

Human Liberty, Property in Human Beings, and the Pennsylvania Supreme Court

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In 1780—with the American Revolution still raging—the Pennsylvania legislature passed the first law in the history of the world for the purpose of abolishing slavery: “An Act For the Gradual Abolition of Slavery.”¹ At the time, slavery was legal almost everywhere in the western world. Before the European discovery of America, slavery had been practiced in virtually every culture of the world, and was particularly important to cultures of the Middle East, sub-Saharan Africa, and both the Christian and Muslim shores of the Mediterranean Sea. While antebellum southerners would call their system of human bondage a “peculiar institution,”² historically there was “nothing notably peculiar about the institution of slavery. It has existed from before the dawn of human history right down to the twentieth century, in the most primitive of human societies and in the most civilized.”³ As the great scholar of world slavery Orlando Patterson has noted “[t]here is no region on

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1. An Act for the Gradual Abolition of Slavery, Act of Mar. 1, 1780, available at http://avalon.law.yale.edu/18th_century/pennst01.asp [hereinafter 1780 Act].

2. See, e.g., KENNETH M. STAMPP, *THE PECULIAR INSTITUTION: SLAVERY IN THE ANTEBELLUM UNITED STATES* (1956).

3. ORLANDO PATTERSON, *SLAVERY AND SOCIAL DEATH* vii (1982); see also JEAN ALLAIN, *THE LEGAL UNDERSTANDING OF SLAVERY: FROM THE HISTORICAL TO THE CONTEMPORARY* (2012). Slavery has also reemerged as an issue in the twenty-first century, as essays in Allain’s book note.

earth that has not at some time harbored the institution.”⁴ Patterson concluded that “probably there is no group of people whose ancestors were not at one time slaves or slaveholders.”⁵ Doubtless, there are many people throughout the world who are the descendants of both slaves and slaveholders.

When the American Revolution began, slavery could be found in every one of the new thirteen states. Slavery was also legal in every jurisdiction in the western hemisphere, from the British colonies in Canada to the Spanish colony in Argentina.⁶ Millions of slaves from Africa, or of African ancestry, toiled in every colony and state in the Americas.

Most of the maritime nations of Western Europe—including Great Britain, the Netherlands, France, Spain, Portugal, and Denmark—participated in the African slave trade, which was enormously profitable. Slavery was a thriving institution in Spain and Portugal, throughout the Mediterranean basin, and on the Atlantic islands off the Iberian Peninsula. In the rest of Europe liveried slaves were a status symbol for the elite, driving their coaches, serving their meals, and doing the heavy lifting in their houses and businesses. In 1772, William Murray, Chief Justice Lord Mansfield of the Court of King’s Bench estimated that there were between 12,000 and 15,000 slaves in England.⁷ In that year Mansfield ruled, in *Somerset v. Stewart*,⁸ that slaves could not be held against their will in Great Britain, but the evidence suggests that many enslaved blacks remained in Britain well after that year.⁹ In *Somerset*, Mansfield emphatically asserted that his decision applied *only* to the mother country, and did not affect the status of slavery in any British colonies or the status of slaves transported from Africa to the New World.¹⁰ While unwilling to allow James Somerset to be held as a slave in London, Mansfield was clear that “[c]ontract for sale of a slave is good here; the sale is a matter to which the law properly and readily attaches, and will maintain the price according

4. PATTERSON, *supra* note 3, at vii.

5. *Id.*

6. While beyond the scope of this article, slavery existed in the New World before the arrival of Europeans. The Inca, Maya, and Aztecs all were slaveholders as were numerous Indian societies from the Tlinglit in the Pacific Northwest to the Iroquois in the east. See generally PATTERSON, *supra* note 4; PAUL FINKELMAN & JOSEPH C. MILLER, *THE MACMILLAN ENCYCLOPEDIA OF WORLD SLAVERY* (1998).

7. *Somerset v. Stewart*, 98 Eng. Rep. 499, 509 (K.B. 1772).

8. *Id.*

9. For a discussion of this case see PAUL FINKELMAN, *AN IMPERFECT UNION: SLAVERY, FEDERALISM, AND COMITY* (1981) and WILLIAM M. WIECEK, *THE SOURCES OF ANTI-SLAVERY CONSTITUTIONALISM IN AMERICA 1760–1848* (1977).

10. *Somerset*, 98 Eng. Rep. at 509.

to the agreement.”¹¹ A few years later he explained that his decision in *Somerset* “got no further than that the master cannot by force compel him to go out of the kingdom[,]”¹² and presumably could not hold a slave by force within England. Caribbean masters took their slaves to England long after *Somerset*. In 1827, shortly before he left the bench, William Scott, First Baron Stowell, of the High Court of Admiralty ruled in *The Slave, Grace*, that while a slave might have a claim to freedom while in England, she could not claim that freedom after she returned to a slave jurisdiction in the American colonies.¹³ French courts and local legislatures had reached similar decisions, but the French parliament and crown modified this theory of law to allow French owners to bring their slaves from the New World or Africa for limited periods of time.¹⁴

Thus, in a world where every western legislature and government supported the African slave trade and allowed slavery either locally (or like England, in theory, only in its colonies), Pennsylvania was different. The new government of the Commonwealth declared that its public policy was to end the practice of buying, selling, and owning human beings. The change in public policy was to be gradual, as the legislators tried to balance claims of property with the inalienable right to liberty. But the change was emphatic and clear. Under the 1780 Act, slavery would wither away and die, and within a generation Pennsylvania would no longer have slavery.

Despite the clear direction of the legislation, the gradual end of slavery led to an enormous amount of litigation. Between 1786 and 1861, the Pennsylvania Supreme Court (Court) heard over one hundred cases involving slavery and blacks.¹⁵ Some of these were routine, run-of-the-mill cases in which slavery or race were incidental

11. *Id.*

12. *The King v. Inhabitants of Thames Ditton*, 99 Eng. Rep. 892 (K.B. 1785).

13. *The Slave, Grace*, (1827) 166 Eng. Rep. 179 (High Ct. of Admiralty). Baron Stowell left the bench in 1827. See *The Life of Lord Stowell*, 16 LAW MAG. QUART. REV. JURIS. 23 (1836), and *Stowell, William Scott*, 25 ENCYCLOPEDIA BRITANNICA 973 (1911).

14. SUE PEABODY, *THERE ARE NO SLAVES IN FRANCE: THE POLITICAL CULTURE OF RACE AND SLAVERY IN THE ANCIENT REGIME* (1996).

15. We do not have an exact count of all slave cases before the Pennsylvania Supreme Court. In her path-breaking compilation of reported cases involving slavery and blacks, Helen T. Catterall found 102 state cases and 35 federal cases in Pennsylvania. See 4 HELEN T. CATTERALL, *JUDICIAL CASES CONCERNING SLAVERY AND THE NEGRO* 24-318 (1926). However not all cases at this time were reported. For example, in 1840 the Pennsylvania Supreme Court affirmed the kidnapping conviction of Edward Prigg, but did not issue an opinion in the case and the outcome is thus unreported. The U.S. Supreme Court reversed this decision in *Prigg v. Pennsylvania*, 41 U.S. 539 (1842). For a history of that case see Paul Finkelman, *Story Telling on the Supreme Court: Prigg v. Pennsylvania and Justice Joseph Story's Judicial Nationalism*, 1994 SUPREME COURT REVIEW 247-94 [hereinafter *Story Telling*]. Similarly, the case of *Commonwealth ex rel. Annette, a mulatto Girl v. John Irvine*, is mentioned in the opinion of the Court in *Commonwealth, ex rel. Cribs v. Vance*, 15 Serg. &

to the facts and the jurisprudence. For example, in a case involving the final distribution of an estate, the Court noted that among his other property, that when the testator died in 1821 he had left a “servant boy Harry” to his wife.¹⁶ Harry was probably the child of slave woman, and he would eventually be free but was a bound servant at the time the testator died. Other examples include a case where the Court resolved a suit against the African Methodist Episcopal Church by a man who wished to be restored to his membership and role as a trustee,¹⁷ and a suit over a \$5000 bequest to educate the natives of Africa.¹⁸ None of these cases were about slavery or race, although they touched both issues.

Many of the Court’s cases, however, were central to the important issues of slavery, emancipation, and race in Pennsylvania. For example, in the state’s first reported slavery case, *Pirate, alias Belt v. Dalby*, the Pennsylvania Supreme Court ruled that someone born of a slave mother was a slave, even though his complexion was nearly white.¹⁹ This holding was consistent with the American law of slavery dating from 1662 and followed by all the American colonies and states.²⁰ Significantly, in this case, the rule that the child of a slave women was a slave trumped the general cultural notion that slaves were black and people who looked white were free. On the other hand, three years later the same Court ruled that three children born of a slave mother in Pennsylvania were free because their master had failed to properly register them under the state Gradual Emancipation Act of 1780.²¹

These cases illustrate that Pennsylvania’s experience with slavery and race was deeply complicated. Slavery was present in Pennsylvania in the 1680s, and in the eighteenth century most elite and wealthy Pennsylvanians owned slaves. The colony passed its first statutes regulating slavery in 1700.²² By the 1760s, Philadelphia

Rawle 36, 38 (Pa. 1825) (citation omitted in original), as “not yet reported,” and apparently it never was reported.

16. *Huston’s Appeal*, 9 Watts 472, 473 (Pa. 1840).

17. *Green v. African Methodist Episcopal Soc’y*, 1 Serg. & Rawle 254 (Pa. 1815). The Court ordered that Green be restored to his position in the Church.

18. *Appeal of Domestic and Foreign Missionary Soc’y*, 30 Pa. 425 (1858). The Court upheld the bequest.

19. 1 Dall. 167 (Pa. 1786).

20. *Negro womens children to serve according to the condition of the mother*, 2 Hening Va. Stat. 170, Act XII, Dec. 1662 (“WHEREAS some doubts have arrisen whether children got by Englishmen upon a negro women should be slave or free, Be it therefore enacted . . . that all children borne in this country shall be held bond or free only according to the condition of the mother, And that if any christian shall committ ffornication with a negro man or women, hee or shee soe offending shall pay double the ffines imposed by the former act.”).

21. *Republica v. Negro Betsey*, 1 Dall. 469 (Pa. 1789).

22. An Act for the Trial of Negroes, Act of Nov. 27, 1700.

had about 1,400 slaves, who constituted about seven percent of the city's 18,000 residents.²³ But, Pennsylvania was also the home of the first antislavery society in the new nation and the Pennsylvania legislature was the first in the history of the world to pass a law to end slavery. The life of Pennsylvania's most famous citizen—Benjamin Franklin—illustrates the significance of slavery in the colony and the revolutionary-era state.

Franklin purchased his first slave in 1750, when he was a forty-four-year-old prosperous businessman and one of the leading citizens of the “City of Brotherly Love.”²⁴ He would own six or seven different slaves until very late in life.²⁵ Like most elite urbanites of the period, as well as many middle class tradesmen and skilled craftsmen, Franklin could not run his household without domestic help, and slaves were always less expensive (in the long run) and more reliable than hired labor.²⁶ Indeed, by the time of the Revolution one of every five households in Philadelphia owned slaves.²⁷ Franklin, like many Pennsylvania masters, was ambivalent about slavery,²⁸ but it was not until after he returned from negotiating the Treaty of Paris in 1783, which ended the American Revolution, that he emancipated his remaining slaves. He then became the first president of the newly reconstituted Pennsylvania Society for the Promotion of the Abolition Society,²⁹ more commonly called the Pennsylvania Abolition Society or PAS.

Thus, in March 1780, less than four years after Americans had proclaimed (in a document that Franklin helped write)³⁰ their rights to “Life, Liberty, and the Pursuit of Happiness,”³¹ the Pennsylvania legislature took steps to end slavery in the newly independent state. But, some residents of the state, especially the members of the Pennsylvania Supreme Court, were ambivalent or hostile to ending bondage and creating liberty in the Keystone state. In the 1780s, Pennsylvania moved towards equal rights, but in the

23. GARY NASH, *FORGING FREEDOM: THE FORMATION OF PHILADELPHIA'S BLACK COMMUNITY, 1720–1740*, 10 (1988).

24. NATHAN R. KOZUSKANICH, *BENJAMIN FRANKLIN: AMERICAN FOUNDER, ATLANTIC CITIZEN* 71 (2015).

25. *Id.* at 140.

26. *Id.* at 142.

27. *Id.*

28. Gary B. Nash, *Franklin and Slavery*, 150 *PROCEEDINGS OF THE AM. PHIL. SOC'Y* 627 (2006).

29. KOZUSKANICH, *supra* note 24, at 138.

30. Franklin was part of the five-man committee that wrote the Declaration of Independence, along with John Adams, Roger Sherman, Robert Livingston, and Thomas Jefferson.

31. *THE DECLARATION OF INDEPENDENCE* para. 2 (U.S. 1776).

1830s the Supreme Court supported the disfranchisement of African American voters.³² An understanding of the Pennsylvania Court's jurisprudence on slavery and race begins in the colonial period and continues through the statutes passed during and immediately after the Revolution.

I. EARLY ANTISLAVERY IN PENNSYLVANIA

Pennsylvania's antislavery legacy is strong. The first protest against slavery in American history came from Germantown in 1688.³³ This famous document, written by a group of German Mennonite immigrants affiliated with the local Quaker Meeting, succinctly challenged the fundamental morality of slavery:

[T]ho they are black we cannot conceive there is more liberty to have them slaves, as it is to have other white ones. There is a saying that we shall doe to all men alike as we will be done ourselves; making no difference of what generation, descent or colour they are. And those who steal or rob men, and those who buy or purchase them, are they not alike?³⁴

Refugees from religious oppression in their homeland, these recent arrivals in Penn's colony, made the obvious comparison of their situation to slaves: "In Europe there are many oppressed for conscience sake; and here there are those oppressed who are of a black colour."³⁵ They also noted that slavery led to fundamental violations of Biblical law:

And we who know that men must not commit adultery—some do commit adultery, in others, separating wives from their husbands and giving them to others; and some sell the children of these poor creatures to other men. Ah! doe consider well this thing, you who doe it, if you would be done at this manner? and if it is done according to Christianity?³⁶

As pacifists, they warned that slavery would inevitably lead to violence, and they asked if blacks have "as much right to fight for their freedom, as you have to keep them slaves?"³⁷ Their conclusion

32. See *Hobbs v. Fogg*, 6 Watts 553 (Pa. 1837).

33. The full document is found in KERMIT L. HALL, PAUL FINKELMAN & JAMES W. ELY, JR., *AMERICAN LEGAL HISTORY: CASE AND MATERIALS* 57 (4th ed. 2011).

34. *Id.*

35. *Id.*

36. *Id.*

37. *Id.*

was that slavery offended public morality, threatened the peace of the community, and violated Christian values.³⁸

This protest against slavery illustrated a tension in Pennsylvania over slavery that would exist for more than a century-and-a-half. On one hand, many Pennsylvanians were deeply offended by the immorality and oppression of slavery. This was especially true among Quakers, Mennonites, and members of other pietistic faiths, and later among Baptists and Methodists. On the other hand, many Pennsylvanians, especially high church Protestants and a significant number of wealthy Quakers, saw nothing wrong with slavery, which was profitable, common in the Atlantic world, and sanctioned by both the law of man and the law of God. Whether reading about Old Testament slaveowners, like Abraham, Jacob, and Job, or reading St. Paul's letter to Philemon (in which he returned a fugitive slave who was also a fellow Christian), religious Pennsylvanians found scriptural justification for buying and selling human beings. Like almost all other Americans, Pennsylvanians had a strong respect for private property, which included slaves. Finally, the race of the slaves *did* matter to white Pennsylvanians, who were willing to "do unto others" things they would not want done to themselves, precisely because Africans were so different from them.

Thus, from the 1680s until the Revolution, Pennsylvanians debated slavery more than residents of any other colony. Indeed, in most of the colonies there were very few debates over slavery until the Revolution, because most residents of the other colonies accepted the legitimacy of slavery.³⁹ But, as noted above,⁴⁰ as early as 1688, some Pennsylvanians openly expressed their disgust at the buying and selling of human beings. Starting in the 1730s, some Quaker opponents of slavery began to push their fellow Friends to give up slaveholding. Thus, from the mid-1730s until the eve of the Revolution, the relentless agitation of antislavery Quakers caused enormous turmoil in the Philadelphia Yearly Meeting. Starting about 1735, Benjamin Lay publicly attacked slaveholding among his fellow Quakers.⁴¹ By 1737, some Quaker meetings in New Jersey and Pennsylvania had banned him as a "frequent Disturber"

38. *Id.*

39. Aside from the Germantown document, the only other early attack on slavery was a single book written by a Massachusetts lawyer. SAMUEL SEWALL, *THE SELLING OF JOSEPH* (1700).

40. See HALL, FINKELMAN & ELY, *supra* notes 33–38 and accompanying text.

41. DAVID BRION DAVIS, *THE PROBLEM OF SLAVERY IN WESTERN CULTURE* 320–26 (1966).

and a “disorderly person” for his relentless and sometimes outrageous condemnations of slavery.⁴² That year he wrote *All Slave-Keepers That Keep the Innocent in Bondage, Apostates Pretending to Lay Claim to the Pure & Holy Christian Religion*.⁴³ Benjamin Franklin printed this tract, but did not identify himself as the printer because he wanted to avoid an open breach with the wealthy and powerful Quaker leadership in Philadelphia.⁴⁴ The fierce denunciations of slavery in Lay’s book led to his expulsion from the Society of Friends, which had prohibited members from publishing antislavery tracts.⁴⁵ However, in 1758, a year before Lay’s death, the Philadelphia Quaker meeting finally condemned trafficking in slaves.⁴⁶

Although Lay scandalized his fellow Quakers, and his often intemperate language alienated many in the community, he set the stage for John Woolman’s profoundly important, *Some Considerations on the Keeping of Negroes*, published in 1754, and the writings and preaching of Anthony Benezet. In the 1760s there were still many Quaker slaveowners in the colonies, and in Rhode Island many were still actively involved in the African slave trade. But, by the beginning of the American Revolution most Quaker meetings in Pennsylvania (as well as many in New Jersey, New York, and elsewhere) had condemned slavery and many Quakers were committed to manumitting their own slaves. In 1775, Benezet helped organize The Society for the Relief of Free Negroes Unlawfully Held in Bondage—the first antislavery organization in the United States. However, the organization only met four times that year before the Revolution diverted attention away from striving for black freedom to fighting to preserve American liberty.⁴⁷ Ironically, while the Revolutionaries often spoke about liberty, the conflict undermined the new antislavery society because two thirds of the members were Quakers, whose pacifism meant they would not take up arms to secure American liberty and independence from Great Britain. Indeed, Philadelphia’s Quakers were “reviled for their pacifism and Tory leanings during the war” and “suffered the loss of much property when they refused to pay fines for not serving in the

42. *Id.*

43. BENJAMIN LAY, *ALL SLAVE-KEEPERS THAT KEEP THE INNOCENT IN BONDAGE, APOSTATES PRETENDING TO LAY CLAIM TO THE PURE & HOLY CHRISTIAN RELIGION* (1737).

44. DAVIS, *supra* note 41, at 320–26.

45. *Id.*

46. *Id.*

47. GARY B. NASH & JEAN R. SODERLUND, *FREEDOM BY DEGREES: EMANCIPATION IN PENNSYLVANIA AND ITS AFTERMATH* 80 (1991).

militia.”⁴⁸ Thus, their pacifism left them politically vulnerable when the Revolution began and this hurt their antislavery cause.

II. ENDING SLAVERY AND THE REVOLUTION

Even though Benezet’s organization ceased to function, the Revolution put new pressure on supporters of slavery in Pennsylvania. During the Revolution the slave population in Philadelphia dropped from about 1200 to 400, as the dislocations of the war, revolutionary ideology, and the need for soldiers led to formal manumissions and many *de facto* or informal emancipations.⁴⁹ In addition, slaves from the countryside and other states drifted into Philadelphia, where they became free simply because their masters could not find them and no one came to claim them.⁵⁰ The ideology of the Revolution as set out in the Declaration of Independence—“All men are created equal” and are entitled to the rights of “life, liberty, and the pursuit of happiness” —implied that slavery was wrong. The author of this language, Thomas Jefferson, owned at least 150 slaves at the time he drafted the Declaration, and never imagined his flowery language applied to his human property or black people in general.⁵¹ However, throughout the North, patriots argued that slavery violated the spirit of the new nation. Furthermore, thousands of blacks joined the Continental Army, providing manpower for the Revolution while disproving racist assumptions about their worthiness to be free.⁵²

This set the stage for passage of Pennsylvania’s “Act for the Gradual Abolition of Slavery,” on March 1, 1780.⁵³ This was the first law in the world enacted for the purpose of abolishing slavery. Some places had seen slavery disappear over time. Chief Justice Lord Mansfield of the Court of King’s Bench had ruled, in *Somerset v. Stewart*,⁵⁴ that slaves could not be held against their will in Great Britain, but he emphatically asserted that his decision applied *only* to the mother country, and did not affect the status of slavery in any British colonies or the status of slaves transported from Africa to the New World.⁵⁵ The decision did not serve as an emancipation

48. NASH, *supra* note 23, at 71.

49. *Id.* at 65.

50. *Id.* at 65, 66–99.

51. PAUL FINKELMAN, *SLAVERY AND THE FOUNDERS: RACE AND LIBERTY IN THE AGE OF JEFFERSON* 193–280 (3d ed. 2014) [hereinafter *SLAVERY AND THE FOUNDERS*].

52. *See generally* BENJAMIN QUARLES, *THE NEGRO IN THE AMERICAN REVOLUTION* (1961).

53. Act of 1780.

54. *Somerset v. Stewart*, 98 Eng. Rep. 499, 509 (K.B. 1772). For a discussion of this case see FINKELMAN, *supra* note 9; WIECEK, *supra* note 9, at 1760–1848.

55. *Somerset*, 98 Eng. Rep. at 509.

proclamation, *per se* and so some slaves were held in Britain until the 1830s, when Parliament ended all slavery in its American colonies. French courts and local legislatures had reached similar decisions, although the French parliament and crown modified this theory of law to allow French owners to bring their slaves from the New World or Africa for limited periods of time.⁵⁶

The action of Pennsylvania's legislature, however, was emphatically different and ground breaking. Most importantly, it ended slavery in a place where it was legal, unlike *Somerset*, which merely denied masters the right to hold their slaves in a free jurisdiction.⁵⁷ The elaborate 1780 statute provided that the children of all slave women would be born free and that no new slaves could be brought into the state. Thus, as the existing slaves passed away, slavery in Pennsylvania would quite literally die out.

From a modern perspective the law was hardly perfect, or even just. The children of slave women were required to serve the masters of their mothers, until they turned twenty-eight.⁵⁸ This provision was designed to compensate masters for raising the children of their slaves and also educating them in preparation for a life of freedom.⁵⁹ The legislators feared that if the children of slaves were born free, with no indenture, masters would abandon them, perhaps forcing mothers to give up their children at birth and at the same time requiring the state to build orphanages or other facilities to raise these children.⁶⁰ Modern economists argue that this scheme compensated the masters far more than the cost of raising these children and denied the children of slaves the fruits of their labor during some of their most productive years.⁶¹ But the members of the Pennsylvania legislature did not have the benefit of modern economic analysis or data crunching computers. They were trying to solve a problem that no other legislature in the history of the world had ever tried to solve.

56. PEABODY, *supra* note 14.

57. *Somerset*, 98 Eng. Rep. at 509.

58. Act of 1780, § 4.

59. ARTHUR ZILVERSMIT, *THE FIRST EMANCIPATION: THE ABOLITION OF SLAVERY IN THE NORTH* 124-38 (1967). While the legislature was considering the law, citizens complained that allowing slaves to become free at age twenty-one "would provide insufficient compensation to their masters for the expense of raising them." *Id.* at 128. Others, however, believed that the final law that established an indenture until age twenty-eight was unfair to children of slaves. *Id.* at 150.

60. The politics surrounding the passage of this law are discussed at length in ZILVERSMIT, *supra* note 59, at 124-38.

61. Robert W. Fogel & Stanley L. Engerman, *Philanthropy at Bargain Prices*, 3 J. LEGAL STUDIES 377 (1974).

A more pressing critique is that this law, while gradually ending slavery, did not actually free any slaves.⁶² Any child of a slave woman born in Pennsylvania before March 1, 1780 would be a slave for life. One can imagine families in which older children born in 1778, 1779, or early 1780 would be slaves for life, as would their parents, while their younger siblings, born on or after March 1, 1780, would eventually become free. We can even imagine a pair of twins, with first born at 11:50 p.m. on February 29, 1780 (and thus a slave for life) and the second twin born after 12:01 a.m. on March 1, and thus would be free after the child's indenture expired. Such an outcome would seem outrageously unfair. But, the inherent unfairness of these rules was balanced, in the minds of the legislators, by the need to respect private property. It is also likely that a more sweeping law could not have been passed because of opposition from defenders of private property. Slavery, after all, had been legal in Pennsylvania for a century, and to suddenly take slave property from owners seemed to violate a fundamental tenant of the Revolution, which was opposed to arbitrary government and the seizure of private property by the state. During the Revolution many states were willing to confiscate property of loyalists who actively backed the British, but it was quite another matter to take property from patriots or even new citizens who had not joined either side.

The new law was thus an attempt to balance the Revolution's respect for property with the Revolution's aspirations for liberty. However, the law made clear that the long-term goal of the new Pennsylvania society was liberty. Thus, the law began with a remarkable two-paragraph preamble, which explained this novel act and the motivation for it.

First the statute noted that the "arms and tyranny of Great Britain" had been used to oppress the people of Pennsylvania, and that the people of the state had "a grateful sense of the manifold blessings" of being delivered "from the state of thralldom, to which we ourselves were tyrannically doomed"⁶³ Thus, the representatives of the new state declared they could now "rejoice that it is in our power to extend a portion of freedom to others."⁶⁴ In essence, the white revolutionaries of Pennsylvania recognized that the British government was trying to enslave them, at least politically, and if that was wrong, then it was equally wrong for them to enslave people directly.

62. For comments on this point see ZILVERSMIT, *supra* note 59, at 130.

63. Act of 1780, § 1.

64. *Id.*

Having established the moral obligation to end slavery, the legislature turned to the vexing question of race in American society. The response here reflected a mixture of the state's Quaker heritage and the enlightenment science and deism of some of its leading citizens, including Benjamin Franklin, Benjamin Rush, and one of the state's newest immigrants, the radical pamphleteer Tom Paine. Thus the preamble continued:

It is not for us to enquire why, in the creation of mankind, the inhabitants of the several parts of the earth were distinguished by a difference in feature or complexion. It is sufficient to know, that all are the work of an Almighty hand. We find, in the distribution of the human species, that the most fertile as well as the most barren parts of the earth are inhabited by men of complexions different from ours, and from each other; from whence we may reasonably, as well as religiously, infer, that He, who placed them in their various situations, hath extended equally his care and protection to all, and that it becometh not us to counteract his mercies.⁶⁵

The legislature then used this wartime legislation to point out that emancipation was only possible because of the Revolution and the separation from England:

We esteem it a peculiar blessing granted to us, that we are enabled this day to add one more step to universal civilization, by removing, as much as possible, the sorrows of those, who have lived in undeserved bondage, and from which, by the assumed authority of the Kings of Great-Britain, no effectual, legal relief could be obtained.⁶⁶

This was not an attempt, like Thomas Jefferson's disingenuous paragraph in a draft of the Declaration of Independence,⁶⁷ to blame the whole problem of slavery and the slave trade on King George. Instead, this was a correct observation that under British rule emancipation was not possible without the King's consent, which was unlikely to be forthcoming.

65. *Id.*

66. *Id.*

67. FINKELMAN, SLAVERY AND THE FOUNDERS, *supra* note 51, at 203–05. The Continental Congress had wisely deleted Jefferson's self-serving and utterly dishonest language from the Declaration. *Id.*

The second preamble, Section II of the new law, focused on one of the greatest injustices of slavery—the destruction of black families. The lawmakers noted that bondage:

[N]ot only deprived [slaves] of the common blessings that they were by nature entitled to, but has cast them into the deepest afflictions, by an unnatural separation and sale of husband and wife from each other and from their children, an injury, the greatness of which can only be conceived by supposing that we were in the same unhappy case.⁶⁸

This was the first time that any government in the western world asked whites to see blacks as people just like themselves. Essentially, the Pennsylvania legislature argued that whites could only understand the injustice of slavery if they were willing to imagine what it would be like to walk in the shoes of the slave—and have their children or their spouse arbitrarily taken from them. This was also the first time in the western world that a legislature officially took the position that the law should treat all people with some measure of equality. Thus “in grateful commemoration of our own happy deliverance from that state of unconditional submission, to which we were doomed by the tyranny of Britain,”⁶⁹ Pennsylvania took steps to formally and legally end slavery.

The rest of the law set out how slavery would be dismantled. As already noted, the children of all slave women would be born free, subject to an indenture.⁷⁰ After the indenture expired, these now fully free people would be given “freedom dues,” just as free white indentured servants were given at the end of their service.⁷¹ The law required that every slaveowner register his or her slaves with the county clerk by November 1, 1780, and pay a two dollar registration fee for each slave,⁷² which was a considerable sum at the time. Any slaves not properly registered in a timely manner would be free.⁷³ Masters of blacks born to their slaves would be held liable to the Overseers of the Poor if these free blacks were, in the future, unable to support themselves, *unless* the master freed the servants before the end of their indenture.⁷⁴ This provision created a great

68. Act of 1780, § 2.

69. *Id.*

70. *Id.*

71. *Id.* § 4.

72. *Id.* § 5.

73. For example, in *Commonwealth, ex rel. Jesse v. Craig*, Jesse (a black man) was released from bondage because his owner had failed to register him as servant until age twenty-eight with six months of his birth. 1 Serg. & Rawle 23 (Pa. 1814).

74. Act of 1780, § 6.

incentive for masters to educate the children of their slaves, and prepare them for life after bondage. In a remarkable innovation—unheard of in any other slave society—the law provided that slaves charged with crimes “shall be enquired of, adjudged, corrected and punished, in like manner as the offences and crimes of the other inhabitants of this state are and shall be enquired of,” with the sole caveat that slaves could not testify against free people.⁷⁵ This provision meant that free blacks and indentured blacks could testify against whites. While no Pennsylvanian could import any new slaves, the legislation allowed visiting masters to bring slaves into the state for up to six months, after which they would be free.⁷⁶ In addition, recognizing that Philadelphia was the national capital, the law allowed “delegates in [C]ongress from the other American states, foreign ministers and consuls” to keep their “domestic slaves attending upon” them for an indefinite period of time.⁷⁷

This was a remarkable law that would be copied in part by most of the other northern states, when they passed their own gradual abolition acts, although the subsequent state laws reduced the indenture periods for the children of slave women. In 1782, the legislature passed a supplementary act giving residents of two western counties extra time to register their slaves, because in 1780, it was unclear if they were actually living in Pennsylvania or Virginia.⁷⁸ In 1788, a new law closed various loopholes in the original gradual abolition Act of 1780.⁷⁹ This law required registration of the children of slave women within six months after their birth, with a provision for their freedom if they were not properly registered.⁸⁰ The law prohibited masters from selling spouses away from each other or removing pregnant slaves to slave states so their children would

75. *Id.* § 7.

76. *Id.* § 10.

77. *Id.* At the time there was no national executive—just a Congress which functioned as both the executive branch and the legislative branch of the nation. Nor were there any national judges. Thus, after 1788, it was not clear if slaveholding executive and judicial branch officers—such as George Washington, Thomas Jefferson, Edmund Randolph, or Justices John Rutledge, James Iredell or Bushrod Washington—could keep their slaves in Philadelphia. No one ever publicly challenged their right to do so, and thus no court was ever asked to decide the issue. George Washington prudently used free servants while serving as President and living in Philadelphia. Jefferson kept some slaves in Philadelphia, including his cook James Hemings, whom he had previously taken to Paris. In 1793, he signed an agreement to free James, probably because members of the PAS confronted him with the fact that James was in fact free under Pennsylvania law, as well as French law. This is discussed in FINKELMAN, *SLAVERY AND THE FOUNDERS*, *supra* note 51 at 218–29, 234 n.107.

78. An Act to Address Certain Grievances Within the Counties of Westmoreland and Washington, Act of Apr. 13, 1782.

79. An Act to Explain and Amend An Act, Entitled ‘An Act for the Gradual Abolition of Slavery,’ Act of Mar. 29, 1788.

80. *Id.*

be born as slaves.⁸¹ The law also strictly prohibited Pennsylvanians from participating in the African Slave Trade.⁸²

III. SLAVERY BEFORE THE PENNSYLVANIA COURTS

In the wake of the Revolution and the passage of the 1780 Act, opponents of slavery rejuvenated Benezet's virtually defunct organization in 1784, now calling it the Pennsylvania Society for Promoting the Abolition of Slavery, and for the Relief of Free Negroes Unlawfully Held in Bondage. In April 1787, the society was reorganized as The Pennsylvania Society for Promoting the Abolition of Slavery, and for the Relief of Free Negroes Unlawfully Held in Bondage, and for Improving the Condition of the African Race. However, it was almost always called the Pennsylvania Abolition Society, or the PAS. The new leadership represented the political, social, and economic elite of Philadelphia, and included Dr. Benjamin Rush, Hilary Baker (soon to be the mayor of Philadelphia), James Pemberton, Jonathan Penrose, Thomas Paine, Richard Peters, and Tenche Coxe.⁸³ The crowning jewel of this rejuvenated leadership was the new president of the PAS, Benjamin Franklin, who was the most famous American in the world and the living embodiment of the ideals of the Revolution. The members, like the new leaders, were a glittering group of merchants, lawyers, entrepreneurs, and civic and political leaders. The newly rejuvenated PAS worked hard to protect the freedom of blacks in the state and to implement new laws passed to gradually end slavery in the state. The PAS became the first civil rights organization in the nation to use the courts as a vehicle for implementing social change. The PAS was able to operate in this manner because during and after the Revolution the legislature had passed three laws, in 1780, 1782, and 1788, that were designed to dismantle and eventually end slavery in the Commonwealth. Not surprisingly, the PAS quickly used the laws—and its many attorney members—to fight against slavery and for the rights of free blacks. The PAS—led by the most important men in Pennsylvania—became the model for future public interest litigation based organizations, such as the NAACP Legal Defense and Education Fund, the Anti-Defamation League (ADL), and the American Civil Liberties Union (ACLU). The PAS brought numerous cases to the Pennsylvania courts, which led the state supreme court to interpret and apply the laws of 1780, 1782, and 1788.

81. *Id.*

82. *Id.*

83. NASH & SODERLUND, *supra* note 47, at 124–25.

Individual blacks also brought cases, finding counsel not necessarily affiliated with the PAS. In these cases, the Court tended to follow a strict adherence to the statutes, although in some cases the Court might have been more creative in furthering liberty.

IV. REGISTRATION CASES

The first case to interpret the new laws was *Respublica v. Negro Betsey*, which involved three children of a slave mother, all of whom were born before the 1780 Act.⁸⁴ As such, they could have been held as slaves for life, but their owner neglected to register the three children or their parents.⁸⁵ The parents had already won their freedom, and the children now asked to be reunited “under the care . . . of those parents.”⁸⁶

Chief Justice Thomas McKean, who would soon become an ally of Jefferson and his proslavery Democratic-Republican Party, would have condemned the children to bondage until age twenty-eight.⁸⁷ In his seriatim opinion McKean argued that the 1780 Act did not specifically declare that unregistered children of slaves were unconditionally free.⁸⁸ He conceded that the children could not be slaves for life because they were never properly registered, but argued that even though they were born before 1780, the children should be treated as indentured servants and have to serve their master until age twenty-eight.⁸⁹ In what can only be seen as a racist analysis (even for the period), McKean argued that child Betsey would be worse off if she were free because, “[w]ere she discharged from her master, she would be incapable to take care of herself, and her parents are unable to educate her.”⁹⁰ Showing no appreciation for the family interests of blacks or the horrors of slavery, the Chief Justice of Pennsylvania concluded:

She cannot suffer so much by living with a good master, as being with poor and ignorant parents. By a contrary judgment, she, as I have just hinted, would be little benefited, and her

84. 1 Dall. 469 (Pa. 1789).

85. *Id.*

86. *Id.*

87. *Id.* at 471.

88. *Id.*

89. *Id.*

90. *Id.*

master, who hitherto has derived no advantage from her services, and has been subjected to considerable expen[s]es for her food, clothing, and lodging would be a great sufferer.⁹¹

Compensating the master for his expenses was far more important to the Chief Justice of Pennsylvania than the liberty of a young girl, her right to be raised by her parents, or her parents' right to raise their daughter.

Chief Justice McKean's tortured argument gained no support from the rest of the Court. Justice William A. Atlee succinctly noted that the 1780 Act provided that "no negro or mulatto then within the State, shall, from and after the said first day of November, be deemed a slave, or servant for life . . . unless his, or her name, shall be entered as aforesaid" with the county clerk.⁹² This had not been done, and so the plaintiffs could not be slaves. Atlee further noted that the law clearly stated "that no man or woman of any nation or colour, except the negroes and mulatoes, who shall be registered as aforesaid, shall be deemed, adjudged, or holden, within the territories of this Commonwealth, as slaves, or servants for life; but as freemen and free-women."⁹³ Atlee also focused on the family issues, pointing out that the preamble to the 1780 Act had noted that "among the unhappy circumstances formerly attending these people" was the "unnatural separation and sale of husband and wife, from each other, and from their children."⁹⁴ Atlee concluded that:

[I]n the present case, it is attempted to separate these children from their parents, by a construction which appears to me to clash with the intention of the makers of the law; while such a construction as will secure freedom to them, and restore them to their parents, will I think, agree best with the design of the Legislature.⁹⁵

The other Justices agreed with Atlee in separate opinions, and the three black children gained their liberty and the right to live with their parents. The importance of this case—the first to interpret the 1780 law—is illustrated by its length. The report of the case covered eleven pages of the first volume of Dallas's reports.⁹⁶

91. *Id.* at 471–72.

92. *Id.* at 472–73.

93. *Id.*

94. *Id.* at 474.

95. *Id.*

96. *See id.* at 469–79.

Only two cases, at twelve pages each, were longer, and the vast majority of the cases reported in that volume were dispatched with fewer than three full pages.

After this case the Court would hear numerous other registration cases, almost always reading the statute strictly, which usually favored black plaintiffs. In 1794, for example, the Court released “negro Robert” because he had not been properly registered in 1780.⁹⁷ Similarly, Aberilla Blackmore lost her slaves in 1797, because they had been brought into the state too late to be registered under the supplemental law of 1782 for slaves owned by people in Westmoreland County.⁹⁸ In 1780, there was no clear boundary between Virginia and Pennsylvania in the southwest corner of Pennsylvania, in what was then Westmoreland County. In 1781, part of Westmoreland became Washington County.⁹⁹ Many slaveowners in this area did not comply with the 1780 law because they believed they were actually living in Virginia. In 1782 the legislature passed a special act allowing masters of slaves who had lived in the area before September 23, 1780 to register their slaves.¹⁰⁰ The legislature chose that date because that was when Pennsylvania agreed to accept the boundary, even though the border was not finalized until the following year. The Blackmores had bought land in Westmoreland County in March 1780, with the intention to move with their slaves.¹⁰¹ They finally moved there with their slaves in December 1780.¹⁰² After the passage of the 1782 supplemental law, they immediately complied with all the registration requirements.¹⁰³ But this was insufficient to preserve their claim to these slaves, because as Justice Jasper Yeates explained, Blackmore’s slaves had not been living in Pennsylvania on September 23, 1780, which is what the statute required.¹⁰⁴ The fact that Blackmore owned land in the state before September 23, had no effect on the status of the people she claimed as slaves, but were in fact now free.¹⁰⁵ Other slaves in these two counties also gained their freedom from faulty registrations,¹⁰⁶ but properly registered slaves, who had

97. *Respublica v. Gaoler*, 1 Yeates 368 (Pa. 1794).

98. *Respublica v. Blackmore*, 2 Yeates 234 (Pa. 1797).

99. Today this area includes Westmoreland, Washington, Greene, and Fayette Counties.

100. An Act to Address Certain Grievances Within the Counties of Westmoreland and Washington, Act of Apr. 13, 1782.

101. *Blackmore*, 2 Yeates at 234.

102. *Id.*

103. *Id.*

104. *Id.*

105. *Id.*

106. *See Lucy (a negro woman) v. Pumfrey*, 1 Add. 380 (Pa. 1799); *John (a negro man) v. Dawson*, 2 Yeates 449 (Pa. 1799).

been living there before September 23, 1780, remained in bondage.¹⁰⁷

The Court was usually strict about interpreting the registration requirements, because otherwise, “fraud and perjury” by masters would “make slaves of Negroes really free.”¹⁰⁸ Thus, the Court held that only an owner could register slaves.¹⁰⁹ But the Court refused to release slaves for meaningless technicalities. Thus, Hannah did not gain her freedom because her master had registered her as “a slave” but did not write on the registration form that she was a “slave for life.”¹¹⁰ The Court ruled that “slave . . . signifies a perpetual servant.”¹¹¹ In another case, Chief Justice William Tilghman acknowledged that “freedom is to be favoured, but we have no right to favour freedom at the expense of property.”¹¹² Thus he reversed a lower court’s decision to free a slave, because the Chief Justice believed the registration had been made in a timely manner.¹¹³ This was a close case, and a different appellate judge might have interpreted all ambiguous facts in favor of liberty, as the trial judge had. But, Tilghman, who was himself a slaveowner, clearly sympathized with his fellow master. In this case, the Chief Justice declared that the state should purchase all remaining slaves and free them, which would have ended the issue (and of course enriched him).¹¹⁴ This opinion suggests that Tilghman’s status as a slaveowner—in a state where slavery was dying and slaveholding was increasingly rare—affected his jurisprudence.

But in other cases where important requirements of the registration procedures were not fulfilled, Tilghman and the other justices ordered blacks released from their bondage. The children of slaves had to be registered within six months of their birth. The reason was clear. If masters could wait longer they could lie about when slave women gave birth and thus squeeze a few more months or years of labor out of a slave. Thus, Jesse gained his freedom when the Court concluded that his master had not registered him on time.¹¹⁵

107. *Giles (a negro man) v. Meeks*, 1 Add. 384 (Pa. 1799); *Campbell v. Wallace*, 3 Yeates 572 (Pa. 1803).

108. *Lucy (a negro woman) v. Pumfrey* 1 Add. 380, 381 (Pa. 1799).

109. *Elson (a negro) v. M’Colloch*, 4 Yeates 115 (Pa. 1804).

110. *Respublica v. Findlay*, 3 Yeates 261 (Pa. 1801).

111. *Id.*

112. *Marchand v. Negro Peggy*, 2 Serg. & Rawle 18, 19 (Pa. 1815).

113. *Id.*

114. *Id.*

115. *Commonwealth ex rel. Jesse (a black man) v. Craig*, 1 Serg. & Rawle 23 (Pa. 1814).

Perhaps the most bizarre case involving the technical requirements of registration was *Wilson v. Belinda*, decided in 1817.¹¹⁶ In 1780, when Belinda was less than two years old, her owner registered her and seven other slaves, with authorities in Cumberland County, as required by the Gradual Abolition Act.¹¹⁷ Her owner, John Montgomery, provided most of the registration information required by the law, but failed to indicate his occupation, the county of his residence, and the gender of Belinda and two other slaves.¹¹⁸ A trial court held that Belinda was free because she was not properly registered.¹¹⁹ Chief Justice William Tilghman, speaking for a unanimous Court, rejected Belinda's arguments that she was free because Montgomery failed to note his occupation.¹²⁰ The slaveholding Tilghman explained that Montgomery might not have actually had an occupation, although this seems unlikely.¹²¹ Tilghman also refused to free Belinda because on his registration form Montgomery had failed to indicate his county of residence.¹²² Tilghman asserted that the master actually lived in the county where he registered Belinda, and for the Chief Justice this was sufficient.¹²³ This sort of flexible application of the law could have allowed for the fraudulent enslavement of people who were either free from birth or illegally imported into the state. But, Tilghman seemed to ignore these possibilities.

Despite his flexible application of these requirements of the 1780 law, Tilghman was persuaded that the failure to indicate Belinda's gender required that she be set free. The purpose of the registration was to prevent fraud and to protect the liberty of black people who might otherwise be illegally claimed as slaves. Wilson, who now claimed to own Belinda, argued that "*the sex is implied in the name,*

116. *Wilson v. Belinda*, 3 Serg. & Rawle 396 (Pa. 1817).

117. *Id.* at 398.

118. *Id.*

119. *Id.* at 396.

120. *Id.* at 399.

121. *Id.*

122. *Id.*

123. However, in other cases the Court was more concerned about the owner's occupation being listed on the registration. See *Commonwealth v. Barker*, 11 Serg. & Rawle 360, 361 (Pa. 1824) (the court freed a young man named Frank because the owner, Baker, had failed to put down his occupation on the registration form. Baker claimed he had "no occupation," but the Court held "it was incumbent on the master to remove all doubt," and Baker's "evidence" was not "sufficient for the purpose" because it appeared from other evidence that he "was a partner of a manufacturing company."); *Commonwealth ex rel. Cribs v. Vance*, 15 Serg. & Rawle 36, 38 (Pa. 1825) (Justice Duncan upheld the registration of Pompey Cribs, as a servant for twenty eight years. The court held that "Esq." was sufficient to identify the owner who at the time was a sitting judge on a county court. Two of the five members of the Court dissented in this case, and would have freed Cribs. In another (unreported) case, "yeoman was a sufficient description" of the owner's occupation.).

and therefore there was no occasion to be more explicit.”¹²⁴ But Tilghman rejected this claim, noting that “[i]t may be very true, that every one who hears the name of *Belinda*, would suppose at once, that the person was a female. The name, however, is not a certain criterion of sex; for men are sometimes called by the names generally given to women, and *vice versa*.”¹²⁵ Tilghman further asserted that the statute required the sex of the slave to be noted in the registration, and the failure to do so was sufficient to invalidate the registration.¹²⁶ It is not clear why Tilghman thought that a failure to state the sex of the slave was enough to invalidate the registration, but that a failure to state the owner’s home county or his profession or employment was not sufficient to invalidate the registration.

Justice John Bannister Gibson emphatically agreed with the outcome, suggesting that without the sex of the slaves, it would be possible for a master to commit fraud and keep a free person in servitude: “We cannot recognize the name *Belinda* as being exclusively that of a female, or as sufficiently indicating a particular sex; for the act requires the age and sex to be ‘*severally* and *respectively* set forth.’”¹²⁷

V. THE SIX MONTHS LAW AND FUGITIVE SLAVES

When Pennsylvania passed its 1780 law, slavery was legal in every one of the thirteen new states. Philadelphia was America’s largest city and the capital of the new nation. Thus, the legislature accommodated visitors who brought slaves with them. The law did this in two ways. First, it allowed visitors to bring a slave into Pennsylvania for up to six months.¹²⁸ Second, the law gave members of Congress, diplomats, and other government officers the right to keep slaves in the state for an unlimited period.¹²⁹ The 1788 amendment to the law provided that slaves would be immediately free if their master “intended” to permanently reside in Pennsylvania, and that they were free, even if the master removed them before the six months transit period had expired.¹³⁰

124. *Wilson*, 3 Serg. & Rawle at 398.

125. *Id.* Tilghman reached this result without knowing about the future popular Johnny Cash song, “A Boy Named Sue.” JOHNNY CASH, A BOY NAMED SUE (1969).

126. *Wilson*, 3 Serg. & Rawle at 398.

127. *Id.* at 401–02.

128. Act of 1780, § 10.

129. *Id.*

130. An Act to Explain and Amend An Act, Entitled “An Act for the Gradual Abolition of Slavery,” Act of Mar. 29, 1788.

A number of slaves gained their freedom through the six months provision of the 1780 law.¹³¹ The PAS was particularly vigilant in trying to free slaves whose masters had overstayed their welcome. Both the court of common pleas and the Pennsylvania Supreme Court heard cases on what constituted a six months stay.

In 1794, the Pennsylvania Supreme Court ruled against the claim of two slaves owned by Madame Chambrè, a refugee from the French colony of Santo Domingo, Haiti.¹³² Chambrè lived in Philadelphia for five months and three weeks, and then moved with her slaves to New Jersey, where slavery was still completely legal.¹³³ The slaves then ran back to Philadelphia, and when captured, lawyers for the PAS argued they were free because Chambrè had left the state only “to avoid the operation of the [Gradual Abolition] [A]ct.”¹³⁴ The implication here was that she “intended” to move to Pennsylvania and thus the slaves became free under the 1788 law because of her intention. However, the lawyers for the slaves presented “no proof . . . that she had ever intended to settle in Pennsylvania.”¹³⁵ The lawyers for the PAS also tried to argue that the slaves had been there for six lunar months, and thus were free.¹³⁶ The PAS lawyers knew this claim was unusual, but argued “that, even if the computation by calendar months were more usual at common law, a different construction would be adopted in favour of liberty, and to prevent an evasion of the most honourable statute in the Pennsylvania code.”¹³⁷ This was a plea for the Court to adopt any construction of the law that would favor liberty. Most of the members of the Court in the 1790s were reasonably sympathetic to these sentiments, but they were unimpressed by the argument. When Chambrè’s lawyer tried to speak to this issue, the Court stopped him, declaring that the Justices “were, unanimously, of opinion, that the legislature intended calendar months” and the blacks were remanded to Chambrè.¹³⁸

Although Chambrè’s slaves remained in bondage, the logic of this case worked to the benefit of another slave, whose master brought his slaves back and forth from Trenton in order to avoid keeping him in the state for six continuous months. The court of common

131. For an extensive discussion of this law and the jurisprudence surrounding it, see FINKELMAN, *supra* note 9, at 46–63.

132. *Commonwealth v. Chambre*, 4 Dall. 143 (Pa. 1794).

133. *Id.*

134. *Id.*

135. *Id.*

136. *Id.* at 143–44.

137. *Id.* at 144.

138. *Id.*

pleas found that this proved the owner's intention to reside in Pennsylvania and the slave went free.¹³⁹

The last case on this issue involved a slave named Charity Butler, who as a young child was taken in and out of Pennsylvania a number of times, over a two-year period, each visit only lasting a short time.¹⁴⁰ Many years later, Butler and her children escaped from Maryland and claimed to be free because as a child Butler had gained her freedom under the six month law.¹⁴¹ In ruling against Butler, the Pennsylvania Supreme Court accepted a jury's verdict that Butler was never in the state for six consecutive months. The Court said that it would have reached a different result if there had been a "fraudulent shuffling backward and forwards in *Pennsylvania*, and then into *Maryland*, and then back to *Pennsylvania*."¹⁴² The court of common pleas had in fact done this in *Commonwealth v. Smyth*.¹⁴³ But here there was no evidence of a fraudulent moving of Charity back and forth when she was a child, and so Butler and her children were returned to Maryland.¹⁴⁴ In his opinion, Justice Thomas Duncan noted that the Keystone state had resorts at York and Bedford, and southerners often summered at these places.¹⁴⁵ If the six months were cumulative, then these visitors would not be able return each year with their servants.¹⁴⁶

Both the Pennsylvania Supreme Court and the U.S. Circuit Court heard cases involving Congressmen. The federal case was a collateral attack on an abolitionist after a southern master, Pierce Butler, lost his slave because he kept the slave in Philadelphia longer than six months.¹⁴⁷ Butler was no ordinary visitor to Philadelphia. He was a signer of the Constitution and then served as a U.S. Senator from South Carolina. From 1787 to 1804, he spent most of his time in Philadelphia and kept his slave, Ben, there.¹⁴⁸ During most of this period he was in the Constitutional Convention or the Congress.¹⁴⁹ But, for a two-year period, when Butler was not a member of Congress, he lived in Philadelphia with Ben in his house.¹⁵⁰ With the help of the Quaker abolitionist, Isaac T. Parker, and the PAS,

139. *Commonwealth v. Smyth*, 1 Browne 113 (Pa. 1809).

140. *Butler v. Delaplaine*, 7 Serg. & Rawle 378 (Pa. 1821).

141. *Id.* at 378–80.

142. *Id.* at 379–80.

143. *Smyth*, 1 Browne at 113.

144. *Butler*, 7 Serg. & Rawle at 379–80.

145. *Id.* at 384.

146. *Id.* at 383–85.

147. *Butler v. Hopper*, 4 Fed. Cas. 904 (1806).

148. *Id.*

149. *Id.*

150. *Id.*

Ben gained his freedom from a Pennsylvania court under the six months law.¹⁵¹ Butler then sued Hopper in federal court, where Justice Bushrod Washington (himself a slaveowner and a nephew of George Washington), while riding circuit, ruled that when Butler was not in Congress he had no right to keep a slave in the state more than six months.¹⁵² Thus, Ben remained free and Butler lost his civil suit against Hopper.

A decade later, a case involving an actual member of Congress reached the Court. By then Philadelphia was no longer the national capital, and Congress no longer met there. Thus, when Congressman Langdon Cheves of South Carolina remained in the state with his slave, Lewis, for more than six months, lawyers for the PAS brought suit.¹⁵³ The PAS attorneys representing Lewis argued that the exemption for members of Congress was no longer applicable because Philadelphia was no longer the nation's seat of government.¹⁵⁴ The Court, however, disagreed. The statute was clear, and represented an effort by Pennsylvania to get along with the slave states, and the exemption for members of Congress existed even if Congress no longer met in Philadelphia.¹⁵⁵ This argument was particularly compelling because Representative Cheves had fled Washington when the British army invaded the city during the War of 1812, and remained in Philadelphia because it was virtually impossible for him to return home.¹⁵⁶ Thus, he kept his slave.¹⁵⁷

The interstate comity expressed in favor of Representative Cheves extended to fugitive slaves as well. In 1819, for example, the Court quashed a writ of habeas corpus designed to release a fugitive slave from jail.¹⁵⁸ Chief Justice Tilghman held that he was obligated to defer to the Federal Fugitive Slave Law of 1793, and not interfere with the return of those slaves who escaped from the South.¹⁵⁹ However, the Court also supported the state's attempt to protect its free blacks from kidnapping. In 1826, Pennsylvania required that no one could remove an alleged fugitive slave from the

151. LYDIA MARIA CHILD, ISAAC T. HOPPER: A TRUE LIFE 99 (1853).

152. *Id.* at 905.

153. *Commonwealth ex rel. negro Lewis v. Holloway*, 6 Binn. 213 (Pa. 1814).

154. *Id.* at 214–15.

155. *Id.* at 215.

156. *Id.* at 215–16, 218.

157. *Id.*

158. *Wight alias Hall v. Duncan*, 5 Serg. & Rawle 62 (Pa. 1819).

159. *Id.*

state without first receiving a certificate of removal from a state judge.¹⁶⁰

In 1837, four Maryland men, including Edward Prigg, brought Margaret Morgan, her husband Jerry Morgan, and their children, before Thomas Henderson, a York County justice of the peace, to obtain a certificate of removal under the law.¹⁶¹ Henderson refused to issue the certificate because the facts offered by the Morgans led him to conclude that they were not in fact fugitive slaves.¹⁶² Jerry Morgan, it turned out, had been born a free man in Pennsylvania, so even the slave catchers admitted they could not return him to Maryland.¹⁶³ Margaret's parents had been slaves, but their master informally freed them shortly before she was born, and Margaret had never been claimed as a slave, but had lived openly as a free person in Maryland.¹⁶⁴ Thus the judge believed she was actually free under Maryland law, as were her children. Furthermore, at least one (and maybe more) of Margaret Morgan's children had been born in Pennsylvania and all children born in Pennsylvania, even those of slave mothers, were free at birth under the 1780 Act.¹⁶⁵ Prigg and his cohorts then took Margaret Morgan and her children (but not Jerry Morgan) to Maryland in violation of the 1826 law.¹⁶⁶ Eventually Margaret Morgan and her children were sold south.¹⁶⁷

A grand jury in York County then indicted Prigg and the three other Maryland men for kidnapping.¹⁶⁸ After extensive negotiations, authorities in Maryland agreed to cooperate with Pennsylvania's extradition requisition for Prigg (but not the other three men), so he could be tried for kidnapping. A jury in York County convicted Prigg and the Pennsylvania Supreme Court affirmed his conviction without opinion in 1841.¹⁶⁹ A year later the U.S. Supreme Court reversed this outcome.¹⁷⁰ In an intensely proslavery decision, Jus-

160. An Act to give effect to the provisions of the constitution of the United States relative to fugitives from labor, for the protection of free people of color, and to prevent Kidnapping, Act of Mar. 25, 1826.

161. *Prigg v. Pennsylvania*, 41 U.S. (16 Pet.) 539 (1842); see also Finkelman, *Story Telling*, *supra* note 15, at 247–94.

162. *Prigg*, 41 U.S. (16 Pet.) at 539; see also Finkelman, *Story Telling*, *supra* note 15, at 247–94.

163. See Finkelman, *Story Telling*, *supra* note 15, at 276.

164. *Id.* In fact, the 1830 census for Harford County, Maryland, listed Margaret Morgan as a free woman of color.

165. *Prigg*, 41 U.S. (16 Pet.) at 539.

166. *Id.*

167. See Finkelman, *Story Telling*, *supra* note 15, at 276.

168. *Prigg*, 41 U.S. (16 Pet.) at 539.

169. *Id.* at 609.

170. *Id.* at 558–59.

tice Joseph Story held that the Pennsylvania Act of 1826 was unconstitutional and that the states had no power to interfere in the return of fugitive slaves, even to prevent the kidnapping of their own citizens.¹⁷¹

After *Prigg*, the Pennsylvania courts were less supportive of the enforcement of the federal fugitive slave laws of 1793 and 1850. This was in part because of the rise of antislavery politics in the Keystone state, but it was also a reaction to Story's overwhelmingly proslavery decision, which made it impossible for the free states to protect their citizens from southern kidnappers. Thus, in 1848 the Court released thirteen abolitionists from prison, rejecting the three-year sentence at hard labor or solitary confinement for rioting, after they helped rescue a fugitive slave.¹⁷² The Court offered a short history of the abuses of the criminal justice system in England, including a denunciation of the Star Chamber and "burning in the hand, cutting off the ears, placing in the pillory, whipping, or imprisonment for life."¹⁷³ The Court declared that all such punishments as well as "the pillory, tumbril, and ducking-stool" belonged to a "barbarous age" and were no longer acceptable in Pennsylvania.¹⁷⁴ The sentences of these opponents of slavery smacked of the same sort of barbarism and the Court would have none of it. All the defendants were released after, but only after they had spent about nine months in the state penitentiary.¹⁷⁵

However, when the abolitionist, Passmore Williamson, was incarcerated by federal authorities for allegedly helping a slave escape, the Pennsylvania Supreme Court refused to issue a writ of habeas corpus.¹⁷⁶ The opinion was written by Justice Jeremiah Black, a proslavery Democrat who had no sympathy at all for abolitionists.¹⁷⁷ That the Court declined to try to release an abolitionist from federal custody was not surprising, as courts in Massachusetts and Ohio acted in a similar fashion. But the Williamson case in fact offered the opportunity for the Court to take a more forceful stand against slavery. In 1847, Pennsylvania repealed its "six months law," which meant that slaves brought to Pennsylvania by their masters were now instantly free. Williamson had not in fact helped a slave who escaped into Pennsylvania, and thus he should not have

171. See generally Finkelman, *Story Telling*, *supra* note 15.

172. *Clellans v. Commonwealth*, 8 Pa. 223, 226-27 (1848).

173. *Id.* at 227.

174. *Id.* at 228.

175. *Id.* at 229.

176. *Passmore Williamson's Case*, 26 Pa. 9 (1855).

177. *Id.* at 14.

been prosecuted by the federal government for violating the Fugitive Slave Law of 1793. Instead, Williamson had helped a slave leave her master *after* the master had brought her to Philadelphia.¹⁷⁸ Thus, this was not in fact a fugitive slave case, and the federal courts should have had no jurisdiction over the issue. Williamson's case offered an opportunity for the Pennsylvania Supreme Court to affirm Pennsylvania's right to prevent slaves from being brought into the state. But the doughface¹⁷⁹ Justice Black had no interest in the rights or liberty of slaves, free blacks, or abolitionists, and so he refused to assert Pennsylvania's interest in liberty in this case.

VI. A COURT CAUGHT BETWEEN SLAVERY AND FREEDOM

The Williamson case illustrates the complexity of slavery and freedom in the state. In 1780, Pennsylvania was on the cutting edge of ending slavery in the North, even as the state tried to balance the issues of slavery and freedom, and property and liberty in the new nation. By the 1850s, Pennsylvania embodied the tensions in the North between the emerging anti-slavery Republican Party and the proslavery Democratic Party, symbolized by Pennsylvania's only successful presidential candidate, a proslavery Democrat, James Buchanan.¹⁸⁰

The state no longer tolerated slavery and after 1847 all people in the state were free and visitors were no longer allowed to bring slaves into the state. But, despite a clear statute that freed any slave voluntarily brought into the state, the Pennsylvania Supreme Court, in the case of *Passmore Williamson*, would not lift a finger to challenge the proslavery arrogance of the administration of President Franklin Pierce.¹⁸¹ This contrasts with New York, where the courts and the state government fought hard to protect the right of the state to emancipate slaves brought to New York by their masters.¹⁸² In 1860, the New York Court of Appeals emphatically held

178. *Id.* at 10.

179. A Doughface was a "northern man with southern principles." This term of derision was used against northern politicians who sided with the South on issues of slavery. It was said that their faces were made of bread dough, and southerners could shape them into anything they wanted.

180. For a superb collection of essays on Buchanan, see JOHN W. QUIST & MICHAEL J. BIRKNER, *JAMES BUCHANAN AND THE COMING OF THE CIVIL WAR* (2013). For a discussion of Buchanan's proslavery views, see Paul Finkelman, *James Buchanan, Dred Scott, and the Whisper of Conspiracy*, in *id.* at 20–45; see also JEAN H. BAKER, *JAMES BUCHANAN* (2004).

181. *Passmore*, 26 Pa. at 9.

182. See *Lemmon v. The People*, 20 N.Y. 562 (1860); FINKELMAN, *SLAVERY AND THE FOUNDERS*, *supra* note 51, at 284–312.

that any slave brought into the state was immediately free.¹⁸³ In Pennsylvania, however, Justice Black had no interest in siding with freedom, even when the statutes were clear and not in doubt, and the federal government had no jurisdiction because the matter did not involve a slave who had escaped *into* Pennsylvania. The Pennsylvanian, James Buchanan, would reward Black for his proslavery loyalty by making him the Attorney General of the United States and then his Secretary of State. The decision in *Williamson* also contrasts with the actions of the state courts in *Prigg* and a half-century earlier, when the slave of Pierce Butler gained his freedom in the state.

The Court over the years also vacillated in its support of the rights of free blacks. Under the state's first two constitutions free blacks were allowed to vote. But in *Hobbs v. Fogg*, in 1837, the Pennsylvania Supreme Court upheld the right of an election official to refuse to allow a black to vote, even though there had not been any changes to the Pennsylvania Constitution.¹⁸⁴ This helped set the stage for the new state Constitution of 1838, which limited the vote to "white freemen."¹⁸⁵ This change was a result of the political power of Jacksonian Democrats, who expanded access to the ballot for white men, while taking voting rights away from blacks. At this time, Jeremiah Black was a young attorney and an ardent Jacksonian. James Buchanan was the leader of the Jacksonians in Pennsylvania. Thus, the connection between the Court's failure to protect black freedom in the 1850s was tied to the long standing opposition to black rights in the Pennsylvania Democratic Party.

In 1853, the Court considered the relationship between land ownership, race, and political rights. The case, *Formans v. Tamm*, involved the right of a black man to claim vacant land owned by the Commonwealth under the state's preemption law.¹⁸⁶ The Court was emphatic that "[t]he question has no relation to the political rights of the colored population."¹⁸⁷ Two decades after *Hobbs v. Fogg*, the Jacksonians on the Pennsylvania Supreme Court happily reiterated the racist doctrine of that case and the legitimacy of the 1838 Constitution, which limited voting to "white freemen." In *Formans*, Justice Ellis Lewis—another power in the state Democratic Party, an ardent Jacksonian, and an ally of James Buchanan—reaffirmed the reasonableness of denying blacks the right to vote. The Court

183. *Lemmon*, 20 N.Y. at 562.

184. *Hobbs v. Fogg*, 6 Watts 553 (Pa. 1837).

185. PA. CONST. art. III, § 1 (1838).

186. *Formans v. Tamm*, 1 Grant 23 (Pa. 1853).

187. *Id.*

declared that until the “white population, who settled this Commonwealth” decided to enfranchise non-whites, “the negro and the Indian must be content with the privileges extended to them, without aspiring to the exercise of the elective franchise, or to the right to become our legislators, judges and governors.”¹⁸⁸

But Justice Lewis saw a huge distinction between political rights and economic and property rights. This illustrates, to some extent, the difference between northern and southern Jacksonians. Slaveholding Jacksonians, like Chief Justice Roger B. Taney of the U.S. Supreme Court, were ready to deny blacks *any* rights.¹⁸⁹ But at least in Pennsylvania the Jacksonians were willing to concede that blacks were entitled to some basic economic rights. Thus, Lewis asserted there was “nothing in the principles of the common law, or in the former condition of the colored population, which excludes them from acquiring, in like manner, freedom and the right to purchase property, by the consent, either express or implied, of those who had heretofore held them in bondage.”¹⁹⁰ The Court found that “the effect” of a state’s abolition of slavery was:

[T]o give to the colored man the right to acquire, possess and dispose of lands and goods, as fully as the white man enjoys these rights. Having no one to look to for support but himself, it would be a mockery to tell him he is a ‘free man,’ if he be not allowed the necessary means of sustaining life. The right to the fruits of his industry and to invest them in lands or goods, or in such manner as he may deem most conducive to his comfort, is an incident to the grant of his freedom.”¹⁹¹

Thus, by the eve of the Civil War, all blacks in Pennsylvania were free and entitled to many basic common law rights. The Pennsylvania Supreme Court would support these two principles. The Court, however, did not aggressively defend freedom or prefer freedom to slavery and, the Democratic majority on the Court emphatically supported the idea that blacks had no role to play in the Commonwealth’s political process. All that would change in the next decade as new egalitarian leaders, such as Simon Cameron, William Kelley, and most of all, Thaddeus Stevens, gained political

188. *Id.*

189. See *Dred Scott v. Sandford*, 60 U.S. 393 (1857); Paul Finkelman, *Coming to Terms with Dred Scott: A Response to Daniel A. Farber*, 39 PEPPERDINE L. REV. 49–74 (2012); Finkelman, *Was Dred Scott Correctly Decided? An ‘Expert Report’ For the Defendant*, 12 LEWIS & CLARK L. REV. 1219–52 (2008); Finkelman, *Scott v. Sandford: The Court’s Most Dreadful Case and How it Changed History*, 82 CHICAGO-KENT L. REV. 3–48 (2007).

190. *Formans*, 1 Grant at 24.

191. *Id.* at 25.

power, and the United States followed Pennsylvania's lead from 1780 in finally ending slavery at the national level.