American Legal History – Russell

***Bryan v. Walton*, 14 Georgia 185 (1853).**

LUMPKIN, J.

. . . .

[13.] *Thirdly*, the last and main point in this case, remains to be discussed; and it is this: Can a free person of color in Georgia, dispose of slaves by deed of gift?

This is a grave question. It involves a great principle; it establishes an important precedent; it must be determined upon reason and argument; it is without authority, so far as my researches have extended.

On this point, the Court and the counsel for the plaintiff in error, occupy positions as wide as the poles apart from each other. And one is entirely right, and the other altogether wrong; for there is no half-way ground to stand upon. It is contended by the counsel of Mr. Bryan, that free persons of color in this State, are entitled to all the rights, and may exercise all the powers and privileges of free white citizens, unless restricted by Statute; and that no law of the land having deprived this class of persons of the *jus disponendi*, that it is attached necessarily, as an incident to the ownership or *jus tenendi*.

[14.] Whereas, we maintain, that the *status* of the African in Georgia, whether bond or free, is such that he has no civil, social or political rights or capacity, whatever, except such as are bestowed on him by Statute; that he can neither contract, nor be contracted with; that the free negro can act only by and through his guardian; that he is in a state of perpetual pupilage or wardship; and that this condition he can never change by his own volition. It can only be done by Legislation.

[15.] That the act of manumission confers no other right but that of freedom from the dominion of the master, and the limited liberty of locomotion; that it does not and cannot confer *citizenship*, nor any of the powers, civil or political, incident to *citizenship*; that the social and civil degradation, resulting from the taint of blood,

adheres to the descendants of Ham in this country, like the poisoned tunic of Nessus; that nothing but an Act of the Assembly can purify, by the salt of its grace, the bitter fountain--the "*darkling sea*."

I feel a strong inclination, I confess, to give my sentiments pretty fully upon this subject--to go beyond the usual limits of an opinion; to speak in the style of argument rather than of authority. I am somewhat prepared to do so. And the novelty of the subject would seem to justify, if not to require it. It would not be unprofitable, I have thought, to sketch hastily the history of African slavery in this country, from its first introduction into the Colonies, at the commencement of the 17th century, down to the present period--to review summarily the laws of all the Southern States upon this subject--and notice the various modifications which they have undergone; keeping pace not only with the advancing civilization of the age, but with the improved condition of the negro himself. In this way, the present *status* of free persons of color could the more clearly be ascertained and defined.

But who would commend me for this labor? Or rather, I might ask, who would not condemn me for this tax upon their time and patience? In this age of amplification, when Presidential and Gubernatorial Messages, Congressional speeches, and all other public documents are measured by the ell instead of the inch, Judges are criticised and censured for not writing opinions with the brevity of "Coke's Reports in verse," where a whole case is compressed within the narrow compass of a couplet.

Thus admonished, I must forego the temptation, however strong and inviting; and resign the task to other and abler hands.

I would remark, that it will be found, on examination, that the condition of the African race is different in every slave State; and is less favorable in the extreme Southern, than in the more Northern slave States; and that consequently, whenever a question is made relative to a free person of color, we must have recourse mainly to our own local laws, to find a rule for our determination, and to such principles as are dictated by the peculiar genius of our people, and policy of our institutions.

[16.] I would further suggest, than any analogy drawn from the villenage of the feudal times, is utterly fallacious as to this investigation. A villein, it is admitted, might acquire any kind of property, real or personal; and he might freely dispose thereof, unless prevented by the entry and seizure of the lord; he might sue all manner of actions against any other than his lord; in the capacity of executor, he might even sue his lord. In a word, where his lord was not concerned, a villain was

a freeman in all his dealings. (*Litt. Ten. S.* 189, 190. *Hallam's View of the Middle Ages, vol. i.* 122, 124; *vol. ii*. 199).

How different the circumstances of the villein, from the slave of the Southern States. His *status* resembles much more strikingly the slavery of the Ancient Republics. Their slaves, like ours, had no name, but what their masters gave them.--They could take nothing by purchase or descent; they could have no heirs; they could make no will or contract of any kind. The fruits of their labor and industry belonged to their masters. They could neither plead nor be impleaded; and were utterly excluded from all civil concerns. They were incapable of marriage. The laws of adultery did not apply to them. They might be sold or mortgaged. *Partus sequitur ventrem*, was the rule indiscriminately applied to slaves and cattle. (*Dr. Taylor's Elem. Civ. Law*, 429, and *the authorities there cited*.) And this was not only the civil law, but the law of the Jews, Phenicians, Carthagenians, Egyptians and Greeks, and all other nations, tongues and people. Also, *nostri servi sunt qui ex nostris anceillis nascuntur*, was the settled doctrine of the nations at that day. Such was the condition of *white* slaves in democratic Greece and republican Rome; and notwithstanding the disproportion in the former *free state*, as it is justly called, was in the ratio of 30,000 to 400,000 Aristotle, the prince of logicians and philosophers, declared that the relation of master and *slave*, was just as indispensable in any well-ordered State, as that of husband and wife.

What has been stated, will suffice to show, that villenage differed extremely from the slavery of the civil law; and that our law of African slavery corresponds much more closely to the latter than the former; and that the effect of manumission, by the civil law, would have great influence in the determination of a similar question here, were it not for the difference in *color* between their slaves and ours--a difference deep and ineradicable, extending more or less, not only to every portion of this country, but even to the continental nations. As yet, I believe, *free negroes* are not in *any* State in the Union, entitled to *all* the privileges and immunities of *citizens*. And marriage of whites with blacks, are not only generally prohibited in the United States, under ignominious penalties, but such connections in France and Germany, constitute but a degraded state of concubinage.

Anciently, in Rome, the manumission of a slave produced no change of state in him, "*because he had no state or civil capacity*." *Servus autem manumissus capite non minuitur; quia nullum caput habuit*. (*Justinian Lib*. 1, *Tit*. 16, *p*. 43.) And such in a word, we apprehend to be the exact result of African manumission here; and for the very brief, but satisfactory reason assigned in this single sentence. It produces no change in the state of the *negro* slave here, because he has no state or

civil capacity. This we believe to be the whole law of this case: and upon this simple principle, it may be safely rested. How can the mere act of manumission, by the master, invest the slave, who previously held no standing in the State, with any of the attributes of a freeman? . . .

[18.] Such is the result, and no more, of manumission here. The slave is dismissed from the dominion of his master: and clothed with the privilege of going where he pleases. But to become a citizen of the body politic, capable of contracting, of marrying, of voting, requires something more than the mere act of enfranchisement. To adopt into the body politic a new member, is a vastly important measure in every community.--It is an act of sovereignty, just as much as naturalizing a foreign subject. The highest act of sovereignty a government can perform, is to adopt a new member, with all the privileges and duties of citizenship. Was there a general law, elevating all free persons of color to this condition, then the assent of the government would be given in advance of the Act of Manumission. No such act is claimed--none such exists. The black man in this State, may have the power of volition. He may go and come, without a domestic master to control his movements; but to be civilly and politically free, to be the peer and equal of the white man--to enjoy the offices, trusts and privileges our institutions confer on the white man, is not now, never has been, and never will be, the condition of this degraded race.

[19.] Our ancestors settled this State when a province, as a community of white men, professing the christian religion, and possessing an equality of rights and privileges. The blacks were introduced into it, as a race of Pagan slaves. The prejudice, if it can be called so, of caste, is unconquerable. It was so at the beginning. It has come down to our day. The suspicion of taint even, sinks the subject of it below the common level. It is to be credited, that parity of rank would be allowed to such a race? Let the question be answered by our Naturalization Laws, which do not apply to the *African*. He is not and cannot become a *citizen* under our Constitution and Laws. He resides among us, and yet, is a stranger. A *native* even, and yet not a citizen. Though not a *slave*, yet is he not free. Protected by the law, yet enjoying none of the immunities of freedom. Though not in a condition of chattelhood, yet constantly exposed to it.

[20.] He is associated still with the slave in this State, in some of the most humiliating incidents of his degradation--Like the *slave*, the *free* person of color is incompetent to testify against a free white citizen. He lives under, and is tried by the same Criminal Code. He has neither vote nor voice in forming the laws by which he is governed. He is not allowed to keep or carry fire-arms. He cannot

preach or exhort without a special license, on pain of imprisonment, fine and corporeal punishment. He cannot be employed in mixing or vending drugs or medicines of any description. A white man is liable to a fine of five hundred dollars and imprisonment in the common jail, at the discretion of the Court, for teaching a *free* negro to read and write; and if one *free* negro teach another, he is punishable by fine and whipping, or fine or whipping, at the discretion of the Court. To employ a free person of color to set up type in a printing office, or any other labor requiring a knowledge of reading or writing, subjects the offender to a fine not exceeding one hundred dollars.

I do not refer to these severe restrictions, for the purpose of condemning them. They have my hearty and cordial approval. The great principle of self-preservation, demands, on the part of the white population, unceasing vigilance and firmness, as well as uniform kindness, justice and humanity. Everything must be interdicted which is calculated to render the slave discontented with his condition, or which would tend to increase his capacity for mischief. My object is to counteract the antagonistic position assumed by counsel, who assert the claim of a free negro to *give* and *sell*; in broader terms, to contract and be contracted with. The argument is, that a negro is a man; and that when not held to involuntary service, that he is free; consequently that he is a free man; and if a freeman in the common acceptation of the term, then a freeman in every acceptation of it. This pithy syllogism comprises the whole chain of reasoning, however elaborated on the other side. The fallacy of it is, its assumption that the manumission of the *negro*, which signifies nothing but exemption from involuntary service, implies necessarily, and imparts *ipso facto*, all the rights, privileges and immunities which are incident to freedom, among the free white inhabitants of this country. . . .

To my mind, the idea is absurd, that the mere act of manumission can invest with all the attributes of manhood in a free state, a being who had no head or name or title, in the State before; who was held, *pro nullis, pro mortuis*, and for some, yea many purposes, *pro quadrupedibus*.

But let us look for a moment to our own legislation, founded on our own peculiar policy, in order to fix the condition of a free negro in this State. And for the purposes of this discussion, I deem it unnecessary to go behind the Act of 1818. By that Act, free persons of color were prohibited from acquiring the title or use of any slaves; and all such slaves were deemed and held forfeited to the State. (*Cobb*, 993.) Doubts were entertained whether this act did not operate retrospectively, so as to divest free persons of color of the property held by them at the time of its passage. Consequently, the Legislature, the year ensuing, declared that "All

property held by any free persons of color, at the time of the passing of the foregoing Statute, shall not be deemed or considered as forfeited; *but that the same shall remain in the owner, or in his or her descendants, after his or her death*. (*Cobb*, 995.)

It is by this grant, that the slaves in controversy are held.--The General Assembly, in effect, provide, that under the Act of 1818, James Nunez, the father of Joseph Nunez, should not be divested of the title to the slaves which he thus held: but that the property should *remain* with *him* during his lifetime, and at his death, *go to his descendants*. It is by virtue of this section of the Act of 1819, and not under the will of his ancestor, that Joseph Nunez held these slaves. But this act will be analysed in vain, for authority in either father or son, to give these negroes by will or deed.

By the Act of 1833, contracts made with free persons of color, even for necessaries, are rendered void, unless made upon the written order of their guardian. (*Cobb*, 1005.) Can it be supposed that the Legislature would accord to this class the higher and more important privilege of giving or selling slaves, without the intervention of their guardian?

[21.] But it is attempted to analogise this case to the contracts of infants, which it is insisted that the infant may confirm and give binding force to, after he comes of age. The parallel falls in this. At twenty-one, the legal disability attaching to infancy, terminates. The minor is then a man.--But the pupilage in the other case is perpetual. The acts of an infant are *voidable*, only, because at maturity, he may affirm or disaffirm them. The acts of a free person of color are *void*, because he never ceases to be a ward, though he attain to the age of Methuselah. His legal existence is forever merged in that of his guardian.

But I deem it useless to pursue this investigation further.

[22.] This judgment is pronounced in view of a few facts, to which I will barely advert, in conclusion.

In no part of this country, whether North or South, East or West, does the free negro stand erect and on a platform of equality with the white man. He does, and must necessarily feel this degradation. To him there is but little in prospect, but a life of poverty, of depression, of ignorance, and of decay. He lives amongst us without motive and without hope. His fancied freedom is all a delusion. All practical men must admit, that the slave who receives the care and protection of a tolerable master, is superior in comfort to the free negro. Generally, society suffers,

and the negro suffers by manumission. I am fully persuaded that the State ought sternly to withhold its assent to domestic emancipation; and that the true policy, is not to seek to elevate the black man in our midst to a condition of equality which it is impossible for him to exercise wisely for himself or the community. Civil freedom among the whites, he can never enjoy. To this isolated class, it will ever be but a name.

We doubt the propriety of ejecting our free negros upon the free States. They will not only become troublesome allies in the unconstitutional and unholy work of inveigling off our slaves, and assisting them to escape; but their constant effort and aim will be to create discontent among our slaves; and in case of intestine war, which may Heaven in its mercy avert, such a population would be in a situation to do us much mischief.

Whether the scheme of African colonization be feasible or not, the ablest and most discriminating minds have doubted.--There yet stands on our Statute Book, a resolution of the representatives of the people in favor of this colonial enterprise, as presenting to the philanthropist, the citizen and the statesman, the only means, not only of benefitting the nominally free who are scattered over the land, but everywhere treated as an inferior race; but as affording an outlet to the humane feelings of the benevolent, as well as a drain for that relative increase of the slave over the white population of this country, and which in some sixty years, has swelled to between 350 and 400 thousand. Of one thing I am quite certain, and that is, that whether freedom will, in Africa, be a *reality* to the colored man and his children or not, in the United States, whether shaveholding or non-slaveholding, it is worse than slavery itself. And that the Courts of this country should never lean to that construction, which puts the thriftless African upon a footing of civil or political equality with a white population which are characterized by a degree of energy and skill, unknown to any other people or period. Such alone, can be *citizens* in this great and growing Republic, which extends already from the Atlantic to the Pacific, and from the St. Lawrence to the Rio Grande.

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