# VALIDITY

OF

# SLAVE MARRIAGES.

OPINION BY

HON. JAMES B. BRADWELL,

PROBATE JUDGE.

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# COUNTY COURT OF COOK COUNTY, ILLINOIS.

## SEPTEMBER TERM, A. D. 1866.

## IN THE MATTER OF THE ESTATE OF HENRY JONES.

ELIZABETH SMITH, *Guardian of* M. C. JONES,

*vs.*

JULIUS ROSENTHAL, *Administrat'r of the estate of* HENRY JONES.

Henry Jones, a negro slave, was married in Tennessee, by a Justice of the Peace, to a colored woman the slave of another master, with the consent of their masters. They had one child while in slavery, the fruit of such marriage, called Matt. C. Jones—the mother died in slavery. Jones and Matt. C. were afterwards emancipated. *Held*, after the death of Henry Jones, that such marriage was not void: and that Matt. C. was the legitimate son of Henry Jones, and, as such, entitled to inherit his estate; notwithstanding the fact that his parents were slaves at the time of their marriage and his birth.

Marriages of slaves, consummated during slavery in a slave State where there is no Statute declaring them void, are good for all purposes upon emancipation.

MICHAEL W. ROBINSON, *for Petitioner.*
ROSENTHAL & HOPKINS, *for Respondent.*

Opinion by JAMES B. BRADWELL, *Probate Judge*:—

Henry Jones was a colored man, and died intestate at Chicago on the 27th day of April, A. D., 1863. Administration was granted by this Court on the following day, to Julius Rosenthal.

All the assets of said estate have been collected, all debts paid, and a balance is now in the hands of the administrator, subject to the order of the Court, to be paid to the heirs of the deceased.

Elizabeth Smith, guardian of Matt. C. Jones, appointed by the County Court of Brownsville, Tenn., filed her petition in this Court, alleging that her ward is the only heir of the deceased, and asking that a decree be entered to that effect, and that the administrator be compelled to pay her the balance now in his hands. The administrator answered the petition, and stated that he knew nothing of the matters alleged therein, and called for strict proof. On the hearing, several depositions were read, similar to that of William Saughter, which in substance is as follows:

Henry Jones lived fourteen or fifteen years in Brownsville, Tenn.; was of African descent; in color, ashy black. He was sometimes called Henry Servier, because he was the slave of John Servier, of Brownsville, Tenn., which place he left in the latter part of the year A. D., 1862, and went to Chicago. He was married to a girl named Emeline, the black slave of a Mr. William H. Loring, of Brownsville, about thirteen years ago, by myself, then a Justice of the Peace in said town. After the marriage, they lived together as husband and wife until the death of Emeline in 1862. They were recognized and regarded as husband and wife by their acquaintances and neighbors during that time. There were two children, the only fruits of that marriage; the one died in infancy: the other, Matt. C. Jones, is still alive, resides in Brownsville, and was born on the 4th of September, 1860. Jones never had any other wife, or child, or children, than as I have stated. He and his wife were both slaves at the time of this marriage, and were married with the consent of their masters. It was also proved that when our army advanced into Tennessee, Jones was taken by the military power and sent North, under the written order or command to pass "Henry Severe, colored:" that at the time of his death he had obtained a residence in Chicago; and that after his liberation by the military power he often spoke of Matt. C. as his son.

and that he intended his money for him. It was claimed on the argument that, the parties both being slaves at the time of the marriage, they could not contract or give their consent to such an undertaking, and that the child was consequently a bastard and not capable of inheriting. Jones' domicil at the time of his death being in this State, his personal property must be distributed according to the law of Illinois and this law must determine who are his heirs. The validity of the marriage is to be determined by the law of Tennessee, and if invalid there, will be invalid here, unless there is some statute in Tennessee imposing conditions contrary to the general law of nations, which might work as a prohibition of marriage, and would have no extra territorial effect—*Mallac vs. Mallac, 2 Swabey & Tristram, 67.* At the time Jones left Tennessee, the Constitution of the United States provided that the fugitive should be delivered up, on the claim of the party to whom labor or service should be due; but Jones was no fugitive, he had not escaped from labor or service due in Tennessee, and could not then have been taken back legally under this provision of the Constitution and the then existing Fugitive Slave Law. He was taken by the strong arm of the Government of the United States, and, at the moment of his capture, his shackles fell—he was changed from a chattel to a man, from a slave to a freeman.

Mr. Dana, in a note to his edition of Wheatons's International Law, page 348, in treating of the right to emancipate slaves under the war power, says: "But as persons capable of being used by the will of the master, or his slave, irrespective of their own will, in war, as soldiers, or as laborers, the occupying sovereign has the right to transfer this faculty of service from the enemy to himself. They are so directly liable to State control in war, that their condition follows the fortunes of war; and as the slaves are grouped, at least temporarily, in families, with rights, at least moral, in the service and affection and duty of one another, the transfer of the whole slave population of women, children, and persons not capable of labor, as appurtenant to the laborers. If the occupying State hold slaves, the slaves merely change masters; if it does not, the slaves are emancipated."

Their emancipation is as complete as their transfer would have been. It is a plenary act of ownership exercised upon them by the capturing power, in actual possession.

The emancipating of slaves by the occupying power, may also be treated as an exercise of temporary power of conquest over the political system of the ejected enemy."

Jones having been freed by the war power, I shall treat his case, from the time of his capture, as I would the case of an emancipated slave.

Marriage, in its origin, is a contract of natural law, and, in civil society, is a civil contract requiring no form or ceremony unless imposed by local law, and even when the local law directs the ceremony to be conducted in a prescribed manner, a failure to comply with such forms does not effect the validity of the contract, unless such effect be expressly directed by statute."

*Ferrei vs. Public Administrator, 3 Brad., Sur., R. 151; 2, Kent Com. 51.*

In the absence of any provision declaring marriages between parties of certain ages absolutely void, all marriages regularly made, according to the common law, are valid and binding, although made in violation of the specific regulations imposed by statute."

*Pacton vs. Harvey 1, Grey 119, (Mass.)*

Dr. Lushington, in *Cutterall vs. Sweetman 1, Rob. Eccl. R, 321,* says: "Marriage is essentially distinguished from every other species of contract, whether of legislative or judicial determination; that this distinction has been universally admitted; that, not only is all legal presumption in favor of the validity, and against the nullity of marriages, but it is so on this principle: That a legislative enactment to annul a marriage *de facto* is a penal enactment, not only penal to the parties, but highly penal to the innocent offspring, and, therefore, to be construed according to the acknowledged rule, most strictly."

By the laws of all civilized countries, as marriage is a natural right, all subjects may marry at pleasure.

*Bishop on M. & D., Sec. 150.*

We will now examine the Statutes of Tennesse to see if there is any provision restraining slaves from marrying.

The statute of Tennessee, [Sec. 4924 and 4925,] provides, that no white person can intermarry with a negro, mulatto, or other person of mixed negro blood, to the third generation inclusive, and declares any such attempted marriage void. Again, [Section 2710,] when a free person of color has married a slave in another State, and the slave is brought into this State to settle and remain here, he, or she, may be permitted by the County Court to remain in the State to live with the wife or husband.

The Statute, also, provides, that where a free man of color has intermarried with a slave in Tennessee, that he may remain upon giving bonds, &c.

By Section 2730.—No person of color shall intermarry, or cohabit, with a slave, without the owner's consent in writing, attested by two Justices of the Peace:

Every such offender shall be liable to pay the owner of the slave twenty-five dollars, and on failure to pay the same shall be held to service to said owner for one year. The Statute [Sec. 2440] provides, that no formula need be observed in the solemnization of a marriage, except that the parties shall respectively declare, in the presence of the minister, or officer, that they accept each other as man and wife. There is no Statute of Tennessee forbidding the marriage of slaves with each other; and we see that there is a positive Statute allowing, under certain restrictions, a free black to marry a slave; and what is true of Tennessee, in this respect, I believe, is true of every other Southern State. I have been unable to find a single Statute forbidding slaves to marry.

The Statute making no other or different provisions for the marriage of negroes or slaves, than those for whites or free persons, the Courts can make none. There is the same desire in the black as in the white to marry; to obey the Divine command: "Multiply and replenish the earth:" and not only the same desire, but the same natural right.

The legislature having provided that some slaves may marry, the Courts are estopped from deciding, in the absence of any Statute, that marriages between slaves are void, and that they can not consent to the marriage contract.

A marriage which is not absolutely void, but only voidable, is esteemed valid for all civil purposes until separation, which must be made during the lifetime of the parties, and Courts will not annul the marriage after the death of either party to bastardize the issue.

*Bonham et al., vs. Badgley 2, Gilman 628; Elliott et al., vs. Gurr, 2 Phil. Eccl., C. R. 16; Godolphin's Eccl. Law, 486, & 487, Sec. 22; 1 Burn's Eccl. Law, 120 & 121.*

Grotius, on War and Peace, Book 2, chap. 5, sec. 14, No. 4, says:

Sed sciendum simul est, non quod vetitum est fieri lege humana, si fiat, irritum quoque esse, nisi et hoc lex addiderit aut significaverit.

XV. 1. Ut ad alia pergamus, observandum hoc est, concubinatum quendam verum ac ratum esse conjugium, et si effectibus quibusdam juris civilis propriis privetur aut etiam effectus quosdam naturales impedimento legis civilis, amittat. Exempli causa inter servum, et ancillam jure Romano contubernium esse dicitur, non matrimonium, attamen ad ipsam conjugii naturam nihil de est in tali consociatione, quæ propterea in antiquis canonibus "*gamo*" nomine appellatur.

The marriage relation existed at a late but did not exist at an early day among the slaves of the German nations, and into the ninth century the contubernial relation alone was recognized.

*Potgiesser, Book 1, Chap. 3.*

The same author claims that the Germans were the first who united their slaves together in the name of Christ. *Book 2, chap. 2, sec. 10.* When with the consent of their master, such marriage was valid, without it, void. *Ibid, sec. 12 & 13.*

A learned writer who, in the preface to his work on slavery, has the candor to admit, that he doubts not, he is biased by his birth and education in a slave holding State says: "The fact of cohabiting and living together as man and wife is universal among slaves, and the privileges of parents over children, in correcting and controlling them, are universally acceeded to them in all trials of offences committed by them; these relations are recognized by the Courts, and the merciful extenuations of the law, to the conduct of the husband and father, are extended to the slave in the same situation. How far this contubernial relation between slaves may be recognized and protected by law, is a question of exceeding nicety and difficulty."

*Cobb on Slavery, Sec. 275 & 276.*

The Chancery Court of South Carolina, in the case of *Milledge vs. Sumner*, 4 *Desaussure*, 640, in treating upon the rights of slaves, says: "Inquiring, then, into the rights acquired in that species of property, it seems to be proper to resort to the civil law, which, according to Sir William Jones, is the true source of all the English laws that are not of feudal origin.

2 *Randolph*, 241; *Jackson vs. Lorry*, 5 *Cowen*, 402.

The same Court, in *Bynum vs. Bostick et al.*, 4 *Desaussure*, 267, says, speaking of the law relating to slavery: "The condition of slaves in this country is analagous to that of the slaves of the ancients, the Greeks and Romans, and not that of the villains of feudal times." They are, generally speaking, not considered as persons but as things.

They can be sold or transferred as goods or personal estate; they are held to be *pro nullis*, *pro mortuis*.

Almost all our Statute regulations follow the principles of the civil law in relation to slaves, except in a few cases, wherein the manners of modern times, softened by the benign principles of Christianity, could not tolerate the severity of the Roman regulations.

They cannot be tortured, they cannot be put to death at the caprice of the master, with impunity.

But in most other respects they are considered as property. By the civil law, slaves cannot take property by descent or purchase: and I apprehend this to be the law in this country.

Many cases of beneficent provision for slaves are allowed to take effect *sub silentio* by the humaaity of those interested. But when the law is appealed to, it must take its course."

Upon this point, authorities might be cited to any extent. Thus, we see that the courts of the slave States have always claimed that the common law was not applicable to the institution of negro slavery, as it was an institution unknown to the common law—but that whenever the Statute was silent in regard to any matter connected with slavery, recourse was had by the courts to the civil law; and this law has furnished the ground work for most of the decisions in favor of slavery, and sustaining the master's right to almost unlimited power over the life and person of his slave. Let us, then, examine the civil law, and see what would be the condition and rights of the emancipated slave, his wife and children, under that law, which is acknowledged by all writers of respectability to be the harshest known among civilized nations, in its provisions in regard to slavery.

Professor Ferdinand Walter, in his able "History of the Roman Law," (published in German, in 1861,) for which I am indebted to Mr. Rosenthal, the respondent in this case, says

Section 655: The right to inherit from emancipated slaves grew out of simple commencements to an intricate system, wherein the following general views appear prominent: He who was manumitted, in the regular way, was treated, if he had children, as the founder of a Roman family, the same as a free-born man. If he did not leave any children, his patron took their place, as legally he had no collaterals. The different steps were as follows:

Sec. 656. At first, according to the old civil law, the last wills of freedmen, who were Roman citizens, were treated in form and substance according to the regular rules. In default of a will, then the children belonging to his family succeeded, wherein, however, the children born in slavery were not included. In default of such free-born children, the patron succeeded.

Sec. 657. Afterwards, the Prætorian Edict, however, changed the succession in the following manner: First, it declared his heirs to be the children, those belonging to the family as well as the emancipated ones, then those persons who were entitled to heirship according to the old civil law.

Sec. 658. This was changed in important points, as regards the right of the patron to inherit from the freedman.

Sec. 659. Through Valentinian the III, (447 years after Chris,) additional enactments were made. First, the children of the freedman were to inherit even those that were born in slavery, if they were only free. In default of children, the right of thepatron remained as before.

We find in the Institutes of Justinian, "which have been the study of the wisest men, and revered as law by the politest nations," Lib. 3, Tit. 7, the following: It is certain that the part of the edict in which the possession of goods is promised, according to the right of proximity, does not relate to servile cognation; which hath not been regarded by any ancient law.

But, by our own Constitution, concerning the right of patronage, which right was heretofore obscure and every way confused, we have ordained (humanity so suggesting) that, if a slave shall have a child, or children, either by a free woman, or by a bond woman, with whom he lives in *contubernio*, and, on the contrary that, if a bond woman shall have a child, or children, of either sex, by a free man, or by a slave, with whom she so lives, and such father and mother are afterwards enfranchised, the children shall succeed to their father or mother, without regarding the right of patronage.

"We have not only called these children to succeed to their parents, but also mutually to each other, whether they are in sole succession, as having all been born in servitude and afterwards manumitted, or whether they succeed with others, who were conceived after the enfranchisement of their parents, and whether they are all by the same father and mother, or by a different father or mother, and, that children born in slavery, and manumitted, should succeed in the same manner as the issue of parents legally married."

From this review of the civil law, we see that, under the law, as modified by the Prætorian Edict, Matt. C. Jones would be declared the legal heir of the deceased, and entitled to his estate notwithstanding the claim that Jones and his wife were slaves at the time of their marriage. Legitimacy and lawful marriage were some of the pleasing sounds following individual emancipation at Rome hundreds of years ago. Shall it be deprived of these pleasing sounds in the Nineteenth Century, and shall liberty fail to recognize the marriage relation between slaves, when slavery, with all its cruelty, and in the days of itsgreatest power, when it numbered its victims by millions, was compelled to give a quasi recognition to this relation? What? when slavery said the cohabitation between the black slave and his wife was innocent and free from sin, and under the law of God, pure! shall liberty (after emancipation) say that such cohabitation was adulterous, immoral, and sinful—and that the fruits of

such marriage are bastards? If so, the emancipated slave may well say, "God deliver me from emancipation!"

I will now refer to the leading case of *Girod vs. Lewis*, decided in 1819, 6 *Martin's Louisiana R.*, 559, and when I say leading case, I mean the case which has gone the farthest to recognize the civil rights of a slave marriage after emancipation, and then give the comments of some of the courts of slave States upon that decision. Judge Matthews, in delivering the opinion of the Court, said:

"The only question in this case, submitted to the Court, is, whether the marriage of slaves produces any of the civil effects resulting from such a contract after manumission.

"It is clear that slaves have no legal capacity to assent to any contract. With the consent of their master, they may marry, and their moral power to agree to such a contract or connection as that of marriage cannot be doubted; but whilst in a state of slavery, it cannot produce any civil effect, because slaves are deprived of all civil rights.

"Emancipation gives to the slave his civil rights, and a contract of marriage, legal and valid by the consent of the master, and moral assent of the slave, from the moment of freedom, although dormant during the slavery, produces all the effects which result from such contract among free persons."

The Supreme Court of North Carolina, in the case of *Howard vs. Howard*, 6 *Jones' Law R.*, 236, in commenting upon the right of slaves to marry, and upon the case last sited, says:

"A slave being property, has not the legal capacity to make a contract, and is not entitled to the rights or subjected to the liberties incident thereto.

He is amenable to the criminal law, and his person (to a certain extent) and his life are protected. This, however, is not a concession to him of civil rights, but is a vindication of public justice, and for the prevention of public wrongs. Marriage is based upon contract, consequently the relation

of "man and wife" cannot exist among slaves. It is excluded both on account of their incapacity to contract and of the paramount right of ownership in them, as property. There is in moral contemplation, and in the nature of man, a wide distinction between the cohabitation of slaves as "man and wife" and an indiscriminate sexual intercourse; it is recognized among slaves, for, as a general rule, they respect the exclusive rights of fellow slaves who are married. Such marriages are permitted and encouraged by owners as well in consideration of the happiness of the slaves and their children, as because in many ways, their interests, as masters is thereby promoted. Hence a married couple is permitted to have a "cabin and a patch off to themselves," and when they belong to different persons, the man, at stated times, is allowed "to go to his wife's house." The relation is so far favored in the administration of the criminal law, as to allow to it the effect of drawing into application the rule, that when a person finds one in the act of adultery with his wife, and instantly kills him, it is but manslaughter, because of the legal provocation. This result, however, is not attributable to any civil right growing out of the relation, but to the fact that, to a certain extent, it has its origin in nature; and a violation of the right which is peculiar to it, in that respect, excites the *furor brevis*." Whether the relation was entered into with or without the legal capacity and the ceremonies and forms necessary to make a marriage valid for civil purposes.

Chief Justice Parsons, after giving his opinion upon this subject as above, says:

"Our attention was called to *Girod vs. Lewis*." No authority is cited and no reason is given for the decision except the suggestion that the marriage being dormant during the slavery, is endowed with full energy, from the moment of freedom. We are forced to the conclusion that the idea of civil rights being merely dormant during slavery, is rather a fanciful conceit (we say it with respect) than the ground of a sound judgment. It may be that, in Louisiana, the marriage relation is greatly effected by the influence of religion, and the mystery of its supposed dormant rights is attributable to its divine origin."

"If so, the case has no application, for, in our courts, marriage is treated as a mere civil institution."

"To the suggestion, that as the qualified relation of husband and wife between slaves is not unlawful, and ought in fact to be encouraged, upon the

ground of public policy. So far as it comports with a right of property, emancipation should be allowed to have the effect of curing any defect arising from the non-observance of the prescribed form and ceremonies, and the absence of a capacity to contract, as there is plenary proof of consent, which forms the essence of the marriage relation; the reply is:

The relation between slaves is essentially different from that of man and wife joined in lawful wedlock. The latter is indissoluble during the lives of the parties, and its violation is a high crime, but with slaves it may be dissolved at the pleasure of either party, or by sale of one or both, dependent upon the caprice or necessity of the owner. So the union is formed, and the consent given in reference to this state of things and no ground can be conceived of upon which the fact of emancipation can, not only draw after it the qualified relation, but, by a sort of magic, convert it into a relation of so different a nature. In *Alcary vs. Powell*, 1 *Jones' Eq*, 35, it was held, where a mother and children had been emancipated, that a child begotten and born while the mother had no husband was entitled to the same share of her estate as the children who were begotten and born while she had a husband; on the ground "that the law of North Carolina required no solemnity or form in regard to the marriage of slaves, and whether they 'take up' with each other by the express condition of their owners, or from a mere impulse of nature, in obedience to the divine command 'multiply and replenish the earth,' cannot, in contemplation of law, make any difference; that in regard to slaves and free negroes there is no necessity growing out of grave consideration of public policy, for the adoption of the stern rule of the common law.

"A bastard shall be deemed *nullius filius;* to have no parents and not even to be considered the child of the mother who gave it birth."

In this case, the Court claimed to so far modify the common law in favor of slavery as to allow a bastard to inherit from its emancipated mother, which, had it been white, under the common law, it could not have done.

The Supreme Court of Alabama, in the case of *Malinda et al. vs. Gardner et al.*, 24 *Ala.*, 723, in passing upon a slave marriage, says:

"Malinda and Sarah could not claim as heirs proper of their father, for the reason that both the father and mother were slaves, and persons in that condition are incapable of contracting marriage, because that relation brings

with it certain duties and rights with reference to which it is supposed to be entered into. But the duties and rights which are deemed essential to this contract, are necessarily incompatible with the nature of slavery, as the one cannot be discharged, nor the other be recognized, without doing violence to the rights of the owner. In other words, the subjects of the contract must cease to be slaves before the incidents inseparable to the relation of marriage, in its proper sense, can attach."

"This has alway been the doctrine of the civil law. *Taylor's C. L.*, 429; *Cooper's Justinian*, 411–420; *Puff B. 2, chap. 7, sec. 11*, and in every State where slavery exists, and the question has been presented it has been so decided. *Girod vs. Lewis*, 6 *Martin's La. Rep.*, 559.

"There was, indeed, among slaves, a permitted cohabitation called *contubernium*, but it brought with it no civil rights. The cohabitation, therefore, between Tom and the mother of Malinda and Sarah, in a state of slavery, was not marriage or evidence of marriage. It conferred no rights upon the offspring, and created no legal disabilities on the part of the father from forming a valid marriage whenever he became in a condition which would authorize him to contract one. But the record contains no evidence that this relation existed between himself and the mother of the appellant at any time after their emancipation, on the contrary, the testimony shows that before he became free, he ceased to cohabit with her, and formed a connection with Charlotte, one of the appellees, which continued up to his death."

In this case, the court cites with approval the opinion of the Louisianna Court, in the case of *Girard vs. Lewis*, above cited, and place great stress upon the point that, in the case before the Court, there is no evidence that the relation existed at any time after the emancipation of the parties, but that the relation was broken off before emancipation.

Judge Carr, of Virginia, in delivering the opinion of the Court, in regard to the right of an emancipated slave, in the case of *Fulton vs. Shaw*, *4 Rand., 599*, says:

"We must give to the instrument its true meaning; and that is exceedingly plain. The grantor meant to emancipate Mary Shaw fully and immediately, and to hold in slavery any children she might after wards 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 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 conditions 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 law. The reservation, therefore, was repugnant to the grant."

Chief Justice Ruffin, of North Carolina, in delivering the opinion of the Court, in the case of the *State vs. Samuel, 2 Devereux and Battles' Law R., 182*, says:

"If it be said, that the Statutes relate only to the cases of free persons, and therefore do not require the marriage of slaves to be thus celebrated; the reply is obvious, that the marriage of slaves, then, is wholly pretermitted, and hence a legal marriage cannot be contracted between them. Such, indeed, may unfortunately be the law; and may have been intended by the Legislature to be the law, upon the general ground of the incapacity of a slave to enter into this, as into other contracts, upon the presumption of the want of free consent, and upon the further ground, of the difficulty of giving legal validity to the marriage, in respect to its most important legal incidents, without essentially curtailing the rights and powers of the masters. If it be so, it may be a fit subject for legislative interposition to avert this melancholy addition to the misfortunes and legal disabilities of this depressed race. The subject is too full of perplexities to authorize the court to express an opinion upon that point, without duly considering it in a case in which it shall directly arise. Assuming, therefore, that marriage is an exception from the principles on which their contracts generally are deemed null, and that in law they may marry, yet in the absence of particular regulations for the marriage of slaves, to give validity to a marriage contracted by them, it must be such a marriage as, by the general law, is valid."

The Supreme Court of North Carolina, in the case of *State vs. Man, 2 Devereux Law R., 267*, in regard to the treatment of slaves, and the policy of the courts towards slavery, says:

"That there may be particular instances of cruelty and deliberate barbarity where, in conscience, the law might properly interfere, is most probable. The difficulty is to determine where a court may properly begin. Merely in the abstract it may well be asked which power of the master accords with right. The answer will probably sweep away all of them. But we cannot look at the matter in that light. The truth is, that we are forbidden to enter upon a train of general reasoning on the subject. We cannot allow the right of the master to be brought into discussion in the courts of justice. The slave, to remain a slave, must be made sensible, that there is no appeal from his master; that his power is in no instance usurped; but is conferred by the laws of man at least, if not by the law of God. The danger would be great indeed, if the tribunals of justice should be called on to graduate the punishment appropriate to every temper and every direlection of menial duty. No man can anticipate the many and aggravated provocations of the master, which the slave would be constantly stimulated by his own passions, or the instigation of others to give; or the consequent wrath of the master, prompting him to bloody vengeance, upon the turbulent traitor—a vengeance generally practised with impunity, by reason of its privacy.

"The Court, therefore, disclaims the power of changing the relation, in which these parts of our people stand to each other.

"We are happy to see, that there is daily less and less occasion for the interposition of the Courts. The protection already afforded by several Statutes, that all-powerful motive, the private interest of the owner, the benevolences toward each other, seated in the hearts of those who have been born and bred together, the frowns and deep execrations of the community upon the barbarian who is guilty of excessive and brutal cruelty to his unprotected slave, all combined, have produced a mildness of treatment, and attention to the comforts of the unfortunate class of slaves, greatly mitigating the rigors of servitude, and ameliorating the condition of the slaves. The same causes are operating and will continue to operate with increased action, until the disparity in numbers, between the whites and blacks, shall have rendered the latter in no degree dangerous to the former, *when the policy now existing may be further relaxed.*

"This result, greatly to be desired, may be much more rationally expected from the events above alluded to, and now in progress, than from any rash expositions of abstract truths, by a judiciary, tainted with a false and fanatical philanthropy, seeking to redress an acknowledged evil, by means still more wicked and appaling than even that evil.

"I repeat, that I would gladly have avoided this ungrateful question. But being brought to it, the Court is compelled to declare, that while slavery, exists amongst us in its present state, or until it shall seem fit to the Legislature to interpose express enactments to the contrary, it will be the imperative duty of the Judges to recognize the full dominion of the owner over the slave, except where the exercise of it is forbidden by the Statute."

The Courts have always been very cautious in pronouncing against marriages which were celebrated according to the peculiar rules of any religious sect; or, according to the manners and customs of any nation or race of people, as will appear from the following cases:—

The Supreme Court of Missouri, in *Johnson vs. Johnson, Administrator 30, Mo., 72*, in passing upon the validity of a marriage between a white man and a Indian squaw, says:

"Among the savage tribes of North American Indians, marriage is merely a natural contract, and neither law, custom, nor religion, has affixed any conditions, limitations or forms, other than those which nature herself has prescribed. Permanency is not to be regarded as an essential element of marriage by the law of nature; otherwise, all such connections as have taken place among the various tribes of the North American Indian—either between persons of pure Indian blood, or between half breeds, or between the white and Indian races—must be regarded as illicit, and the offspring illegitimats, for it is well established in most of the tribes, perhaps in all, the understanding of the parties is, that the husband may dissolve the contract at his pleasure. The power of divorce in one or both of the parties to a contract of marriage, at his or her pleasure, is not inconsistent with the law of nature.

"A mere casual commerce between the sexes does not constitute a marriage by the law of nature; but where there is a cohabitation by consent, for an indefinite period of time, for the procreation and bringing up of children, that, in a state of nature, would be a marriage."

The Supreme Court of Alabama, in *Wall vs. Williamson, 11 Ala., (N. S.) 839*, in speaking of Indian marriages, says:—

"When a man and a woman agree to cohabit for an indefinite period as man and wife, that, in a state of nature, would be a marriage, and, in the absence of civil and religious institutions, might safely be presumed to be as it is popularly called, 'a marriage in the sight of God.'"

It has been made a question how long the cohabitation must continue by the law of nature—whether to the end of life. In answer to that inquiry, it is said "that it cannot be a mere casual and temporary commerce, but must be a contract at least, extending to such purposes of a more permanent nature in the intention of the parties. The contract thus formed in the state of nature is adopted as a contract of the greatest importance, in civil institutions, and it is charged with a vast number of obligations merely civil. Marriages among the Indian tribes must be regarded as taking place in a state of nature, and if, according to the usages and customs of the particular tribe, the parties are authorized to dissolve it at pleasure, the right of dissolution will be considered a term of the contract. Either party may take advantage of this term, unless it be expressly, or implicitly waived by them: or they may, perhaps, acquire such relations to society as will give permanency to the contract, and take from them the right to annul it."

The Supreme Court of Tennessee (the State where the marriage between the colored people in question in this case took place,) says, in *Morgan vs. McGhee, 5 Hump. 14*, in passing on the validity of an Indian marriage:—

"The proof shows, that the Plaintiff, Margaret Morgan, and one Gideon Morgan were married in the Cherokee Nation of Indians, according to the forms and ceremonies of the tribe, sometime in the year 1813: that Margaret was a Cherokee woman residing in the Nation; that she and Morgan lived together many years as man and wife, and had a large family of

children, and that they are now living apart, and that he is alive. Upon this proof the jury found that the plaintiff was a *femme covert*.

"We think the testimony supports the verdict,—our courts of justice recognize as valid all marriages of a foreign country, if made in pursuance of the forms and usages of that country, and there is no reason why a marriage made and consummated in an Indian nation should be subject to a different rule of action. The fact that a portion of the lands inhabited by the Cherokee Indians was within the limits of the State of Tennessee, and that the marriage took place within that portion cannot effect the question.

"To hold this marriage to be void would be to vitiate all the marriages made in the nation, and might be productive of much mischief."

Slaves are made by captivity, or by virtue of local law enacted against the law of nature—justice and humanity—in fraud and wrong, and during this captivity or slavery they are deprived of many of their civil rights, but upon their emancipation they are restored to their natural condition. Even in slavery they are subject to all the laws of nature like other men, for that force, or law, which deprived them of liberty, could not deny them the rights, nor absolve them from the obligations of their nature.

Judge Ware, says, in speaking of slaves: "The personal status of an individual is to be determined by the law of the place where he is, as to acts done within that jurisdiction, and that the civil incapacities which attach to him in one country, do not follow him into another. *Polydore vs. Prince, Ware 432*, *See*, also, the case of *Somersett 20, State Trials, 1. People vs. Lemon, 5 Sandfords R. 706, 20 N. Y., 615.*

"The law of States where slavery is prohibited, or not sanctioned, recognizes neither slavery nor property in slaves within their own territorial limits."

*Anderson vs. Poindexter, 6, Ohio 674.*

Judge Skinner, in delivering the opinion of the Court in *Rubey vs. Ills. C. Railroad Co.*, says: "Slavery, in the States where it exists, has its foundation in the municipal regulations of such States, which have no extra territorial operation and no binding force in another sovereignty. The owner, therefore, by force of the laws of another State, under the law of Illinois, has no property in the fugitive, and can here, under State authority, assert no property in, or power over, him."

*19 Ills. 44.*

With slavery, the law of slavery, and the reason for the law has passed away, and courts will not recognize the effects of the institution for the purpose of bastardizing the issue of the dead or slandering the living.

The slave in the Southern States owed service to his master not by the law of nature, but under the local law; which law fixed the termination of that servitude at the end of the natural life of such slave. The strict legal right, under the local law, to the service is the same in the parent as in the master, the only material difference is in the duration of the term. In the case of the emancipation of the child from the power of the father, the marriage contracted during his servitude, under the age of consent, is good, (as we have seen,) unless he repudiates it upon arriving at his majority. Apply this principle to the emancipated slave, and a marriage contracted during slavery would be good upon emancipation, if the parties were all living and, if dead, the children of such marriage upon being emancipated would be ligitimate.

At an early day there was a Statute in Massachusetts, providing that, "no master should unreasonably deny marriage to his negro with one of the same nation; any law, usage, or custom, to the contrary, notwith-standing. *Prov. Stat. of Oct. 1705, Chap. 19, Sec. 3.*

Mr. Bishop, in his able work on *M. & D., vol. 1, page 155*, says: "Either in consequence of this provision, or judicial adjudication upon the question, as one at common law slave marriages

were deemed to be valid, and the rights of divorce were extended to slaves the same as to freemen; and, in the year 1745, a negro slave did actually obtain a divorce from the Governor and Council for his wife's adultery with a white man. *Quincy, 29.*

During the existence of slavery in New York, there was a Statute providing that all marriages, where one or both of the parties are slaves, are equally valid as though the parties were free, and their issue is declared to be ligitimate; and it was *held*, in *Marbletown vs. Kingston 20, Johns 1*, that when a slave man and a free woman intermarry the children born of such marriage were legitimate children of the mother. Mr. Bishop not only puts great stress upon the fact that the decisions in Mass. and New York rest upon special statutes, but, also, that "they were pronounced *in States where slavery was never precisely what it was*, (at the date of his writing,) *in our Southern States.*"

The proposition, that the slave has no power to consent to the contract of marriage so as to bind himself, has no foundation in reason, and has been repudiated by the slave States themselves in always considering that he has sufficient power over his will to make him answerable not only to his master, but to the law of the land for any crime that he might commit. There may be much more reason for saying that the duties of a husband or wife are incompatible with the duties of a slave during the existence of the servitude. *Bishop, M. & D. 158.*

Mr. Bishop is of the opinion, that the case of *Howard vs. Howard*, above cited, lays down the doctrine upon which all such cases should turn, and says: "If after the emancipation the parties live together as man and wife; and if before emancipation, they were married in the form, which either usage or law had established for the marriage of slaves; this subsequent mutual acknowledgement of each other as husband and wife, should be held to complete the act of matrimony, so as to make them lawfully and fully married from the time at which this subsequent living together commenced." *1 Bishop on M. & D. 162.*

It should not be forgotten that, at the time the learned author wrote the above, slavery existed in all its power: that the emancipation of which he speaks is individual, and not universal. There can be no valid reason given why the same rule should not apply to the marriage of a slave, when the seeming disability is removed, that does to an insane person, or an infant, whose acknowledgment upon arriving at age, or restoration of reason, makes the marrige good from the commencement. The objection made by Mr. Bishop, that the marriages between slaves are dissoluble without judicial sentence, would seem to be met by the decisions above cited in regard to the Indian marriages.

It is claimed that the right to inherit must be fixed at the time of the death, and at that time the master of Jones would have taken the estate. It is a sufficient answer to this proposition to say, that in the case of the death, or incapacity, of the person to take, the law looks for the next party entitled to the inheritence: the master has been removed; his claim (if he had any) forever barred, and he has left no successor or representative, he is the last of his race. We look for some one else to take the estate, and find that the constitutional amendment has emancipated his child and removed the only (pretended) barrier between him and his father's estate, *slavery*. The common law ignores slavery and all its consequences, and, therefore, the common law courts are barren of decisions upon the questions now before the Court, and I have to determine this case more upon principle than upon the weight of former judicial decisions. Now that slavery has been abolished by the bullets of our soldiers and the ballots of our citizens; that universal liberty is the great corner stone of this really free Republic; that all men stand free and equal before the law; that hundreds of thousands of our bravest sons have shed their blood, and laid down their lives to establish and maintain, in this Government, the great truths "that all men are created equal, and are endowed by their Creator with certain inalienable rights, among these are life, liberty, and the pursuit of happiness;" and now that the policy of the Government and of the courts, State and National, is in favor of liberty, and that the

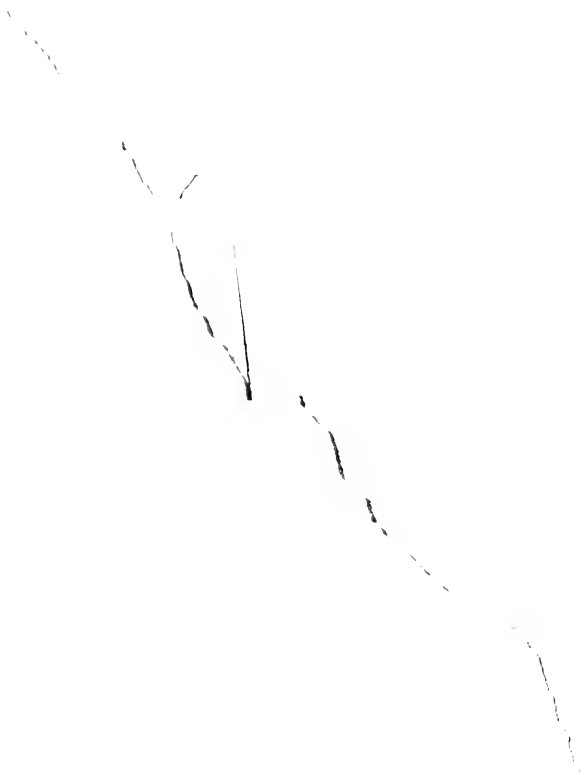
legislation of Congress and of the States is in the spirit of humanity, to make, as far as possible, these unfortunate people forget that they were slaves, and to protect them in the full enjoyment of all their civil rights, free from any of the disabilities of slavery or its consequences.

It cannot be claimed that the decisions made by the courts of slave States when the policy of the Government and courts was to sustain and perpetuate the power of the master over the slave, are to be regarded now in determining this case, and when all presumptions were in favor of the master and against the slave, and when in a Southern State to have a black skin was *prima facia* evidence that a man was a slave and would compel him, in a court, to prove his freedom.

Were there a thousand of these decisions, made under this influence, in favor of slavery and against the conclusions I have come to in this case, I would brush them aside as I would a spider's web, and decide this case upon what I consider to be the first principles of law—justice and humanity.

I am, therefore, of the opinion that the marriage between Jones and the mother of Matt. C. was not void: that during slavery they were deprived of some of their civil rights; that upon the emancipation, of Jones and the Petitioner they regained all their civil rights, and, for the purposes of this suit, are to be treated the same as if they had never been slaves; that Matt. C. is the only surviving child of the deceased and as such entitled to inherit his estate.

To come to any other conclusion would be to say, that the representatives of a race were bastards and that millions, for generations, had been living in adultery, when they had done all in their power to make the connexion lawful. The view I have taken of this case makes it unnecessary for me to examine the Civil Rights Bill passed by Congress, or the enabling act of the Tennessee Legislature.



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