PORT TOBACCO TIMES,
AND CHARLES COUNTY ADVERTISER.

VOL. II. PORT TOBACCO, (MD.) THURSDAY, FEBRUARY 26, 1846. NO. 43.

ENOCH PRATT BALTO. FREE LIBRARY

PUBLISHED EVERY THURSDAY
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REPORT

Of the select committee, consisting of the delegates of Charles county, relative to the removal of the Free People of Color of Charles county.

The committee to whom was referred the subject of the removal of the free people of color of Charles County, beg leave to REPORT:

That they have examined this question with all the care and investigation due to a question of such vital importance to the moral and legal integrity of our State. It is a question which is regarded as of deep interest to the ultimate prosperity of our State, by every citizen within her borders, and, by almost unanimous consent, the institution of free negroes is considered an intense and growing evil. All are agreed that if they could be removed beyond the limits of our State it would be greatly to the advantage of our every interest; and and, for the purpose of affecting their removal, various propositions *have* been suggested, all of which are perhaps destined to prove illusory and ineffectual. It will be found, also, that there are different views entertained in different parts of the State on this subject, and for this reason the committee will apply their plan, which, they hope, will prove effectual to their own county; and also hope that it may meet with general approbation.

The State has appropriated an annual fund of ten thousand dollars for the purpose of establishing a colony in Africa. Notwithstanding this appropriation and the establishment of a colony by means of it, we find that they are now and always have grown with a steady and ceaseless growth up to this time. It will, indeed, be found to be the fact, upon due examination, that they have increased much more rapidly throughout the State, and indeed throughout the Union, than they have been colonized. It is manifest from this fact and an invincible indisposition on their part to remove; there must be some means extraneous of the power of the Colonization Society applied to effect their removal. It is generally known, and indeed the testimony of the Colonization Society, obtained thro' its agents, prove that they are resolved not to remove unless some compulsory means be adopted for that purpose.

The colony in Africa will, in the course of time, furnish a solution of the problem of their capacity or incapacity to govern themselves and improve; and it will be found, after full experiment, that their capacity for self-government and improvement will depend upon their possession of the faculty of invention or discovery of new truths. Without these faculties they will prove themselves incapable of self-government and improvement.

There are strong objections entertained against their removal by force, on the grounds of humanity, while some believe that to do so would be unconstitutional. This committee assume the position, and believe it correct, that it would be the fullress of humanity to transport them without their consent, and that the State has a perfect right to dispose of them as she may think best for their and her own interests. This last position is clear. It is by many believed they are freemen by virtue of the Constitution, and for this reason no forcible action could be had against them, except by a change of that instrument. This is a dangerous doctrine, and if it were permitted to prevail and impress itself upon public opinion, it would result in the most dangerous consequences. It would firmly fasten them upon us beyond the hope of ever obtaining relief from any source. Indeed for a manifest reason, it would endanger the institution of slavery; for if we were to attempt a change of the Constitution, for the purpose of effecting their removal, opposing elements in our community might effect the destruction of the institution of slavery, while such a removal, through the medium of a change, was sought to be achieved.

This committee assume this position, and they do so without qualification or reservation—that they are exclusively the *creatures* of the *law*, and from this source arose all their rights *as freemen.* The only right which they possess above the law and by virtue of the constitution is that which they possessed while in a state of slavery. It grows out of that clause in the constitution which guarantees to the *inhabitants* of the State of Maryland "the right of trial by jury," This right the slave has always and does now possess to the extent—that he can be brought within action of a court of justice. This right, synonymous with that which the slave possess, the free negro possess as the only one which he can claim by virtue of the constitution—all others being the fruits of his manumission, spring from legislative enactment exclusively. Thus the right of freedom itself, the right of sueing and being sued, the right of holding property and of inheriting, and all others of a kindred character, are primarily and entirely the *being* of law, and for this reason are liable to be altered, abolished, enlarged or diminished at the pleasure of the Legislature

It will hardly be denied by any one of ordinary intelligence, but that if there exists the power to alter the law, the power of repeal is a necessary consequence. Indeed this is a conversion of the truth—for the power to alter or amend is a *natural* and unavoidable result of the power to repeal or destroy, unless the tribunal authorized to alter or amend has such a power by grant. In this case, however, no such restriction exists in reference to the right of the Legislature to alter or amend, because the authority to give the freedom was not a derivative authority, but was properly a creative authority. If the Legislature had derived the power to grant freedom from another tribunal, and not from the people, the case would be altered; for in the case of the exercise of a derivative authority, the Legislature would have acted as the agent of another and been restricted in its authority, and could not have gone beyond the terms of the grant. But in this case the people have given this freedom by *law*, because the Legislature which passed the *law* acted as the agent of the people, and the acts of the agent and the principal are the same. Here, then, exists the power, not only to alter or amend, but to repeal or destroy, on the rule that must by every one be conceded, that "the power which creates must ever uncreate." We constantly restrain them in the exercise of their original rights given by law. Limitations are imposed upon their egress from and regress to the State—restrictions are affixed to their right of holding and using fire-arms, and there never has been an attempt made, nor could there be, to set a limit to the power of imposing restrictions upon them—and this is an authority which never has and cannot be exercised towards a citizen under the constitution, which gives equal rights to all and exclusive advantages to none. They are, then, clearly legal and not constitutional citizens, and are rightly and only constitutional "inhabitants" of the State to the extent alone they were so before they were manumitted.

It is manifest, from the nature of our government, that they cannot claim their free rights by virtue of the constitution. If they could do so they could only derive such rights from compact, for our Bill of Rights declare that our government is founded in compact. To have derived their freedom then from the Constitution, they must have been free at the time our constitution was adopted—must have been on equal terms with the whites—been represented in the convention, and united in the compact which produced our constitution. That they were in such a situation no man who has any regard to his reputation will assert.

But this committee assume with full confidence that the act giving them their freedom is clearly unconstitutional. Our government is founded in equality, for, by an express clause of our Bill of Rights, no "monopolies" shall be granted because contrary to the spirit of free government. Indeed, it is and must be conceded by all that the genius of our institutions of government is perfect equality, and exclusive advantage or privileges to none. The institution of slavery grows out of the constitution, and the social organization of our society is derived from the same source. How then can you grant to one slave exclusive advantage while others are retained in bondage? You carve out of the social compact, of which slavery is a component part, certain privileges and confer them on one part of the slaves, while the other portion is retained in slavery.

But the answer is made by some that it is not a privilege conferred on the slave, but that it is a grant to the master, who gives the freedom or unequal advantages. This is doing indirectly what cannot be done directly, and if it could not be given directly to the slave, because unconstitutional, it could not be given through an agent.

But again, it is answered that every man has a right to do what he pleases with his own property. This is true, if he violates no social, or leagal, or constitutional right of another. But no man can so dispose of his property as to grant exclusive benefits to one class while they are denied to another. There is another aspect of the question, however, which makes it still more conclusive. No man shall so deal with his property as to injure that of his neighbor, and it is not in the power of government to grant such a right. Our government, from its free constitution, cannot give power to one class to use property to the injury of another class. In this case the manumission effected by legislative enactment have proved an injury to the slave—for the example and condition of the free negro is directly calculated to impair the efficacy and weaken the bond of slavery, and, by this process, the free negro by manumission is working a continual injury to slave property. This Legislature could not grant the power to any one to dam up a stream of water so as to injure another, and even if a general law should work such consequences it would be unconstitutional. If a general privilege of which all, if they saw fit, could avail themselves were given, and only a few should use it, and the result of the use was a clear injury to others who did not use it, would be palpably unconstitutional. This is too clear for argument.

Thus those rights which now exist as to slavery are primary or constitutional rights, founded in fundamental compact, and when there are privileges given which conflict with the fundamental right, as founded in compact. such privileges must give place to the fundamental, though such privileges should be the fruit, of a general law: because you cannot force citizens holding rights by virtue of the constitution to yield them to mere legal rights. Thus the institution of slavery is a constitutional right and that of the free negro is a legal right, and in a conflict the latter must yield to the former; and the idle existence of the free negro is doing an injury to the slave, the constitutional *property* of the master.

An unconstitutional act may be tested, as well by the consequences as by its direct conflict with the constitution. You cannot compel every citizen to comply with the provisions of an act, although it is general, if there are rights held by the constitution contrary to the conssquences of the general act. Thus slavery is a constitutional right, and where you pass an act allowing manumission, every man is not bound to manumit, nor indeed could you compel every one to do so; and in a conflict the constitutional or stronger right must prevail; and the right of freedom by manumission must yield, in a collision with the right of slavery, the latter being founded in fundamental compact, which is the highest right the citizen can possess.

If there is a stronger or constitutional right, and there is a weaker one, and the latter injures the former, there is a clear unconstitutionality. That the institution of slavery and that of the free negroes are in direct conflict, no one will deny; and then the institution of slavery being constitutional that of the free negro must be unconstitutional. Light is not darkness.

It is generally conceded that the institution of the free negro is a nuisance. It will not be contended but that if an act, even general in its character, should produce a nuisance, it would be unconstitutional; and in such a case the Legislature would not only have the right but be bound to repeal it and remove the injury.

If there was in the State of Maryland but one individual who held slaves, such holding would be by the constitution, and, consequently, a social and stronger right; and although there should be but one slave owner in the State, if the institution of free negroes was adverse in any manner to his interests in his slave, or to the value of his property in his slave, you could not compel him to yield; for although he should be the only slave holder, yet his right is constitutional, and consequently a stronger right. The free negro has no part in the social compact, except to the extent that he possesses it with a slave—such as the right of trial by jury whenever a slave can be brought within the action of a court of justice.

But there are those who rely upon two clauses in our bill of rights as guaranteeing to the slave constitutional rights. The first is in these words: "That every *freeman*, for any injury done him in his person or property, ought to have remedy by the course of the law of the land, and ought to have justice and right freely without sale, fully without any denial, and freely without delay, according to the law of the land."

The next clause upon which reliance is placed, is in these words: "That no FREEMAN ought to be taken or imprisoned or deprived of his freehold, liberty or privileges, or outlawed or exiled or in any manner destroyed, disfranchised of his life, liberty or property, but by the judgment of his peers or by the law of the land."

It is clear it must be conceded that the free negro did not participate in the formation of these clauses, nor by constitutional compact give their consent to them; and hence, cannot derive any benefit from them as parties to the compact which exists by virtue of the constitution.

The view generally entertained on this subject is, that the word FREEMAN, by constitutional signification, embraces free negroes. This view is certainly incorrect, for reasons already given; and if this word is not applicable to them to give them the rights expressed in the two clauses, then all those rights enumerated in each clause, to wit, "injuries done him in his person and property;" and "being taken or imprisoned or deprived of his freehold, liberty or privileges, or outlawed or exiled, or in any manner destroyed or disfranchised of his life, liberty or property," do not belong to them by the constitution.

It is needless to argue the question as we have high authority, which is conclusive on this subject.

Thus, if the constitution should declare that every *freeman* should vote, and it were judicially declared that the word freeman did not embrace free negroes to entitle them to the right of suffrage, it would be a decision that no other right enumerated in the Constitution or Bill of Rights, as belonging to *freemen*, could belong to free negroes by force of that word. This is settled by a decision of the Supreme Court of Pennsylvania, and although it is not absolute authority in this State, yet coming from a judicial tribunal distinguished for its legal learning, it ought to be conclusive, and more particularly when that judicial tribunal is located in a region with every disposition to favor the free negro. It is the case of Hobbs and others *vs* Fogg, in 1837, contained in Watts' Reports, Pennsylvania Decisions, page 553.

HOBBS AND OTHERS AGAINST FOGG.

A negro, or mulatto, is not entitled to exercise the right of suffrage, at the general election, under the existing constitution and laws of Pennsylvania.	*Writ of error to the common pleas of Luzerne county.*

This was an action on the case, brought in the court below, by William Fogg, the defendant in error, against the plaintiffs in error, Hiram Hobbs, inspector, and Levi Baldwin, John Miller, and Uriah A. Gritner, judges, of the general election, held in the county of Luzerne, on the 13th of October 1835.

The plaintiff below was a colored man, either a negro or mulatto, and, it would seem, brought this action, for the purpose of establishing a right, which he claimed to have, of voting at the general election, held in the county where he resided, for governor and other officers, as a citizen and freeman of the State, according to the provision in this behalf, contained in the constitution and laws.

The declaration set forth the election of Hiram Hobbs, by the electors of the township of Greenfield, in the county of Luzerne, on the 2d day of October 1835, as an inspector for the then ensuing general election, about to be held on the 13th of the same month; his acceptance of the office; also the due appointment of the other plaintiffs in error, as judges of the said general election; their acceptance of the office; and that they all, accordingly, acted in and exercised their respective offices, at and during the said general election; when and where the defendant in error, being one of the freemen, and citizens of the commonwealth of Pennsylvania, and having resided within the said commonwealth for two years next before said election, in the township of Greenfield; and being also above the age of twenty-one years, and having paid a county tax, assessed at least six months before the said election, all which being made known to the plaintiffs in error, he offered to vote, but they contriving, and fraudulently, and maliciously intending to injure and damnify him, the plaintiff in error, in this behalf, absolutely refused to receive his vote, and thus prevented him from doing so.

On the trial of the cause, the facts stated, by the plaintiff below, in his declaration, with the exception that his vote was fraudulently or maliciously refused; and with the addition, that the plaintiff was a negro or mulatto, were admitted. It was distinctly admitted by the plaintiff below, that there was no express malice on the part of the defendants below, in refusing to receive his vote; and that he was a free negro or mulatto.

There being no controversy between the parties, as to the facts of the case, the present judge (Scott) charged the jury as follows:

"This suit is brought for the gurpose of ascertaining the political rights of the man of color in Pennsylvania. The defendants insist, 1st, that even supposing the plaintiff was entitled to recover in any form of action, he cannot, in an action on the case. That the act of assembly gives a specific remedy, which must be pursued. Upon this point, the court charge the jury, that this is not a proceeding to recover the penalty imposed by any act of assembly, but to recover damages for a personal wrong, in being deprived of the right of suffrage by the defendants, who were officers of the election, they well knowing that he was a legal voter. Such action may be sustained, notwithstanding the penal sanction of the laws and the specific modes prescribed for enforcing them. Upon this point, the court instruct the jury, that the declaration sets forth every fact necessary, under the act of assembly, to qualify the plaintiff to exercise the rights of a voter, and that the defendants well knowing the premises rejected his vote. It is, therefore, unnecessary for the plaintiff to prove express malice; malice is implied in law.

"It is finally urged, that a free negro or mulatto is not a citizen within the meaning of the constitution and laws of the United States, and of the State of Pennsylvania, and, therefore, is not entitled to the right of suffrage. This, the court regard as the most important point in the cause; and the question, as it is avowed on the part of the plaintiff, which this suit was brought to settle.

"We know of no expression in the constitution or laws of the United States, nor in the constitution or laws of the State of Pennsylvania, which can legally be construed to prohibit free negroes and mulattoes, who are otherwise qualified, from exercising the rights of an elector. The preamble to the act, for the gradual abolition of slavery, passed on the 1st of March 1780, breathes a spirit of piety and patriotism, and fully indicates an intention in the legislature to make the man of color a *freeman.*

"As there is no dispute between the parties, in relation to the facts in this case, and as the opinion of the court, upon the points of law, are decidedly with the plaintiff, the verdict of the jury must be in his favor, &c."

To this charge of the court, the counsel for the defendants below, excepted; and assigned the same for error in the court above.

1st. That the court erred, in charging the jury, that it was unnecessary for the plaintiff to prove express malice, in order to entitle him to recover; that malice was implied in law.

2d. That the court erred, in charging the jury, that there was no provision in the constitution or laws of this State, which can be legally construed, to prohibit free negroes, or mulattoes, who are otherwise qualified, from exercising the rights of an elector.

The decision of the supreme court on the question, involved in the second error, rendered the expression of an opinion unnecessary in respect to the first.

Wright and *Conyngham*, for plaintiffs in error, cited, as to the first error, 1 *East* 555, *note page* 563; 11 *Johns Rep.* 114; 3 *Con.* 537; *Serg. & Rowle*, 3; 3 *Eng. Com. Law* 486; 2 *Starkie's Rep.* 577. In support of the second error, *Crandall's Case*, 10 *Con.* 339; 2 *Kent's Com.* 258, *note;* 1 *Litt. Ky. Rep.* 333; *Constitution of U. S., art.* 4, *sect.* 2; *Sergeant on Const. Law* 393.

Kidder and *Greenough*, for defendants in error, cited, as to the first error, 2 *Ld. Raym.* 938; 11 *Mass.* 330; *Constitution of Penn. art.* 3, *sect.* 1; *Abolition act of* 1780; 2 *Kent's Com.* 258; *Sergeant on Const. Law* 393; *Vattel's Law of Nations*, 166–7; *Stroud's Purd.* 981.

The opinion of the Court was delivered by

GIBSON, C. J.—This record rises, a second time, the only question on a phrase in the constitution, which has occurred since its adoption; and however partizans may have disputed the wisdom of its provisions, no man has disputed the clearness and precision of its phraseology. We have often been called upon to enforce its limitations of legislative power; but the business of interpretation was incidental, and the difficulty was not in the diction, but in the uncertainty of the act to which it was to be applied. I have said, a question on the meaning of a phrase has arisen a second time. It would be more accurate to say the *same* question has arisen the second time. About the year 1795, as I have it from James Gibson, Esquire, of the Philadelphia bar, the very point before us was ruled by the high court of errors and appeals, against the right of negro suffrage.—Mr. Gibson declined an invitation to be concered in the argument, and therefore, has no memorandum of the cause to direct us to the record. I have had the office searched for it; but the papers had fallen into such disorder as to preclude a hope of its discovery. Most of them were imperfect, and many were lost or misplaced. But Mr. Gibson's remembrance of the decision is perfect and entitled to full confidence. That the case was not reported, is probably owing to the fact that the judges gave no reasons; and the omission is the more to be regretted, as a report of it would have put the question at rest and prevented much unpleasant excitement.—Still the judgment is not the less authoritative as a precedent. Standing as the court of last resort, that tribunal bore the same relation to this court, that the supreme court does to the common pleas; and as its authority could not be questioned then, it cannot be questioned now. The point, therefore, is not open to discussion on original grounds.

But the omission of the judges, renders it proper to show that their decision was founded in the true principles of the constitution. In the first section of the third article, it is declared, that "in elections by the citizens, every FREEMAN of the age of twenty-one years, having resided in the State two years before the election, and having within that time paid a State or county tax," shall enjoy the rights of an elector. Now the argument of those who assert the claim of the colored population is, that a negro is a man; and, when not held to involuntary service, that he is free; consequently that he is a freeman; and if a freeman in the common acceptation of the term, then a freeman in every acceptation of it. This pithy and syllogistic sentence comprises the whole argument which, however elaborated, perpetually gets back to the point from which it started. The fallacy of it, is its assumption that the term freedom signifies nothing but exemption from involuntary service; and that it has not a legal signification more specific. The freedom of a municipal corporation, or body politic, implies fellowship and participation of corporate rights; but an inhabitant of an incorporated place, who is neither servant nor slave, though bound by its laws, may be no freeman in respect of its government. It has indeed been affirmed by text writers, that habitance and paying scot and lot, give an incidental right to corporate freedom; but the courts have refused to acknowledge it even when the charter seemed to imply it; and, when not derived from prescription or grant, it has been deemed a qualification merely, and not a title. *Wilcox, chap.* 3, p. 456. Let it not be said that the legal meaning of the word freemen is peculiar to British corporations, and that we have it not in the charters and constitutions of Pennsylvania.

The laws agreed upon in England, in May 1682, use the word in this specific sense, and even furnish a definition of it. "Every inhabitant of the said province that is or shall be a purchaser of one hundred acres of land or upwards, his heirs and assigns; and every person who shall have paid his passage, and shall have taken up one hundred acres of land at a penny an acre, and have cultivated ten acres thereof; and every person that hath been a servant or bondsman, and is free by his service,