THE RULE OF LAW AND THE GENESIS OF FREEDOM: A SURVEY OF SELECTED VIRGINIA COUNTY COURT FREEDOM SUITS (1723-1800)

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INTRODUCTION

Although the legal petitions of Dred Scott and his family are relatively well-known among American history and constitutional law scholars, the cause of action for freedom from bondage as it originated in antebellum Virginia is of less familiarity. Early Virginia cases filed in the seventeenth century reinforced the legal principle at English common law that the legal status of a child, as slave or free, depended upon the legal status of its father.[1] In response to the practical effect of this maxim as it was applied in the emerging slave economy of colonial Virginia, the colonial legislature enacted a statutory provision in which the legal status of a child followed that of the mother in 1662.[2] Such ancient legal principles, along with a number of other statutes, assisted in the establishment and reinforcement of the burgeoning economic institution of chattel slavery, resulting in an environment favorable to its proliferation as the colony grew in wealth and political power.[3]

In 1795, the Virginia legislature promulgated a statute providing access to the courts to individuals who sought to vindicate their claims to freedom from slavery.[4] The statute appears to foreshadow the Louisiana Territorial Act, Section 35,[5] and the subsequently enacted Missouri state statute[6] upon which the petitions in the *Dred Scott* case were predicated. Based on digital facsimiles made available in the winter of 2016 by the Archives of the Library of Virginia, this paper explores a number of freedom suits brought in the county courts of the colony and state of Virginia from 1723 to 1800 and examines the legal theories upon which the petitioners, through their court-appointed legal counsel, based their claims for liberation. Particular attention is paid to the ways in which lawyers developed and advanced these legal theories, including the use of the writ of *de homine*

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1. A. Leon Higginbotham Jr., *Virginia Led the Way in Legal Oppression,* WASH. POST (May 21, 1978).

2. THOMAS D. MORRIS, SOUTHERN SLAVERY AND THE LAW, 43-46 (1st ed. 1996).

3. *Id.* at 45.

4. *Anti-Slavery Petition of 1795*, William and Mary Law Library, http://lawlibrary.wm.edu/wythepedia/index.php/Anti-Slavery_Petition_of_1795.

5. Missouri State Archives, *Before Dred Scott: Freedom Suits in Antebellum Missouri,* https://www.sos.mo.gov/archives/education/aahi/beforedredscott/1807FreedomStatute

6. *Id.*

replegiando, both before and after the passage of the freedom suit statute of 1795, which codified specific legal theories for the pleading of freedom suits. These cases elucidate some of the ways in which the rule of law has been employed throughout the history of this nation to marginalize on the one hand, and to vindicate on the other, the rights and privileges of enslaved persons as they have struggled to emerge from bondage.

This Article explores some of the ways in which the rule of law in eighteenth century Virginia provided a legal mechanism for the vindication of claims to freedom from slavery, in particular the statutory and selected case law regarding freedom suits. This Article examines the legal strategies employed by attorneys in the colonial and early post-Revolutionary periods in several Virginia jurisdictions[7] that were used to make claims of freedom brought on behalf of enslaved individuals. The next line of inquiry turns to an examination of the ways in which Virginia freedom suits jurisprudence may have influenced the territorial and state laws of Missouri, locus of the infamous *Dred Scott* decision.[8] The exploration of these cases will hopefully contribute to the elucidation of a "truth"[9] that will lead to liberation from "the dark past"[10] and reconciliation in human interactions of the present day. Although some may question the continuing relevance of the study of the "peculiar institution"[11] of American chattel slavery, there is ample evidence of the persistent deleterious effects that slavery[12] and its legacy still wreak

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7. The jurisdictions examined in this paper are the town of Alexandria and the counties of Accomack, Goochland, and Northampton.

8. Dred Scott v. Sandford, 60 U.S. 393 (1856).

9. *1 John* 1:8–9 (King James) ("If we say we have no sin, we deceive ourselves, and the truth is not in us, but if we confess our sins, God, who is faithful and just, will forgive our sins and cleanse us from all unrighteousness." This Scriptural admonition informs the following notion: as a kind of *protasis*, if the people of this nation know the "truth" about slavery, then, as a form of apodosis, this "truth" will liberate the minds of many, making them free of some of the attitudes that persist in this country as vestiges of bigotry.).

10. James Weldon Johnson & John Rosamond Johnson, *Lift Every Voice and Sing* (1900), https://www.youtube.com/watch?v=ya7Bn7kPkLo.

11. KENNETH M. STAMPP, THE PECULIAR INSTITUTION: SLAVERY IN THE ANTE-BELLUM SOUTH 3 (1956).

12. Matthew Spalding, *How to Understand Slavery and the American Founding*, (The Heritage Foundation, White Paper #138 2002), http://www.heritage.org/research/reports/2002/08/how-to-understand-slavery-and-americas (Spalding commented that: "Slavery was indeed the imperfection that marred the American Founding. Those who founded this nation chose to make

upon some disadvantaged quarters of the African-American community: from dire pronouncements about the future of the newly-emancipated former slaves[13] to the sad evaluation of African-Americans in the 1940s,[14] and from

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practical compromises for the sake of establishing in principle a new nation dedicated to the proposition that all men are created equal.") (emphasis added). Much of the discussion in this paper will focus on the terrible effects these "practical compromises" had on the enslaved.

13. ALEXIS DE TOCQUEVILLE, DEMOCRACY IN AMERICA 313 (Eduardo Nolla ed., Historical-Critical ed. 1835) (One such example of dire predictions is found in de Tocqueville's writings: "If I were called upon to predict the future, I should say that the abolition of slavery in the South will, in the common course of things, increase the repugnance of the white population for the blacks. I found this opinion upon the analogous observation I have already made at the North. I have remarked that the white inhabitants of the North avoid the Negroes with increasing care, in proportion as the legal barriers of separation are removed by the legislature; and why should not the same result take place in the South? In the North, the whites are deterred from intermingling with the blacks by an imaginary danger; in the South, where the danger would be real, I cannot believe that the fear would be less."). His prescience notwithstanding, it should be noted that de Tocqueville regarded "the blacks" with much of the same disdain as did the "Anglo-Americans," his phrase for the nation of people whom he studied. *Id.* at 299 ("The . . . slave differs from his master not only in his condition, but in his origin. You may set the Negro free, but you cannot make him otherwise than an alien to the European. Nor is this all; we scarcely acknowledge the common features of humanity in this stranger whom slavery has brought amongst us. His physiognomy is to our eyes hideous, his understanding weak, his tastes low; and we are almost inclined to look upon his as a being intermediate between man and brutes.").

14. JUNE PURCELL GUILD, BLACK LAWS OF VIRGINIA: A SUMMARY OF THE LEGISLATIVE ACTS OF VIRGINIA CONCERNING NEGROES FROM EARLIEST TIMES TO THE PRESENT 14 (Karen Hughes White & Joan W. Peters eds., 1936) (In the "Introduction," Guild writes: "The manumitted slave did not become a citizen and enjoyed few civil rights in Virginia. The Negro in the Old Dominion, whether indentured servant, slave, free person or citizen, has always been an enormously disadvantaged human being. The writer knows the law's inequalities administratively, the differences in school facilities for Negroes and whites, the heavy economic handicaps of Negroes, the inferior social work and welfare programs provided for them is astonished that so many present-day Negroes are able to avoid the pitfalls in their white-made environment. Negroes do indeed furnish a disproportionate share of juvenile delinquents, criminals, illegitimates, venereally diseased, tuberculous, illiterates and unemployed, but that their showing is no worse

the supposedly racist predictions about the fate of the "Negro family" in the 1960s[15] to contemporary ratification of those predictions.[16]

I. PROLOGUE

Although sometimes referred to as "Mother of Presidents,"[17] it has been argued that the state of Virginia was also the mother of the complex economic apparatus known as chattel slavery.[18] For example, A. Leon Higginbotham has commented on the significance of the state of Virginia and the pivotal role it played in the evolution of slavery in the United States:

> As the homeland of Thomas Jefferson, James Madison, George Washington, and Patrick Henry, Virginia justifiably claims that from the earliest years it singularly provided significant leadership for all the colonies. In many ways, relatively, it was a model of agricultural and economic success as one of the first colonies. It played a major role in precipitating the American Revolution and in shaping the destiny of the new nation after 1776. Yet, tragically, Virginia was also a leader in the gradual debasement of blacks through its ultimate institutionalization of slavery. It pioneered a legal

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is to their honor, when the details of their past and present are dispassionately considered.").

15. *See* U.S. Dept. of Labor, *The Negro Family: The Case for National Action*, OFF. POL'Y PLAN. & RES. (1965), https://www.dol.gov/oasam/programs/history/webid-meynihan.htm, (discussing predictions about the likely fate of the African-American family in the absence of social programs designed to ameliorate the effects of poverty).

16. *See* GREGORY ARCS ET AL., THE MOYNIHAN REPORT REVISITED (2013), http://www.urban.org/sites/default/files/alfresco/publication-pdfs/412839-The-Moynihan-Report-Revisited.PDF.

17. Virginia Tourism Corporation, *Birthplace for Presidents*, VIRGINIA (last updated Apr. 13, 2017), http://www.virginia.org/birthplacepresidents/ ("As the first, largest and most prosperous of the British colonies in America, Virginia provided four of the first five Presidents of the United States . . . ." This website, sponsored by the state as a vehicle for the promotion of tourism, does not, however document the fact that each of the four former presidents discussed owned slaves).

18. *See, e.g.*, A. LEON HIGGINBOTHAM, JR., IN THE MATTER OF COLOR: RACE AND THE AMERICAN LEGAL PROCESS 19 (1978).

> process that assured blacks a uniquely degraded status-one in which the cruelties of slavery and pervasive racial injustice were guaranteed by its laws. Just as they emulated other aspects of Virginia's policies, many colonies would also follow Virginia's leadership in slavery law.[19]

From their initial arrival at the Jamestown colony in 1619[20] to the abolition of slavery accomplished by the ratification of the Thirteenth Amendment of the Constitution[21] in 1865, enslaved persons in this nation have waged a war for liberation that was prosecuted on a number of fronts. Some, aided by the valiant leadership of Harriet Tubman[22] and other "conductors"[23] on the Underground Railroad,[24] proceeded to "fight the battle"[25] on the literal ground, following the signs and tracks leading the way

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19. *See id*.

20. A. LEON HIGGINBOTHAM, JR., SHADES OF FREEDOM: RACIAL POLITICS AND PRESUMPTIONS OF THE AMERICAN LEGAL PROCESS 18 (1996).

21. U.S. CONST. amend. XIII § 1.

22. STAMPP, *supra* note 11, at 122 ("Harriet Tubman was one of the many ex-slaves who served as 'conductors' on the famed Underground Railroad. Among its various routes in the Northeast and Northwest they, together with northern free Negroes and sympathetic whites, sheltered the frightened fugitives and sped them on their way.") (citations omitted).

23. WILLIAM STILL, THE UNDERGROUND RAILROAD: A RECORD OF FACTS, AUTHENTIC NARRATIVE, LETTERS, &C., 3 (2008) (describing the function of the Underground Railroad and the spirit of abolition that motivated its operation: "While the grand little army of abolitionists was waging its untiring warfare for freedom, prior to the rebellion, no agency encouraged them like the heroism of fugitives. The pulse of four millions of slaves and their desire for freedom, were better felt though 'The Underground Railroad' than through any other channels.").

24. *See generally id.* (describing the process and the people involved in the Underground Railroad).

25. JAMES ABBINGTON, SOMEBODY'S CALLING MY NAME 459 (2001). This reference to the Negro spiritual entitled "Joshua Fit Da Battle of Jericho" is intended to invoke recollection of the long-standing and rich tradition begun during times of slavery. Rev. Wyatt Tee Walker has written on this subject. He frames the history of the spiritual: "The ground and root of all music indigenous to America is the music art from commonly known as the Negro spiritual . . . . Its antecedents were the first slave utterances, moans, and chants for deliverance that can be traced to the early slave experience. The spiritual evolved from the rhythm forms of the West African oral tradition as a folk response to an index of the social dynamics and

to freedom left for them by those who sojourned before them[26] and by those who served as waystations on the long and perilous journey.[27]

A number of writers,[28] including this author,[29] have documented the legal battles waged by enslaved persons who turned to the courts to prosecute

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culture of the slave community. The oral tradition was the primary means of the spiritual's survival and dissemination throughout the slave and folk community. In the course of the accommodation necessary in the New World, in the areas of religion, language, and mores, music revealed what was going on in the life of the antebellum slave community and registered the varied responses to servitude. Out of that response preserved chiefly in the spiritual, there grew an identifiable Black musical tradition." *Id.* at 465. He continues with a comment on the decline of the art form: "The spiritual form, in the antebellum style or post-Civil War style, in Black consciousness has always been associated with the slave experience. On at least four occasions since the act of Emancipation, the spiritual form has experienced a pronounced renaissance, both in interest and in use. Shortly after the Emancipation was signed by Lincoln, the spirituals lapsed into gradual neglect . . . ." *Id.* [Author's Note: As this paper was involved in the editorial process, Rev. Walker, passed away on January 23, 2018. https://nytimes.com/2018//01/23/obituaries/wyatt-tee—walker-dead.html. Walker was described as "…chief of staff to the Rev. Dr. Martin Luther King, Jr. and a key strategist behind civil rights protests that turned the tide against racial injustice in the Jim Crow South of the 1960s…." Id. A great library has burned down.]

26. STILL, *supra* note 23.

27. JACQUELINE L. TOBIN & RAYMOND G. DOBARD, HIDDEN IN PLAIN VIEW: THE SECRET STORY OF QUILTS AND THE UNDERGROUND RAILROAD (1999) (explaining how fugitives and those who assisted them relied on a number of mechanisms by which to point the way to freedom. One method involved the use of quilts containing various patterns to serve as guideposts).

28. *See, e.g.*, MARK A. GRABER, DRED SCOTT AND THE PROBLEM OF CONSTITUTIONAL EVIL (2006); Kelly Marie Kennington, *River of Injustice* (2009) (unpublished Ph.D. dissertation, Duke University) (http://dukespace.lib.duke.edu/dspace/bitstream/handle/10161/1257/D_Kennington_Kelly_a_200904.pdf); *see also* LEA VANDERVELDE, REDEMPTION SONGS: SUING FOR FREEDOM BEFORE DRED SCOTT (2014).

29. *See* Gloria A. Whittico, *'A Woman's Pride and a Mother's Love' the Missouri Freedom Suits and the Lengths and Limits of Justice*, 2014 FREEDOM CTR J. 39 (2014); Gloria A. Whittico, *'If Past Is Prologue': Toward the Development of a New 'Freedom Suit' for the Remediation of Foster Care Disproportionalities Among African-American Children*, 43 CAP. U. L. REV. 407 (2015).

their claims to freedom.[30] From early cases such as a lawsuit filed in the seventeenth century[31] to the Missouri freedom suits[32]—the most well-known of which was the Dred Scott case[33]—freedom suits stand as powerful testimony to the degree to which the enslaved labored to secure freedom for

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30. David Thomas Konig, *The Long Road to Dred Scott: Personhood and the Rule of Law in the Trial Court Records of St. Louis Freedom Suits*, 75 UMKC L. REV. 53 (2006). Prof. Konig offers an excellent contextualization of the "freedom suit." In his seminal paper on the Missouri freedom suits, he writes:

> This article examines one mechanism of antislavery, the "freedom suit" initiated by those who challenged the legality of their enslavement, in one particular context, the Circuit Court of St. Louis County. America's "peculiar institution" of slavery was especially peculiar in St. Louis, where the confrontation of slavery and freedom heightened the importance of the rule of law as a fragile barrier against the explosive potential of the peculiar tensions of a border slave state. Between 1806 and 1857 the St. Louis Circuit Court heard more than 280 freedom suits, whose range of human experience reveals the complexity of a uniquely American struggle. This struggle, between those seeking freedom and those opposing it, reveals that the process that culminated in *Dred Scott* was a long one, consisting of hundreds of trials that tested the concept of the rule of law in a bitterly divided community.

Since the date of the publication of Prof. Konig's paper, approximately 23 accretions (additional lawsuits) have been added to the collection of cases); *see* PAUL FINKELMAN, DRED SCOTT V. SANDFORD: A BRIEF HISTORY WITH DOCUMENTS (1997) (providing a definitive yet accessible treatment of the Dred Scott case).

31. Taunya Lovell Banks, *Dangerous Woman: Elizabeth Key's Freedom Suit-Subjecthood and Racialized Identity in Seventeenth Century Colonial Virginia*, 41 AKRON L. REV. 779 (2008) (analyzing the early freedom suit of Elizabeth Key, a mulatto woman who based her claim to freedom on the assertion that her father was a white Englishman).

32. GRABER, *supra* note 28.

33. Dred Scott v. Sanford, 60 U.S. 393 (1856) (The year 2016 marked the two-hundredth anniversary of this decision).

themselves and their families.[34] In a 1999 article entitled "'The Squint of Freedom': African- American freedom suits in post-revolutionary Virginia,"[35] historian Michael L. Nicholls situates the Virginia freedom suit and its place in the legal history of the state:

> The American Revolution opened new doors to freedom for enslaved African Americans in Virginia. Some gained their freedom by serving in the military struggle for Independence. Several thousand slaves fled during the war and about one thousand found liberty by leaving with the defeated British forces. Thousands more benefited from the manumission law of 1782 which permitted individual owners to free slaves and which indirectly made it legally possible for slaves to purchase themselves. Still others pursued the precarious path of running away and trying to pass as free people of colour, a ruse now more possible because of the growth of the free black population. Finally, a few found freedom through the judicial process, successfully suing for being "illegally detained in slavery."[36]

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34. STAMPP, *supra* note 11, at 91 ("Although . . . [several enslaved families] may have prevailed initially in their quests for freedom, their victories may have been reversed upon appeal . . . . Although their victories may or may not have been short-lived, for those who gained their freedom, the world in which they lived as free people of color did not guaranteed to them an equal existence either under the law or on a daily basis as they went about living their lives and caring for their children.").

35. Michael L. Nicholls, *'The Squint of Freedom': African-American Freedom Suits in Post-Revolutionary Virginia*," 20 SLAVERY & ABOLITION 47 (1999).

36. *Id.* at 47 (Professor Nicholls continues by situating the Virginia freedom suit in the legal history of the state: "In the generations following Independence, the courts of Virginia became the site of intense struggles over freedom, revealing both the strength of the liberating thrust of the Revolution and its limits. Although freedom suits by enslaved African Americans did not emerge with the American Revolution, the manumission act of 1782 and efforts to curtail the importation of slaves created new opportunities under which individual slaves could judicially seek their liberation. Sometimes successful and often protracted, the cases illustrate the grounds for a slave to charge a master with 'false imprisonment.' Besides the human drama behind the legal façade, the suits indicate the purposeful use of the courts by the plaintiffs, provoking the General Assembly to restrict the scope for bringing

In the freedom suit, the enslaved were presented with a yet another mode by which to effect freedom's pursuit. As some slaves ran away, perhaps aided by those who ran the Underground Railroad, petitioners in Virginia's early freedom suits were assisted by court-appointed counsel, were permitted to sue *in forma pauperis* (as poor persons), and were granted certain procedural rights. This type of action is discussed in Part III.

Although the Virginia General Assembly did not enact its freedom suit statute until 1795,[37] a close examination of these suits reveals certain procedural commonalities and appears to have evolved as lawyers sought out legal theories upon which to predicate the claims to freedom of their clients. The 1795 statute appears to foreshadow the 1805 federal freedom suit provision, as well as the previously mentioned statute of the state of Missouri that was based upon the federal territorial provision. These statutes are included in Appendix A.

For many Americans, the history of chattel slavery is thought best relegated to the province of ancient memories of questionable contemporary relevance. As has been suggested earlier, elucidation of the "truth" concerning slavery may, from a spiritual perspective, do much to facilitate meaningful, modern discourse about race relations of the present day. It may be argued that beyond the realm of spirituality and salvation of the soul of this nation, the history of slavery continues to be insubstantiated in a number of concrete ways. Ira Berlin offers a compelling argument in the following apologetics for the continuing relevance of the study of slavery:

> The historicization of slavery—and freedom—reveals how the critical changes in the nature of slavery have been employed to make history. Whether it is recalling the promises of the Revolution ("all men are created equal") or the Civil War ('forty acres and a mule") or remembering the Middle Passage from Africa or the Second Middle Passage from Virginia, the history of slavery has itself been used to make slavery's history. For some three hundred years,

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suits for freedom. The issues surrounding these court cases also highlight the ambiguities in the attitudes of white Virginians towards slavery, the slave trade and freedom as a consequence of the American Revolution.") (internal citations omitted).

37. An ACT to amend an act, intitule, "An act to reduce one the several acts concerning slaves, free negroes and mullatoes, and for other purposes, 1 Statutes at Large of Virginia Ch. 11 (1835), *infra* app. A.

> Americans have situated their own history in terms of the struggle between freedom and slavery—and freedom's triumph. It thus should not be surprising that even at the beginning of the twenty-first century, one hundred and thirty plus years after slavery's legal demise, slavery continues to play a part in American life, as Americans discover that their national buildings were constructed by slaves, their great cities are underlaid with the bones of slaves, and their greatest heroes and heroines were slaveowners and slaves. Coming to terms with slavery's complex history is no easier in the twenty-first century than it was in centuries past.[38]

It can be argued that the failure of American history to address fully and robustly the "historicization" of slavery has resulted in unbalanced optics concerning peoples of African descent whose ancestors entered this hemisphere in bondage of some form. A *tableau vivant* of sorts has depicted a commonplace: that of nameless, faceless, culture-devoid individuals being crammed into the bowels of slave-laden vessels as the Middle Passage commenced. It may be further argued that this commonplace may have its place in historical, visual depiction[39] and in contemporary accounts documenting slavery in this nation. For example, Professor Higginbotham notes:

> About the last of August, there came to Virginia a Dutchman of Warre that sold us twenty Negers. John Rolfe, Secretary and Recorder of the Virginia colony, made the above entry toward the end of August, 1619. It survives as the earliest known record dating the arrival of blacks at an American colony. These first "Negers," who arrived in Jamestown a year before the Pilgrims landed at Plymouth Rock, had not volunteered for the voyage. Unlike the Pilgrims, they had been brought to America unwillingly, captives in fact, of

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38. IRA BERLIN, GENERATIONS OF CAPTIVITY: A HISTORY OF AFRICAN-AMERICAN SLAVES 14–15 (2003) (citations omitted).

39. Slave Trade Photo Galleries, HISTORY.COM, http://www.history.com/topics/black-history/slavery/pictures/slave-trade/interior-of-slave-ship (last visited Feb. 11, 2018).

> Dutchmen who had apparently seized them from a Spanish ship to sell them to the labor-short colonists.[40]

This, however, was not the beginning of the experience of persons of African descent in this country. People who came to be known as "Atlantic creoles," a sophisticated, polyglot, and vital group, helped to facilitate the development of trans-Atlantic commerce and exploitation of the Western hemisphere.[41] Ira Berlin has described them as follows:

> Black life on mainland North America originated not in Africa or in America but in the netherworld between the two continents. Along the periphery of the Atlantic—first in Africa, then Europe, and finally in the Americas—it was a product of the momentous meeting of Africans and Europeans and then their equally fateful rendezvous with the peoples of the New World. Although the countenances of these "new people of the Atlantic"—Atlantic creoles—might bear the features of Africa, Europe, or the Americas in whole or part, their beginnings, strictly speaking, were in none of those places. Instead, by their experience and sometimes by their person, they had become part of the three worlds that came together in the Atlantic littoral. Familiar with the commerce of the Atlantic, fluent in its new languages, and intimate with its trade and cultures, they were cosmopolitan in the fullest sense.[42]

Berlin further traces the Atlantic creoles and their influence on the settlements on the eastern seaboard of what is now the United States of America:

> The first Black people to arrive in mainland North America bore—or soon adopted—names like Anthony Johnson, Paulo d'Angola, Juan Rodrigues, Francisco Menéndez, and Samba Bambara. Although enslaved, they established families,

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40. HIGGINBOTHAM, *supra* note 20, at 20.

41. IRA BERLIN, MANY THOUSANDS GONE: THE FIRST TWO CENTURIES OF SLAVERY IN NORTH AMERICA, 17 (1998).

42. *Id.*

> professed Christianity, and employed the law with great facility. They travelled widely and enjoyed access to the great ports and from there the larger Atlantic world. Throughout the mainland, they spoke the language of their enslaver or the ubiquitous creola lingua franca. They participated in the exchange economies of the pioneer settlements and accumulated property, gaining reputations as shrewd and knowledgeable traders in the manner of creoles throughout the Atlantic littoral. A considerable portion of these first arrivals—fully one-fifth in New Amsterdam, St. Augustine, and *Virginia's* eastern shore—gained their freedom. Free men often served as soldiers, and some attained modest privilege and authority.[43]

Much has been written about the origins of the slave trade in Virginia. For example, Stampp writes:

> When a "Dutch man of warre" brought the first cargo of twenty "negars" to Virginia in 1619, John Rolfe and his neighbors sanctioned a trade and tapped a source of labor that had been familiar to some Europeans for nearly two centuries. Virginia landholders received a small trickle of Negro servants during the next fifty years and worked them on tobacco plantations along with their infinitely more numerous white servants. As early as the 1630's, Maryland planters began to use black labor; in 1669, Carolina's Lords Proprietors promulgated John Locke's "Fundamental Constitutions" which gave every freeman "absolute power and authority over his negro slaves"; by 1750, Georgia colonists had persuaded the trustees to rescind their original policy of prohibiting slavery.[44]

He describes the early growth and development of slavery and comments on how this particular species of slavery differed from its forms in other societies:

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43. BERLIN, *supra* note 38, at 53 (emphasis added).
44. STAMPP, *supra* note 11, at 18 (internal citations omitted).

> In its early stages the South's peculiar institution grew slowly and uncertainly. The specific form it took in the eighteenth and nineteenth centuries was unknown to English law, and in some respects unlike the forms of servitude which had developed in other places. During most of the seventeenth century the Negro's status was so vague and amorphous that his ultimate position might conceivably have been defined in several different ways. In any case, the Negro's presence in the South antedated by many years the legal existence of chattel slavery. That some early colonial statutes used the term "slave" had no decisive significance, because the term had sometimes been applied loosely to white servants.[45]

Stampp further elucidates the growth of slavery in the colony of Virginia:

> During the seventeenth century the…Negro population increased very slowly. In 1649, thirty years after the arrival of the first Africans, Virginia counted only three hundred black laborers in its population. Until the end of this century. . .landowners relied chiefly upon the labor of white servants. Then, when English and colonial merchants entered the slave trade on a large scale, and when the advantages of slavery were fully understood, Negroes began to arrive in substantial numbers. In the eighteen the century thousands of them were imported annually, some from the West Indies but most directly from Africa. By the eve of the American Revolution Virginia's population was divided almost equally between Negroes and Whites . . . .[46]

Therefore, slavery, as it came to operate in the Virginia colony, was a robust, rapidly developing economic concern. With such vitality came challenges, such as those discussed in the following section of this paper. With these challenges came the eventuality of laws that attempted to protect the economic interests of those who were engaged in this "peculiar" form of commerce.

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45. *Id.* at 21.
46. *Id.* at 24 (internal citations omitted).

II. THE VIRGINIA ORIGINS OF THE LAW OF SLAVERY

The best known of the Missouri slavery freedom suits, filed by Dred Scott[47] and his wife Harriet,[48] has been briefly mentioned above.[49] The laws governing slavery as it evolved in the colony and state of Virginia had a profound effect on the laws governing this economic institution as it evolved and expanded westward. For example, legislation regarding slavery in the Territory of Indiana was based upon the laws of Virginia.[50] In 1886, Daniel Wait Howe wrote:

> Notwithstanding the prohibition in the ordinance of 1787, slavery existed in fact in the Indiana territory for several years after its organization. Its visage, under very thin disguises, sticks out plainly in the laws of the governor and judges. In 1803 a law was adopted from Virginia entitled, "A law concerning servants." By this law it was provided that "all negroes and mulattoes [and other persons not being citizens of the United States of America] who shall come into this territory under contract to serve another in any trade or occupation, shall be compelled to perform such contract specifically during the time thereof." The benefit of such contract was assignable and passed to the executors or legatees of the master.[51]

The provisions of laws governing inheritance regarding the assignability and passage of ownership appear to contemplate a form of chattel ownership, as opposed to laws governing other basic contracts such as one of indenture.[52] In addition to influencing slavery law in the Indiana

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47. Scott v. Sanford, 60 U.S. 393 (1857).

48. *See generally* LEA VANDERVELDE, MRS. DRED SCOTT: A LIFE ON SLAVERY'S FRONTIER (2009) (highlighting a fascinating account of the life of Harriet Scott).

49. *See generally* VANDERVELDE, *supra* note 28.

50. DANIEL WAIT HOWE, THE LAWS AND COURTS OF THE NORTHWEST AND INDIANA TERRITORIES 16 (1886).

51. *Id.* at 14, 15.

52. *Id.* at 21, 22.

Territory, Virginia law affected the provisions of such laws in Missouri and Kentucky.[53] Harrison Anthony Trexler describes this effect:

> The Missouri slave law, like that of Kentucky, is usually said to have been taken largely from the Virginia statutes. This statement seems to be fairly well founded if the early Missouri laws are compared with those of Virginia. The [Missouri] Code of 1804 bears many close resemblances, in some cases having the identical wording of the Virginia statutes. In addition to this internal evidence is the fact that Governor Harrison and one of the three Indiana judges were native of the Old Dominion, while another judge came from Kentucky.[54]

These sources lend credence to the assertion that the laws relating to slavery that originated in the colonial and state courts of Virginia are a worthy source of study of the legal doctrines underpinning the slavery freedom suit as a cause of action.

A. The Virginia Freedom Suit Act of 1795

On Christmas Day in 1795, a Virginia General Assembly statute,[55] the purpose of which was "[t]o reduce into one the several acts concerning slaves, free negroes, and mulattoes [sic] and for other purposes,"[56] became effective. The preamble of this statute leaves little to the reader's imagination regarding the legislative intent of its drafters:

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53. HARRISON ANTHONY TREXLER, SLAVERY IN MISSOURI: 1804-1865 59-60 (1914).

54. *Id.* at 60.

55. SAMUEL SHEPHARD & WILLIAM WALLER HENING, *THE STATUTES AT LARGE OF VIRGINIA, FROM OCTOBER SESSION 1792, TO DECEMBER SESSION 1806 363–65* (1835).

56. ANNE TOYER V. WILLIAM JACOB, ANDREW SMAW, AND CLARK NOTTINGHAM, 1733, African American Digital Narrative Collection, Library of Virginia, Richmond, V (cause of action on behalf of her three children, Solomon, Jane, and Rhodea based upon allegation that they were born free. Northampton, VA. The reference to the laws of Virginia here is somewhat cryptic in that the petition in this case does not set forth with specificity the precise statutory predicate of the case).

Whereas great and alarming mischiefs have arisen in other states of the Union, and are likely to arise in this by voluntary associations of individuals, who under cover of effecting that justice towards persons unwarrantably held in slavery, which the sovereignty and duty of society alone ought to afford; have in many instances been the means of depriving masters of their property in slaves, and in others occasioned them heavy expenses in tedious and unfounded law suits: To the end that a plan and easy mode may be pointed out by law for the recovery of freedom where it is unjustly and illegally denied, and that all such practices may in future be made useless and punished:

1. Be it enacted, That when any person shall conceive himself or herself illegally detained as a slave in the possession of another, it shall and may be lawful for such person to make complaint thereof either to a magistrate out of court, or to the court of the district, county or corporation where he or she shall reside, and not elsewhere. When the complaint shall be made to a magistrate of such illegal detention, it shall be the duty of the said magistrate forthwith to issue his warrant, summoning the owner or possessor of such complainant, to appear before him or some other magistrate of the county, to answer the complaint so made, and upon his appearance shall compel him to give bond with security, equal at least to the full value of such complainant, conditioned that he shall suffer him or her to appear at the next court to be held for the district, county or corporation wherein he or she resides, for the purpose of petitioning the said court to be allowed to sue therein in *forma pauperis*, for the recovery of his or her freedom; and if such master or holder shall fail or deny to give security as aforesaid, such magistrate shall order the complainant into the custody of the officer serving the warrant, to be kept by him safely at the expense of such master or holder, until the sitting of the first court that shall happen

> after such judgment by him given, and produce him or her before such court.[57]

Based upon the language of the statutory preamble, it may be concluded that organized and significant efforts were marshalled by individuals who desired to assist enslaved persons seeking to vindicate their claims to freedom.[58] Historian Kenneth Stampp has observed:

> Many Southerners were convinced that the slave states were honeycombed with northern abolitionist agents seeking to create discontent among the slaves and to urge them to abscond. While this was an exaggeration, a few Northerners did undertake this hazardous enterprise. . . . But the bondsmen generally needed assistance more than persuasion.[59]

That the state of Virginia had concerns about those who sought to assist the efforts of the enslaved to escape from bondage is attested to by various records kept by governmental authorities in the mid-nineteenth century.[60] Whether the fears were justified or better characterized as

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57. Virginia Freedom Suit Act 1795 Chapter II [hereinafter *1795 Acts of VA*], *infra* app. A.

58. The phenomenon of southern sympathy for those who sought their freedom may have had a somewhat astonishing effect.

59. STAMPP, *supra* note 11, at 121.

60. *Id.* at 121–22. Contemporary government records reveal an astonishing source of "support" for freedom-bound enslaved. "An 1845 report form the Virginia Penitentiary and a roster of inmates in that institution in 1850 show that authorities were on guard and courts had concluded that some people were actively working to help slaves escape. Fourteen people were in the penitentiary in 1845 for 'carrying off slaves feloniously,' 'aiding slaves to abscond,' 'stealing slaves,' and 'enticing a slave and stealing a horse.' The 1850 census indicated that twelve people were incarcerated in the penitentiary for stealing a slave, which was apparently an umbrella designation for all of the offenses named in the 1845 report. The identity of the 1850 inmates suggests that slave owners had something to fear from a group other than northern abolitionists or free African Americans. . . . That group was white craftsmen. There were four black inmates and one 'mulatto'; only one person, an African American, was a native of a northern state. But the group of twelve comprised four wheelwrights, four shoemakers, two carpenters, a blacksmith, and a seamstress. This striking phenomenon bears further analysis, but it does show that

paranoia, documentation of these matters reveals that a movement did exist, that, regardless of the motives of its facilitators, militated in favor of freedom.

Despite its duplicitous optics, the Virginia freedom suit statute sets forth specific procedural requirements to be utilized by counsel for petitioners in causes of action brought under the law. The statute also provides for court-appointed counsel.[61] The statute also, consistent with its pro-slavery intent, contained the following provision:

> If any person or persons shall be found aiding, abetting, or maintaining any person in the prosecution of a suit upon a petition as aforesaid, and such person or persons shall fail to establish his or their claim to freedom, every person so found aiding, abetting or maintaining shall forfeit and pay to the owner of such slave . . . the sum of one hundred dollars.[62]

Prior to the effective date of the 1795 statute codifying the procedural requirements of the freedom suit cause of action, the law suit for liberation from bondage was exclusively a creature of common law. It appears that the legal principles upon which the pre-statutory cases were pleaded and decided worked their way into and influenced the statutory scheme, thereby transforming the freedom suit and its potential as a tool for the liberation of enslaved persons.[63] The cause of action became a part of the legal apparatus, not merely of the common law, but of the prescribed statutory procedural provision that circumscribed the contents of the freedom suit petitions. However, before the statute was enacted, freedom suits were brought in the courts of Virginia based upon a number of novel theories. In the next section of this paper, a number of these lawsuits are examined. Each of these lawsuits

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public pronouncements concerning external 'interference' with southern slaves completely missed or covered up one source of opposition to slaver." PHILIP J. SCHWARTZ, SLAVE LAWS IN VIRGINIA 135–36 (2010).

61. 1795 Acts of VA, *infra* app. A.

62. *Id.* at 364. This statute was amended in 1818 to provide that "in all cases wherein the property of a person held as a slave demanding freedom, shall come for trial, no person who shall be proved to be a member of any society instituted for the purpose of emancipating negroes from the possession of their masters, shall be admitted to serve as a juror." 1797 Va. Acts 77.

63. As has been argued, the Virginia freedom suit statutory provisions appear to foreshadow the Louisiana Territorial Act and the Missouri state law regarding freedom suits. *See supra* n. 23 and accompanying text.

represents a step in the direction of the establishment of a statutory standard for pleading such cases. They also represent a movement away from reliance upon the laudable novelty of counsel as they attempted to craft novel legal theories upon which to prosecute their clients' cases.

III. FREEDOM SUITS IN VIRGINIA

The common law cause of action referred to as the freedom suit, as it existed in early Virginia, has been carefully described by Taunya Lovell Banks, who writes:

> Elizabeth Key, an Afro-Anglo woman, was born around 1630 in the Virginia Colony. Twenty-five years later she sued for her freedom after the overseers of her late master's estate classified her and her infant son as *negroes* (Africans or descendants of Africans) rather than as an indentured servant with a free-born child. Unwilling to accept permanent servitude, Elizabeth sued for their freedom, and after protracted litigation she and her son were set free.[64]

Key's case is significant for a number of reasons. First, Banks asserts that the legal theories upon which her case depended—that she was the Christian daughter of a free Englishman and that her period of indenture had expired[65]—were fundamentally different than the freedom suits brought by servants who claimed that despite the fact that their periods of indenture had expired, they nonetheless remained subject to the stricture of the indenture.[66] Banks explains:

> One key to Elizabeth Key's success lies in the theories she used to assert her legal status as a free-born English subject. Her pleadings differed materially from typical seventeenth century freedom suits in several respects. Most seventeenth century freedom suits by English indentured servants in

64. Taunya Lovell Banks, *Dangerous Woman: Elizabeth Key's Freedom Suit - Subjecthood and Racialized Identity in Seventeenth Century Colonial Virginia*, 41 AKRON L. REV. 798, 799–800 (2015).

65. *Id.* at 800.

66. *Id.* at 811.

> Virginia usually alleged only that the complainant is being held beyond the agreed upon years of service . . . . In the typical freedom suit there would be no need for an English servant to assert free birth since by the seventeenth century English men and women were presumptively free.[67]

Key's eventual success, based in part upon the legal status of her father (also referred to as *partus sequitur partem*)[68] provides an interesting conceptual jumping off point for the examination of freedom suits that pre-dated the 1795 Virginia Freedom Suit Act. These cases will be discussed in the context of the legal theories upon which the claims to freedom were pled.

A. The Narratives: Various Legal Theories Upon Which Freedom Suits Were Plead Prior to the 1795 Freedom Suit Act

1. Thomas Ferrell's Case: "Being Born of a White Woman"

The earliest of the cases examined in this survey was brought in the courts of Northampton County, Virginia.[69] According to his petition, Thomas Ferrell, a mulatto,[70] had been bound out by the courts of colonial Virginia.[71] Although the period of his indenture[72] "to William Bradford & his assignes"

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67. *Id.*

68. *Id.* at 812.

69. *Ferrell, Thomas: Freedom Suit*, AFRICAN AMERICAN DIGITAL NARRATIVE COLLECTION, LIBRARY OF VIRGINIA, http://digitool1.lva.lib.va.us:8881/R/QG8NNTM1RN5SRXPY3ASBRXKAGCTXCYUK6TA5NL1JPKL4C1BD3F-01281?func=search-advanced-go&LOCAL_BASE=2694&ADJACENT=N&find_code1=WRD&request1=ferrell&find_operator=AND&find_code2=WCV&request2=Northampton+County&find_operator2=AND&find_code3=&request3=&pds_handle=GUEST. This case was filed in the court in Northampton County, Virginia in 1723.

70. Ferrell's claim to be a mulatto implicated a statute setting the terms of indenture. *See* 1705 Va. Acts, *infra* app. A.

71. *Ferrell*, *supra* note 69.

72. HIGGINBOTHAM, *supra* note 20 at 392–93 ("In its simplest form, an indentured servant was a person obligated to serve a master for a period of years, generally four to seven years. In return for this service, the master often paid the indentured person's fare to America, and, throughout the entire period of the indenture, was required to provide a minimum level of subsistence—food, shelter, clothing—for the servant. Often the master also agreed to give the servant a

had expired, he was still being held in bondage having attained the age of thirty-one years, seven years longer than the term contemplated in the original period of indenture.[73] The defendant in Ferrell's case, John Jackson, appears to have been one of several assignees, including another named in the court file, Charlton Smith, in Accomack County, Virginia.[74] Ferrell alleged that his period of indenture should have expired when he reached the age of 24 as specified in a court order and related certificate, both of which appear to have been duly filed with the court.[75]

Ferrell's prayer for relief was a simple one: that the court order him to be discharged from Jackson's service.[76] The legal predicate of his claim was also straightforward. He asserts that he is a mulatto, "being born of a

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specified award at the end of service, which became known as 'freedom dues' (most commonly in money, tools and clothing). Because few planters could go to England and select their own servants, the servant was usually indentured to a merchant, a ship captain, or sometimes even to seamen, and then exported like other cargo. When the servants landed in the colonial port, they were sold to the highest bidder; the new owner, often a planter, was bound to abide by the terms of the original indenture."). For the statutory text of the "freedom dues" law, see 1705 Va. Statutes, Act XIII, *infra* app. A. Although the specific term of Ferrell's indenture, coupled with his characterization as "mulatto" in the petition itself, are not susceptible of misinterpretation that his status was not that of servant as opposed to slave, there has existed for some time a disagreement among scholars regarding the question of slave or indentured servant as those terms were applied to those of African descent. For example, Higginbotham has noted that "[a]s far back as 1896, for instance, Philip A. Bruce had asserted that the blacks brought to Virginia in 1619 came as slaves, whereas only six years later, J. C. Ballagh, in A History of Slavery in Virginia, contended that they were servants whose statutory enslavement did not begin until 1660. More recently, John Hope Franklin has authoritatively stated, 'there is no doubt that the earliest Negroes in Virginia occupied a position similar to that of the white servants in the colony.'" HIGGINBOTHAM, *supra* note 20 at 21 (internal citations omitted). Although their true status may never be completely known, that scholars still consider this question may be adduced in support of the proposition that the economic importance of labor, whether rendered without compensation for a period of years or for life, should not be underestimated in the attempt fully to appreciate the critical role of Africans in the development of the emerging nation.

73. *Ferrell*, *supra* note 69.
74. *Id.*
75. *Id.*
76. *Id.*

white woman."[77] In 1723, Virginia law contained a number of provisions that determined the legal status of mulattoes.[78] The provision that probably controlled in Ferrell's case was the 1705 act of the Virginia General Assembly that established the age of 31 as the limit on the length of servitude.[79]

On February 13, 1722, the clerk of court commanded the sheriff of Northampton County, Virginia, to summon Thomas Gascoyn to provide evidence in a lawsuit brought by Ferrell against John Jackson.[80] Although it is not clear from the extant documents in Ferrell's file, it is possible that Bradford sold or otherwise transferred possession of Ferrell to Jackson at some point in time after the petition was filed in 1715. When Gascoyn gave his sworn statement, he indicated that he "was present" when Ferrell was "bound by Indenture to Charlton Smith in Accomack County and that the Said Smith did not discharge the said Ferrell from any former indenture" to the best of Gascoyn's recollection.[81] This somewhat tangled "chain of custody" reflects the reality that indentured servants, much like chattel slaves, were subject to the changing circumstances, perhaps of a financial nature, of those who had held control of them by the terms of their indenture.

Ferrell, like Elizabeth Key some sixty years earlier, based his claim to freedom upon the expiration of his period of indenture.[82] Like Key, Ferrell prevailed in his freedom suit.[83] The court held that "it appeared to this court that thee said Ferrell hath fully served that time as expressed in [the order by which he was bound out] . . . & taking the said petition into consideration and being fully heard & satisfied doe thereupon order that the said Thomas Ferrell mullatto be discharged from his service according to the terms expressed in the said order it now being completed & ended and that he pay

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77. *Id.*

78. *See* HIGGINBOTHAM, *supra* note 20, at 40-47.

79. *See* HIGGINBOTHAM, *supra* note 20, at 411 commenting upon the Act XLLX, 1705 (noting that "[t]he period of servitude, thirty-one years, was a substantial portion of a servant's life in a colony with so high a mortality rate . . . In 1769, the statute was amended reducing mulattoes' terms of service to eighteen years of age for females, and twenty-one years of age for males.") (internal citations omitted).

80. *Ferrell*, *supra* note 69.

81. *Id.*

82. *Id.*

83. *Id.*

charges of court."[84] Thomas Ferrell's case stands as an example of a freedom suit in which an indentured servant won his freedom based upon an initial assertion and subsequent proof that the term of indenture had expired. The next case is a freedom suit in which a mother sues for the freedom of her children.

2. Anne Toyer v. William Jacob, et al.: "Contrary to the Law of This Colony . . . Being Born Free"

Another freedom suit was brought in the courts of Northampton County by Anne Toyer against three individual slaveholders who she alleged illegally held her three children in captivity, "contrary to the Law at this Colony."[85] The petition was filed on behalf of her son, Solomon, and her

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84. *Id.* The process by which these freedom suit files have been transcribed and made available to the public has been documented by Mr. Gregory Crawford, Local Record Program Manager, Library of Virginia, http:/www.virginiamemory.com/collections/aan/join-the-narrative. I thank him for permitting me to provide this link to his presentation, and for providing me with the preferred citation format employed in this paper. In addition, I should note that I have attempted to conform quotations from the cases files to the rules of modern orthography, capitalization, and punctuation for ease of reading. I have attempted to maintain the original meaning and have been cautious in these attempts.

85. LIBRARY OF VIRGINIA: DIGITAL COLLECTIONS, ANNE TOYER: FREEDOM SUIT (1733), http://digitool1.lva.lib.va.us:8881/R/SFUGCEXD9BTKFQAG4QU9B2367QX3GDU1FRIMVCFEJX3EY3U3S9-00883?func=search-advanced-go&LOCAL_BASE=2694&ADJACENT=N&find_code1=WRD&request1=anne+toyer&find_operator=AND&find_code2=&request2=&find_operator2=AND&find_code3=&request3=&pds_handle=GUEST; *see* A. Leon Higginbotham Jr. & F. Michael Higginbotham, *Yearning to Breathe Free: Legal Barriers Against and Options in Favor of Liberty in Antebellum Virginia*, 68 N.Y.U. L. REV. 1212, 1234–35 (1993) (The petition does not specify the colonial laws alleged to have been violated. It is unlikely that Toyer based her claims upon the doctrine of partus sequitur partem, because by literal terms of the pleading itself, she claims that each child was "born free." Therefore, their claims to freedom were direct, not derivative based upon the status of their mother. Judge and Professor Higginbotham may shed some light on this question. They write:

> "[a]lthough slaves had no personal rights, they were nonetheless permitted to sue for their freedom in state courts. …Freedom suits

daughters, Jane and Rhodea.[86] She alleged that Solomon was held by William Jacob, Jane by Andrew Smaw, and Rhodea by Clark Nottingham.[87] The petition contains recitations of each of the claims to freedom for each child, and requests that the court summon each of the defendants to "show cause if any why he detains the said [child] and that [the child] be set free."[88] The case file indicates that Andrew Smaw was in fact summoned, William Jacob was granted "time til next Court," and Clark Nottingham was given "time granted."[89] It is interesting to note that the order for the summonses issued from the clerk of court apparently went to the same sheriff, indicating that all three defendants must have been located within that sheriff's bailiwick.[90] This suggests that Jane knew where each of her children resided and that she may have seen or even had the opportunity to visit with them. This speculation gives the modern reader a glimpse into one of the real tragedies of slavery, the destruction of the enslaved's families. One historian of the period has noted:

> A primary concern that thoughtful southerners in the slave-exporting states voiced about the interstate slave trade was its tendency to destroy slave families. This criticism of speculation could be compelling. If southerners allowed

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existed not as a means for blacks to alter their legal status from slave to free, but as a recourse for those who were *in fact* free, and who thus possessed a remedy for illegal enslavement. *De jure*, those enslaved illegally were not slaves at all, but free persons wrongly deprived of their legal rights. Thus a claimant's right to petition the court was not predicated on the assumption that a slave had any legal rights, but instead on her rights as a presumptively free person illegally held in slavery. In practice, questions of wrongful enslavement turned largely upon the race of the plaintiff. Successful claimants were usually individuals who appeared white or Native American, or who could produce evidence of either Native American descent or of matrilineal descent from a free woman. Race was so sharply determinative not because of any legislative provision, but rather because of judicial interpretation.").

86. *Id.*
87. *Id.*
88. *Id.*
89. *Id.*
90. *Id.*

> traders to wantonly destroy kinship networks, then it would be difficult to assume that slavery was a benign institution. Even though most southerners normally thought of a slave family as a woman and her two children, most assumed that speculators would not hesitate to sunder even these loosely defined relationships. The Benevolent Society of Alexandria for Ameliorating and Improving the Condition of the People of Color hated how slave traders continually tore apart slave families. A Kentucky resident agreed with these sentiments and called for legislation that prohibited men from driving slaves through his state. He contrasted the rightness of slavery with the "sordid" world of selling slaves for profit. Knowing that bondservants had been severed from their families was a thought "revolting to humanity." Those who shrunk from the forced sundering of slave families thought speculation was a contagion. If it contaminated slaveowners to the extent that they would do anything for money, then it could further erode white morals. While the activity of breaking up slave families was bad, the callous attitude of masters was worse.[91]

The complexity of the relationship between slaveholders and the enslaved has been a subject-matter of much scholarly focus. Genovese has observed:

> During the last half of the eighteenth century, planters dwelled increasingly upon the responsibilities that accompanied mastership. Nowhere was this interplay between the aspirations of master and slave more evident than in the evolution of the slave family, as the desire for a stable domestic life joined all black people together. Planters too had a stake in the permanence of the slave family—at least insofar as domestic stability aided production and reproduction. But while planters applauded—and profited from—the slaves' natural increase, they had little direct interest in the organization of the slave family. Often they found it inconvenient for husbands and wives to reside together, and

91. ROBERT H. GUDMESTAD, A TROUBLESOME COMMERCE: THE TRANSFORMATION OF THE INTERSTATE SLAVE TRADE 64 (2003).

> frequently they found it profitable to sell children away from their parents or divide families to satisfy their own dynastic aspirations.[92]

The outcome in Toyer's case is quite remarkable. Two of her children, Solomon and Jane, were ordered to be set free.[93] Rhodea, however, was "bound" and forced to remain in bondage.[94] Because the details of their claims to freedom are somewhat speculative, it is difficult to speak with certainty about the rationale that served as the foundation of the different outcomes. It is possible that the children freed were younger and less capable of performing as servants. Likewise, if Rhodea were older and more capable of serving or nearing child-bearing years, the court may have been more sympathetic to her slaveholder's economic plight if she was freed. In any event, Toyer's success in winning the freedom of two of her children may have turned on the race of each child. In the end, she enjoyed some measure of success based upon a general assertion that her children's bondage was terminated based upon judicial fiat.

3. Francis Etheridge's Case (Northampton County, 1749): "An Instrument of Writing"

The next case examined is based upon a putative claim of indenture and shed additional light upon the legal principles upon which pre-Freedom Suit Act suits were based. The petition in this case alleges as follows:

> To the Worshipfull Court of Northampton County the Petition of Francis Etheridge humbly sheweth That Whereas your Petitioner is a Free man, & from being a Servant to any Person from the Time of his Nativity hitherto hath remained, Nevertheless a certain Phillip Dill under pretence of an Indenture or some other Instrument of writing keeps your Petitioner under him as a Servant whereas in Truth there is no such Indenture or Instrument of writing by Virtue whereof the said Philip can have any Right or Property in your Petitioner

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[96] IRA BERLIN, MANY THOUSANDS GONE: THE FIRST TWO CENTURIES OF SLAVERY IN NORTH AMERICA 129 (1998).

93. Anne Toyer Freedom Suit, *supra* note 85.

94. *Id.*

> as aforesaid wherefore your Petitioner prays Relief in the Premisses & he as in Duty bound shall pray &c . . . Fra. Etheridge.[95]

Based upon his petition, it appears that Dill or someone acting on his behalf prepared forged documents purporting to establish a contractual relationship of indenture.[96] Based upon some rather cryptic notations in the case file, it appears that the petition may have been dismissed in June 1749.[97] However, in the absence of accretions to the file that may be discovered and made available in the future, the fate of Francis Etheridge and his petition for freedom from what he claimed was a pretense may never be known.

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95. Etheridge, Francis: Freedom Suit, Northampton County (1749) 1, *in* AFRICAN AMERICAN DIGITAL NARRATIVE COLLECTION, LIBRARY OF VIRGINIA, http://digitool1.lva.lib.va.us:1801/view/action/nmets.do?DOCCHOICE=1151404.xml&dvs=1517881866719~453&locale=en_US&search_terms=dill+freedom+suit&adjacency=N&VIEWER_URL=/view/action/nmets.do?&DELIVERY_RULE_ID=1&divType=&usePid1=true&usePid2=true.

96. Hugh F. Rankin, *The General Court of Colonial Virginia* (1958), *reprinted in* Colonial Williamsburg Foundation Research Report Series-0088 56, 73 (Colonial Williamsburg Foundation, 1990), http://research.history.org/DigitalLibrary/View/index.cfm?doc=ResearchReports%5CRR0088.xml. Although this was not a criminal case, it is interesting to note that under the criminal law of the time, forgery, depending upon its degree, carried severe punishments upon conviction. As Dr. Rankin writes, at the time, "[f]orgery was defined as 'an Offence . . . where any Person fraudently [sic] makes and publishes false Writings to the Prejudice of another's Right.' Forgeries varied in degrees of seriousness, the most grave being the forging of false deeds, sealed writings, court records, and wills. Under English common law the offender was required to pay double damages to the injured party, to be put in the pillory, his ears cut off, his nostrils slit and seared with a hot iron, to forfeit the profits of his lands and be imprisoned for life. The second offence was a felony calling for the death sentence. By Virginia statute, all those who forged tobacco notes, receipts, or lottery tickets could be punished as a felon. A person convicted of felony was prohibited from holding any public office, even if pardoned." *Id.* Given the extreme penalties possible in the event of a forgery conviction, if Dill did in fact forge indenture documents he most certainly did so at an enormous risk.

97. *Id.* at 33.

B. Cases Brought Subsequent to the Effective Date of the Virginia Freedom Suit Act of 1795

1. The Freedom Suit Act of 1795

The legal history of Virginia and the role played by the freedom suit has been discussed by historian Michael L. Nicholls who writes:

> The American Revolutions opened new doors to freedom for enslaved African Americans in Virginia. Some gained their freedom by serving in the military struggle for Independence. Several thousand slaves fled during the war and about one thousand found liberties by leaving with the defeated British forces. Thousands more benefitted from the manumission law of 1782 which permitted individual owners to free slaves and which indirectly made it legally possible for slaves to purchase themselves. Still others pursued the precarious path of running away and trying to pass as free people of color, a ruse now more possible because of the growth of the free black population. Finally, a few found freedom through the judicial process, successfully suing for being "illegally detained in slavery."[98]

On Christmas Day of 1795, a Virginia General Assembly's statute, the purpose of which was "to reduce into one the several acts concerning slaves, free negroes, and mulattoes [sic] and for other purposes,"[99] was enacted into law. The preamble of this statute leaves little to the imagination with respect to the legislative intent of its drafters. In this Act, the General Assembly updated several laws relating to slaves and legal issues with respect to ownership rights.[100] The statutory preamble provides as follows:

> Whereas great and alarming mischiefs have arisen in other states of the Union, and are likely to arise in this by *voluntary*

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98. Nicholls, *supra* note 35, at 35.

99. An ACT to amend an act, intituled, 'An act to reduce into one the several acts concerning slaves, free negroes and mulattoes, and for other purposes, *infra* app. A (hereinafter "Virginia Freedom Suit Act").

100. *Id.*

> *associations of individuals*, who under cover of effecting that justice towards persons unwarrantably held in slavery, which the sovereignty and duty of society alone ought to afford; have in many instances been the means of depriving masters of their property in slaves, and in others occasioned them heavy expenses in tedious and unfounded law suits: To the end that a plan and easy mode may be pointed out by law for the recovery of freedom where it is unjustly and illegally denied, and that all such practices may in future be made useless and punished.[101]

The reference to "voluntary associations of individuals" seems to suggest that the legislature was motivated, at least in part, by an intention to thwart the efforts of any persons engaged in activities assisting the enslaved in gaining their freedom, perhaps with acts serving as a precursor for the Underground Railroad.[102] The statute then sets forth the procedural requirements for an individual who sought to vindicate his or her claims to freedom. Section 1 contains the fundamental principles upon which the freedom suit cause of action was to be pled:

> *Be it enacted,* That when any person shall conceive himself or herself illegally detained as a slave in the possession of another, it shall and may be lawful for such person to make complaint thereof either to a magistrate out of court, or to the court of the district, county or corporation where he or she shall reside, and not elsewhere. When the complaint shall be made to a magistrate of such illegal detention, it shall be the duty of the said magistrate forthwith to issue his warrant, summoning the owner or possessor of such complainant, to appear before him or some other magistrate of the county, to answer the complaint so made, and upon his appearance shall compel him to give bond with security, equal at least to the full value of such complainant, conditioned that he shall

101. *Id.* (emphasis added).

102. *Id.* According to the Encyclopedia of Virginia: "[In this Act], the General Assembly updateds [sic] several of its laws relating to slaves, and primarily disputes over their legal ownership. The law's preamble implies the existence of a network to assist fugitive slaves, perhaps a precursor of what came to be known as the Underground Railroad."

> suffer him or her to appear at the next court to be held for the district, county or corporation wherein he or she resides, for the purpose of petitioning the said court to be allowed to sue therein in *forma pauperis,* for the recovery of his or her freedom; and if such master or holder shall fail or deny to give security as aforesaid, such magistrate shall order the complainant into the custody of the officer serving the warrant, to be kept by him safely at the expense of such master or holder, until the sitting of the first court that shall happen after such judgment by him given, and produce him or her before such court.[103]

The statute recognizes the practical implications of financial impediments to the enslaved by providing that the freedom suit was to be filed with relief from payment of court costs and fees.[104] The statute also provided that the enslaved petitioner was to be provided with counsel and other procedural protections designed to ensure that he or she had access to the courts in order to prosecute the claim.[105] Section 2 of the statute provides:

> When a petition shall be offered to the court of any district, county, or corporation, by any person or persons so complaining, it shall state the material facts of the case, which being proved by affidavit or otherwise, to the satisfaction of such court, the petitioner shall obtain counsel, to be assigned by the said court, who, without fee or reward, shall prosecute the suit of such complainant: But before process shall issue upon the said petition, the counsel so appointed shall make an exact statement to the court, of the circumstances of the case, with his opinion thereupon, and unless from such circumstances and opinion, the court shall see manifest reason to deny their interference, they shall order their clerk to issue process against the owner, to appear and answer the complaint, and in the mean time, that such complainant shall be in custody of the sheriff, until the owner shall give bond with security, either in court, or with the clerk of the court, to

103. *Id.*
104. *Id.*
105. *Id.*

> have him or her forthcoming to answer the judgment of the court; in which case the complainant shall be returned into possession of the owner.[106]

Section 3 of the freedom suit act returns to the theme established in the preamble reflecting what may be characterized as the reactionary nature of this legislation. The General Assembly enacted punitive measures designed to deter the actions of those "voluntary associations of individuals" who might be involved in attempts to assist the enslaved:

> *[And] be it further enacted,* That if any person or persons shall be found aiding, abetting, or maintaining any person in the prosecution of a suit upon a petition as aforesaid, and such person or persons shall fail to establish his or [her] claim to freedom, every person so found aiding, abetting, or maintaining, shall forfeit and pay to the owner of such slave, or to the person who shall prosecute for the same, the sum of one hundred dollars, for every person so complaining; to be recovered by action of debt or information in any court of record within this commonwealth, and moreover, be liable to an action on the case for damages arising therefrom, to the party grieved thereby.[107]

Section 5 of the statute is a provision establishing criminal penalties for forging documents where the enslaved petitioner claimed to have obtained the permission of the slaveholder to file the law suit in the first place:

> *[Be] it also enacted,* That if any person shall make, forge, or counterfeit, or cause to be made, forged, or counterfeited, or willingly act, or assist in the making, forging, or counterfeiting any writing whatsoever, whereby any slave or servant of another, without the approbation or consent of the owner, master, or mistress of such slave or servant shall be declared to be or intended to be emancipated, or shall be suffered to go at large, or pass as a free person for any space

106. *Id*.
107. *Id.*

> of time, every person so offending and thereof legally convicted, shall forfeit and pay the sum of two hundred dollars, and suffer one year's imprisonment without bail or mainprize.[108]

A. Leon and F. Michael Higginbotham have thoroughly researched the Virginia Freedom Suit Act and the practical effect that it had upon those enslaved persons who brought suit explaining that:

> The statute permitted suits *in forma pauperis* and also provided, remarkably enough, for the assignment of counsel to indigent slave petitioners. It did not include any provision for monetary damages or labor profits for those illegally enslaved. The Freedom Suit Act required a petitioner to present himself at the county court or to a magistrate, who would then summon the apparent owner to answer the complaint. By requiring the freedom suit petitioner to present himself at the courthouse, the 1795 Act effectively asked slaves to obtain their masters' consent to be sued. Recognizing the coercive power of owners to impede further proceedings, the law compelled a slaveholder to provide a deposit equal to the value of the alleged slave as a guarantee that he would allow the claimant to appear at the next court session. If the owner refused to provide the deposit, the court held the petitioner and charged the owner for its expenses in holding the slave.[109]

Based upon the language of the statutory preamble, it may safely be concluded that organized and significant efforts were being marshalled by individuals who desired to assist enslaved persons vindicate their claims to freedom.[110] Historian Kenneth Stampp has observed:

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108. *Id.*

109. A. Leon Higginbotham, Jr. & F. Michael Higginbotham, *"Yearning to Breathe Free": Legal Barriers Against and Options in Favor of Liberty in Antebellum Virginia*, 68 N.Y.U. L. REV. 1213, 1235 (1993) (internal citations omitted).

110. The phenomenon of southern sentiments for those who sought their freedom may have had a somewhat astonishing aspect.

> Not the least of those who gave assistance to fugitives were former slaves who had themselves escaped and then returned to help others. Harriet Tubman after twenty-five years in bondage, escaped from her master who lived on the Eastern Shore of Maryland. During the 1850's she returned nineteen times to deliver parties of fugitives… [She] was one of the many ex-slaves who served as "conductors" on the famed Underground Railroad. Along its various routes in the Northeast and Northwest they, together with northern free Negroes and sympathetic whites, sheltered the frightened fugitives and sped them on their way. These runaway slaves did much to disturb the consciences of the northern people and to arouse sympathy for those they left behind.[111]

The foregoing discussion lends credence to the notion that the Virginia General Assembly had concerns about those who sought to assist the efforts of the enslaved to escape from bondage attested to by various records kept by governmental authorities in the mid-nineteenth century.[112] Whether the fears were justified or better characterized as paranoia, documentation of these matters reveals that there did exist a movement that, regardless of the motives of its facilitators, militated toward freedom. The Virginia Freedom Suit statute, despite its somewhat duplicitous optics, sets forth specific procedural requirements to be utilized by counsel for petitioners in causes of action brought under the law. As the language of the statute attests, the cause of action was established, and provision was made for court-appointed counsel.[113] The statute, consistent with its pro-slavery intent, also contained the following provision:

> If any person or persons shall be found aiding, abetting, or maintaining any person in the prosecution of a suit upon a petition as aforesaid, and such person or persons shall fail to establish his or her claim to freedom, every person so found aiding, abetting or maintaining, shall forfeit and pay to the

111. STAMPP, *supra* note 11, at 121–122 (internal citations omitted).

112. STAMPP, *supra* note 11, at 121-122; *see also* PHILIP J. SCHWARZ, SLAVE LAWS IN VIRGINIA 135–36 (2010).

113. Virginia Freedom Suit Act, *infra* app. A.

> owner of such slave, or to the person who shall prosecute for the same, the sum of one hundred dollars.[114]

As discussed in Part II of this article, prior to the effective date of the 1795 statute, codifying the procedural requirements of the freedom suit cause of action, a law suit for liberation from bondage was exclusively a creature of the common law, that particular form of "judge-made" law in the Anglo-American jurisprudential tradition that has been described by a noted American jurist as that species of law that owes its origin to a "gradual build-up."[115] After the January 1, 1796 effective date of the statute,[116] a cause of action that had been essentially developed by judges based upon the legal arguments of counsel became the legal precedents upon which subsequent cases were decided. It appears that the legal principles upon which the pre-statutory cases were pleaded and decided worked their way into and influenced the statutory scheme, thereby transforming the freedom suit and its potential as a tool for the liberation of enslaved persons.[117] The cause of action became a part of the legal apparatus, of the prescribed statutory procedural provision that circumscribed the contents of the freedom suit petitions, and not merely of the common law.

However, before the statute was enacted, freedom suits were brought in the courts of Virginia based upon a number of novel theories. In the next section of this paper, a number of these law suits are examined. Each of these

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114. This statute was amended in 1818 to provide that "in all cases wherein the property of a person, held as a slave, demanding freedom shall come for trial, no person who shall be proved to be a member of any society instituted for the purpose of emancipating negroes from the possession of their masters, shall be admitted to serve as a juror in the trial of the said cause." JOSEPH TATE, DIGEST OF THE LAWS OF VIRGINIA 871, Act of January 17, 1818 Ch. 124, §6 (Richmond et al. 2d ed., 1841).

115. Patricia M. Wald, *The Rhetoric of Results and the Results of Rhetoric: Judicial Writings*, 62 UNIV. CHI. L. REV. 1371, 1371 (1995) (stated "Our[] [system] is a system of law by gradual buildup, and the process of reasoning by reference to past cases is used to . . . develop common law.").

116. SAMUEL PLEASANTS & HENRY PAGE, ACTS OF VIRGINIA 346, § 189 (1803).

117. As has been argued, the Virginia freedom suit statutory provisions appear to foreshadow the Louisiana Territorial Act and the Missouri state law regarding freedom suits. *See* Virginia Freedom Suit Act; Laws of the Territory of Louisiana; Laws of the State of Missouri; *infra* app. A.

lawsuits represents a step towards the establishment of a statutory standard for pleading such cases and a movement away from reliance upon the laudable ingenuity of counsel attempting to craft legal theories upon which to prosecute their clients' cases.

2. Jacob, alias Pompey: A Freedom Suit Predicated on an Illegal Importation

In this petition,[118] "Negro Jacob, alias Pompey" brought suit under the Freedom Suit Act, basing his claim for freedom upon an alleged violation of the 1788 state law prohibiting the importation of slaves from other states.[119] His complaint asserts that he was owned by Henry Ward of Charles County, Maryland, and was sold at the age of about eleven years, on December 21, 1781,[120] to Samuel Arell of Fairfax County, Virginia. Subsequently, he was sold to William Hunter, and was then sold by Hunter

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118. Negro Jacob Alias Pompey v. Narr Stephen Cooke, Jacob: Freedom Suits, Arlington County (1798), *in* AFRICAN AMERICAN DIGITAL NARRATIVE COLLECTION, LIBRARY OF VIRGINIA, http://digitool1.lva.lib.va.us:8881/R/M1B8MM4URIXND65NCMHS655JAA1BAGIYEPTXNFL2RPPJTAQMV8-02006?func=results-jump-full&set_entry=000020&set_number=262282&base=GEN01-LVA01.

119. Higginbotham & Higginbotham, *supra* note 109, at 1249 ("The Importation Act prohibited the importation of all non-resident slaves by either Virginians or out-of-state owners, and it required slaveholders moving into the state to swear that any slaves accompanying them were not intended for sale. The penalty assessed against Virginians who unlawfully imported slaves and against foreign owners who carried slaves into Virginia without swearing an oath within one year of import was harsh: forfeit of the slave by emancipation. These importation prohibitions reduced foreign competition and increased the value of Virginia slaves by discouraging the sale of slaves within Virginia of slaves bought more cheaply in the West Indies. The Importation Act also provided a window of opportunity for some slaves to petition Virginia courts for their freedom by claiming that their masters had transported them illegally and/or failed to swear the required oath." This statute was the substantive basis of Jacob's petition.).

120. Negro Jacob Alias Pompey, *supra* note 118, at 5. The case file contains the deposition of William Hunter, whose sworn statement asserts that "I do hereby certify that on the 21st of December 1781 Henry Ward of Charles County Maryland sold unto Samuel Arell of Alexandria a Negro Boy named Jacob then about Eleven years old which Boy I afterwards [bought] and Call[e]d him Pompey of said Arell Burdett Hamilton of Nanymoy [sic] was Present as a witness."

to Cooke, the defendant in this lawsuit.[121] The sale by Hunter was pursuant to a public sale by the sheriff to satisfy a judgment against Hunter.[122] The precise language of the petition is quite compelling. Through his counsel Jacob alleges:

> That he was afterward sold by the said Samuel Arell to a William Hunter in the said County of Fairfax, and that sometime in the last Summer or Fall Your Petitioner was sold at Public Sale in Alexandria by the Sheriff of Fairfax County to satisfy an Execution against the said William Hunter at which last mentioned Sale, Your Petitioners right to his Freedom was publicly declared. Still a certain Stephen Cooke of Alexandria knowing the Circumstances and being Present, purchased Your Petitioner at the price as well as he remembers, of fifty seven pounds Virginia Currency, and holds Your Petitioner unjustly and against Law as a Slave, which several facts contained in this Petition, Your Petitioner has the most ample proof of. He therefore prays that he may be permitted to commence a Suit in this… Court in Forma pauperis against the said Stephen Cooke for false Imprisonment and detaining your Petitioner.[123]

As required by statute, the petition was filed *in forma pauperis*, and alleged the statutory grounds of trespass, assault, and false imprisonment.[124] He requested damages in the amount of one hundred pounds, and the prayer for relief requested that the defendant be ordered to refrain from sending Jacob outside of the court's jurisdiction, and that he be permitted time to confer with counsel and to prosecute his case in court.[125] These provisions are contained in the Freedom Suit Act[126] and are almost identical to the provisions of the Territorial and Missouri Freedom Suit Acts.[127] In addition, the case file contains a certification by "Moore, Council" dated January 1795,

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121. *Id.* at 1, 5.
122. *Id.* at 1.
123. *Id.*
124. *Id.*
125. *Id.* at 6.
126. *See* Virginia Freedom Suit Act, *infra* app. A.
127. *See* Laws of the Territory of Louisiana; Laws of the State of Missouri, *infra* app. A.

stating "I do hereby certify that I am [sic] opinion the within Jacob alias Pompey is justly entitled to his Freedom."[128] However, there is no evidence in the file that points to whether Jacob was successful due to the absence of future accretions to the file, as is the case with several of the lawsuits under consideration in this paper. Thus, Jacob's fate remains unknown.

Jacob, who had been re-named Pompey by one of his serial slaveholders,[129] appears to have decided to file his petition in what may have been the name given him at birth. His doing so may have foreshadowed the action taken by formerly enslaved men and women who did the same when freedom came. Genovese writes:

> Generally, slave parents named their own children, although in numerous instances slaveholders presumed to do it for them. On the great patriarchal plantations the planters had the inconvenience of numbers to encourage them to mind their own business. The slaves' choices varied from concern with family continuity to whim, but rarely did they choose those pompous, classical, or comical names which masters sometimes inflicted upon them. Very few Caesars, Catos, and Pompeys survived the war; the freedmen divested themselves of these names so quickly that one wonders if they had ever used them among themselves in the quarters.[130]

3. Jane Banks[131] and Ned Scott[132]: Money Damages Requested

It should not come as a surprise that petitioners in freedom suits may have been inclined to seek monetary compensation based upon their claims.

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128. Negro Jacob Alias Pomprey, *supra* note 118, at 2.

129. *Id.* at 5.

130. EUGENE D. GENOVESE, ROLL, JORDAN, ROLL: THE WORLD THE SLAVES MADE 447 (1976).

131. Banks, Jane: Freedom Suit, Goochland County 1 (1763) *in* AFRICAN AMERICAN NARRATIVE DIGITAL COLLECTION, LIBRARY OF VIRGINIA, http://digitool1.lva.lib.va.us:1801/webclient/DeliveryManager?pid=1151446&custom_att_2=direct (hereinafter "Jane Banks Freedom Suit").

132. Scott, Ned: Freedom Suit, Arlington County 1 (1797) *in* AFRICAN AMERICAN NARRATIVE DIGITAL COLLECTION, LIBRARY OF VIRGINIA, http://digitool1.lva.lib.va.us:1801/webclient/DeliveryManager?pid=1075018&custom_att_2=direct (hereinafter "Ned Scott Freedom Suit").

However, it appears that such claims were not frequently successful. Higginbotham and Higginbotham noted: "[a] practical limitation on the adjudication rights of slaves was that, for most of the antebellum period, Virginia courts routinely denied damages to litigants who won their freedom."[133] An example of a case in which the petitioner included a request for "freedom dues"[134] or money damages based upon a claim of an unlawfully extended period of indenture is the case Jane Banks brought in Goochland County court.[135]

> [Banks] avers that she was born at a time when her said mother was free & that yourPetitioner is of the age of nineteen years and upward & being advised that she ought not by Law be compelled to service longer than 'til her age eighteen years hath applied to the said Judith Leak to be discharged form her service & to be paid yourPetitioners Freedom Dues according to Law both which the said Judith Leak refuseth & still detains yourPetitioner in servitude.[136]

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133. Higginbotham and Higginbotham, *supra* note 119, at 1247.

134. An Act Concerning Servants and Slaves, ch. 49, § 13 (1705) *in* 3 THE STATUTES AT LARGE: BEING A COLLECTION OF ALL THE LAWS OF VIRGINIA 447, 451 (William Waller Hening ed., New York, R. & W. & G. Bartow 1823), https://www.encyclopediavirginia.org/media_player?mets_filename=evr3431mets.xml (referring to the provision as "freedom dues" in a margin note). A provision for the payment of "freedom dues" was enacted into law in October 1705 by the Virginia General Assembly. *See infra* app. A.

135. Jane Banks Freedom Suit, *supra* note 131, at 1.

136. *Id.* In 1765, two years before the 1763 case, a Virginia statute provided that certain female servants would not be required to serve past the age of eighteen. The only date that clearly appears in Banks' petition is 1760, the date she was bound to Leak. The date of the decision is not facially apparent in the file. The author believes that the date on 1763 is an error. The language in the petition clearly refers to an age limit of eighteen. The previous age limit was thirty-one years of age. *See* An act concerning Servants and Slaves Ch. 28 (1705), *infra* app. A. By reference to the free status of her mother, "Mary Banks a free Mulatto Woman," her petition also implicates the doctrine of *partus sequitur ventrem*. *See* Negro womens children to serve according to the condition of the mother, *infra* app. A.

The case file does not reveal whether Banks was successful in her quest for freedom and financial remuneration.[137] However, another case filed by Ned Scott against James Kenner in Alexandria, after the effective date of the Freedom Suit Act, resulted in a verdict in favor of freedom and a jury award to "the Plaintiff forty shilling Damages" on December 8, 1797.[138] In this case, the deposition of Elisha Williams sets out the basis of the claim to freedom on behalf of the petition for the Scott family:

> The abovesaid Elisha Williams the Deponant being sworn on the Holy Evangelist of Almighty God Deposeth and saith That he well knew and was acquainted with a Black Man present Ned Scott Senr. who is a free man and has always been reputed as such and his wife who is also a free woman and nearly white, that the abovesaid. . .Plaintiff is his Son, and was raised by the said Ned Scott in his Family the whole of which are free people. That this Deponant knew the whole Family as free people of upwards Eleven years, that the old man, removed from towards Richmond into the County of Bedford where he purchased a [piece] of land and resided thereon for Eight years. he then sold said land and removed out with his Family to the French Broads together with his son Ned and this deponant was present when the wife of said Ned Scott Senr. was privily examined and released her Right of Title of Dower to John Chanahan the purchaser of said land. Question by Kenner, the Defendant, how many Brothers & Sisters has the said plaintiff. Answer Eight viz. Israel,

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137. Banks' petition closes with the following prayer for relief: "Your Petitioner therefore humbly prays your Worships to take her Case into Consideration & that by Order of your Worships she may be declared free & discharged from service of the said Judith & may also be paid her lawful freedom Dues & have *all such further Relief as the Nature of her Case may require* . . . ." *Id.* (emphasis added). This language bears a striking resemblance to language included in the Territorial Act of 1807 that became the basis for the Missouri law enacted in 1825. "The court before whom such suit may be tried, may instruct the jury that the weight of proof lies on the petitioner, but to have regard not only to the written evidences of the claim to freedom, but to such other proofs either at law or in equity as *the very right and justice of the case may require*." *See* Law of the Territory of Louisiana, *infra* app. A (emphasis added).

138. Ned Scott Freedom Suit, *supra* note 132, at 4.

> Pleasant, Moses, (Ned the pltf), Billy, Aaron, John, Isaac, all free people.and further this deponant saith not. Elisha Williams his [X] mark.[139]

This case is an example of a freedom suit predicated on the intergenerational reputation of its petitioner and his family as free people of color. It also illustrates the use of a deposition as a critical tool in the prosecution of a freedom suit. The information provided under oath or affirmation was essential to the advancement of a theory of freedom based upon a number of grounds, including the notion that a particular individual or family group enjoyed a reputation of freedom within their communities.

4. Thomas[140] and Mary[141]: Freedom Suits Predicated on the Writ of De Homine Replegiando

In two Accomack County freedom suits, attorney Griffin Stith filed suit against Edward Roberts, who was represented by his own counsel, John Stratton.[142] The suits were brought pursuant to the writ of *de homine replegiando*.[143] Blackstone describes the nature of this writ:

> The writ *de homine replegiando* lies to replevy a man out of prison, or out of the custody of any private person (in the same manner that chattels taken in distress may be replevied…), upon giving security to the sheriff that the man shall be forthcoming to answer any charge against him. And, if the

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139. *Id.* at 1.

140. Thomas: Freedom Suit, Accomack County (1794) *in* AFRICAN AMERICAN NARRATIVE DIGITAL COLLECTION, LIBRARY OF VIRGINIA, http://digitool1.lva.lib.va.us:1801/webclient/DeliveryManager?pid=1074964&custom_att_2=direct (hereinafter "Thomas Freedom Suit").

141. Mary: Freedom Suit, Accomack County (1795) *in* AFRICAN AMERICAN NARRATIVE DIGITAL COLLECTION, LIBRARY OF VIRGINIA, http://digitool1.lva.lib.va.us:1801/webclient/DeliveryManager?pid=1074967&custom_att_2=direct (hereinafter "Mary Freedom Suit").This case was filed in the spring of 1795. The Freedom Suit Act was signed into law on December 25, 1795 and did not become effective until January 1796.

142. Thomas Freedom Suit, *supra* note 140; Mary Freedom Suit, *supra* note 141.

143. *Id.*

> person be conveyed out of the sheriff's jurisdiction, the sheriff may return that he is eloigned, *elongatus;* upon which a process issues (called a *capias in withernam*) to imprison the defendant himself, without bail or mainprize, till he produces the party. But this writ is guarded with so many exceptions, that it is not an effectual remedy in numerous instances, especially where the crown is concerned.[144]

The writ of de homine replegiando is then distinguished from the more familiar writ of *habeas corpus*:

> The writ of *habeas corpus,* the most celebrated writ in the English law. . . . Of this there are various kinds made use of by the courts at Westminster, for removing prisoners from one court into another for the more easy administration of justice. Such is the *habeas corpus ad respondendum* . . . when a man hath a cause of action against one who is confined by the process of some inferior court; in order to remove the prisoner, and charge him with this new action in the courts above. Such is that *ad satisfaciendum* . . . when a prisoner hath had judgment against him in an action, and the plaintiff is desirous to bring him up to some superior court to charge him with process of execution.[145]

5. Negro Sylvia's Case[146]

In 1795, the General Assembly of Virginia enacted a statute setting forth the law and civil practice by which an enslaved individual could gain access to the courts in order to attempt to vindicate his or her claim to

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144. 3 WILLIAM BLACKSTONE, COMMENTARIES *129.

145. *Id.* at *129-30.

146. Silvia: Freedom Suit, Arlington County (1801) *in* AFRICAN AMERICAN NARRATIVE DIGITAL COLLECTION, LIBRARY OF VIRGINIA, (http://digitool1.lva.lib.va.us:8881/R/XPLNKNTND8FSIDA3RM6I22KPQDPM4PY1AB1AGADJEL191SL8YF-06240?func=results-jump-full&set_entry=000020&set_number=259104&base=GEN01-LVA01 (the plaintiff is referred to as both Silvia and Sylvia in the text) (hereinafter "Sylvia Freedom Suit").

freedom.[147] This paper has examined a number of legal theories upon which petitions for freedom were filed in the courts of Virginia prior to the promulgation of this statute containing specific procedural requirements for such suits. The common law theories relied upon by counsel were of continuing relevance after the passage of the act and were of continuing importance as the enslaved pressed the courts with their suits pleading for freedom from bondage. For example, on April 9, 1800, Negro Sylvia filed such a petition in the Court of Hustings of Alexandria.[148] The substantive foundation of her case was based upon the claim that she had been taken by the defendant, George Coryell, into the state of New Jersey at some time between 1790 to 1792, and that she resided there for about two years.[149] Although the pleadings do not explicitly assert this proposition, it is likely that her claim to freedom was based on the 1788 New Jersey statute prohibiting the removal of an enslaved person, to another state without his or her consent, who had resided in the state for more than twelve months.[150i]

The specific language of her pleadings lends considerable credence to this assertion: "The Petition of Negro Sylvia humbly sheweth that your Petitioner about 8 or 10 years ago was . . . by Geo Coryell of Alexa, who now claims the Said Sylvia as a slave into the State of New Jersey, that she remained in the state of New Jersey for the space of about 2 years from whence she was removed into this State and where she has remained ever since, your Petitioner [claiming] that under those Circumstances she is Entitled to her Freedom."[151] In her prayer for relief, the petitioner invokes the procedural specifications of the Virginia Freedom Suit Act of 1795: she claimed that she was entitled to her freedom pursuant to "the Act of Assembly in Such Cases made & provided" by virtue of that statute, including a request "that she may be permitted to institute her Suit in forma pauperis."[152]

The petition continues with a statement by her counsel, Mr. Faw, appointed in accordance with the statute, in the form of a certification, to the effect that "From the Facts stated in the above Petition it appears to me that under the Laws of this State it is doubtful whether the Petitioner is entitled,

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147. *See* Virginia Freedom Suit Act, *infra* app. A.

148. Sylvia Freedom Suit, *supra* note 146, at 1.

149. *Id.*

150. HENRY SCOFIELD COOLEY, A STUDY OF SLAVERY IN NEW JERSEY 429 (Herbert b. Adams ed. 1896).

151. Sylvia Freedom Suit, *supra* note 146, at 1.

152. *Id.*

but that it is extremely probable that under the Laws of New Jersey which the Courts of this State will recognize her residing there 2 years will entitle her to freedom, and I am of opinion that there exists no circumstance to induce this Court to deny their interference."[153] Thomas Patten, foreman of the jury, published the following verdict in Negro Sylvia's case: "We of the jury find for the [plaintiff] One penny Damages, subject to the opinion of the Court on the case agreed."[154] However, the court in this case found in favor of the defendant.[155] The rationale for its decision does not appear in the record.

CONCLUSION AND CODA

August 20, 2019 will mark the quadricentennial anniversary of the arrival of the first known Africans at the Jamestown, Virginia English colony.[156] In anticipation of this anniversary, federal legislation was enacted to ensure its formal recognition.[157] Senate Bill 392, known as the "400 Years of African American History Commission Act," established an entity charged with the responsibility to plan programs "appropriate for the commemoration" of this event.[158] Yet as the anniversary of the arrival approaches, communities across this nation are faced with the issue of determining the fate of Confederate monuments and other objects of veneration that stand as testimonials to a part of the American experience,[159]

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153. *Id.*

[160] *Id.* at 4.

155. *Id.* at 2.

156. STAMPP, *supra* note 11, at 3.

157. S. 392, 115th Cong. (2017).

158. According to the bill, "the term *commemoration* means the commemoration of the 400th anniversary of the arrival of Africans in the English colonies, at Point Comfort, Virginia, in 1619." S. 392, https://www.govtrack.us/congress/bills/115/s392/text. As has been noted above, the actual point of final debarkation was Jamestown, at a point toward the interior of the state.

159. This issue is perhaps nowhere better illustrated than in the state of Virginia. "In Virginia, Lee tributes have included at least five high schools, two elementary schools, an Army base and a university. His name is stamped on both a state holiday and a trans-commonwealth highway that stretches from Rosslyn to Bristol. The Lee Chapel at Washington and Lee University in Lexington is a cathedral-worthy shrine that includes a statue of the general in eternal marble repose and his tomb one floor below it. The Lee mansion overlooking Arlington National

although the question regarding the ultimate fate of these monuments may have to await judicial interpretation of state statutes.[160] While awaiting such judicial pronouncement, some organizations, such as the Association for the Study of African American Life and History (ASALH), have argued against the continued veneration.[161] In a recent statement, ASALH president Dr. Evelyn Brooks Higginbotham stated:

> The Association for the Study of African American Life and History rejects the appropriateness of memorializing persons whose support of slavery led them to disavow their loyalty to the United States. We do not hold as heroes men who took actions that led to war and to the formation of their own separate nation and government, with its attendant national capital, president, congress, military, its separate monetary system, and flag. And all this in order to preserve human bondage! Thus, ASALH makes a clear distinction between the Founding Fathers' motivations that led to the Revolutionary War and the Secessionists' motivations that led to the Civil War and the establishment of the Confederacy.[162]

This eloquent argument against the continued veneration of the individuals so memorialized carries much weight, but it may also be argued that the removal of these monuments, whether in a wholesale or more circumspect manner, will result in a sanitization of the history of this nation, in a sort of metaphorical whitewashing of this nation's true story. Dr. Higginbotham continues:

> ASALH follows in the tradition of its founder Carter G. Woodson, who praised the leadership of George Washington

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Cemetery is a Park Service memorial that draws more than a million visitors a year." Steve Hendrix, *The Day White Virginia Stopped Admiring Gen. Robert E. Lee and Started Worshipping Him,* WASH. POST (Oct. 8, 2017).

160. For example, a Virginia statute authorizing the erection of Confederate or Union monuments prohibits the disturbance or interference with the monuments. VA. CODE § 15.2-1812.

161. *ASALH's Position on Confederate Monuments*, ASSOC. STUDY AFRICAN AMERICAN LIFE & HISTORY, https://asalh.org/asalhs-position-on-confederate-monuments/.

162. *Id.*

> and Thomas Jefferson, as well as that of Abraham Lincoln. In doing so, however, Woodson, called attention to a more complete and honest rendering of the historical record. He wrote: "We should not learn less of George Washington, but we should learn something also of the three thousand Negro soldiers of the American Revolution who helped to make this 'Father of Our Country' possible. We should not fail to appreciate the unusual contribution of Thomas Jefferson to freedom and democracy, but we should invite attention to one of his outstanding contemporaries, Benjamin Banneker, the mathematician, astronomer." Regarding the Civil War, Woodson emphasized that "we should not cease to pay tribute to Abraham Lincoln, but we should ascribe praise to the 178,975 Negroes who had to be mustered into service of the Union before it could be preserved, and who by their heroism demonstrated that they were entitled to freedom and citizenship."[163]

It is hoped that this paper, in recounting several of the legal battles for liberation waged by the individuals described in their narratives, will testify, as Dr. Woodson suggests, as propositions adduced in support of the notion that more accurate historiography, not efforts of a revisionist character, will indeed point the way to liberation for the soul of this nation. This paper is respectfully proffered as an offering in a long series of determined efforts to tell the truth.

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163. *Id*.

APPENDIX A

A. Virginia Statutes

1. Negro Womens Children to Serve According to the Condition of the Mother, Virginia Act 12 (1662)[164]

Whereas some doubts have arisen whether children got by any Englishman upon a Negro woman should be slave or free, *Be it therefore enacted and declared by this present grand assembly*, that all children born in this country [sic] shall be held bond or free only according to the condition of the mother, *And* that if any Christian shall commit fornication with a negro man or woman, he or she so offending shall pay double the fines imposed by the former act.

2. Act Concerning Servants and Slaves ch. 49 § 13 (1705).[165]

And whereas there has been a good and laudable custom of allowing servants corn and clothes for their present support, upon their freedom; but nothing in that nature ever made certain, *Be it also enacted, by the authority aforesaid, and it is hereby enacted*, That there shall be paid and allowed to every imported servant, not having yearly wages, at the time of service ended, by the master or owner of such servant, viz: To every male servant, ten bushels of indian corn, thirty shillings in money, or value thereof, in goods, and one well fixed musket or fuzee, of the value of twenty shillings at least: and to every woman servant, fifteen bushels of indian corn, and forty shillings in money, or the value thereof, in goods: Which, upon refusal, shall be ordered, with costs, upon petition to the county court, in the manner as is herein before directed, for servants complaints to be heard.

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164. WILLIAM WALLER HENING, THE STATUTES AT LARGE; BEING A COLLECTION OF ALL THE LAWS OF VIRGINIA, FROM THE FIRST SESSION OF THE LEGISLATURE IN THE YEAR 1619 170, § 12 (1823).

165. An Act Concerning Servants and Slaves, ch. 49, § 13 (1705) *in* 3 THE STATUTES AT LARGE: BEING A COLLECTION OF ALL THE LAWS OF VIRGINIA 447, 451 (William Waller Hening ed., New York, R. & W. & G. Bartow 1823), https://www.encyclopediavirginia.org/media_player?mets_filename=evr3431mets.xml (referring to the provision as "freedom dues" in a margin note).

3. An act concerning Servants and Slaves ch. 49 § 28 (1705).

And if any woman servant shall have a bastard child by a negro, or mulattos, over and above the years service due to here master or owner, she shall immediately, upon the expiration of her time to her then present master or owner, pay down to the church-wardens of the parish wherein such child shall be born, for the use of the said parish, fifteen pounds current money of Virginia, or be by them sold for five years, to the use aforesaid: And if a free christian white woman shall have such bastard child, by a negro, or mulatto, for every such offence, she shall, within one month after her delivery of such bastard child, pay to the church-wardens for the time being, of the parish wherein such child shall be born, for the use of the said parish fifteen pounds current money of Virginia, or be by them sold for five years to the use aforesaid: And in both the said cases, the church-wardens shall bind the said child to be a servant, until it shall be of thirty one years of age.

4. Virginia Statute Chapter 1 (1778)[166]

In the third year of the Commonwealth, Patrick Henry, Esquire, being Governor, at the Capitol at Williamsburg, it is enacted, that hereafter no slave shall be imported into the Commonwealth by sea or land. Every slave imported contrary to the interest and meaning of this act shall become free.

Provided that persons may remove from any of the United States to Virginia if not with the intention of evading this act, and their slaves were not imported from Africa or any of the West Indies since November 1, 1778.

5. Virginia Statute Chapter 21 (1782)[167]

It is lawful for any person by last will and testament or other instrument in writing sealed and witnessed to emancipate and set free his slave or slaves.

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166. June Purcell Guild, Black Laws of Virginia: A Summary of the Legislative Acts of Virginia Concerning Negroes From Earliest Times to the Present 60 (Negro Univ. Press 1936).

167. *Id.* NOTE: In 1792 this statute was amended to specify that such instrument must be "attested and proved by two witnesses" and that they were "liable to be taken on execution to satisfy any debt contracted by the person so emancipating." LAWS OF VIRGINIA ch. 41 §§ 53-54 (1792).

All slaves so set free, not being of sound mind and body, or being above forty-five years of age, or males under twentyone, and females under eighteen shall be supported by the persons liberating them. Provided, also, that a copy of the instrument of emancipation shall be delivered to the slave emancipated. Slaves travelling outside of the county without such an instrument shall be confined to jail.

6. Virginia Freedom Suit Act[168]

AN ACT to amend an act, intituled, 'An act to reduce into one the several acts concerning slaves, free negroes and mulattoes, and for other purposes'

Whereas great and alarming mischief has arisen in other states of this Union, and is likely to arise in this by voluntary association of individuals, who under cover of effecting that justice toward persons unwarrantably held in slavery, which the sovereignty and duty of society alone ought to afford; have in many instances been the means of depriving masters of their property in slaves: To the end that an easy mode may be pointed out by law for the recovery of freedom when it is illegally denied, it is enacted that a person conceiving himself to be detained as a slave illegally may make complaint in court; the petitioner shall be assigned counsel who without fee shall prosecute the suit.

If any person or persons shall be found aiding, abetting, or maintaining any person in the prosecution of a suit upon a petition as aforesaid, and such person or persons shall fail to establish his or her claim to freedom, every person so found aiding, abetting or maintaining, shall forfeit and pay to the owner of such slave, or to the person who shall prosecute for the same, the sum of one hundred dollars. A person forging or counterfeiting a paper giving a slave freedom shall pay two hundred dollars and suffer one year's imprisonment without bail.

168. LAWS OF VIRGINIA 363, Ch.10 (1795).

B. Territorial and Missouri Acts

1. Laws of the Territory of Louisiana

*AN ACT to enable persons held in slavery, to sue for their freedom**[169]

1. Persons held in slavery to sue as paupers, when.

2.Suits, how instituted--counsel assigned petitioner--petitioner not to be removed.

3.Petitioner about to be removed, defendant may be required to enter into recognizance; petitioner may be hired out when--person hiring to enter into recognizance.

4.Weight of proof on petitioner--judgment.

5.Appeal to general court.

Be it enacted by the Legislature of the Territory of Louisiana, [as follows.]

1. It shall be lawful for any person held in slavery to petition the general court or any court of common pleas, praying that such person may be permitted to sue as a poor person, and stating the grounds on which the claim to freedom is founded. If in the opinion of the court the petition contains sufficient matter to authorize their interference the court shall award the necessary process to bring the cause before them.

2. The court to whom application is thus made, may direct an action of assault and battery, and false imprisonment, to be instituted in the name of the person claiming freedom against the person who claims the petitioner as a slave, to be conducted as suits of the like nature between other persons. And the court shall assign the petitioner counsel, and if they deem it proper shall make an order directing the defendant or defendants to permit the petitioner to have a reasonable liberty of attending his counsel, and the court when occasion may require it, and that the petitioner shall not be taken nor removed out of the jurisdiction of the courts, nor be subjected to any severity because of his or her application for freedom.

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169. LAWS OF A PUBLIC AND GENERAL NATURE: OF THE DISTRICT OF LOUISIANA, OF THE TERRITORY OF LOUISIANA, OF THE TERRITORY OF MISSOURI UP TO THE YEAR 1824 96 (1824)(original emphasis) *repealed* R.L. 1825, p.500, sec.13.

3. If the court, or any judge thereof in vacation shall have reason to believe that the above order has been or is about to be violated, in such case the said court, or any judge thereof in vacation, may require that the person of the petitioner be brought before him or them, by writ of *habeas corpus*, and shall cause the defendant or defendants, his, her, or their agent, to enter into recognizance with sufficient security, conditioned as recited in the above order, or in case of refusal to direct the sheriff of the district to take possession of the petitioner, and hire him or her to the best advantage, which hire shall be appropriated either to the petitioner, or to the defendant or defendants, as the event of the suit may justify. And the person hiring the petitioner shall enter into recognizance with sufficient security, conditioned as the above order directs.

4. The court before whom such suit may be tried, may instruct the jury that the weight of proof lies on the petitioner, but to have regard not only to the written evidences of the claim to freedom, but to such other proofs either at law or in equity as the very right and justice of the case may require. And the court on a verdict in favor of the petitioner, may pronounce a judgment of liberation from the defendant or defendants, and all persons claiming by, from, or under, him, her, or them.

5. Suits instituted in any court of common pleas under this law, may be removed into the general court before judgment, or if judgment is given in any such cause in the court of common pleas, appeal, or writ of error shall lie to the general court as in other cases.

The foregoing is hereby declared to be a law for the territory of Louisiana, to take effect and be in force from and after the passage thereof.

June 27, 1807.

*Repealed R.L. 1825, p.500, sec.13.

2. Laws of the State of Missouri

AN ACT to enable persons held in slavery to sue for their freedom.[170]*

Sec 1. *Be it enacted by the General Assembly of the state of Missouri,* That is shall be lawful for any person held in slavery to petition the circuit court, or the judge thereof in vacation, praying that such person may be permitted to sue as a poor person, and stating the ground upon which his or her calm to freedom is founded; and if, in the opinion of the court or judge, the petition contains sufficient matter to authorize the commence of a suit, such court or judge may make an order that such person be permitted to sue as a poor person to establish his or her freedom, and assign the petitioner counsel, - which order shall be endorsed on the petition. And the court or judge shall, moreover, make an order that the petitioner have reasonable liberty to attend his or her counsel and the court, when occasion may require; and that the petitioner shall not be taken or removed out of the jurisdiction of the court, nor be subject to any severity because of his or her application for freedom, - which order, if made in vacation, shall be endorsed on the petition, and a copy thereof endorsed on the writ and served on the defendant.

Sec 2. *Be it further enacted,* That if the court, or the judge thereof in vacation, shall be satisfied, at the time of the presenting the petition, or at any time during the pendency of any suit instituted under the provisions of this act, that any petitioner hath been or is about to be restrained by any person from reasonable liberty of attending his or her counsel or the court, or that the petitioner is about to be removed out of the jurisdiction of the court, or that he or she hath been or is about to be subjected to any severity because of his or her application for freedom, or that any order made by the court or judge in the premises as a aforesaid has been or is about to be violated, then and in every such case, the court, or the judge thereof in vacation, may cause the petitioner to be brought before him or them by a writ of habeas corpus; and shall cause the defendant, or the person in whose possession the petitioner may be found, his or their agent, to enter into a recognizance, with a sufficient security, conditioned that the petitioner shall at all time during the pendency of the suit have reasonable liberty of attending his or her counsel, and that

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170. *MISSOURI STATE ARCHIVES Before Dred Scott: Freedom Suits in Antebellum Missouri*, MISSOURI DIGITAL HERITAGE, https://www.sos.mo.gov/archives/education/aahi/beforedredscott/1824MissouriLaw.

such petitioner shall not be removed out of the jurisdiction of the court wherein the action is to be brought or is pending, and that he or she shall not be subjected to any severity because of his or her application for freedom, - which recognizance shall be recorded and filed among the records of the court, and be deemed and taken to all intents and purposes to be a record of such court. But if the party required to enter into a recognizance as aforesaid shall refuse so to do, the court or judge shall make an order that the sheriff take possession of the petitioner and hire him or her out to the best advantage, from time to time, during the pendency of the suit; and that he take a bond from the person hiring the petitioner, in such penalty as the court shall in such order direct, and with such security as the sheriff shall approve, conditioned as directed in the recognizance of the defendant, and moreover that he will pay the hire to the sheriff at the time stipulated, and return the petitioner at the end of the time for which he or she is hired, or sooner if the action shall sooner be determined; and the sheriff shall proceed accordingly, and pay the money received for hire to the party in whose favor the suit shall be determined.

Sec 3. *Be it further enacted,* That all actions to be commenced and prosecuted under the provisions of this act, shall be in form, trespass, assault and battery, and false imprisonment, in the name of the petitioner, against the person holding him or her in slavery, or claiming him or her as a slave. And whenever any court of judge shall make an order as aforesaid, permitting any such suit to be brought, the clerk shall issue the necessary process, without charge to the petitioner: the declaration shall be in the common form of a declaration for assault and battery and false imprisonment, except that the plaintiff shall aver that before and at the time of the committing the grievances he or she was and still is a free person, and that the defendant held and detained him or her and still holds and detains in slavery, - upon which declaration the plaintiff may give in evidence any special matter; and the defendant may plead as many pleas as he may think is necessary for his defense, or he may plead the general issue, and give the special matters in evidence. And such actions shall be conducted in other respects in the same manner as the like actions between other persons, and the plaintiff may recover damages as in other cases.

Sec. 4. *Be it further enacted,* That in all actions instituted under the provisions of this act, the petitioner, if he or she be a Negro or mulatto, shall be held and required to prove his or her right to freedom; but regard shall be had not only to the written evidence of his or her claim to freedom, but to such other

proofs, either at law or in equity, as the very right and justice of the case may require. And if the issue be determined in favor of the petitioner, the court shall render a judgment of liberation from the defendant or defendants, and all persons claiming from, through or under him, her or them.

Sec. 5. *Be it further enacted,* That if any party to a suit instituted under the provisions of this act, shall feel him or herself aggrieved by the judgment of the circuit court, he or she may have and prosecute an appeal or writ of error to the supreme court, as in other cases; Provided, That if the petitioner appeal or prosecute a writ of error, he or she shall not be required to enter into a recognizance, but such appeal or writ of error shall operate as a *supersedeas* without such recognizance.

This act shall take effect and be in force from and after the fourth day of July next.

APPENDIX B

Importation					
DATE	**PLAINTIFF**	**DEFENDANT**	**CHARGES**	**NOTES**	**OUTCOME**
1795	Milly	Hugh McGahon	Importation, assault, and false imprisonment	Defendant illegally imported the Plaintiff into Virginia against the Act of Assembly of 1778. Plaintiff is suing for damages	Judgment for Plaintiff for 1 penny
1795	Jenny	Nicholas Lowe	Importation	Defendant illegally imported plaintiff against Maryland's law. Lowe alleged to have beaten the Plaintiff and committed other injuries against her (Notes: non-removal; reasonable time to attend counsel).	Judgment for Defendant
July 1795	Sangaree	Unknown	Petition for freedom	(Notes: Importation 1778/1785)	Unknown
July 1795	John Rivers	John Luckett & John McIver	Importation & False Imprisonment	Luckett imported Plaintiff into Virginia and then sold him to McIver, in violation of the Import Ban of 1778. Plaintiff sought permission to file suit and be provided counsel. Notes: Act, Nov. 1, 1778	Unknown
1797	Fanny et. al (includes Ben, Jack, Lucy [daughter of Fanny])	Phillip Marsteller	Detaining the Plantiffs in slavery	Defendant came into possession of Plaintiffs as the administrator of the Harrison's estate. Defendant abused, beat, and held them inslavery. They sue for their freedom and 500 pounds. A new trial was granted to the Plaintiffs on a motion. They were granted damages of 1 penny.	Judgment for Plaintiffs

DATE	PLAINTIFF	DEFENDANT	CHARGES	NOTES	OUTCOME
July 21, 1797	Joseph Harris	Dr. James Craik	Importation & False Imprison-ment	Defendant removed her from Maryland and detained her in Virginia as a slave in violation of the Import Ban of 1778	Unknown
Aug. 9 1797	Betsey Scarlet	Dr. James Craik	Importation	Defendant removed her from Maryland and detained her in Virginia since as a slave in violation of the Import Ban of 1778. 1785-oath contained in Nicholls article. Plaintiff seeking permission to file suit.	Permission granted. Judgment for Plaintiff.
Sept. 1797	Matilda Thompson & Ann Caruthers	Dr. James Craik	Importation	Plaintiffs argued that they were illegally imported against Maryland's law. Court ordered that Defendant not remove them from the jurisdiction unless he paid the security and bond of 100 pounds for each of them.	
1798	Linnus Hopewell et al., represented by Thomas Swann	Edward Talbot	Importation	Defendant alleged to have acted in violation of the Act of Assembly of 1778	Judgment for Plaintiffs
1798	Jacob, alias Pompey	Stephen Cooke	Importation	Notes: recitation of facts. "Sale and Importation" certificate enclosed; See deposition Plaintiff complains that Defendant enslaved & falsely imprisoned him after his importation.	Unknown

DATE	PLAINTIFF	DEFENDANT	CHARGES	NOTES	OUTCOME
1798	Terry	William Mitchel	Importation	Plaintiff argues that Defendant imported her from Maryland in violation of the laws of Virginia. Defendant argues that he did not import or try to evade the Commonwealth's law. Plaintiff granted leave as a pauper to file suit.	Unknown
1799	Nace	Bernard Chiquire	Importation	Plaintiff alleges that the Defendant assaulted and treated him with ill contempt. Plaintiff requested $10 in damages. Witnesses were called to testify.	Unknown
Native American Ancestry					
DATE	**PLAINTIFF**	**DEFENDANT**	**CHARGES**	**NOTES**	**OUTCOME**
1747	Indian Will	Estate of George Nicholas Turner	Native American ancestry	Plaintiff filed suit as a person of Indian Will, as his mother was "very well known" as a free Indian by several inhabitants in the County. Plaintiff prays for the benefits of freedom having a right to property affairs.	Unknown
Aug. 20, 1752	Anne Williams	Unknown	Native American ancestry	Plaintiff asserted her freedom as the child of an "Indian ," who she alleged was also free. Numerous witnesses testified contrary to this and also stated that Plaintiff's mother lived and died as a slave.	No leave to sue. Verdict for Defendant.

DATE	PLAINTIFF	DEFENDANT	CHARGES	NOTES	OUTCOME
Aug. 20, 1752	Anne Williams	Unknown	Native American ancestry	Plaintiff asserted her freedom as the child of an "Indian ," who she alleged was also free. Numerous witnesses testified contrary to this and also stated that Plaintiff's mother lived and died as a slave	No leave to sue. Verdict for Defendant.
1795	Sally, Annikey, Jordan, Solomon, and Sally, free persons	Joseph Perkins	Native American ancestry	1795 law requiring due diligence of counsel. Plaintiffs claimed that they were entitled to their freedom because their grandmother was a free "Indian."	Unknown
May 1796	George Cook, a man of Black and Native American ancestry	John Walker	Trespass vi et armis	Plaintiff claimed Indian ancestry based upon his grandmother, Mary. Defendant assaulted, wounded, and ill-treated the Plaintiff by force with the use of knives, guns, and swords. Witness were deposed, and one Sacker Parker confirmed that Plaintiff's grandmother was Indian, and that her master released her upon her threat of suing for freedom to avoid releasing her children from slavery because if she would have sued based on her Native American ancestry, her children would have been freed as well.	Judgment for Defendant

Other Cases					
DATE	**PLAINTIFF**	**DEFENDANT**	**CHARGES**	**NOTES**	**OUTCOME**
April 1723	Thomas Ferrell, a mulatto man	John Jackson	Expired indenture	Plaintiff filed suit for freedom from bondage after his term of indentured servitude expired. Question of relationship between binder by church warden versus by the court, as Plaintiff was born to a white woman and a man of color. Plaintiff was bound by the court to William Bradford and his assigns until Plaintiff reached 24 years of age--he prayed for discharge upon that term expiring. An order for freedom was filed March 12, 1722. Thomas Gascoyne Gent testified that after Plaintiff being indentured to Charlton Smith in Accomack County, Gent was not aware of Smith discharging Plaintiff from his servitude	Unknown

DATE	PLAINTIFF	DEFENDANT	CHARGES	NOTES	OUTCOME
Aug. 1733	Anne Toyer, on behalf of her children: Solomon Toyer, Jane Toyer, and Rhodea Toyer	William Jacob, Andrew Smaw, and Clark Nottingham	Partus sequitur ventrem	Toyer's three children were born free but were held by the Defendants retrospectively.	Solomon and Jane were freed; Rhodea still held
Sept. 5, 1747	Alias William, a mulatto man	Mary Johnson	Assault & Battery; False Imprisonment	Plaintiff was born to a free woman and was transported and sold into slavery when he was a child to Luke & Mary Johnson. Plaintiff's Attorney was Mitchel Scarburgh. Π alleged that he was taken, mistreated, assaulted, and severely beaten at the Defendant's request. Defendnt was ordered by the court to be brought in to answer the petition filed by the Plaintiff. John Troyford, Robert Jones, & Mary Belote were summoned to appear on the Plaintiff's behalf	Unknown

DATE	PLAINTIFF	DEFENDANT	CHARGES	NOTES	OUTCOME
1749	Katherine Anderson, a free woman of color, on behalf of her child, James Anderson	Executor of the Estate of Thomas Widgeon	Partus sequitur ventrem	James, born to a free mother, was detained against his will and consent by Widgeon, during Widgeon's lifetime and remains held and detained by the Executor.	Petition rejected
Mar. 1749	Francis Etheridge, a free man of color	Phillip Dill	Falsely Indentured	Defendant held Plaintiff as a Servant under false pretenses, using a fake Indenture or Instrument of writing by Virtue, to indenture Plaintiff who was born a free man and had remained as such all of his life.	Unknown
1763 (date uncertain)	Jane Banks	Judith Leak	Wrongfully Indentured	Banks held as an Indentured Servant by the Leak after her service had been complete and a year after she had reached the age of 18 years. Claims (mother) petitions for her freedom, and to be paid Freedom Dues as Leak refuses and still detains her in servitude. Bank's mother was summoned to	Unknown

				testify on her behalf.	
DATE	**PLAINTIFF**	**DEFENDANT**	**CHARGES**	**NOTES**	**OUTCOME**
May 20, 1794	Thomas, a man of color	Edward Roberts	Writ de homine replegiando & manumission deed	After Defendant's parents married, his father abandoned the family, and his mother manumited all of their slaves. This Manumit was agreed to by her oldest son, who would have inherited the slaves upon his mother's death, and took effect either (1) one year after it was agreed to or (2) upon the slave reaching 21 years of age for boys and 18 years of age for girls. A year after this agreement, Defendant's father returned, and took control of all of the slaves. He then deeded Plaintiff to the Defendant. At the time of the suit, Plaintiff was 21 years of age.	Judgment for Defendant. Plaintiff appealed and lost.
Aug. 15, 1794	Mary, a woman of color (children: Samuel, 14, Nell, 8, and	Edward Roberts	Writ de homine replegiando	After Defendant's parents married, his father abandoned the family, and his	Judgment for Defendant; Mary appeals and lost on appeal

	Harry, 20 months)			mother manumited (freed) all of the slaves that belonged to the Land. This manumit was agreed to by her oldest son, who would have inherited the slaves upon his mother's death, and took effect either (1) one year after it was agreed to or (2) upon the slave reaching 21 years of age for boys and 18 years of age for girls. Defendant's father returned, and took Mary with him to Portsmouth, where she eloped and went at large. An agent of the Robert's family found Mary and took her back into service until his death, where she again went at large until the Date of the writ. The Defendant's father then devised Mary and her children to the Defendant; but she claimed that during the time she was at	

				large, no taxes were paid on her by the Defendant's family.	
DATE	**PLAINTIFF**	**DEFENDANT**	**CHARGES**	**NOTES**	**OUTCOME**
Jan. 1795	Peter, a man of color	Andrew Wales	False Imprisonment & assault	Defendant falsely imprisoned the plaintiff for 6 months, assaulted him, and did other things.	Judgment for Plaintiff; $0.01
Aug. 10, 1795	Abraham Kinney, a man of color	Representatives of Thomas Johnson (deceased)	False Imprisonment	Plaintiff believes himself to be a free man under the laws of the Commonwealth of Virginia; sued "in forma pauperis" (as a pauper unable to pay).	Judgment for Plaintiff
Aug. 1796	Roger, a man of color	Robert Bell	False Imprisonment, Trespass, and Assault & Battery	Roger was freed by Manumission by George Bell, to take affect when he reached 21 years of age. Bell's heir or assign held Plaintiff against the Law.	Judgment for Plaintiff
Dec. 8. 1797	Ned Scott, a man of color	James Kenner	Unknown	Kenner held plaintiff as a slave, even though Plaintiff was a free man, born into a free family, as testified to by Elisha Williams. Defendant was arrested and held on a bond of 100 pounds, which	Judgment for Plaintiff; damages in the amount of 40 shillings.

				was paid by Kenner and Grafford.	
DATE	**PLAINTIFF**	**DEFENDANT**	**CHARGES**	**NOTES**	**OUTCOME**
May 1799	Amey Evans et al.	David Allen	Assault, Battery, & Trespass	Claim of freedom based on the lineal freedom of Frances Evans.; Allen filed an answer rejecting the claim, and stated that PlaintiffIIs are his rightful slaves.	Judgment for PlaintiffIIs
April 1800	Negro Sylvia (Silvia)	George Coryell	Statutory grounds	Taken as slave into NJ. Claimed to be "entitled To freedom " and to sue In forma pauperis. Counsel assigned: "Joua. Faw." Jury awarded one Penny in damages. Court Overruled verdict.	Unknown