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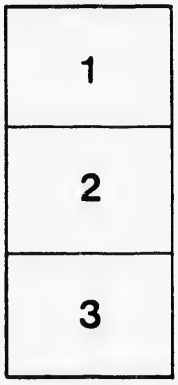

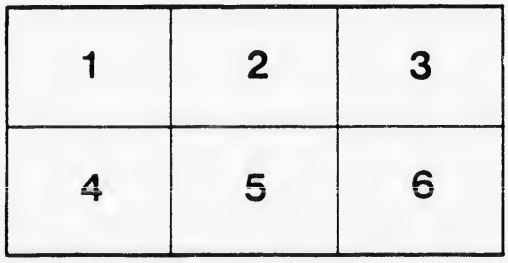

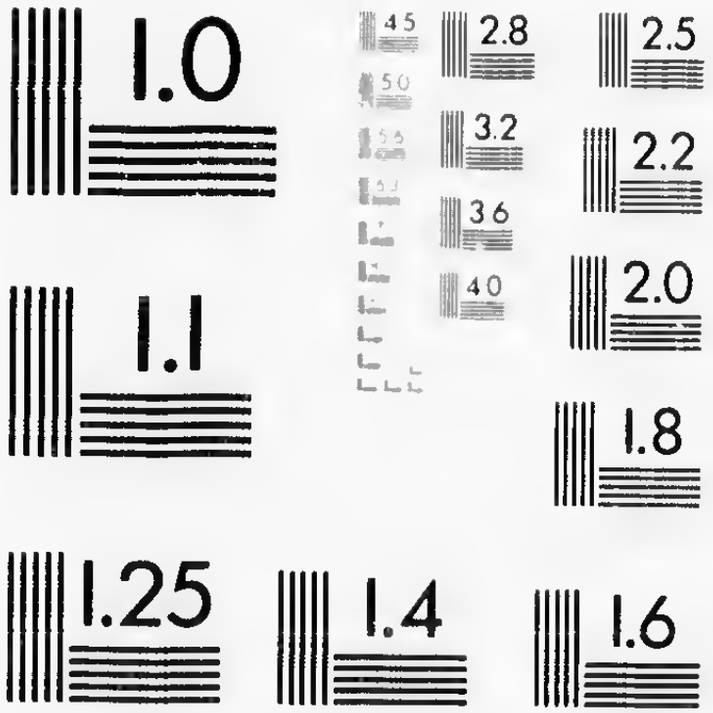

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OPINIONS

OF SEVERAL

GENTLEMEN OF THE LAW,

ON THE SUBJECT OF

NEGRO SERVITUDE,

IN THE PROVINCE OF

NOVA-SCOTIA.

ST. JOHN:
PRINTED BY JOHN RYAN, NO. 9, LONG-WHARF,
SOUTH SIDE MARKET SLIP, PRINTER TO
THE KING'S MOST EXCELLENT
MAJESTY.
1802.

PREFACE.

SUCH is the authority of Cuſtom, that nothing is now given to the Public without a Preface.—Though not

"*Oblig'd by hunger, or request of Friends,*"

I nevertheleſs find myſelf, on the preſent occaſion, under the neceſſity of ſubmitting to this ſame authority.

It muſt naturally excite ſome degree of ſurprize in the mind of the Reader, to ſee the Public in poſſeſſion of papers which embrace only a private concern of Col. Delancy, were not ſome explanation of the motive which induced to the publication, to accompany them. I will now proceed to give this explanation with the waſte of as few words as poſſible: And not only ſo, but I will relate the manner in which I became poſſeſſed of theſe very intereſting papers.

First, as to my motive to this publication. Let me then ſay, that the queſtion, whether any ſuch thing as Negro Slavery can legally exiſt in this Province, has long occupied the attention both of the learned and unlearned among us. It has, indeed, lately undergone a judicial inveſtigation, but without any judicial deciſion. Now, whether any particular Negro (admitting him to be a Slave) belongs either to A or B, is a matter in which none but the litigating parties are directly intereſted. Therefore a judicial deciſion of it, can only diſappoint the hopes of one of two Men. But when it becomes queſtionable, whether any *particular thing*

thing is really and truly *property*, which had hitherto been conſidered as *property*, the diſpute becomes a matter in which every Member of the Community is either nearly or remotely intereſted; for although every Man in this Province is not poſſeſſed of this ſpecies of property, yet every Man *may* be poſſeſſed of it. Nothing, therefore, can be of more extenſive utility to the Public, than to have this queſtion put ſo faſt a-ſleep, that it may never awake again. How far the publication of theſe papers may go towards effecting this, the event only can tell.—Thus much as to my motive.

As to the *manner* in which I became poſſeſſed of theſe papers, I deſire leave to refer the Reader to the following ſhort Narrative.

About a year ago, I heard that Col. Delancy (an old acquaintance of mine, and who lives near Annapolis, in our neighbouring Province) had inſtituted a ſuit againſt a Mr. Wooden for detaining his Negro Slave. I heard alſo, that after a verdict in his favour, there was a motion in arreſt of judgment grounded upon the idea, that an action of Trover (as Lawyers call it) would not lie for a Negro in that Province, but that ſome other action was the proper one. All this happened at the laſt September Term of the Supreme Court there. And I ſince find, that the hearing of the motion was delayed till the September Term in the preſent year.

Now, happening ſince to underſtand, that Col. Delancy had reſorted to ſeveral of the moſt learned Counſellors in England for their opinions on this intereſting ſubject, and that he had obtained opinions from them parallel to his moſt ſanguine wiſhes, I thought I ſhould be doing well were I to requeſt Col. Delancy, by letter, to ſend me a copy of thoſe opinions, with his leave to ſhow them where I might think they would be of ſervice. Accordingly I wrote him, and received

from

from him the papers in the order in which they are now publiſhed, together with his leave to make what *prudent* uſe of them I might think proper. Although this permiſſion does not go the full length of *literally* juſtifying me in ſending them to the Preſs; yet I have taken the liberty of amplifying this my authority, from a well grounded belief, that the liberty would have been granted me, were it more ſpecifically requeſted.

I would juſt add, that the Attorney-General of England is always, from the high official rank which he ſuſtains, conſidered as being at the very top of his profeſſion. As to Mr. Tidd, it can ſcarcely be a ſecret here, that he is reputed to be the moſt learned ſpecial pleader in that country. And I am informed, that the profeſſional character of Mr. Perſival, riſes far above the level of mediocrity. As Mr. Aplin's opinion is pretty generally referred to in the three Engliſh opinions, and as the latter would not be well underſtood without a peruſal of the former, the whole was ſent me; and accordingly I publiſh the whole.

CASE.

JAMES DELANCY, Eſquire, of Annapolis, in the Province of Nova-Scotia, had a Negro Slave, named Jack, who run away from his ſervice without leave, and went to Halifax, above an hundred miles diſtant from Annapolis, where he was taken into the ſervice of a Mr. Wooden on wages.

ON hearing this, Col. Delancy directed his Attorney to write to Mr. Wooden, informing him, that the Negro belonged to Mr. Delancy, and that if he detained him, an action would be brought againſt him for

ſo

ſo doing. To which Mr. Wooden's Attorney returned for anſwer, that the Negro in queſtion was indeed retained by Mr. Wooden in his ſervice, but that he, as well as all other Negroes in this Province, were Freemen; there not being any law here to make them otherwiſe.

WHEREUPON an action of Trover was commenced by Mr. Delancy againſt Mr. Wooden, for the Negro Slave: And the cauſe came on to be tried at the laſt Term of the Supreme Court, which was in September laſt, when the Plaintiff obtained a verdict with £70 damages. But the Counſel for the Defendant moved the Court in arreſt of judgment, upon the ground, that an action of Trover would not be for the converſion of a Negro in this Province. And the motion was ordered to ſtand over for argument to the Term in September next.

IT was ſtrongly urged, on the part of the Defendant at the Trial, that inſtead of an action of Trover, the Plaintiff ſhould have brought his action for damages for detaining the Negro, *per quod Servitium amisit*, as in the caſe of any other Servant; and that no action of Trover could be maintained for the Negro, as he could be no more the Slave of Mr. Delancy in this Province, than he could that of any other perſon in London, or elſewhere.

YOUR opinion is therefore requeſted, whether an action of Trover was the proper form of action for Mr. Delancy to recover the value of his Negro Slave? Or what is his proper remedy for recovery of amends for the damage he has ſuſtained.

Mr.

Mr. APLIN'S Opinion.

Sir,

Your letter of the tenth of October laſt, in which you deſire my opinion on a ſtated caſe, I have both received and carefully peruſed: And I am much miſtaken indeed, if an action of Trover does not lie for the converſion of a Negro in this Province. I am almoſt tempted to ſay, that it is the only proper action, unleſs the taking ſhould appear in proof to be a tortuous one. In this latter caſe, the Plaintiff has his election, either to bring this action, or treſpaſs. Property in the Plaintiff, and a ſubſequent converſion, are the characteriſtic ingredients of an action of Trover.

But the queſtion is, whether a Negro is or can be, in the legal ſenſe of the word, the property of any Man in this Province?

Now, whether a Negro is or can be the property of any Man in this Province, will emphatically depend upon another queſtion—Whether a Negro can or cannot be a Slave in this Province? For if he can be a Slave here, I think when we come coolly to conſider the legal dominion which the maſter has over him, he cannot be taken to be any thing leſs than his Maſter's property. If ſo, Trover muſt neceſſarily lie againſt any Man who detains the Slave, after a demand and refuſal;—unleſs, indeed, the general Law, in reſpect to Trover, is laid proſtrate in favour of this ſpecies of property.

Two things, therefore, at this ſtage of the inquiry, ſeem to offer themſelves for diſtinct conſideration.—Firſt, whether a Negro can, in this Province, be a Slave? Secondly, although he may legally be a Slave here; yet, whether he can legally be deemed the property of any other Man?

Answering the firſt of theſe queſtions will, I think, go a great way towards anſwering the other.

In

In reſpect to the firſt propoſition, whether a Negro can, in this Province, be a Slave, I would juſt obſerve, that ſuch a queſtion has never yet come directly before any of the Courts of Weſtminſter-Hall. I ſay directly, becauſe it certainly has ſeveral times come before them in a collateral way, as I ſhall take occaſion, in a ſubſequent ſtage of the preſent inquiry, more particularly to remark. It is to the ſtatute Law of the Mother-country, I preſume, that we are principally to look for a ſolution of this very intereſting queſtion. And when we come to recur to the original Charter conſtituting the African Company, the ſeveral Royal confirmations of it, the ſeveral Proclamations to ſecure the excluſive trade againſt interlopers, and particularly the 23. Geo. 2. (which latter lets in all his Majeſty's ſubjects, without exception, to an equal participation in the African trade;) we ſhall be at a loſs to diſcover any legal grounds for ſuppoſing Negroes, who are conſtantly mentioned as Slaves, not to be truly and legally ſuch.

In the ninth of the privileges granted by this ſame original Charter, which was made by Charles the Second, in the year 1661, Negroes are expreſsly named as one article of excluſive traffic. And why a Negro, ſo made an article of traffic, ſhould not be as much the property of a Company trader, as Oſtrich Feathers, Indigo, or Gold Duſt, is an enigma which I am unable to unravel.

The Preamble of the 23. Geo. 2. recites, "that the "trade to and from Africa, being very advantageous "to Great Britain, and neceſſary for the ſupplying the "Plantations and Colonies belonging thereto, with a "ſufficient number of Negroes, at reaſonable rates, "ought to be free and open to all his Majeſty's ſubjects." And accordingly the trade was made free and open by an enacting clauſe of the ſame act.

Under the latitude of this and other acts it was, that the

the ſubjects of the more Northern Colonies, while they yet remained under the dominion of his Majeſty, proſecuted a very gainful trade to the coaſts of Africa, no leſs for the ſupply of Negroes to the Weſt-India Iſlands, than to ſupply the more Southern Colonies with that article of traffic. Add to all this, that under the protection of the ſame general Laws, theſe northern colonial traders ſupplied their own ſeparate diſtricts of country, with juſt as many Negroes as they could find a market for.

I have carefully run my eye over the earlier Laws of Antigua, Virginia, and New-York; and it is worth remarking, that there is no Law among any of theſe provincial codes, that is *creative* of any ſuch ſtate as that of Slavery. Many of their Laws, indeed, and particularly thoſe which were nearly contemporary with the firſt organization of the reſpective governments, do recognize Negroes as Slaves. But then theſe ſame acts go no further than to regulate their pre-exiſting ſtate of bondage. The reaſon is obvious. They conſidered, and rightly too, that this deſcription of Men were already made Slaves by thoſe acts of Parliament which made them emphatically articles of traffic. Conſequently, they had nothing further to do, than barely to make the before mentioned regulating acts, and to adjuſt them to the then exiſting circumſtances of the caſe.

The ſame thing may be ſaid of the more northern colonies: and particularly of Maſſachuſetts, Rhode-Iſland, and Connecticut. I mention theſe three, becauſe I am pretty well acquainted with their whole ſyſtem of colonial juriſprudence. Their Laws alſo ſpeak of Negroes as Slaves; but none of them are declaratory of a ſtate of Slavery. The only Law of this Province, which ſo much as mentions a Negro, is intituled, "An act for "the regulating Inn-holders, Tavern-keepers, and Re-

"tailers

" tailers of Spirituous Liquors." Now this Act, in the ſecond ſection of it, enacts, " that in caſe any Soldier, " Sailor, Servant, Apprentice, bound Servant, or *Negro* " *Slave*, or other perſon whatſoever, ſhall leave any pawn " or pledge, as a ſecurity for the payment of any ſum " exceeding Five ſhillings, contracted in ſuch manner, " ſuch Soldier, Sailor, Servant, Apprentice, bound Ser- " vant, or *Negro Slave*, or other perſon whatſoever, or " the Maſters or Miſtreſſes of ſuch Servant, Appren- " tice, bound Servant, or *Negro Slave*, may complain " to any Juſtice of the Peace where ſuch Retailer, Inn- " holder, Tavern or Ale-houſe keeper, or any other " perſon whatſoever, receiving ſuch pawns or pledges, " uſually reſides, that ſuch pawn or pledge is detained " from him or her by ſuch Retailer, Inn-holder, Ta- " vern or Ale-houſe keeper, or any other perſon what- " ſoever, and having made proof thereof upon oath, or " otherwiſe to the ſatisfaction of the ſaid Juſtice, ſuch " Juſtice of the Peace is required, by warrant under his " hand and ſeal, to compel ſuch Retailer," &c.

It is obſervable that this Act does, and that in the moſt emphatical manner, ſpeak of Negroes as *Slaves*.— But it may eaſily be diſcerned, that it does juſt as emphatically ſuppoſe them to have been ſo before the Act was made, or even thought of. Hence it may be inferred, at leaſt, that the provincial Legiſlature had in their eye (if indeed they had any thing in it rational) that theſe very Acts of Parliament had already made Slaves of Negroes within the Province. Therefore it may not improperly be ſaid, that a Law of this Province does, in fact, *admit* of ſuch a ſtate as that of Slavery in it.

This ſame Act of the 23. Geo. 2. further ſays, that " any of His Majeſty's ſubjects" [whether Britiſh or Colonial] " for the ſecurity of their Goods, or Slaves, may " erect houſes," &c. It ſpeaks of Negroes, in ſeveral other

parts of it, as *Slaves*. There are alſo ſeveral other ſubſequent Acts of Parliament, which ſpeak of Negroes as being in the ſame ſtate of Bondage.

HENCE we may ſafely argue, that as ſeveral Acts of the Britiſh Parliament do make Slaves of Negroes; and as all His Majeſty's ſubjects [whether Britiſh or Colonial] are made equal ſharers in the profits of the African or Negro traffic, the Colonial Traders might carry their Slaves, either to the Weſt-Indies, or to any other of His Majeſty's Colonies on the Continent. Conſequently, if Negroes, ſo imported into the Weſt-Indies, were legally held as Slaves *there*, they cannot, when imported into any of the Continental Colonies, be in a better ſtate than they would have been, had they been imported into the *Weſt-Indies*.

IF Negroes therefore are Slaves, as well within this Province, as in the Weſt-Indies (for the ſame Law that makes them Slaves *there*, makes them ſo *here*) then it remains to be conſidered, whether Negroes, ſo made Slaves, can be the property of their Maſters.

I would only further remark, on this head, that whatever is made an article of traffic, muſt neceſſarily have an owner, and conſequently become an article of ſale. And whatever may be legally ſold, muſt have been the property of the ſeller: For nothing but property can be ſold, and therefore, whatever can be ſold, muſt be property.

BUT, that the matter in diſpute may not depend altogether upon the foregoing reaſoning, let us next ſee, whether there is no Law that does, ſtill more pointedly, make Negroes property in the hands of their Maſters. Surely there is; for the Act of the 5. Geo. 2. C. 7. does expreſsly make perſonal Eſtate of them, and ſubject them to be ſold under Execution to ſatisfy the demands of Engliſh creditors. Some of the Colonies, it ſeems, and particularly Barbadoes and Virginia, had made Laws

which

which turned Negroes, who were before perſonal Eſtate, into real. Conſequently, when an Engliſh creditor attempted to ſue out Execution for a perſonal demand against a Colonial debtor, if he meant to faſten it on the Negro property of the Defendant, he muſt neceſſarily ſue out an *Elegit*; and Negroes being turned into real Eſtate, the creditor could only take one half of them. But this is not quite all; for he muſt, even afterwards, be put to his ejectment. Now, this ſhuffling game being perceived by the Britiſh Legiſlature, they were not content barely with metamorphoſing Negroes into perſonal Eſtate again; but they proceeded, in the laſt mentioned Act, to turn all real Eſtate in the Colonies into perſonal Eſtate alſo. Any one may eaſily perceive how much the Coloniſts loſt by this kind of Legiſlative trick.

WHOEVER conſiders this clauſe of the Act, along with the ſeveral Colonial acts which it was meant to defeat, muſt wonder much at hearing that Negroes in thoſe *particular Provinces* were not property. But if they were indeed property in thoſe *particular Provinces*, it will require much ſophiſtical reaſoning to prove, that they are not as much property *here*, as they ever were or could be *there*. This Act embraces all the Colonies without diſtinction. A Negro *here*, as well as *elſewhere*, is made property by it, and ſubject to a *fieri facias* at the ſuit of an Engliſh creditor. If making a Negro liable to be thus ſold, does not make him property in the hands of the purchaſer, we muſt wander far out of the ſyſtem of Engliſh juriſprudence to find out what property is. Buying and ſelling, if they imply any thing muſt neceſſarily imply property both in the ſeller and purchaſer.

IT may not be amiſs juſt to mention, before I enter upon the other propoſed point of conſideration, that Negroes, even in this Province, have always been allowed

lowed to paſs by Will, as perſonal Eſtate. They have always found their way into Inventories both of teſtate and inteſtate perſons. They have conſtantly been made the ſubjects of diſtribution, under our Provincial law, as part of the Inteſtate's perſonal Eſtate. They have uniformly been ſold here under Execution; and, add to all this, they are and always have been ſold, in the common courſe of traffic, as other chattel intereſts are or were ſold, and warranted by the bill of ſale to be the property of the ſeller.

If I could be excuſed a little ſyllogiſtic pedantry, I would make this part of the argument to ſtand thus.

Trover will lie for any chattel that is legally made the ſubject of property.

But Negroes are, by expreſs Act of Parliament, made the ſubjects of property in this Province.

Therefore, Trover will lie for a Negro in this Province.

I am now prepared to enter upon the other point of conſideration, which has nothing further for its object, than juſt to obviate ſuch objections as have already ſtood, or may in future ſtand in the way of the foregoing reaſoning.

To prove that Trover does not lie for a Negro in the Plantations, the caſe, Smith vs. Gould, in 2. Salk. 666, has been cited and wholly relied on. The ſame caſe is reported in Ray. 1274. But when we look into this Caſe, and accurately attend to the reaſoning of the Court, we ſhall find it only to prove, that ſuch an action would not lie for a Negro in *England*. Now, before I can be brought to think the cited Caſe to prove any thing againſt the preſent action, it muſt clearly be ſhewn me, that there is no legal difference between the ſtate of a Negro in England, and the ſtate of one in the Plantations: And this no Man can believe, who has read and duly conſidered the before cited authorities. "Men," ſay

ſay the Court, " may be the owners, and therefore can-
" not be the ſubjects of property." Or, in other
words, " as a Negro, the very moment he lands in
" England, becomes a Freeman; ſo he then becomes
" capable alſo of acquiring property. Therefore, who-
" ever is rendered capable of acquiring this, can never
" remain the ſubject of it. Freedom, and a capacity
" of acquiring property, are always concomitants,
" and can no more be put aſunder than Man and Wife."
In the Caſe next preceding, the cited one, where *Inde-*
bitatees was brought for the price of a Negro ſold in
England. Holt, Ch. J. held, " that as ſoon as
" a Man comes into England, he becomes free." Con-
ſequently, having now become free, he has become ca-
pable of acquiring property; and having acquired this
capacity, he can no longer remain the ſubject of pro-
perty.

The peculiarity of his Lordſhip's expreſſion in this laſt cited Caſe, appears to deſerve more than a curſory attention. If a Negro does indeed *become* free as ſoon as he lands in England, then there muſt be juſt the ſame difference between his latter and former ſtate, as there is between a ſtate of Freedom and a ſtate of Slavery.— Were the two cited Caſes to be taken in *pari Materia*, as I think they ought to be taken, they would be ſeen to be ſo far from proving Trover not to be the proper action, to recover damages for a Negro in the Planta-tions, that they will go very far towards proving it to be the only proper action, if the taking is not a torti-ous taking. The former and latter ſtate of the Negro are clearly aſcertained by the Court, the one being a ſtate of Slavery, which implies a ſtate of property, and the other a ſtate of Freedom, which implies his being his own Man. Therefore, before it can be made out, that Trover will not lie for a Negro, who is property, it muſt be ſhewn, that property or no property in the

ſubject

ſubject of an action of Trover, makes no difference in the queſtion, whether it is the proper or improper remedy.

THE before mentioned Caſe of Smith vs. Brown and Cooper, when rightly underſtood, may, I think, throw yet ſome additional light on this ſubject. The action was, as I have already hinted, *Indebitatees* for the price of a Negro ſold in England. Whereas he actually was, at the time of ſale, in Virginia—Of courſe, had the ſale been in Virginia, there could have been no objection to the action's being brought in England. But though the ſale actually was in England, the Court held, that the action would have been well brought, had the declaration ſtated a ſale at London, (which was the truth of the Caſe) and that the Negro was then in Virginia, and that Negroes were ſaleable articles by the Laws of that Country.

HAD the Negro been in England at the time of ſale, no ſuch action could have been ſuſtained; for according to the ſtated axiom, that a Negro upon landing in England becomes free, the Negro then being a free Man, could no longer remain the ſubject of ſale.—But ſtill, while this ſame Negro remained in Virginia, he was a ſaleable article even in London; and all the Plaintiff had to do, was to adjuſt his declaration to the real ſtate of the Caſe. Surely this Caſe, if it proves any thing, proves that the Negro was a Slave, and therefore property in Virginia. If property in Virginia, the ſame Law that made him property *there*, makes him ſo in *Nova-Scotia*.

THE converſion of any thing that can be the ſubject of an action of Trover, has always been conſidered by the Courts of Weſtminſter-Hall, to be the very point of the action. Conſequently, if a Negro, who was before a Slave, becomes a free Man as ſoon as he gets to England, Trover will not lie for him *there*, becauſe he

there

there ceaſes to remain a ſubject of property. Yet, I believe, no Man will, upon a little cool reflection, ſay, that this ſame action would not lie in Weſtminſter-Hall, for the converſion of a Negro in Virginia, as in the latter place he was legally the property of his Maſter. The truth is, a Negro can no more be converted than ſold in England. Converted he cannot be, unleſs it can be made out, that a Negro, who is there his own Man, can be converted to the uſe of ſome other Man.

THE authority of the Caſe, Smith vs. Brown and Cooper, has been eſtabliſhed by a courſe of commercial dealing, from that time down to the preſent hour.—Cargoes of Negroes are conſtantly inſured from Africa to the Plantations; and, with a very few exceptions, whatever may be inſured may be ſold. Therefore, at this day, *Indebitatees* would lie in England for a cargo of Negroes that were ſold while the ſhip was yet on the African coaſt. But this action would not lie for a cargo of Slaves that were ſold while the ſhip was lying in the Thames. And for this plain reaſon, becauſe Negroes becoming Freemen as ſoon as they reach England, could no more become ſubjects of ſale, than they could the ſubjects of converſion. And ſubjects of converſion they could not be, becauſe nothing but property is capable of being converted to any Man's uſe. And Negroes, when in England, are not property.

LET us recur, for a moment, to the report of the before-mentioned Caſe by Raymond. This more accurate Reporter makes the whole Court to ſay, "this "action does not lie for a Negro, no more than for "any other Man: For the common Law takes no no-"tice of Negroes being different from other Men.—"By the common Law no Man can have property in "another, but in ſpecial Caſes," &c.

SURELY this is no more than ſaying, that by the common Law of England, no Man *there* can have property

perty in another. It can never be conſtrued to mean, that one Man cannot be the property of another in the Plantations: For this opinion is expreſsly grounded on the common Law, "which takes no notice of Ne-"groes being different from other Men." But the Statute Law does make a difference between them and other Men, while they yet remain in the Plantations, where they are ſubject to the controuling authority of that Law. However, as none of theſe Statutes legalize the Importation of Slaves into Great-Britain, ſo the common Law, which ſtill remains unaltered *there*, will not and cannot diſtinguiſh between them and other Men *there*.

In Bacon's Abridgement, under title Trover, my idea of this matter will appear correctly right. His words are, "it has been holden, that a perſon cannot "have ſuch a property in a Negro in *England*," (putting the latter word in Italics) "as will enable him to "maintain an action of Trover for the converſion of "the Negro; and that he can only recover," [that is to ſay, in *England*] "as he may in the caſe of any other "ſervant, damages for the loſs of his ſervices."—This is the abridged Caſe of Chamberlain vs. Harvey. Ray. 146.

When he ſpeaks of the Caſe more immediately under conſideration, he ſays, "in a ſtill later Caſe it has "been holden, that a Man cannot have ſuch a pro-"perty in a Negro in *England*," (putting the latter word again in Italics) "as will enable him to maintain an "action of Trover for the Negro." Surely I may, without putting any tone upon this author's words, ſuppoſe him to have meant, that although Trover would not lie for a Negro in England, where he is out of the reach of the Statute Law; yet in the Plantations, where he is under the immediate operation of it, this action is the proper, if not the only proper action.

What

WHAT the learned Blackſtone ſays upon this ſubject, in the 424th page of his Commentaries, will ſhew that I have had a right apprehenſion of the opinion of the Court, as it ſtands reported in the preceding Caſe by Salkeld and Raymond. This profound Lawyer, ſpeaking of the abhorred ſtate of Slavery, has theſe remarkable words:—"And now it is laid down, that a "Slave or Negro, the inſtant he lands in England, be-"comes a Freeman; that is, the Law will protect him "in the enjoyment of his perſon and his property."—Two things decidedly appear from this recited clauſe. Firſt, that a Negro, before he lands in England, either is or may be a Slave. Secondly, that the inſtant he lands in England, he becomes a Freeman. He next proceeds to deſcribe the diſtinguiſhing badges of Freedom; and accordingly he adds, that "the Law," (meaning the common Law of England) "will protect him in "the enjoyment of his perſon and his property."—Hence it is clear, that a Negro, who had been incapable of acquiring property, while remaining under the Plantation Laws, may nevertheleſs acquire property after he gets to England. He is now capable of taking by deviſe, or gift, no leſs than acquiring property by lawful traffic. But this he could not do, while he remained under a Plantation juriſprudence. Nor could he hold property acquired in England, after his return, if he took it along with him; for then his property, as well as his perſon, fall immediately again under the power and dominion of his owner.

THIS ſame learned author tells us before in p. 127, pretty nearly what he tells us in the before recited paſſage. Here he ſays, that "the ſpirit of liberty is ſo "deeply implanted into our Conſtitution, and rooted in "our very ſoil, that a Slave or a Negro, the moment "he lands in England, falls under the protection of the "Laws, and ſo far becomes a Freeman; though his Maſ-

"ter's right to his ſervices may *poſſibly* remain." By this laſt paſſage it no leſs appears that a Negro, before he lands in England, is a Slave.

I underſtand attempts to have been made, to make the Caſe of a Negro, and that of a villain, parallel Caſes.

On this head I would juſt obſerve, that the moſt characteriſtic marks of difference which at preſent occurs to me, between theſe two deſcription of Men, ſeem to be theſe. Firſt, a villain was, at the worſt of times, capable of holding lands by long uſage or immemorial cuſtom. Secondly, if he purchaſed lands or goods, and afterwards ſold them before his Lord had ſeized upon them, the laſt purchaſer would hold them againſt the claim of his Lord. But neither of theſe languid ſparks of Freedom belong to a Negro Slave. For if lands ſhould be deviſed to ſuch a Slave, I apprehend the Maſter could not enter upon them, but that the heir at Law might enter, and claim them as an undiſpoſed part of the real Eſtate. I believe it to have been a generally received opinion, even in New-England, where Slaves were treated with great humanity, that they were rendered ſo incapable of acquiring property themſelves, that it could not be derived through them to any one elſe.—In ſhort, they were conſidered as incapable of receiving any thing, except through their Maſters: And conſequently their Maſters could not receive any thing through them, except their earnings and ſervices. No Man, who coolly reflects on the ſtate of a Negro Slave, in all the aſpects of it, can help ſeeing, that the ſtate of a villain is but very faintly analogous to that of the former.

No Man who has the lawful poſſeſſion of goods, can be the object of an action of Trover, till after demand and refuſal, becauſe, till then, there can be no converſion. The converſion, therefore, being the very point of the action, muſt neceſſarily be under the controul of the

the Laws of the Country where the converſion happens. If a Jamaica gentleman brings his Slave over to England, and another takes his Slave into his ſervice, it is admitted the owner cannot maintain Trover for him *there*. The reaſon is obvious—becauſe the Maſter could have no property in him where the converſion is laid: And no Man can bring Trover for any thing in which he has no property. But ſtill, although the Maſter has no property in the perſon of the Negro, while he remains in England, he may, in the cautious language of Blackſtone, *poſſibly* retain a right to his ſervices.—"But can a Maſter remain intitled to the ſervi-"ces of a Negro, and yet have no property in his per-"ſon?" He aſſuredly may: For although property always implies a power of diſpoſing of it, yet, when a Negro lands in England, he is, *co inſtanti*, under the protection of the common Law, and therefore ceaſes to be property *there*. He is now capable of acquiring property, and of diſpoſing of it afterwards; which would be nonſenſe, if he was not owner of himſelf.

"But if he is truly owner of himſelf, how happens "it that another Man ſhould be intitled to his ſervices?" Let Blackſtone anſwer the queſtion.—"Yet," ſays he, "with regard to any right which the Maſter may have "acquired to the perſonal ſervices of John or Tho-"mas, this will remain exactly in the ſame ſtate as be-"fore; for this is no more than the ſame ſubjection for "life, which every Apprentice ſubmits to for the ſpace "of ſeven years, or ſometimes for a longer term."—Now, the Maſter did not acquire the perpetual ſervice of John or Thomas, by his or their *perſonal* ſubmiſſion; for they never ſubmitted either their perſons or ſervices to any Maſter, as Apprentices do. "Yet, are "not theſe two Caſes different from each other, which "this great Man makes to be ſimilar ones?"—By no means, if this author is rightly underſtood: For he plainly

plainly means a *right* to ſervices *acquired* in the Plantations, and under the operation of *(a)* Plantation Laws. Whereas, in England, no ſuch right could be acquired without the conſent of the party. The whole reaſoning, on this part of the ſubject, amounts to but ſimply this.—"As an Apprentice, in England, can yield his "ſervices to a Maſter for ſeven or more years; ſo the "Plantation Laws give the Maſter of a Negro, while "the latter is reſident in the Plantations, a right as "well to the perſon as to the ſervices of the Slave.—"But when the ſame Negro lands in England, the "Plantation Laws ceaſe to make him the abſolute pro-"perty of his Maſter, ſo as to be ſold as an article of "traffic, becauſe, by the common Law, no Man can be "a Slave in England. Yet, as the Laws of the Realm "do admit of perſons yielding their *ſervices* to a Maſter; "ſo the Plantation Laws ſhall ſtill ſo far affect the Ne-"gro, even while in England, as to intitle his Maſter "to his ſervices, although they are perpetual."—It ſhould be carefully noted, that the Weſt-India Planter acquires no property either in the perſon or ſervices of the Negro, after the latter becomes reſident in England; for, by the common Law of the Realm, he could acquire none, unleſs by the Negro's voluntary conſent.

It is, therefore, by the Statute Law, which extends to the Plantations, but not to England, that the Maſter ſtill retains an intereſt even in the ſervices of the Negro. The truth is, the ſame Statute Law which gave him a right to the perſon of the Negro, while in Jamaica, leaves him only intitled to the ſervices of the Negro, while he is reſident in England. Both rights are acquired by the ſame Statute Law, though this ſame

Law

(a) By Plantation Laws, is not meant Laws made by any of the Colonial Legiſlatures, but thoſe Acts of Parliament which affect the Plantations. Theſe latter Acts are indifferently called *Plantation Laws*, or Laws *regulating Plantation Trade*.

Law operates variouſly on the Negro, accommodating itſelf to the different places of his reſidence.

THE common Law Courts have always diſplayed ſo jealous a regard for the common Law of the Realm, that they may, without carrying the expreſſion to any undue length, be called the Guardians of that Law.—Hence it is, theſe Courts will never ſuffer it to be abrogated or altered, even by Act of Parliament, unleſs the Act contains words, of unequivocal interpretation, ſhewing an intention that it ſhould be altered in certain reſpects. And hence it is, that although theſe Acts regulating the African trade, do permit Engliſh merchants to ſend their veſſels from any of the ports within the Realm, to the coaſts of Africa, and after taking in there cargoes of Slaves and other articles of traffic, to carry the Slaves to any part of the Plantations (and where they have a right to carry them by the expreſs words of thoſe Acts). Yet, ſuch has been the jealouſy of the common Law Courts over the common Law of the Realm, that the African trader has never yet been permitted to bring his Slaves within any of its ports. The plain and obvious reaſon of all this, is, that England is not named in thoſe Acts. And as no Man, by the common Law, can be a Slave in England, ſo theſe ſame Slaves, when once they land *there*, become Freemen as to their *perſons*. Hence it appears, that the trader, after he has purchaſed his Slaves on the African coaſt, becomes the abſolute owner of them; for, if a Man has not a property in what he can buy and ſell, he cannot be the owner of any thing. Yet he cannot bring this ſame property to England, becauſe by the common Law, which is not there abrogated or altered by any Act of Parliament, the perſon of no Man can be the property of another. Or, as C. J. Holt has it, "Men may be the owners, and therefore "cannot be the ſubjects of property."

FROM

FROM this view of the matter, a Britiſh trader may, under the various Acts, as well encouraging as regulating the African trade, become the abſolute owner of a Negro, either on the coaſts of Africa, or in any of the Plantations. But the common Law of England, upon the arrival of the Slave *there*, ſo far operates as a manumiſſion, as to tranſmute the Maſter's right to his perſon, into a bare right to his ſervices. Yet, on the return of the Negro to any of the Plantations, he, I apprehend, is out of the tranſmuting operation of the common Law, and conſequently falls again under the controuling power of the Statute Law, which makes him a Slave *there*. Of courſe, the reſidence of the Slave in England, affects only a temporary ſuſpenſion, both of the Maſter's rights and the Negro's eaſement.

FROM the preceding remarks, one may eaſily diſcover, that the Maſter's claim to a Negro while in the Plantations, is not the ſame that it is while he is reſident in England. In the latter caſe, the Maſter is intitled to the ſervices of his Negro, but not to his perſon. In the Plantations, he is intitled to both. Now, it muſt appear ſingular to a legal eye, that the Maſter ſhould have no action more appropriating for a Negro in the Plantations, than he could have in England, when it is evident, that in the former, the Maſter had no leſs a right to the perſon of his Negro than to his ſervices: whereas in the latter, the Maſter is intitled to his ſervices only.

ANY Man, who has only a common foreſight of things, may eaſily ſee to the full length of what is hoped for from this motion. Negroes are made articles of traffic, and conſequently ſaleable articles in the Plantations generally, by expreſs Act of Parliament. It is ſeen by the abettors of the motion, that if no action more appropriating than an action *per quod Servitium amisit* would lie for a Negro, the Maſter's right

to

to his perſon is extinct: For this action is, in the very nature of it, appropriate only to the caſe of a Servant, or an Apprentice, in whoſe perſon the Maſter has no direct property. Their ſervices, indeed, the Maſter has a right to; and therefore, if they are inticed away and detained, this action accommodates itſelf to the recovery of damages for the loſs of thoſe ſervices. And if it is once ſolemnly adjudged here, on the ſtrength of Blackſtone, and the caſe of Smith vs. Gould, that no action more appropriating would lie, the Negro would be exactly in the ſame ſituation here, that a Negro is in London, where he is no more a ſaleable article than a Servant, or indeed any other Man. Should a Man here, therefore, be diſpoſed to ſell his Negro, he might probably ſeek for a purchaſer in vain. But admitting ſome body or other might riſk the purchaſe of him, he ſtill muſt be delivered on a *habeas corpus*, as any other Servant in England would be, ſhould his Maſter *there* take it into his head to ſell him as his property.

YET even this is not quite all: For ſuch a judgment on the motion would operate as an effectual repeal of the 5. Geo. 2. which, as has been already remarked, makes perſonal Eſtate of Negroes in the Plantations, and ſubjects them to be ſold, as ſuch, under a *fieri facias* at the ſuit of Engliſh creditors.

I am therefore clearly of opinion, that an action of Trover, on the Caſe ſtated, is the proper action, if not the only proper one.

The ATTORNEY-GENERAL'S *Opinion.*

I AM of opinion, that an action of Trover was the proper form of action for Mr. Delancy to recover the value of his Negro Slave. I concur ſo *entirely* with Mr. Aplin, in the very able opinion which he has given upon the ſubject, that I cannot do better than generally refer

refer to his reaſoning. It appears to me, that the legal inference which he draws from the 5. Geo. 2. C. 7. as applicable to this queſtion, is QUITE IRRESISTIBLE AND UNANSWERABLE.

The Opinion of Mr. TIDD.

I AM of opinion, that under the circumſtances of this Caſe, an action of Trover was the proper form of action for the recovery of the value of the Slave in queſtion. In order to maintain this action, three things are neceſſary to be proved. Firſt, property in the Plaintiff. Secondly, poſſeſſion in the Defendant. And, thirdly, a converſion.

THE great criterion of property, is the power of diſpoſing of it: And it appears from the very able opinion of Mr. Aplin, and the Acts of Parliament and Caſes he refers to, that in the Plantations and Colonies in America, as well as in the Weſt-India Iſlands, Slaves are conſidered as ſaleable property—that they paſs by Will, or go to the next of kin, in caſe of an Inteſtacy, and that they may be taken in Execution to anſwer the owner's Debts.

CONSIDERING a Slave, then, as ſaleable property, I think there can be no doubt but that an action of Trover might be maintained for the recovery of his value, upon proofs that he came to the poſſeſſion of, and was converted by, the Defendant. Suppoſing the Sheriff, under an Execution authorized by the Stat. 5. Geo. 2, C. 7. were to take and diſpoſe of a Slave not belonging to the Defendant, can it be ſaid that an action of Treſpaſs, or Trover, would not lie againſt him? Or, that ſuch an action would not lie againſt the Defendant, or a third perſon, for taking away and diſpoſing of a Slave, which the Sheriff had rightfully taken under ſuch an Execution? As in the Caſe of Welbraham vs. Snow, 2 Saund.

Saund. 47.—See alſo 2. Ld. Ray. 1073, and Gilbert's Exec. 15.

A ſpecial action of the Caſe, which might perhaps have been maintained for detaining the Slave *per quod Servitium amisit*, would have been founded upon the idea, that the Plaintiff was only intitled to his ſervices. But in truth it appears, that he was intitled to ſome thing more, namely, to *the property in him* and *right of diſpoſing of him*. And, upon that ground, I think an action of Trover was the proper form of action. And, indeed, a ſpecial action on the Caſe would not, in the Caſe of an actual converſion, be an adequate remedy; as the damages, in that Caſe, would not ariſe from the detention of the Slave.—The Caſe referred to in 2. Salk. 666, and 2. Ld. Ray. 1274, is not, I think, applicable to the preſent queſtion, for the reaſons ſtated in Mr. Aplin's opinion.

THE only doubt ſeems to be, whether there was a proper demand and refuſal of the Slave, previous to the commencement of the action? Or, whether the Evidence ſtated was ſufficient to authorize the Jury in finding a converſion?—But, as they have found it, that conſideration cannot be material on a motion in arreſt of judgment.

The Opinion of Mr. PERCIVAL.

I AM of opinion, that an action of Trover was the proper action for Mr. Delancy to recover the value of his Negro Slave. I concur ſo *intirely* with Mr. Aplin, in the very able opinion which he has given upon the ſubject, that I cannot do better than generally refer to his reaſoni 15.—It appears to me, that the legal inference which he draws from 5. Geo. 2. C. 7. as applicable to this queſtion, is QUITE IRRESISTIBLE and UNANSWERABLE.

FINIS.