relation to the sale of Indians as slaves, was repealed by the act of 1705, and not by those of 1684 or 1691.

[1 Case that cites this headnote](#)

****1** These, were several actions of trespass, assault and battery, brought by the plaintiffs against persons who held them in slavery, to try their titles to freedoms. They were descendants of Indian women brought into this country by traders, at several times, between the years 1682 and 1748, and by them sold as slaves under an act of Assembly made in 1682. The question therefore was, when that act was repealed, and whether it ever was?

Attorneys and Law Firms

Mason, for the plaintiffs, first premised an historical state of the several acts of Assembly, which had been made on the subject of Indians, with their causes and effect.

1662, c. 136. Purvis. 96. The first he took notice of was, an act made in the year 1662, entitled 'acts concerning the Indians.' Reciting that the discontents and fears of the English and Indians proceeded, chiefly, from the wrongs done the Indians by the English, which brought on acts of revenge, and, in the end, a general disturbance of the peace, and then enacting, among other things, that the properties of the Indians should be confirmed to them, and their persons so secured, that whoever should take by fraud or force their goods, or injure their persons, should make such satisfaction and suffer such punishment, as if the wrong had been done to an Englishman. And after many other provisions in their favor, it enacts, 'that what Englishman, trader, or other, shall bring in any Indians as servants, and shall assign them over to any other, shall not sell them for slaves, nor for any other time than English of the like ages should serve by act of Assembly;' which by the 98th act of the same session, was till twenty-four years of age, if under sixteen, and if more than sixteen, then five years and no longer. This law he considers from the nature of its provisions to be, what indeed it calls itself, a treaty of peace made by **one** free people with another; and, as proof, that our Assembly then considered themselves as having no rights over the Indians. Nor does the clause, limiting the time of their servitude, prove the contrary; for having, by the preceding parts of the act, put them on a footing with Englishmen, as to other wrongs done their persons or properties, it proceeds in the article of servitude also, to put them into an equal state.

1665, c. 8. Purv. 134. entitled 'an act concerning the Indians' takes from the Indians and lodges in the Governor of Virginia, the power of electing their Warowance, or chief commander. This was the first act of sovereignty assumed by the Assembly, and the ***110** consequence was a war, which appears to have ensued from the recital of the act of

1666, c. 1. Purv. 140. entitled 'an act for a cessation,' which says, the communication between Virginia and Carolina was cut off by a war with the Indians.

1666, c. 8. entitled 'an act concerning Indians,' made at the same session, was never printed, nor is now to be found in the rolls of the house of Burgesses; but its purport was, to make it death for any Indian to come into Henrico county, as appears by the act of

****2** 1671, c. 5. Purv. 174. entitled 'an act repealing the act making it death for Indians coming into Henrico county.' And though this act does not describe the **one** it repeals by its date or chapter, yet Purvis, who compiled about the year 1682, when the law of 1666, c. 8. was probably extant, notes this to have been the law repealed by 1671, c. 5.

1670, c. 12. Purv. 172. 'an act concerning who shall be slaves.' The words of it are, 'whereas some disputes have arisen whether Indians taken in war by any other nation, and by that nation that takes them sold to the English, are servants for life or term of years; it is resolved and enacted, that all servants not being Christians, imported into this country by shipping, shall be slaves for their life time, but what shall come by land shall serve, if boys and girls, until thirty years of age, if men and women, twelve years and no longer.'

1675-6, c. 2. entitled 'an act prohibiting trade with Indians,' recites that they were then engaged 'in a most chargeable and dangerous war' with the Indians, so that the fire kindled by the act of 1665, and other acts of usurped power was not yet extinguished. This act of 1675-6, c. 2. was never printed, but is still extant among the rolls of the house of Burgesses.

1676, c. The Indian slaves when taken

But this as well as the other laws of that session were made by the command and compulsion of the rebel Bacon, who obliged the assembly to declare war against the Indians, and to appoint him general of their forces. All these laws, however, were repealed at the next session by the act of

1676-7, c. 4. Purv. 198. entitled 'an act declaring all the acts, orders or proceedings of a grand Assembly, held at James City in the month of June 1676, void 'null and repealed.'

He then produces a *** of the Assembly from their rolls of February 20, 1676-7, who state it as a reason why they had declined entering into a war with all the Indians, that ***111** only about twenty of them had aggressed, and that it was wrong for the offence of a few to involve whole nations in war. And the use he makes of these several acts is to shew that the war, to effectuate which the subsequent acts were made, was unjust on our part; that we were the aggressors, as the Assembly themselves confess; and have no other excuse for it but the compulsion of Bacon. During the course of this war was made the act of

1679, c. 1. Purv. 229. entitled 'an act for the defence of the country against the incursions of the Indian enemy.' Which after enacting that every forty titheables should set forth **one** man and horse completely armed; that these should form a standing army to proceed on duty, and other things, has these words; 'And for the better encouragement, and more orderly government of the souldiers, that what Indian prisoners or plunders shall be taken in war, shall be free purchase to the souldier taking the same.' In justification of this act, perhaps it will be said, the law of nature allows us to make slaves of captives in war: but that was in the opinion of heathens only. Grotius, Puffendorf, and all the Christian writers on that subject, say, that to justify such a measure, the war must have been just; whereas the present **one** was confessedly not so.

****3** 1680, c. 4. Purv. 257. 'An act for continuation of the several fortifications and garrisons at the heads of the four great rivers,' repeals a part of the act of 1679, to wit, the clause directing that every forty titheables should set forth a soldier, and the number of soldiers to twenty for every fort.

1682, c. 1. Purv. 282. 'An act to repeal a former law, making Indians and others free,' is the

law on which the defendants rely for their title. It recites and repeals the act of 1670, which made temporary servants only of Indians taken in war by other Indians, our neighbors and confederates, as this act calls them, and sold to the English; and then enacts that 'all servants except Turks and Moors, whilst in amity with his Majesty, which from and after the publication of this act, shall be brought or imported into this country, either by sea or land, whether Negroes, Moors, Mulattoes, or Indians, who, and whose parents and native country were not Christians, at the time of the first purchase of such servants by some Christian, although afterwards and before such their importation and bringing into this country, they shall be converted to the Christian faith, and all Indians which shall hereafter be sold by our neighboring Indians, or any other trafficking with us and for slaves, are hereby adjudged, deemed and taken, and shall be adjudged, deemed and taken to be slaves.' This act by making slaves of the Indians taken in war, and sold by our friendly Indians, who ***112** by the act of 1670, were only temporary servants, put such friendly Indians, as to their captures, on a footing with our own soldiers, whose captives were slaves by the act of 1679.

1682, c. 7. 'An act for disbanding the present souldiers in garrison in the forts at the heads of the several rivers?? as also for the raising of other forces in their stead,' repeals the act of 1680; recites that there was now a peace with some of the Indians, and therefore reduces the number of forces, but shews the war continued as to others, by keeping up a part of the forces, and directing their proceedings on the approach of the enemy.

1684, c. 7. Rolls of house of Burgesses. 'An act for the better defence of the country,' expressly repeals the acts of 1679, 1680, and 1682, c. 7, provides other troops for protecting the frontiers, and re-enacts nothing derogatory of the rights of freedom. Then comes the act of

1686, c. 9. Rolls of the house of Burgesses. 'An act repealing the seventh act of Assembly made at James City, the 16th day of April, 1684.' Which after repealing the said act, enacts that 'the souldiers settled by the said law at the heads of the four great rivers shall be disbanded,' and says no more. So that while it takes away the repealing act of 1684, it shews it does not intend to re-establish the acts of 1679, 1680, and 1682, c. 7. by re-enacting matter contradictory to them. Consequently that clause of the act of 1679, which made "the Indians taken in war, free purchase to the souldiers taking the same," was still under repeal. Indeed it could not be otherwise, because there being now no soldiers to take them, no Indians could come within the description.

****4** 1691, c. 9. Rolls of the house of Burgesses. 'An act for a free trade with Indians.' This enacts 'that all former clauses of former acts of Assembly, limiting, restraining, and prohibiting trade with Indians be, and stand hereby repealed, and they are hereby repealed; and that from henceforth there be a free and open trade for all persons, at all times, and at all places, with all Indians whatsoever.'

1705, c. 49. Collection of law in 1733, p. 218. 'An act concerning servants and slaves,' enacts 'that all servants * imported ***113** and brought into this country by sea or land, who were not Christians in their native country, (except Turks and Moors in amity with her Majesty, and others that can make due proof of their being free in England, or any other Christian country, before they were shipped, in order to transportation hither) shall be accounted and be slaves, and as such, be here bought and sold, notwithstanding a conversion to Christianity afterwards.' And it repeals all other acts so far 'as they relate to servants and slaves, or to any matter or thing whatsoever, within the purview of this act.'

Having thus premised the several acts of Assembly, so far as they threw light on this subject, or on **one** another, he observed, that but four of them have imposed servitude or slavery on Indians; to wit,

1662, which makes temporary servants of those brought in as servants by Traders. This was never repealed till 1705.

1670, which makes temporary servants of those taken in war by our friendly Indians. This was expressly repealed by the act of 1682, c. 1.

1679, which makes slaves of those taken in war by our soldiers. This was expressly repealed by the act of 1684. And

1682, c. 1. which made slaves of all Indian servants imported by sea or land, and of all Indians sold as slaves by other Indians trafficking with us. This is the act on which the defendants rely, supposing it to have been in force when the ancestors of the plaintiffs were brought into this country. But on the contrary he proposed to prove,

****5** I. That it was originally void in itself, because it was contrary to natural right.

II. That it was virtually repealed by the act of 1684. If not, yet,

III. It was virtually repealed by the act of 1691. And if by neither of these, then,

IV. It was actually repealed in 1705.

I. He observed that we came to this new world, not called by the invitations, nor provoked by the injuries of its inhabitants. That by force we dispossessed them of the wilds they had inhabited from the creation of the world; which was carrying far enough our violation of their rights. That we did not therefore pretend, in the general, to reduce their persons under our dominion. Of some of them indeed we accepted the subjection; but this was a civil union of the **one** state with the other, not a domestic and ***114** servile submission of individuals to individuals. Accordingly, the freedom of the confederate or united states was secured by solemn treaties. This is the case of our tributary and friendly Indians, whose liberty could not be invaded by any act of Assembly, without committing so fundamental a violation of these treaties, as would dissolve the union or confederacy, and restore them again to their natural Independence. As little could the wars we waged against others of them, justify the reducing the captives to slavery. Because all such wars, whether we or they commenced hostilities, were just on their part, entered into pro aris et focis, to defend from the invasion and encroachments of hostile strangers, that native soil in which the God who made had planted their fathers, and said to them, 'over this thou shalt have dominion.'* So that if we apply these acts of our legislature to the captives from hostile tribes of Indians, they cannot be justified on the rights of war; if to those in amity with us, they are infractions of the federal as well as natural rights of those people. No instance can be produced where even heathens have imposed slavery on a free people, in peace with them. The Indians of every denomination were free, and independent of us; they were not subject to our empire; not represented in our legislature; they derived no protection from our laws, nor could be subjected to their bonds. If natural right, independence, defect of representation, and disavowal of protection, are not sufficient to keep them from the coercion of our laws, on what other principles can we justify our opposition to some late acts of power exercised over us by the British legislature? Yet they only pretended to impose on us a paltry tax in money; we on our free neighbors, the yoke of perpetual slavery. Now all acts of legislature apparently contrary to natural right and justice, are, in our laws, and must be in the nature of things, considered as void. The laws of nature are the laws of God; whose authority can be superseded by no power on earth. A legislature must not obstruct our obedience to him from whose punishments they cannot protect us. All human constitutions which contradict his laws, we are in conscience bound to disobey. Such have been the adjudications of our courts of justice. And cited **8 Co. 118. a.** Bonham's case. Hob. 87; **7 Co. 14. a.** Calvin's case. And so he concluded the act of 1782, originally void, because contrary to natural right and justice.

****6** II. But if this law had possessed any original validity, it would have been repealed, or, which is the same in effect, rendered useless by the act of 1684. The describing words of the act of ***115** 1682, are, 'servants hereafter brought or imported by sea or land, whether Negroes, Moors, Mulattoes, or Indians, and all Indians which shall hereafter be sold by our neighbor Indians, or any other trafficking with us, as and for slaves.' To come within this description, then, they must be servants at the time they are imported or sold by our neighboring Indians as slaves. Now servants they could not be in their own country, for it is notorious there is no such thing as servitude known among any of the Indian tribes. Even their captives in war, they either adopt into their families to supply the place and represent the person of some relation lost in the war, or make them free members of their country, or

kill them. As little could they be servants among our southern neighbors of Carolina; for till the year 1715, they had no slave law there, nor yet in Maryland.

And since they could come to us no other way, it is plain they could not be servants at the time of their coming. Nor must it be supposed the legislature, by the other of the alternative descriptions, 'sold as slaves,' intended to create a servitude which did not exist before; for by these words they mean to include only those who may be legally so sold. We cannot suppose they intended to give their sanction to the sale of an Indian as a slave, whom the person selling had no authority so to sell. It was a daring act of injustice, worse than murder, in the vendor; can we believe the legislature meant to become his accomplices? The question then is, who were those Indians who might be legally sold as slaves? For they are the persons whose slavery is confirmed by this act. The answer is, Those who were or should be taken under the act of 1679, the only act which had given any person authority to sell Indians as slaves, and therefore the only sales the act of 1682 meant to confirm. If there be any doubt of this, the preamble of 1682, will confirm it. It consists of three members; the 1st. recites the act of 1670; the 2nd. shews in what manner it bore on the ***116** purchasers of Negroes, Moors and Mulattoes; the 3rd. member of the preamble shews how it affected the purchasers of the Indians described in the same act 1679, and then goes on to enact. So that the preamble proposes the subject of the act, to wit, Negroes, Moors, Mulattoes, and the Indians of^d 1679, and does therefore restrain the generality of the enacting clause, if the expressions of that should be thought to take in any others. This construction of the act is well grounded and just, whereas any other would be most unjust: and it is a rule in law that wherever an act or statute will bear two constructions, the **one** of which is just, the other unjust, the former is to be adopted. If then none were continued in slavery by this act of 1682, but those who might be made slaves by that of 1679, the repeal of 1679, by the act of 1684, was in effect a repeal of that of 1682, because it took away the subject matter on which it was to work. Before 1682, no Indian could be legally sold as a slave, unless under the act of 1679. The sales under that act, then, were the only **ones** confirmed by the act of 1682. Consequently when those sales are put down, the act of 1682, becomes of no use, unless to confirm those made before the repeal. Or, still to vary its point of view, 1679 was the basis of 1682. When that was demolished, the superstructure fell of course. Accordingly, it is notorious that it was the universal opinion in this country, that the law of 1682, was repealed in 1684. Both bench and bar were in possession of that belief; the latter advising, the former adjudging the law to be so, and under that persuasion hundreds of the descendants of Indians have obtained their freedom, on actions brought in this court. Nor was ever the propriety of these decisions called into question till within these four years. The gentleman (Colonel Bland) who is now of counsel on the other side, started the doubt at the bar, on no other foundation, as I conceive, than the want of an express repeal. But it is hoped the virtual repeal will answer the same end, and that we shall again be permitted to return into our wonted channel of adjudication.

****7** III. But if it was not repealed by the act of 1684, then it was by the act of 1691, which repealed 'all former clauses of former acts of Assembly, limiting, restraining, and prohibiting trade with Indians.' By this it was made lawful for the Indians to come into this country, at any time, for the purpose of trade. But can we suppose, that as soon as they came, they should be picked up and sold as slaves? If so, this fair faced act was but a trap to catch ***117** them, an imputation which would do indignity to any legislature. It is a rule that 'when any power is given by any act or statute, all incidents necessary to the making it effectual, are also given.' Thus the statute of Gloucester, c. 5. giving him in reversion an action of waste against his tenant for life or years, has been deemed to give him authority to enter into the houses or lands letten, to see if any waste be done, without his being subject to an action of trespass for such entry. 2 Inst. 306. This operates then so far as an implied repeal or alteration of the common law, which had given the tenant a right to bring such an action. So in our case, when a law gives right to the Indians to come into our country to trade, it gives them all incidents necessary to the exercise of that right, as protection of their persons, properties, &c. and consequently takes from every other the right of making them slaves, and so far implies a repeal of the law of 1682. If, contrary to this rule, that law continued still in force, the Indians could not come to trade with us, and so the new law

would not produce its effect of opening a free trade with them. These two acts then being contradictory, which is to prevail? The latter surely. Under the words of the act of 1691, the question may be shortly asked, whether that of 1682, which subjected Indians to slavery as soon as they entered this country, restrained their trade or not? If it did, it was repealed by this of 1691, which said that 'all former acts restraining their trade should be repealed.'

IV. He proceeded to shew it was repealed in 1075, if it was then subsisting. *

The act of 1705, c. 49. describes the persons who are thenceforth to be considered as slaves. But two of the marks or characters there required, do not apply to any Indians. For first, they are not servants, that condition of life being unknown to them, as I have before observed; nor were they ever shipped; whereas the same act describes only such persons as could not make proof of their being free in some Christian country before they were shipped for transportation hither; plainly designing such foreign infidels only as are brought hither by sea, and not the free Aborigines of this continent, whose rights we had sufficiently violated when we took from them their lands, without adding further aggravation by enslaving their persons. The act having described who should *118 be slaves, repeals 'all other acts, so far as they relate to servants and slaves.' So that if the act of 1682, related to servants and slaves, it was hereby repealed.

Colonel Bland, for the defendants.

8 I. He insisted that the law of 1682, was not void in itself. That societies of men could not subsist unless there were a subordination of **one to another, and that from the highest to the lowest degree. That this was conformable with the general scheme of the Creator, observable in other parts of his great work, where no chasm was to be discovered, but the several links run imperceptibly into **one** another. That in this subordination the department of slaves must be filled by some, or there would be a defect in the scale of order. That, accordingly, Puffendorf, b. 6. c. 3. a. 10. proves it to be founded on the law of nature. In the earlier stages of social confederacies, we find this connection between master and servant established. If this had been contrary to the law of nature, it could never have been tolerated under the Jewish theocracy. Yet that it was so tolerated, Holy writ affords us ample testimony. In fact there is no great difference between slavery in its absolute state, and that species of it called villeinage, known to our common law. This too, derived its origin from the rights of war, the ancestors of the villeins having been originally captives in war. So that this is a plain recognition of that right by our municipal law, under which, therefore, as well as under the law natural, the captor may hold his prize. The laws of 1679 and 1682, particularly, so much complained of, were founded on principles of self-defence, and may be considered as proofs of the humanity of our ancestors, who substituted this punishment on the Indian captives, instead of those cruel deaths they inflicted on ours. But certain it is, they are much less unjust than the laws making slaves of negroes, inhabitants of Africa. They can never injure our properties or disturb our peace: Indians, were perpetually invading both. Yet is no objection made to the validity of the negro laws on account of their injustice, by the counsel on the other side. But he denied that these laws, if they were contradictory to natural justice, could therefore be disregarded by a court of law, and cited 1 Bl. 91. to prove that 'if we could conceive it possible for the Parliament to enact a thing to be done which is unreasonable, there is no court that has power to defeat the intent of the legislature, when couched in such evident and express words, as leave no doubt whether it was the intent of the legislature or no.'

II. He denied that the act of 1682, was repealed by that of 1684. He observed that the **one** of 1679, was not the sole ground of this, but that the act of 1670, was its principal foundation. This *119 was our first slave law, and bore on its face so glaring an absurdity, to wit, the making slaves of those infidels who came by sea, and only temporary servants of those who came by land, that it was thought to affect the reputation of the legislature, and was therefore repealed by the act of 1682; which put them all on a footing. But he said, that before either of the laws of 1670 or 1679, great numbers of Indian captives were held in slavery, every man thinking himself entitled, under the law of nature, to his captives in war. That these, therefore, as well as those under the laws of 1670 and 1679, afforded matter for the operation of the act of 1682. That also long before this, * negroes had been brought into this country and were held as slaves by the persons who had purchased them.

There was indeed a set of negroes after the year 1679, who, having been brought in by land, were under the law of that date but temporary servants, and these are the subject of **one** of the main branches of the act of 1682; so that when the act of 1684, repealed that of 1679, it took away only **one** of the many foundations of 1682. There still remained subject to its operation, 1. The Indians taken in war before the year 1670, and held by the captors in slavery, under the law of nature. 2. Negroes brought in and sold as slaves before that time. 3. Indians and negroes brought in by land after 1670, and under that act held in temporary servitude. On all these the act of 1682, continued to operate, so that in fact none were withdrawn from its power but the few described by the act of 1679, to wit, those who might thereafter be taken in war by our own soldiers, whenever we should have soldiers.

****9** III. That the law of 1691, was no repeal of that of 1682. To prove this, he said, the acts of assembly which have been cited on the other side may be distinguished into two classes, totally independent of, and unconnected with **one** another, to wit, those relative to slavery, and those relative to trade. And he enumerated ***120** and arranged them under these heads: and first of those relative to slavery.

1662, makes temporary servants of Indians brought in by our traders. But this act extended only to friendly not to hostile Indians, as appears by the clause directing such Englishmen as live in their neighborhood to assist them in their fencing. This act is distinguished from all others by this circumstance, that it relates to friendly Indians, and puts them on a footing with servants of other nations; whereas all the other acts relate to hostile tribes, of whom therefore they make slaves. Of the latter class, were the ancestors of the people now before the court.

1665, 1666, c. 1. c. 8. 1671, c. 5. do not concern either trade or slavery, nor can they throw any light on the present subject. The first empowers the Governor to appoint the Werowance, but this could not have brought on the war which followed. It is the custom to this day for the Governor to make such appointment. The second relates to the making of tobacco; the third and fourth to the carrying on our war with the enemy.

1670. This was the first establishment of slavery by any express act of the legislature. This law is related to that of 1662, as enlarging the field of servitude. That had made temporary servants of Indian friends brought in by our traders; this does the same as to the captives in war made by our Indian friends, and as to negro servants brought in by land, and makes slaves of those imported from beyond sea.

1677. He produces a treaty of peace made with the Indians, by the fifteenth clause of which, it is provided, that no Indian in amity with us, shall be sold as a servant for any longer time than English servants are bound to serve by act of Assembly, and that they shall not be slaves at all. Which treaty is signed by the chiefs of about ten nations, all of whom appear by their names to be our neighbors. This explains the laws of that period, and shews they were not meant to extend to our neighboring and friendly Indians.

1679, makes slaves of Indian prisoners taken by our own soldiers, and so still extends the circle of slavery; but not so as to take in our friendly Indians in violation of the treaty before mentioned.

1682, c. 1. is the great law now in question, and is made solely on the subject of slavery. This repeals the law of 1670, on account of its absurdity, and removes the groundless distinction between servants coming in by land and those coming by sea. But still it affects only the hostile tribes of Indians.

He then proceeded to the acts of the second class, to wit, those made to regulate our trade with the Indians.

***121** 1662, c. 114. Purv. 83. entitled 'free trade.' This act was not cited on the other side. It repeals all former laws restraining trade with the Indians, lays it open to every person for every article except for beaver, otter, or other furs. Till this act was made, none but the person called the "Cape Merchant" could trade with the Indians.

****10** 1667, c. 3. Purv. 217. 'An act licensing trading with Indians,' is another act on the

subject of trade.

1680, c. 8. Purv. 270. 'An act licensing a free trade with Indians' almost verbatim the same * with the act of 1691, relied on by the plaintiffs.

1691. This act comes next, and comes properly after these. It has no relation to those made on the subject of slavery, it was not made by any eye to them, and should not, therefore, have any effect on them. If the legislature had meant by this to repeal the act of 1682, they would have done it in express terms, and not merely by a side wind, the effect of which they must have foreseen would at least occasion dispute.

IV. The act of 1705, does indeed repeal that of 1682, but it re-enacts very nearly the same matter. Compare them together.

1682. All servants brought or imported into this country by sea or land.	1705. All servants imported and brought into this country by sea or land.
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Whether Negroes, Mcors, Mulattoes or Indians.

Who and whose parents and native country were not Christians, at the time of the first purchase of such servants by some Christian.	Who were not Christians in their native country.
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Except Turks and Moors, whilst in amity with his majesty.	Except Turks and Moors in amity with her majesty.
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And others that can make due proof of their being free in a Christian country, before they were shipped in order to transportation hither.

And all Indians which shall hereafter be sold by our neighbor Indians, or any other trafficking with us, as and for slaves.

Shall be slaves.

Shall be slaves.

The only difference is that the act of 1705, omits the clause which speaks particularly of Indians sold to us as slaves by our neighbor or other Indians. But this clause was tautologous in the act of 1682; the former words having been sufficient to comprehend them in that, as the words answering to them, are in this act. They are imported by land, and were not Christians in their native country, which are the material characters of the act of 1705. So that the plaintiffs get little by this repeal, when the same matter is instantaneously re-enacted.

Mason, in reply, denied that Puffendorff justified slavery on the principles of natural law. That on the contrary, b. 6. c. 3. a. 2. 4. 5. he proves it to have no foundation in nature, but to be derived from contract alone. That if the Israelitish practice was a proof of the morality of any act, we might under that, indulge ourselves with a plurality of wives, this being agreeable to the laws of the Jewish theocracy; so that this proof by doing too much, does nothing at all. That as to the difference between slavery and death, in point of humanity, he thought that those savages shewed infinitely the most, in adopting the latter rather than the former, inasmuch as no life at all is preferable to a painful **one**. That as to the objection drawn from the superior injustice done the Africans, by the laws imposing slavery on them, though he would not undertake to justify them, yet he conceived them less unjust than those now in question. For the Africans are absolute slaves in their own country, none but the King being a freeman there. So that the act of Assembly only continued a slavery which existed before, whereas, as to the Indians, the slavery is created by the acts.

****11** That as to the express repeal of the act of 1682, which might have been made if intended in 1691, it would have been improper, as is shewn on the other side, as it would have discharged negroes from slavery, which was not intended. Therefore the virtual repeal answered their purpose better, because it acted partially.

And lastly, that the act of 1705 does indeed describe servants brought in by land as well as

by sea, but another part of the description is, that they shall have been shipped. This then explains what is meant by 'servants brought in by land,' to wit, such as having been transported by shipping to our neighboring colonies, *123 are afterwards brought here by land, of which there were formerly great numbers.

Opinion

The court adjudged that neither of the acts of 1684 or 1691, repealed that of 1682, but that it was repealed by the act of 1705.

All Citations

Jeff. 109, 1772 WL 11

Footnotes

- * The act of 1748, c. 14. Revisal of 1748, pa. 285. instead of the words 'all servants imported,' substitutes 'all persons who have been or shall be imported;' an alteration of few words indeed, but of most extensive barbarity. It has subjected to slavery the free inhabitants of the two continents of Asia and Africa (except of the small parts of them inhabited by Turks and Moors in amity with England) and also the Aborigines of North and South America, unless Mason's observation on the word 'shipped,' shall be thought to avail them. It even makes slaves of the Jews who shall come from those countries, on whose religion ours is engrafted and so far as it goes, supposes it to be founded on perfect verity. Nay, it extends not only to such of those persons as should come here after the act, but also to those who had come before, and might then be living here in a state of freedom.—Edition 1829
- * Gen. 1. 28.—Edition 1829.
- * It seems however, clear, this act intended to take in as well those described in the act of 1670, to wit, 'Indians taken and sold by our friendly Indians,' as those of the act of 1679, who were the captives of our own soldiers. Or else the act of 1682, would have done nothing; for those under 1679, were slaves without it. However, it is as plain, that while the former branch of the description applies to those only who were servants before their coming here, the latter is confined to those who were servants under the act of 1670, whom it makes slaves instead of servants. So that the Indians brought in by our traders, and sold as servants under the act of 1662, are still out of that of 1682, whose basis is purely those of 1670 and 1679; or their state after 1684, may be thus expressed. The act of 1662, had never been touched. That of 1670, had indeed been demolished by that of 1682, but a new edifice raised on its ruins. That of 1679, was expressly repealed by that of 1684.—Edition 1829.
- d These arguments are so contradictory, that I can hardly suppose the plaintiff's counsel so used them: yet do my notes, taken while he was speaking, confirm them in so many places, that I can as little suppose the error in myself.—Edition 1829.
- * Here, he says, there was a committee then appointed, to revise and reduce into **one** body all the laws then in force; and an act to repeal all such as were not in that revisal, of which the law of 1682, was **one**. This appointment was by the acts 1699, c. 8. 1700, c. 3. The former has no such repealing clause. The latter I have never seen.—Edition 1829.
- * The first negroes brought into this country were in the year 1619, about the last of August, when a Dutch man of war came in and sold twenty to the settlement. Smith's history of Virginia, 126, note. There was no separate property in lands or labor at that time, but all worked together for the common good, and consequently the right to these negroes was common; or perhaps

they lived on a footing with the whites, who, as well as themselves, were under the absolute direction of the president. Beverley and Stith. 182. who takes this on his authority, states the arrival of these negroes in 1620. But Smith is most to be credited, as he had it from the relation of John Rolfe, a member of the council, and our first secretary, who was on the spot. In 1625, another negro called Brass, was taken in at the West Indies, by **one** Captain Jones, to assist in working his vessel hither. I find an order of the General court of October 3, 1625, that he shall 'belong to Sir Francis Wyatt, then governor, as his servant, notwithstanding any sale by captain Jones, on any challenge by the ship's company.' Rot. N. 1. fo. 85. 96. I suppose this order was made on some litigation of the property in the said negro.—Edition 1829.

* There is a remarkable difference occasioned by the alteration of a single word. This act says, there shall be a free trade with our 'friendly' Indians; that of 1691, with 'all' Indians. Applying this to Colonel Bland's observation, it should seem to favor the plaintiffs. The act of 1670 and 1679, he said, related to hostile Indians alone. Therefore, in 1680, the legislature, that their act opening a trade might not repeal these laws, expressly give the license of coming to trade to 'friendly' Indians only. But in 1691, when a general peace was now established, they extend their license to 'all' Indians, because they meant that all should be now on a footing.—Edition 1829.

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