MARYLAND REPORTS

BEING

A SERIES OF THE

MOST IMPORTANT LAW CASES,

ARGUED AND DETERMINED

IN THE

PROVINCIAL COURT AND COURT OF APPEALS

OF THE THEN

PROVINCE OF MARYLAND,

FROM THE YEAR 1700 DOWN TO THE AMERICAN REVOLUTION.

SELECTED FROM THE RECORDS OF THE STATE, AND FROM NOTES OF SOME OF THE MOST EMINENT COUNSEL WHO PRACTISED LAW WITHIN THAT PERIOD.

BY THOMAS HARRIS, JUNIOR,

CLERK OF THE COURT OF APPEALS,

AND

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1809.

SEPTEMBER TERM, 1770.

William and Mary Butler *against* Richard Boarman.

THIS was a petition for freedom. The petitioners claimed their freedom as being descended from a free white woman, named *Eleanor*, commonly called *Irish Nell*, who had been brought into *Maryland*, by Lord *Baltimore*, as a domestic servant, previous to the year 1681. The petitioners were claimed as slaves, by reason of the marriage of their ancestor, *Eleanor Butler*, with a negro slave, under the act of 1663, ch. 30. which act is in the words following:

"An act concerning negroes and other slaves. Sect. 1. "Be it enacted by the right honourable the Lord Proprietary, by the advice and consent of the Upper and Lower "Houses of this present General Assembly, that all negroes, or other slaves within the Province, and all negroes "and other slaves to be hereafter imported into the Province, "shall serve *durante vita*, and all children born of any negro or other slave, shall be slaves as their fathers were "for the term of their lives."

"Sect. 2. And forasmuch as divers free-born *English* "women, forgetful of their free condition, and to the disgrace of our nation, do intermarry with negro slaves, by "which also, divers suits may arise, touching the issue of "such women, and a great damage doth befall the masters "of such negroes, for prevention whereof, for deterring "such free-born women from such shameful matches; *be "it further enacted*, by the authority, advice and consent "aforesaid, that whatsoever free-born woman shall intermarry with any slave, from, and after the last day of this "present assembly, shall serve the master of such slave, "during the life of her husband; and that all the issue of "such free-born women, so married, shall be slaves as "their fathers were."

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" Sect. 3. And be it further enacted, that all the issues " of *English*, or other free-born women, that have already " married negroes, shall serve the master of their parents, " till they be thirty years of age, and no longer." *See Lib. W. H. and L. fol.* 28. *one of the Law Records of the State.*

Evidence was offered of the marriage of *Eleanor Butler*, with the negro slave, in the year 1681, that she was a free white woman brought into the Province by Lord *Baltimore*, and lived in the family of the defendant.

It was contended by the petitioners' counsel, that the act of 1663, ch. 20. together with all forfeitures incurred under it, was repealed by the act of 1681, ch. 4. previous to which act, the marriage of *Eleanor Butler* had taken place; the issue being born after the act.

The act is as follows:

" An act concerning negroes and slaves."

" Sect. 1. Be it enacted, &c. that all negroes, and other " slaves, already imported, or hereafter to be imported into " this Province, shall serve *durante vita;* and all the chil- " dren already born, or hereafter to be born of any negroes, " or other slaves within this Province, shall be slaves to all " intents and purposes, as their fathers were, for the term " of their natural lives."

" Sect. 2. And forasmuch, as divers free-born *English*, " or white women, sometimes by the instigation, pro- " curement or connivance, of their masters, mistresses, or " dames, and always to the satisfaction of their lascivious, " and lustful desires, and to the disgrace not only of the " *English*, but also of many other christian nations, do in- " termarry with negroes and slaves, by which means, " divers inconveniences, controversies, and suits may arise, " touching the issue or children, of such free-born women " aforesaid; for the prevention whereof for the future, be it " further enacted, &c. that if any master, mistress or dame, " having any free-born *English*, or white woman servant as

"said, in their possession or property, shall by any insti-
"gation, procurement, knowledge, permission or contri-
"vance whatsoever, suffer any such free-born *English*, or
"white woman servant in their possession, and wherein
"they have property as aforesaid, to intermarry, or con-
"tract in matrimony with any slave, from and after the
"last day of this present sessions of assembly, that then the
"said master, mistress or dame, of any such free-born wo-
"man as aforesaid, so married as aforesaid, shall forfeit
"and lose all their claim and title to the service and servi-
"tude of any such free-born woman; and also, the said
"woman servant so married, shall be, and is by this pre-
"sent act, absolutely discharged, manumitted and made
"free, instantly upon her intermarriage as aforesaid, from
"the services, employments, use, claim or demands of any
"such master, mistress or dame, so offending as aforesaid.
"And all children born of such free-born women, so
"manumitted and free as aforesaid, shall be free as the
"women so married as aforesaid; as also, the said mas-
"ter, mistress and dame, shall forfeit the sum of ten thou-
"sand pounds of tobacco, one half thereof to the Lord
"Proprietary, and the other half to him or them, that shall
"inform and sue for the same, to be recovered in any
"Court of Record within this Province, by bill, plaint, or
"information, wherein no essoyn, protection or wager of
"law to be allowed; and any priest, minister, magistrate
"or other person whatsoever, within this Province, that
"shall, from and after the publication hereof, join in mar-
"riage any negro or other slave, to any *English* or other
"white woman servant, free-born as aforesaid, shall forfeit
"and pay the sum of ten thousand pounds of tobacco, one
"half to the Lord Proprietary, and the other half to the
"informer, or the person grieved, to be recovered by ac-
"tion of debt, bill, plaint, or information in any Court of
"Record within this Province, wherein no essoyn, pro-
"tection or wager of law be allowed."

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"Sect. 3. And be it further enacted, &c. that an act, "entitled *an act concerning negroes and slaves*, be and is "hereby utterly repealed and made void, provided that all "matters and things relating in the said act, to the mar- "riage of negroes with free-born women, and their issue, "are firm and valid, according to the true intent and pur- "port of the said act, *until this present time of the repeal* "*thereof*, any thing in this act to the contrary, notwith- "standing." *Vid. Lib. W. H. fol.* 174. &c.

The Court adjudged that the petitioners were free, and that they should be discharged from the service of the defendant.

The defendant appealed to the Court of Appeals. At *May* Term, 1771, the cause came on for argument.

Jenings, for the appellant.

By the act of 1663, all the posterity springing from a marriage between slaves, were declared to be slaves. The act of 1681, does not relate to any time antecedent to the passing of it, and does not avoid the effect of the act of 1663. It appears that the parents of the petitioners were married, antecedent to the act of 1681, but that the issue was born subsequent to it, and if the construction contended for by the petitioners' counsel should prevail, the act of 1681, will have an operation on events antecedent to its passage. The Legislature intended the act to operate on marriages, only subsequent to the time when the act passed, and also to confirm pre-existing titles, which had accrued under the preceding act. The words of the act of 1681, are, "provided that all matters and things, re- "lating in the said act (of 1663,) to the marriage of ne- "groes with free-born women, and their issue are firm "and valid, according to the true intent and purport of the "said act, until this present time of the repeal thereof." By the law of 1663, an interest in the servant and the issue had vested, and consequently, the law of 1681 confirms that interest and property. The intention of the

Legislature must prevail, and that intention may be collected from the term *issue*, in the act of 1681. A statute and a will, must be construed by the same rule. The word *issue* in the construction of wills, implies all the issue then born, or which may thereafter be born. The same construction is to prevail as to both the acts, as it respects the word *issue*. That the intent of the makers is to prevail, in the construction of a statute, see *Plow.* 57. 205. 464. 5 *Co.* 5. a. Of the two constructions put on the act of 1681, that which supports precedent rights ought to prevail. It was not necessary for the security of persons, who held negroes in slavery under the first law, that the last clause should be made in the law of 1681. The proviso has no effect in point of construction, as was contended for by the opposite counsel; no clause however, ought to be rejected, if it can have any operation. The holding of the mother in slavery would be burthensome to the master, if the issue were not also to be held in slavery. There is no law empowering the County Court to provide for them. Laws ought to have a commencement *in futuro*, and ought not to have an *ex post facto* exposition given to them. 1 *Bl. Com.* 46. 2 *Show.* 16. Where one statute repeals another, all mesne acts under that statute, are valid; it is otherwise if the second act declares the first to be *null* and *void*. *Jenk.* 233. Many of our acts of assembly, have the expression "*null and void.*" See the acts of 1704. ch. 77. 1732. ch. 23. 1735. ch. 16. 1751. ch. 3. 1763. ch. 21. the language of which acts, shews the construction which is to be put upon the words "*null and void.*" Custom is the best interpreter. 6 *Co.* 6.

Johnson, same side.

Statutes shall not have a retrospective operation. The issue was not the object in the contemplation of the law of 1663; the great object of the act was to deter white women from intermarrying with slaves. Under that act, *posthumous* children, born after the passing of that act, would

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be within it. If the Assembly, when they passed the act of 1681, had intended that all issue born after the passage of it, were not to be slaves, although the marriage from which they sprung, was before the law, they would have expressly mentioned " all children (*then*) born" of such marriage. The construction of statutes, deeds and wills, must be according to the intention of the makers of them. The issue being slaves, is a consequence of the parent's slavery, and if it was intended to make the after born children free, the Legislature would have made some provision for the support of them. It is inconceivable, that some of the children, which have sprung from marriages circumstanced like this, have not found friends to advocate their freedom; if the Legislature in 1681, had intended they should be so. There is no circumstance appearing, to shew that the Legislature meant to discriminate or distinguish between the issue born before the act and those born after.

Tilghman, for the petitioners.

In the year 1676 the Lord Proprietary met the Assembly in person; in 1677 he returned to *England*, and, in 1681 he returned to this Province, bringing *Irish Nell* with him as a domestic servant. In 1681 she married, and the repealing law was passed in the month of *August*, immediately after the marriage, and his Lordship interested himself in procuring the repeal with a view to this particular case. The act of 1663 was repealed also, to prevent persons from purchasing white women and marrying them to their slaves for the purpose of making slaves of them. The penalty is laid upon the masers, &c. and the clergyman and the woman were intended to be favoured. The master has ample satisfaction by a property for life, where he originally purchased for five years only.

The Court of Appeals reversed the judgment of the Provincial Court.

I. Hollyday's note upon the construction of the repealing act.

The act of 1663, reciting and condemning the practice of white women intermarrying with negroes, by which means also divers suits might arise touching the issue, &c. enacts, that "whatsoever free-born subject woman should "intermarry with any slave from and after the last day of "that Assembly, should serve the master of such slave "during the life of her husband, and that all the issue of "such free-born woman so married, should be slaves as "their fathers were."

The act of 1681, reciting the ill use that had sometimes been made of the former act, by masters, &c. of white women procuring such marriages, and that inconveniences might arise by controversies touching the issue of such free-born women, enacts, that if any master, &c. of any free-born *English* or white woman, should by any instigation, procurement, &c. suffer any such free-born *English* or white woman to marry a slave, after the last day of that session of Assembly, he should forfeit his title to the services of such woman, and the said woman should be free, &c. A penalty of 10,000lbs. of tobacco is laid upon the master for procuring or suffering such marriage, and the like penalty upon the priest who should marry them, &c. Then follows the repealing clause: "And be it enacted, "that one act, entitled, An act concerning negroes and "slaves, be and is hereby utterly repealed and made void, "provided that all matters and things relating in the said "act to the marriage of negroes and free-born women *and* "*their issue*, are firm and valid *according to the true intent* "*and purpose of the said act*, until this present time of the "repeal thereof, any thing in this act to the contrary notwithstanding."

In *Jenkins*, 233. pl. 6. it is laid down as a rule, that where one statute *is repealed* by another, acts done in the mean time shall stand; but not if a statute be declared

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null. Cites 4 *H.* VII. 10. 10 *H.* VII. 22. 1 *Freem.* 26, 27.

In 2 *Jo.* 19. in argument it is said, " Where an act of " Parliament makes a thing *void*, it shall be void to all in- " tents, and shall have a very violent relation." Cites 3 *H.* VII. 15. 4 *H.* IV. 10. 10 *H.* VII. 22. *Dyer*, 227. 377. *Fitz. Partition*, 2. 1 *Freem.* 27. The cases cited do not seem to be to the purpose. *Dyer*, 227. 337.

Viner has inserted this case out of *Jones*, and cites *Latch.* 143. which is the case of stat. 23 *H.* VI. of sheriff's bonds, for ease and favour, which statute has no retrospect.

But admit this rule of construction to be true and right as applied to acts of Parliament in *England*, yet it may possibly not affect this case. The rules of construction of statutes in *England*, as settled by the Judges at home, especially where they relate to the construction of particular terms, are very improper guides to the construction of our acts of Assembly, made so early as this repealing act was. For these rules have been settled upon a presumption that the law-makers were well acquainted with the legal import and effect of the terms they made use of, and that they intended they should have that effect, and no other. For example, when the Legislature *repeal* an act they have one intent, that is, that the act shall have no future operation, but that mesne acts should be preserved. But when they declare an act *null* and *void*, they have another intent, that is, that the act shall have not only no future operation, but that the mesne acts also shall be destroyed. And they so understand the terms they make use of.

But however right and reasonable this presumption may be when applied to Parliament in *England*, who for many centuries have been composed of the wisest and ablest men in the kingdom, and where generally, if not always, lawyers of the first abilities in their profession have been found, and where the Judges assist; surely it can hardly be a reasonable presumption, when applied to a *Maryland*

Assembly so early as the year 1681, when there were few lawyers, and perhaps none of considerable ability in the country, and when most probably our Assemblies were composed of men whose attention was chiefly employed in improving their plantations and procuring the necessaries of life, and who had neither leisure nor inclination to acquire such a degree of knowledge in the law as this rule of construction supposes.

There is one rule of construction, however, which is universally applicable to all occasions and to all times. Judges are to expound acts of Parliament in such manner as may be agreeable to the intent of the makers. It seems unnecessary to cite cases to evince this rule; it is founded on the highest reason, and its authority is self-evident. Acts of Parliament are nothing else but the declarations of the mind and intention of the supreme legislative authority, concerning what they enjoin or prohibit to be done. The will, the intention, is the law, and the words are the vehicle by which the intention is conveyed and made known to those who are bound by it. The words are the shell, the intention the kernel. *Plow.* So Ld. *Coke. Qui hæret in litera hæret in cortice.* Can any thing then be more reasonable than to expound an act of Parliament in such manner as may give it that operation which the makers intended?

This is the only rational rule by which acts of Assembly made in the early times of the Province, can be expounded. For there is this difference between an *English* Parliament and a *Maryland* Assembly in the infancy of the country—They indeed both settle and determine what they would enjoin and prohibit, and then they reduce their determination to the form of a law, in such terms as they conceive apt to express their intention. But the Parliament in *England* understood the legal import of all the terms commonly used in acts of Parliament, and therefore the legal import of the terms they use must be understood to express their meaning. But it cannot be supposed that a *Maryland* Assembly in 1681 understood the legal import

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of all the terms used, and therefore it would be a very unsafe rule to judge in all instances of their intention by the legal import of the terms they used. I speak of technical terms.

If the Assembly in 1781 intended by the repeal to destroy mesne acts, and knew that the terms they made use of were proper for that end, to what purpose was the provision added which favours them until the time of the repeal? This circumstance alone is sufficient to shew that they did not understand the terms *utterly repealed and made void* in that extent which is now contended for. If, therefore, upon a consideration of the whole act and comparison of the several parts of it, the intent of the makers can be discovered, that is the rule which must govern the construction of it.

The Assembly no doubt knew that acts had been done and the rights acquired under the law of 1663, and I shall submit that their intent was to confirm those acts and to save those rights. It must be confessed that they intended something by the provision. Now, if they intended that acts done under the law of 1663 should not be valid until the repeal, but null and void, the provision seems altogether useless, for the act of 1663 continued in force until it was repealed, and therefore all acts done under it must have been valid until that time, and needed not the provision to make them so. It requires very little skill in the law to determine this. Every body knows, that an act done under a law is valid as long as the law exists.

But suppose the Assembly thought otherwise, and intended by the provision to confirm the acts and save the rights under the law of 1663 until the time of the repeal, but no longer, of what use would this be? *Boarman's* ancestor had acquired a right under the law of 1663; he had been in the possession and exercise of that right, and had reaped all the fruits of it until 1681. Then to what purpose was it to say that his right should be valid until 1681, if they intended, that after that time it should be null and void? The proviso, upon this construction, gave him

nothing more than he had already enjoyed, and therefore was useless and impertinent. The Assembly could not make that never to have existed which had already had its existence. But the Assembly of 1681 knew that rights had been acquired under the law of 1663, and in the course of so many years as that law subsisted, there might have been instances where these rights had been transferred. They considered them as acquired under a law of the proviso; and though, for reasons that governed them, they thought fit to repeal that law, they thought it would be contrary to public faith to destroy these rights, and therefore intended by this proviso to save them. This it is reasonable to suppose was the intent of the Assembly in 1681, because this intention was agreeable to justice and the public faith of the country. Purchasers might have bought the issue born as slaves, and their issue also might have been devised.

There is some obscurity in the penning of the provision as it stands, but by a very easy transposition of the words they will clearly express the meaning of the makers as we contend for. The clause stands thus, viz. "Provided, "that all matters and things relating in the said act to the "marriage of negroes and free-born women and their issue, "are firm and valid until this present time of the repeal "thereof," &c. Now suppose it be read thus: "Pro- "vided, that all matters and things relating to the mar- "riage of negroes and free-born women and their issue "until this present time of the repeal, are firm and valid." Here is not a word added or omitted, and I submit it that this is the true sense of the provision; as if they had said that all matters and things done and transacted until the time of the repeal, should be valid. For what was the true intent and purpose of the act of 1663? To make the issue of these unnatural marriages, and their mothers, slaves. How is that intent and purpose answered, if immediately upon the repeal they are manumitted? Surely if the act of 1681 sets them free, that is directly con-

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trary to the terms of the proviso, that all matters and things, &c. are firm and valid according to the true intent and purpose of the act of 1663.

I beg leave to repeat this observation, because I think it points out a difficulty the counsel on the other side must be involved in upon their construction. The act of 1663 makes the issue slaves as their fathers were. The act of 1681 repeals that act, but has a proviso, that all matters and things, &c. are firm and valid, according to the true intent and purpose, &c. Which intent and purpose was to make slaves of the issue, if immediately upon the repeal they are all to be free.

If this law is to have such a construction as will manumit the issue who were made slaves by the act of 1663, the consequence will be, that it will have the effects of an *ex post facto* law; for an interest was vested in Mr. *Boarman's* ancestor under the law of 1663, and this act of 1681 will strip him of that interest. I take it that a law which has an *ex post facto* effect ought to be very clear and explicit in the terms of it, otherwise the Court will not give it such a construction as will defeat rights formerly acquired and well settled. 2 Ld. *Raym.* 1352. 2 *Show.* 16.

A saving in an act of Parliament may restrain the purview, but not destroy it. *W. Jones*, 339. *Vide* stat. 25 *Edw.* III. c. 1. 10 *Mod.* 115.

When a proviso in an act of Parliament is directly contrary to the purview, it shall stand and be a repeal of the purview.

This construction is good in a political point of view. Many of these people, if turned loose, cannot mix with us and become members of society. What may be the effects cannot perhaps be fully pointed out; but as much inconvenience may reasonably be expected, their title to freedom ought to be made out very clearly.

Such construction is to be made as is agreeable to the intention of the Legislature. The stat. *Westm.* 2 *Car.* I. says, if a fine be levied of lands, *ipso jure sit nullus*, but this does not make the fine void, but only works a discon-

tinuance. *Plow.* 57. 205. 464. 5 *Co.* 5. 3 *Co.* 59. b. No clause, sentence, or word is to be rejected. 1 *Show.* 108.

Judges have a liberty over laws to mould and construe them to the best convenience. *Hob.* 346. The whole act is to be taken together. 1 *Show.* 490. The intention is to prevail in a deed, *a fortiori* in a statute, which shall be construed as a will. 8 *Co.* 118, 119. See *Co. Litt.* 217. as to transposition of words.

Ex post facto acts are to be construed as much as possible in favour of precedent rights. 2 Ld. *Raym.* 1351, 1352. 2 *Show.* 16.

A saving in an act which goes in destruction of the whole purview, is void, but not if it goes to part. *W. Jones*, 339. 10 *Mod.* 115. 1 *Bl. Com.* 89.

The following repealing expressions are used in different acts of Assembly:

By the act for free-schools, made the 8th *July*, 1694, c. 17. the act made the 21st *September*, 1690, *is utterly repealed and made void.*

By the act for the establishment of religious worship, of the 26th *March*, 1701—2, c. 1. the act of 26th *April*, 1700, *is repealed and made void.*

By the act for the speedy conveying public letters, &c. of the 14th *November*, 1713, c. 2. the act 26th *March*, 1707, *is repealed and made null and void.*

By the act for regulating writs of error, &c. of the 14th *November*, 1713, c. 4. the act made the 28th *October*, 1712, *is utterly repealed and made void.*

By the act for direction of sheriffs in their offices, &c. of the 3d *June*, 1715, c. 46. the acts of the 26th *April*, 1704, and 22d *October*, 1713, *is repealed and made void.*

By the act of the 3d *June*, 1715, c. 49. declaring certain laws to be repealed, the laws are declared *to be repealed, abrogated, null and void, to all intents and purposes whatever.*

By the act for limiting the continuance of actions, made the 5th *August*, 1721, c. 14. the act of 1718, and that of 1720, *are utterly repealed and made void.*

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By the act to punish blasphemers, &c. made 26th *October*, 1723, c. 16. the acts of 1696, and 1715, *are repealed and made void.* A proviso not to affect former judgment.

By the act to encourage the destroying of wolves, &c. of the 24th *October*, 1728, c. 7. all former laws in relation thereto, are *repealed, abrogated, and made null and void.*

By the act for repealing part of the act against forging or counterfeiting foreign coin, made the 8th *August*, 1729, c. 2. part of the act of 1704, c. 4. *is utterly repealed and made void.*

By the act providing what shall be good evidence to prove foreign and other debts, 1729, c. 20. the act of 1715, c. 29. *is repealed and abrogated.*

By the act for the preservation of the breed of deer, 1730, c. 17. the act of 1729, c. 1. *is repealed, abrogated, and made null and void.*

By the act of 1732, c. 23. part of the act of 1715, c. 36. for laying a duty on *Irish* servants, is *abrogated and repealed.*

By the act of 1735, c. 16. the act of 1704, c. 90. is *repealed and abrogated.*

By the act of 1763, c. 21. the act of 1715, c. 12. for recovering small debts before a Justice, is *abrogated, repealed, and made void.*

By the act of 1751, c. 3. the act of 1713, c. 13. and the supplementary law, are *repealed, abrogated, and made null and void.*

The word *repeal* only is used in the act of 1715, c. 14. of 1718, c. 4. 1749, c. 12. 1759, c. 14.

By the act of 1766, c. 5. so much of the act of 1715, c. —. as relates to summoning Juries to the Provincial Court, is *repealed and made void.*