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The Will of the Master: Testamentary Manumission in Virginia, 1800-1858

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THE WILL OF THE MASTER:
TESTAMENTARY MANUMISSION

AND WILL CONTESTS

IN VIRGINIA,

1800-1858

By

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A thesis submitted in partial fulfillment of the requirements for the

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The Will of the Master: Testamentary Manumission in Virginia, 1800-1858

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Abstract

This thesis explores the issues surrounding testamentary manumission, the ability of masters to manumit slaves via their will in Virginia during the first half of the nineteenth century. Using 37 cases in which the will was challenged and appealed up to the Supreme Court of Virginia, I argue that in addition to the complexities of adjudicating a contested will, the arguments and opinions offered by lawyers and judges in these cases show the evolving discourse surrounding slavery in Virginia during this period.

After developing a consistent and coherent body of law to regulate the manumission of slaves in the early nineteenth century, the justices of the Virginia Supreme Court suddenly made a sharp change in the way they decided manumission cases. Because of the increasing fervor of the national discourse surrounding slavery and particularly the expansion of slavery to new territories, the Court abandoned its relatively neutral position on the issue of manumission and instead interpreted the legal right to manumit as a threat to the established order of Virginia's slave society.

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Dedication

To my husband, Daniel Wisnosky. Your encouragement, love, humor and support through this effort and in everything else are immeasurable.

And

To Bruce Tucker for being there, for arguing the finer points of Virginia history and law, and for the many hours of stimulating conversation when I needed a break from everything else.

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Chapter I: Introduction

On an August afternoon in 1771, John Pleasants III was suddenly stricken ill at his home, Curles' Neck Plantation, located on a bend of the James River, about fifteen miles down from the town of Richmond, Virginia. With the assistance of his son, Robert, whom he named his executor, he drafted a will. However, John Pleasants' will was not an ordinary will. He used his final hours to draft a document, which manumitted the entire slave population of Curles' Neck and granted them land upon which to settle. There was only one problem with this plan. In 1771, manumitting any slave required an act of the General Assembly, which by statute could only be done if the slave had provided "meritorious service" to the colony. As it turned out, Pleasants' ordinary act of drawing a will culminated almost a generation later in the first testamentary manumission case heard by the Virginia Supreme Court of Appeals.¹

In some ways, Pleasant was ahead of his times. In 1782, the General Assembly enacted a provision to allow for slaves to be manumitted by will or deed. Pressure from religious groups, as well as a general feeling of post-Revolution fervor for liberty contributed to the change. Among the religious groups who were active in advocating for a liberalization of manumission laws were the Quakers, the denomination of the Pleasants family. Quakers were active in anti-slavery movements in both England and the American colonies. During the latter part of his life, Pleasants devoted an increasing amount of both his time and his wealth to his Quaker Meeting. Although a slave owner and a very wealthy man, both John and Robert Pleasants held anti-slavery sentiments. Both were

¹ At the time the will was drafted, the court of last resort for Virginians would have been referred to as the General Court, seated at Williamsburg. For clarity in this paper, I have chosen to refer to the court as the Supreme Court of Appeals or simply the Supreme Court, the title it has held since the General Assembly created four superior courts for the new Commonwealth in 1779, since no case treated in this paper arose to that level prior to the 1779 restructuring.

also very involved in advocating for the change in the law that would have allowed Pleasants to manumit his slaves.

This thesis examines 37 cases of contested wills involving manumission heard by the Virginia Supreme Court from 1800 through 1858². The cases began with the will of John Pleasants, which was settled by the Supreme Court in 1800, and conclude with four cases settled by the court in 1858. Prior to the earliest cases, this method of manumission was not legally permissible. I will argue that beginning in the 1850s, testamentary manumission was no longer socially acceptable, although it remained legal. The Court decided the last four cases with a different mindset than it had used to approach earlier cases. The shift in tone and in legal reasoning which appear in the opinions of the Court in the 1858 cases demonstrate the effect of the debates over slavery on the legal community in Virginia over the course of the nineteenth century. After developing a consistent and coherent body of law to regulate the manumission of slaves, the Court suddenly shifted in 1858. Because of the increasing fervor of the national discourse surrounding slavery and particularly the expansion of slavery to new territories, the Court moved from a relatively neutral position on the issue of manumission to a position of interpreting the legal right to manumit as a threat to the established order of the slave society. After 1865, the issue was moot, although freed slaves suing estates as beneficiaries of the wills of former masters still appear in the court records until the end of the nineteenth century.

The testamentary manumission cases of this period touch on issues important to an understanding of both the law of slavery and of the more personal aspects of life in a slave society. Wills, in particular, are valuable documents for understanding the values and mores of a society.

² For a detailed list of cases, please refer to Appendix 1.

Historian can use these texts to analyze notions of value, proper behavior, and sentiment. Although legal documents, there was no single form for wills. Some wills were simple and straight to the point. Others revealed glimpses of the personalities and preferences of the testators their feelings towards their beneficiaries and general commentary on their descendants and their expectations.³

This thesis focuses on contested wills, using the records of the Supreme Court of Virginia. In many cases, the original will is lost, but the relevant portions of the will were quoted in the court records, along with the opinions of the judges who ruled on the case. The judgments themselves provide insight into how these cases were conceived of by jurists of the period. I will argue that for most of the period, these cases were treated as routine court matters, and were handled in much the same way as any contested will would have been settled. For the majority of the period covered by these will cases, slaves were treated as chattel property, although cases involving manumission also reflected, sometimes movingly, upon the humanity of this “peculiar species of property.”⁴ However, the cases of 1858, particularly *Bailey & als. v. Poindexter's Ex'or*,⁵ took a markedly different view. The justices of the 1858 court were much more conscious of the implications of treating slaves as more

³ A testator is the writer of a will. Testatrix refers to a woman who writes a will. Testamentary refers to acts authorized or situations created pursuant to the directives specified in a will.

⁴ Virginian George Mason, who like John Pleasants was a slave owner opposed to slavery, referred to slaves in this way during the debate over the “Three-Fifths” clause of the Constitution during the convention in 1787. Interestingly, Mason’s will mentions over 30 slaves individually by name, yet manumits none of them. It is possible that this is because his will was dated 1773, nine years before the 1782 act relaxing manumission law in Virginia. However, it is notable that many Virginians, and other Southerners, who held public anti-slavery views passed their slaves on to their heirs rather than free them, either during their life or after their death. Mason’s will is available in Robert A. Rutland, ed., *The Papers of George Mason* (Chapel Hill: The University of North Carolina Press, 1970) pp. 147-161. It is an excellent example of the complete will of a wealthy, Virginia planter and slave owner.

⁵ I have chosen to keep the titles of the cases as they appear in the court records and as they are transcribed in Lexis. As a result, I have not standardized the use of *Executor* versus *Ex'or*. Another common abbreviation in the titles of these cases is *Adm'r* for administrator/administratrix. An executor is a person who is nominated by the will to tend to the estate of the deceased and ensure that the will is carried out. An administrator serves the same purpose, but is appointed by the court or serves in the case of intestacy (death without a will) or where the executor named fails to qualify for or declines the position. Executors and administrators are frequently one of the parties in these cases.

than property in any way. I will show that the legal reasoning in these final cases consciously departed from the earlier jurisprudence.

The tightly focused periodization of these cases, combined with the length of the history of slavery in Virginia and its importance to the development of American slavery make this area of study an important lens for examining the legal development of slavery in the United States. It also provides a focused way of exploring the changing ideas and thoughts of both legal thinkers and ordinary Virginians on slavery as a dominant characteristic of Southern life. The view of slavery expressed by the Court in these cases evolved from a general tolerance of the master's right to manumit in the earlier cases to a hardened defense of the institution of slavery in the 1858 cases.

The late cases were informed both by national politics and also by the Dred Scott decision handed down by the United States Supreme Court in 1857. Legal Historian Robert Cottrell traces the development of the Dred Scott decision as being a product not only of the legal and political enforcement of slavery, but also as a direct product of the "greater democratization and heightened egalitarianism of the United States in the antebellum era."⁶ This trajectory is evident in the decisions rendered by the Virginia Supreme Court. The earlier cases reflect an assumption that manumission is both a moral good and, more importantly, an inherent property right. The decisions and reasoning of the Court placed great weight on the individual right of a testator to manumit, provided that the will was in all other ways in accordance with the Court's opinion on the proper ordering of society. As such, these cases are an important tool for historians and legal scholars to understand how slavery was made to fit into what was theorized as a democratic and egalitarian society.

⁶ Cottrell, Robert J. The Long, Lingered Shadow: Slavery, Race, and Law in the American Hemisphere (Studies in the Legal History of the South). Athens, GA: University of Georgia Press (2013).

Virginia's history of African slavery is the longest of the Eastern seaboard English colonies in North America. The roots of slavery in Virginia began in 1619, with the arrival of the first Africans. Prior to 1619, Virginia, unlike the British colonies in the Caribbean, adopted a mix of indentured servitude and Indian slavery as a means to provide labor to work the land. The need to increase the number of colonists became greater due to the adoption of tobacco cultivation as a cornerstone of the Virginia economy. Tobacco cultivation was well suited to the development of a plantation system because it was most efficiently grown on large tracts of land with many hands working the tract. Small, free hold tobacco farmers were always marginal economic producers. To encourage the development of efficient plantations and to incentivize the colonization of Virginia, the Virginia Company introduced the "headright" system in 1618.⁷

Under that system, settlers already in Virginia were given two headrights, new colonists who paid their own passage were given one headright per laboring person (for example, a wife or older child) and those who paid passage for a new settler were given an additional headright for each settler for whom they paid passage.⁸ This encouraged the development of indentured servitude and increased the division between wealthy and poorer Virginians. Those who could afford to pay their own passage arrived to settle their own land. Those able to afford passage for others could consequently increase their land holdings. Although many indenture contracts specified that the headright, or at least a portion of it, reverted to the servant at the end of his or her indenture, these contracts proved difficult to enforce. However, indentured European servants had a clear right

⁷ See Parent and Edmund S. Morgan, *American Slavery, American Freedom: the Ordeal of Colonial Virginia* (1995) for a full discussion on the impact of the headright system on the growth of Virginia slavery.

⁸ A headright in Virginia was 50 acres of land.

under the law to make these contracts and to sue their masters for enforcement of their contractual rights.⁹

The status of Africans initially appeared to be the same as European bond servants. There was no legal distinction between white bond servants and Africans, although in some related laws, such as the 1660 law punishing English people for “running away with negroes” do mention and differentiate between the races.¹⁰ That law punished whites, who ran away with “negroes,” by making the white runaway serve out the lost time of the African runaways. Most of the early laws governing servants were concerned with running away. Tobacco was a labor-intensive crop; many servants who initially contracted to perform the work thought better of it and sought to escape.

The fate of one African runaway, John Punch, in 1640, was grim. He was sentenced by the court to a perpetual extension of his indenture, “to serve his said master or his assigns for the rest of his natural life.”¹¹ Two European bondsmen, a Dutchman named Victor and a Scot named James Gregory, who ran away with Punch, were merely sentenced to a one-year increase in their indenture and three years additional service to the colony. All three were equally sentenced to 30 lashes.¹²

This was not always the case. Punch was sentenced on 9 July 1640, but on 22 July of the same year, another African bondsman, Emanuel, who ran away to “the *Dutch* plantation” with six white bondsmen from another plantation was sentenced to the standard 30 lashes, branding with the letter ‘R’ on the cheek and an additional year’s service to his master and further service, term

⁹ A requirement of the transfer was that the former servant was obligated to have the land surveyed and patented prior to claiming it. The cost of doing so was often higher than the contractual sum paid out at the end of the indenture, if there was any money owed at the end of the indenture contract at all. When the land was not properly surveyed and patented, it often remained titled to the initial grantee.

¹⁰ William Waller Hening, ed., *The Statutes at Large; Being a Collection of All the Laws of Virginia from the First Session of the Legislature, in the Year 1619* (New York: R. & W. & G. Bartow, 1823), 2:26

¹¹ H. R. McIlwaine, ed. *Minutes of the Council and General Court of Colonial Virginia: 1622–1632, 1670–1676*. Richmond, VA: Virginia State Library. (1924) p. 466

¹² *Ibid.*, pg. 467

unspecified, to the colony. In this instance, Emanuel's sentence did not differ from his six white companions. In 1643, the General Court codified this sentence, the first of several seventeenth-century acts that specifically addressed the problem of runaways. Interestingly the 1643 act also included penalties for servants who ran away to the Indians carrying "peice, powder and shott." The act declared that those "being thereof lawfully convicted shall suffer death as in case of ffelony."¹³

While scholars consider John Punch to be the first official slave in Virginia, the formal laws of the colony did not fully embrace slavery for another 20 years. As Thomas Morris showed, slavery came to America informally, an institution without legal definitions.¹⁴ The process of adapting a system of contract labor to a system of slavery took roughly half a century from the sentencing of Punch to the 1705 passage of the Act Concerning Servants and Slaves, which explicitly rules

all servants imported and brought into this country, by sea or land, who were not [C]hristians 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 [C]hristian 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 [C]hristianity afterwards.¹⁵

Although it took nearly half a century, the colonists in Virginia began the task of adapting the laws of the colony to reflect the reality of the growing dependence of the planter-colonists on slavery as a basis of the plantation system. The changes to the law reflected both the need for labor to work the land and a social and legal system, which supported the development of an economic system based on slave labor.¹⁶ They also marked a difference between the inherited Common Law

¹³ Ibid.

¹⁴ Thomas Morris. Southern Slavery and the Law 1619-1860. Chapel Hill, NC: University of North Carolina Press. (1999)

¹⁵ Hening, pp. 447-462

¹⁶ Eugene Genovese's Roll Jordan, Roll is invaluable in understanding the early social issues of slavery in America. For a full discussion of the legal and economic realities of slavery in the Virginia colony, see Anthony S. Parent, Jr.'s book Foul Means: The Formation of a Slave Society in Virginia, 1660-1740.

tradition of England and an emerging legal system adapted to colonial issues. As an example, under the common law, slavery was permissible only in cases where the slave was an “infidel.”¹⁷

Some of the first changes dealt explicitly with the distinction between African and white women. In 1629, the legislature passed a statute that made titheable (taxable) women, who worked in the field as laborers.¹⁸ Field work was not an unusual occupation for white women, who were few in number and consequently more valuable as wives, mothers and domestics, rather than as farm laborers. In 1630, Hugh Davis, a white man, was sentenced to “be soundly whipped, before an assembly of Negroes and others for abusing himself to the dishonor of God and shame of Christians, by defiling his body in lying with a negro; which fault he is to acknowledge next Sabbath day.”¹⁹ Davis’s sentence linked interracial sex with a violation of both temporal and moral law. His punishment was not only secular (the whipping), but also an act of humiliation (the whipping took place in front of a mixed racial group) and required an act of religious contrition (he was required to confess dishonoring God and shaming Christians, presumably before his religious congregation on the Sabbath).

The complexities of interracial sexuality were such that the legislature passed a statute to classify the offspring of such unions. The 1662 act was needed to resolve the “doubts [which] have arisen whether children got by any Englishman upon a Negro woman should be slave or free.”²⁰ To resolve this issue, the legislature instituted the rule of *partus sequeter ventram* (lit.: that which is brought forth follows the womb). The doctrine of *partus* diverged from the Common Law that held that the

¹⁷ See *Butts v. Penny* (1677).

¹⁸ Henning, vol 1, pg. 144.

¹⁹ *Ibid.*, pg. 146

²⁰ Henning, p. 170

status of a child followed from the father. Virginia, on the other hand, decreed that status came from the mother.

The first laws in Virginia established a race-based framework around for addressing legal issues involving property and proper inheritance. Women's labor was the first labor to be delineated as white and black, and the status of children born to black laboring women was reduced. In order to maximize the economic benefits of the headright system landowners had incentive to keep as many people as possible in lengthy, if not perpetual, terms of servitude. In addition to preventing blacks from leaving servitude, the switch to determining servant status via descent from the mother increased the estate of the father. Most mixed-race children were born of English fathers and servant mothers. By granting the child of those sexual unions servant status, the father increased and protected his legitimate children's estates. Instead of a sibling becoming another heir, forcing a division of the estate, the enslaved sibling became inheritable property whose labor and value increased the value and productivity of the land.

Tensions between economic interest and social cohesion, and between those protected by the law and those who were outside it were features of will cases. Yvonne Pitts, for example, has examined the social history of wills in Kentucky. Her work focused on testamentary capacity cases, or cases where the will was challenged during the probate process by asking the court to determine whether the testator was competent to draft a will.²¹ Her work revealed the complexities of probate, and how courts strove to balance the parties' interests in these cases. My work builds on these findings to specifically examine one specific set of cases. In the Virginia manumission cases, I find that the Court sought to balance the interests of the heirs and the slave society with the testator's

²¹ Pitts, Yvonne. Family, Law, and Inheritance in America: A Social and Legal History of Nineteenth-Century Kentucky (Cambridge Historical Studies in American Law and Society). Cambridge: Cambridge University Press (2013)

right to dispose of his or her own property according to their wishes, even if that included removing it from the estate. My work also reveals a significant difference between the Kentucky cases and the Virginia cases. Pitts finds that a common reason for will contests involving the manumission of slaves was a challenge to the testator's competency. In the Virginia cases, no heir used competency, or the mental soundness to make a will, as a basis for the challenge. In Virginia, the right to manumit via will or deed was sound law. It was not considered evidence of mental infirmity. While Kentucky never had a law explicitly prohibiting the manumission of slaves, unlike Virginia, it never passed a law which governed the process. The protection of this written law in Virginia forced both courts and heirs to acknowledge the legitimacy of manumission.

The mechanics and function of the legal process itself is the focus of Andrew Fede's work. He discovered that courtroom procedures created a barrier, which was difficult for slaves to overcome.²² Although it was possible for slaves to initiate freedom suits, procedural and evidentiary rules were increasingly interpreted in more strict ways to block these suits as time progressed. Fede demonstrated that over the course of the nineteenth century slave holding states increasingly limited manumission via statute and also increased the procedural complexity for those filing suits for their freedom. Simultaneously, Fede argues that these states simplified the process for free blacks to return themselves and their children to slavery. In my examination of these cases, I emphasize the legal process. I focus on how the judges interpreted the law to reconcile the legal right of testators to manumit with the responsibility the Court had to uphold the political values of a slave system. I also show how the wider national discourse conflicted with Virginia law and forced the judges in these cases to challenge the precedent set out by the Court earlier in the century.

²² Fede, Andrew. Roadblocks to Freedom: Slavery and Manumission in the United States South (Legal History & Biography Book 5). New Orleans, LA: Quid Pro, LLC (2011)

This legal progression from indentured servitude to chattel slavery is also documented in A. Leon Higginbotham's work. Higginbotham, a judge as well as a jurist, argued that the law was instrumental in developing a nuanced justification of unequal racial status. Higginbotham documented the ways in which perceptions of racial inferiority eventually became codified in to the law, culminating in Chief Justice Taney's statement in the Dred Scott decision that "blacks were so inferior that they had no rights which a white man was bound to respect." This stands in stark contrast with the earlier statutes, enacted during the British colonial period. Legal historian Christopher Tomlins explores the influence of labor and law on the colonization and development of the Anglo-American colonies discusses the commodification of labor, both indentured and enslaved. He argues that colonial indenture was more than an outgrowth of more traditional European migrant labor practices. He explores the idea of the migrant as a feature of transatlantic trade and the indenture process as being a commodification of labor based on "mercantile investment backed by legal enforcement [...] specifying a saleable quantum of service (a multiyear period) over and above the capacity to perform labor."²³

Higginbotham focused the first chapter of *In the Matter of Color* on Virginia, because he sees Virginia as the leader in early American thought. Because Virginia was a model of economic and social development in the colonies and played a major role in shaping the American Revolution it was also used as a model for slave legislation.²⁴ This role also allowed Virginia's ideas on slavery to become models for other slave-holding colonies. Virginia's 1705 slave act was used as a model for similar acts in South Carolina (1712) and New York (1706).

²³ Tomlins, Christopher. *Freedom Bound: Law, Labor, and Civic Identity in Colonizing English America, 1580-1865*. Cambridge: Cambridge University Press (2010), pg. 81

²⁴ Higginbotham, A. Leon. *In the Matter of Color: Race and the American Legal Process: The Colonial Period*. Oxford: Oxford University Press (1980). Virginia is the subject of the first chapter, pp. 19-60

New York's slave statute was also a way of Anglicizing New York's laws. Under the Dutch, manumission was more tolerated and Dutch law provided for a half-free status, mainly for elderly slaves. While some scholars, such as Higginbotham, have described this status as more tolerant or lenient, I argue that "half-freedom" for elderly, and thus less economically productive, slaves is less kind than it is economically expedient.

Half-free blacks lived on freedman's lots, which they were able to rent and to farm for themselves. In return, they were subject to an annual duty, rent on their lot and could be called up by the colony should their labor be needed. Their status was not inheritable, so their children remained enslaved. While this status undoubtedly gave the half-free more autonomy than they were able to exercise when they were enslaved, it was not freedom in any meaningful sense of the word. They were still restricted from land ownership, did not have defined civil rights, and were unable to leave the colony.

In most other states, including Virginia, it was illegal to manumit elderly slaves because too many slave owners were manumitting slaves who were elderly, ill or injured simply to get them off the plantation's books when the cost of their maintenance became greater than their productive value. The Virginia law, passed in 1691 specifies that its intent was to prevent these freed people from becoming a drain on the local poor funds:

And forasmuch as great inconveniences may happen to this country by the setting of negroes and mulattoes free, by their either entertaining negro slaves from their masters service, or receiving stolen goods, or being grown old bringing a charge upon the country; for prevention thereof, Be it enacted by the authority aforesaid, and it is hereby enacted, That no negro or mulatto be after the end of this present session of assembly set free by any person or persons whatsoever, unless such person or persons, their heires, executors or administrators pay for the transportation of such negro or negroes out of the countrey within six moneths after such setting them free, upon penalty of paying of tenn pounds sterling to the Church wardens of the parish where such person shall dwell with, which money, or so much thereof as shall be necessary, the said Church wardens are to cause the

said negro or mulatto to be transported out of the countrey, and the remainder of the said money to imploy to the use of the poor of the parish.²⁵

With this law, Virginia introduced the quit-state provision, rules forcing the newly freed slave to leave the area within a specified time period or face re-enslavement, often at public auction, which became a common feature of manumission laws.²⁶ They also created a way to fund poor whites at the expense of slaves. The bond in Virginia's law was not provided to the former slave, for his or her care. It was split between removing the slave from the colony and benefitting the white poor of the area.

In cases where freed slaves overstayed the limits of the quit-state, the freed slave faced re-capture and re-sale, generally at a public auction where the proceeds of the sale benefitted the state or county. As Eric Williams, Edward Baptist, Walter Johnson, Eugene Genovese, James Huston and others have argued, the commingling of economics and political economy formed a strong motivation for the law to begin to adapt itself to conform to and to encourage slavery and its growth as a formal institution.²⁷ Genovese in particular argued that slavery was not simply a labor system. Its development gave the South a distinct culture and identity. The class and social stratifications of

²⁵ Henning, pg. 88

²⁶ Ten jurisdictions (Alabama, Florida, Kentucky, Louisiana, Maryland, North Carolina, Tennessee, Texas, South Carolina and Virginia) had a quit-state provision at some point prior to the start of the Civil War. Virginia's was the first, lasting from 1691 until 1732 (when the right to manumit was eliminated altogether), and then reintroduced in 1806. North Carolina followed suit in 1715. Texas was the last jurisdiction to force manumitted slaves to leave the territory in 1836. The period of time which manumitted slaves had to leave ranged from immediate (Tennessee) to 12 months (Virginia in 1806, South Carolina (1722, reduced to six months in 1735), Alabama (1834, reduced to six months in 1852)). Benjamin Joseph Klebaner gives a comprehensive examination of the history of manumission laws, from which many of these dates have been compiled, in his article "American Manumission Laws and the Responsibility for Supporting Slaves".

²⁷ Williams, Eric. *Capitalism and Slavery*. Chapel Hill, NC: University of North Carolina Press (1994); Baptist, Edward E. *The Half Has Never Been Told: Slavery and the Making of American Capitalism*. New York: Basic Books (2014); Johnson Walter E. *River of Dark Dreams: Slavery and Empire in the Cotton Kingdom*. Cambridge, MA: Belknap Press (2013); Genovese, Eugene D. *The Political Economy of Slavery: Studies in the Economy and Society of the Slave South*. New York: Vintage Press (1967)

the slave system had an effect on how the South viewed itself both as a distinct region and as separate from the non-slaveholding North.

The history of the testamentary manumission cases adjudicated by the Virginia Supreme Court from the period of 1800 through 1858 also reflect how the political, social and economic influence of slavery extended into the courtroom.. These cases were not just statements of law. They were marked by and strongly influenced by issues occurring outside the courtroom. Many of the opinions in these cases referenced influences other than the law. The judges addressed religious and political controversies of the period, and offered their thoughts on morality.

Will cases were first and foremost about the orderly division of property. However, in cases where the will was contested, courts had to determine whether the testator's intentions meet with the state's idea of orderliness. In general, courts provided generous legal readings of wills. In capitalist systems, individual private property rights were granted a near-sacred status in the law. Courts interpreted wills in such a way that unless the testator's directions were irredeemably in conflict with existing law or were unjustifiably pernicious, the intention of the will would be carried out.

Intention, then, was central to the interpretation of the will. The deceased, obviously, cannot be called to testify. She cannot explain her actions or her motivations, nor can she clarify the meaning of her written words. Absent that, the court needs to decide the deceased's intention based on the judges' interpretation of the testator's words and meaning. These cases offered relatively few purely semantic arguments. In most, the intention of the testator to manumit their slaves was not the issue that most vexed the court. The wills all tended to be clear in both language and intent. In all 37 wills included in this study, there was a clear intention to manumit. The act of manumission

itself was not controversial in all but one of these cases. After the passage of the 1782 act, which permitted manumission by will or by deed, the law was clear and settled.

The liberalization of manumission law in Virginia happened during the post-Revolution period, during a legislative session devoted to addressing post-war business matters. The law was passed in May of 1782, along with acts which covered “the recovery of slaves, horses and other property, lost during the war,” an act “to ascertain the losses and injuries sustained from the depredations of the enemy within this commonwealth,” and various acts to survey roads, set up courthouses, settle new areas of the Commonwealth.²⁸ One act transferred property between a loyalist branch of the Harmer family and a revolutionary branch. The same act also restored lands escheated by an earlier assembly, from Walter King to Walter King Cole. The bulk of the May legislative session of the Commonwealth was dedicated to restoring some order after the chaos of war.

The 1782 “act to authorize the manumission of slaves” was part of this busy legislative session.²⁹ It was comprised of three sections, the first stated “application had been made to this present general assembly, that those persons who are disposed to manumit their slaves may be empowered to do so, and the same hath been judged expedient under certain restrictions.” The restrictions followed in the next two sections. First, that slaves who were infirm or over the age of 45, or males under the age of 21 or females under the age of 18 need to be “supported and maintained” by the former owner or their estate as a condition of manumission. Although post-revolutionary Virginia was amenable to the idea of manumitting their slaves, the state required that those freed not become a charge on the general populace. It was also possible that the state wanted

²⁸ Henning, vol, 11, pg. 23-25

²⁹ Ibid., pg. 39-40

to limit the number of manumissions, and make it more difficult to manumit those slaves who were viewed as less responsible or more prone to being seen as “troublemakers”, namely younger men. The fact that there was a difference in the ages where the former owner would be responsible for the maintenance of men and of women may show a concern about a sudden increase in the population of younger, unmarried, and unsupervised black men. The fact that the former owner needed to provide them with support also allowed the former owner or their (white) representative a means to continue to control their behavior.

Second, the act mandated that the manumittor or his representative pay an administrative fee of five schillings to the county clerk to record the deed and provide a copy to the manumitted slave. Under the act, this recorded deed was proof of the manumission, and was required to be carried by the freed person, should he or she wish to travel out of the county. If they did not have a copy of this paper to prove manumission, the act allowed that “[i]t shall be lawful for any justice of the peace to commit to the gaol of his county, any emancipated slave travelling out of the county of his or her residence without a copy of the instrument of his or her emancipation, there to remain till such copy is produced and the gaoler's fees paid.” Because these documents were required by the slave, failure to provide the freed slave with properly recorded papers would result in a ten pound fine, plus costs, one half of which would go to whoever sued to force compliance (presumably the county which had the former slave in jail), the other half to the person who should have received the deed.

The third section of the act required the newly freed slave to pay any taxes and fees levied against them each year, “imposed or to be imposed by law.” Should they refuse or be unable to pay, the sheriff of the county was authorized to hire them out “for so long a time as will raise the said taxes or levies.” This section of the act reinforced the idea of maintaining some form of control over this new population of manumitted slaves. The section of the act extended the idea of responsibility.

Part of membership, even the half-membership that would have been available to any person of color in the newly independent United States, was both self-reliance and shared responsibility. While manumission was seen as the right of the master, the results must not be a burden on others. Those who could not take care of themselves were still the responsibility of the former master. Those who could not, or would not, contribute to the Commonwealth were liable to be forced to do so.

The fact that the third section was vague – the taxes or duties payable were not specified, and the act extended the right to impound the labor of the freedman both now and in the future showed the uncertainty which the legislators faced. Manumission had been illegal for 77 years, and the free non-white population of Virginia was small, only about 1.7% of the population by most estimates.³⁰ Although people desired the right to manumit, and the legislature could not see a reason to prevent property owners from disposing of their property in this way, the law was written in such a way that would allow the state to maintain control of the population of freed people to the maximum extent possible, while ostensibly allowing them to be free. They were namely free, but subject to the right of the state to impose any tax or levy on them, which, of course, included criminal fines or civil penalties. The implicit threat for free blacks, even under the act allowing them freedom, was prison and forced labor.

In this thesis, I examine 37 high court cases, which arose after the passage of this act. All of these cases are Virginia high court cases. They were all appeals from lower court decisions regarding the provisions of a will that attempted to manumit slaves. These wills were contested for a variety of reasons. Some cases involved an heir, who was attempting to challenge the manumission because he

³⁰ Exact numbers are impossible to determine, as the 1790 and 1800 census records for Virginia were lost when the British occupied Washington, DC in 1812. Any reproductions of those records are based on extracts of property and head of household records as well as abstracts of the official census records which were preserved. It is possible that these records under count the number of free people of color, as those individuals were less like to either own property or to have been enumerated as a “head of household”.

or she wanted to retain the slaves. Administrators or executors initiated other cases to seek clarification of specific provisions of the will. Slaves brought some of the cases to court, in which they argued that their late owner's will manumitted them. In such cases, they asked the court to force the heirs to adhere to the provisions of the will. The final reason that these cases appeared in court was because creditors to the estate believed that they were owed money by the deceased and are seeking to claim the slaves for payment of the debt.

In order to understand the statutory environment of these cases, it is important to understand the history of manumission in Virginia. The statutory history took place in four distinct phases: the early phase, in which slaves and other bond laborers had the same legal status; the Colonial phase, during which manumission was virtually impossible, absent an act of the legislature; the post-Revolutionary phase, characterized by a liberalization of the law to reflect the freedom and liberty ethos of the early Republic; and finally, the Antebellum phase, which made manumission more difficult by reintroducing the requirement forcing manumitted slaves to leave the Commonwealth within a year or forfeit the right to freedom.

During the early phase, manumission was lightly regulated, and seen as a form of contract between any labor-owner and laborer. Because there were so few Africans in the colony at this time, the law did not recognize any distinction between white laborers and African laborers. The divisions between slavery and indenture were not hardened, and the racial component of slavery was not yet fixed. The main concern of property owners at this time was keeping as many people laboring on their land as possible and minimizing the cost of the labor. Because of the headright system, land owners benefitted from importing many of inexpensive laborers, whose labor would increase the value of their estate, but would be unlikely to compete for land, wealth and prestige.

By 1691, the difference between slaves and indentured servants was becoming more distinct. During the 1691 session, the legislature passed two acts relating to manumission and to slavery. The first was an act which required manumitted slaves to leave Virginia within six months of being manumitted. The second act dealt with interracial marriage, and as with the manumission law, required those who married a member of another race to leave the colony, however those involved in an interracial marriage had less time to find other accommodations; the statute required them to leave the state within three months of the marriage. The members of the legislature were concerned about enforcing a the parameters of the social hierarchy of the slave system - blacks are slaves, not free people or potential marriage partners – and stemming a potential toxic element from further infecting the society of the colony.

This act was the sole legal guideline for manumission until 1723, when the general assembly passed an “Act Directing the Trial of Slaves, Committing Capital Crimes; and for the More Effectual Punishing Conspiracies and Insurrection of Them; and for the Better Government of Negros, Mulattos, and Indians, Bond or Free.” The title of the act gives an indication of which anxieties were plaguing the legislators in 1723. During the 1720s there were several small slave uprisings which would culminate in the 1730 Chesapeake Uprising, in which 300 slaves in Prince Anne County amassed and escaped to join the Maroon communities in the Great Dismal Swamp.³¹ This follows not long after Bacon’s Rebellion, which united laborers, including slaves and free blacks, in attacking the sitting governor. Bacon’s Rebellion required royal military assistance to halt. Anthony Parent and Edmund Morgan both see Bacon’s Rebellion as an impetus for the elite of the colony to make some concessions to laboring Virginians. One way in which this could be done was to enhance the class

³¹ Anthony Parent puts particular emphasis on the centrality of the Chesapeake Rebellion to the hardening of slave law. See particularly section 3 of Foul Means.

status of poor whites by drawing a firm, racialized distinction between white and black laborers. The title of the act also made it perfectly clear that when talking about slaves, it is a racial category.

Servants are white, slaves are “Negros, Mulattos, and Indians”, however, whether they are “Bond or Free”, they need to be better governed.

The statute begins

“WHEREAS the laws now in force, for the better ordering and governing of slaves, and for the speedy trial of such of them as commit capital crimes, are found insufficient to restraint heir tumultuous and unlawful meetings, or to punish the secret plots and conspiracies carried on amongst them”³²

It is clear that the possibility of a wide-spread slave uprising was already weighing heavily on the minds of white landowners in the area. The cooperation between lower-class whites and blacks during Bacon’s Rebellion provided a frightening portrait of what the future could hold if poor whites and blacks could find common cause through either intermarriage or equal treatment under the law. The fact that there were small outbreaks in the mixed communities of the Chesapeake region and persistent rumors of larger conspiracies compelled the legislature to act.

The manumission legislation passed in 1723 states:

XVII. And be it further enacted, by the authority aforesaid, That no negro, mullatto, or indian slaves, shall be set free, upon any pretence whatsoever, except for some meritorious services, to be adjudged and allowed by the governor and council, for the time being, and a licence thereupon first had and obtained. -- And that, where any slave shall be set free by his master or owner, otherwise than is herein before directed, it shall and may be lawful for the churchwardens of the parish, wherein such negro, mullatto, or indian, shall reside for the space of one month, next after his or her being set free, and they are hereby authorized and required, to take up, and sell the said negro, mullatto, or indian, as slaves, at the next court held for the said county, by public outcry; and that the monies arising by such sale, shall be applied to the use of the said parish, by the vestry thereof.³³

³² Henning, Vol 4, pg. 126

³³ Ibid, Vol 4, pg., 132

This legislation is the first law outright prohibiting the manumission of slaves by their owners. The primary goal of this legislation between the initial 1691 statute and the 1723 tightening of the law to forbid manumission, absent an act of the governor, helped to reinforce the dominant class's control over labor in the wake of Bacon's rebellion. In the 1723 statute, even slaves that were freed for "meritorious service" now had to leave the colony in 30 days, much less than the 6 months given under the 1691 statute.³⁴ This posed a substantial barrier to masters who wished to manumit slaves. As a result, the population of free blacks in Virginia remained small.³⁵

During the legislative session of 1782, the House made manumission a routine property transaction. Rather than manumission being an act that required the social approbation of the entire colony via an act of the government, manumission became a private agreement between a master and the slave(s) whom he wished to free. The complex and cumbersome process of pleading to the governor became the simple filing of a document, either a will or a deed, with the county. Manumission was treated, along with many other routine property matters, as an issue at equity, rather than as a complex legal matter.

This state lasted until 1806, when the legislature responded to concerns about the growth of the free population. After the honeymoon period of the American Revolution, the continued Atlantic revolutions, including uprisings in Dominica, Jamaica and Haiti sparked a new fears over the growth in the free population. Virginia was still operating under the law of *partus*, so women who were freed would then pass that status down to their children. While the legislature did not seem interested in over-regulating the right of a property owner to dispose of his goods in any way he saw

³⁴ One "meritorious service" often cited as grounds for a successful petition was informing on slave rebellions.

³⁵ Hast, "The Legal Status of the Negro," 220-1. John Henderson Russell, *The Free Negro in Virginia, 1619-1865* (Baltimore: The Johns Hopkins Press, 1913), 53.

fit, it did wish to protect the state from the influence of free blacks. Towards that end, it reinstated the requirement that slaves who were to be freed must leave the state, this time within the space of 12 months. The penalty for failure to do so was to be seized by the county where the freed person was found past the 12 months' grace period and sold back in to slavery for the benefit of the poor of the county.

The fact that legislation provided masters with the ability to manumit their slaves via a will created new opportunities for slaves to gain their freedom. However, it also strictly reinforced that their status in society was that of property. By law, slaves were classified as property of the estate that could be bequeathed to heirs, or sold to settle debts. As property, slaves were subject to separation by sale or bequest, were unable to form legal families of their own and were debarred from having legal rights in most cases. There were two exceptions to this. Slaves were subject to criminal law and considered responsible for their own crimes. Second, the law did grant slaves the right to act as plaintiffs, *in forma pauperis*, in freedom suits.

It is worth noting that there are two things that these cases are remarkably silent on. The first is race as a general concept. Initially, I theorized that racial composition would have an impact on the outcome of these cases. In many states, manumission cases offer tantalizing glimpses of masters manumitting slaves who they acknowledge as blood relations. Fathers manumitting their children, for example, or a white brother manumitting his slave-descended half siblings are not unheard of. Yvonne Pitts discusses cases that touch on the intimate relations of slavery, as does Emily West.³⁶ Bernie D. Jones examines the issue of inheritance from master to slave, often from

³⁶ West, Emily. Chains of Love: Slave Couples in Antebellum South Carolina. Chicago and Urbana: University of Illinois Press (2004). West mainly focuses on the romantic and familial relations between slaves. However, because the sexual exploitation of enslaved women had a profound effect on the ability for enslaved couples to form romantic, sexual and familial relations, she devotes a chapter to interracial sexuality.

father to child. She is able to document through will contests numerous cases throughout the south where masters bequeathed or attempted to bequeath not only freedom, but often property and money on their slaves, often because they admitted to a family relationship with the beneficiaries.³⁷ This is not apparent in the cases covered in this thesis. In one case, *Dunn v. Amey*, a very close reading seems to suggest that there was a closer relationship between the slave Amey and the testator. However, it is not stated. Other clues, such as mention of skin tone, are also absent. In Virginia, it seems that the doctrine of *partus* has rendered complete the ascription of birth-based status.

The second issue that does not occur until the 1850s is any discussion of slaves as being less than human. Tomlins argues that the status of slaves as property did not appear to have been part of an effort to deny slaves' humanity as part of the slave regime. In his examination, "not one of the regimes examined here relied on defining the enslaved as non-human in order to keep them enslaved" rather, the central focus was on "control. Control of entry, control of life within, control of exit, whether by manumission or death."³⁸ The idea of control is central to my argument. However, I disagree with the idea that the denial of slave humanity was never a part of the American slave power. As I will show in this thesis, the years leading up to the Civil War show a marked change in how Virginia's courts reflected on the status of slaves as human beings, as property and as markers of their owner's social standing and ability to exert control over their property.

The thesis proceeds in three parts. The first chapter examines the case of *Pleasants v. Pleasants*. This was the first contested case the courts hear after the passage of the 1782 law, and the

³⁷ Jones, Bernie D. *Fathers of Conscience: Mixed-Race Inheritance in the Antebellum South*, Athens, GA: University of Georgia Press (2009)

³⁸ Tomlins, pp. 507-508

text of their decision in this case became the leading precedent for this area of law. Because the judges in this case were venturing in to a new area of law, the decisions they wrote and the reasoning they applied illuminated the way in which the question of slavery was being discussed in Virginia during this period.

The second chapter analyzes the 25 cases heard between 1810 and 1855. These cases were less concerned with the notion of slavery than they are with how to balance the idea of manumission with the demands of property. After 1810, I argue that the law was settled and these cases were routine. The court in these cases was less concerned with remarking on manumission, slavery or the legitimacy of the right to manumit. Rather, these cases balanced the rights of claimants against the estate with the right of the property owner to dispose of his or her property.

The third chapter explores the last cases, heard in 1858, particularly focusing on *Bailey & als. v. Poindexter's Ex'or*. I argue that the cases in the first two chapters demonstrate a continuance of jurisprudence which, although their external pressures differ, can still be read as a coherent, evolving and dependent body of law. *Bailey* is an abrupt break from the history of Virginia's manumission jurisprudence. As I will show, the way that this case was both argued and decided shows the impact of national politics and public debate on the judicial process.

Chapter II: The Quaker Cases: *Pleasants v. Pleasants* and Post-Revolutionary Sentiment

The Pleasants family was a prominent Virginia Quaker family. Around 1665 John Pleasants immigrated to Henrico County, Virginia, where he converted to Quakerism and became an active member of the church. His grandson, John Pleasants, III was the member of the family involved in this [be more specific] case. The younger Pleasants amassed a large fortune in both land and slaves, but towards the end of his life, actively advocated for the abolition of slavery. He made his will in 1771, in which he requested that his slaves be emancipated. The Society of Friends was the first religious group to formally incorporate both moral condemnation of slavery and political and social abolitionist actions into their religious philosophy.³⁹

This was the will which was contested by several of his heirs, who, although also practicing and vocal Quakers, did not share their ancestor's willingness to match words to actions. The will itself appeared to be relatively straightforward. The court gave this summary of the case:

[t]he bill states that the said John Pleasants by his last will devised as follows, "my further desire is, respecting my poor slaves, all of them as I shall die possessed with shall be free if they choose it when they arrive to the age of thirty years, and the laws of the land will admit them to be set free without their being transported out of the country. I say all my slaves now born or hereafter to be born, whilst their mothers are in the service of me or my heirs, to be free at the age of thirty years as above mentioned, to be adjudged of by my trustees their age."⁴⁰

However, some of the language was problematic. First of all, the will itself admitted that at the time of its writing, manumission by will was not legal in Virginia. The will was written in 1771, eleven

³⁹ William Southeby is credited with being the first white, native-born American to condemn slavery. He openly called for a ban on both slave ownership and on the slave trade. The "Germantown Protest" was a formal remonstrance against the idea that one person can own another. The notion that all people, regardless of race or social standing are equal in the eyes of God is a foundational premise of the Quaker movement. Quakers, especially in Pennsylvania, were active in all forms of abolition activities, including the Underground Railroad, education and support of freed people and political work relating to abolition from early colonial days through the end of the Civil War and emancipation. Bryn Mawr College has an excellent online timeline of Quaker abolitionist activities available at <http://trilogy.brynmawr.edu/speccoll/quakersandslavery/resources/timeline.php>.

⁴⁰ The will of John Pleasants, as recorded in the proceedings of the Supreme Court of Virginia, 6 VA 319; 1800. Further cited as *Pleasants*.

years prior to the passage of the 1782 law that removed the need to petition the governor. Although Pleasants, along with many of his fellow Friends, was actively working on the passage of a broader manumission law, it had not passed at the time the will was written. The heirs used this discrepancy between the will of John Pleasants and the law of Virginia to raise their main objection to the will. Because the manumission provision in the will was illegal at the time it was written, and because the slaves were freed at a date later than the time the will was proved, the heirs argued that the will created a perpetuity and should be thrown out.

A perpetuity is a complex legal doctrine which occurs when the provisions of a will cause the creation of a condition which makes it such that an interest in property does not vest in fewer than 21 years.⁴¹ In plain language, when Pleasants stipulated that he wished for his slaves to be free at the age of 30 years, any slave younger than the age of 8 (the age of the slave plus 21 years) could be construed as creating a perpetuity. The rule against perpetuities was developed in the common law specifically to block provisions, which gave the deceased control over his property for longer than a reasonable period of time. The law attempted to prevent the enforcement of provisions that required lengthy administration or required refereeing unforeseeable events. In fact, the actual occurrence of the event may not be a concern to the court. The mere chance that the provision could vest outside the 21-year period, for example, could lead a court to classify a provision as a perpetuity.

The will also made individual bequests of certain slaves to certain heirs. It seemed plain from the will that Pleasants was specifying who would be responsible for the care and maintenance of the slaves who were under 30 or were blocked by law from being manumitted without being transferred

⁴¹ The rule also provides for “gestation time.” The life-in-being clock begins at conception according to the law. This is to cover posthumous births in the case where wills devise property to children.

out of the country. He made all these bequests with the above stipulation, that the slaves be freed at the age of 30, provided it was in conformity with the law. That he repeated this stipulation with every individual bequest showed how seriously he meant his declaration of emancipation. He sought to make his intentions completely clear, both to his heirs and to the court.

Although Pleasants came to abolition late in life, he meant for it to become part of the culture of the family, and for his descendants to carry on free from the stain of slaveholding. He used his will not just to free his slaves, but also to instruct his beneficiaries to fit the slaves as well as possible, so “that they may partake of and enjoy that inestimable blessing, to order and direct, as the most likely means to fit them for freedom, that they be instructed to read, at least the young ones as they come of suitable age.” He was serious about his determination that freedom was a blessing and he was direct in instructing his heirs on how he wished his slaves to be prepared for the eventuality of being free. It is “on these express conditions and no other” that he made the bequests of slaves to them. His wording indicated that he did not view the assignment of slaves as a transfer of property. He was creating a guardianship until such time as the slaves would be able to assume legally the freedom he conveyed to them.

Bequeathing the slaves to his heirs was a necessary risk. At the time of his death in August 1771, it would have been difficult for him to manumit the slaves during his lifetime. At this point, he was limited by statute to petitioning the governor on behalf of every slave he wished to free. He also would have had to devise and document a specific meritorious act that each slave had performed that would qualify that slave for manumission under the law as it was written in 1771. The statute does not specify what kinds of meritorious acts qualified, but it seems clear from the history of the law that the acts of slaves rarely were deemed such by the authorities.

The number of slaves who had been manumitted under the “meritorious service” law was small. A search of the Journals of the Council of Virginia showed fewer than 20 instances over the period between the 1730 law and the 1782 law.⁴² Several were given that grant for services benefiting the security of the colony: one for informing on other slaves and two for service during the war with Britain. Two were granted manumission for devising cures for medical conditions, one for a snakebite remedy, and the other for a treatment for a non-specified venereal disease.⁴³ The remainder did not explicitly specify the meritorious act.

Due to political considerations, it was unlikely that governor would have been able, even if he had had the desire, to manumit a large number of slaves under the current law. However, by passing his slaves on to his heirs, Pleasants ran the risk of those slaves being considered a bequest, forever passing them out of the control of Pleasants and his will. The heirs later argued these two points when they contested the will.

Pleasant’s final illness was sudden, and when he realized he was about to die, he asked his son Robert to help him prepare the will. He also named Robert as his executor. In the capacity as executor, Robert Pleasants eventually brought suit against the rest of his family in order to compel

⁴² Google Books has digitized copies of these records. They are available at <http://books.google.com/books?id=zw4SAAAAAYAAJ>

⁴³ These records are to be found in the Executive Journals of the Council, which has been digitized by Google Books in several versions. An example of one from April 29, 1729:

Whereas upon consideration of the many extraordinary Cures perform’d by Papaw a Negro Slave belonging to M[istress] Frances Littlepage of the County of New Kent, it was resolved that means should be used to obtain from him a discovery of the secret whereby he performs the said cures; and the said Papaw having upon promise of his freedom now made an ample discovery of the several medicines made use of by him for that purpose to the satisfaction of the Governor and the Gentlemen appointed by him to inspect the application and operation of the said medicines, It is the opinion of this board and accordingly ordered that as a reward for useful a discovery, which may be of great benefit to mankind, and more particularly to the preservation of the lives of great numbers of Slaves belonging to the Inhabitants of this Country frequently infected with the Yaws, and other venereal distempers, the said Papaw be set free; and that the sum of £50 current money be paid to the said M[istress] Frances Littlepage out of his Majesty’s Revenue of 2 shillings per hogshhead, for his freedom; but that he remain still under the direction of the Government until he made a discovery of some other secrets he has for expelling poison, and the cure of other diseases.
(<http://books.google.com/books?id=zw4SAAAAAYAAJ>)

them to manumit the slaves left to them. Between his father's death in 1771 and the hearing of the case in the Supreme Court in 1799, another member of the Pleasants family, Jonathan, passed away. Jonathan reiterated his father's desire to manumit the slaves who came to Jonathan's estate as a beneficiary under John's will. Robert also served as Jonathan's executor, and so the fate of the slaves left in Jonathan's care became part of the case that the court heard in 1798.

During the intervening years, Robert did his utmost to convince his family to conform to the terms of his father's will. After the passage of the 1782 manumission act, the legal barrier to manumission was dissolved. However, all of Robert's efforts were in vain, and as he reached the end of his life, he was left with no choice but to use the law to compel his reluctant family to conform to the dictates of his father.⁴⁴ He reluctantly resisted using the law as a method of enforcement, since eleven years passed between the change in the law, which gave the family the ability to execute the manumissions and the initial suit.

In 1793, Robert filed suit against his sister Molly and her husband Charles Logan in Powhatan County Court. This suit began a seven-year period of Robert suing several members of his family in order to compel compliance. At this point, 22 years had elapsed between his father's death and the commencement of the lawsuits. Some of the slaves in question had died. Other beneficiaries under the will had also died, leaving the slaves, in bondage, as part of their estate. Robert retained future Supreme Court Justice John Marshall. Marshall appealed to Chancellor George Wythe for an order from the Chancery Court to compel Robert's son-in-law, siblings, nieces and nephews to free what now amounted to over 400 slaves. The number of slaves in question amounted to a small fortune in property. Few slaveholders in the south owned that many slaves.

⁴⁴ Hardin, chapter 3.

Membership in the planter elite has been given different definitions by historians. Robert Fogel and Stanley Engerman class large planters as owning more than 50 slaves and medium planters as owning between 20 and 50.⁴⁵ Peter Kolchin sets the number at 20.⁴⁶ Few slave owners had that much of their estate in human property and no other Virginia manumission case in this study had the lives of so many people at stake.

Wythe ruled for the slaves, declaring that those who were 30 years or older in 1782 were entitled to their freedom under that act. Those who were born before Pleasants died, but were not 30 in 1782 were entitled to their freedom at the age of 30. Those who were born after 1782 were entitled to their freedom at birth. Wythe further ordered that the slaves be examined by a commission to determine their ages, and also “to take account of their profits since their respective rights to freedom accrued”⁴⁷ The defendants appealed to the Supreme Court. The Court heard the case in 1798, 27 years after John Pleasants’s death.

Wythe’s decision to award the slaves both their freedom and the right to their profits reflected two things. First, Wythe was personally opposed to slavery.⁴⁸ He was deeply invested in the Revolutionary cause, serving as both a signer of the Declaration of Independence and as Speaker of Virginia’s Revolutionary Assembly. He had also already manumitted his own slaves following his wife’s death. John Noonan argued that Wythe saw the act of manumission as not the creation of a new legal person, but rather as the removal of a disability established by law.⁴⁹ In this regard, he was

⁴⁵ Fogel, Robert William and Stanley L. Engerman. Time on the Cross: The Economics of American Negro Slavery. Boston: Little, Brown (1974)

⁴⁶ Kolchin, Peter. American Slavery 1619–1877 New York: Hill and Wang (1993)

⁴⁷ *Pleasants* pg. 3.

⁴⁸ Sandefur, Timothy. "Why the Rule Against Perpetuities Mattered in *Pleasants v. Pleasants*" *Real Property Probate & Trust Journal* 40 (2006): 669.

⁴⁹ Noonan, Jr. John T. Persons and Masks of the Law: Cardozo, Holmes, Jefferson, and Wythe as Makers of the Masks. Berkeley: University of California Press, 1976.

adjudicating *Pleasants* in the tradition of the common law rather than in the tradition of Virginia's statute law. In the process, he framed the issues so that the Supreme Court would be forced to rule in a wider philosophical tradition of rights established by the language of the *Somerset* case in England.⁵⁰ It is from Wythe's revolutionary decree that the plaintiffs appealed.

At the hearing of the appeal, the first question that the court considered was the standing of the suit. Initially, the executor brought the question of the slaves' freedom to the legislature, as was required under the law prior to the 1782 liberalization. The legislature demurred, indicating that they thought this was a proper matter for the judiciary. Edmund Randolph and John Wickham, as council for the Pleasants family members who objected to the requirement to manumit the slaves, began their argument against manumission with an assertion that the case had originated in the wrong court. If the slaves were to be entitled to their freedom, the suit should have originated in law, not in chancery.⁵¹ The first ground for appeal, then, was improper venue. Wickham grounded this argument on property rights: "[i]t may be proper to premise", Wickham wrote, "that although it may be true that liberty is to be favored, the rights of property are as sacred as those of liberty; and therefore that this cause should be decided on the same principles of law, that other causes are."⁵²

The appellant raised a second issue: a manumission from a will dated 1771 was illegal. They argued that the act allowing manumission by will did not pass until 1782, and a *futro* emancipation

⁵⁰ Although often misinterpreted to mean that slavery was illegal in England, what *Somerset* really says is that the legal disability of slavery has no standing in the common law. People may be slaves, but before the law, they are not different than any other person in their position.

⁵¹ At the time, legal cases were heard in two separate venues, at law and in chancery. Chancery courts generally heard issues relating to property; charitable acts and acts of conscience; and care of the insane. The original purpose was to provide a venue where the inequality of law (for example, a reliance on strict fact and statute, as opposed to compassion and mercy) would be mitigated. Law courts were limited in the remedies they could provide and were concerned with punishment and restitution. Chancery courts were able to compel specific performance or issue injunctions against performing acts. It is understandable why Marshall would have pursued this case in chancery rather than at law, and equally understandable why Randolph and Wickham would have much preferred to see the case tried at law.

⁵² *Pleasants*, pg. 4.

was void. Wickham explained: “then it appears, that during all the period between the death of the testator and the passing of the act of Assembly, the legatees had property, to which there was a repugnant and illegal condition annexed [...]”⁵³ Wickham did not contest the idea that liberty is a value which should be favored, but he reminded the court that property is a commonly-held value, as well. The fact that time had passed, that the legatees had had possession of the property and that the condition of alienating the legatees from their property was something that the court must carefully consider.

During this line of argument, Randolph and Wickham claimed that the will created a perpetuity. They explained, “During all the period between the death of the testator and the happening of the contingency [the passing of the 1782 law], it was wholly uncertain, whether the law would pass, or not; and consequently, the condition operated as a bar of alienation [...]”⁵⁴ Although it was known that the Pleasants family were actively involved in the lobbying process for the liberalized manumission law, it would not have been possible for them to know when, or even if, their efforts would be successful. Pleasants seemed to believe that they would eventually get something passed through the legislature, but at the time of the writing of the will, he could not have been certain.

Both Marshall, and another attorney, John Warden⁵⁵, argued the case for Robert Pleasants. Warden’s argument is presented first, countering the venue claim by reminding the court that the issue of the case was to compel the appellants to perform an act under the will. Because the case rested on an issue of trust, the court of Chancery was the proper venue. Wickham further attacked

⁵³ Ibid.

⁵⁴ Ibid.

⁵⁵ John Warden was assigned as a *pro bono* lawyer for Ned, one of the slaves originally intended to be freed by John Pleasant’s will. Ned sued *in forma pauperis* for his freedom. His case was consolidated with *Pleasants* and Warden joined with Marshall to argue the case in the Supreme Court.

the argument against *in toto* manumission by stating “[t]his was a trust to perform a certain act, when the trustee should be enabled to do it: Which trust was not inconsistent with law; and the act of 1782, having enabled the legatees to do it, their conscience is affected, and, consequently, they are bound to perform it.”⁵⁶ Warden’s argument struck at both the main arguments of Wickham: Chancery was the correct venue, and the manumission created a trust which the legatees, by accepting the legacy, were bound to uphold as soon as they had the ability to do so. Both of these arguments had to hold for Wickham to be successful – if the relationship created was not a trust, then the argument for improper venue is strong. If the relationship was a trust, under which the legatees accepted the property knowing that they would be called upon to fulfill the trust, then they did not gain an interest in the property at stake.

Marshall began by reiterating Warden’s arguments against Wickham before arguing that the will had not created a perpetuity. He explained that the answer to the question of whether the act of manumission shall be performed could only be answered in the negative if the Court finds that the action ordered by the will is illegal or if the action creates a perpetuity. He attacked the first objection with the reasoning that there is nothing *malum in se* – the act of manumission is not, in and of itself, against the law. The 1748 act does not forbid manumission or make it illegal.⁵⁷ It merely puts extremely restrictive conditions on it, which were then eased by the passage of the 1782 act. The legatees could have gone to the legislature and petitioned, and had the petition been granted, the manumission would have been in conformity with the law at the time. However, after the 1782 act, which authorized manumission by will and did not compel the manumitted to leave the

⁵⁶ Ibid.

⁵⁷ The 1748 act is a re-passage of the 1723 act. In 1748, the Assembly passed another omnibus bill regarding slaves, intended to consolidate the laws already existing. See St. George Tucker’s *Blackstone's Commentaries: with Notes of Reference* (1803), Volume 2, Note H, *On the State of Slavery in Virginia*. Both sides reference the act as a 1748 act in *Pleasants*.

jurisdiction, the conditions under which the bequest was made were valid and should have been acted upon.

Marshall turned next to the objection of the perpetuity: “The great question therefore is, as to the perpetuity; Now a perpetuity is a condition which may run forever, or to an unreasonable time, But this does not, For the will relates to several subjects, and therefore may be construed severally.”⁵⁸ Marshall could not avoid the fact that a perpetuity may exist if the will were taken as a whole. He focused specifically on the mothers, because the issue of a perpetuity is, generally considered, a life in being, plus 21 years. So all the slaves in existence at the time of the will would not have created a perpetuity. They should have been freed at the passage of the 1782 act, or a life in being plus 11 years. The mothers, and their increase, the term used to refer to the children or future children of enslaved women, are the issue. Marshall argued that they, however, did not create a perpetuity: “Thus where a mother was born at the death of the testator, the most remote limitation would be a life in being, and thirty years afterwards,”⁵⁹ the life, plus the 30 years until the will specifies that she be manumitted. This was not a perpetuity, because the time was finite. If, at the time of the 1782 act, the person existed, then time was set, not to some unknown or unknowable future event, but to a specific, known and obtainable event. Once the slave turns 30, by the provisions of the will, he is to be freed. “Therefore,” Marshall pointed out, “as to the mothers born at the testator’s death, the bequest is good, upon the soundest principles of law.”⁶⁰ He, however, admitted that the mothers born after the testator’s death “may, perhaps, form a different class of cases.” But, even if they did form a different class of cases, the decision in Chancery provided for

⁵⁸ *Pleasants*, pg. 7

⁵⁹ *Ibid.*

⁶⁰ *Ibid.*

that by finding that any slave who had been born since the 1782 statute was enacted were to be entitled to freedom at birth.

Randolph wrote the response to Marshall. He again reiterated that the case should have proceeded at law and that the manumission was in violation of the law at the time the will was written. He then argued in depth that the manumissions created a perpetuity which, if sustained “would be to shake titles, and unsettle property.”⁶¹ Randolph’s argument hinged on the notion that because, in 1771, it was impossible to know whether or not the contingent act would occur in two years, 20 years, 200 years or never, the will must be read as though the act never happened. The will required an illegal act as a condition of a legacy and this sufficiently alienated the legatees from their bequest so thoroughly that it could not be upheld.

After reiterating the illegality of the condition and the creation of a perpetuity, Randolph closed with a new issue: “But, at any rate, the account of profits is contrary to practice, and the equity of this case in particular; because the defense was reasonable, and therefore the defendants justifiable in making it.”⁶² This refers to the Wythe’s stipulation that the commission, which was to determine the slaves’ ages, was also responsible for accounting of their profits since the time when they should have been manumitted. The Chancery court not only freed the slaves, it ordered the defendants to provide restitution for the profit they made from the slaves’ labor when the slaves should have been free.

The Supreme Court upheld Wythe’s decision and again found in favor of Robert Pleasants and the slaves. Opinions were written by two of the judges. The first published is that of Judge Roane, a former student of Wythe. The second opinion was written by the President of the Court,

⁶¹ Ibid, pg. 7

⁶² Ibid, pg. 8

Edmund Pendleton. Both opinions upheld Wythe's decision, but the reasoning behind them was different. Roane's opinion was much more concerned with the issue of liberty. Pendleton approached the case differently, with much more of a focus on the property issues. Like Wythe, Roane saw the manumission as right; Pendleton viewed it as a right.

Pendleton had been seated on Chancery court with Wythe when the decision freeing the slaves had been written, and Roane was a former student of Wythe at William and Mary. Although Pendleton had a much more conservative bent than Wythe, he had also been active in Revolutionary and early national politics. He had initially been in favor of moderation in the 1760s but became a supporter of the Revolution and served as the President of the Virginia Committee of Safety. He also served with Wythe and Thomas Jefferson on the committee which re-wrote Virginia's laws during the Revolution, although he was injured in an accident during that time, and Wythe and Jefferson reportedly edited out many of his ideas. He also was the proposer of the amendment, which many understood to have exempted slaves from the Virginia Declaration of Rights, thus allowing slaveholders to support it.⁶³

Roane's decision addressed the question as growing out of the will of Robert Pleasants, and first considered the slaves as

a species of property recognized and guaranteed by the laws of this country, and to be considered, with respect to a limitation over (by the act of 1727, on the same footing with other chattels [...] if their claim will be sustained on this foundation, any by analogy to

⁶³ The Virginia Declaration of Rights, Section I reads: "That all men are by nature equally free and independent and have certain inherent rights, of which, when they enter into a state of society, they cannot, by any compact, deprive or divest their posterity; namely, the enjoyment of life and liberty, with the means of acquiring and possessing property, and pursuing and obtaining happiness and safety." Pendleton proposed the change which added the clause "when they enter a state of society". Slaveholders, and the law of Virginia, did not embrace slaves as being in a "state of society", or as being legal persons who possessed the capacity to enjoy the benefits of the declaration. Women, Indians, children and the insane would have been given the same understanding by the men who framed this "Declaration of Rights".

ordinary remainders of chattels, every argument will hold, with increased force, when the case is considered in its true point of view, as one, which involves human liberty⁶⁴

Roane made it clear from the outset that he is going to read this case in a context where human liberty was at stake. He linked that liberty to the right of property. In a sense, he was addressing not just the actual liberty of the slaves, but also the liberty of Pleasants to devise his property, a property governed under the laws of the Commonwealth, as he saw fit.

Roane's decision focused on the notion that liberty must be the guiding issue. The questions of the case were weighty, he acknowledged, especially in considering the perpetuities issue: "[t]his limitation has become a fixed cannon of property, and ought not to be lightly departed from,"⁶⁵ but he ultimately concluded that the perpetuity issue is null because 1782 falls well within the limit of time to avoid a perpetuity. For the slaves that were above 30, they were free as of 1782. For those below 30, they were free upon attaining the age of 30. They were to be regarded as persons who were free, but bound to a term of service for a fixed number of years. As to the children who were born to people who should have been freed in 1782, they were free because they were born to people who should have been legally free. As to those born to people who should be free at some point after 1782, they were also free because their mothers should be considered as indentures, not as slaves under the doctrine of *partus*. Roane so departed from Pleasants' property interest in the slaves that he said: "[t]he power of the testator, in this respect, has yielded to the great principle of natural law, which, is also a principle of our municipal law, that the children of a free mother are themselves also free."⁶⁶

⁶⁴ *Pleasants*, pg. 9

⁶⁵ *Ibid*

⁶⁶ *Ibid.*, pg. 10

For Roane, the issues at law were difficult, but ultimately they must yield to the issue of human liberty. Roane's sentiments were backed by Pendleton, the President of the Court, who stated in his opinion: "on mature consideration, I am of the opinion that the suit in Chancery cannot be sustained [...] At the same time, these characters furnish a commendable reason for his stating the case for these paupers to the court; and it ought to be heard and decided upon, without a rigid attention to the strict legal forms[.]"⁶⁷ These two judges understood that siding with the slaves required them to apply a very loose reading to the law. The will, as it was written, was illegal. Although courts generally try to provide constructions of wills which give the most favorable reading to the wishes of the testator, the difference in years between the writing of the will and the liberalization of the law would have been difficult, in ordinary circumstances, for a court to ignore. Under the "strict legal forms," it would have been almost impossible for the judges to decide to go ahead with this case.

Both judges determined, however, that the presumption in favor of liberty tipped the balance. The ability for Pleasants to have distributed his property as he saw fit, and the right of the slaves to take possession of the property of themselves was the highest principle and that the law must be fit to the case in such a way as to allow this ideal to prevail.

This presumption in favor of liberty, extracted directly out of *Pleasants* remained sound jurisprudence until the late 1850s. The Revolutionary era judges who heard *Pleasants* established the principle that judges would provide liberal readings of wills that providing for manumission of slaves. For example, the Supreme Court heard a similar case, *Charles & al. v. Hunnicutt* in 1804. The

⁶⁷ Ibid, pg. 13

Hunnicut family was also a Quaker family, and was related by marriage to John Pleasants.⁶⁸ Both of these cases take place under similar courts, which had a distinct bias in favor of liberty.⁶⁹ They held that the will of the master must be read such as to conform to his wishes regarding the distribution of his property, even when the will was in conflict with the law. Roane reasserts this position in this case, citing Mansfield and reaffirming the idea that a will addressing human liberty required broad judicial construction.

That both families were Quakers played no small role in these cases. The religious and social views of the time were such that slavery was a contested issue, even in the South. The Quakers were active in anti-slavery issues; Baptist and Methodist churches also tended towards anti-slavery views during this period. Although neither denomination made anti-slavery thought as central to their faith as the Quakers, both Baptist and Methodist preachers denounced slavery.⁷⁰ Political and legal thinkers such as St. George Tucker wrote against slavery. Several anti-slavery petitions were considered, but ultimately rejected, by the legislature during this era.

⁶⁸ In April, 1781, Gloister Hunnicutt made out a deathbed will which bequeathed six slaves, mentioned by name, to his monthly Quaker meeting, “to be manumitted by such members of the said meeting, as the meeting shall appoint.” He wished this manumission to take place “on or before the first month next 1782” He appointed his wife, Jane, his son, Pleasant Hunnicutt, and his brother, Wyke Hunnicutt as executors. After his death, Jane and Wyke qualified as executors.

His specification of the date is indication that he was aware that the Quaker-backed revision of the law to provide for manumission was likely to take place, which would allow the slaves to be manumitted legally. The act passed in May, and under those terms, Wyke and Edward Stabler, both members of the meeting, appointed by the meeting, as directed by the will, drew up documents of manumission for the six slaves and executed them on 6 July 1782. The documents were admitted to record in the county of Sussex in November of that year. The six slaves filed suit in court against Pleasant Hunnicutt for their freedom. The district court found in favor of Pleasant, and the slaves sought review with the Supreme Court. Again, the court held that although the will was executed prior to the passage of the 1782 act, the intent of the testator was obviously to have the meeting hold the slaves until such time as it was legal to manumit them, and to do so when permissible. As with Pleasants, the court provided the most lenient interpretation of the law to honor the desire and right to manumit over mere legal form. Judge Roane sat on this case, as well as on Pleasants.

⁶⁹ Roane and Carrington, the other judge who ruled in *Pleasant's*, are still on the Court. Pendleton died in 1803.

⁷⁰ See Eva Sheppard Wolf, *Race and Liberty in the New Nation: Emancipation in Virginia from the Revolution to Nat Turner's Rebellion* (Louisiana State University Press: 2006), pp 10-16 and pp 88-101 for an overview of anti-slavery sentiments and activities in the Baptist and Methodist churches.

The two Quaker manumission cases set the precedent under which the Court considered contests of wills involving manumission for the next 50 years. These early cases were marked strongly by the ideals that inspired the Revolutionary War. The judges who decided these cases were inspired by the philosophy and rhetoric of the time and brought that idealism into their opinions in these cases. When they were confronted with making a distinction between a right to freedom and a right to property, they erred on the side of freedom.

Chapter III: The Debt Cases: Balancing Liberty and Property

With *Pleasants*, the Court set a precedent for placing a heavy weight on finding for liberty. With the two Quaker cases, the Court rendered a decision that privileged a presumption of liberty over and above any other concerns. However, this idealistic interpretation would not last. Although the first two contested cases were decided in favor of liberty for the slaves, the practicalities of governing a slave society would begin to exert pressure on the Court and influence the way in which the Court felt that it had latitude to rule in these cases. In this chapter, I examine how the Court retreated from the strict presumption for liberty in favor of providing decisions which contributed to a stable and orderly governing of society.

The Court had to contend with two issues in the early Nineteenth century. First, the increase in the amount of free blacks living in Virginia became a source of concern. Second, after the initial idealistic enthusiasm of both the Court and Virginia citizens for manumission, the Court now had to contend with the practicalities of managing the obligations of testamentary manumission with the orderly settlement of testator's estates. One of the most common conflicts between the ideal of manumission and the reality of orderly settlement was found in estates which were in debt.

By examining the debt cases, I will show that the Court began to retreat from the idea of a strict presumption for liberty. In the debt cases, liberty was viewed as an admirable goal, but not a governing factor. The testator's desire to give his slaves freedom needed to be balanced with his obligation to fulfill promises, which he had made. While they still found in favor of liberty in several instances, in cases where the asset against which the debt could be paid was the slave, the liberty of the slave did not fare well. In these cases, the obligations of the estate to other white people were seen as superior to the deceased's promise to manumit her slaves. In some cases, the two external pressures, the orderly payment of debt and the desire to limit the number of free blacks in Virginia

combined, and the Court found that slaves, even those who had been living as free for some time, were potential collateral which could be used to guarantee the debt. In cases where the value of the slave, either as a chattel or as an indentured laborer, was the only asset available to the estate, the Court ordered those people put back in to some form of forced labor, either permanently as slaves or for a period of time as indentures. This solved two problems, it upheld and affirmed as superior obligations made between whites and it removed at least some blacks from the population of freed people.

By 1806, the presence of a growing class of freed slaves was becoming a concern the Commonwealth. The decision given in *Pleasants* partially accounted for this. There were also a significant number of slaves manumitted by their owners by deed. The compiled deed and will books of Charles City County, Virginia list 29 separate manumissions by deed between 1782 and 1811 and 14 manumissions by will between 1792 and 1821.⁷¹ Those of Sussex county list 71 separate manumissions by deed and another 36 by will between 1782 and 1818, including the will of Gloucester (listed as Glaster in the will book) Hunnicutt.⁷² Several of these records detail the manumissions of multiple slaves.

The Assembly responded to this growing population by passing a law requiring freed people to leave Virginia within 12 months or risk being sold back in to slavery. This was prompted by both Gabriel Prosser's aborted slave uprising in 1800, another aborted uprising among the enslaved boatmen on the Appomattox and Roanoke rivers as well as the marked growth in the population of

⁷¹ I am grateful to Dr. Michael L. Nicholls and Lenaye Howard at Utah State University for compiling and making available this archive online. They compiled will and deed records of manumissions for eight Virginia counties focusing on pre-1820 manumissions. The archive is available at: <http://libguides.usu.edu/virginia-manumissions>

⁷² Ibid.

free blacks.⁷³ In Virginia, between the period of 1782 and 1810, the free black population numbered approximately 30,000, roughly 7 percent of the total black population.⁷⁴ The threat of uprisings and the growth of the population caused the legislature to react with a series of acts in the early years of the nineteenth century which not only forced free blacks to leave the state, but also restricted the rights of free blacks, such as requiring them to register their presence with the clerk of the county they resided in every three years or risk being apprehended as a runaway slave.

There is an evident tension between an idea that liberty is a virtue and the fear of a large and possibly hostile free black community. This tension becomes increasingly evident in the shifts in the jurisprudence as the issue evolved. The cases heard in the early part of the Nineteenth century were much more mixed than precedent set by *Pleasants* would have suggested. In this period, the cases were generally adjudicated based on the law, following the established methods for adjudicating a contested will. It is rare to see the judges in those cases make sweeping statements about slavery or about external influences, as they did in either *Pleasants* or, later, in *Bailey*.

In *Dunn v. Amey and Others*, Amey was manumitted along with her son James, and her sister and brother, as well as their offspring. John Campbell, the testator, made his will in 1818 and died in 1819. In addition to the manumission, he directed his executor to sell his assets to pay his debts, reserving enough to purchase “a house and a proportionable small garden for my slave Amy [*sic*] [...] and, if possible, to have leave granted them to remain in the state.”⁷⁵

⁷³ During this period, it was common for slave owners to hire out skilled slaves. Boatmen, in particular, had a great deal of liberty, even when technically enslaved. They were generally unsupervised by whites as they transported goods for their masters from the plantations to trading and shipping centers along the rivers. As evidenced by the South Carolina Negro Seaman Acts of 1822, free and mobile blacks were a seen as source of threat to whites. They were unsupervised; could spread messages and news; help transport runaways; and, it was feared, carry the contagion of rebellion to slaves and free blacks over wide areas.

⁷⁴ Kolchin, p. 81

⁷⁵ *Dunn v. Amey and Others* 28 Va. 465, p. 1

The will was duly executed and James Shipherd, Campbell's executor, wrote a deed dated 4 January 1820 freeing Amey. Another deed was written 6 January 1820, freeing the brother Ned. Neither of these deeds were executed. In May of 1821, a judgment was entered against Shipherd and the estate for \$575.00 with interest and cost. The judgment was assigned to Dunn, the appellant in the case, who, in 1826 attempted to claim Amey and the other slaves in payment of the debt. At this point, Amey and the others had been "free" for six years. Amey responded by arguing that there were ample assets to pay the debt, and that every other asset should be exhausted before they were to be made bodily liable for the debt. Dunn noted that the deeds were not filed, so the emancipation was not valid. By remaining in the Commonwealth for over a year, even if the emancipation was considered valid, Amey was still liable to be taken up and sold in to slavery, whether she had been freed or not.

The Supreme Court in this case did not apply the lenient review of the law, which the earlier courts did. The presumption in favor of liberty was held to be subordinate to the debt. Judge Cabell wrote for the Court and acknowledged immediately that "[i]t was, unquestionably, the intention of the testator Campbell to emancipate the appellees, and his will is sufficient for that purpose."⁷⁶ However, "the right to emancipate slaves is subordinate to the obligation to pay debts previously contracted [...]"⁷⁷ Although the emancipation was valid under the Court's interpretation of the law, Amey was still an asset which could be taken for Campbell's debt. However, the Court also explicitly specified that if any other money could be found to pay the debt, Amey and the other slaves were to be considered unquestionably free. Cabell ordered an inventory of the estate to be taken, and the debt to be paid. He did not, however, mandate that Amey and the others be remanded back to

⁷⁶ *Dunn*, p. 5

⁷⁷ *Ibid.*

slavery to cover the debt. His order was that they be “sold for such a term of years as may be sufficient to raise the adequate fund.”⁷⁸ Rather than return Amey and the other appellees to slavery, the court strove to strike a balance between liberty and the property right.

In *Dunn* the Court walked a fine line between compassion and justice. Although the opinion does not mention the fact that Amey and the others had lived as free for six years before this decision and did not give that fact any weight, the Court still did not provide a strict application of the law that would have remanded Amey and the other five people back in to slavery. Even with papers granting freedom, the court still viewed Amey as property. Her freedom was subsidiary to a debt contracted between two white men and there was no recourse other than a court which was run by people whose interests were more apt to be in line with white, male property owners not with freed women of color.

What is clear, however, is that the strict presumption in favor of liberty was being diminished over time and gradually replaced by practical concerns about the status of slaves as property in the estate. The law and the jurisprudence mirror the growing division in the South and the nation over the slave issue. The Revolutionary and early National period has a legal and judicial presumption that slavery is at least somewhat incompatible with the natural law. The liberalization of the manumission law, combined with religious and social attitudes which allowed the Court broad latitude to operate under the presumption in favor of liberty had begun to harden as the legislature and the planter class become more pressured by fears of a growing free black population. Pressure from abolitionists in the North and widespread national debate over the slave question combined to make it difficult for the Court to act as liberally as it did in the past.

⁷⁸ Ibid.

Conflicts of property were the single largest reason why manumission wills failed. Of the 37 cases examined for this study, the court found the slave free in the majority of the cases, 20, or 54%. In 12 of the cases (32.4%), the court finds the manumission invalid and ruled in favor of continued enslavement. In an additional 5 cases (13.5%) the court remanded the case back to the lower court with further instruction on how to re-hear the case. In three of the remanded cases, the issue of the debt of the estate was a barrier to the court finding in favor of manumission. In those three cases, the Supreme Court directed the lower court to make an inventory of the assets and liabilities of the estate and, if no other means of paying the debt could be found, the slaves must be sold to make good on the debts of the estate.

It was only in one case where the court found for manumission of a slave in a case where debt was alleged against the estate. In *Jincey & als. v. Winfield's Adm'r & als. Jones v. Jincey & als.* (50 Va. 508), the court resolved two separate suits in a combined decision. In the first, Jincey sued the estate of her mistress claiming freedom under the testatrix's will. In the second, Jones, the testatrix's nephew sued the estate for possession of the slaves. He claimed that he was owed money for services he had provided to his aunt, the testatrix, when she was alive.

The nephew was asked by his elderly aunt, an unmarried woman with an unproductive farm, to come stay with her and keep her accounts. She implied to her nephew that she would make provision for him in her will. Under these conditions, and believing that he would inherit her property, he left his job with the railroad and took up residence with his aunt to keep her books and to keep her company. However, the nephew only resided with her a year before marrying and moving to another house several miles away. The aunt left a will which did not favor the nephew, but did manumit her slaves.

The only significant debt against the estate was the debt claimed by the nephew, who sued for the loss of wages from his job with the railroad, which he left at his aunt's request. The court was skeptical of the nephew's claims, especially in light of the fact that he left his aunt's home. They awarded him much less than he asked for, stating: "[h]ad he continued to live with her until her death, she would probably have made a satisfactory provision for him in her will [...]. Having thus early ceased to live with her, there is no longer any reason for looking to any higher standard of value of his services afterwards rendered, than a *quantum meruit*."⁷⁹ The Court described the aunt as "frugal" but a "poor manager and an indulgent mistress."⁸⁰ They faulted Jones for failing to perform his duty to his aunt, a vulnerable woman in a difficult situation. The court agreed that he should receive something for his services, but reduced the amount claimed to a sum they believed was worth the effort that he gave to assist his aunt, a mere \$50 per year, rather than the \$380 he was making when he was at the railroad.

Although Jincey and the other slaves in this case were granted their freedom, it is only because of a failing on the part of Jones. Had Jones performed his socially expected role as a man and as a family member, this case would likely have followed the other cases where debt was an issue. It was only because the court was using the freedom of Jincey and the others to reprimand Jones that they were freed. Even then, however, the freedom was not immediate. They were still liable to be leased by the administrator to pay whatever money was owed that was not covered by the assets held by the estate. The Court did find that the slaves were entitled to their freedom, but remanded the case back to the lower court to get an inventory of the estate's assets and to have the lower court compel Jones to provide a detailed accounting of the estate's finances and his activities

⁷⁹ *Jincey & als. v. Winfield's Adm'r & als. Jones v. Jincey & als.* (50 Va. 508), pg. 9

⁸⁰ *Ibid.*

during the time that he managed her business affairs. Only after the estate had been settled could Jincey and the other slaves be fully freed by the court.

Another reason that a testatory grant of manumission may have failed was because the wording was not deemed sufficiently clear to the Court. In the 1831 case *Rucker's Adm'r &c. v. Gilbert*, the Court heard a case where a slave was emancipated by will, but the testator's administrator did not comply. Gilbert, the slave, sued *in forma pauperis* to compel the administrator to give him his deed of freedom. The case was heard first by a jury, which found for the slave, and then by a circuit court on appeal, which also found for Gilbert. The administrator appealed again, and the Supreme Court overturned the lower courts because they found that the wording of the will was unclear. Unlike in the earlier cases, where the Court construed the mention of the word manumission as making the testator's desire clear, this court found that the testator was unclear because he said "It is my will and desire that my mulatto man James Gilbert should be free; but finding there would be some difficulty for it to be so, and for him to remain here, I therefore request my executors to lay off three acres of land for said James Gilbert, at any corner of my land, and let him settle on it."⁸¹

The opinion of the Court was that if had Rucker stopped at "It is my will and desire that my mulatto man James Gilbert should be free," then there would have been no doubt. But because the testator qualified this expression with an admission that he could not stay in the state if this were so, the slave was not free. The Court admitted that the intention of the testator must be given great weight, as did earlier courts, however, instead of applying a liberal reading to the testator's wishes, and the legality thereof, as was done earlier, the Court found in this case that the testator was unclear. Instead of divining his wish in favor of manumission, they throw the manumission out. The

⁸¹ *Rucker's Adm'r &c. v. Gilbert* 30 Va. 8, pg. 1

will of the testator was clearly in favor of manumission to both a jury and a lower court, but in this instance, the Supreme Court took a harder stance against freedom.

It was likely that Gilbert's status as a mulatto influenced this. It is evident from the panoply of legislation against miscegenation that the mixing of the races was a source of anxiety for slave owners. The existence of mixed-race people fundamentally confused the developing notions of scientific racism and was socially destabilizing. It was much easier to look at the world of slavery in binary terms: black = slave and white = free. A class of people who existed between the two complicated that view and also reminded whites of the personal and human relationships between slaves and masters in a slave society. The will alluded to a "difficulty" in Gilbert's removing from the state, and so attempted to get around the law by setting him up in a quasi-free state, where he was technically still a slave, and thus was not required to leave. There would have been several "difficulties" attached to this. The will did not specify much about Gilbert, other than that he was mulatto. His age, family status and relation to the testator were unknown, but the will may have given hints that there was some form of close relationship between the testator and Gilbert. The will mentions other slaves, and directs that they be valued and then divided among Rucker's wife while she lives and then go to his children after her death. Rucker specifically mentioned that James was to be exempted from both the valuing and the dividing and that instead he be given three acres of land to live on as though he were free for the remainder of his life. After Gilbert's death, the land was to return to the estate and be passed on to Rucker's children. It is possible that Gilbert is Rucker's child, which is why he was singled out for special treatment, and also why Rucker wanted to specify that Gilbert be exempt from the control of, or used for the benefit of, his wife. It is also possible that James was a childhood companion of Rucker, perhaps his playmate, or possibly his brother. If

this were the case, it could be that the jury was disposed to look kindly on what was, for them, a reality of the slave owning world.⁸²

It was striking that a local jury found for the manumission in this case, but the Supreme Court did not. Since over 50% of cases which went to the Court were decided in favor of the slaves and only 32% against them, this seems like a relatively simple case to decide. The Court did not give this case the same type of reading, which it did with the majority of cases examined. Instead of reading deeper into the words of the will to find a reason to support the manumission, they strictly construed and deemed it invalid.

The debt cases show the difficulty the Court had in finding the balance between the presumption for liberty and the state interest in protecting debtors. As the issue matured over the decades following the American Revolution, the Court began to treat these cases as routine testamentary matters. The issue of freedom for the slaves was mentioned positively in opinions, but did not attract the attention which it did in the cases which inaugurated this issue. The main focus of the Court in these cases was to determine the will of the testator and then to judge whether or not there were substantive issues, which would prevent the court from adhering to the wishes of the deceased. In cases where the Court found that there was debt owed by the estate, the desirability of freedom for the slaves in question fell before the law's mandate that the estate be settled properly. Even, as in the case of Amey, people who had been living as free for years were still assets, which could be used to settle debts owed by their former master.

⁸² For information on female slaves, miscegenation, and the structuring of plantation households, see Deborah Gray White *Ar'n't I a Woman: Female Slaves in the Plantation South* New York: W. W. Norton & Company; Revised Edition (1999), Eva Wolf Sheppherd, *Almost Free: A Story about Family and Race in Antebellum Virginia* (Race in the Atlantic World, 1700-1900). Athens, GA: University of Georgia Press (2012), Elizabeth Fox-Genovese, *Within the Plantation Household: Black and White Women of the Old South* (Gender and American Culture Series). Chapel Hill, NC: University of North Carolina Press (1988), and Karen A. Getman "Sexual Control in the Slaveholding South: The Implementation and Maintenance of a Racial Caste System". 7 *Harvard Women's Law Journal* 115, 125-34 (1984)

The auspicious start found in *Pleasants* was unable to sustain itself. The issue of freeing slaves began to develop more political and social overtones. Rather than being an example of liberty in a new nation, manumitting slaves became another aspect of regulating the affairs of an increasingly settled and fixed slave society in the South. As the state acted more and more definitively to restrict the rights of freed slaves in Virginia, the Court was forced to contend with the ramifications of manumission. The legislative acts forcing slaves to depart the Commonwealth would lead to another complexity in the jurisprudence. Masters who freed slaves now needed to take in to consideration what would happen to the freedperson after their death. Some master who wished to manumit offered slaves the choice to leave Virginia as a free person, or to remain in some form of bondage. When this choice was offered in the body of the will, it created a conundrum for the Court. At what point were slaves transformed from the status of chattel, who had no power to offer their opinion on their living conditions to legal persons who had a right to make their own life choices? Throughout the 1830s and 1840s, the Court would shift further away from the ideals laid out in *Pleasants* and move more firmly towards a jurisprudence which upheld the slave power.

Chapter IV: The Election Cases

The issue of the moment in which the beneficiary of a grant of manumission transformed from a type of property into a legal person was a complex issue for the Court. The ramifications of that transformation could be profound. Because the doctrine of *partus* had never been changed, children of slaves were born slaves, and children of free people were born free. The challenges to many of these wills lasted years, sometimes decades. When deciding the case, the Court needed to determine what the status of children born during these contests were. At what moment did the grant of freedom occur? On the date when the will was drafted? When it was executed? Or was it much later, when the final court ruled on the validity of the manumission?

The property interest of the white heirs was not the only property interest being settled. Extending the work of scholar Cheryl Harris, freedom became a property which was inheritable by the children of freed mothers.⁸³ Also at stake for those mothers was the legal right to make decisions on behalf of their children. This chapter examines cases which involve slave elections to be free. When Virginia passed the law which required manumitted slaves to quit the state, testators sometimes incorporated what the Court referred to as an “election clause” in the will. Before the slaves could be manumitted, the will directed the executor to poll the slaves, asking if they wished to be freed and forced to leave, or to continue to reside in Virginia in a condition of slavery. This provision became a point over which heirs could contest the will because they argued that it created a condition somewhere between freedom and slavery. If the beneficiaries of the manumission could give their opinion about their condition, they were not behaving as slaves.

⁸³ Critical theorists hold that whiteness is a particular property which is inheritable. See particularly Cheryl Harris “Whiteness as Property” 106 Harv. L. Rev. 1709-1791, 1724-1737 (1993).

In the 1833 case *Elder v. Elder's Ex'or*, the testator, Herbert Elder included an election provision in his will. Elder died in June 1826. He directed that his debts should be paid and that his executor shall give his slaves the choice of becoming free and then being sent to Liberia, but only if the Colonization Society will defray the expense. The election to stay or go to Africa was specified to take place within a year. Those who elected to go were to be given to a trustee until they were transported. Any slaves who elected to stay would remain slaves and be bequeathed to his brother and his heirs forever. After two years had elapsed without the election being held, the brother claimed all the slaves for himself and sued Herbert's executor, Minton Thrift. He argued that because the slaves had not chosen to be transported to Liberia within the year mandated by the will, they had become his property.

Thrift's response was that the estate was in debt and that he had not yet offered the slaves the chance to be freed and transported because he was leasing them out to earn money to cover the debts. Once he was comfortable that the labor of the slaves had covered the debts, he intended to hold the election specified in the will. Subsequently, the Colonization Society did offer to cover the debts, and all but one slave had opted to go to Liberia to be freed. John Elder's position was that the reasons why the election was not made was not an issue; the fact is, the will stipulated one year, and that year had passed without the slaves choosing to leave, therefore, the manumission was void and the slaves should be turned over to John as his property.

This case is particularly interesting because it provided another example of how the manumission cases were being used to reinforce and reward behavior that the Court believed upheld the social values of the planter elite. In this case, the Court here swung back toward the side of mercy, and did so because it agreed that the testator and his executor were demonstrating proper concern for the cultural and economic values of the society. It found that the will of the master here

was clear: the slaves should be freed. The Court contended that the testator's wishes should be given priority not only because they were clear, but because his wishes were in line with what the Court viewed as proper behavior. Elder properly provided under the terms of his will that the slaves should be free only upon the condition that they leave Virginia, which was in strict conformity with the law.

Further, the Court appreciated that Elder did not place the burden for the cost of their removal on the estate; he suggested that the Colonization Society could, and would, bear this cost. Judge Cabell wrote: "The intention of the testator to emancipate his slaves, is too evident to require argument; and it is equally clear that there is nothing illegal in the mode which he has adopted."⁸⁴ Cabell again wrote about the presumption in favor of liberty: "I approve of the principle declared by this court [...] that every instrument conferring freedom, should be construed liberally, in favor of liberty."⁸⁵ However, as some of the other decisions rendered by the Court during this era demonstrate, the Court did not always apply the construction most in favor of liberty. They do so when they understood the manumission as an act of benevolence, not as an act that undermined the structure of Virginia's slave-holding and hierarchical society.

John Elder claimed in his suit that the debts against the estate were few, and further claimed, contrary to the executor Minton Thrift's testimony that the slaves had had the condition of the will explained to them, and had, as a body chosen to remain as slaves in Virginia, rather than leave for Liberia. He all but accused Thrift of keeping the slaves and asked the Court to force Thrift to turn the slaves over to him and to provide an accounting for the labor of the slaves and their profits, which should go to him under the terms of the will. Thrift refuted this story. He did admit that the

⁸⁴ *Elder v. Elder's Ex'or*, 31 Va. 252, pg. 6.

⁸⁵ *Ibid*, pg. 7

slaves knew about the will. However, he asserted that the estate was in debt and, rather than sell the slaves outright to meet the debt, he held them and was using the proceeds of their leases to meet the debt. Because he wanted to settle the estate and pay the outstanding debt, while he had explained the conditions of the will to the slaves, he had not yet held the formal election because he was not ready to give them their freedom yet. He believed that his choices were to do what he had done or to sell the slaves outright, which he thought would be an “injustice toward them.”⁸⁶

An accounting of the estate conducted by the lower court showed that Thrift’s administration of the estate had been proper. It revealed that there were some debts owing both to and from the estate, and that the profit from the labor of the slaves had been properly applied to debts against Elder. The commissioner, who had inventoried the estate, held the election and found that all but one slave, Mingo, wished to leave Virginia for Liberia as free people. The lower court held that all John Elder was entitled to under the will was Mingo, who did not wish to leave Virginia and ordered Thrift to finish paying the debts, turn Mingo over to Elder, and prepare the slaves for their journey to Africa.

John Elder appealed. In his appeal, he restated his feelings about the timing of the election and also, in an attempt to retain something from his brother’s estate, questioned the status of children born during the intervening years. With regard to the timing of the election, Cabell stated, “If the residuary legatee wished to avail himself of the rights which would accrue to him, on their refusal to go to Liberia, it was his duty to take measures for compelling them to make their election.”⁸⁷

⁸⁶ Ibid., pg. 1

⁸⁷ Ibid., pg. 6

The attitude of the Court to John Elder was similar to the attitude the Court took towards Jones, the nephew who sued his aunt's estate in *Jones v. Jincey et. als.* The grasping over the estate displeased the Court, and the attempt to contest the will for the chance to profit off the property of someone else was problematic for the judges. Especially in this case, as John Elder had already benefitted under the will. The real property owned by Herbert was left to his brother. The Court believed that the obligation to the family was met by Herbert Elder, and he has the right to play the benevolent master to his slaves without unduly harming either his family or the society.

As to the children, John Elder contended that they were slaves. His argument was that since the election was not yet held, the mothers of the children were still slaves. Since the mothers had not yet chosen to be free, they were still slaves. Under Virginia law, the children follow the status of the mother, so the children were slaves. Again, the Court disagreed. Cabell stated: "I think the children born since the death of the testator, are entitled to their freedom, equally with their mothers. If the mothers, are to be considered, by relation, as free from the death of the testator, than the children, following the condition of their mothers, were free at their birth."⁸⁸ The slaves, in this case, were to be considered as free the minute the will was executed. However, the executor did right by entailing them until his responsibility for the payment of the debts of the estate were paid. The death of Herbert Elder converted the slaves from slaves to indentured workers, whose labor could be used to benefit the estate until the estate had been cleared. But indentured workers were not slaves, and could not give birth to slaves.

There was plenty of room, in this case, for the Court to act magnanimously. The Court could find no reason that this manumission was a threat to the established order: the freed slaves

⁸⁸ Ibid.

were removed, and those that were not removed stay slaves; the debts owed to other whites were covered; the main part of the estate, except for the slaves, were duly and properly kept in the family. The slaves were Herbert's property, not John's, and Herbert Elder was under no obligation to devolve his whole estate to John if he did not want to. The land stayed in the family, but Herbert's personal property was his to dispose of as he wished. In this case, it was clear that his wish was to free them in such a manner as did not place any burden or threat upon the society. The Court was thus free to dispense paternal mercy to the slaves, because it did not threaten the wider economic and social world of the slaveholding, propertied elite.

In this regard, this case was similar to several of the cases after *Pleasants* and *Hunnicutt*. In both of the earlier cases, the Revolutionary-era judges found for manumission for the sake of freedom. The ideals of the Revolution were present in the minds of the men who fought a war for liberty. In the later cases, the Court ruled not just on the ideal of freedom, but also on the idea of upholding the slave system's social order. In cases where the testator was seen as conforming to the social structure, and the manumission was a personal preference and a statement of his or her own beliefs and ideals, the testator should be rewarded for demonstrating compassion. In cases where the testator violated the social norms, for example, by leaving an estate in debt, the Court gave primacy to contracts between whites. The liberty claim in such instance was subordinated to the property interest.

A similar case, *Dawson v. Dawson's Ex'or* (37 Va. 602) was heard in 1840. In this case, like in *Elder*, a testator provided a sum of money to emancipate his slaves, who are given 12 months to decide whether they wish to leave the state and be freed or to remain in Virginia as slaves. Two years later, the testator added a codicil, which provided funds to his nephew for the support and maintenance of the slaves. The nephew sued, claiming that this codicil gave him an interest in the

estate and that the manumission clause was voided by the codicil. The Court disagreed, determining that the purpose of the trust was to benefit the slaves through the removal process, not to enrich the nephew. The judgment went in favor of the slaves, and the funds from the trust were to be used for the testator's specified purpose.

This was another instance where the Court punished what they perceived as a grasping relative. When the claim of debt was seen as valid, the Court enforced it, at the expense of the slaves. When the claim of debt was seen as faulty, in the three cases discussed because the Court determines that heirs are being greedy, the Court generally ruled in favor of liberty for the slaves. This was less to reward the slaves, or to give any credence to the idea that slavery was somehow unjust. It was a ruling that was meant to enforce the social values of family and property. The testator must be protected from those who would ignore his or her wishes in order to benefit themselves.

The Court heard *Isaac v. West's Executor* (27 Va. 652) in 1828. The issues in that case were substantially similar to other cases discussed in this thesis in depth. In this case, the slave owner executed a deed of manumission that freed the plaintiff's mother, Jenny, along with 23 other slaves, at the owner's death. Although he retained the right to her services for the rest of his life, he did not wait until his will to document the manumission and the deed was recorded with the county of Accomack. Isaac, the plaintiff, was born to Jenny seven years after the execution of the deed. The owner had settled many of his slaves on a portion of his land, which he devised to them in his will. For all practical purposes, he freed them to live their lives and hire themselves out to others, reserving a right to claim their labor for the duration of his life.

After his owner's death, Isaac sued the executor claiming his freedom. The trial court found that Isaac was not free, because his mother was still a slave at the time of his birth. The court

reversed this decision and entered a judgment for Isaac, saying that he was free. The court held that the three clauses of the deed, when read together, indicated that the owner's intention was to set the mother free immediately, not at his death. The wording of the deed was such that West had renounced all his title and interest, retaining only a right to claim the mother's personal services. It seemed likely that in addition to wanting to retain the service, West probably did not have the ready cash to post the bond which he would have had to do had he freed them outright. He may also have wanted to retain the right to their labor should it be needed.

West's will reinforced his desire to free his slaves. In the will, he also made provision for his legal heirs. The court described the will as follows:

After devising sundry tracts of land to his relations, and bequeathing them sundry valuable chattels, he says, "Item, I give all the Negroes which belonged to me the land lying above the Neck road, supposed to be two hundred acres more or less, it being part of the land where I now live, to them and their heirs forever on the female side in common amongst them all as a place of refuge. I also authorize my Executors to give them thirty barrels of corn, and one thousand weight of pork. I also give them all the flax, wool, and leather that may be in the house at my death. Item, I give to my men Joshua, Will, Sam, Parker, Edmund, and Adam, forty dollars each should they finish the crop."⁸⁹

Aside from the land and the slaves, West left an estate that was valued at \$4000.00 after settling all the debts against the estate. The Court again provided a liberal reading of the will. The estate was large enough that the heirs still benefitted. Those whom he manumitted were clearly left with enough property to maintain themselves without being burdensome on the county. Further, in this case, those initially manumitted by the deed filed in 1806 had been living as free people, hiring themselves out and also hiring their children out and keeping the proceeds of the hires for themselves. West never acted as though he were still their master, and their labor did not go to the

⁸⁹ *Isaac v West's Executor* (27 Va. 652), pg. 1

estate. The removal clause was not an issue in this case because the grant was filed in 1806, before the law required slaves manumitted to leave the state within a certain time period.

Unlike in *Rucker*, the creation of a quasi-state of freedom was not an issue in *Isaac*. The changes to the law between the times of the two wills clearly had an effect on the ability to manumit slaves. A later case, *Cranford v. Moses*, 37 Va. 277 also decided on this issue in 1839 and follows *Rucker*. In *Cranford*, a master left his estate to his widow and directed that upon the termination of her widowhood, the slaves, and all their increase be freed. A child of one of the slaves given to the wife sues for his freedom, based on the will. The Court finds that the doctrine of *partus* outweighed the will. Because he was born during the widow's life, while his mother was still a slave, he retained the slave status. Unlike in *Isaac* and *Pleasants*, the Court held that a *futro* emancipation was void and provided a much stricter reading of the will.

In these cases, the Court continued to balance the conflicting ideals of liberty and property rights. Additionally, the Court attempted to come to terms with its role in determining when and how a slave made the transition from property to person. The Court still saw a positive good in allowing for manumissions, and occasionally still cleaved to the *Pleasants* interpretation of a presumption for liberty. Unlike in the debt cases discussed in Chapter 2, the Court was willing to apply liberal readings to wills in cases where it felt that the testator had followed the norms of a slave society. The Court consistently applied three criteria before they would offer this liberal reading: first, the estate must have been clear of debt; second, proper provision must have been made to remove the freed people from Virginia; and, finally, the family must have been properly provided for by the testator's will. When those conditions were met, the Court was open to interpreting the will in such a way as to find reasons to uphold the master's will to manumit. Only if the testator had shown

him or herself to be a responsible member of society would the Court validate their right to dispose of their human property in a way that converted slaves into people.

The issue of the transformation from chattel into person complicated these wills. When, exactly, that transformation occurred had great impact. The judges in these cases were willing to place that moment of transformation at the execution of the will. The intent to manumit was the genesis of that transformation in these cases, so the children of slaves in contested will cases were born free and had the rights of free people at the moment of birth. As in *Pleasants*, the will was interpreted to embrace unborn children, even in cases where the white heirs requested a stricter reading that only manumitted slaves who were alive at the time of the will, while simultaneously allowing the heirs to retain freed people's offspring as an inheritable part of the estate. As I will show in the next chapter, this interpretation would be strongly challenged in the 1850s.

Chapter V: The Case of *Bailey & als. v. Poindexter's Ex'or*

In the 1850s, the Court heard the last eight cases it would decide involving testamentary manumission. In the early part of the decade, the cases fit firmly in the thread of jurisprudence, which has been laid out by the Court. In cases where the intention to manumit was clear, and there were no social reasons why the Court believed that the manumission needed to be restrained, judges upheld manumission. However, the cases heard in 1858 marked a dramatic departure from this ostensibly settled line of jurisprudence. The increasing pressure of the abolition debate and the tenor of national politics inserted another layer of complexity to these decisions. Rather than enforcing a moral or social standard, applicable only within the south, the Court suddenly used these cases to defend the institution of slavery. The cases, which I examine in this chapter, rejected the presumption of liberty and were adjudicated in a context of preserving and upholding both the slave system and the idea that slaves were not and could not be anything other than chattels.

With *Bailey & als. v. Poindexter's Ex'or*, the Court made this dramatic shift. Heard in 1858, this case is a substantial departure from the prior cases considered. In 1858, the divisions between the North and South were at a fever pitch. Two acts of the United States Congress on the expansion of slavery were passed in the 1850s. The Compromise of 1850 admitted California as a free state, and allowed the status of slavery in the territories of New Mexico and Utah to be decided by popular sovereignty. In order to give something to the Southern delegation, one element of the compromise strengthened the Fugitive Slave law.

Generally, the Compromise of 1850 was a politically popular solution, and people hoped that it would put an end to sectional tensions. However, the expansion of the Fugitive Slave Act outraged abolitionist activists in the north and increased calls for the abolition of slavery in the states as well as the territories. Harriet Beecher Stowe published *Uncle Tom's Cabin* in 1852, which brought

the abolitionist cause to the attention of a broader audience. *Twelve Years a Slave* was published in 1853 and was used to argue how easily the Fugitive Slave Act could be abused to force even free blacks into southern slavery. By the middle of the 1850s, instead of being settled, the sectional divide over slavery had widened and threatened disunion.

The political debate over the spread of slavery was reopened in 1854 when the Kansas-Nebraska Act created the two territories and again allowed them to determine their free or slave status by popular vote. Although Congress hoped that the compromise and popular vote would ameliorate the public, Kansas erupted in a bloody civil war because people on both sides of the issue flooded the state to try to sway the vote. Instead of easing tensions, the act increased them, inspiring the creation of the Republican Party out of the Free Soil Party, which added an economic anti-slavery argument to the social and moral opposition to slavery. The Republican Party seized on the “slave power” argument as a key part of its platform, opposing the spread of slavery as a threat to the egalitarian ideals of the American political system.

In 1857, the United States Supreme Court decided *Dred Scott v. Sandford*, the landmark case in which it was held that blacks, whether slave or free, were not and could not be citizens of the United States, and therefore had no right to sue in Federal Court.⁹⁰ The case also blocked the Congress from prohibiting slavery in the territories. This case had profound implications for freedom suits, and for the legal lives of blacks throughout the nation. The case was meant to firmly and forever “settle” the issue of slavery. However, it had the opposite effect. It further galvanized the abolitionist movement and ratcheted up tensions between the South and the North.

⁹⁰ *Scott v. Sandford* has been written about extensively. Don E. Fehrenbacher’s [The Dred Scott Case: Its Significance in American Law and Politics](#). New York: Oxford University Press USA (2001) is an excellent resource.

It was in this environment that the Supreme Court heard *Bailey*. The facts of *Bailey* should, by now be familiar as they echo most of the other cases: the testator wrote a will which gave his widow a life estate in his slaves, and stipulated that at the termination of that life estate, the slaves would have the right to make an election as to whether they would be freed and transported from Virginia, or remain slaves and be sold at public auction. John L. Poindexter's will stated: "The negroes loaned to my wife, at her death I wish to have their choice of being emancipated or sold publicly. If they prefer being emancipated, it is my wish that they be hired out until a sufficient sum is raised to defray their expenses to a land where they can enjoy their freedom."⁹¹ Of those who choose to remain, Poindexter directed that they be sold publicly and the resulting funds be divided equally between his sister and his nieces and nephews. He also bequeathed two specific legacies, to Ann Lewis Howle and to Georgianna Bryan, and directed that if the non-slave property vested in his wife was not enough to pay them out at her death, the slaves should be leased out until such time as the money existed to pay the legacies and then the slaves should be disposed of as directed.

The same day on which the will was written, Poindexter added a codicil: "I wish it to be understood that in the event of my negroes loaned to my wife be emancipated at her death, and not sold for the benefit of my sister [and others mentioned in the will]." The codicil directs that "my nephew Jacquelin L. Poindexter shall pay the sum of one thousand dollars to be divided equally between [the legatees named in the will]; and I give him my plantation Cedar Lane on that condition"⁹² This seemed like it should be the type of case that did not get much attention by the Court. The testator behaved in the responsible way. His instruction to manumit was clear. His will provided generously for his wife, leaving her a life estate which she even retained a portion of if she

⁹¹ *Bailey & als. v. Poindexter's Ex'or* 55 Va. 132, pg. 3

⁹² *Ibid.*

were to remarry.⁹³ His nieces and nephews were cared for. The will also specified that the slaves were to be leased to cover the debts and named legacies if the cash portion of the estate fell short. Should the slaves be freed, the legatees were to receive a cash payment in lieu of the value of the slaves.

It seemed clear that whoever drafted the will was familiar with the issues raised by manumission and wrote it to conform to the prevailing legal standards. The manumission clause, for example, was unambiguous. The issue of the election had been settled by earlier cases. There was no legal problem that should have been apparent by asking the slaves if they wanted to leave Virginia as free people or if they wished to stay in Virginia but remain slaves. The estate was sufficient to allow Poindexter to provide for his responsibilities to the social order: his wife and relations were cared for and the land remained in the hands of his family.

The executor brought the suit because at the death of the widow, he received no accounting for the personal property loaned to the wife under the will (listed in the case as having been personal and perishable property appraised at \$1146.05), but had only been given back the slaves. Of the slaves, “several” had died, and 13 had been born.⁹⁴ The case was first heard in 1855 by the lower court at the death of the widow, prior to *Scott v. Sandford*, and the lower court held that the slaves were “by the terms of the emancipating clause in his will contained, absolutely free at the death of the life tenant, and that it was not proper or necessary to put said slaves to their election.”⁹⁵ The court also held that the slaves which had been born during the life estate were also to be considered as free at the death of the widow. It was from this decree that the defendants appealed.

⁹³ It was common in wills for a man who pre-deceases his wife to leave her at least the required dower portion, one-third of the estate, for her use as long as she lives. It was also common for that portion to be revoked in its entirety if the widow remarries.

⁹⁴ Ibid., pg. 3

⁹⁵ Ibid.

The lower court's ruling fits in with the prior jurisprudence. One would expect that the Supreme Court would uphold the lower court based on its own prior decisions. There was nothing in this case, on its face, which signaled any of the prior departures. The will of the master was clear; the slaves were to be transported if they elected to be free; means were provided in the will to honor the bequests and debts to other white elites. This would clearly seemed to be the type of case that the Court would construe liberally. However, this was not what happened.

The Court's handling of this case departed dramatically from tradition. Both sides retained 3 lawyers each to argue their side. In fact, the case itself stated that it was "argued at great length, in writing" and that "the reporter has found it impossible to combine in one all the arguments on a side; and equally impossible to insert all of them."⁹⁶ The case went on for 33 printed pages, much longer than any prior case discussed.⁹⁷ No other case featured six lawyers. And certainly, none of them seemed to vex the reporter quite so much, or at least, no earlier reporter inserted himself in the case to say so.

John Howard opened the arguments for the appellants. He first requested that the Court consider the question of the election, but before he believes the court can get to that, he discussed the issue raised in *Scott v. Sandford*: the legal status of the negro slave, and whether the slave has any right or capacity to decide on his own whether to be free. The issue of election had come up in two prior Virginia cases: *Dawson* and *Elder*. In neither case was the issue of the election of slavery or freedom by the slaves an issue that was litigated substantially. In *Elder*, the Court even held that mothers of slave children had the right to make the election for their child, on the basis of the

⁹⁶ Ibid.

⁹⁷ *Pleasants* runs longer than average at 17 modern printed pages. *Elder* is seven, which is typical of the cases discussed in this paper.

natural family order. The relative silence on this issue indicated that neither the lawyers nor the judges involved found any issue, legal or social, with the notion of asking the slaves if they wished to be free. It was assumed that, as long as the election was not in violation of the laws, for example, asking the slaves if they wished to be free and remain in Virginia, that there was no harm in ascertaining their opinion about their status.

Howard emphatically denied that the slaves have any rights at all. Because slavery was unknown to the Common Law, Virginia was forced to create law and jurisprudence to cope with slavery. He argued, counter to the previous jurisprudence on the issue, that because of this, the slaves had no rights that could be found in the Common Law, only in the statutes that the Constitution and the law give them. If the law, he added, gave them rights, it then must confer an obligation to uphold those rights, and therefore must grant the slave civil remedies to defend them. Howard cited *Blackstone's Commentaries* to define what those civil rights were: the right of personal liberty; the right of personal security; and the right of private property (cited in the case as 1 Black Com. 129, 130). It was obvious, then, that as the slaves possessed none of those rights under Virginia Law, they therefore were not required to have any remedy to defend them, save for the exceptional case of a suit for freedom. Here, he cited *Scott v. Sandford* in support of his argument that slaves have no rights, which the law is obligated to uphold. This was unusual. Although these types of suits happened all throughout slaveholding regions, Virginia lawyers and judges kept the references in their briefs almost wholly to Virginia jurisprudential precedent. There were almost no references to case law or statute from other states. When there were references in either the decisions or the case summaries which have been preserved, they were to the common law, and generally only then when the writer wished to make a larger point about the liberality that should be

given either in the construction of testator's intent in will cases, or to broader concerns about the preference for liberty which comes from the common law tradition.

Next, Howard examined the history of Virginia, and commenced to restate the law from the first shipment of slaves in "1620", through the acts of 1705, 1727, 1792, 1819 and 1849.

Conveniently, he left out the act of 1782. He concluded this summary by saying: "[l]ooking at these acts, it is safe to say that the law regards a negro slave, so far as his civil status is concerned, as purely and absolutely mere property."⁹⁸ This extensive defense of the slave law of Virginia was excessive.

The case, on its face, was not about the continued existence of slavery. The case was not about the status of slaves as property, the case arose precisely because slaves were property, which belonged to a property owner who could bequeath them as he saw fit. There was nothing in the case itself that differentiated it from the prior cases, which were not seen as being proxies for the slavery debate. Clearly, at this point in time, the idea of freeing slaves at all, even the act of releasing personal property, which was never an issue at law, had become imbued with broader political meaning.

It is in this vein that Howard went on for several more pages, arguing not against this manumission in particular, but the idea of manumission in general. He equated it with the creation of a contract with a slave.⁹⁹ The election clause imbued the slaves with rights that were never before granted to slaves, he claimed. The sum of Howard's argument was not that this will was a problem; it was, however, a problem for a master to free his slaves. In this political climate, the admission that the slaves were a "peculiar species of property" was too much. The slaves must be a regular species

⁹⁸ Ibid, pg. 5

⁹⁹ Contracts with slaves have a mixed history in Virginia law. Slaves could hire themselves out and slaves could contract on their master's behalf, and cases involving slave action in either of those two areas were heard. Contracts involving self-purchase, when heard by the court, were never successful. See *Sawney v. Carter* 27 Va. 173 (1828) for an example. Although the court is sympathetic to Sawney, who sued for his freedom based on an agreement he'd made with his master, under which he'd performed. The Court recognized that Sawney had made payment, but found that he had no remedy at equity to enforce the contract.

of property, such as an ox. To grant the slaves any humanity at all was to threaten the entire system of slaveholding in Virginia, which was already under attack from within and without. Attacks from within, could not be tolerated.

The main focus of his John Howard's attack was on the election clause. Slaves were not anything other than property. Only legal persons can be admitted to express opinions at law, and unless the slaves were free, they were not legal persons. By making their opinion predicate to their emancipation, the Court would be granting the slaves civil rights prior to the creation of a legal person who can exercise those rights. This, Howard argued, created the condition whereby the Court was asking slaves if they wish to be free. If this were extended beyond this case and these slaves, it would create a crisis whereby slaves could express opinions about their condition.

Howard finally reviewed the prior jurisprudence as it related to the fact of this case. He provided a fresh reading of *Pleasants* and of *Elder*. He denied that *Pleasants* had any bearing on the case at hand. Unlike *Bailey*, the wills of both John and Jonathan *Pleasants* conferred an absolute and unquestionable manumission when the laws of the country would allow it. Neither will gave the slaves the right of choice. They were disposed of as property, and were not given any legal or civil capacity until the moment of manumission. With regard to *Elder*, he argued that the court was silent on the issue of the election of the slaves, and thus the case gave this Court no guidance on the matter. As he explained,

[G]reat questions like this, affecting state policy not less than large private interests, ought never to be determined without thorough discussion and careful consideration; and it is not too much to ask of this court, a full court of five judges [...] to take in to serious deliberation the novel but highly important question now for the first time distinctly presented, upon full argument, for its authoritative [sic] judgment¹⁰⁰

¹⁰⁰ Ibid., pg. 10

After this, the recorder again inserts himself into the case to say that “Mr. Howard then entered into an elaborate review of the history and the policy of the emancipation laws and of the laws *in pari materia*.” The recorder, however, did not preserve these arguments, instead summarizing them as follows. It is worth quoting this summary at length, because this was the heart of the issue, and of Howard’s argument:

He contended, that since the earlier decisions of this court favoring freedom to the slave, there had been a radical revolution in the legislation and policy of the state in respect to the institution of slavery; that the institution was now consolidating and fortified by the organic and statute law, and that it’s protection and perpetuation was a chief part of the public policy of Virginia and all the southern states; that the maxims of the civil and common law in *favorem libertatis*, arose from a state of things, and were applied to a class of persons, utterly different from those before us; that those maxims had no just application to our negro slaves; and that it was the duty of the courts of the commonwealth, in cases of doubtful emancipation, to favor and perpetuate slavery, instead of following the suggestions of a false philanthropy in aiding its destruction.¹⁰¹

This, then, was Howard’s true argument in this case. He contended that the law, the facts, the years of legislation and jurisprudence prior to 1858, no longer mattered. Benevolence was neither practical nor desirable at this time. The slave system was under attack, and the courts were a primary bulwark in the task of favoring and perpetuating slavery. In previous cases, the Court had taken a role in perpetuating the values of southern society and of American ideals of rights in private property. The right of a testator to manumit slaves rested completely in the idea of property rights. It was only generally restrained by the Court in prior cases where the Court saw the right to manumit as being in conflict with other duties the testator has, predominantly cases where there existed debt. In those cases, the Court set the right of whites to the property interest of their debt obligation. If there was no such obligation, if the Court was convinced that the testator has performed his responsibilities to the social order, then the manumission was seen as a benevolent act, which also helped to reify the

¹⁰¹ Ibid, pg. 11

idea of slavery as a necessary institution that benefitted those involved. Southern responses to anti-slavery arguments strove to show that slavery was a positive good. Slaves in the south, contrary to what Stowe wrote, were happy, content, well cared for. George Fitzhugh famously argued that “Negro slaves of the South are the happiest, and, in some sense, the freest people in the world. The children and the aged and infirm work not at all, and yet have all the comforts and necessities of life provided for them. They enjoy liberty, because they are oppressed neither by care nor labor.”¹⁰² Prior to *Bailey*, manumission reinforced the idea that Virginia slave owners were good people, who used the power they held lightly and in the best interests of the slaves and of their society.

Patton next argued for the executors. His defense of the will was tepid at best. He was “willing to concede for the purposes of this argument, and indeed, candor compels me to say, that in my opinion it is true, they were not free at the death of the widow.”¹⁰³ He argued that they were not free at the point of election, either. The election should be read as incidental, and that if the slaves are free at all, they are free “on the terms (and only on the terms) thus prescribed by the will.”¹⁰⁴ He contended that this case was no different from *Elder*. The slaves did not make themselves free, they were freed because the master was benevolent. His argument then rested on the idea that this case must be read in context with the prior jurisprudence. Manumission was legal, provided the slaves left the state. The manner under which they left and the fact that their master was compassionate enough to give thought to their wishes was, as it always has been, a matter that was strictly a private issue and an issue of property rights.

¹⁰² Fitzhugh, George. “Cannibals All! Or Slaves Without Masters”. Richmond: VA (1858)

¹⁰³ *Bailey*, pg. 11

¹⁰⁴ *Ibid.*

Robertson, in reply to Patton, avoided the embellishment and scope of his colleague and focused on the points of law raised by Patton. The election was critical, and he argued, a predicate condition placed on the slaves, upon which the slavery or freedom hinged. “Doubtless he [Poindexter] intended that they should enjoy the full benefit of their choice. All that my associates or myself contend for is that they cannot lawfully make the choice or election with the testator intended.”¹⁰⁵ He contended that to allow this choice was to allow the slaves to free themselves. Patton argues that they do not, that they are free upon the “will of the master,”¹⁰⁶ they were not free because they were given the choice to be free, and they were free because Poindexter declared them to be so. However, Robertson disagreed. The choice was not incidental, it was necessary under the will. This, he stated, the testator could not do. The fact that other testators have done so before, and that it had been upheld by the Supreme Court was not referenced in Robertson’s argument. In fact Robertson did not raise any new point of law in his rebuttal. He instead focused on the minutiae of Patton’s language.

The case produced two opinions, the first by Judge Daniel, with Judge Allen, the President of the Court, and Judge Lee concurring. Judge Moncure wrote a second opinion, with Judge Samuel concurring. Daniel’s opinion opened with an admission that “[t]here does not seem to be to be any serious doubt as to the intention of the testator in respect to the emancipation of his slaves.”¹⁰⁷ However, even admitting to this, Daniel could not find his way past the election clause. “The codicil to the will does, however, I think, aid in showing that the idea of an election, by his slaves, with its consequences, was distinctly and prominently presented to the mind of the testator whilst engaged

¹⁰⁵ Ibid., pg. 15

¹⁰⁶ Ibid.

¹⁰⁷ Ibid., pg. 23

in planning and setting out the scheme of his will.”¹⁰⁸ Daniel believed this because the codicil affected the way that the bequests to the named legatees were handled. Should the slaves make the election to be free, the legatees received a fixed payment of cash. However, if the slaves were sold, then they went to auction and the amount raised by the sale was to be split between them.

Although election clauses had not been a previous cause for the will to be broken, Daniel seemed to be looking for a way to construe the clause as causing harm to the legatees. If he could interpret this clause in a way that harmed the legatees, he could structure his rejection of the will in a similar vein as the earlier jurisprudence. He also provided an additional, negative to the clause: “I cannot undertake to say that there would not be as plain a violation of the testator's intentions in forcing emancipation and its consequences on his slaves, against their election to remain here in slavery, as there would be in withholding freedom from them, on their expressing a preference to be emancipated.”¹⁰⁹ The misconstruction of this clause may not only harm the legatees, Daniel argued, it may actually harm the slaves, by inflicting an unwanted liberty on them. It seems here that Daniel was substituting the reading in favor of liberty with a reading that is in favor of slavery, not just for the legatees, or for the planter elite, but for the slaves themselves.

In addition to the election clause, Daniel faulted the will for failing to provide for the slaves in Liberia. This issue had never been brought up in a Virginia manumission case. The law did not specify that the master had any obligation to the slave after manumission. The only obligation alluded to in the law was an obligation to prevent the freed slaves from being a burden on Virginia. Once the slaves had been removed, they were free and, as they were no longer within the Commonwealth, the law had remained silent. Connected to the issue of support, Daniel raised the

¹⁰⁸ Ibid.

¹⁰⁹ Ibid, pg. 24

objection that the testator assumed that some slaves would have opted to stay in Virginia in a condition of slavery. Daniel opined that these slaves were likely to be those who were old and infirm. The implication was that these slaves were likely to bring poor prices. There was evidence that this was a concern in the law. Several statutes relating to slaves from the seventeenth century forward limited the manumission of old or infirm slaves, to prevent masters from dumping unwanted and infirm slaves on the poor roles of the counties. Part of the responsibility of slavery was seen as a responsibility to provide care to the aged and infirm.

Daniel had reached the heart of the matter: “If the condition [the election] is legal and possible, we are bound, in carrying out the testators intentions, to allow the slaves an opportunity to perform it. If, on the other hand, we find it to be illegal or impossible, we are equally bound to declare the bequest, dependent on its performance, void.”¹¹⁰ In this portion of his argument, Daniel the court firmly in the context of the common law. In general, and as stated in prior cases, notably in *Pleasants*, the intent of the testator was to be given the highest weight. The making of a will was a grave legal matter. The will not only performed the legal role of conferring property, it had a deep social significance. It affirmed the right of a person, as a free person, to dispose of his goods to his heirs. It enforced and encompassed social relationships. It provided for the final act of a legal person. Courts assumed that the testator engaged in this issue with all due seriousness, and the prevailing legal guideline was to, wherever possible, interpret the wishes of the deceased in such a way as his intentions were seen as fit and legal, and to then aid the living in carrying them out. In prior cases, where, as Daniel noted at the beginning of his opinion, the will of the master was clear, earlier courts went out of their way to read the will and the law in such a way as to enact the will of

¹¹⁰ Ibid

the testator. In this case, the Court departed from these assumptions and practices. Although the election issue had been heard in several prior cases, and did not form an insurmountable impediment to the fundamental desire for a man to bestow his property as he saw fit, this court abandoned that notion. The issues surrounding the granting of anything that looked like a civil right to a slave was too much an issue in 1858 for the court to be comfortable upholding it.

Daniel commented on the issues raised by both *Pleasants* and *Elder*. Regarding *Pleasants*, he remarked that the election is subsidiary, the will of the testator made it clear that his intent was to manumit, regardless of the election of the slaves, so the issue of election was not an issue at law in that case. This was true, the focus of the case, then as now, has tended towards the issue of the perpetuity. As that issue was not raised in *Bailey*, Daniel remained silent on how he may have found were that issue before him. In the matter of *Elder*, Daniel admitted that “[i]n the case of *Elder v. Elder’s Ex’or* (it must be admitted), the will, to be construed and executed, does, in all its features disclosing a purpose on the part of the testator to leave the manumission of his slaves to their election, bear a very close resemblance to the will in the present case.”¹¹¹ However, he rejected utterly the idea that the finding of the Supreme Court in *Elder* should bear weight on the present case. Because the issue of the election was not raised in the arguments left to the court (it is seems that they only had the records of the Supreme Court hearing of the case, not the full litigation of the lower court cases which gave rise to the Supreme Court’s hearing). The issue in *Elder* was simply the time of the election, not the election in and of itself. Because that issue was not adjudicated, the Court sidestepped *Elder* as an authority. It would be likely, however, that had *Elder* found that the election itself was spurious, that the Court would have held it to be an authority. The issue, for the

¹¹¹ Ibid, pg. 26

lawyers and for the judges in *Bailey* was to find a way to hold that the will of this master was invalid. The personal concerns regarding this man, his right to property and the ability of this testator to make his desires known to the law and to his posterity must take a backseat to the broader desire to uphold the law and system of slavery. To admit of anything else at this point would be to find fault in the system, and to imply that the enemies of the system had some valid points. To allow the slaves to make the election treats the slaves as human beings, not as mere chattels. While the earlier cases had, in the majority, shown the legal system to be tolerant, if not of the broader idea of slave manumission, at least to the inherent property right of the master.

Moncure began his separate concurrence in a more measured tone. He found that the idea of emancipation *in futuro* was common, has been widely adjudicated in Virginia and was the settled law. He did not wish to address the issue of manumission in general, stating that that was a concern that was better left to the legislature, not to the judiciary¹¹² and, that the legislature has not yet moved to repeal the act of 1782, only to modify it in 1806 with the removal provision. He did not even see an issue with the idea of a master emancipating *in futuro* dependent on a condition precedent, provided that the condition be in compliance with the law. His issue, then, was the question of whether the specification of election could be construed to be in violation of the law. He relied on the authority of *Elder*. This case, he stated “even if I doubted the soundness,”¹¹³ implying that he might feel that way, he felt bound to abide by it, because it was argued ably, judged by a competent and august panel and had existed for a quarter of a century. He admitted that it was considered sound law for that time, and that testators and their council had looked to the decision for guidance.

¹¹² Ibid., pg. 29

¹¹³ Ibid., pg. 30

He pointed out that this will was written two years after *Elder*, and that the decision of the court in *Elder* likely provided a template for the draftsman.

Because this issue was settled law, Moncure demurred from wishing to change it via the judiciary. Moncure was reluctant to become an activist judge: “[i]f public opinion has undergone any change as to the policy or propriety of authorizing masters to emancipate their slaves, or to emancipate them in futuro or upon condition, such change must develop itself in the action of the legislature, and not of the courts”¹¹⁴ he wrote, opining that the business of the court was to legislate the law as it is, not how they think it should be.

Although he admitted of difficulties in the stipulation for election, he noted that in *Elder* difficulties were overcome, and believed that the same could be done in this case. Moncure argued here not necessarily for the slaves or for the idea of manumission. He set himself up as a champion of the law. The process of the law, in his mind, should not be as slave to public opinion or political whim. The courts have, laid out a method to handle these cases. That method incorporated not only the legislation of Virginia, but also common law principles, the religious and personal sentiments of the Quaker manumitters and a steady, evolving reliance on the stability of the decisions of prior courts. Although he alluded to the idea of political change, Moncure wished to absolve the court from descending to the level of opinion and politics.

The majority of the court concurred with Daniel. The slaves, in this case, did not achieve their freedom. The will of this master was turned aside against the rising tide of national affairs. This was not the only case that the Court heard this year. In fact, 1858 brought four cases involving testamentary manumission to the court. *Bailey* was heard first, in January. In April, the Court heard

¹¹⁴ Ibid., pg. 32

three cases. In the first, it found in favor of Clara, a woman who alleged that she had been illegally detained in Virginia after being freed by a will in Maryland.¹¹⁵ The second case decided that April overturned a lower court ruling freeing slaves because the estate was in debt.¹¹⁶

The final case heard in April of 1858 was also the final case that the Virginia Supreme Court heard regarding testamentary manumission. The facts of this case were strikingly similar to *Bailey*. In *Williamson & als. v. Coalter's Ex'ors & als.*, the testatrix made a will in 1857 which manumits one slave by name.¹¹⁷ In another clause, she wrote that she wished “the balance” of her slaves to be manumitted on January 1, 1858.¹¹⁸ She directed her executor to use enough of her estate to settle the slaves in Liberia or “any free state in the country in which they may elect to live.”¹¹⁹ She also directed that any slave who does not wish to leave the state be permitted to choose their new owner from among her relations. In both the election to stay or leave, and in the case of those who stay, to whom to belong, she directed that the slaves shall choose and that parents shall choose for their children.

In this case, the testatrix’s daughter and other legatees appealed a lower court verdict, which held that the slaves were freed by the will. The lower courts seemed to feel more bound by precedent in these later cases. Again, as with *Bailey*, there seemed to be nothing in this will which would have been out of line with the prior jurisprudence. The estate was a large one, the brief in the case stated that the clause manumitting the balance of the slaves embraced 93 people. The estate,

¹¹⁵ *Hunter v. Humphreys* 55 Va. 287 (1858)

¹¹⁶ *Reid's Adm'r v. Blackstone & als.* 55 Va. 363 (1858)

¹¹⁷ It is striking how quickly this case was heard. Normally, it takes several years between the probate of the will and the resolution of the will by the Supreme Court. In this instance, the Court takes up the matter in the same term as the bill to hear it was filed. The Court likely was aware that the *Bailey* decision was already causing a disruption in the way that wills were being drafted and moved quickly to settle the matter further.

¹¹⁸ *Williamson & als. v. Coalter's Ex'ors & als.* 55 Va. 394 (1858), p. 1

¹¹⁹ *Ibid.*

not including the slaves, was estimated at being worth fifteen to twenty thousand dollars, more than enough to raise the funds the will directed to outfit the slaves for their journey to Liberia without completely depleting the estate. Other clauses of the will provided for her daughter and the other legatees. In this case, as with *Bailey*, it seemed that the drafter of the will was familiar with the pitfalls of a manumission will, and was careful to keep the will congruent with the guidelines set out by earlier cases. The manumission clause was clear, and the presence of the election for slavery or freedom would not have seemed problematic prior to the Court's decision in *Bailey*.

The case was argued around the precedent set by the *Bailey* decision. Both the council for the plaintiffs and for the appellants mentioned the case. The appellants argued that the case could not be distinguished from *Bailey*, the manumission under condition of election made the will void on its face. The plaintiffs' council argued that the case was not like *Bailey* at all, because the clause granting manumission was clear, and the election came as part of a subsequent clause. They cite another manumission case, *Osborne & als. v. Taylor's Adm'r & als.*, where the Court was asked to decide whether a confusing manumission clause voided the manumission.¹²⁰

The substance of the case was that Osborne left a self-made will that had a manumission clause, but later directed that some of his slaves be left in life estate to his wife and then manumitted on her death. The initial will was probated and the slaves not left to the wife were freed. On the wife's death, her heirs sued for the slaves left in the life estate, claiming that the will was unclear about their status, and the status of the offspring born during the life estate. Since the clause was unclear, the heirs felt that the manumission clause was void. The court disagreed, finding that the slaves were freed at the execution of the will and that the offspring of the mothers were also free

¹²⁰ *Osborne & als. v. Taylor's Adm'r & als.* 53 Va. 117 (1855)

because they were born during an indenture, not to a slave. The Court in this case also found that the slaves, who were put out to lease while their status was decided were also entitled to the proceeds of their hires for the duration of the case. The difference in the jurisprudence in three years clarifies the shift that has happened, especially considering that the composition of the Court was the same.

The Court in *Williamson* was divided as it was in *Bailey*. Samuels and Moncure in both cases found that the wills should be upheld. In both cases, it was not based on earlier ideas of the preference for liberty, but rather it is the property interest and the consistency of the law that Moncure is most worried about. In *Bailey* he wrote:

On the faith of it counsel have advised, testators have made their wills, courts have construed them, and executors have carried them into effect. To disregard it now, and decide otherwise, may be attended with the greatest evils. The same reasons which are said to require us to disregard that case, seem equally to require us to disregard all the cases which decide that emancipations in futuro are lawful; and thus the whole law would be unsettled in regard to the emancipation of slaves.

He, with Judge Samuels concurring, reiterates that position in *Williamson*:

Stare decisis, I know, is a rule of the first importance. But that case itself, in my judgment, does so much violence to the rule, that it would be more vindicated by overruling than by adhering to the case. I do not mean to say, however, that, confirmed as that case is by the opinion of the majority in this case, I may not feel myself bound by it hereafter.

The ramifications of the shift in the jurisprudence during the session of 1858 did not escape Judge Moncure. As shown, the majority of the testamentary manumission cases heard during this period fit into an evolving and continuous narrative of jurisprudence. Although there were different external factors putting pressure on the parties to the cases and the judges deciding them, there was still a stable theory underlying the decisions and guiding the judges. Although this line of jurisprudence was initiated by a Revolutionary era combination of the presumption in favor of liberty coupled with the ability for a master to be secure in his right to manage and bestow his property as he saw fit, the

law's main concern when hearing these cases, for the majority of the nineteenth century was the reinforcement of the right of slave owners to hold their property in slaves and a desire to reify the values of a slave holding society.

It is possible to draw a clear line of reasoning from *Pleasants* through to *Osbourne*. It was rare for these cases to cite outside events or to attempt to read the issue of the manumission at hand in the context of a broader philosophy for or against slavery. While the cases can be read as supporting or denying some level of anti-slavery sentiment, the Court takes care not to let politics intrude on the work of the law.

It was only with this severe social rupture that the traditional jurisprudence was discarded. *Bailey* is, in almost all respects, different from every case which came before it. The length and tenor of the argument demonstrates the seriousness with which the litigants approached the case. They were not arguing this case alone, they were arguing for the sustainment of the entire slave system. They are clearly aware of the pressures being put on the system from without and are building not only a political, but a legal and judicial bulwark against the coming changes. This case, unlike the others, was not about a private matter of property, it was about the defense of the pro-slavery ideology and it reflected the hardening of opinion in America as the 1850s drew to a close.

The Virginia testamentary manumission cases provide a lens through which we can understand the evolution of the law of slavery in the American South. The focus of the literature has mainly been directed towards examining the landmark cases of the United States Supreme Court, or on examining the development of statutes governing slavery. Examining contested wills provides an example of how the law worked in practice. The legislative actions provided the operating limits around which the judges interpreted and applied the laws directly to the most private areas of people's lives.

These cases involved the most intimate relationships and the most personal of acts. American society, and the Common Law traditions on which it rests, put immense value on the right to private property. Corollary to that right is the testator's right to dispose of that property in the manner they determine. Writing a will is the last legal act a person performs. Courts are often hesitant to interrupt a testator's direction. In these cases, we see how the Court inserted itself.

The circumstances under which the Virginia Supreme Court was willing to override the will of the master to manumit his or her slaves focus our attention on the extent to which the slave question permeated every aspect of Virginia life. These wills, and the arguments made for and against them, illustrate the tension between multiple layers of rights: the right to own and dispose of property and the right to be or to become free. The history of these wills illustrate another level of discourse around slavery in Virginia. The shift in the interpretation of these rights over the course of the antebellum period demonstrates the process of not only extending law to accommodate slavery but also how the development of a slave society permeates every aspect of life.

These cases also illustrate the economic and social pressures created by slavery. In other types of will contests, the species of property involved does not often matter. The value of the property is all that is important about to the Court. It is unusual for the feelings of an object of property to be considered in the court. The shift in time from the presumption of liberty outlined in *Pleasants* to the staunchly pro-slavery interpretation offered in *Bailey* offer an insight in to how individuals and institutions approached the dichotomy of dispositioning property which possessed consciousness. This issue is also not present in other types of manumission actions at law. In freedom suits, the assumption is that the plaintiff both desires freedom and has some standing to sue for it. In the testamentary cases, the Court is forced to make several determinations and to directly decide the instant when the slave moves from chattel to person. These cases demonstrate

that this was not a clear decision and that influences external to the law had a strong bearing on how the courts could approach that transformation.

Appendix: Table of Cases

Case Title	Case No.	Year of Will	Year Decided	Time Between	Num. Slaves	Num Legatees	County	Debt	Result	Testator Sex
Pleasants v Pleasants	6 Va. 319	1777	1800	23	300	10	Henrico	N	F	M
Charles v Hunnicutt et al	9 Va. 311	1781	1804	23	7	1	Sussex	N	F	M
Woodley and Wife and Others, v. Abby and Other Paupers	9 Va. 336	1790	1805	15	4	>2	Isle of Wight	Y	U	M
Patty and Others, Paupers, v. Colin and Others	11 Va. 519	1794	1808	14	3	1	Richmond	Y	U	F
Peggy and Mary v Legg	20 Va. 229	1790	1818	28	3	1	Loudoun	N	S	M
Dempsey v Lawrence	21 Va. 333	?	1821		1	1		N	F	M
Maria and Others v. Surbaugh	23 Va. 228	1790	1824	34	5	1	Greenbrier	N	S	M
Fulton v Shaw	25 Va. 597	1788	1827	39	1	0	Petersburg	N	F	M
Moses v Denigree	27 Va. 561	1781	1828	47	1	1	Surrey	N	S	M
Isaac v West's Executor	27 Va. 652	1816	1828	12	1	0	Accomack	N	F	M
Dunn v Amey and Others	28 Va. 465	1818	1829	11	4	0	Richmond	Y	U	M
Walthall's Ex'or v. Robertson and Others	29 Va. 189	1819	1830	11	5	>3	Richmond	N	S	M
Thrift v. Hannah and al.	29 Va. 300	?	1830		4	1	Albermarle	N	U	F
Rucker's Adm'r &c. v. Gilbert	30 Va. 8	?	1831		1	0	Amherst	N	S	M
Paup's Adm'r and Others v. Mingo and Others	31 Va. 163	1789	1833	44	>10	2	Brunswick	N	F	M
Elder v. Elder's Ex'or	31 Va. 252	1826	1833	7	16	1	Petersburg	Y	U	M

Case Title	Case No.	Year of Will	Year Decided	Time Between	Num. Slaves	Num Legatees	County	Debt	Result	Testator Sex
Nicholas v. Burruss	31 Va. 289	1801	1833	32	>5	0	Fluvanna	N	F	M
Henry and Others Paupers v. Bollar and Others	34 Va 19	1819	1836	17	14	?	Bath	N	F	F
Emory and Others, Paupers, v. Erskine	34 Va. 267	1801	1836	35	8	2	Berkeley	N	S	M
Manns v. Givens and Others	34 Va 689	1797	1838	41	13	0	Monroe	N	F	M
Erskine v. Henry and Wife and Others	36 Va. 188	1828	1838	10	8	2	Berkeley	N	F	F
Crawford v. Moses	37 Va. 227	1785	1839	54	1	1	Powhatan	N	S	M
Dawson v. Dawson's Ex'or & Others	37 Va. 602	1833	1840	7	?	1	Albermarle	N	F	M
Anderson's Ex'ors v. Anderson	38 Va. 616	1805	1841	36	2	1	Chesterfield	N	F	M
Henry v. Bradford	40 Va. 53	1795	1842	47	1	1	Acommac	N	S	M
Ellis v. Jenny and Others	41 Va. 597	1792	1844	52	>4	3	Charles City CC	N	S	M
Binford's Adm'r v. Robin & als.	42 Va. 327	?	1845		2	1	Henrico	N	F	F
Wynn & als. v. Carrell & als.	43 Va. 227	1812	1845	33	>1	>2	Tazewll	N	S	M
Lucy & Others v. Cheminant's Adm'rs.	43 Va. 36	1801	1845	44	7	2		N	F	F
Forward's Adm'r v. Thamer	50 Va. 537	1836	1853	17	>10	1	Northampton	N	F	M
Jincey & als. v. Winfield's Adm'r & als. Jones v. Jincey & als.	50 Va. 708	1847	1853	6	13	1	Sussex	Y	F	F
Osborne & als. v. Taylor's Adm'r & als.	53 Va. 117	1835	1855	20	>10	>5	Powhatan	N	F	M
Wood v. Humphreys	53 Va. 333	1798	1855	57	>28	0	Jefferson	N	F	M

Case Title	Case No.	Year of Will	Year Decided	Time Between	Num. Slaves	Num Legatees	County	Debt	Result	Testator Sex
Bailey & als. v. Poindexter's Ex'or.	55 Va. 132	1835	1858	23	>25	>5	New Kent	N	S	M
Hunter v. Humphreys	55 Va. 287	1829	1858	29	1	1	Alexandria	N	F	F
Reid's Adm'r v. Blackstone & als.	55 Va. 363	1852	1858	6	2	1	Fairfax	N	S	M
Williamson & als. v. Coalter's Ex'ors & als.	55 Va. 394	1857	1858	1	94	>1	Stafford	N	F	F

Table 1: Cases Referenced

For result, F = Free, S = Slave, U = Undetermined. In cases where the result is undetermined, the Court referred the case back to the originating court with further instructions on how to proceed. In all but one of these cases, the presence of debt was the reason for this ruling. The Court ordered the lower court to proceed with a fact finding on the legitimacy of the debt and the availability of funds to pay the debt. The free or unfree status of the slaves in question would hinge on these questions.

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