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**EMANCIPATION UN-LOCKE'D: *PARTUS SEQUITUR*
VENTREM, SELF-OWNERSHIP, AND "NO MIDDLE STATE"
IN *MARIA V. SURBAUGH***

BY DIANE J. KLEIN*

I. INTRODUCTION

Maria v. Surbaugh,¹ an 1824 Virginia case arising from a suit for freedom by the children of an emancipated woman, is remarkable in several ways - not least among them Judge John Williams Green's open repudiation of a Lockean theory of property in oneself that many regard as foundational in Anglo-American law.² The case also reveals important changes in the Virginia legal understanding of chattel slavery over the first quarter of the nineteenth century, including its evolution from an undoubtedly brutal and exploitative labor arrangement into a *sui generis* institution inextricably linking heritable enslavement to African descent itself.³ Attempts to emancipate human chattel property (and their unborn issue) upon an age condition greater than twenty-one years also raised vexed future interests problems with which these nineteenth-century slaveholding jurists were forced to deal.⁴

To give away the ending, the children's suit failed.⁵ While their mother was a little girl, her enslavement had been made terminable when she reached 31 years of age.⁶ But her children Maria, Nancy, Solomon, and Samuel were all born before that happened, and did not benefit from that limitation on her enslavement.⁷ After three decades in

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* Professor of Law, University of La Verne College of Law, Ontario, California. This Article is dedicated to the two women who inspired it, and whose work has "bookended" my scholarship in this area: Prof. Adrienne Davis, whose *The Private Law of Race and Sex: An Antebellum Perspective*, 51 STAN. L. REV. 221 (1999), has shaped my teaching of wills and trusts for twenty years; and Prof. Stephanie Jones-Rogers, whose book, *THEY WERE HER PROPERTY* (Yale University Press: 2019), rekindled my sense of urgency around exploring the connections between the American history of slavery, gender, maternity, and archaic property rules.

¹ 23 Va. (2 Rand.) 228 (1824).

² *See id.* at 228, 231.

³ *See id.* at 236–37.

⁴ *See id.* at 239–40.

⁵ *Id.* at 245.

⁶ *Maria v. Surbaugh*, 23 Va. (2 Rand.) 228, 228–29 (1824).

⁷ *Id.* at 228, 245.

bondage, Mary was absolutely free - but her four children were enslaved for life.⁸

The case might seem like a straightforward application of the principle (codified repeatedly in Virginia law from the 17th century onward⁹) that under slavery, the condition of the children follows that of the mother - but the Virginia Supreme Court¹⁰ saw it as anything but simple. Paradoxically, what Judge Green's genuinely painstaking and scholarly analysis demonstrates most clearly is that a path, and a precedent,¹¹ favoring the children's liberty and personhood was available, both legally and intellectually. But he rejected it.¹² When given the chance to choose between a humane and decent outcome, and one that more thoroughly maintained and perpetuated slavery, the Court chose the latter.¹³

Judge Green presents himself as legally compelled to this result, his duty being "to ascertain and pronounce what the law is,"¹⁴ and "to execute the law as I find it,"¹⁵ conceding only, in the words of Ulpian, "*Quod quidem perquam durum est, sed ita lex scripta est*" ("This indeed is exceedingly hard, but so the law is written"). The high court of another slave state, Tennessee, said of Judge Green's reasoning, "It is a most strict construction, not to say a strained one, in prejudice of human liberty, and is in conflict with the opinions of Chancellor Wythe and Judge Roane, in the cause of *Pleasants v. Pleasants*."¹⁶ In that case, on similar facts, Judge Spencer Roane had declared, "I rejoice to be an humble organ of the law in decreeing liberty to the numerous appellees now before the court."¹⁷

⁸ *Id.* at 228–29, 245.

⁹ 2 THE STATUTES AT LARGE; BEING A COLLECTION OF ALL THE LAWS OF VIRGINIA, FROM THE FIRST SESSION OF THE LEGISLATURE, IN THE YEAR 1619, at 170 (William Waller Hening ed., New York, NY, R. & W. & G. Bartow, 1823) [hereinafter 2 HENING'S VIRGINIA STATUTES]. By contrast, for example, Maryland passed a law in 1664 enslaving not only the children of enslaved fathers and freeborn mothers, but the mothers as well. JENNIFER L. MORGAN, LABORING WOMEN: REPRODUCTION AND GENDER IN NEW WORLD SLAVERY 72 (2004).

¹⁰ At all times relevant here, Virginia's highest court was called the "Supreme Court of Appeals of Virginia," its justices were simply referred to as "Judge" and the Chief Justice as "President." In what follows, I will generally refer to it as the "Supreme Court" or the "Supreme Court of Virginia," to avoid confusion. *A Short History of the Supreme Court of Virginia*, VA. APPELLATE CT. HIST., <https://scvahistory.org/scv/supreme-court-of-virginia/> (last visited Mar. 21, 2020).

¹¹ See *Pleasants v. Pleasants*, 6 Va. (2 Call) 319 (1800).

¹² *Maria*, 23 Va. (2 Rand.) at 228–29.

¹³ *Id.*

¹⁴ *Id.* at 229.

¹⁵ *Id.* at 244–45.

¹⁶ *Harris v. Clarissa*, 14 Tenn. (6 Yer.) 227, 242 (1834).

¹⁷ *Pleasants v. Pleasants*, 6 Va. (2 Call) 319, 344 (1800).

Judge Roane, like Judge Green,¹⁸ was a slaveowner himself.¹⁹ He was nevertheless persuaded by the arguments of his future judicial opponent and Chief Justice of the U.S. Supreme Court, then-lawyer John Marshall, to free the unborn children of a conditionally emancipated enslaved woman.²⁰ Similar arguments were unavailing with Judge Green and his brethren in 1824.²¹ In the tortured reasoning of *Maria v. Surbaugh* we witness a crucial step toward the pernicious legal binarism that claims “no middle state between slavery and absolute freedom,”²² paralleling the racist “one-drop” ideology applied to persons of African descent,²³ each no less influential for being fictive.

II. LEGAL BACKGROUND

Human chattel slavery - permanent, racialized, and hereditary - is in a sense impossible in the fixed and rigid taxonomy of Anglo-American private property law. As Blackstone says, “The objects of dominion or property are things, as contradistinguished from persons.”²⁴ Persons (natural or non-natural) are, each of them, potential property owners; everything else is potential property, to be owned by persons.²⁵ The idea of human beings *as* property at all is therefore deeply problematic, a category mistake; like enslavement itself, the individual transition from slavery to freedom, individual emancipation without abolition, was literally inconceivable under traditional property theory and law.²⁶ And yet, it occurred - an event whose very comprehensibility revealed the monstrous fiction at the heart of human enslavement.

¹⁸ *John W. Green*, Wikipedia.com, https://en.wikipedia.org/wiki/John_W._Green (last visited Feb. 10, 2020).

¹⁹ *Judge Spencer Roane*, ROANE FAMILY TREE, http://roanefamilytree.com/Judge_Spencer_Roane.html (last visited Feb. 9, 2020).

²⁰ *Id.*; *Pleasants*, 6 Va. at 330.

²¹ See *Maria v. Surbaugh*, 23 Va. (2 Rand.) 228, 241–42 (1824).

²² *Id.* at 240.

²³ See Daniel J. Sharfstein, *Crossing the Color Line: Racial Migration and the One-Drop Rule, 1600-1860*, 91 MINN. L. REV. 592, 593 (2007).

²⁴ 2 WILLIAM BLACKSTONE, COMMENTARIES *16, https://avalon.law.yale.edu/18th_century/blackstone_bk1ch14.asp.

²⁵ See *Property and Ownership*, STANFORD ENCYCLOPEDIA OF PHIL., <https://plato.stanford.edu/entries/property/> (last updated Mar. 21, 2020).

²⁶ See James L. Huston, *Property Rights in Slavery and the Coming of the Civil War*, 65 J. OF SOUTHERN HIST. 249, 262 (1999).

The judges who decided *Maria v. Surbaugh* thus were operating within a complex, internally contradictory legal framework that had developed over two centuries of slavery in Virginia.²⁷ The law of slavery was not static, and varied from colony to colony (later, from State to State). By the 1820s, Virginia slave law contained a variety of statutes and doctrines relevant to the question presented by *Maria v. Surbaugh*, the status of the afterborn issue of a conditionally emancipated enslaved woman, though no facts quite like it had come before the Virginia Supreme Court before 1824.²⁸

A. Testamentary manumission

1. Outright

Freeing enslaved persons by will, also known as testamentary manumission, was not unknown in the earliest period in Virginia.²⁹ However, by an Act of 1723 (reenacted in 1748),³⁰ such private emancipations were prohibited.³¹ “The law of 1723 forbade the freeing of any slave, on any pretense, ‘except for some meritorious service,’ as judged by the governor and Council. No longer could an owner manumit a slave privately . . .”³² As a result, “[b]etween 1723 and the American Revolution only about twenty-four enslaved people were legally emancipated in Virginia.”³³ Twenty-four – out of an enslaved population numbering in the hundreds of thousands.³⁴

²⁷ Philip D. Morgan, *Virginia Slavery in Atlantic Context, 1550 to 1650*, in *VIRGINIA 1619: SLAVERY AND FREEDOM IN THE MAKING OF ENGLISH AMERICA* 85, 85 (Paul Musselwhite, et al. eds., 2019).

²⁸ See *Maria v. Surbaugh*, 23 Va. (2 Rand.) 228, 228 (1824).

²⁹ Linda Rowe, *After 1723, Manumission Takes Careful Planning and Plenty of Savvy*, COLONIAL WILLIAMSBURG FOUND., <https://www.history.org/history/teaching/enewsletter/volume3/february05/manumission.cfm> (last visited Feb. 10, 2020).

³⁰ Catherine Wisnosky, *The Will of the Master: Testamentary Manumission in Virginia, 1800-1858* (Aug. 1, 2015) (unpublished M.S. dissertation, University of Nevada, Las Vegas) (on file with Digital Scholarship at UNLV Theses and Dissertations Database).

³¹ *Pleasants v. Pleasants*, 6 Va. (2 Call) 319, 324 (1800).

³² Adele Hast, *The Legal Status of the Negro in Virginia 1705-1765*, 54 J. OF NEGRO HIST. 217, 221 (1969). *Deed of Manumission for Francis Drake, May 23, 1791*, EDUC. AT LIBR. OF VIRGINIA, https://edu.lva.virginia.gov/online_classroom/shaping_the_constitution/doc/drake (last visited Mar. 26, 2020).

³³ *Deed of Manumission for Francis Drake, May 23, 1791*, EDUC. AT LIBR. OF VIRGINIA, https://edu.lva.virginia.gov/online_classroom/shaping_the_constitution/doc/drake (last visited Mar. 26, 2020).

³⁴ See *Statistics on Slavery*, WEBER ST. U., https://faculty.weber.edu/kmackay/statistics_on_slavery.htm (last visited Mar. 26, 2020). In 1750, the Black population of Virginia was 101,452; by 1790, the enslaved Black population had grown to 292,627. *Id.*

This law changed after Independence. In 1782, Virginia passed “An act to authorize the manumission of slaves,” providing, in pertinent part

. . . that it shall hereafter be lawful for any person, by his or her last will and testament, or by any other instrument in writing, under his or her hand and seal, attested and proved in the county court by two witnesses, or acknowledged by the party in the court of the county where he or she resides, to emancipate and set free, his or her slaves, or any of them, who shall thereupon be entirely and fully discharged from the performance of any contract entered into during servitude, and enjoy as full freedom as if they had been particularly named and freed by this act.³⁵

This 1782 law also required that persons emancipating enslaved minors or persons over 45 years old make provision for their support.³⁶ A formerly enslaved person over 45 was both rare and “old”; life expectancy for enslaved women ranged from 18 to 38,³⁷ and for enslaved people overall, about 40,³⁸ although some evidence suggests there were more enslaved centenarians than White ones.³⁹

Some of the “Founding Fathers” took advantage of this restored opportunity. For example, Thomas Jefferson freed five enslaved men by his will, Joseph Fossett, Burwell Colbert, and John, Madison, and Eston Hemmings, the last and youngest of whom was 18 at the death of Jefferson (their probable father) on July 4, 1826.⁴⁰

2. *Emancipation in futuro: postponed and conditional manumission*

But not all manumissions, even testamentary ones, took effect immediately. For example, George Washington’s 1799 will freed the

³⁵ 11 THE STATUTES AT LARGE; BEING A COLLECTION OF ALL THE LAWS OF VIRGINIA, FROM THE FIRST SESSION OF THE LEGISLATURE, IN THE YEAR 1619, at 39–40 (William Waller Hening ed., Richmond, Va. George Cochran, 1823). [hereinafter 11 HENING’S VIRGINIA STATUTES].

³⁶ *Id.*

³⁷ *What was Life Like Under Slavery*, DIGITAL HIST. (2019), http://www.digitalhistory.uh.edu/disp_textbook.cfm?smtID=2&psid=3040; *Life Expectancy and Mortality Rates*, ENCYCLOPEDIA.COM, <https://www.encyclopedia.com/humanities/applied-and-social-sciences-magazines/life-expectancy-and-mortality-rates> (last updated Mar. 17, 2020); see also Maris A. Vinovskis, *The Demography of the Slave Population in Antebellum America*, 5 J. of Disciplinary Hist. 459, 463–64 (1975).

³⁸ *Slave Health on Plantations in the United States*, WIKIPEDIA.COM, https://en.wikipedia.org/wiki/Slave_health_on_plantations_in_the_United_States (last visited Feb. 10, 2020).

³⁹ See *Health History: Health and Longevity Since the Mid-19th Century*, STANFORD SCH. OF MED., https://geriatrics.stanford.edu/ethnomed/african_american/fund/health_history/longevity.html (last visited Mar. 26, 2020).

⁴⁰ *Slaves Who Gained Freedom*, THE JEFFERSON MONTICELLO, <https://www.monticello.org/site/research-and-collections/slaves-who-gained-freedom> (last visited Mar. 26, 2020).

123 persons enslaved at Mount Vernon who belonged to him (of the total of 317) - but not until the death of his wife, Martha.⁴¹ Martha also had a life interest in 153 “dower slaves” she received as the widow of Daniel Parke Custis, who would go back to the Custis family upon her death.⁴²

Postponed manumissions were inherently conditional. Whether emancipation depended upon the enslaved person’s attainment of a particular age, or upon outliving another person (like a widow), it could never be known in advance whether the enslaved person would live long enough to reach freedom. Perhaps to avoid conflicts with the support provisions of the 1782 law, testamentary manumissions, especially of minors, often did not take effect until the enslaved persons reached specified ages.⁴³ Further complicating matters, some persons “emancipated *in futuro*”⁴⁴ were or grew into fertile women of childbearing age, who gave birth to children while still enslaved themselves on unfulfilled emancipation conditions.⁴⁵

Such was the situation of little Mary, born in 1787 and bequeathed in 1790, upon the condition that she be emancipated only many years later.⁴⁶ And such were the circumstances under which Mary’s children, Maria, Nancy, Solomon, and Samuel, the plaintiffs in *Maria v. Surbaugh*, came into the world.⁴⁷

B. Partus sequitur ventrem and the doctrine of increase: one rule or two?

In 1662, long before Mary’s own birth, Virginia had enacted a statute under the heading, “Negro womens [sic] children to serve according to the condition of the mother,” providing that,

⁴¹ *A Decision to Free His Slaves*, George WASHINGTON’S MOUNT VERNON, <https://www.mountvernon.org/george-washington/slavery/washingtons-1799-will> (last visited Mar. 26, 2020). In fact, she emancipated them by deed in 1801, perhaps because she did not need their labor, and perhaps for fear of her own safety. *Id.* Another 41 enslaved persons were rented from a neighbor and daughter-in-law of Martha’s. *Id.* She died in 1802. *The Deaths of George & Martha*, GEORGE WASHINGTON’S MOUNT VERNON, <https://www.mountvernon.org/george-washington/martha-washington/the-deaths-of-george-martha/> (last visited Mar. 26, 2020).

⁴² *A Decision to Free His Slaves*, *supra* note 41.

⁴³ *See id.* at 27.

⁴⁴ *Maria v. Surbaugh*, 23 Va. (2 Rand.) 228, 244 (1824).

⁴⁵ *Id.* at 228.

⁴⁶ *Id.*

⁴⁷ *Id.*

Whereas some doubts have arisen whether children got by any Englishman upon a negro woman should be slaves or free, *Be it therefore enacted and declared by this present grand assembly*, that all children borne in this country [shall be] held bond or free only according to the condition of the mother . . .⁴⁸

This rule, “contradicting the rule of the common law”⁴⁹ which conferred status based on paternity, was carried forward by subsequent statutes, last enacted in 1753, and still in effect at the time of *Maria v. Surbaugh*.⁵⁰ This Virginia rule is reminiscent of another older and more general rule of property law as it applies to animals, known as the “doctrine (or rule) of increase.”⁵¹ This ancient and near-universal rule⁵² assigns ownership of newborn animals to the person who owns the mother (“newborn animals belong to the person who owns the newborn’s mother”⁵³).⁵⁴ This rule was already well-enough established in English common law by the Tudor period that it was notable when an exception was made to it, in a 1592 case about the disputed ownership of cygnets (baby swans),⁵⁵ memorable also for the colorful commentary provided by Lord Coke in the early 1600s.⁵⁶

Confusingly, the Latin maxim *partus sequitur ventrem*, literally, “the issue follow the womb,” was *historically* used to express the doctrine of increase, a rule about animal ownership.⁵⁷ In England, the maxim endured as a part of game law.⁵⁸ But in slave-owning Virginia,

⁴⁸ 2 THE STATUTES AT LARGE; BEING A COLLECTION OF ALL THE LAWS OF VIRGINIA, FROM THE FIRST SESSION OF THE LEGISLATURE, IN THE YEAR 1619, at 170 (William Waller Hening ed., Richmond, VA, Samuel Pleasants, 1810). “Negro womens children to serve according to the condition of the mother,” imperfectly quoted at *Maria*, 23 Va. (2 Rand.) at 237 (omitting the word “only”).

⁴⁹ *Maria*, 23 Va. (2 Rand.) at 237.

⁵⁰ *Id.* at 231.

⁵¹ See Carruth v. Easterling, 150 So.2d 852, 855 (Miss. 1963).

⁵² See, e.g., Felix S. Cohen, *Dialogue on Private Property*, 9 RUTGERS L. REV. 357, 368 (1954) (explaining that the particular rule that the owner of a mare owns the offspring “has appealed to many different societies across hundreds of generations”).

⁵³ Thomas W. Merrill, *Accession and Original Ownership*, 1 J. LEGAL ANALYSIS 459, 460 (2009).

⁵⁴ *Id.*

⁵⁵ See The Case of Swans, 77 Eng. Rep. 435 (K.B. 1592).

⁵⁶ 4 THE REPORTS OF SIR EDWARD COKE, KNT.: IN THIRTEEN PARTS, at 85 (John Henry Thomas ed., John Farquhar Fraser ed., J. Butterworth and Son 1826) (“[T]his case of the swan doth differ from the case of kine, [archaic plural of “cow”] or other brute beasts”).

⁵⁷ See, e.g., EDWARD CHRISTIAN, A TREATISE ON THE GAME LAWS 27, 29 (1817) (discussing the seventh book of Lord Coke’s Report, which explains that “the general law; which is, that ‘partus sequitur ventrem,’ or the whole of the young or offspring belong to the owner of the mother or female”).

⁵⁸ See *id.* at 24.

this maxim expressing a *property* rule (*who* among contending claimants was the owner of an animal's offspring) was repurposed to answer a much more foundational *status* question: whether certain human beings were property *at all*.⁵⁹

Although he concurs in the outcome of *Maria v. Surbaugh*, Judge Francis T. Brooke⁶⁰ alone among the panel recognizes and rejects this equivocation, and distinguishes *partus sequitur ventrem* from the rule that "all children shall be bond or free, according to the condition of their mothers."⁶¹ He does so without citation, but historically at least, Judge Brooke is correct that the doctrine of increase "is a rule of *property*, not of *liberty*,"⁶² and the rule looking to the condition of the mother to determine enslaved status "is a rule of a different character."⁶³

Yet Virginia law combines these two ideas, blurring this distinction between status of the mother and ownership of the offspring, as dual aspects of her "condition," lending a patina of age and legitimacy to a particularly inhuman aspect of the emerging Virginia law of chattel slavery (a word aptly sharing its etymological origins with "cattle"⁶⁴): the treatment of the enslaved as human livestock, rather than (at worst) persons bound in a contractual and terminable relation of servitude.⁶⁵

Partus sequitur ventrem as it was understood in Virginia slave law thus meant that:

(1) The issue of an enslaved woman born during her enslavement are enslaved, *and* are the property of the person who owns their mother; and

(2) The issue of an emancipated (or freeborn) woman (born after her emancipation) are free, and are no one's property⁶⁶ (although, if a certain 1705 act applies, they may be bound to service⁶⁷).

C. *The offspring of an enslaved woman temporarily rented to another*

Enslaved persons, perhaps even more frequently than livestock, were sometimes rented out.⁶⁸ Renting out a pregnant enslaved woman

⁵⁹ See *Maria v. Surbaugh*, 23 Va. (2 Rand.) 228, 245–46 (1824) (Brooke, J., concurring).

⁶⁰ *A Short History of the Supreme Court of Virginia*, *supra* note 10.

⁶¹ *Maria*, 23 Va. (2 Rand.) at 245–46 (Brooke, J., concurring).

⁶² *Id.* at 246 (Brooke, J., concurring).

⁶³ *Id.*

⁶⁴ *Id.* at 231–32; *Chattel*, OXFORD ENGLISH DICTIONARY (2d ed. 1989).

⁶⁵ See *Hast*, *supra* note 32, at 218.

⁶⁶ See *supra* Part II.B.

⁶⁷ *Hast*, *supra* note 32, at 219–20.

⁶⁸ See, e.g., JOHN J. ZABORNEY, SLAVES FOR HIRE: RENTING ENSLAVED LABORERS IN ANTEBELLUM VIRGINIA 28 (2012); see, e.g., 3 THE STATUTES AT LARGE; BEING A COLLECTION OF ALL THE LAWS

until after her child was born was a familiar device to reduce expenses at a time of her diminished labor capacity.⁶⁹ As John Zaborney explains in *Slaves for Hire: Renting Enslaved Laborers in Antebellum Virginia*,

Hiring out slave women was a very common practice among Virginia slave owners, and far from being an obstacle to the hiring out of female slaves, pregnancy *increased* a female slave's likelihood of being hired out by whites who sought to get the relatively unproductive, and relatively costly, slaves off their hands. . . . [T]he hiring out of pregnant slave women. . . was an inherent and routine feature of slave hiring, and slavery generally, in Virginia.⁷⁰

The ownership of children born during that time was not disputed.⁷¹ Just as a calf born to a cow on loan to a neighboring farmer ultimately belonged to the lender, not the borrower (who had their use only temporarily), so, too, children born to an enslaved woman ultimately belonged not to the person to whom she had been temporarily hired out (for example, to perform domestic labor), but rather, to her owner.⁷²

The law of Virginia was clear on this point:

[T]here is now no question in Virginia, but that in relation to slaves, the increase born during the continuance of any temporary interest in the mother goes, as she does, to the person entitled to the absolute property in the mother, after the expiration of the temporary interest, unless otherwise directed by the original owner of the female.⁷³

These notions of “temporary” and “absolute” interest applied to any present and future interest, not just a short-term hire, but also a life estate and remainder, and applied regardless of whether the future interest was reversionary, as the right of the original hirer, or in a third party.⁷⁴ Citing cases going back a hundred years, the Court reiterates

OF VIRGINIA, FROM THE FIRST SESSION OF THE LEGISLATURE, IN THE YEAR 1619, at 447–63 (William Waller Hening ed., Philadelphia, PA, R. & W. & G. Bartow, 1823) [hereinafter 3 HENING'S VIRGINIA STATUTES]; see also Hast, *supra* note 21, at 234–35 (explaining how slaveholders often hired out women and girls to other slaveholders).

⁶⁹ ZABORNEY, *supra* note 68, at 29.

⁷⁰ *Id.* at 30.

⁷¹ See CHRISTIAN, *supra* note 57, at 29; *Maria v. Surbaugh*, 23 Va. (2 Rand.) 228, 246 (1824) (Brooke, J., concurring).

⁷² See *Maria*, 23 Va. (2 Rand.) at 230.

⁷³ *Id.*

⁷⁴ See *id.*

that “the increase goes to the person entitled to the original stock, after the life-estate expired. And this rule has become common law to us.”⁷⁵

And so we have:

Lemma to (1): The issue of an enslaved woman born during her enslavement *subject to a present interest* are enslaved, and are the property of the person who owns *the future interest in their mother*.⁷⁶

This is a default rule; it would also be possible to transfer the offspring to the present interest holder, or a third party, just as one might transfer present and future interests in other forms of property to different transferees.⁷⁷

D. *The mixed-race offspring of a White woman*

Under Virginia’s *partus sequitur ventrem* law, the children of enslaved women were enslaved, whatever their paternity.⁷⁸ But what about the reverse - mixed-race children of White mothers? By a law of 1705, by “An act concerning Servants and Slaves,” miscegenation was expressly prohibited,⁷⁹ rendering sexual activity between White women and non-White men itself illegal.⁸⁰ But it nevertheless occurred, frequently enough that the law was called on to address the status of any resulting children. They were not enslaved, but rather, were bound to service for thirty one years.⁸¹ Shockingly, perhaps, this law did not apply only to White mothers who were themselves servants, although such women might also see their own indenture extended to provide for the child.⁸² Nor did it apply only to children whose fathers were enslaved or in service.⁸³ This law applied even if *both* parents were free people.⁸⁴

As African descent came to be more and more closely identified with enslaved status *per se* in Virginia, mixed-race persons were at risk of permanent enslavement.⁸⁵ And thus, in 1765, the Virginia Assembly

⁷⁵ *Id.*

⁷⁶ *See id.*

⁷⁷ *See Maria*, 23 Va. (2 Rand.) at 230.

⁷⁸ *See* 2 HENING’S VIRGINIA STATUTES, *supra* note 9, at 170.

⁷⁹ 3 HENING’S VIRGINIA STATUTES, *supra* note 68, at 447–63.

⁸⁰ *Id.* at 454.

⁸¹ *Id.* at 452–53.

⁸² *See id.*

⁸³ *See id.*

⁸⁴ *See* 3 HENING’S VIRGINIA STATUTES, *supra* note 68, at 452–53.

⁸⁵ *See* Hast, *supra* note 32, at 234 (“An individual with any Negro ancestry had to be able to claim only one Negro and fifteen white great great grandparents to achieve the rights and status of a Caucasian”); *see also* ALEJANDRO DE LA FUENTE AND ARIELA GROSS, *BECOMING FREE, BECOMING BLACK: RACE, FREEDOM, AND LAW IN CUBA, VIRGINIA, AND LOUISIANA* (2020).

passed “An act to prevent the practice of selling persons as slaves that are not so, and for other purposes therein mentioned.”⁸⁶ As its name suggests, the Act was primarily directed against “divers ill disposed persons [who] have of late years been guilty of selling and disposing of mulattoes and others as slaves, who by the laws of this colony are subject to a service only of thirty one years, after which they become free.”⁸⁷ The Act made this conduct, when done knowingly, subject to a heavy fine.⁸⁸

The second important provision of this law was to cut back the thirty-one year age condition to twenty-one for men, and eighteen for women - in other words, to something like an age of majority or adulthood.⁸⁹ The longer time of service was deemed “an unreasonable severity towards such children,”⁹⁰ who were of course not responsible for the circumstances of their birth.

E. The leading case: Pleasants v. Pleasants

In 1771, Quaker John Pleasants (born in 1697) made a will bequeathing his estate, including more than 400 enslaved persons, to numerous relatives.⁹¹ The will stated, in pertinent part, as follows:

My further desire is respecting my poor slaves all of them as I shall die possessed with, shall be free, if they chuse it, *when they arrive to 30 years of age, and the laws of the land will admit them to be free*, without their being transported out of the country, I say all my slaves now born, or hereafter to be born, whilst their mothers are in the service of me or my heirs, to be free *at the age of 30 years*, as above mentioned . . .⁹²

When he was writing, Pleasants knew full well that “the laws of the land” did not permit private emancipation (without forced exile).⁹³ But he hoped the law would change - and in 1782, it did.⁹⁴ Robert,

⁸⁶ 8 THE STATUTES AT LARGE; BEING A COLLECTION OF ALL THE LAWS OF VIRGINIA, FROM THE FIRST SESSION OF THE LEGISLATURE, IN THE YEAR 1619, at 133–35 (William Waller Hening ed., New York, NY, R. & W. & G. Bartow, 1823) [hereinafter 8 HENING’S VIRGINIA STATUTES].

⁸⁷ *Id.* at 133.

⁸⁸ *Id.*

⁸⁹ *Id.*

⁹⁰ *Id.*

⁹¹ See *Pleasants v. Pleasants*, 6 Va. (2 Call) 319, 319–21, 334 (1800).

⁹² *Id.* at 334.

⁹³ *Id.* at 324; see FUENTE & GROSS, *supra* note 85, at 88–89.

⁹⁴ WILLIAM WALLER HENING, 11 THE STATUTES AT LARGE; BEING A COLLECTION OF ALL THE LAWS OF VIRGINIA FROM THE FIRST SESSION OF THE LEGISLATURE, IN THE YEAR 1619, 39–40 (Richmond: J. & G. Cochran, 1821).

John's abolitionist son⁹⁵ and the executor of his father's estate, sought to emancipate as many enslaved persons as his father's will and the laws of Virginia would allow, over the objection of what appears to be most of the rest of his family.⁹⁶ Robert's efforts led to the largest testamentary manumission case in American history,⁹⁷ requiring the Virginia Supreme Court to determine to what extent this complex devise should be given effect.⁹⁸

Pleasants v. Pleasants was a big case in every way.⁹⁹ It was argued and decided by some of Virginia's leading legal lights, and it concerned the estate of one of the largest slaveholders in Virginia or any Colony (440-500 enslaved persons, depending on the source).¹⁰⁰ In Chancery, ably represented by the future Chief Justice of the United States, John Marshall, Robert prevailed; but before the Virginia Supreme Court, he (and the enslaved persons he represented) fared considerably less well.¹⁰¹ The resulting opinion, *Pleasants v. Pleasants*, became Virginia's leading case on multigenerational, postponed, and conditional testamentary manumission.¹⁰² The situation was complex, and all of the parties, as well as the judges, recognized that different enslaved persons, of different ages and situations, might require different treatment.¹⁰³ But the judges did not agree on how or what should be done, and their opinions reveal deep divisions amongst jurists of the time.¹⁰⁴

I. Judge Spencer Roane votes to emancipate. . .

Judge Spencer Roane (1762-1822), decades younger than the other two judges who heard the case, was not yet forty and on the bench for just five years when *Pleasants* came before the court.¹⁰⁵ Following

⁹⁵ William Fernandez Hardin, *Robert Pleasants (1723-1801)*, ENCYCLOPEDIA VIRGINIA, https://www.encyclopediavirginia.org/Pleasants_Robert_1723-1801 (last updated June 11, 2019).

⁹⁶ *See id.*

⁹⁷ *Id.*

⁹⁸ *See Pleasants v. Pleasants*, 6 Va. (2 Call) 319, 319 (1800).

⁹⁹ Hardin, *supra* note 95.

¹⁰⁰ *See* Tom Blake, *The Sixteen Largest American Slaveholders from 1860 Slaves Census Schedules*, ROOTSWEB, <https://sites.rootsweb.com/~ajac/biggest16.htm> (last updated Dec. 2004).

¹⁰¹ *Pleasants*, 6 Va. (2 Call) at 330, 333.

¹⁰² *See* Hardin, *supra* note 95.

¹⁰³ *See Pleasants*, 6 Va. (2 Call) at 353-54.

¹⁰⁴ *Id.* at 343-44, 346.

¹⁰⁵ *See Spencer Roane*, WYTHEPEDIA W & M L. LIBR., https://lawlibrary.wm.edu/wythepedia/index.php/Spencer_Roane (last updated Sept. 10, 2018).

his law teacher Chancellor Wythe in the lower court,¹⁰⁶ Judge Roane took the most emancipatory approach.

He began with an analysis that assumes it is entirely unproblematic to treat persons suing for their own freedom as claiming a property right in themselves.¹⁰⁷ As he puts it, “I will also consider, in the first place, the claim of the appellees to their freedom, only, as that of ordinary remaindermen, claiming property in them . . .”¹⁰⁸ under “the rules of the common law, relative to ordinary cases of limitations [future interests] of personal chattles.”¹⁰⁹ The Rule Against Perpetuities, in the form familiar to us today (with slightly less terminological precision), applies to such property,¹¹⁰ with the same results: “. . . where the event must happen, if at all, within those limits [the perpetuities period], the executory devise is good; and on the happening of the contingency, the estate will become absolute, in the remainderman.”¹¹¹ At the same time, Judge Roane acknowledges that “. . . neither the particular species of property now in question, nor the case of a remainderman (if I may so express it) claiming his own liberty, were in the contemplation of the judges, who established the doctrine on this subject [the Rule Against Perpetuities] . . .”¹¹²

That the litigants are seeking their own freedom, for him, only *strengthens* the case: “if their claim will be sustained on this foundation, and by analogy to ordinary remainders of chattles, every argument will hold, with increased force, when the case is considered in its true point of view, as one, which involves human liberty.”¹¹³ Judge Roane puts these persons, who have been objects of property but now claim freedom, on the same footing as those who might have claimed an ordinary

¹⁰⁶ See *id.*; *Pleasants v. Pleasants*, 6 Va. (2 Call) 319, 343–45 (1800).

¹⁰⁷ See *Pleasants*, 6 Va. (2 Call) at 335.

¹⁰⁸ *Id.*

¹⁰⁹ *Id.* at 335–36. Whether enslaved persons are to be treated as real property, personal property (“chattels” or “chattles,” the judges themselves utilize different spellings), or some hybrid, is not squarely at issue in this case. See *id.* at 332, 335–36, 339, 347; but see 3 ST. GEORGE TUCKER, BLACKSTONE’S COMMENTARIES WITH NOTES OF REFERENCE n. E (1803). Under the laws of Virginia, enslaved persons were classified as real property in 1705, but re-classified as chattles in 1727, including for future interests purposes. See Warren M. Billings, *The Law of Servants and Slaves in Seventeenth-Century Virginia*, 99 THE VIRGINIA MAGAZINE OF HIST. & BIOGRAPHY 45, 61 n. 50 (1991). These reclassifications responded to tensions between the inheritance of land together with enslaved persons to work the land, and the sale of enslaved persons to satisfy estate debts. See *id.* at 61.

¹¹⁰ See *Pleasants*, 6 Va. (2 Call) at 336.

¹¹¹ *Id.*

¹¹² *Id.* at 340.

¹¹³ *Id.* at 335–36.

future interest in them, upon the happening of the same or similar conditions.¹¹⁴ If a third party could have a valid executory interest in these enslaved persons, Judge Roane reasons, so much the more valid is their own claim to be emancipated on the same terms.¹¹⁵

Turning to the substance of the devise, as a condition, “. . . passing a law to authorize emancipation, standing simply, is too remote, as it may not happen, within 1000 years . . .”¹¹⁶ Does this invalidate the interest? Not if it can be read to be limited to lives in being: “. . . such a limitation to one, *in esse* [in being], for life is good; because the contingency must happen, if at all, so as to vest the estate, within a life in being . . .”¹¹⁷ Judge Roane is here properly distinguishing between an executory interest that vests in a person upon the happening of a remote condition (“To A, but if X occurs, to B”) (invalid), and an executory interest (whether in fee or in life estate) that vests in a particular person if an event (even a potentially remote event) occurs *within the lifetime of the grantee* (“To A, but if X occurs during the life of B, to B [or: for life]”) (valid).¹¹⁸ Thus, as to persons in being when the interest is created, “. . . this restrains the happening of the contingency . . . and makes the executory devise good, at least as to all, who are within the legal limits [that is, of the perpetuities period].”¹¹⁹ Reasoning in this way, Judge Roane continues, “. . . the estate [the interest], limited on the contingency (if I may so express it,) that is to say, the right to freedom, was good, if the contingency happened within the legal limits, in favour of such, as might be *in esse* to enjoy it, and void, if it happened beyond those limits.”¹²⁰ In more contemporary terms, a condition precedent (however potentially remote) to the emancipation of a particular person, who is already alive (“in being”) when that condition is imposed, must necessarily be fulfilled during that person’s lifetime, or never (with respect to their emancipation), and is therefore valid.¹²¹

Applying this result (“ . . . the limitation can be sustained [the interest can be validated] . . . as to such as might be *in esse* during such limits; although it may be void, as to such as might be born, in a remote generation”¹²²) to the facts of *Pleasants*, Judge Roane finds that for all those already born when the will took effect, who were alive when the

¹¹⁴ *Id.*

¹¹⁵ *Pleasants*, 6 Va. (2 Call) at 335–36.

¹¹⁶ *Id.* at 337.

¹¹⁷ *Pleasants v. Pleasants*, 6 Va. 319, 336 (1800).

¹¹⁸ *Id.* at 336.

¹¹⁹ *Id.* at 337.

¹²⁰ *Id.* at 338.

¹²¹ *Id.*

¹²² *Pleasants v. Pleasants*, 6 Va. 319, 338 (1800).

law changed and who have reached 30, the emancipation provision is effective for them once both conditions are fulfilled, even if invalid as to others yet unborn.¹²³

Because the law changed during the life of many enslaved persons in being at Pleasants' death, ". . . the limitation over has thenceforth become vested, in interest, in all the appellees [the enslaved persons], then *in esse*; and vested in possession, as to all, then, or as they might become, thirty years of age."¹²⁴ This, then, is the "easy" category, or rather, two categories, of emancipated persons: (1) enslaved persons already 30 years old in 1782, when the law changed, and (2) those who have attained that age by the time of this judgment (1800), all of whom were (conveniently) born in 1770 or before, and thus, all of whom were *in esse*, in being, when the original will was made (in 1771).¹²⁵

As to a third category, (3) those not yet 30, Judge Roane concludes, ". . . their right to freedom was complete, but they were postponed /as to the time of enjoyment."¹²⁶ They were in the case of persons bound to service for a term of years; who have a general right to freedom, but there is an exception, out of it, by contract or otherwise."¹²⁷

There are two things worth noting about how Judge Roane handles this third group. The first is that he readily assimilates - indeed, equates - enslaved persons (of African descent) who have a right to freedom upon attaining a particular age, with (White or mixed race) persons "bound to service for a term of years."¹²⁸ That approach will later be rejected outright in *Maria v. Surbaugh*, with devastating consequences.¹²⁹ The second point is that Roane does not inquire or differentiate between those born before or after 1782 (but after 1771), or between those born to mothers already 30 in 1782, or in 1800.¹³⁰ His perpetuities analysis simply does not make those fine distinctions.¹³¹

The last category he considers are (4) ". . . the children born of mothers, so postponed in the enjoyment of their freedom."¹³² He is referring to children born after 1782 to women who were *themselves* born after 1770 (not yet 30 in 1800).¹³³ Judge Roane asks of such children,

¹²³ *Id.*

¹²⁴ *Id.*

¹²⁵ *Pleasants v. Pleasants*, 6 Va. (2 Call) 319, 338-39 (1800).

¹²⁶ *Id.*

¹²⁷ *Id.* at 339.

¹²⁸ *See id.*

¹²⁹ *Maria v. Surbaugh*, 23 Va. (2 Rand.) 228, 246 (1824).

¹³⁰ *See Pleasants v. Pleasants*, 6 Va. (2 Call) 319, 338-39 (1800).

¹³¹ *See id.*

¹³² *Id.* at 339.

¹³³ *See id.*

“Are they, at their birth, entitled to freedom? Or are they too, to be postponed, until the age of thirty?”¹³⁴ The latter approach would seem to validate a “remote” interest in themselves, as afterborn children are (of course) not certain to reach thirty within twenty-one years after the death of everyone alive at Pleasants’ death.¹³⁵

But having deemed their mothers legally identical to “persons bound to service for a term of years,” Judge Roane concludes that, the *mothers* being “. . . free persons, held to service, for a term of years, such children are not the children of slaves.”¹³⁶ “. . . [A]ll the children born of the female negroes, in question, since the passage of the act of 1782, are, and were thenceforth entitled to freedom by birth,”¹³⁷ that is, “. . . by birth and not by emancipation.”¹³⁸

Judge Roane thereby invalidates Pleasants’ (perhaps well-meaning) testamentary attempt to bind such children to service until the age of thirty, deftly avoiding the perpetuities issue, the financial requirements of the act of 1782 (including provision for minors, liability for his debts or those of his devisees,¹³⁹ etc.), and emancipating the children - all at one stroke.¹⁴⁰

To reach this result, Judge Roane treated the combined effect of Pleasants’ will and the 1782 change of law in the most liberatory way, not simply as providing for the uncertain possible future emancipation

¹³⁴ *Id.*

¹³⁵ Worse yet, this possible invalidity might seem to threaten Judge Roane’s validation of the gift for *any* member of the class. However, when *Pleasants* was before the court in 1800, the English case of *Leake v. Robinson*, 2 Mer. 363, 35 Eng. Rep. 979 (Ch. 1817), imposing the “all or nothing” class gift rule, had not yet been decided, and Judge Roane describes himself as interpreting the will “construed distributively.” *Pleasants*, 6 Va. (2 Call) at 338. For this reason, one commentator’s statement that “A gift to an entire class requires that the R.A.P. be satisfied for the entire class, or it fails entirely. . . .” is incorrect, or rather, is an anachronism. Timothy Sandefur, *Why the Rule Against Perpetuities Mattered in Pleasants v. Pleasants*, 40 Real Prop. Prob. & Tr. J. 667, 674 (2006). Sandefur’s misunderstanding does not stop there; he also suggests the rule of convenience can be used to cure a perpetuities-violating class gift. *Id.* at 674. It cannot. The rule of convenience is a class-closing rule used to *distribute* a gift (after the termination of the prior estate); the Rule Against Perpetuities applies when the interest is *created*. An invalid class gift therefore does not “survive” long enough to be closed using the rule of convenience. Thus, although the rule of convenience was established in time to be used in *Pleasants*, it was not cited because it did not apply. See *Andrew v. Partington*, 2 Cox 223, 3 Bro. C.C. 401 (1791), cited in Adrian P. Schoone, *Class Gifts: Time When Class Closes - Rule of Convenience*, 41 Marq. L. Rev. 205, 206 n. 5 (1957).

¹³⁶ *Pleasants*, 6 Va. at 339.

¹³⁷ *Id.* at 343.

¹³⁸ *Id.* at 345.

¹³⁹ *Id.* at 344–45.

¹⁴⁰ And he knows it. *Id.* at 339–40 (“The view of the subject I have now taken. . . will supersede the necessity of a very delicate and important enquiry: Namely, whether the doctrine of perpetuities is applicable to cases in which human liberty is challenged?”).

of one group of enslaved women, but as fundamentally changing - humanizing - their status.¹⁴¹ It is neither radical nor controversial that “. . . the children of a free mother are themselves also free.”¹⁴² What *is* radical - and so controversial his brethren on the court did not so much reject as simply ignore it - is the idea that the children of an enslaved woman, not yet actually free nor ever certain to become so, are nonetheless “the children of a free mother”¹⁴³ and thus “free[] by birth.”¹⁴⁴

Had Judge Roane’s approach been adopted by the majority, all enslaved persons in Pleasants’ estate born before 1770 or after 1782 would be emancipated at once, and only those born in between those dates, aged 19 to 29 when the case was decided, would serve until the age of thirty.¹⁴⁵ As a perpetuities matter, his reasoning is somewhat sloppy - persons born after Pleasants’ death, whether before or after the passage of the 1782 act, are not certain to reach the age of 30 “in time,” and some of those born after 1782 were born to women under 30 at that time.¹⁴⁶ Yet his determination not to allow these niceties to threaten emancipation is admirable. He reads the act of 1782 as “. . . authorizing or encouraging emancipation . . .”¹⁴⁷ and sees the practice itself as “countenance[d]” by the “Legislature, at least from the æra of our independence,” and regards it as “dear to every friend of liberty and the human race . . .”¹⁴⁸ For his own part, he says, “[a]s it is the policy of the country to authorize and permit emancipation, I rejoice to be an humble organ of the law in decreeing liberty to the numerous appellees now before the court.”¹⁴⁹

2. . . .but Judge Paul Carrington and President (Chief Justice) Edmund Pendleton impose servitude and family separation

Judge Paul Carrington (1733-1811) and Judge Edmund Pendleton (1721-1803), the first Chief Justice of Virginia, were both original

¹⁴¹ See Hast, *supra* note 32, at 236 (“The vast majority of Negroes, as slaves, lived under a legal-social system which dehumanized them. Treated as property, they did not even have the dignity of family names”).

¹⁴² *Pleasants*, 6 Va. (2 Call) at 339.

¹⁴³ *Id.* at 339.

¹⁴⁴ *Id.* at 345.

¹⁴⁵ See *supra* Part II.E.1.

¹⁴⁶ See *supra* Part II.E.1.

¹⁴⁷ *Pleasants*, 6 Va. (2 Call) at 340.

¹⁴⁸ *Id.*

¹⁴⁹ *Id.* at 344.

appointees to Virginia's Supreme Court, named in 1788.¹⁵⁰ Pendleton was also a Virginia delegate to the First Continental Congress.¹⁵¹ Both are much more willing than Judge Roane to impose perpetual hereditary enslavement for the first thirty years of life.¹⁵²

Judge Pendleton and Judge Carrington engage differently with the perpetuities issue. Had Pleasants' will instructed his executor to emancipate the enslaved persons *immediately* upon his death, "the condition, being unlawful, would have been void, and the property vested . . ." ¹⁵³ absolutely in the legatees to whom the enslaved persons were bequeathed.¹⁵⁴ A later change of law would have no effect. However, ". . . a condition, that they should become free when the law would permit it, was not of that sort."¹⁵⁵ Still, any future interest created thereby is ". . . void; since the Legislative permission might never be given: might be afforded one hundred years after; or at any earlier period."¹⁵⁶ A future interest on this remote condition, whether held by the enslaved persons themselves or anyone else, is invalid.

Judge Carrington, undeterred, says,

[T]hese devises are sustainable. . . and not liable to the rule respecting chattel interests, limited on more remote contingencies, than the law allows. For the subjects of the devises are different; inasmuch as in the devise of chattels, property only, is concerned; but liberty is devised in this case. Both sacred rights indeed; but the rules of limitation not necessarily the same with regard to them.¹⁵⁷

Where Judge Carrington chooses, in effect, to dispense with the Rule, Judge Pendleton crafts his own rule: "But I am of the opinion, that it would be too rigid to apply that rule, with all its consequences, to the present case . . ." ¹⁵⁸ Instead, he says, ". . . if the [change of law] happens

¹⁵⁰ *Paul Carrington (Judge)*, WIKIPEDIA, [https://en.wikipedia.org/wiki/Paul_Carrington_\(judge\)](https://en.wikipedia.org/wiki/Paul_Carrington_(judge)) (last updated Mar. 28, 2020); *Edmund Pendleton*, WIKIPEDIA, https://en.wikipedia.org/wiki/Edmund_Pendleton (last updated Mar. 18, 2020).

¹⁵¹ *Edmund Pendleton*, *supra* note 150.

¹⁵² *Pleasants*, 6 Va. (2 Call) at 356 (Pendleton, majority opinion); *id.* at 348 (Carrington, concurring).

¹⁵³ *Id.* at 351.

¹⁵⁴ *Id.* at 350.

¹⁵⁵ *Id.* at 351.

¹⁵⁶ *Id.*

¹⁵⁷ *Pleasants*, 6 Va. (2 Call) at 347 (Carrington, concurring).

¹⁵⁸ *Id.* at 351 (Pendleton, majority opinion).

whilst the slaves remain in the possession/of the family, without change by the intervention of creditors or purchasers. . . the bequest [manumission] ought to take place . . .”¹⁵⁹ Judge Pendleton seeks to protect those who, for example, may have purchased enslaved persons from Pleasants’ legatees, only to suffer a potential forfeiture upon a change of law.¹⁶⁰ Thus, he believes “. . . it ought to be considered . . .” whether the court should, “. . . in equity, prevent the devise of the manumission from taking effect.”¹⁶¹ In contemporary terms, we might say that Judge Pendleton weighs the interests of downstream transferees who are BFPs for value, against a donee future interest holder, as contemporary recording statutes do.

Because Pleasants’ will did not simply direct what Pendleton calls a “general” (meaning, immediate) manumission as soon as the law permitted,¹⁶² the thirty-year age condition, “. . . directing all future generations of these people, born whilst their mothers were under thirty, should serve to that age . . .”¹⁶³ must also be taken into account. Judge Carrington identifies “. . . the periods, at which, the appellees will be respectively entitled to their freedom . . .”¹⁶⁴ as follows:

“. . . all those *now* above the age of thirty years . . . are to be emancipated at once”¹⁶⁵;

“. . . the increase of mothers above the age of thirty, at the term of the birth of the child, are also to be emancipated immediately”¹⁶⁶;

“. . . those born of mothers, not thirty years of age at the birth of the child, are not to be liberated, until they arrive at the age of thirty . . .”¹⁶⁷,

“. . . and the same rules are to be observed, with respect to their progeny, born, during the servitude of the mothers.”¹⁶⁸

Judge Pendleton takes a similar approach, but also believes the judgment must take account of that section of the act of 1782 requiring that provision be made for enslaved persons who are emancipated after the age of 45.¹⁶⁹ And thus Judge Pendleton, for the Court, decrees as follows:

¹⁵⁹ *Id.* at 351–52.

¹⁶⁰ *See id.*

¹⁶¹ *Id.* at 352.

¹⁶² *Pleasants*, 6 Va. (2 Call) at 352 (Carrington, concurring).

¹⁶³ *Id.*

¹⁶⁴ *Id.* at 348.

¹⁶⁵ *Id.* (emphasis in original).

¹⁶⁶ *Id.*

¹⁶⁷ *Pleasants*, 6 Va. (2 Call) at 348.

¹⁶⁸ *Id.*

¹⁶⁹ *Pleasants*, 6 Va. at 352 (Pendleton, majority opinion).

(1) all the slaves of which the testators were possessed as their property at the time of their respective deaths¹⁷⁰ not subjected to the claims of the creditors or purchasers before stated, and who are now above the age of forty five years and their increase born after their respective mothers had attained the age of thirty years (so soon as [the appropriate persons] enter into bonds...) and all such as are now above thirty and under the age of forty five years immediately shall be emancipated and set free to all intents and purposes, in like manner as if they had been born free;¹⁷¹

(2) all who are now under the age of thirty, and whose mothers had not attained that age at their birth; and all their future descendants, born whilst their mothers are in such service, do serve their several owners until they shall respectively attain the age of thirty years, and then be in like manner free.¹⁷²

The remedy crafted by Judge Pendleton (and clearly along the lines suggested by Judge Carrington) at least favors the *ultimate* emancipation of the adult progeny of those enslaved by Pleasants, by sustaining rather than striking down a remote condition of their emancipation.¹⁷³ It does so, however, by imposing perpetual hereditary enslavement for the first thirty years of life,¹⁷⁴ and the forced separation of emancipated mothers from their still-enslaved children.

III. FACTUAL AND PROCEDURAL BACKGROUND

William Holliday, born in 1738 in England, was one of the early settlers of Augusta County, Virginia.¹⁷⁵ He died in Winchester, Virginia, in 1790,¹⁷⁶ survived by his widow, Jane McClanahan, and their

¹⁷⁰ *Id.* at 320–21 (one of John’s sons and legatees died in 1777, testate under a will with a manumission provision like that in his father’s will).

¹⁷¹ *Id.* at 356.

¹⁷² *Pleasants*, 6 Va. (2 Call) at 356.

¹⁷³ *Id.*

¹⁷⁴ *Cf.* *Harris v. Clarissa*, 14 Tenn. (6 Yer.) 227, 241 (Tenn. 1834) (stating “if this construction be the true one, we have in perpetuity slaves for a term of years”).

¹⁷⁵ *William Holliday (13)*, WE RELATE, [https://www.werelate.org/wiki/Person:William_Holliday_\(13\)](https://www.werelate.org/wiki/Person:William_Holliday_(13)) (last updated Aug. 29, 2017).

¹⁷⁶ *Maria v. Surbaugh*, 23 Va. 228 (1824).

six young children, ranging in age from fourteen down to three (a seventh child, born in 1788, died the same year as William, Sr.).¹⁷⁷ By a will made the same year as his death (after the act of 1782, but ten years before *Pleasants* was decided), Holliday bequeathed¹⁷⁸ an enslaved toddler named Mary to his second son, William McClanahan Holliday, who was just ten years old at the time.¹⁷⁹ The practice of giving enslaved people to children as gifts or bequests was widespread.¹⁸⁰ By the terms of Holliday's will, Mary was to be emancipated upon reaching 31 years of age.¹⁸¹

Fourteen years later, in 1804, William, Jr., sold the now-17 year old Mary to one John White, who thereafter sold her to Gilkeson.¹⁸² Gilkeson later sold Mary to Benjamin Carman, who sold her to David Surbaugh,¹⁸³ by which time Mary had had her first child, Maria.¹⁸⁴ Mary and Maria were sold together to Surbaugh¹⁸⁵ (as was common though

¹⁷⁷ See *William Holliday (13)*, *supra* note 175.

¹⁷⁸ *Maria v. Surbaugh*, 23 Va. (2 Rand.) 228, 228 (1824). The court's use of the term "bequeath" reflects the personal property characterization of enslaved persons. "Devise" is the real property term. The two had not yet become interchangeable as they are today. The distinction was respected at least until the late 19th century. See, e.g., HENRY CAMPBELL BLACK, A DICTIONARY OF LAW 129 (1891) ("bequeath"); *Id.* at 364 ("devise").

¹⁷⁹ See *William Holliday (13)*, *supra* note 175.

¹⁸⁰ STEPHANIE E. JONES-ROGERS, THEY WERE HER PROPERTY: WHITE WOMEN AS SLAVE OWNERS IN THE AMERICAN SOUTH 27 (2019).

¹⁸¹ *Maria*, 23 Va. (2 Rand.) at 228. This age condition may have been intended to track the 1705 Virginia law imposing bound servitude until age 31 on any mixed-race child of any White woman, although that restriction was cut back to age eighteen in 1765 for female children. 3 HENING'S VIRGINIA STATUTES, *supra* note 68, at 447–63 superseded by 8 HENING'S VIRGINIA STATUTES, *supra* note 86, at 133–35.

¹⁸² *Maria*, 23 Va. (2 Rand.) at 228; This "Gilkeson" might be one of the children of Archibald Gilkeson. Archibald Gilkeson, *Archibald Gilkeson*, GENEALOGY, <https://www.geni.com/people/Archibald-Gilkeson/6000000001944731587> (last updated Nov. 18, 2014).

¹⁸³ *Maria v. Surbaugh*, 23 Va. (2 Rand.) 228, 228 (1824). It seems likely that Surbaugh is David Johann (Zorbach) Surbaugh, a Hessian-born slave-owning cabinetmaker who lived in Lewisburg, (now West) Virginia, although multiple records state that he died in 1823, before the case was decided. CHRISTOPHER H. JONES ANTIQUES <https://www.christopherhones.com/chest-of-drawers-with-a-pocahontas-county-west-virginia-history/> (last visited Mar. 31, 2020); *David Johann (Zorbach) Surbaugh*, ANCESTRY.COM, https://search.ancestry.com/cgi-bin/sse.dll?_phsrc=lgg2&_phstart=successSource&usePUBJs=true&indiv=1&dbid=60525&gsfn=David&gsln=Surbaugh&qh=/PX4JJ//Qmv9/9S8UZHeSg%3D%3D&new=1&rank=1&uidh=000&redir=false&msT=1&gss=angs-d&pcat=34&fh=1&h=11479650&recoff=&ml_rpos=2 (last visited Mar. 31, 2020); *Southern Tall Pie Safe Attributed to David Surbaugh*, Cowan's: A HINDMAN CO, <https://www.cowanuctions.com/lot/southern-tall-pie-safe-attributed-to-david-surbaugh-3926969> (last visited Mar. 31, 2020).

¹⁸⁴ *Maria*, 23 Va. (2 Rand.) at 228.

¹⁸⁵ *Id.*

not universal¹⁸⁶); between that sale and Mary's 31st birthday (September 1, 1818), she had three more children, Nancy, Solomon, and Samuel.¹⁸⁷

Mary turned 31 in 1818, and sometime thereafter she brought suit against Surbaugh *in forma pauperis* to emancipate herself and the children.¹⁸⁸ Whether Mary remained enslaved to Surbaugh for several years before suing for her freedom, or whether the suit itself took a number of years to reach the Virginia Supreme Court (or both), is unknown. If she delayed, it may have been under the influence of a law passed by the Virginia General Assembly in 1806, which provided, *inter alia*,

That if any slave hereafter emancipated shall remain within this commonwealth more than twelve months after his or her right to freedom shall have accrued, he or she shall forfeit all such right, and may be apprehended and sold by the overseers of the poor of any county or corporation in which he or she shall be found, for the benefit of the poor of such county or corporation.¹⁸⁹

Particularly if the younger children were very young in 1818, she may have remained with Surbaugh simply to avoid being subjected to this law, which was as cruel a form of family separation as the auction block. And should we be tempted to assume that Mary or her children would have been ignorant of the niceties of Virginia slave law, the work of contemporary historians is a useful corrective. In suits for freedom, enslaved people frequently represented themselves, often ably and sometimes even successfully.¹⁹⁰

In the suit against Surbaugh in Chancery, Mary prevailed, but the children lost, and appealed.¹⁹¹

¹⁸⁶ JONES-ROGERS, *supra* note 180, at 135–36.

¹⁸⁷ *Maria*, 23 Va. (2 Rand.) at 228.

¹⁸⁸ *Id.*

¹⁸⁹ 3 THE STATUTES AT LARGE OF VIRGINIA, FROM OCTOBER SESSION 1792, TO DECEMBER SESSION 1806, at 252 (Samuel Shepherd ed., Richmond, Va., 1836).

¹⁹⁰ JONES-ROGERS, *supra* note 180, at 135–36; see ARIELA GROSS, WHAT BLOOD WON'T TELL: A HISTORY OF RACE ON TRIAL IN AMERICA (2008); see also ANDREW FEDE, ROADBLOCKS TO FREEDOM: SLAVERY AND MANUMISSION IN THE UNITED STATES SOUTH 35–87 (2012).

¹⁹¹ *Maria*, 23 Va. at 228.

IV. *MARIA V. SURBAUGH* IN THE VIRGINIA SUPREME COURT

Three judges heard *Maria v. Surbaugh*.¹⁹² Chief Justice Francis Taliaferro Brooke,¹⁹³ Judge John W. Green, who wrote the majority opinion,¹⁹⁴ and Judge William H. Cabell.¹⁹⁵ Judge Cabell concurred with Judge Green, without a separate opinion.¹⁹⁶

Chief Justice Brooke, the fourth Chief Justice of Virginia, was born August 27, 1763, in Spotsylvania County, Virginia, and served in the Revolutionary War while still a teenager.¹⁹⁷ He served on the Virginia Supreme Court for the last forty years of his very long life, from 1811-1851.¹⁹⁸ Judge Green was born November 9, 1781, in Culpeper County.¹⁹⁹ As a young man, he “[s]erved gallantly in the War of 1812, and so distinguished himself at the Bar that he was soon made Chancellor, and afterwards was promoted to the Bench of the Supreme Court of Appeals.”²⁰⁰ He served on the court of chancery beginning in 1819, and on the supreme court from October 11, 1822, until his death on February 4, 1834.²⁰¹ The 1830 census indicated his household consisted of him-

¹⁹² *Id.* at 229, 245. The opinion notes that Judge Coalter “did not sit in this cause.” *Id.* at 229, n. a1. It appears that the fifth seat may have been empty as a result of the Hon. William Fleming’s death on February 15, 1824. *William Fleming, November 26, 1780-February 15, 1824 (Presiding Judge, July 30, 1809-February 15, 1824)*, VA. APPELLATE CT. HIST., <https://scvahistory.org/courtofappeals/f/william-fleming-1781-1824/> (last visited Apr. 1, 2020); Judge Dabney Carr, Thomas Jefferson’s nephew, filled the vacancy left by the death of the Hon. William Fleming. Virginia Historical Society, *The Carr Family*, 3 VA. MAGAZINE OF HIST. & BIOGRAPHY 208, 214 (1895).

¹⁹³ *Maria*, 23 Va. (2 Rand.) at 245; *Judges of the Supreme Court of Virginia*, ENCYCLOPEDIA VIRGINIA, https://www.encyclopediavirginia.org/Judges_of_the_Supreme_Court_of_Virginia#start_entry (last updated Feb. 3, 2020).

¹⁹⁴ *Maria*, 23 Va. (2 Rand.) at 229; *Judges of the Supreme Court of Virginia*, *supra* note 193.

¹⁹⁵ *Maria*, 23 Va. (2 Rand.) at 245; *Judges of the Supreme Court of Virginia*, *supra* note 193.

¹⁹⁶ *Maria*, 23 Va. (2 Rand.) at 245. Strikingly, in *McMichen v. Amos*, Judge Cabell wrote an opinion for a unanimous court in which he stated (albeit in *dicta*) that the child of an enslaved woman unlawfully imported into Virginia (and thus free by law) would be entitled to their freedom, derivatively from hers, even if she died without any legal declaration of her free status. 25 Va. 134 (4 Rand.) 135, 142 (1826).

¹⁹⁷ *Francis T. Brooke*, UNIV. OF VA. SCH. OF L. ARTHUR J. MORRIS L. LIBR. SPECIAL COLLECTIONS, <http://archives.law.virginia.edu/person/francis-t-brooke> (last visited Apr. 1, 2020).

¹⁹⁸ *Brooke, Francis Taliaferro, 1763-1851*, SOCIAL NETWORKS AND ARCHIVAL CONTEXT, <https://snacooperative.org/view/5792233> (last visited Apr. 1, 2020).

¹⁹⁹ *John Williams Green, October 11, 1822-February 4, 1834*, VA. APPELLATE CT. HIST., <https://scvahistory.org/courtofappeals/g/john-williams-green-1822-1834/> (last visited Apr. 1, 2020).

²⁰⁰ PHILIP SLAUGHTER, A BRIEF SKETCH OF THE LIFE OF WILLIAM GREEN, LL.D.: JURIST AND SCHOLAR, WITH SOME PERSONAL REMINISCENCES OF HIM 13 (Richmond, Wm. Ellis Jones 1883).

²⁰¹ *John Williams Green, October 11, 1822-February 4, 1834*, *supra* note 199.

self, his (second) wife, Million Cooke (a granddaughter of George Mason), and their twelve-year-old son, John,²⁰² two other White men and three White boys, one additional White woman and girl - and 42 enslaved people (28 male and 14 female).²⁰³

A. A future interest in oneself?

In deciding this suit for freedom by the children of a conditionally-emancipated woman, Judge Green addresses, head-on, a matter engaged less directly in *Pleasants*: namely, the nature of the future interest, if any, created by postponed testamentary manumission.²⁰⁴ Judge Green queries whether “. . . an emancipation by will is, in effect, *a bequest of the testator’s property in the slave, to the slave* intended to be emancipated . . .”²⁰⁵ Judge Roane, in *Pleasants*, had assumed as much: in evaluating the validity of a future interest that did not vest until the law was changed and the enslaved person reached thirty, he treated it as if it were an “ordinary” remainder going to “ordinary remaindermen.”²⁰⁶ The entire Court had perhaps done the same, in validating a thirty-year emancipation provision, even while acknowledging that “liberty” is different.²⁰⁷

Judge Green traces the consequences of treating emancipation as vesting the enslaved person with a property interest in herself.²⁰⁸ Although others owned Mary temporarily, she herself would be her own ultimate owner.²⁰⁹ And by that logic, the law would make her the ultimate owner of her children, even those born while she was (still and temporarily) enslaved.²¹⁰ As Judge Green explains, “. . . if the testator gave the property in *Mary* to his son, until she attained the age of 31, and afterwards to herself . . . the son was entitled to her issue until she attained that age,²¹¹ and she then became entitled to them.”²¹²

²⁰² JOHN COOKE GREEN, FINDAGRAVE.COM (2005).

²⁰³ Wikipedia, *John W. Green*, https://en.wikipedia.org/wiki/John_W._Green.

²⁰⁴ See *Maria v. Surbaugh*, 23 Va. (2 Rand.) 228, 228–29 (1824).

²⁰⁵ *Id.* at 229 (emphasis added).

²⁰⁶ *Pleasants v. Pleasants*, 6 Va. (2 Call) 319, 335–36 (1800) (Roane, J.).

²⁰⁷ *Id.*; *Id.* at 347 (Carrington, J.).

²⁰⁸ See *id.* at 338–40.

²⁰⁹ See *id.* at 340–41.

²¹⁰ See *id.*

²¹¹ *Maria v. Surbaugh*, 23 Va. (2 Rand.) 228, 230 (1824) (explaining that the testator did not know if Mary would live to be 31 and thus fulfill the condition on her emancipation).

²¹² *Id.* (emphasis in original).

“But” - Judge Green says - “I cannot assent to this proposition.”²¹³ He then sets about explaining how to avoid this outcome.²¹⁴

B. *Self-ownership and self-enslavement*

Judge Green is not about to reject Lemma (1), *supra*, the modified rule of increase that returns the issue of an enslaved woman (or animal) to the ultimate owner of that woman, rather than any temporary hirer or owner of any inherently limited estate.²¹⁵ Any analysis of Holiday’s devise that emancipates unborn children *sub silentio* is, for Judge Green, a *reductio ad absurdum* of its *other* premise: the Lockean idea of property in oneself.²¹⁶ And so he rejects it, stating, “No man can take or hold a property in himself.”²¹⁷

Emancipation, on Judge Green’s view, is *not* a transfer to the enslaved person; it is fundamentally unlike the transfer of human property from one slaveowner to another.²¹⁸ Instead, “[e]mancipation is an utter *destruction* of the right of property,”²¹⁹ whenever it takes place. “If it be conditional or future, the condition being performed, or the time come, then, and not till then, the right of property is wholly gone.”²²⁰

Judge Green offers three arguments against the idea that conditional emancipation creates a future interest in human property, owned by that very person.²²¹ But in framing these arguments, he must negotiate the legal system that supports slavery itself, including practices of testamentary manumission and related rules vindicating the property rights of slaveowners.²²²

Judge Green’s first argument against self-ownership is the problem of self-enslavement. “If he could [take or hold a property in himself], he might sell himself, and, by his own act, become a slave.”²²³ Just as those with property in others can sell them under slavery, it would seem to follow that one who owns himself could do the same. This

²¹³ *Id.* at 231.

²¹⁴ *See id.* at 231–36.

²¹⁵ *See id.* at 230–31.

²¹⁶ Karen I. Vaughn, *John Locke’s Theory of Property: Problems of Interpretation*, Libertarianism.org (Mar. 1, 1980).

²¹⁷ *Maria*, 23 Va. (2 Rand.) at 231.

²¹⁸ *Id.* at 230.

²¹⁹ *Id.* at 231 (emphasis added).

²²⁰ *Id.*

²²¹ *See id.* at 231–34.

²²² *See Maria*, 23 Va. (2 Rand.) at 231.

²²³ *Id.* at 231.

seems so evidently impossible or wrong to him that no further argument on this basis is offered.²²⁴

Interestingly, Blackstone (who Green quotes²²⁵) offered an argument against the possibility of selling oneself into slavery more than fifty years earlier.²²⁶ But Blackstone was an abolitionist, who found it “. . . repugnant to reason, and the principles of natural law, that such a state [slavery] should subsist any where.”²²⁷

For Blackstone, the self-enslaving transaction is a legal and conceptual impossibility, because the nature of the transaction in the same instant reduces the “seller” to an article of property thereby unable to receive payment from the purported “buyer.”²²⁸ In the *Commentaries*, he explains,

[I]t is said that slavery may begin “*jure civili*,” when one man sells himself to another. This, if only meant of contracts to serve or work for another, is very just: but when applied to strict slavery, in the sense of the laws of old Rome or modern Barbary, is also impossible. Every sale implies a price, a *quid pro quo*, an equivalent given to the seller in lieu of what he transfers to the buyer: but what equivalent can be given for life, and liberty, both of which (in absolute slavery) are held to be in the master’s disposal? His property also, the very price he seems to receive, devolves *ipso facto* to his master, the instant he becomes his slave. In this case therefore the buyer gives nothing, and the seller receives nothing: of what validity then can a sale be, which destroys the very principles upon which all sales are founded?²²⁹

Though clever, this argument cannot really do for Blackstone what he seeks; one might respond that the person selling him- or herself into slavery retains their legal personhood just long enough to receive (and perhaps transfer) that payment. Blackstone also fails to account for anything even slightly less absolute than what he calls “strict slavery.” A defender of Virginia’s extreme chattel slavery could still point

²²⁴ See *id.*

²²⁵ See *Vaiden v. Bell*, 24 Va. (3 Rand.) 448, 451 (1825) (citing Blackstone).

²²⁶ See 1 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 411–12 (1753), https://avalon.law.yale.edu/18th_century/blackstone_bk1ch14.asp [hereinafter BLACKSTONE COMMENTARIES].

²²⁷ *Id.* at 411.

²²⁸ See *id.*

²²⁹ *Id.* at 411–12.

to practices by which enslaved persons were permitted to earn money in their own right, keep some share of their wages, and indeed, purchase their way out of slavery.²³⁰ What might seem impossible to Blackstone was nevertheless quite real in slave-holding Virginia, which tolerated these paradoxes in the interests of preserving slavery.

Regardless of the soundness of Blackstone's position, however, Judge Green's argument against self-enslavement cannot be Blackstone's, which is both too weak (as noted above) and too strong (as it is part of a larger argument intended to undermine both of the only two possible legitimate bases of slavery).²³¹

Blackstone's argument also lacks what Judge Green's must contain, even if *sub rosa*: the ineliminable racial dimension of Virginia slavery.²³² Self-enslavement, for Judge Green, must be impossible, in order that it be clearly foreclosed for *White* people (while bound labor is permitted).²³³ The enslavement of persons of African descent operates on different, racialist premises, undreamt of by Blackstone, permitting the enslavement of those of African descent on terms wholly different from the contractual servitude (however oppressive) of persons of European (and other non-African) descent.²³⁴

²³⁰ See, e.g., *On Buying One's Freedom: Sections from 18th- & 19th-Century Slave Narratives*, NAT'L HUMAN. CTR. RESOURCE TOOLBOX (1500-1865), <http://nationalhumanities-center.org/pds/maai/emancipation/text1/buyingfreedom.pdf>.

²³¹ The other possible justification for slavery addressed by Blackstone is capture in war. "As, first, slavery is held to arise 'jure gentium,' from a state of captivity in war... The conqueror, say the civilians, had a right to the life of his captive; and, having spared that, has a right to deal with him as he pleases. But it is an untrue position, a man may kill his enemy: he has only a right to kill him, in particular cases; in cases of absolute necessity, for self-defence; and it is plain this absolute necessity did not subsist, since the victor did not actually kill him, but made him prisoner. War is itself justifiable only on principles of self-preservation; and therefore it gives no other right over prisoners, but merely to disable them from doing harm to us, by confining their persons: much less can it give a right to kill, torture, abuse, plunder, or even to enslave, an enemy, when the war is over. Since therefore the right of making slaves by captivity, depends on a supposed right of slaughter, the consequence drawn from it must fail likewise." "Lastly, we are told, that besides these two ways by which slaves 'fiunt,' or are acquired, they may also be hereditary: 'servi nascuntur;' the children of acquired slaves are, jure naturae, by a negative kind of birthright, slaves also. But this being built on the two former rights must fall together with them. If neither captivity, nor the sale of oneself, can by the law of nature and reason, reduce the parent to slavery, much less can it reduce the offspring." BLACKSTONE COMMENTARIES, *supra* note 226, at 411–12. The notion of a "negative birthright" is one to which we will return, *infra*.

²³² 1 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND, 411.

²³³ See *Maria v. Surbaugh*, 23 Va. (2 Rand.) 228, 237 (1824).

²³⁴ See Teresa Michals, "That Sole and Despotic Dominion": *Slaves, Wives, and Game in Blackstone's Commentaries*, 27 EIGHTEENTH-CENTURY STUDIES 195, 196 (1993-1994).

“No man can take or hold a property in himself.”²³⁵ Judge Green offers no alternative to the Lockean precept he has rejected.²³⁶ Strikingly, ownership of persons in general, from which self-ownership and ownership of others both might seem to derive, is not understood as a necessary premise for the system of slavery, but as a threat to it.²³⁷ If repudiating this idea has other undesirable consequences - philosophical, legal, or economic - Judge Green pays them no heed.²³⁸

C. Two paradoxes of self-ownership

In addition to the problem of self-enslavement, Judge Green offers two additional situations that he thinks contain counterarguments or paradoxes arising from the idea of the emancipated slave as a self-owner. These are the emancipation of the mother, coupled with temporary or lifelong enslavement of her *afterborn* children (“future issue”);²³⁹ and temporary emancipation and a return to enslavement.²⁴⁰

1. Enslaved future issue of an emancipated mother

Slave law permitted the transfer of an enslaved woman to one person, and her future issue to another.²⁴¹ But could a slave owner emancipate that same woman, and seek to retain or transfer her *afterborn* issue as enslaved persons? A grantor attempted this in the 1827 case of *Fulton v. Shaw*,²⁴² where the purported restriction on the children was held to be void as “repugnant to the grant” of freedom to the mother.²⁴³ As the Virginia Supreme Court there explained, in an opinion by Thomas Jefferson’s nephew Judge Dabney Carr,²⁴⁴

The grantor meant to emancipate *Mary Shaw* fully and immediately, and to hold in slavery any children she might afterwards have; and the only question is a question not of *intention*, but of *power*. *Could* the grantor, after giving the mother perfect freedom, reserve to himself any interest in her future children? When a female slave is given to one, and

²³⁵ *Maria*, 23 Va. (2 Rand.) at 231.

²³⁶ *See id.*

²³⁷ *See id.*

²³⁸ *See id.*

²³⁹ *Id.* at 235.

²⁴⁰ *Maria*, 23 Va. (2 Rand.) at 235.

²⁴¹ *See id.*

²⁴² 25 Va. (4 Rand.) 597 (1827).

²⁴³ *Id.* at 599.

²⁴⁴ *Dabney Carr (1773-1837)*, THE JEFFERSON MONTICELLO, <https://www.monticello.org/site/research-and-collections/dabney-carr-1773-1837> (last visited Apr. 2, 2020).

her future increase to another, such disposition is valid, because it is permitted to a man to exercise control over the increase and issues of his property, within certain limits. But when she is made free, her condition is wholly changed. She becomes a new creature; receives a new existence; all property in her is utterly extinguished; her rights and condition are just the same as if she had been born free. After thus divesting himself of all property in the mother, the grantor could not reserve to himself a right to hold her future progeny in slavery. A *free* mother cannot have children who are *slaves*. Such a birth would be monstrous both in the eye of reason and of law. The reservation, therefore, was repugnant to the grant; and I need not cite authorities to shew, that in such case, the grant is good, and the reservation void.²⁴⁵

Judge Carr, like Judge Green, sees emancipation not as a transfer, but as meaning “. . . all property in her is utterly extinguished . . .”²⁴⁶ *Partus sequitur ventrem* operates with lexical priority - *first*, the mother’s condition must be determined, and if she is free when the children are born, the inquiry is at an end.²⁴⁷ Any other result is, in Judge Carr’s words, “monstrous.”²⁴⁸

2. *The impossibility of temporary emancipation*

As discussed above, renting out the labor of enslaved persons was a common practice,²⁴⁹ as was the creation of a life estate or dower interest in an enslaved person, with a remainder to another.²⁵⁰ But while enslaved persons can be temporarily given or loaned to another (by a life estate or a short-term hiring arrangement), there is no such thing as a grant of “temporary” emancipation, followed by a return to enslavement.²⁵¹ “. . . [T]he owner of a slave, having made him free at present, cannot bind him to any future service, such an obligation being inconsistent with the grant of present freedom.”²⁵² This is another way in

²⁴⁵ *Fulton*, 25 Va. (4 Rand.) at 599.

²⁴⁶ *Id.*

²⁴⁷ *See id.*

²⁴⁸ *Id.*

²⁴⁹ *See supra* II.C.

²⁵⁰ *See, e.g., Chisholm v. Starke*, 7 Va. (3 Call) 25, 25 (1801).

²⁵¹ *See Maria v. Surbaugh*, 23 Va. (2 Rand.) 228, 242–43 (1824).

²⁵² *Id.* at 240. Though Judge Green takes care to circumscribe this to private acts, it is in fact the case that by public law an emancipated person could be subjected to re-enslavement. 8 HENING’S VIRGINIA STATUTES, *supra* note 86, at 135–3. Similarly, the removal of an enslaved person from Virginia, to another state which conferred freedom upon him, followed by his return to Virginia, did not result in re-enslavement. *See Hunter v. Fulcher*, 28 Va. (1 Leigh) 172, 173, 178 (1829).

which the emancipated person cannot be regarded as a particular sort of slaveowner, who happens to own themselves.

What both of these scenarios demonstrate, or at least suggest, is that emancipation *is* different, better understood as a fundamental change of status, instead of a (mere) change of ownership from another to oneself. Later Virginia attorneys took note of this analysis. As one argued in *Hunter v. Fulcher* in 1827, citing *Maria v. Surbaugh*,

When we say a person has a *vested* right of *freedom*, we use a phrase (for the want of one more appropriate) applicable, in its proper sense, only to rights of property. To say that a man is free, is not to say that he has a *vested property in himself*, but to describe his *status* or condition. This imperfection of language sometimes leads to fallacy of judgment: this court corrected a fallacy of the kind, in *Maria v. Surbaugh*, 2 Rand. 230, 246.²⁵³

D. *Children born to a woman contingently emancipated*

With emancipation thus characterized as a destruction rather than a transfer of property, and the arguments presented against the formerly enslaved as self-owners (whether of a present or future interest), Judge Green could answer the question of who owns Mary after she reaches age 31 this way: “No one.”²⁵⁴ But Mary’s emancipation is not at issue in this appeal.²⁵⁵ The issue is the status of Maria and her siblings, “. . . children born, pending the condition or contingency, or before the time appointed for the emancipation to take effect . . .”²⁵⁶

Unlike *Pleasants*, no guidance is to be found in Holliday’s will. His failure to include the familiar formula “and her issue” in the provision emancipating her negates any argument based on his intentions.²⁵⁷ As Judge Brooke explains in concurrence,

If the appellants, the children of Mary, are entitled to freedom, it cannot be by force of any thing in the will, under which she has obtained her liberty. It was highly probable, that she would have children before she attained the age of 31; yet, they are not noticed nor alluded to by the testator. He might have strong reasons for liberating her, when she should arrive at the age of thirty-one, which did not apply to her children, born before that period. It may have been unjust to his family to extend his bounty to them also. However that may be, it is enough,

²⁵³ *Hunter*, 28 Va. (1 Leigh) at 177.

²⁵⁴ See *Maria*, 23 Va. (2 Rand.) at 229.

²⁵⁵ See *id.*

²⁵⁶ *Id.* at 231.

²⁵⁷ *Id.* at 244.

that by no reasonable construction of the will, they can be included in it, or derive any benefit under it.²⁵⁸

As a result, the outcome is determined by Virginia slave law alone: “[t]hey must claim their freedom on the rule, that the children shall be bond or free, according to the condition of the mother . . .”²⁵⁹

1. *The options*

But what, exactly, does that mean? What *is* Mary’s “condition,” which determines her children’s status? Judge Green identified no fewer than six interpretations to which Virginia law might be susceptible in such a case, six different ways of understanding how her condition determines theirs:²⁶⁰

1. If the right to freedom in the mother be contingent, or depending upon a condition, the children may be considered as born slaves, (their mother then being a slave,) and not entitled to the benefit of the contingency or condition, upon which the mother would be entitled to her freedom; or,
2. They may be considered as born slaves, but with all the rights of the mother to be free, upon the happening of the contingency, or performance of the condition; or,
3. They may be considered as born slaves, but upon the condition being performed, or the contingency happening, the mother being free, the children may be deemed free from their birth, by relation; or,
4. If the mother is to be emancipated at a future time, the children may be considered as born slaves, without the benefit of the right of the mother to future liberty; or,
5. With that right; or,
6. They may be considered as born free, upon the supposition that a vested right to future freedom in the mother, puts her in the condition of one free, but bound to service for a limited time.²⁶¹

In interpreting Virginia law, Judge Green states the holding of *Pleasants* this way:

²⁵⁸ *Id.* at 245 (Brooke, J., concurring).

²⁵⁹ *Maria*, 23 Va. (2 Rand.) at 245–46.

²⁶⁰ *Id.* at 231–32 (Green, J.).

²⁶¹ *Id.* at 231–32.

That, a testator might emancipate upon a contingency, and that the children born of mothers who were to be free upon the happening of the contingency, and before the contingency happened, were born slaves, and were not entitled to the benefit of the contingency upon which the mother was to be entitled to her freedom, so as to be free upon the happening of the contingency; nor were to be considered as born free by relation. For, all the Judges agreed, that those born after the death of the testator, and before the passing of the act, were bound to serve until the age of 30.²⁶²

Judge Green distinguishes *Maria v. Surbaugh* from *Pleasants* on the ground that the emancipation in *Pleasants* depended not only on an age condition, but also on a change of law which was not certain to occur - while in *Maria v. Surbaugh*, “the *right* of the mother to freedom at her age of 31 years, was unconditional and certain.”²⁶³ But what difference does this really make? Both a change of law, and a particular person reaching a particular age, are genuine conditions, not certain to occur.

Interpretation 6, the only interpretation which deems the children free from birth, comes closest to the approach taken by Judge Roane in *Pleasants*.²⁶⁴ In that case, Judge Roane described the mothers this way:

[T]heir right to freedom was complete, but they were postponed as to the time of enjoyment. They were *in the case of persons bound to service for a term of years*; who have a general right to freedom, but there is an exception, out of it, by contract or otherwise.²⁶⁵

In Judge Green’s version, the precondition on the children’s free birth is their mother having a “. . . vested right to future freedom . . .”²⁶⁶ But this is impossible. As Judge Green states, “. . . in the case at bar, the legacy *did not vest* until the legatee attained her age of 31 years;. . .if she had died before she attained that age, the legacy would have lapsed,

²⁶² *Id.* at 234.

²⁶³ *Id.* at 236 (emphasis added).

²⁶⁴ See *Pleasants v. Pleasants*, 6 Va. (2 Call) 319, 338–39 (1800).

²⁶⁵ *Id.* (emphasis added).

²⁶⁶ *Maria*, 23 Va. (2 Rand.) at 232.

and the bequest have had no effect whatever . . .”²⁶⁷ Judge Brooke concurs: “If she had never attained that age, it would have been wholly inoperative as to her, and her children would have had no pretensions to freedom.”²⁶⁸ As an attorney in 1827’s *Hunter v. Fulcher* reiterated, “It seems a solecism to say, that a man *actually in bondage*, has a *vested right of freedom*.”²⁶⁹ If such a vested right is a genuine condition precedent to the children’s free birth, then, Judge Green seems to imply, Judge Roane was in error.

But Judge Green has it wrong. Vestedness of the right to freedom is not and cannot be the basis for Judge Roane’s characterization of these enslaved mothers as women “bound to service for a term of years,” because the latter are *also* not certain to reach freedom.²⁷⁰ Whether the children of either group are born free thus cannot depend on the vestedness of their mother’s future right.²⁷¹

Judge Brooke rules this interpretation out as well, but as a matter of will interpretation:

As to her condition at the birth of the appellants, according to the will, she was a slave until she attained the age of 31. It only declares her to be free when she shall arrive at that age. . . . The idea, that she was free from the death of the testator, and only held to service until she attained the age of 31, is wholly inconsistent with the obvious intention of the testator.²⁷²

The emphatic language he uses (“*wholly inconsistent*,” “*obvious intention*”) poorly conceals what is actually the case: that the will said nothing on this point.²⁷³ It emancipated her upon attainment of age 31; it did not delve into these finer points.²⁷⁴ No language can be found *supporting* this interpretation, it is true; but neither can any be found *negating* it.²⁷⁵ As an interpretation of Virginia law, however, Interpretation 6 is not viable for either judge.²⁷⁶

²⁶⁷ *Id.* at 229 (emphasis added).

²⁶⁸ *Id.* at 245 (Brooke, J., concurring).

²⁶⁹ *Hunter v. Fulcher*, 28 Va. (1 Leigh) 172, 177(1829).

²⁷⁰ *Pleasants*, 6 Va. (2 Call) at 338.

²⁷¹ *See id.* at 338–39.

²⁷² *Maria*, 23 Va. (2 Rand.) at 245 (Brooke, J., concurring).

²⁷³ *See id.* at 245–46.

²⁷⁴ *See id.*

²⁷⁵ *See id.*

²⁷⁶ *See id.* at 232.

Notably, judges outside Virginia read a similar disposition as Judge Roane had in *Pleasants*. “Had Clarissa a vested right to freedom on the death of Thomas Bond? As to [her and other enslaved persons], devised for five years to Phil Bond, we think there can be no doubt they were intended by the testator to be free persons, held to service for a term of years . . .”²⁷⁷

Interpretation 3 is an interesting (but unlikely) hybrid, reminiscent of a device used frequently in the common law of future interests.²⁷⁸ If Interpretation 3 were adopted, Maria and her siblings would be enslaved until their mother turned 31, but at that point, the law would reach back in time, and emancipate them from birth (“by relation,”²⁷⁹ what we might call “relation back”). This resembles the treatment of potential heirs, *in utero* upon the death of an ancestor but later born alive, who are treated as having been alive all along; and if not, as if they never existed.²⁸⁰ During the pregnancy, of course, which of these futures will come to pass is unknown; but once it is resolved, this is regarded as the state of affairs from the death of the ancestor, giving the heir all his rights from that time forward, seamlessly. Similarly, for what should be mostly obvious reasons (including the rights it would confer on the formerly enslaved), Judge Green does not seriously entertain this possibility.²⁸¹

On Interpretations 1 and 2, Mary’s right to freedom is “. . . contingent, or depending upon a condition, . . .”²⁸² while on Interpretations 4 and 5, she “is to be emancipated” or has a “right” to “future liberty,”²⁸³ language suggesting a much more robust entitlement on her part. Either way, however, Judge Green therefore must resolve whether this future right, however understood, is properly regarded as “. . . part of the *condition* referred to in the law, . . .”²⁸⁴ which will “follow the womb” and apply to her issue.

This is not simple. Even if the age condition of her emancipation is understood as part of her enslaved condition, *how*, exactly, does it

²⁷⁷ Harris v. Clarissa, 14 Tenn. (6 Yer.) 227, 243 (1834).

²⁷⁸ See *Maria*, 23 Va. (2 Rand.) at 231.

²⁷⁹ See *id.*

²⁸⁰ See *In re Alburger’s Estate*, 117 A. 450, 450–51 (Pa. 1922). The common law found uncertainty in the state of titles less tolerable than “rewriting history”; the unknown outcome of a pregnancy therefore required a sort of “time-traveling,” in which we do not know until months after an ancestor’s death whether a particular person is or is not an heir - but at that point, if born alive, the person was an heir all along. See *id.*

²⁸¹ See *Maria*, 23 Va. (2 Rand.) at 231–32.

²⁸² *Id.* at 231.

²⁸³ *Id.* at 231–32.

²⁸⁴ *Id.* at 235.

determine her children's status? Is it inherited, and part of *their* condition as well (Interpretations 2²⁸⁵ and 5)? Or not (Interpretations 1 and 4)? Did they "follow" her into freedom in 1818 (when she turned 31)? Or does the age condition (emancipation upon attaining age 31) attach to each of them individually (as in *Pleasants*)? Or - worst of all - does Mary's contingent emancipation have no effect whatever on her children's status?

For Judge Brooke, Virginia's *partus sequitur ventrem* rule is straightforward: "It imports the condition at the *time* of the birth, in exclusion of any future right to liberty. It does not include a remote event, which may never happen, nor any right of which the mother is not in the enjoyment, at the time of the birth."²⁸⁶

Judge Green believes more explanation is required. His primary argument that the condition must *not* apply in favor of the emancipation of the children of an enslaved woman ". . . entitled to her freedom at a future day, or upon a contingency, . . ." ²⁸⁷ is that, the children of a servant, for the same reason, though born free, would be bound, as she was, to service, until she was entitled to be discharged from service. But they were not so bound; from which I conclude, that the civil state of the children, with all its consequences, was determined by the civil state of the mother, at the time of their birth, without regard to the present obligation of a free woman, to serve, or the present right of a slave to be free thereafter.²⁸⁸

On first glance, it might appear that a servant currently bound to serve (for a fixed remaining time), and an enslaved woman to be emancipated upon a future age contingency (thus also at a calculable future time), are similarly situated, at least with respect to the legal status (the "civil state") of any children born to them during that period.²⁸⁹ So it appeared to Judge Roane.²⁹⁰ But Judge Green rejects the analogy.²⁹¹

Judge Green's argument is one that might be called, with justice, fiendishly clever. Precisely *because* (he argues) the children of a (White) servant whose time of service will end, are free (as she is), the children of an enslaved woman (of African descent) whose emancipation will occur in the future, are enslaved (as she is).²⁹² To give the

²⁸⁵ See, e.g., *Harris v. Clarissa*, 14 Tenn. (6 Yer.) 227, 241 (1834).

²⁸⁶ *Maria*, 23 Va. (2 Rand.) at 246 (Brooke, J. concurring).

²⁸⁷ *Id.* at 239 (Green, majority opinion).

²⁸⁸ *Id.*

²⁸⁹ See *id.* at 236.

²⁹⁰ See *id.*

²⁹¹ See *Maria*, 23 Va. (2 Rand.) at 239.

²⁹² See *id.* at 240.

children of a defeasibly enslaved woman the *benefit* of her condition, he reasons, consistency would demand that the children of an indentured servant be *burdened* to bound labor.²⁹³ But they are not.²⁹⁴ The similarity of their *situation* (women of childbearing age bound to labor for a fixed time) is not permitted by Judge Green to obscure their racially-essentialized difference of *status*.²⁹⁵ One is free and (typically) of non-African descent (despite being “bound” to servitude), one is enslaved and of African descent (despite a contingent future emancipation that might actually come to pass).²⁹⁶

This is the distinction that makes all the difference. *Partus sequitur ventrem* does not recognize or pass on an indenture, which is simply a labor contract.²⁹⁷ A person of European descent, on this view, can *never* be what a person of African descent always and necessarily is - enslavable, even if not always enslaved.²⁹⁸

2. “No middle state between slavery and absolute freedom”

In thus holding “that a slave emancipated *in futuro*, continues in the meantime a slave to all intents and purposes, [and so] her children, born in the meantime, are born slaves, and so continue, notwithstanding the right of the mother to freedom at a future time, in which they do not participate,”²⁹⁹ the Virginia Supreme Court goes well beyond what Blackstone had called “*servii nascuntur*,” by which “the children of acquired slaves are, *jure naturae*, by a negative kind of birthright, slaves also.”³⁰⁰

To reach this result, Judge Green has added a further nuance to *partus sequitur ventrem*, one foreign to the world of *Pleasants* despite Judge Green’s attempt to ground it in the 1765 law: the “no middle state” ontology of binary and racially-essentialized slavery.³⁰¹ According to Judge Green, “. . . the policy of the law of 1765 [was]. . . to allow no middle state between slavery and absolute freedom, except apprenticeship during infancy.”³⁰² As described at Part II.D, *supra*, a law of 1705 had bound certain mixed-race children into service until age 31;

²⁹³ See *id.* at 242–43.

²⁹⁴ See *id.*

²⁹⁵ See *id.* at 239.

²⁹⁶ See *Maria*, 23 Va. (2 Rand.) at 246.

²⁹⁷ See *id.*

²⁹⁸ See *id.* at 230.

²⁹⁹ *Id.* at 244.

³⁰⁰ BLACKSTONE COMMENTARIES, *supra* note 226, at 412.

³⁰¹ See *Maria*, 23 Va. (2 Rand.) at 240.

³⁰² *Id.*

the law of 1765 cut this period back to 21 for men, and 18 for women.³⁰³ But whether this should be understood as evidencing a general intent to establish “no middle state” between slavery and freedom is much less clear.

In the early 17th century history of Virginia, White bound labor (indentured servitude) was as economically important as slavery, but over time, for various reasons, the former dwindled as the latter grew.³⁰⁴ By the early 18th century, “. . . slavery had become ensconced at all levels of Virginia society and was well on its way to completely replacing indentured servitude as the primary source of bound labor in the colony.”³⁰⁵ Where early Virginia had met its labor needs through a variety of forms of bound immigrant labor, to which persons of both European and African descent might be subjected, by the early nineteenth century, White bound labor had almost disappeared, the importation of slaves was banned,³⁰⁶ and hereditary racialized slavery had taken over. The bond requirements of the act of 1782 reflected long-standing concerns about slaveowners emancipating enslaved people in order to avoid providing for their support, and about the financial burden of emancipated persons.³⁰⁷ But as slavery developed into a more fully racialized hereditary status, the very *presence* of free Black people in Virginia came to be seen as a threat to the order, as reflected in the 1806 law banishing emancipated former slaves.³⁰⁸

Nevertheless, the idea of persons being bound to service but not enslaved remained in Virginia law, and sufficiently familiar to both Judge Roane and Judge Green.³⁰⁹ The customary and statutorily time-limited nature of indentured servitude, which endured for a fixed period of time (depending on the age, race, and sex of the servant),³¹⁰ was familiar to jurists.

Other nineteenth century legal sources, in at least some states, also recognized the existence of a state “between slavery and absolute

³⁰³ 8 HENING'S VIRGINIA STATUTES, *supra* note 86, at 133–35.

³⁰⁴ See David W. Galenson, *The Rise and Fall of Indentured Servitude in the Americas: An Economic Analysis*, 44 J. ECON. HIST. 1, 1–2 (1984).

³⁰⁵ Brendan Wolfe & Martha McCartney, *Indentured Servants in Colonial Virginia*, ENCYCLOPEDIA VIRGINIA, https://www.encyclopediavirginia.org/indentured_servants_in_colonial_virginia#start_entry (last updated Oct. 28, 2015).

³⁰⁶ The Act Prohibiting Importation of Slaves of 1807, 2 Stat. 426 (1808).

³⁰⁷ See 11 HENING'S VIRGINIA STATUTES, *supra* note 35, at 39–40.

³⁰⁸ See 3 THE STATUTES AT LARGE OF VIRGINIA, FROM OCTOBER SESSION 1792, TO DECEMBER SESSION 1806, *supra* note 189, at 251–52.

³⁰⁹ See *Maria v. Surbaugh*, 23 Va. (2 Rand.) 228, 239 (1824).

³¹⁰ See Brendan Wolfe & Martha McCartney, *Indentured Servants in Colonial Virginia*, ENCYCLOPEDIA VIRGINIA, https://www.encyclopediavirginia.org/indentured_servants_in_colonial_virginia#start_entry (last updated Oct. 28, 2015).

freedom.” In *Harris v. Clarissa*, decided in 1834, the Supreme Court of Tennessee referred explicitly to the “middle state” of children born to a woman contingently emancipated.³¹¹ Thomas Reade Rootes Cobb, a leading Georgia lawyer, reporter of the Georgia Supreme Court and a founder of the University of Georgia School of Law,³¹² stated in his 1858 work *An Inquiry Into the Law of Negro Slavery in the United States of America*, “. . . where laws have been passed for the gradual abolition of slavery, . . .” “. . . the condition of the slaves. . . is changed to a state of servitude or apprenticeship.”³¹³

One hears echoes of Judge Roane when Cobb writes, about private emancipation, “. . . wherever the deed of manumission changes the condition of the mother from slavery to mere servitude, though the time of the enjoyment of perfect freedom be postponed, issue born subsequent to the deed, and pending the service of the mother, are free.”³¹⁴

Ultimately, however, the “no middle state” approach became the law of Virginia.³¹⁵ But it was no foregone conclusion, and the decision in *Maria v. Surbaugh* played a significant role in furthering it. If the law as Judge Green read it was *perquam durum*, “exceedingly hard,” that is in part because he hardened it.³¹⁶ This did not escape the notice, or criticism, of contemporary antebellum jurists. The Supreme Court of Tennessee, in *Harris v. Clarissa*, commented upon *Maria v. Surbaugh* this way: “It is a most strict construction, not to say a strained one, in prejudice of human liberty, and is in conflict with the opinions of Chancellor Wythe and Judge Roane, in the cause of *Pleasants v. Pleasants*.”³¹⁷

V. CONCLUSION: TWO FICTIVE BINARISMS

The developments that culminated in *Maria v. Surbaugh* put two false binarisms simultaneously into play: between slavery and absolute freedom, and between persons of African descent (Black) and those of

³¹¹ See *Harris v. Clarissa*, 14 Tenn. (6 Yer.) 227, 240 (1834).

³¹² Steven Nash & Matthew Bauley, *Thomas R.R. Cobb (1823-1862)*, NEW GEORGIA ENCYCLOPEDIA, <https://www.georgiaencyclopedia.org/articles/history-archaeology/thomas-r-r-cobb-1823-1862> (last updated Mar. 11, 2020).

³¹³ THOMAS R. R. COBB, AN INQUIRY INTO THE LAW OF NEGRO SLAVERY IN THE UNITED STATES OF AMERICA: TO WHICH IS PREFIXED, AN HISTORICAL SKETCH OF SLAVERY 77 (1858).

³¹⁴ *Id.*; *Pleasants v. Pleasants*, 6 Va. (2 Call) 319, 338–39 (1800) (stating “their right to freedom was complete, but they were postponed /as to the time of enjoyment).

³¹⁵ See COBB, *supra* note 313, at 77.

³¹⁶ *Maria v. Surbaugh*, 23 Va. (2 Rand.) 228, 245 (1824).

³¹⁷ *Harris v. Clarissa*, 14 Tenn. (6 Yer.) 227, 242 (1834).

European descent (White).³¹⁸ Each depended essentially upon and drew life from the other, and each depended on particular varieties of blindness and denial.³¹⁹ Thus a sharp and rigid *legal* distinction was used to discipline the unruly biological and social reality of interracial sex; the denial of an in-between legal status, after two centuries of indentured servitude, paralleled the denial of the reality of miscegenation, even as laws were passed to prevent “that abominable mixture and spurious issue.”³²⁰

As for “the favor shewn by the common law to liberty,”³²¹ Judge Green sides with “the civilians,”³²² Roman commentators on slavery law, even while claiming (in Latin) to find this outcome “exceedingly hard, but so the law is written.”³²³

This “no middle state” ontology also resolved a functionally undifferentiated category, child-bearing women bound to labor for a fixed time, into two utterly distinct and non-overlapping groups: the enslaved (of African descent) and the free (of European descent).³²⁴ *Partus sequitur ventrem* applied with lexical priority then gives the result Judge Green reaches: the children of the enslaved Black mother are enslaved, notwithstanding her emancipation *in futuro*; while the children of the White servant mother are free, notwithstanding her current bondage.³²⁵ And even should emancipation arrive for the formerly enslaved Black mother, the 1806 law requiring emancipated persons to leave Virginia within twelve months, on pain of re-enslavement,³²⁶ meant she must leave her enslaved children behind to secure her own freedom, a very real immiseration engendered by these vicious fictions.

³¹⁸ See *Maria*, 23 Va. (2 Rand.) at 239.

³¹⁹ See Wolfe & McCartney, *supra* note 310.

³²⁰ 3 HENING'S VIRGINIA STATUTES, *supra* note 68, at 453.

³²¹ *Maria*, 23 Va. (2 Rand.) at 244.

³²² *Id.* at 245.

³²³ *Id.*

³²⁴ See *id.* at 240.

³²⁵ See *id.* at 246.

³²⁶ See 3 THE STATUTES AT LARGE OF VIRGINIA, FROM OCTOBER SESSION 1792, TO DECEMBER SESSION 1806, *supra* note 189, at 252.