# KENTUCKY LAW CONCERNING EMANCIPATION OR FREEDOM OF SLAVES

BY EDWARD M. POST*

## INTRODUCTION

This paper examines the law of Kentucky relating to the emancipation or the right to freedom of slaves between 1792 and 1865 by reviewing the pertinent constitutional provisions, the legislation, and the legal principles developed in the cases decided by the Kentucky Court of Appeals.

## CONSTITUTIONAL PROVISIONS

During the period under discussion Kentucky had three constitutions.

The first of these, adopted in 1792, provided in Article IX that the legislature could pass laws permitting the owners of

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*EDWARD M. POST, B.A., LL.B., is a partner in the Louisville law firm of Taustine, Post, Sotsky, Berman, Fineman and Kohn.

A footnote to the footnotes. In footnoting case law I have followed the system used in legal research rather than in historical research because to have done otherwise would have resulted in documentation that would not have permitted one to locate the material cited. For example, the case of *Davis v. Tingle* (footnote 16) appears in volume VIII of Benjamin Monroe's *Reports of Cases at Common Law and in Chancery Argued and Decided in the Kentucky Court of Appeals in 1848* published by Monroe as court reporter for the Court of Appeals in 1848; other cases appear in works published earlier or later by official court reporters and originally entitled *Decisions of the Court of Appeals of Kentucky* and *Reports of Cases Argued and Adjudged in the Court of Appeals of Kentucky*. Alexander K. Marshall, George M. Bibb, and William Littell also served as court reporters. In addition to these volumes being published by the official reporter in the same year as the case was decided, they were reprinted by different publishing companies from time to time, principally by Henry W. Derby Company (Cincinnati, 1857), Robert Clarke and Company (Cincinnati, 1869), and George G. Fetter Company (Louisville, 1899).

However, to modern legal scholars all of these volumes are known collectively as the *Kentucky Reports* and are cited in the same manner as in the footnotes to this article. So, again using footnote 16 as an example, the beginning of that case will be found in volume 47 of the *Kentucky Reports* at page 539, and it originally appeared in volume 8 at page 539 of Benjamin Monroe's work. The years, printed in parentheses, are the years the cases were decided.

The complete names of litigants mentioned in the text are provided whenever possible.

slaves to emancipate them in accordance with the rights of creditors and provided that they did not become a charge to *the county* in which they resided.[1]

Article VII of the second constitution, adopted in 1799, contained an identical provision except that the power of the legislature was further conditioned so that laws permitting emancipation had to prevent the emancipated slaves from being a charge to *any county* in the commonwealth.[2]

Kentucky's third constitution was adopted in 1850. Section 1 of Article X dealt with the emancipation of slaves. It reflected a concern about emancipated slaves that went beyond preventing them from merely being an economic burden on the counties or the commonwealth. In lieu of the phrase in the first two constitutions, "preventing them from being a charge . . .," there was the phrase, "and to prevent them from remaining in this State as they are emancipated."[3] This provision was compatible with Section 2 of Article X which made it a felony for any Negro thereafter to immigrate to Kentucky and for any slave thereafter emancipated to refuse to leave, or having left, to return.[4]

The shift in emphasis with regard to the status of emancipated slaves during the half century between the second and third constitutions has interesting economic and political implications, but perhaps the most significant aspect of these provisions is their implicit assumption that the legislature needed constitutional sanction in order to pass laws permitting the owners of slaves to emancipate them. There is inherent in these provisions the idea that had the constitutions not so provided, the legislature could not pass laws permitting masters to emancipate slaves; as a corollary to that proposition was the idea that, without legislation, a master had no right to emancipate his slave. So not only was the existence of slavery considered a

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1 Richard H. Stanton, *Revised Statutes of Kentucky* (Cincinnati: Robert Clarke & Company, 1860), p. 851.
2 *Ibid.*, p. 101.
3 *Ibid.*, p. 147.
4 *Ibid.*

proper subject for legislation but so also was the owner's right to free his slaves.

## LEGISLATION

The Kentucky law affecting emancipation was passed in 1794. It provided that it was lawful for a person by will or other writing to emancipate slaves subject to the rights of his creditors. The document had to be signed, sealed, and witnessed by two witnesses; it also had to be proved by both witnesses or acknowledged by the emancipator to be his act in the county court. The act also provided that the county court had the power to demand bond with surety of the emancipator or his representatives for the maintenance of any slaves that might be aged or infirmed so as to prevent such slaves from becoming a charge to the county.[5] By an act in 1798 every slave emancipated was to have a certificate of his freedom from the clerk of the county court on parchment with the county seal affixed thereto for which the clerk was to charge the emancipator five shillings.[6]

In 1800 the act was changed to provide for emancipation by will or by other documents without the need of a seal and witnesses.[7] In 1823 emancipated slaves were required to appear before the county court so that detailed descriptions could be recorded in the Order books.[8]

In 1852 the legislature re-enacted the 1798 requirement that a written instrument of emancipation had to be proved by two witnesses and also provided that emancipation depended upon the willingness of the slave to leave Kentucky. Emancipation would not take effect until after the slave was out of the state. No slave over sixty-five or incapable of self-support could be emancipated unless the owner provided the means of transpor-

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5 William Littell, *The Statute Law of Kentucky* (Frankfort: Hunter, 1809), p. 113.
6 *Ibid.*
7 *Ibid.*
8 Charles A. Wickliffe, S. Turner, and S. S. Nicholas, *The Revised Statutes of Kentucky* (Frankfort: A. G. Hodges, 1852), p. 610.

tation out of the state and one year's support. If a slave was emancipated and refused to leave the state, he was to be hired out for the benefit of the county until he consented to leave.[9]

## Case Law

### Introduction

Many cases came before the Kentucky Court of Appeals between 1792 and 1865 which adjudicated the question of whether a person held in slavery was in actuality a slave or was entitled to freedom.

Although slaves had no right of access to the judicial system, persons held in slavery had the right to litigate the question of whether they were slaves or not. The multitude of cases brought, and frequently won, by those held in slavery attests to the fact that the right of judicial access was not merely a theoretical one. At the same time common sense suggests that for every case successfully litigated by a person held in slavery, there must have been many more cases that were equally meritorious but which were not instituted because of financial limitations or ignorance of the law and available remedies.

### Cases Where Status Depends on Residence outside of Kentucky

In subsequent sections of this paper I shall discuss some of the cases which interpreted or applied the constitutional and statutory provisions discussed earlier. But first I shall deal with the large body of cases which were decided independent of those constitutional or legislative provisions but which arose instead because of the laws of other states where the slave had lived while in bondage.

*Hazelrigs v. Jane,* decided in 1809, is a case which the slaves lost, but it is the first reported case which illustrated the principle that Kentucky might recognize a right to freedom of one held in bondage, if he was free under the laws of another state.[10]

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9 *Ibid.*

10 Hazelrigs v. Jane, 4 Ky. 425, 1 Bibb 425. (1809)

The plaintiffs sued for false imprisonment and for the purpose of ascertaining their right to freedom. The defendant, Amos Jane, was a resident of Virginia in 1780 who held the plaintiffs as slaves under the laws of that state. In October 1780 he took the plaintiffs and left his residence with the intention of moving to Kentucky. However, because of Indian attacks and unusual river conditions he did not get to Kentucky until 1783. In the meantime he lived in territory claimed by both Virginia and Pennsylvania. The boundary claim was settled in 1784; according to the settlement the place where the defendant had lived was several miles inside Pennsylvania. During the time of the dispute the executive and judicial officers of both states exercised jurisdiction of the territory simultaneously and "great public emotion was produced and existed among the people."

The circuit court for Montgomery County held that the plaintiffs were free because of Pennsylvania's act of 1780 abolishing slavery. On appeal the inquiry focused on what laws governed the disputed territory. It was assumed (but not decided) that if in fact Pennsylvania law governed then the plaintiffs were free; but if the laws of Virginia governed, then the plaintiffs were slaves. The court held that justice and sound policy suggested that the conduct of the territory's inhabitants during the existence of the dispute should have been regulated by the laws of the state in which they were citizens. Since the defendent was a citizen of Virginia and trying to go from one place to another place in Virginia, the court held that the law of Virginia applied and reversed the lower court's decision.

Eleven years later the court declared as a principle of law what it had earlier assumed to be the law in *Hazelrigs v. Jane.* In 1820 the court considered the case of Lydia who was born a slave in Kentucky in 1805 and belonged to John Warrick, a Kentuckian, who left in 1807 to settle in Indiana. He kept Lydia as a slave until December 1814, when he sold his right to her to Thomas Miller, a resident of the Indiana Territory, who sold her to Robert Todd, a Kentuckian. Todd then brought her to Kentucky and sold her to John W. Rankin.

Lydia sued Rankin for her freedom and won. The ordinance establishing the Northwest Territory prohibited slavery. The court held that because Warrick went to the Northwest Territory and was governed by its laws, not only was his right as a master suspended, but it ceased to exist, and the court also held that the right of slavery once destroyed cannot be brought back into operation. The court rejected Rankin's argument that although the ordinance gave Lydia a right to freedom, she was never in its actual enjoyment while in Indiana, and since she had remained and acted as a slave while in Indiana, she should be a slave upon her return to Kentucky.[11]

*Amy v. Smith,* decided in 1822, stood for the proposition that although Kentucky would recognize the law of another state entitling a person to freedom, it might not necessarily enforce it.[12] It further illustrates that emancipation was not equated with citizenship. Amy had been a slave in Pennsylvania prior to that state's abolition act of 1780. In 1780 she was not registered in accordance with the law of that state, and so under Pennsylvania law would have been considered free. In 1783 she was taken by her master, William Smith, to Maryland and thereafter to Virginia where under state law she also would have acquired freedom because of her master's failure to take an oath concerning permanent residence pursuant to the prohibition of the importation of slaves for sale. Predicated on these facts, Amy sued for her freedom in Kentucky. Relying on *Lydia v. Rankin,* she contended that since she had been freed by the operation of Pennsylvania and Virginia law she could no longer be enslaved.

Although I have found no appellate cases concerning emancipation prior to 1809, it is apparent that well before 1809 there must have been many cases in the lower courts wherein a similar suit for freedom was based on slaves' contentions that they had been freed by operation of law because of the masters' violation of the laws of another state. This seems probable because in 1808 the Kentucky legislature passed an act providing that no action

11 Rankin v. Lydia, 9 Ky. 813, 2 A. K. Marsh. 467. (1820)
12 Amy v. Smith, 11 Ky. 326, 1 Litt. 326. (1822)

could be commenced by a slave claiming freedom because of a master's failure to comply with the relevant legislation of Pennsylvania and Virginia.[13] The act of 1808 asserted in its preamble that creditors and purchasers were exposed to injustice because people held in slavery were keeping their claims to freedom dormant.

In any event, Amy's master argued on the basis of the 1808 law that her suit which had been brought after 1810 was too late. Amy argued that the limitation of two years was void because it was repugnant to the constitutions of the United States and of Kentucky. She contended the two year limitation violated the clause of the federal constitution which provided that citizens of each state shall be entitled to all the privileges and immunities of citizens of the several states. She argued that before her removal from Pennsylvania, she was a citizen of Pennsylvania and that by her removal to Virginia, she became a citizen of Virginia.

In a 2-1 decision the Court of Appeals held that Amy was not a citizen of any state because she would not have been entitled to the enjoyment of those privileges and immunities on the same terms by which they were conferred on other citizens. The court concluded that even if free in Pennsylvania or Virginia she had not belonged to a class which enjoyed all the privileges and immunities of state citizenship. Therefore she had not become a citizen of any state. The majority asserted that there was a presumption against Amy having become a citizen of any state because "Free Negroes and Mulattoes are, almost everywhere considered and treated as a degraded race of people." Even though a state could make any person it chose a citizen, the laws of the United States permitted only whites to become citizens which "marks the national sentiment upon the subject, and the presumption that no state has made persons of color, citizens."

It should be noted that the limitations act of 1808 did not affect the right of slaves taken out of Kentucky into free states

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13 *Ibid.*

to sue later for freedom in Kentucky without regard to the length of time between leaving the state and bringing suit. Accordingly, between 1820 and 1865 there were a number of such cases.

The rule of *Rankin v. Lydia* was followed uniformly if — but only if — the slave had been taken to *reside* in a free state or territory. So in *Bush's Representatives v. White* where the master Joel White had taken his slave to live in the northwest it was held that all title to the slave was lost.[14] However, in *Graham v. Strader* the master had permitted his slaves to go about as free men earning money as musicians on the river boats of the Ohio.[15] They frequently went into Ohio with their master's permission. Nevertheless, the Court held that a slave's temporary presence in free territory, even with his master's permission, did not confer freedom.

What would happen if only a part-owner of a slave took him to live in free territory? That question was partially answered in *Davis v. Tingle*.[16] Tom's father (a freedman of color) had acquired the interest in Tom during the life of the widow (Mrs. John Ball) of Tom's former owner. He had also acquired an absolute one-third interest in Tom at the death of Mrs. Ball. In 1831 Tom's father took him to Ohio and lived with him there for two years. Subsequently Tom returned to Kentucky. When Mrs. Ball died, the heirs of the original owner claimed an interest in him. The court held that Tom's residence in Ohio conferred freedom because his father, the life tenant, had consented to his residence there and because those who had an interest in Tom had not objected to it. The court also suggested, but did not decide, that residence with the permission of the life tenant might have been sufficient to confer freedom regardless of the objections of the remaindermen, those who would acquire complete ownership at the death of the life tenant.

In 1849 the court considered for the first time the effect of the

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14 Bush's Representatives v. White, 19 Ky. 100, 3 T. B. Mon. 100. (1825)
15 Graham v. Strader, 44 Ky. 173, 5 B. Mon. 173. (1844)
16 Davis v. Tingle, 47, Ky. 539, 8 B. Mon. 539. (1848)

judicial decisions of a sister state on the status of a slave temporarily within its borders. In *Collins v. America,* America, a female slave, had been taken to Ohio for a two-week period for the purpose of attending her owner's sick daughter.[17] A suit for freedom was brought based on Ohio's status as a free state. As has been previously noted, a temporary stay in a free state did not confer freedom under Kentucky law. But the court was faced with America's contention that such a stay did free her under the case law of Ohio. The court held that even assuming America's contention was true, it would adhere to its own law, under which the test was whether the slave's stay in a free state was such as to make the slave "an inhabitant" of that state. *Collins v. America* also anticipated, but did not decide, the question of what would have happened if while in Ohio America had there sued for, and been granted, freedom by the courts of Ohio.

This question arose in 1852 in *Maria v. Kirby.*[18] In 1848 Mrs. Rebecca Kirby took her slave Maria on a pleasure trip to the east. During a three or four day stop in Washington County, Pennsylvania, a writ of habeas corpus was issued on the petition of a colored man by the name of Brown. A Pennsylvania judge discharged Maria from custody under the laws of Pennsylvania and adjudged her to be free. However, Maria voluntarily returned to Kentucky and there remained as a slave until January 1850 when she filed an action claiming freedom by virtue of the proceedings and judgment in Pennsylvania. It was held by the court that regardless of how the Pennsylvania courts construed Maria's status, the Pennsylvania decision could not operate to deprive Mrs. Kirby of her rights since Maria had been in Pennsylvania only temporarily, at least in an action in the state of Kentucky.

These two cases clearly indicate that Kentucky would not consider itself bound by the way in which a free state might interpret its laws. But that does not mean the Kentucky court

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17 Collins v. America, 48 Ky. 565, 9 B. Mon. 565. (1849)
18 Maria v. Kirby, 51 Ky. 542, 12 B. Mon. 542. (1852)

ignored the laws of a free state which dealt with slaves. This is illustrated by *Ferry v. Street* decided in 1854.[19] In 1838 Mrs. Trigg had sent her slave Clarissa to Philadelphia in order to accompany Mrs. Ella Crander who was ill and needed treatment. Mrs. Crander and Clarissa stayed in Pennsylvania for more than six months. Clarissa then voluntarily returned to Kentucky and went back in the service of Mrs. Trigg.

Under the laws of Pennsylvania there was an exception to its Emancipation Act of 1780 for the slaves of persons who were passing through or living in the state but not becoming residents thereof. However, Pennsylvania law also provided that no slave should stay longer than six months.

According to the evidence established in the case, Mrs. Trigg expected that Clarissa would probably remain in Pennsylvania for more than six months; she had also been informed that if Clarissa stayed in Pennsylvania for as long as six months, she might be entitled to freedom under the laws of that state even though she was a transient. However, Mrs. Trigg did not believe that Clarissa would avail herself of the laws of Pennsylvania because she had a husband and children in Kentucky, and because she was to become free when Mrs. Trigg died. However, Clarissa surprised Mrs. Trigg and sued for her freedom when she returned to Kentucky.

The court reviewed previous cases where it had considered the effect of the laws of the states where slavery was not recognized and considered the consequence of a temporary sojourn in such states by the owner's consent. The court had previously held that under such circumstances the slave would not be entitled to freedom in Kentucky. But the court held that it had not considered the situation where a master resided with his slave in a free state longer than the laws of that state permitted. The court found the purpose of the Pennsylvania statute reasonable and noted that Mrs. Trigg had been aware of its implications. The court found for Clarissa, holding that under

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19 Ferry v. Street, 53 Ky. 355, 14 B. Mon. 355. (1854)

the circumstances she was free in Pennsylvania and should be considered free in Kentucky.

The effect of the laws of a sister state was further considered in *Norris v. Patton's Administrator.*[20] A slave and master, while temporarily in Ohio, made a contract for the slave's emancipation upon payment of $400.00. The court held that even though Ohio would have sanctioned such a contract, Kentucky would not recognize it because under Kentucky law the slave's temporary residence in Ohio could not change his status or confer any right to enter into an enforceable contract.

Regardless of the acquisition of a slave's freedom by the operations of the laws of another state, such freedom would not affect the status of a slave's children. Nor could emancipation be conferred other than by strict adherence to the Kentucky statutes or the laws of other states. This is illustrated by *Anderson v. Crawford* in 1854.[21] Sometime between 1828 and 1830, the slave Milly left her master with his consent. However he did not formally emancipate her. Milly lived as a free person in Ohio for a period of twenty years. Although there was a dispute on this issue, the case was decided as though the master had consented to her freedom. It was held by the court that the length of time Milly had lived as a free person would not operate to change her status. It was further held that even if she had become free by operation of the laws of Ohio, she acquired that freedom after her children were born in Kentucky. As a result, the master was able to reclaim the children in spite of the lapse of almost twenty years.

The last case considered involving change of status by change of residence is the 1858 case of *Smith v. Adam.*[22] The master, Ormsby Gray, had in 1854 delivered a defective deed of emancipation to his slave, Adam. Gray considered Adam free, and Adam frequently went to Indiana and stayed there occasionally.

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20 Norris v. Patton's Adm'r, 54 Ky. 575, 15 B. Mon. 575. (1855)
21 Anderson v. Crawford, 54 Ky. 328, 15 B. Mon. 328. (1854)
22 Smith v. Adam, 57 Ky. 685, 18 B. Mon. 685. (1858)

In 1857 Gray's creditors executed on Adam to collect an indebtedness due by Gray. Adam filed suit to ascertain his freedom.

The court held that the law would have been for Adam prior to the Kentucky constitution of 1850 since Adam had resided in Indiana with the intention of his master that he be free. As a matter of fact such a case had already been decided in 1851 (*Mercer v. Gillman,* 50 Ky. 210, 11 B. Mon. 210) where it was held that a slave making periodic trips to Illinois, coupled with his master's declarations that he was free, was thereby emancipated.) However, in Adam's case the court considered that provision of the constitution of 1850 which provided for emancipation only upon removal from the state. It also considered the provision of the 1850 constitution and the statutes that were enacted pursuant to it, which made it a felony for slaves emancipated by the laws of Kentucky to return to Kentucky after having once left or for free negroes to come into the state.

The court held that Adam was not free because his emancipation would defeat the intent of the constitution and the legislature. If Adam were declared free, he could not be prosecuted for his failure to leave Kentucky since his freedom would not have been by the law of Kentucky but by the law of Indiana, but neither could he be prosecuted for coming into Kentucky since he was already a resident of the state.

### Cases Involving Right to Freedom as Dependent on Race

There are two appellate cases which illustrate the principle that one held in servitude could sue for and obtain freedom on the ground that he was not a black, despite being held in bondage.

In 1835 the Court of Appeals decided *Gentry v. McMinnis.*[23] That case dealt principally with the issue of Polly McMinnis's status. She had been born in Pennsylvania after 1780 where even though her mother was a slave, Polly would have been only in a state of pupilage until the age of twenty-eight. The court held that Polly's residence in Kentucky before she became twen-

23 Gentry v. McMinnis, 33 Ky. 382, 3 Dana 382. (1835)

ty-eight would not affect her right to freedom if the jury believed her evidence. But what is more important is that the court also held that, regardless of the jury's determination of the facts with respect to Polly's status by reason of Pennsylvania law, the jury had the right to view Polly to determine if she was white. If it so decided, then Polly would be adjudged free.

The second such case is the 1848 case of *Gatliff's Administrator v. Rose.*[24] The court held that the lower court had correctly instructed the jury that if it believed, as the plaintiffs claimed, that they were descended from an Indian woman named Jin, then it declare that they were free. This instruction was correct because, according to the court, any person apparently not black was considered free until proved otherwise. Neither a bill of sale nor a long period of bondage was sufficient proof. The court said that Indians could be slaves only if it could be proved that their maternal ancestors were slaves during 1679 to 1691 when Indians could be held as slaves in Virginia. Because of erroneous instructions to the jury which were unrelated to the question of race, the lower court's judgment for the plaintiffs (based on a jury verdict in their favor) was reversed with instructions for a new trial.

This case, furthermore, illustrates the intensity and tenacity with which cases involving emancipation or the right to freedom were sometimes litigated. The case was first instituted in 1833 by Rose, who had been brought to Kentucky in 1784 at the age of seven, and her children and grandchildren, thirteen in number. The suit was commenced in Whitley County, but the venue was changed to Pulaski County where the action was submitted to two juries. Neither was able to agree on a verdict. The action was thereafter moved to Knox County and then to Estill County where in 1846 verdicts and judgments were rendered for the plaintiffs. The defendant then appealed to the Kentucky Court of Appeals which, as already noted, sent the case back for a new trial. So by 1848, this case, dealing in part with events that had

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24 Gatliff's Adm'r v. Rose, 47 Ky. 629, 8 B. Mon. 629. (1848)

taken place sixty-four years earlier had already been tried before three juries and was to be tried in the future before a fourth!

Cases Involving Construction of Written Instruments

A number of cases turned on whether a writing relied on as an emancipative document merely promised emancipation at a later date or immediately conferred emancipation with its enjoyment simply postponed to a later date or until the performance of a certain condition.

In the former event the slave could bring no action to enforce the instrument.[25] A slave could not bring an action to enforce a contract with him while a slave or even to enforce one for his benefit that had been made between others.[26] This was so even though the slave who had been promised emancipation had performed his part of the bargain.

A particularly harsh application of this principle is illustrated by the 1823 case of *Cooke v. Cooke*.[27] William Cooke entered into a written agreement with his slave, Peter, to emancipate him upon the payment of $250.00. In his last illness, he made a nuncupative will (an oral will) reduced to writing at the time it was spoken, but not signed by him, in which he directed that "Peter should be free on the payment of $50.00, a balance of $250.00 which Peter had undertaken to pay, which is all paid but the aforesaid $50.00." Peter paid the remaining $50.00 to Cooke's widow and brought an action of trespass, assault and battery, and false imprisonment against Cooke's heirs. He proved that after the date of the contract he had gone at large as a free person and that his master (until he died) always recognized his right to freedom on the payment of $250.00.

The trial court instructed the jury that Peter could not support his claim to freedom on the basis of the written contract because

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25 Beall v. Joseph, 3 Ky. 56, Hardin 56. (1806);
Henry v. Nunn's Heirs, 50 Ky. 239, 11 B. Mon. 239. (1851)
26 Gatliff's Adm'r v. Rose, 47 Ky. 629, 8 B. Mon. 629. (1848)
27 Cooke v. Cooke, 13 Ky. 238, 3 Litt. 238. (1823)

he was a slave at the time it was made. Nor could he rely on the will because slaves, being considered as real property, could not pass under a nuncupative will. Judgment was rendered against Peter, and he appealed. The Court of Appeals affirmed the lower court's judgment, holding that the lower court's statement of the law was correct; whatever comfort he might have derived from it, Peter was certainly the moral victor: "However strong an appeal the claim of Peter may make to the conscience or moral sense, we must accord with the Court below in each of these instructions."

However, when both the parties to the contract were free, the promisee could himself bring an action to compel the promisor to emancipate the slave. In some instances a document was construed to have conferred emancipation by its mere execution even though the slave's enjoyment of freedom was postponed to a certain time or made contingent on other events. In such instances the slave himself could bring a suit for freedom.[28]

### Cases Involving the Descendants of Slaves Prospectively or Conditionally Emancipated

The situations described above gave rise to yet another judicial question and another sub-class of litigation which dealt with the status of the children of slaves who were born, after an instrument of prospective or postponed emancipation, but before the prospective event or condition had occurred. These cases turned on whether the instrument was itself an emancipating document or merely a promise or declaration of intent. If it was an emancipating document, then the children of the slave born prior to the postponed time or event were free; but if only a promise or declaration of intent, then children born to the slave prior to the event were slaves — even though their mother might have become free.[29]

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28 Thompson v. Wilmot, 4 Ky. 422, 1 Bibb 422. (1809);
Henry v. Nunn's Heirs, 50 Ky. 239, 11 B. Mon. 239. (1851)
29 Dunlap v. Archer, 37 Ky. 30, 7 Dana 30. (1838)

In one case the deed of emancipation provided that the grantor "immediately" liberated Susannah (then age ten) "to go free at the expiration of eight years from this date" (1794). Susannah gave birth to the plaintiff, Charles, in 1802. In Charles's suit for freedom the court held that the deed of emancipation became effective in 1794 and that the additional term was merely for the purpose of providing care for Susannah until she became eighteen. Therefore, any children which she bore after 1794 were also free. So after his being held as a slave for twenty-nine years, Charles was declared free in 1831.[30]

Even in cases of prospective emancipation the child of a slave might be held to be free if it could be said that the document also prospectively conferred freedom on the children. In *Fanny v. Bryant* a 1798 deed provided for the emancipation of Julia and her children effective in 1816.[31] Fanny, a child of Julia, was born between 1798 and 1816. She sued for freedom. However, the lower court advised the jury that Fanny was a slave. The appellate court held that if the deed had been silent as to the "increase" of Julia, then Fanny would be a slave because her mother was a slave when Fanny was born. However, the court ruled that the grantor had the power to secure to Fanny, before her birth, all benefits of freedom, and thus to liberate her from hereditary slavery. The court held that although generally a person cannot give what he does not have, nevertheless the owner of a thing is entitled to all of its capacities and may grant them to another. So, for example, the owner of a flock of sheep can grant the wool which will later grow on them. Similarly, the court held that the owner of a female slave may grant her future increase freedom. In 1830 the court declared that ever since 1816 Fanny had been free.

But let us consider the 1837 case of *Jameson v. Emaline* where the grandchild of a slave lost out, even though her mother and grandmother were freed by a document of prospective emancipation.

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30 Charles v. French, 29 Ky. 331, 6 J. J. Marsh. 331. (1831)
31 Fanny v. Bryant, 27 Ky. 368, 4 J. J. Marsh. 368. (1830)

In this case the grantor gave possession of a slave Maria to X for the term of fifteen years and declared at the expiration of that time she "shall be and is hereby manumitted, set free and discharged from all claim of service and right of property whatsoever." The instrument also stated that if Maria had any issue during this period, "they and each of them shall be manumitted and set free when they shall respectively arrive at the age of 30 years." Nancy was born to Maria between the date of the document and the expiration of the prescribed fifteen years. By the terms of the document she would have been emancipated when she reached thirty, but the plaintiff Emaline was born to Nancy before Nancy had attained the age of thirty. The court held that since Nancy was a slave at the time Emaline was born, Emaline was a slave for life.[32]

Cases Involving the Formality of the Instrument

Uniformly the courts held that an instrument had to be executed in strict accord with the provisions of the statutes authorizing emancipation which were in effect at the time. Many cases between slaves and their master's heirs were lost by slaves because of a failure of strict compliance with legislatively prescribed requirements for emancipation.

One illustration of the strict and technical application of the statutes is the 1810 case of *Donaldson v. Jude*.[33] The case also contains a valuable discussion of the history of the right of emancipation and provides a better understanding of the reasons for the Kentucky constitutional and legislative provisions permitting it.

In that case, the plaintiffs were suing for freedom. They offered in evidence a copy of an instrument dated October 12, 1781, which purported to be the deed of Walter Clark which manumitted Jude who was one of the plaintiffs and the mother of the remaining plaintiffs.

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32 Jameson v. Emaline, 35 Ky. 207, 5 Dana 207. (1837)
33 Donaldson v. Jude, 5 Ky. 57, 2 Bibb 57. (1810)

Attached to the instrument was a certificate of the clerk of the county court of Berkley County, Virginia, attesting that on the sixteenth day of January 1787 the deed of emancipation from Clark to various slaves was, in the said county court, proved by a witness William Gruble, who also proved that it had been subscribed by Richard Ridgeway and that it had been ordered to be recorded by the court. Gruble gave a deposition and stated that the written instrument was executed by Clark in 1781 and that it was acknowledged by him again in the fall of 1783. The court reviewed the Virginia statutes which were in force in 1781 and in 1783.

The court held that by the twenty-sixth section of the thirty-first chapter of the Acts of Virginia of 1748 no slave could be set free upon any pretense whatsoever except for some meritorious services, to be adjudged and allowed by the governor and council after a license had been obtained. That law continued in force until 1782. During that time efforts at emancipation by will and deed were considered inoperative and what had happened constantly was that applications were made to the legislature for special acts to legalize the emancipation. The frequency of these applications probably suggested the propriety of making a general provision on the subject. So in May 1782 Virginia enacted a statute that thereafter it would be lawful for any person by will, or by any other properly attested instrument to emancipate slaves.

After the passage of the 1782 act Clark again acknowledged the written instrument in the presence of the witnesses. The court held that even though the instrument was originally void because it had been executed in 1781, it was not necessary for it to have been re-executed and re-attested. So Clark's later acknowledgement was sufficient to render it operative under the act of 1782. However, in 1787 the instrument was proved in the county court in Virginia by only one (instead of two) of the subscribing witnesses. This was then insufficient by the laws of Virginia. Therefore, the court held that the instrument was not valid and

binding, the plaintiff Jude had not been emancipated, and she and her children were slaves.

The foregoing result must seem startling to a lay person in view of the fact that the case was decided in 1810 and at that time in Kentucky (since 1800) all that was necessary for a valid deed of emancipation was the grantor's signature.[34] In any event, the case is one of many in which the court followed a consistent pattern of strict construction of the statutes governing emancipation.

Cases Where Emancipation Depends on Rights of Creditors

There were numerous cases where, despite emancipation by will, the slave was sold by a deceased master's executor to pay debts. The 1838 case of *Nancy v. Snell* illustrates some of the questions which arose in such cases.[35]

Nancy sued for freedom, lost in the lower court, and appealed to the Court of Appeals. She claimed her freedom under the will of Ann Burgess who had died in Maryland in 1826 and who had bequeathed freedom for Nancy and her children. In March 1832, the administrators of Ann Burgess sold Nancy to Osborn of Scott County, Kentucky, who brought them to Kentucky and then sold her to the defendant. The lower court viewed the sale by the executor as conclusive because as a general proposition an executor had a right to sell property to pay debts and because the master's right of emancipation in Maryland as in Kentucky was subject to the rights of creditors.

Because the statutes of Maryland were not introduced into evidence, the court decided the case in accordance with what it conceived to be general principles of law. It was held that slaves are property and that as property in the hands of a testator, they constitute a fund for the payment of debts and cannot be emancipated to the prejudice of creditors. But the court said:

> When a man is emancipated by will, he occupies a double character,

34 Snead v. David, 39 Ky. 350, 9 Dana 350. (1840)
35 Nancy v. Snell, 36 Ky. 148, 6 Dana 148. (1838)

> of property and legatee, or quasi legatee; and, as freedom is a legacy above all price, humanity, justice and the spirit of our laws indicate the propriety of placing him in the most favored class of legatees.

The court in *Nancy v. Snell* pointed to an earlier case recognizing the right of an emancipated slave to assert his right to freedom, even against an innocent purchaser, and to litigate the question of whether there were sufficient funds for the payment of debts without such a sale. Based on the earlier case the Court of Appeals reversed the judgment of the Scott County Circuit Court with directions that Nancy was free unless it could be established that her sale was made after all of the testator's other personal and real property had been exhausted.

### Cases Involving Emancipation Dependent on Going to Liberia

Between 1847 and 1865 there were five cases which dealt with wills which provided for prospective emancipation in the event the slave elected to go to Liberia.

In one of these cases the court held that the testator's will should be construed as having emancipated the slave at the date of the testator's death and thereby as having conferred free status on children born between the testator's death and the slave's departure to Liberia.[36] But in another case the court held that a similar will conferred on the slave's child, born after the testator's death, not freedom but only the right to go to Liberia.[37]

An interesting situation was described in *Winn v. Martin* which illustrates the attraction of Liberia for slaves.[38] Sam was the slave of John Martin who died in 1837. John's will provided that Sam was to go to Martin's wife and children. Eight years after Martin's death, however, Sam was to be offered to the colonization society to be transported to Liberia where he would be considered free. The will also provided that Sam was not to be forced to go and that if he did not go he would continue

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36 Graham's Ex'r v. Sam, 46 Ky. 403, 7 B. Mon. 403. (1847)
37 Adams v. Adams, 49 Ky. 69, 10 B. Mon. 69. (1849)
38 Winn v. Martin, 61 Ky. 231, 4 Metc. 231. (1863)

to serve the Martin family. The will also provided that Sam was to be hired out seven years after the testator's death and that his earnings would be given to him in the sum of $10.00 if he should go to Liberia.

In 1846 when Sam was eighteen he asked Winn to purchase him because he wanted to stay in Kentucky as Winn's slave rather than go to Liberia. However, Sam let it be known that if Martin's executors refused to sell him, he wanted to go to Liberia. Winn tried to buy Sam but he was unable to negotiate an acceptable price. Sam then advised Martin's executors that he wished to go to Liberia, and they delivered him to the colonization society to be transported there. Sam was sent to Liberia, but when he arrived he refused to become a citizen and came back to New York on the same boat. After reaching New York he had a letter written to Winn expressing his desire to return to Kentucky if Winn would buy him. In August 1846 Winn purchased Sam. He came to Kentucky and continued in the service of Winn until 1859 at which time he sued for freedom and the value of his services. Sam won in the lower court, and Winn took an appeal.

The court held that the evidence clearly indicated that Sam never intended to become a Liberian colonist and that the only purpose in announcing his intention to go to Liberia was to try to get his owner to sell him at the price that Winn was willing to pay. Since he did not succeed in his plan, the court asserted, Sam had gone to Liberia intending to return as soon as possible in the hope that this technical performance of a condition of the will would induce his owner to sell him to Winn. The court held that it would not allow Sam to defeat the testator's intent by his technical compliance with the will's conditional emancipation. According to the court, Sam's freedom was not the testator's sole or chief object. The court held that the testator's chief object was to promote the scheme of colonization "which many then regarded as giving promise of a peaceful and happy solution of the problem of African slavery." Because the will was not com-

plied with, the court reversed the lower court and held for Winn against Sam.

### Case Involving Emancipation as Dependent on Spouse or Father's Service in Union Army

In 1865 Congress passed a law providing that the wife and children of any person mustered into the army or navy of the United States would be free. In *Corbin v. Marsh,* decided in 1865 before the passage of the 13th Amendment, Marsh sued Corbin for the possession of Milly who Marsh claimed was his slave.[39] Corbin contended that Milly was the wife of a Union soldier and was therefore free and was by her voluntary act in his employment. The court held that the act of congress was unconstitutional because it had effectively taken private property for public use (encouraging enlistments) without compensation.

## Conclusion

It is clear that there was a considerable body of constitutional and statutory law governing emancipation. This is admittedly not a startling revelation to one knowledgeable about the institution of slavery. Still, it seems surprising to discover how stringently the law restrained or conditioned the right of a master to free his slaves. It seemed easy to entertain the vague notion that when a master decided to free slaves he could do so without a by-your-leave from anyone, that he would simply come out on the veranda and say, "O.K. you all, from now on, you're free."

The wording of the constitutional provisions and enabling legislation suggests that their adoption and enactment had nothing whatsoever to do with a desire to help or protect the slaves. Instead they seem to have represented a grudging concession that if, as John Locke had said, the ownership of property was a natural right, then it should logically follow that a man ought to be able to divest himself of property — at least so long as he did not do so to the detriment of his neighbors. Perhaps

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39 Corbin v. Marsh, 63 Ky. 193, 2 Duv. 193. (1865)

these provisions and statutes were the earliest harbingers of modern day anti-pollution or anti-littering ordinances.

Also of interest is the account of the nature and substance of the case law on this subject. There does not seem to have been any effort heretofore to collate or analyze this litigation. It is not generally known that in a slave state, slaves could, and often did, successfully litigate for their freedom. Even more intriguing are the inferences to be drawn from the extent of this litigation. The Court of Appeals dealt with approximately one hundred such cases. Based on knowledge of the ratio of circuit court cases to appealed cases in modern times (when it is far simpler to take an appeal) it seems reasonable to assume that cases in this category which were litigated in the circuit courts must have numbered in the thousands. But even one hundred appellate cases suggest there was an organized and well-financed attempt by Quakers, abolitionists, and anti-slavery societies to use the judicial process as a means of securing emancipation. If this is not the case and this litigation was merely the product of spontaneous, independent efforts, instituted and financed by slaves themselves, then that too would be worthy of note as a testament to the efforts of slaves at self-emancipation.

In any case it is clear that all these cases, even with today's means of research, communication, and word-processing, would have necessarily involved massive litigative efforts. Most often evidence had to be gathered about events that had occurred many years earlier; sometimes the witnesses lived in far-off places.

Lastly, it seems fair to say that by and large the judicial process was neither pro-slavery nor anti-slavery, neither pro-black nor anti-black. This impression contradicts the natural tendency to assume that the juries, trial judges, and appellate courts of southern states would have automatically decided any disputes between a black and a white in favor of the white. Nevertheless the impression is that the cases were decided objectively. They were decided in an environment where the institution of slavery was unquestioned and where everyone in the deliberative process set aside ethical considerations and concentrated on the right of

property and its full protection under the law. But this did not mean simply a creditor's or master's right of property in one he claimed to be a slave. It also meant the property right to one's own labor by a person claiming to be free. It is somewhat of a paradox but in a society which sanctioned — and sometimes mandated — slavery, the judicial system served both to foster the institutionalization of slavery and yet at the same time to protect zealously the rights of those who were "illegally" held as slaves.