Priscilla Queen* v. *Francis Neale,
The Jesuit Cases, and Their Consequences
by Paul S. Maco

The corruption of manners in the master,
from the entire subjection of the slaves he possesses to his sole will;
from whence spring forth luxury, pride, cruelty,
with the infinite enormities appertaining to their train . . .
(Francis Hargrave addressing the King's Bench
in *Somerset v. Stewart*) (1)

Overview

In the dawn of the United States, an enslaved person who dared to sue their enslaver to secure their freedom undoubtedly understood the terrifying potential consequences awaiting should they fail. Yet thousands of enslaved Black people did just that by filing what are known as "freedom suits." Undeterred, they took the risks in the pursuit of that most precious prize – liberty – for themselves and their descendants. At least in the brief moment in history when they could.

In England, four years before the Declaration of Independence, the case *Somerset* v. *Stewart* (*Somerset, or Somerset's Case*) came before the King's Bench. The King's Bench was the most senior criminal court in England for most of its existence, exercising supervisory jurisdiction over all inferior criminal courts. (2) The case posed the question of whether enslaved persons were entitled to constitutional rights and protections or were mere chattel slaves. The ruling by the Chief Justice of the King's Bench, issued in 1772, setting free the enslaved man James Somerset, "sent political and legal shockwaves through Britain and its American colonies." (3) Its outcome posed a challenge to the North American colonies and their plantations, which were becoming increasingly dependent upon enslaved human labor, as well as to the traders trafficking in that labor. That challenge soon became apparent in the form of post-colonial freedom suits inspired by *Somerset*, testing the resolve of the new American government to fully realize the self-evident truths proclaimed by its

foundational document, the Declaration of Independence. (4)

Among freedom suits, the case of *Priscilla Queen* v. *Francis Neale* (*Queen* v. *Neale*) (5), stands out for parishioners of Holy Trinity Catholic Church in Georgetown because the defendant was also Holy Trinity's founder and first pastor, the Reverend Francis Ignatius Neale, S.J. On a broader scale, *Queen* v. *Neale* was only one among the many freedom suits brought against the Jesuits, who were among the largest enslavers in Maryland. After initial, costly defeats, their subsequent victories in the Maryland courts tightened, case by case, the Jesuits' and their fellow planter-enslavers' hold on their human property (the "Jesuit Cases"). (6) As the sister case preceding *Queen* v. *Hepburn* (7), *Queen* v. *Neale* played a part in the larger story of the establishment of the "hearsay rule" early in the formation of American law, with immediate consequences for freedom suits.

"The most important hearsay case in American history," is *Queen* v. *Hepburn* according to Stanford law professor David A. Sklansky. It "buttressed the institution of slavery by closing off one of the few legal avenues through which people in bondage could seek their freedom." (8) The remaining pathways of freedom suits to the prize of liberty were ultimately shut by the United States Supreme Court in the last freedom suit, *Dred Scott* v*. Sandford* (9)

The consequences emanating from the Jesuit Cases extended beyond the caselaw of Maryland, influencing the development of American law in seemingly benign areas of law governing evidence and trial procedure, instilling a bias favoring the enslavers, and decreasing access to the courts and frustrating rather than promoting justice. The Jesuit Cases went to the heart of the question raised at our nation's birth: are enslaved persons entitled to certain inalienable rights or are they mere chattel slaves? The question would not be settled before a bloody civil war and three amendments to the Constitution. The outcome has never been fully accepted among all Americans.

Francis Ignatius Neale, the founder and first pastor of Holy Trinity, was born in 1756 in Charles County, Maryland, one of thirteen children of William and Anne Brooke Neale, a wealthy and prominent Maryland Catholic family. As were many landowners in Maryland at the time, his parents were enslavers. (10) Francis was a fifth-generation

descendant of Captain James Neale, who came to Maryland around 1637 in the service of Governor Leonard Calvert, for which Captain Neale received a manorial grant of two thousand acres near what would later become Port Tobacco in Charles County. Like three of his older brothers, William, Leonard, and Charles, Francis was sent at an early age to the Jesuit College at St. Omer's in Flanders. All four became Jesuit priests. Three returned to the United States. Leonard would become president of Georgetown College and the second archbishop of Baltimore, and Charles, the founder and chaplain of the first Carmelite convent in the United States at Port Tobacco. Charles exchanged a portion of the family estate, Chandler's Hope, that he owned, with a neighbor for land and buildings that became "The Carmel of Port Tobacco." (11) Francis, on his return to the United States in 1788, was assigned to St. Thomas Manor, near Chandler's Hope and Port Tobacco. (12)

The prominence of his family may have had much to do with Bishop Carroll's bringing him to Georgetown in 1792 – where he would remain pastor of Holy Trinity until 1817. In addition to his duties at Holy Trinity, Francis Neale became on arrival the unofficial treasurer of Georgetown College, and later served as its vice-president and president. (13) He took on various duties with the Corporation of Roman Catholic Clergymen of Maryland as well. (14)

On January 8, 1810, a Petition for Freedom by Priscilla Queen against Francis Neale was filed in the Circuit Court of the District of Columbia for the County of Washington (15) by her attorney, Francis Scott Key, initiating the proceedings in *Queen* v. *Neale*. Her petition stated that "she is unjustly held in bondage as a slave" and "as she apprehends she may be removed out of the County & district before the next term of this Court she prays a subpoena to issue to the said Francis Neale . . . immediately." (16) A Black woman enslaved by Holy Trinity's founding pastor had dared attempt to gain her freedom by filing a freedom suit against him in federal court.

Somerset's Case, Self-Evident Truths, and Freedom Suits

Contrary to much currently held understanding, in the late 18th century the institution of slavery had no firm ground in the laws of England or the new United States. Freedom suits had been filed in colonial America as early as 1656. In the winter

of 1655-56, Elizabeth Key sued the estate of her enslaver, claiming she had been retained beyond her term of service, after which she was to have been freed, as required by the agreement under which she was enslaved. After initial success and reversal, the Justices of the Peace of Northumberland County, Virginia, ruled on July 21, 1656, that Elizabeth Key should be free and compensated for her additional years of service. (17)

Aside from the ill-fated Roanoke Colony, the English colonization of America began with proprietor charters granted by the King to settle overlapping territories along the American coast and westward. (18) During the 17th century, as the colonies were settled and expanded, the nature of the English Crown changed from absolute monarchy to constitutional monarchy with primacy of Parliament over the Crown through the Glorious Revolution culminating with the 1689 English Bill of Rights, (19) establishing both Parliamentary and individual rights, and the installation of William III and Mary II as joint monarchs. In that same year of 1689, John Locke anonymously published his two Treatises of Government, the second of which articulated reason as the law of nature under which "a new doctrine of natural rights – to life, liberty, and property . . . which belong to all people by birth." (20)

Over that same period, the colonies became a source of increasing wealth for England generated by, in many instances, enslaved labor. Colonial laws accommodated enslaved labor while Charles II chartered a monopoly for, and Parliament subsequently legislated engagement in, the international slave trade. As enslavement-generated wealth grew in England, notions of the dubious morality of slavery, particularly in the abolition movement as well as society in general, grew as well. (21) The two came face to face in *Somerset's Case.*

Somerset v. *Stewart* was a freedom suit based on a writ of *habeas corpus* brought in England four years before the thirteen American colonies declared their independence. James Somerset had been brought to England from Virginia by Charles Stewart, his enslaver. (22) He abandoned his enslaver on October 1, 1771. He was subsequently seized and put on board the vessel of Captain Knowles, detained against his will to be taken to Jamaica and sold. While in England, Somerset had been baptized. Prompted by the abolitionist Granville Sharp, his three godparents sought a

writ of *habeas corpus,* a writ requiring one suspected of unlawfully detaining a person to bring that person before the court to determine the legality of the detention. Captain Knowles appeared with James Somerset before the King's Bench on December 9, 1771. Somerset was released until argument of the case before three judges, with Lord Mansfield, Chief Justice of the King's Bench, presiding. (23)

The arguments for both sides had been heavily financed. To the abolitionists, financial support to James Somerset should result in his confirmation by the Court as a person entitled to constitutional rights and protections; to the West Indian merchants financing Stewart's defense, Somerset was and should be found to be a mere chattel slave, property to be bought, sold, and traded with minimal interference, lest the abundant wealth derived from colonial plantations and the slave trade be jeopardized and thousands of enslaved suddenly be set free in England. (24)

Arguments were heard in two hearings. Lord Mansfield understood his decision would have major consequences. As reflected in the case report, he had pushed both sides to settle but the merchants financing Stewart refused. Lord Mansfield responded, "If the parties will have judgment, *fiat justitia, ruat coelum*" (Let Justice be done, though the Heavens fall). They did.

On June 22, 1722, Lord Mansfield ruled:

> *The state of slavery is of such a nature, that it is incapable of being introduced on any reasons, moral or political; but only positive law, which preserves its force long after the reasons, occasion, and time itself from whence it was created, is erased from memory: it is so odious, that nothing can be suffered to support it, but positive law. Whatever inconveniences, therefore, may follow from a decision, I cannot say this case is allowed or approved by the law of England; and therefore the black must be discharged.* (25)

Lord Mansfield pronounced the ruling of the Court and James Somerset was set free. His nuanced, magisterial ruling, although technically ruling only upon the writ, would echo through the ages. (26)

Popularly, *Somerset* was understood to mean that slavery was illegal in England.

(27) *Somerset* posed a powerful challenge to the colonies and their plantations increasingly dependent upon enslaved human labor as well as the merchant traders providing that labor. By "positive law," Lord Mansfield meant an act of Parliament. Parliament had enacted numerous laws enabling the slave trade, as pointed out by Stewart's counsel, William Wallace. But such legislation related to activities outside England. For the various colonies, positive law could be a factor in favor of the enslavers in meeting that challenge.

Two years later in Scotland, Joseph Knight, who had learned of *Somerset*, claimed that although purchased in Jamaica by his enslaver Wedderburn, the act of landing in Scotland freed him, as slavery was not recognized in Scotland. In 1778, in *Knight* v. *Wedderburn,* the Scottish Court of Session (Scotland's Supreme Court) agreed and affirmed the lower court's judgment that had ruled "the state of slavery is not recognized by the laws of this kingdom, and is inconsistent with the principles thereof." The outcome in the Court of Session went beyond *Somerset*: slavery was illegal in Scotland. (28) Powerful forces, abolitionists against the planters and traders, had once again clashed with each other as they had in *Somerset.* So would it be in the new nation, but with different outcomes.

In July 1776, drawing on the Bill of Rights of 1689 and Locke's Second Treatise, the thirteen colonies declared their independence, holding certain "truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty and the pursuit of Happiness." (29) The previous month, the Virginia House of Delegates had adopted the Virginia Declaration of Rights, likewise inspired by the Bill of Rights and Locke, but with a notable caveat in its first section:

> *That all men are by nature equally free and independent and have certain inherent rights, of which,* ***when they enter into a state of society****, they cannot, by any compact, deprive or divest their posterity: namely, the enjoyment of life and liberty, with the means of acquiring and possessing property, and pursuing and obtaining happiness and safety* (emphasis added). (30).

The phrase, “when they enter into a state of society,” was inserted to amend the declaration “specifically to exclude slaves” and “(as a byproduct, women and Native Americans).” (31).

From the summer of 1776, at the birth of the new country, the question – are enslaved persons entitled to certain inalienable rights or are they mere chattel slaves? – was in play.

In 1783, in the Quock Walker case, the Massachusetts Supreme Judicial Court declared slavery effectively abolished as incompatible with the recently adopted Massachusetts Constitution of 1780. (32) Enslaved people in Massachusetts could secure their freedom in the Commonwealth.

The tension would only increase after 1789 under the new Constitution, which acknowledged but did not authorize slavery’s existence, and included the “fugitive slave (which word the text avoided) provision” of Article IV, section 2:

> *The Citizens of Each State shall be entitled to all Privileges and Immunities of Citizens in the several States.*
>
> *…*
>
> *No Person held to Service or Labour in one State, under the Laws thereof, escaping into another, shall, in Consequence of any Law or Regulation therein, be discharged from such Service or Labour, but shall be delivered up on Claim of the Party to whom such Service or Labour may be due.*

More plainly, to the Slave States, Article IV, section 2 meant an enslaved person who flees to a state that has abolished slavery will remain enslaved and will be returned by the State to the enslaver upon demand by the enslaver, effectively negating the principle of *Somerset’s Case*. (33)

Yet, in each of the freedom suits above, an enslaved Black man had initiated and tenaciously pursued his case to secure a landmark ruling allowing others to follow. Individual enslaved Black men and women in Maryland were quick to do the same. (34) In 1791, the Maryland High Court of Appeals affirmed the General Court’s decision freeing Mary Butler, the culmination of an effort begun 28 years earlier. (35) Mary was a

descendant of Eleanor “Irish Nell” Butler, a White indentured servant who in 1681, when free of her indenture, married an enslaved man knowing that under the law at the time her descendants would be enslaved. Decades later, in 1763, after legislative changes allowing freedom to children of free White women married to enslaved men, a grandson of Irish Nell and his wife Mary sued their enslaver for their freedom. Although victorious in 1770 after a long trial, their favorable verdict was overturned on appeal the following year. (36) Thirteen years (including a war of independence) later, their daughter Mary Butler renewed the fight and brought suit against her enslaver, Adam Craig. Mary’s lawyer, Jeremiah Townley Chase, invoked Nell Butler’s rights as an English subject and the injustice and cruelty of passing on penalties to innocent generations of offspring. She won, and was awarded damages, lawyers’ fees, and court costs by the Court – the sum of five thousand five hundred and twenty-five pounds of tobacco. (37) The decision was upheld on appeal by the Maryland Court of Appeals in June 1791. (38) Now a free woman, Mary appeared as a witness in court for her children who, successful in their petitions, were awarded their freedom. (39) According to historian William Thomas, the Butler family filed more than ninety suits for freedom, winning every single one of them between 1787 and 1791. (40) Among the Butlers now eligible for freedom as descendants of Irish Nell were Lucy and Liddy Butler, early parishioners of Holy Trinity. (41)

The Jesuit Cases

As Professor Bernard Cook has recounted in “Maryland Jesuits and Slavery,” from their arrival in 1633 and the establishment of their first plantation at St. Inigoes, to 1790, the year before the first of the Jesuit Cases, the Jesuit properties had grown to include five plantations and a number of smaller properties amounting to approximately 13,000 acres, worked by some 323 enslaved people in 1790. (42) After the Maryland Court of Appeals ruling for Mary Butler, it may not have come as a surprise to the Jesuits when four months later, on October 15, 1791, Edward Queen filed a petition for freedom against the Rev. John Ashton, S.J., in the General Court of the Western Shore of Maryland. (43) Ashton was named because he was Queen’s enslaver, as well as manager of the Jesuit plantation at White Marsh, and the procurator general of the

Corporation of Roman Catholic Clergymen which enslaved Queen's entire family. (44)

The Queens were descendants of Mary Queen, according to deposition testimony admitted into evidence, a free woman of color from New Spain who had come to Maryland from England as an indentured servant around 1713. In May 1794 the jury reached a verdict that Mary Queen was not a slave and Edward Queen was freed. (45) Twenty-one other members of the Queen family were freed in April 1796 by a favorable jury verdict in Prince George's County Court for Edward's mother Phillis in *Phillis Queen* v*. John Ashton*. (46) In this case, in addition to the testimony as to Mary Queen originating in New Spain and coming to Maryland by way of England, the jury heard a contrary narrative in the deposition testimony of Benjamin Duvall, an 83-year-old county resident who had met and spoken with Mary Queen and who testified she was from Africa and always enslaved. The jury gave it little weight but Benjamin Duvall's testimony would later have devastating consequences.

For the enslavers, the combined verdicts were staggering. William Thomas reports that "the trials cost John Ashton and the Jesuits 6,795 pounds of tobacco in damages, court costs and fees." He estimates "the Queen family members freed in April 1796 represented more than a quarter of the people the Jesuits enslaved at White Marsh" and "constituted one of the largest single financial losses in the annals of the Jesuit corporation." (47) Freedom suits, for a brief time following the success of the Queen and Butler families, would proliferate.

Edward Queen was represented by Gabriel Duvall and Philip Barton Key, the uncle of Francis Scott Key. Philip Barton Key was considered to have been quite an effective adversary. Following the jury verdict favoring Edward Queen, the Jesuits hired Philip Barton Key for the sum of 4 pounds 17 shillings sixpence, according to 1774 entries in the St. Thomas Manor Account Book, "to . . . retain or stop the mouth of the lawyer Key from speaking in favor of the Negroes who have sued for their freedom." (48) Their formidable adversary, Philip Barton Key, was now their lawyer. It would soon make a difference.

As freedom suits found success in Maryland courts as well as with juries, the Maryland legislature went to work to turn the tide in the planter-enslavers' favor. In December 1793, the legislature changed the courts of original jurisdiction for freedom

suits from the General Court (drawing jury pools from many counties with non-enslaving majorities) to the lower district courts of the county where the petitioner and enslaver lived (from which a jury would be selected – and potentially influenced by the enslaver). The statute's stated purpose was to address "the inconvenience to citizens" of original jurisdiction residing with the general court. Substantively it did much more, restricting appeals from the county court to "matters of law, where the facts shall have been tried by a jury." Findings of fact could no longer be challenged. (49) The shift to county courts and limitations on appeal soon took its toll.

In June 1794, Nancy Queen filed a Petition for Freedom in Charles County Court against Charles Sewall, a Jesuit priest and her enslaver, claiming her freedom as the great granddaughter of Mary Queen. In August 1796, four months after the jury verdict freeing Phillis Queen and her descendants, the jury for Nancy Queen heard the deposition of Benjamin Duvall as to Mary Queen's origins and found Mary Queen "always was a slave." The court ruled Nancy Queen was not entitled to her freedom and must "return to her master." (50)

On October 18, 1791, three days after filing Edward Queen's petition for freedom against the Reverend John Ashton, Gabriel Duvall filed a second petition against Ashton on behalf of Charles Mahoney, this time in Anne Arundel County. (51) Charles Mahoney claimed he was entitled to his freedom as descended from a free woman named Ann Joice who derived her freedom, as in *Somerset*, through her presence in England and subsequent transport to Maryland by Lord Baltimore. (52) Unlike his representation of the petitioner Edward Queen, Philip Barton Key did not join Gabriel Duvall as part of Charles Mahoney's legal team. To the contrary, following his retainer by the Jesuits in August 1794, Key would defend Ashton. (53)

Charles Mahoney's journey through the Maryland courts would be much longer than Edward Queen's, as both sides gathered extensive deposition testimony and awaited response from a committee searching for evidence in London. (54) Time and money would seem to have been without limit. After a jury verdict in the first trial on his petition had been deemed insufficient, in the second the jury returned a verdict in his favor in May 1799, more than seven years after the filing of his petition, awarding the sum of $159.00 together with 8,929 pounds of tobacco in costs and charges. (55) For

the time being, Charles Mahoney was free.

Three years after the costly freedom of the Queen family, the potential financial consequences of freedom for the Mahoneys and other descendants of Ann Joice for the Jesuits and their fellow planter-enslavers were ominous. More than fifteen hundred descendants of Ann Joice, all relatives of Charles Mahoney, stood to gain their freedom. Among the planter-enslavers was Charles Carroll of Carrolton who "held more than 60 Joice descendants in bondage." (56) Ashton's lawyers immediately filed an appeal with the Maryland Court of Appeals, (57) but the Court of Appeals would not hear the case until June 1802. In the interim, John Ashton was "removed from his post as manager of White Marsh in 1801 as Bishop John Carroll sought to take control of the litigation and contain the losses on the Jesuit plantations." (58) Thomas recounts: "The Jesuits, the Carrolls, and many others feared the unraveling of slavery on their respective plantations, as well as the potential financial loss if hundreds of Mahoney family members went free. Neither the Jesuit trustees nor Bishop John Carroll trusted John Ashton to defend their interests against the Mahoneys." (59) As the West Indies merchants took control of Stewart's defense in *Somerset*, the true parties at interest took control before the upcoming hearing before the Court of Appeals.

For the defendant Jesuits and other Maryland planter-enslavers, as well as the Mahoney enslaved and their supporting abolitionists, the stakes in the case before the Maryland Court of Appeals were as high as were for those in *Somerset* v. *Stewart*. The eloquent and aggressive arguments of counsel recorded in the court reports of each case reflected no less. (60) Jeremiah Townley Chase, earlier Mary Butler's lawyer and now the chief justice of the general court, had instructed the jury:

> *That if, from the evidence, the jury are of opinion that the woman Joice, from whom the petitioner is descended, was in England, and came from thence, they must find a verdict for the petitioner.*

Before his instruction, Chase delivered the opinion of the court that the applicable law for the case was the common law of England, as reflected in *Somerset*. Ashton's lawyers took exception, providing the fourth bill of exception before the Court of Appeals. The now thirty-year-old *Somerset* ruling was at the heart of the arguments

before the Court of Appeals, both in interpretation and application. (61) Was *Somerset* simply a narrow ruling on the writ of *habeas corpus* or had *Somerset* abolished slavery; prospective only or retroactive as well; and was the outcome for James Somerset personally, local only to England, or universal, effective wherever he travelled?

Mahoney's counsel argued whatever status Ann Joice had, once she set foot in England, she was free:

> *Once free, we contend she could not afterwards by any change of her residence, nor could any agreement between Lord Baltimore, and her former master, affect her, or impair this right in the slightest degree. Slavery is incompatible with every principle of religion and morality. It is unnatural and contrary to the maxims of political law more especially in this country, where "we hold these truths to be self evident, that all men are created equal;" and that liberty is an "unalienable right."* (62)

Arguing for Ashton and the Jesuits, Maryland Attorney General Luther Martin countered:

> *Negroes, we contend, are property, and merchandise, and are sold as such. . . . We admit that the decision of Lord Mansfield divested the master's right [in Somerset]; yet we contend that the moment the master and slave left England, the master's rights revived. . . . So when the master of Ann Joice returned with her to Maryland or got her out of England . . . she was his slave. The common law, at the time Ann Joice was in England, was that trover [a lawsuit for damages for wrongful taking of personal property] would lie for a negro slave; and that the Case of Somerset was afterward and therefor was not applicable.* (63)

Both sides had agreed to stipulate the lineage of Charles Mahoney. The questions before the Court were: had Ann Joice been in England, what was her status when there, and had her status changed upon her arrival in Maryland? Noting that Ann Joice was said to have been in England some ninety years or more before *Somerset*,

the Court declined to speculate how England, now a foreign court, would have ruled on her case at the time she was there. The Court noted Lord Mansfield had declined to decide whether Somerset had been freed by his presence in England; rather, absent positive law supporting the state of slavery, there was no basis for Somerset's retention, so he was freed. The Court then observed that a positive law, such as was lacking in *Somerset*, existed in Maryland:

> *By a positive law of this state in 1715, the relation of master and slave is recognized as then existing, and all negro and other slaves then imported, or thereafter to be imported into this province, and all children then born, or thereafter to be born, of such negroes or slaved, are declared to be slaves during their natural lives.* (64).

The Court of Appeals ruled:

> *We are of the opinion that [this case] must be governed by the laws of this state; and that in this case … upon bringing Ann Joice into this state, then the Province of Maryland, the relation of master and slave continued in its extent as authorized by the laws of this state; and therefore that the judgment of the general court must be reversed.* (65).

In the third trial of Charles Mahoney's petition, although years had passed as evidence was gathered before the prior trial, surprising new evidence appeared and was presented by John Ashton's lawyers – the depositions of two witnesses taken in 1801 to the effect that Ann Joice was a "Guinea Negro" purchased by Lord Baltimore while sailing to America from England mid-ocean from a ship sailing from Guinea to America. (66) Ashton, the Jesuits, and the Maryland planter-enslavers prevailed.

Ashton would subsequently manumit Charles, Patrick, and Patrick Mahoney and others. (67) Spared the costs levied by the court at the end of trial, the Jesuits were still left with substantial legal bills. Archbishop John Carroll instructed Francis Neale, then the Corporations agent as well as Holy Trinity's pastor, "The sale of a few unnecessary

Negroes, three or four, and Stock would replace the money." (68)

After the Court of Appeals ruling, Maryland law on the relation of master and slave, not *Somerset*, determined an ancestor's status upon arriving in the state, a consequence far more costly to the enslaved than the overall costs the Jesuits and other planter-enslavers would have paid had the Court of Appeals ruled the other way.

Six years later, on May 1, 1808, Nancy Queen (not the same) filed a petition for freedom against Charles Neale, now the agent for the Corporation of the Roman Catholic Clergyman in the State of Maryland, in Charles County Court, Maryland. (69) On March 20, 1809, Nancy, through her attorney, requested the Court to transfer the case to a different county court within the judicial district, "wither Saint Mary's or Prince Georges'," because they believed they could not have a fair and impartial trial in Charles County. As required by the Maryland statute, Nancy produced an affidavit supporting the request. The Court refused transfer, and trial began on August 21, 1809. The jury found against her, and her attorney, Francis Scott Key, appealed to the Maryland Court of Appeals. (70) On December 17, 1810. The Court of Appeals affirmed the judgment. The Court's opinion, delivered by Justice Nicholson, was short. He first noted that the statute required an affidavit to be made by a party "competent to make an affidavit." He then ruled: "A negro, petitioning for his freedom, is not competent to make such an affidavit – his slavery or freedom being then *sub judice* (at issue before the court), and if a slave, he is excluded by the act of 1717, *ch 13*." (71) Nancy Queen's affidavit was incompetent because she was enslaved.

The Words that Had Set Us Free Can Do So No More

State legislatures were not the sole source of impediments to the continued success of freedom suits. The developing law of hearsay – that which does not come from "the personal knowledge of the witness, but from the mere repetition of what he has heard others say" (72) – would soon become a powerful barrier to admission of evidence regarding an ancestor's race or past presence in England, each a critical base for a freedom suit.

On January 8, 1810, when Francis Scott Key filed Priscilla Queen's petition for freedom with the Circuit Court of the District of Columbia, he filed three additional

freedom petitions on behalf of other Queen family members: *Mina Queen and Louisa Queen* v. *John Hepburn*; *Hester Queen* v. *James Nevitt & Richard Nally*; and *Alexis Queen* v. *John Davis* (73). As with Priscilla Queen's, the petitions for each asked the Court to grant her relief and to subpoena the defendant(s) immediately "as she apprehends that she may be removed" out of the jurisdiction of the Court before the next term. Priscilla's case would be the first to come before the Court.

Priscilla Queen was "born in 1763, the great-granddaughter of Mary Queen and one of the last Queens still held by the Jesuits." She was born to Mary Queen at All Hollow's Parish in Anne Arundel County, and when a child was at Fingale, together with siblings Nancy, Cate, and Rachel. (74) Aside from this moment in time captured in the records of the Circuit Court at which an enslaved woman bravely challenged her powerful owner, little else is known about Priscilla Queen.

Her case against Francis Neale went to trial in June 1810, with a jury empaneled on June 20 and the trial beginning the following day. On June 21, Neale's lawyers read the testimony of Benjamin Duvall to the jury, without objection as hearsay by Francis Scott Key, so the jury heard Duvall's contrarian account that Mary Queen was African and always a slave. To counter Duvall's testimony, Key offered to read the portion of Fredus Ryland's deposition containing his first-hand account of the declaration of Mary Queen of her free birth in New Spain and three years in England. The court refused. (75) Both Gabriel Duvall, who had represented Edward Queen and Charles Mahoney, and Simon Queen, after the court overruled the objection to Queen by Neale's lawyers, testified on behalf of Priscilla Queen. Key was able to read into evidence portions of depositions of other witnesses used in previous trials, including those of Thomas Warfield, which included a declaration of John Jiams, and the deposition of George Davis, which included a declaration of Lewis Lee, each of which stating that Mary Queen was a free woman and brought into this country and sold for seven years. The Court rejected the argument by Neale's lawyers that the declarations of Jiams and Lee were inadmissible and subsequently rejected the proposal by Neale's lawyers to instruct the jury that the declarations read were incompetent to prove Mary Queen was entitled to freedom and illegally detained in slavery. The Court instructed the jury as follows:

> *If the Jury believed from the evidence that the petitioner is lineally descended in the female line from Mary Queen, and that the said Mary Queen was brought into this Country as a free woman or a servant and sold for seven years, they must find for the petitioner, and the declarations of Capt. Jiams that the said Mary Queen was a free woman and that she was brought into the Country and sold for seven years (as stated in the deposition of Warfield) is admissible evidence to prove those facts.* (76)

Both sides filed bills of Exceptions to the Court the same day: Francis Scott Key to the exclusion of the portions of Fredus Ryland's deposition containing the declarations of Mary Queen, and John Law to the admission of the declarations of Jiams and Lee and to the testimony of Simon Queen. For reasons unclear, Priscilla Queen's case does not appear to have proceeded to verdict. (77)

The Circuit Court did rule on the exceptions entered by each counsel: As to the exclusion of the portions of Fredus Ryland's deposition containing the declarations of Mary Queen, the Court ruled "The declaration of the ancestor, while held as a slave, cannot be given in evidence," and as to the inclusion of the declarations of Jiams and Lee and the corresponding instructions to the jury, it ruled "Declarations of deceased persons, that the ancestor was free, may be given in evidence, to show that the ancestor was in fact free, that is, not held in slavery." (78)

Put simply, declarations of Mary Queen were inadmissible because she was enslaved (assumed until the jury found otherwise), but the double hearsay of Jiams and Lee were admissible to prove the fact of Mary Queen's freedom (and the jury would decide whether or not to believe it).

The petition of Mina Queen and her minor child Louisa, also descendants of Mary Queen, against their enslaver John Hepburn came next. Hepburn was represented by John Law, Francis Neale's lawyer, and Walter Jones. As in Priscilla Queen's case, the D.C. Court again disallowed the same portions of the deposition of Fredus Ryland but allowed the testimony of Simon Queen. Francis Scott Key attempted to put a portion of Caleb Clarke's deposition as to what he heard his mother say and what he heard his mother say her father said about the pedigree of Mary Queen.

Hepburn's counsel objected to any part of the deposition stating what Clarke's mother had told him she was informed of by her father Marsh Mareen Duvall. The Court sustained the objection and decided the statements (the statements of Clarke's mother as to what her father told her) were inadmissible evidence. Key again tried to introduce the portions of the deposition of Fredus Ryland containing the declarations of Mary Queen, but again was denied. Key took exceptions to both. (79) The deposition of John Warfield as to the declarations of John Jiams was allowed, but this time the Court instructed the jury:

> *If they should be satisfied upon the evidence that these declarations of John Jiams were not derived from his own knowledge, but were founded on hearsay or report communicated to him many years after the importation and sale of the said Mary, without its appearing by whom or in what manner such communication was made to him; then his said declarations are not competent in this cause*. (80)

The jury found for the defendant John Hepburn after the last six jurors were sworn in, on June 26th or 27th, 1810. On June 29, 1810, Francis Scott Key appealed the outcome to the United States Supreme Court pursuant to a writ of error. (81)

The case was argued before the Court on February 5, 1813, before Chief Justice John Marshall, and Associate Justices Bushrod Washington, William Johnson, Henry Brockhorst Livingston, Gabriel Duvall, and Joseph Story. Absent was Justice Thomas Todd. Justice Duvall, who had represented Edward Queen, Charles Mahoney, and many others in prior freedom suits, and testified as a witness for the petitioners in the trials of both Priscilla Queen and the appellants in the case Mina and Louisa Queen, had joined the Court seventeen months after the verdict in the case now before the Court in which he had testified. (82)

Key explained to the Court that "the principal exception is to the opinion of the [Circuit] Court that in tracing a pedigree, the hearsay of hearsay is not admissible. Caleb Clarke's deposition as to what he heard his mother say was admitted, but, as to what he heard his mother say her father said, was rejected. If this opinion be correct it will be impossible to prove any ancient fact." (83)

The majority opinion, written by Chief Justice John Marshall, denied the appeal and upheld the lower court, holding that "hearsay evidence is incompetent to establish any specific fact, which fact is in its nature susceptible of being proved by witnesses who speak from their own knowledge." (84) Critically, Marshall opined:

> *However the feelings of the individual may be interested on the part of a person claiming freedom, the Court cannot perceive any legal distinction between the assertion of this and of any other right which will justify the application of a rule of evidence to cases of this description which would be inapplicable to general cases in which a right to property may be asserted. The rule then which the Court shall establish in this cause will not, in its application, be confined to cases of this particular description, but will be extended to others where rights may depend on facts which happened many years past. . . .*
> *If the circumstance that the eye witnesses of any fact be dead should justify the introduction of testimony to establish that fact from hearsay, <u>no man could feel safe in any property a claim to which might be supported by proof so easily obtained</u>* (emphasis added). (85)

The words that had freed Mina Queen's ancestors could no longer free her, her daughter, or the other Queens. To Chief Justice Marshall and the Supreme Court of the United States, even though the case is about a person's petition for her freedom, there was nothing about the case different from any general case on property rights. The rule established became a general rule.

In the lone dissent, newly appointed Justice Gabriel Duvall, who before appointment had represented Edward Queen and other descendants of Mary Queen, as well as taken the deposition of Fredus Ryland, in his only written dissent in his 24-year career on Supreme Court (86), strongly disagreed, stating:

> *In Maryland the law has been for many years settled that on a petition for freedom where the petitioner claims from an ancestor who has been dead for a great length of time, the issue may be proved by hearsay evidence, if the fact is*

of such antiquity that living testimony cannot be procured. Such was the opinion of the judges of the general Court of Maryland, and their decision was affirmed by the unanimous opinion of the judges of the High Court of Appeals in the last resort, after full argument by the ablest counsel at the bar. I think the decision was correct. Hearsay evidence was admitted upon the same principle, upon which it is admitted to prove a custom, pedigree and the boundaries of land; because from the antiquity of the transactions to which these subjects may have reference, it is impossible to produce living testimony. To exclude hearsay in such cases, would leave the party interested without remedy. It was decided also that the issue could not be prejudiced by the neglect or omission of the ancestor. If the ancestor neglected to claim her right, the issue could not be bound by length of time, it being a natural inherent right.

It appears to me that the reason for admitting hearsay evidence upon a question of freedom is much stronger than in cases of pedigree, or in controversies relative to the boundaries of land. It will be universally admitted that the right to freedom is more important than the right of property.

And people of color, from their helpless condition under the uncontrolled authority of a master, are entitled to all reasonable protection. A decision that hearsay evidence in such cases shall not be admitted, cuts up by the roots all claims of the kind, and puts a final end to them, unless the claim should arise from a fact of recent date, and such a case will seldom, perhaps never, occur. (87)

To the question – are enslaved persons entitled to certain inalienable rights or mere chattel slaves? – Chief Justice Marshall and the Supreme Court answered – No, the safety of property rights must not be jeopardized even for an individual's liberty.

Professor Paul Finkelman puts Marshall's opinion in perspective for modern observers:

Marshall's opinion was at odds with the law in Maryland, Virginia, and

> *other slave states, where judges often recognized the distinction between freedom suits and other kinds of cases. Only a few years before, in Hudgins v. Wrights, 11 Va. 134 (VA 1806), the Virginia Court of Appeals had upheld the freedom of an enslaved family based in part on hearsay evidence. George Wythe, Marshall's former law professor, declared the slaves free in the trial court and it was upheld by one of the nation's leading jurists, St. George Tucker, the author of the first American edition of Blackstone's Commentaries. Marshall could easily have found an exception to hearsay rules in freedom suits, because they were special kinds of cases.* (88)

In *John Davis* v*. Wood,* 14 U.S. (1 Wheat.) 6 (March 12, 1816), hearsay formed a portion of the basis for Chief Justice Marshall's rejection of the evidence that the ancestor of the petitioners, Mary Davis, was a white woman, and in the process confirming its opinion in *Mima Queen* v*. Hepburn*. The remaining portion of the basis was the rejection of the judgment finding the petitioners' mother to be a free white woman, because the defendant in that case was not the same as in the case then before the Court. Marshall, delivering the opinion of the Court, stated, "The rule is, that verdicts are evidence between parties and privies. The Court does not feel inclined to enlarge the exceptions to this general rule, and, therefore, the judgment of the court below is affirmed." (89) Under *Davis* v*. Wood* the Butlers would not have been able to win their freedom.

The courthouse doors were now closed to freedom suits dependent upon hearsay testimony throughout the land. Both descent from a white woman, and a woman who had been in England after Somerset and therefore free, no longer formed the basis for a freedom suit because the best evidence of the status of the ancestor was no longer admissible in evidence. Yet the struggle for freedom continued. Tenacious enslaved men and women, together with their lawyers, carefully examined the particular facts of their situation, the quality of supporting evidence, circumstances offered by new or existing statutes such as

Maryland's 1796 non-importation law, (90) and various other aspects of their lives that would provide the basis for a freedom claim that a court would hear. These efforts continued until the courthouse doors were slammed tightly shut in 1857 when, in Dred Scott v. Sandford, the Supreme Court held that former enslaved people did not have standing in federal courts because they lacked U.S. citizenship, even after they were freed. (91) The doors would not open again until after the Civil War and the Thirteenth and Fourteenth Amendments nullified the Dred Scott decision.

In June 1813, after the February 5, 1813, Supreme Court decision in Mima Queen v. John Hepburn, the D.C. Circuit Court dismissed Priscilla Queen's case. (92)

Francis Neale continued as pastor at Holy Trinity until 1817. In the interim he incurred the ire of Bishop John Carroll after Bishop Carroll discovered that he "continued to sell for life people enslaved by the Jesuits," contrary to the 1814 decision of the Corporation "to sell all the enslaved people they held with the provision that they would be granted their freedom after a specific number of years" (which the Jesuits revoked in 1820). (93) In 1817, he was appointed Superior at St. Thomas Manor and pastor of St. Ignatius Church at nearby Chapel Point, close to his family's estate, Chandler's Hope, and his brother Charles. Reverend Francis Neale was buried upon his death on December 20, 1837, at St. Ignatius Church. (94)

Priscilla Queen is reported to have died in Georgetown "after 1815." The circumstances of her death and details of her life in the time after her petition remain unknown. (95) Mina Queen is likewise reported to have died in Georgetown "after 1815," two years since the Supreme Court decision denying her freedom. (96)

Consequences

The Jesuits' landholding and need to support themselves had momentous consequences, drawing them willingly, as participants, into the plantation system,

ultimately dependent upon enslaved labor to support themselves and their mission, as Professor Cook has noted. (97) They eventually became one of the largest enslavers in Maryland, little different from the other wealthy plantation enslavers, at risk not only to the vicissitudes of weather, crop prices, and other risks of agriculture, but potential loss of their human property – their free labor – through freedom suits in the courts and the costly compensation levied for the newly freed. They were co-defendants with other wealthy plantation owners insisting before the Maryland Court of Appeals that their "Brothers in Jesus Christ" as a previous superior of the Maryland Jesuits phrased it, "are property, and merchandise, and are sold as such." They won that case and others, establishing precedent in the courts and resulting in pernicious, long-lasting damage to the enslaved of Maryland while falling victim to the moral corruption of which Francis Hargrave had eloquently warned.

Queen v. *Hepburn,* as Professor Sklansky notes, provides "an object lesson in the law's complicity in the institution of slavery," reminding that the history of that complicity lies imbedded in virtually every field of American legal doctrine, including rules of evidence. (98)

Epilogue

When the courthouse doors did open again, the question of whether the United States had finally fully realized the self-evident truths for all was only partially answered.

The Thirteenth Amendment had abolished slavery when ratified on December 6, 1865. Section 1 of the Fourteenth Amendment made all persons born or naturalized in the United States citizens of the United States and the State in which they reside and prohibited any State to "make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." It was effective, together with its three additional sections, when ratified on July 9, 1868. Section 1 of the Fifteenth Amendment, "the right of citizens of the United States to vote shall not be denied by the United States or by any State on account of race, color or previous condition of servitude," was effective when ratified on February 3, 1870. The last section of each

Amendment gave Congress the power to enforce the Amendments by "appropriate legislation."

The words were now in the Constitution, aligning it with the self-evident truths of the Declaration of Independence. But would action meet the words?

In addition to having passed the "Reconstruction Amendments," Congress quickly used its newly granted authority, passing among other legislation, the Civil Rights Act of 1866 (over the veto of President Andrew Johnson); the Enforcement Act of 1870; Enforcement Act of 1871; the Ku Klux Klan Act (or the Third Enforcement Act); and the Civil Rights Act of 1875. (99)

The Supreme Court, however, would quickly take the country in a different direction. That became apparent with the Supreme Court's decision in the *Slaughterhouse Cases*, the Court's first major decision interpreting the Fourteenth Amendment. (100) The five to four majority, with their opinion written by Associate Justice Samuel F. Miller, narrowly construed the Fourteenth Amendment as applying only to former slaves and interpreted the Privileges or Immunities Clause as limited to those privileges or immunities conferred by national citizenship, such as "the right to use the navigable waters of the United States, however they may penetrate the territory of the several States, [and] all rights secured to our citizens by treaties with foreign nations [that are] dependent upon citizenship of the United States," (101) as distinguished from "those which belong to citizens of the States as such . . . that are left to the State governments for security and protection, and not by this article placed under the special care of the Federal government." (102) Four Justices dissented, including Chief Justice Salmon Portland Chase (who alone among the dissenters did not write an opinion and died three weeks later).

Writing in dissent, Associate Justice Stephen Johnson Field summed up the majority ruling by stating if the majority interpretation of the 14th Amendment was correct, "it [the Amendment] was a vain and idle enactment, which accomplished nothing and most unnecessarily excited Congress and the people on its passage."(103) Justice Field's assessment was prescient. Under the Court's opinion, the Privileges or Immunities Clause, thought to be the most likely basis for enforcing individual rights, (104) in effect does nothing. Neither the Bill of Rights nor fundamental natural rights

were included within its scope, so in order to apply the Amendment, the equality function of the Privileges or Immunities Clause was taken over by the Equal Protection Clause, and the substantive functions were taken over by the Due Process Clause. (105)

Three years later, on March 27, 1876, the Court decided two cases which narrowed the scope of the Fourteenth and the Fifteenth Amendments. The first, *United States* v*. Reese* (106) was an 8-1 decision ruling that the Enforcement Act of 1870 was not a valid exercise of Congress's power to enforce the 15th Amendment. The case was the Court's first voting rights case since adoption of the 15th Amendment. Chief Justice Morrison Waite (who replaced Chief Justice Salmon Portland Chase) first stated that the Fifteenth Amendment "does not confer the right of suffrage upon any one," but "prevents the States, or the United States, however, from giving preference . . . to one citizen of the United States over another on account of race, color, or previous condition of servitude."(107)

The second, decided the same day, *United States* v*. Cruikshank*, (108) in a five to four decision written by Chief Justice Morrison Waite, upheld the lower court's dismissal of federal criminal charges for conspiracy under the Enforcement Act 0f 1870, arising out of the Colfax Massacre in Grant Parish, Louisiana. The Court ruled that the Fourteenth Amendment protected citizens only from state action and not from violent attacks committed by private individuals. The Court, citing *United States* v*. Reese*, its decision earlier in the day discussed above, further construed the Fifteenth Amendment such "that the right of suffrage is not a necessary attribute of national citizenship, but that exemption from discrimination in the exercise of that right on account of race, &c., is. The right to vote in the States comes from the States, but the right of exemption from the prohibited discrimination comes from the United States. The first has not been granted or secured by the Constitution of the United States, but the last has been." (109)

The Civil Rights Act of 1875 required: "That all persons within the jurisdiction of the United States shall be entitled to the full and equal enjoyment of the accommodations, advantages, facilities, and privileges of inns, public conveyances on land or water, theaters, and other places of public amusement; subject only to the

conditions and limitations established by law, and applicable alike to citizens of every race and color, regardless of any previous condition of servitude." The second section provided that any person denied access to these facilities on account of race would be entitled to monetary restitution under a federal court of law. (110) Eight years later, after the Compromise of 1877 resolved the Hayes-Tilden election of 1876 with a Republican President Hayes in exchange for the end of Reconstruction, the Supreme Court declared the Civil Rights Act of 1875 unconstitutional in an 8-1 vote.

The Civil Rights Cases, 109 U.S. 3 (1883), consolidated five appeals, *U.S.* v. *Stanley*; *U.S.* v. *Ryan*; *U.S.* v. *Nichols*; *U.S.* v. *Singleton*; and *Robinson and wife* v. *Memphis & Charleston Railroad Company*, all of which concerned discrimination on the grounds of race at the hands of private organizations. Differentiating between state and private action, the majority ruled that the Fourteenth Amendment did not permit the federal government to prohibit discriminatory behavior by private parties. Sections 1 and 2 of the Civil Rights Act of 1875 were unconstitutional because they exceeded Congress's authority under the Fourteenth Amendment by purporting to regulate the conduct of private individuals. The Court held the Act likewise exceeded Congress's authority under the Thirteenth Amendment, which bars involuntary servitude and is restricted to prohibiting ownership of slaves, not other forms of discriminatory conduct. (111)

Plessy v. *Ferguson*, decided on May 18, 1896, (112) provided the capstone to the Supreme Court's actions to curb what it had previously characterized as:

> *So serious, so far-reaching and pervading, so great a departure from the structure and spirit of our institutions; when the effect is to fetter and degrade the State governments by subjecting them to the control of Congress in the exercise of powers heretofore universally conceded to them of the most ordinary and fundamental character; when, in fact, it radically changes the whole theory of the relations of the State and Federal governments to each other and of both these governments to the people.* (113)

Plessy involved a Louisiana state law, the Separate Car Act, which required

separate railway cars for blacks and whites. Homer Plessy – who was seven-eighths Caucasian – agreed to participate in a test to challenge the Act. Plessy was technically black under Louisiana law and sat in a "whites only" car of a Louisiana train. When told to vacate the whites-only car, he refused and was arrested. At trial, his lawyers argued that the Separate Car Act violated the Thirteenth and Fourteenth Amendments, but the judge found that Louisiana could enforce this law insofar as it affected railroads within its boundaries and Plessy was convicted. In a 7-1 decision, the Court held that the Separate Car Act was constitutional. In an opinion authored by Justice Henry Billings Brown, the majority upheld state-imposed racial segregation. Justice Brown conceded that the 14th Amendment intended to establish absolute equality for the races before the law, but held that separate treatment did not imply the inferiority of African Americans. Put simply, segregation did not in itself constitute unlawful discrimination. In dissent, John Marshall Harlan argued that the Constitution was color-blind and that the United States had no class system. Accordingly, all citizens should have equal access to civil rights. (114)

By means of the Court's rulings in *Plessy* and the preceding cases discussed above, the Supreme Court managed to greatly curtail the effect of the Reconstruction Amendments, as the Thirteenth, Fourteenth, and Fifteenth Amendments are called. At the dawn of the twentieth century, the Supreme Court's decisions had provided the foundation in the Southern States for "Jim Crow" laws and what southerners would come to call, and violently defend through state and local law, as well as extrajudicial "lynchings," as "a way of life." (115)

> *The record is there for all to read. It resounds all over the world. It might as well be written in the sky. One wishes that Americans, white Americans, would read, for their own sakes, this record, and stop defending themselves against it. Only then will they be enabled to change their lives.*
>
> James Baldwin (116)

Notes

1. *Somerset* v. *Stewart*, Easter Term 12 Geo. 3, 1772, K. B. May 14, 1772, (at Lofft 2) available at: https://www.nonhumanrights.org/wp-content/uploads/Somerset-v.-Stewart.pdf and http://www.commonlii.org/int/cases/EngR/1772/57.pdf. Francis Hargrave, together with John Glynne, John Alleyne, and William "Serjeant" Davy pleaded James Somerset's case, financed by the abolitionist Granville Sharp. Charles Stewart's case was pleaded by John Duning and William Wallace, who were financed by West Indian planters and merchants, who, Charles Stewart wrote "have taken [the case] off my hands and I shall be entirely directed by them in the further defense of it." "The Somerset v. Stewart Case," English Heritage, available at: https://www.english-heritage.org.uk/visit/places/kenwood/history-stories-kenwood/somerset-case/ A member of Lincoln's Inn, *Somerset* was Hargrave's first case, he is considered its legal star and it made his career. On the 250th anniversary of the case, Lincoln's Inn published a four-part series celebrating James Somerset on the occasion of Black History Month in the United Kingdom, available at: https://www.lincolnsinn.org.uk/news/james-somerset-black-history-month-2022/

2. As explained by the British National Archives Research Guides, The King's Bench seniority was based upon the principles of pleas heard regularly and formally within the king's immediate purview even if not always in his actual presence. Available at: https://www.nationalarchives.gov.uk/help-with-your-research/research-guides/court-kings-bench-records-1200-1600/#2-what-was-the-court-of-the-kings-bench

3. "The Somerset v Stewart Case," English Heritage. *See also,* George Van Cleve, *Somerset's* Case and Its Antecedents in Imperial Perspective, *Law and History Review, Vol. 24, No. 3 (Fall, 2006), pp. 601-645*:

> *On June 22, 1772, Mansfield announced a decision in Somerset of about two hundred words that profoundly altered not just the English, but also ultimately the American, framework for the law of slavery. (cit. om.) The proceedings in Somerset were reported in at least thirteen British newspapers, several widely*

circulated magazines, and twenty-two out of twenty-four operating North American colonial newspapers. The case then became the subject of transatlantic pamphlet wars. Somerset played out before a transatlantic audience because contemporaries thought it had implications for England and for its Atlantic colonies. Mansfield fully understood the imperial context of slavery and made his decision with that context firmly in mind. Somerset was cited as authority -- or disapproved of -- by English and American courts for nearly one hundred years (cit. om.)
http://pryan2.kingsfaculty.ca/pryan/assets/File/Van%20Cleve%20on%20Somerset%27s%20Case.pdf

4. "We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty and the pursuit of Happiness. That to secure these rights, Governments are instituted among Men. . ," Declaration of Independence: A Transcription, National Archives, America's Founding Documents, available at: https://www.archives.gov/founding-docs/declaration-transcript.

5. *Queen* v. *Neale*, 20 F. Cas. 130. 2 D.C. 3, (2 Cranch) (1810).

6. The Jesuit Cases are: *Charles Mahoney* v. *John Ashton*, LEXSEE 1799 Ms. LEXIS 8,4 H. & McH, 295; *Nancy Queen* v*. Charles Sewall*, Judgment Record August 1796, Available at OSCYS, https://earlywashingtondc.org/doc/oscys.mdcase.0005.001; *Nancy Queen* v*. Charles Neale*, 3 H. & J, 158; 1810 Md. LEXIS 32, Judgment Record December 1810, available at OSCYS, https://earlywashingtondc.org/doc/oscys.mdcase.0004.001https://earlywashingtondc.org/doc/oscys.mdcase.0004.001; and *Priscilla Queen* v*. Francis Neale*, *supra*.

7. *Mima Queen* v*. Hepburn*, 11 U.S. 290 (1813); 20 F. Cas. 130, 2 D.C. 3, 2 Cranch (1810). Francis Scott Key filed four separate freedom petitions for Queen family members at the same time, on behalf of Priscilla, Mina and er daughter Louisa, Hester

and Alexis Queen. As explained below, the critical evidence regarding ancestry was the same among the petitioners.

8. Sklansky, David, “The Neglected Origins of the Hearsay Rule in American Slavery: Recovering Queen v. Hepburn” (September 12, 2022). 2022 Supreme Court Review 413, Available at SSRN: https://ssrn.com/abstract=4207141 or http://dx.doi.org/10.2139/ssrn.4207141

9. 60 U.S. 393 (1857).

10. In February 1763, Francis Neale’s father William bequeathed “to my wife Anne, 7 slaves, to [daughters], Clare and Eleanor, 3 slaves.” (available at: https://colonial-settlers-md-va.us/rpt_ind.php: https://colonial-settlers-md-va.us/getperson.php?personID=I16203&tree=Tree1). The Neales were, as Sharon M. Leon observes, “a large, powerful Catholic slaveholding family.” Leon, “Marriage in the Eyes of the Clergy,” Jesuit Plantation Project*,* Life and Labor under Slavery: The Jesuit Plantation Project – Marriage in the Eyes of the Clergy. Leon also observes “Together the clergymen who hailed from these families (the Carrolls, Fenwicks, and Neales) exercised a great deal of control over the lives of the enslaved owned in common by the Jesuits, but also over the lives of the enslaved people owned by their parents, siblings, in-laws, cousins, and nieces and nephews.” Leon, “Jesuits from Elite Slaveowning Families,” Jesuit Plantation Project.

11. Stephanie A.T. Jacobe, PH.D., “The Foundation of the Carmelites of Port Tobacco,” Catholic Standard, March 29, 2022, available at: https://www.cathstan.org/from-the-adw-archives/the-foundation-of-the-carmelites-of-port-tobacco The author reports, “A check of the 1820 United States Census shows that …there were also 41 enslaved persons recorded as living on the plantation, which would make the Carmelites one of the largest owners of enslaved persons in Charles County at that time.”

12. William V. Warner, “At Peace with All Their Neighbors: Catholics and Catholicism in the National Capital, 1787-1860” (Washington, D.C., 1994), pp. 18-19; Laurence J. Kelly, S.J., “History of Holy Trinity Parish, Washington, D.C., 1795-1945” (Baltimore, Md., 1945), pp. 12-13.

13. Warner, p. 19, pp, 27, 99.

14. The trust created following Pope Clement XIV’s 1773 suppression of the Jesuits to secure the properties individually then held since the time under British rule when religious orders could not own property. Bernard A. Cook, “Maryland Jesuits and Slavery,” p.1. At n.1, Cook explains the background of the Pope’s suppression of the Jesuits and the organization and intended purpose of the corporation. *See also*, William G. Thomas III, “A Question of Freedom: The Families Who Challenged Slavery from the Nation’s Founding to the Civil War” (New Haven, 2020), describing Reverend Francis Neale’s efforts “as duly appointed agent of the corporation,” with fellow Jesuit Reverend John Ashton, the prior agent over the corporation, of his mismanagement at p. 126.

15. The Circuit Court of the District of Columbia was established by The District of Columbia Organic Act of 1801, officially An Act Concerning the District of Columbia (6th Congress, 2nd Sess. Ch 15, Secs. 2-4, Stat 103, February 27, 1801), which divided the District of Columbia into two counties, Alexandria and Washington and was to hold four sessions a year in each county. Federal Judicial History: Federal Courts of the District of Columbia. 2 Stat. 103 U.S. Statutes at Large, available at: https://govtrackus.s3.amazonaws.com/legislink/pdf/stat/2/STATUTE-2-Pg103b.pdf. Professor Paul Finkelman observes, “The District’s laws were oddly complicated. The District was created by cessions of land from Virginia and Maryland. Virginia ceded what is today the City of Alexandria, which was called Alexandria County, until its retrocession to Virginia in 1846. Maryland gave the nation Washington County, which constitutes present-day Washington, D.C. Congress had full constitutional power to enact all laws for the District but left many state laws in place; during Marshall’s tenure Alexandria County was generally governed by Virginia law, and Washington County was generally

governed by Maryland law." Paul Finkelman, "John Marshall's Proslavery Jurisprudence: Racism, Property, and the "Great" Chief Justice" (Online Essay), available at: https://lawreview.uchicago.edu/online-archive/john-marshalls-proslavery-jurisprudence-racism-property-and-great-chief-justice.

16. "Priscilla Queen's Petition for Freedom, 1810," Georgetown University Slavery Archive, item 29, https://slaveryarchive.georgetown.edu/items/show/34.

17. Encyclopedia of Virginia, "Elizabeth Key," available at: https://encyclopediavirginia.org/entries/key-elizabeth-fl-1655-1660/.

18. For a brief history of the Roanoke Colonies, see Encyclopedia Virginia at: https://encyclopediavirginia.org/entries/roanoke-colonies-the/.
In 1606 King James I granted two charters for the colonization of America, with overlapping territory: one to colonize the American coast anywhere between parallels 34° and 41° north and the other anywhere between 38° and 45° north. Because members of the first company lived in London, it became known as the Virginia Company of London (Virginia Company); as members of the second dwelt in Plymouth, it was called the Plymouth Company. Virginia Company had the area from the Carolinas to northern New Jersey. The Virginia Company of Plymouth had the area from southern New Jersey to Maine. The Virginia Company initially struggled but succeeded. Subsequent new charters extended its territorial reach two hundred miles north and south from Point Comfort (today's Hampton), "and all that Space and Circuit of Land, lying from the Sea Coast of the Precinct aforesaid, up into the Land throughout from Sea to Sea, West and Northwest…" See, The Second Charter of Virginia; May 23, 1609, at The Avalon Project, https://avalon.law.yale.edu/17th_century/va02.asp. Unlike the Virginia Company, the Plymouth Company did not prosper. After abandoning its colony on the coast of Maine, Popham, after one year, it was reorganized by the 1620 Charter of New England as the Council for New England. Under the Charter, King James I granted "all that Circuit, Continent, Precincts, and Limitts in America, lying and being in Breadth from Fourty Degrees of Northerly Latitude, from the Equnoctiall Line, to

Fourty-eight Degrees of the said Northerly Latitude, and in length by all the Breadth aforesaid throughout the Maine Land, from Sea to Sea, with all the Seas, Rivers, Islands, Creekes, Inlet, Ports, and Havens, within the Degrees, Precincts and Limitts of the said Latitude and Longitude, .. and called by the Name of New-England, in America." The Charter of New England: 1620, available at: https://avalon.law.yale.edu/17th_century/mass01.asp.

19. English Bill of Rights 1689, The Avalon Project, Yale Law School Lillian Goldman Law Library, available at: https://avalon.law.yale.edu/17th_century/england.asp.

20. Quotation from James MacGregor Burns "Fire and Light, How the Enlightenment Transformed our World," p.11 (e-book version), Thomas Dunne Books St. Martin's Press, New York; "the state of nature has a law of nature to govern it, which obliges every one: and reason, which is that law, teaches all mankind, who will but consult it, that being all equal and independent, no one ought to harm another in his life, health, liberty, or possessions: for men being all the workmanship of one omnipotent, and infinitely wise maker; all the servants of one sovereign master, sent into the world by his order, and about his business," John Locke, "Second Treatise of Government," Chapter II Section 6. The Project Gutenberg eBook of Second Treatise of Government, by John Locke accessed at: https://www.gutenberg.org/files/7370/7370-h/7370-h.htm?ref=americanpurpose.com#CHAPTER_II.

21. For example, the famous lexicographer and essayist Samuel Johnson abhorred slavery and corresponded with his biographer James Boswell, who happened to be assisting Joseph Knight in his case before the Scottish Court of Session. See "Samuel Johnson on the Freedom of Joseph Knight," The Samuel Johnson Birthplace Museum Blog, available at: https://sjmuseum.wordpress.com/2020/11/27/samuel-johnson-on-the-freedom-of-joseph-knight/.

22. *Somerset* v. *Stewart*. The first sentence of the case report states so. The

New England Historical Society puts a finer point on Somerset and Stewart, identifying Charles Stewart as "a Boston customs collector" who "bought James Somerset from a Virginia plantation owner. The Boston Runaway Who Ended Slavery in England. https://newenglandhistoricalsociety.com/james-somerset-the-boston-runaway-who-ended-slavery-in-england/ . This is not inconsistent with the court report. As the location of the transaction where Stewart purchased Somerset, Virginia, and its laws and the context of the transaction would be important to the Court.

23. "Chapter 1: James Somerset," Black History Month 2022 The Honorable Society of Lincoln's Inn, October 7, 2022, https://www.lincolnsinn.org.uk/news/james-somerset-black-history-month-2022/

24. "The Somerset v Stewart Case," English Heritage, "The Opposing Sides."

25. 12 Geo. 3 1772, KB, 1, at 19. This quotation is from a case report contained in Lofft's Reports, as viewed in the original on the website of The Honorable Society of Lincoln's Inn, Rare Books and Manuscripts Online. It is available at: https://archives.lincolnsinn.org.uk/documents/40.

As explained on the Inn's website, Lofft's Reports is a set of law report compiled by Capel Lofft (1751- 1824), a barrister member of Lincoln's Inn, as was Lord Mansfield, William Murray, 1st Earl of Mansfield, and Francis Hargrave, Somerset's counsel. Lofft's report of Somerset's case was the most widely-circulated permanent copy. Other versions of the decision included newspaper accounts (very [few] copies of which survived more than a few days) and a number of private manuscript copies.
The Inn notes that "at this date, however, major cases were not transcribed and verified by the judge who gave the decision. Contemporary records of Mansfield's words vary considerably." The Inn's Library has a manuscript account of the decision by another Inn member, Serjeant Hill, "a contemporary whose personal records of cases he witnessed are judged to be very reliable." Hill's version of Mansfield's opinion ends:

Slavery is so odious that it must be construed strictly. No master was ever

allowed here to send his servant abroad because he absented himself from his service or for any other Cause. No authority can be found for it in the Laws of this Country. And therefore we are all of the Opinion that James Somerset must be discharged.

As the Inn notes, "In other words, in Hill's version, the issue decided in the case was whether a slave could be detained in England and transported back to the plantations. Some years later, in *R v Inhabitants of Thames Ditton* (1785) Lord Mansfield expressly stated that [*Somerset's case*] 'got no further than that the master cannot by force compel him to go out of the kingdom.'" Hill's version, however, is a handwritten manuscript in the library of Lincoln Inn, Lofft's widely published and considered authoritative.

The quotations and narrative In this note are from a 2022 series "celebrating James Somerset, a slave who gained his freedom as the result of a landmark case 250 years ago," adding that " Lincoln's Inn has many connections with this case – members of the Inn played key roles and the Library contains important manuscripts relating to the case." The series is available at: https://www.lincolnsinn.org.uk/news/james-somerset-black-history-month-2022/.

26. In 1965, almost two centuries after the decision, Yale Law School Dean Eugene V. Rostow said, "Yet in the 1770's, and throughout our history as a nation, every judge, and every thoughtful man, knew that the principle of *Somerset's* case should have been our law too. That conviction, like the knowledge of evil, has been the source of much in our law, and in our lives: a restless, uneasy pressure for change: a sense of guilt; a zeal for liberty." Dean Rostow's remarks were made in his William H. Leary Lecture at the University of Utah College of Law (now the S.J. Quinney College of Law) subsequently published in the school's law review. Eugene V. Rostow, "The Negro in Our Law," 9 Utah L. Rev. 841. 843, 1964-1965. On the semiquincentennial, numerous events occurred including a three-day conference of scholars held in Philadelphia by the American Philosophical Society, Nov.30 –Dec. 2, 2022, for which the program is available at: https://www.elhblog.law.ed.ac.uk/2022/12/22/somerset-v-stewart-1772-

conference-philadelphia/. The immediate impact in the American colonies of *Somerset* v*. Stewart* became a matter of dispute following the publication of The 1619 Project in the August 18, 2019, *The New York Times Magazine* and subsequent publication on December 20, 2019, by the *Magazine* of a letter from five eminent historians requesting print corrections of certain errors. *See* Sean Wilentz, *A Matter of Facts*, The Atlantic Monthly, Jan. 22, 2020, and Adam Serwer, *The Fight Over the 1619 Project Is Not About the Facts*, The Atlantic Monthly, Dec. 23, 2019. Wilentz, among other matters, argues with the formal response to the letter by *New York Times Magazine* editor in chief, Jake Silverstein who asserted that Somerset "caused a 'sensation'." Wilentz states that "[i]n fact, the *Somerset* ruling caused no such sensation. In the entire slaveholding South, a total of six newspapers—one in Maryland, two in Virginia, and three in South Carolina—published only 15 reports about *Somerset*, virtually all of them very brief. Coverage was spotty: The two South Carolina newspapers that devoted the most space to the case didn't even report its outcome." *But see* van Cleve, "*Somerset's* Case and Its Antecedents in Imperial Perspective": "*The proceedings in Somerset were reported in at least thirteen British newspapers, several widely circulated magazines, and twenty-two out of twenty-four operating North American colonial newspapers. The case then became the subject of transatlantic pamphlet wars. Somerset played out before a transatlantic audience because contemporaries thought it had implications for England and for its Atlantic colonies."*

27. The niceties of the legal issues, however, evaded many contemporaries. Mansfield's judgment was seen as deciding that a person could not be held as a slave in England and he became a hero of the abolitionist cause. Mansfield may have been reluctant to give a judgment which would damage the interests of British merchants and investors and his decision might have been far more limited than presented by the abolitionist movement. Nonetheless, all the accounts of the opinion include Mansfield's view that the state of slavery is so odious that it could not be justified by natural law or reason. https://www.lincolnsinn.org.uk/news/james-somerset-black-history-month-2022/.

28. National Records of Scotland: “Slavery, Freedom or Perpetual Servitude? – The Joseph Knight Case,” https://www.nrscotland.gov.uk/research/learning/slavery/slavery-freedom-or-perpetual-servitude-the-joseph-knight-case#:~:text=Knight%20claimed%20that%2C%20although%20many,found%20in%20favour%20of%20Wedderburn.

29. N.4, *supra*.

30. https://www.archives.gov/founding-docs/virginia-declaration-of-rights.

31. The suggestion to George Mason’s draft was made by Edmund Pendleton. The Virginia Declaration of Rights, June 12, 1776, Shaping the Constitution, Resources from the Library of Virginia and the Library of Commerce, available at: https://edu.lva.virginia.gov/oc/stc/entries/the-virginia-declaration-of-rights-june-12-1776.

32. What is known as “the Quock Walker Case” is a series of three cases “that began as a freedom suit based on a promise of freedom or manumission, but resulted in a sweeping declaration by Supreme Judicial Court Chief Justice William Cushing that the institution of slavery was incompatible with the principles of liberty and legal equality articulated in the new Massachusetts Constitution.” The result is that slavery became unenforceable in a Massachusetts court. Yet, the decision was not widely publicized. The 1790 census recorded no enslaved in Massachusetts. Changing economic conditions, and other factors may have brought about an end to slavery in the Commonwealth. As a result, a scholarly and legal debate exists whether the Quock Walker Case “abolished” slavery in Massachusetts. See “The Quock Walker Case” in “Massachusetts Constitution and the Abolition of Slavery,” https://www.mass.gov/guides/massachusetts-constitution-and-the-abolition-of-slavery#-the-quock-walker-case-. Six years later, in 1789, Massachusetts Supreme Judicial Court Justice William Cushing would be third among the original six appointed by President Washington as Justices of the Supreme Court of the United States.

33. Rostow, “The Negro in Our Law” at 847.

34. For a narrative of freedom suits in Maryland, see Thomas, “A Question of Freedom,” 27, 99.

35. *Butler* v. *Craig,* 2 Md. 214 (1787), affirmed, Court of Appeals, 2 H & McH.214: 1787 Md. LEXIS 5, June 1791, https://cite.case.law/md/2/214/ and https://msa.maryland.gov/megafile/msa/speccol/sc5400/sc5496/000500/000534/images/2_h_mch_214.pdf.

36. *William Butler and Mary Butler* v. *Richard Boarman*, https://msa.maryland.gov/megafile/msa/speccol/sc5400/sc5496/000500/000534/images/1_h_mch_371.pdf (see reversal at 376, p. 7 of pdf).

37. Transcript from General Court of Western Shore, November 19, 1787, entry for October 9, 1787. Available at OSCYS at: https://earlywashingtondc.org/doc/oscys.mdcase.0014.072.

38. *Butler* v. *Craig, supra.*

39. Thomas, 27; *Samuel Butler, Flora Butler, and Tracey Butler* v. *Adam Craig*, OSCYS, https://earlywashingtondc.org/cases/oscys.caseid.0605.

40. Thomas, 24.

41. Cook, “Holy Trinity Parish and Race: An Overview,” p. 8.

42. Cook, “Maryland Jesuits and Slavery,” p. 2.

43. Petition for Freedom, *Edward Queen* v. *John Ashton* (Oct. 15, 1791),

available at OSCYS, https://earlywashingtondc.org/doc/oscys.mdcase.0001.017.

44. Thomas, 52.

45. Judgment, *Edward Queen* v. *John Ashton* (May 23, 1794), available at OSCYS, https://earlywashingtondc.org/doc/oscys.mdcase.0001.012.

46. Docket, *Queens* v. *John Ashton*, available at OSCYS, https://earlywashingtondc.org/doc/oscys.mdcase.0009.002.

47. Thomas, 77.

48. Ibid., 68, n. 35.

49. Laws of Maryland, Session Laws, 1793, chap. 55, Whereas clause and sections 2 through 4, accessed at: https://msa.maryland.gov/megafile/msa/speccol/sc2900/sc2908/000001/000645/html/am645--53.html. See also discussion in Thomas, at 68.

50. Judgment Record, *Nancy Queen* v. *Charles Sewall*, available at OSCYS, https://earlywashingtondc.org/doc/oscys.mdcase.0005.001.

51. *Charles Mahoney* v. *John Ashton*, Petition for Freedom, available at OSCYS, https://earlywashingtondc.org/doc/oscys.mdcase.0008.006.

52. Ibid.

53. Ibid. Judgment Record entry p. 112, reflecting filing of depositions with the General Court listing William Cooke, Philip Barton Key, and John Thompson Mason and Luther Martin as John Ashton's attorneys. Available at: OSCYS, https://earlywashingtondc.org/doc/oscys.mdcase.0008.003.

54. Ibid. Summary, OSCYS, https://earlywashingtondc.org/cases/oscys.caseid.0481.

55. Ibid. Transcript from Prince George's County Court, June 5, 1799, at p.28. Available at: OSCYS, https://earlywashingtondc.org/doc/oscys.mdcase.0008.049.

56. Thomas, 88, 90. See also, Rev. John Ashton, "Archives of Maryland," "The Mahoney case affected other Maryland Gentry including Charles Carroll of Carrollton who also owned other Mahoney family members." Available at: https://msa.maryland.gov/megafile/msa/speccol/sc5400/sc5496/041700/041715/html/041715bio.html.

57. Docket Sheet May 1799, OSCYS, https://earlywashingtondc.org/doc/oscys.mdcase.0008.004.

58. *Charles Mahoney* v*. John Ashton*, Summary, OSCYS, https://earlywashingtondc.org/cases/oscys.caseid.0481.

59. Thomas, 105.

60. See the discussion of *Somerset*, in the text and notes, *supra*. Lord Mansfield intended to stimulate future debate, particularly in the Colonies, rather than to endeavor to settle the question once and for all. He did, however, choose the opportunity to frame the debate. Recent scholarship argues Lord Mansfield's phrasing and intentions signaled broader intentions through his focus on positive law or lack thereof, in addition to other phrasing in common among the differing Reports. See, e.g. van Cleve, *"Somerset's Case"* and Its Antecedents in Imperial Perspective," at 645: "The manner in which Mansfield reframed the debate over slavery significantly influenced that debate for the next one hundred years. His judgment contained important silences and ambiguities. Yet, Somerset expanded freedom when it banished any doubt that English

law protected certain fundamental "rights of man" even for African slaves in England, including the right of access to the courts to protect against unlawful imprisonment or abuse, and freedom from chattel slavery."

61. *Mahoney* v. *Ashton*, Court of Appeals of Maryland, General Court 4H.& McH. 295; 1799Md. LEXIS 8, p.1, 5-6.

62. Ibid., p.2

63. Ibid., p. 13.

64: Ibid., p. 18.

65: Ibid.

66. Depositions of Samuel Douglass and Thomas Lane read into evidence at trial as noted in the record of the General Court October 12, 1802. *Mahoney* v. *Ashton* Judgment Record, October 1802. OSCYS, available at: https://earlywashingtondc.org/doc/oscys.mdcase.0008.054. Although speculation exists given the discovery of two new witnesses after more than a decade after initiation of the suit, were the witnesses testimony in fact truthful, the ship sailing from Guinea to America on which Ann Joice was a passenger would have been one belonging to the New Royal African Company, chartered September 27, 1672, with a monopoly in the slave trade, including between Guinea and America. The Charter is available at: https://www.british-history.ac.uk/cal-state-papers/colonial/america-west-indies/vol7/pp404-417. It succeeded the Company of Royal Adventurers of England Trading with Africa, incorporated by royal charter issued by Charles II, January 10, 1663. *See*, https://discovery.nationalarchives.gov.uk/details/r/C13807.

67. Rev. John Ashton, Maryland State Archives, citing Charles County Court (Land Records) Liber IB 6, 117-118 for Charles and Patrick Mahoney, and 418 for

Daniel Mahoney; Thomas, 127-128.

68. Thomas, 116, n. 55., citing Caroll to Neale, November 12, 1805, box 57.1, folder 15. Online MPA, for paper finding aid, box 57.5 labeled 57.A.

69. *Nancy Queen* v*. Charles Neale*. Judgment Record, December 1810, OSCYS, available at: https://earlywashingtondc.org/doc/oscys.mdcase.0004.001

70. Ibid.

71. *Queen* v*. Neale*, 3 H. & J. 1810 Md. Lexis 32, December 1810., available at: https://msa.maryland.gov/megafile/msa/speccol/sc5300/sc5339/000263/000000/000002/restricted/3_g&j_158.pdf. The act of 1717, ch. 13 cited in the opinion provided: "… no Negro, or Mulatto Slave, Free Negro, or Mulatto born of a White Woman, during his Time of Servitude by Law, or any Indian Slave, or Free Indian Natives of this or the neighbouring (sic) Provinces, be admitted and received as good and valid Evidence in Law, in any Matter or Thing whatsoever, depending before any Court of Record, or before any Magistrate within this Province, wherein any Christian White Person is concerned." Available at: https://msa.maryland.gov/megafile/msa/speccol/sc2900/sc2908/000001/000033/html/am33--111.html.

72. "Hearsay," citing *Black's Law Dictionary,* 4th ed., in "*Priscilla Queen* v. *Francis Neale*," *O Say Can You See: Early Washington, D.C., Law and Family,* https://earlywashingtondc.org/cases/oscys.caseid.0025.

73. Each of the handwritten Petitions contains on the first page "F. S. Key," and on the second, one or more numbers written at the top. The summonses issued do the same, preceded by the word "Trials," and number "206" in the case of Priscilla Queen, "207" in the case of Mina, "208" in the case of Hester, and "209" in the case of Alexis. These appear to be the markings Clerk of the Court scheduling the sequencing of

proceeding for each case. Hester's trial sequence is changed several times, likely because while James Nevitt was served his summons on January 8, Richard Nally, the second defendant, was not summoned until February 21, perhaps because of difficulties in serving Richard Nally. The summons for John Davis, in the case of Alexis, was served "26 February." See the documents available for Priscilla at: https://earlywashingtondc.org/cases/oscys.caseid.0025, for Mina at: https://earlywashingtondc.org/cases/oscys.caseid.0011, for Hester at: https://earlywashingtondc.org/cases/oscys.caseid.0026, and for Alexis at: https://earlywashingtondc.org/doc/oscys.case.0012.002.
Thomas, who makes no mention of Alexis, posits that the petitions for Priscilla, Mina, and Hester, the timing of the filing for the petitions was part of a strategy, as he explains in "The Timing of *Queen* v*. Hepburn*: An Exploration of African American Networks in the Early Republic," *O Say Can You See,* https://earlywashingtondc.org/stories/queen_v_hepburn.

74. Some doubt exists as to the exact year of Priscilla Queen's birth. I have chosen 1763 as more likely, based on the 1764 White Marsh Memorandum contained among the Jesuit documents compiled in the 1908 book by Thomas Hughes.
The OSCYS *Queen Family Network* family tree lists her as one of four children of Mary Queen born "abt. 1762." https://earlywashingtondc.org/families/queen. William G. Thomas's *The Timing of Queen* v*. Hepburn*, n..73, *supra*, states she was "[b]orn in 1764." *Life and Labor under Slavery: the Jesuit Plantation Project*, indicates her birth in 1763 at: https://jesuitplantationproject.org/s/jpp/item/1520, listing Priscilla Queen, with Identifier 4031, in 1763 as "inventory" at "Fingale" and a child not capable of work under John Lewis, S.J., linked to the event "1810, Priscilla Queen freedom petition, and presenting an image of pages 230-231 listing "Names of the children not capable of work at Fingal," and identifying Priscilla as one of four children of Mary on page 231. The data is sourced by link to the Georgetown Slavery Archive at: http://slaveryarchive.georgetown.edu/items/show/61, titled "White Marsh Memorandum, 1764," described as "A record of enslaved persons at White Marsh 1764, indicating family groups," and providing an image of pages 230-231 of Thomas Hughes, History of

the Society of Jesus in North America Colonial and Federal Documents, Vol.1, Part 1 Nos 1-140 (1605-1838) (Cleveland: The Burrows Brothers company 1908). https://archive.org/stream/historyofsociety11hugh#page/n3/mode/2up. That same document lists at Fingal: Mina, together with Simon and Henry as “Nanny Cooper’s” “children not capable of work” with the additional notation “Far advanced in age and mothers of many children: Phyllis and Nanny.” In the Jesuit records, Simon Queen was born in January 1759, a child of Nanny Cooper, who petitioned for his freedom in 1794 against John Ashton, ran away in 1795, was the subject of the reward offered by John Ashton on May 1, 1795 and manumitted Queen by Rev. John Ashton in April 1796, together with Basil, Billey, Charity, Edward, Jacob, John, Mary, Nelly, Nicholas and Stephen. See: https://jesuitplantationproject.org/s/jpp/item/1504; https://jesuitplantationproject.org/s/jpp/item/4002: https://msa.maryland.gov/megafile/msa/speccol/sc5400/sc5496/041700/041715/images/17950507mdg1.pdf; and https://msa.maryland.gov/megafile/msa/stagser/s1400/s1411/000001/html/s141101-285.html

75. *Priscilla Queen* v. *Francis Neale*. Petitioner's Bill of Exceptions, available at: https://earlywashingtondc.org/doc/oscys.case.0025.004.

76. *Priscilla Queen* v. *Francis Neale*. Defendant's Bill of Exceptions, available at: https://earlywashingtondc.org/doc/oscys.case.0025.006.

77. See Sklansy, n.8, *supra*, at 420, n.5.

78. *Queen* v*. Neale,* 20 F. Cas. 130, 2 D.C. 3 (2 Cranch) 3 (1810), available at: https://www.courtlistener.com/opinion/8346264/queen-v-neale/.

79. *Mima Queen* v. *John Hepburn*, Petitioners' Bill of Exceptions No. 1, (June 26, 1810) https://earlywashingtondc.org/doc/oscys.case.0011.004, and Petitioners' Bill of Exceptions No. 2, (June 26,1810),

https://earlywashingtondc.org/doc/oscys.case.0011.005.

80. *Mima Queen* v. *Hepburn*, 11. U.S. (7 Cranch) 290, 295.

81. *Mima Queen* v. *John Hepburn*, Minutes of the U.S. Circuit Court for the District of Columbia, 1801-1863 (June 26, 1810). The image of the handwritten document indicates that the last six jurors were sworn "on the 26th June, 1810," after which is the notation "Verdict for Defendant" and "Jury fee paid." The transcription at OSCYC precedes "Verdict for Defendant" with "June 27th[?]," so the precise date is uncertain. OSCYS documents include the Bond of two hundred dollars posted by Mima Queen's lawyers upon appeal and approved by Chief Judge William Cranch on June 29th, 1810 and the Summons issued to John Hepburn to appear before the Supreme Court, of the same date.

82. 11. U.S. (7 Cranch) 290 (1813).

83. Ibid., at 291-292.

84. Ibid., at 295.

85. Ibid.

86. Sklansky at 423.

87. 11. U.S. (7 Cranch), at 298-299.

88. Paul Finkelman, *John Marshall's Proslavery Jurisprudence: Racism, Property, and the "Great" Chief Justice*, The University of Chicago Law Review, Online Essay, available at: https://lawreview.uchicago.edu/online-archive/john-marshalls-proslavery-jurisprudence-racism-property-and-great-chief-justice. Professor Finkelman notes:

> *The Marshall Court heard fourteen cases involving black freedom. The Chief Justice wrote the majority opinion in seven, and in every case the slaves lost. Justice William Johnson, of South Carolina, wrote the opinion rejecting freedom in one case in 1827. In six other cases, decided from 1829 to 1835—when Marshall no longer totally dominated the Court—other justices, including two southern slaveowners, wrote opinions upholding black freedom. That others wrote these opinions suggests Marshall did not agree with the results. But, in an era when dissents were rare—Marshall only wrote six dissents in his lifetime—the chief justice's silence is deafening.*
>
> *The outcome of these cases is striking: Chief Justice Marshall never wrote an opinion supporting black freedom. In some of these cases Marshall overturned lower court decisions, from slaveholding jurisdictions, emancipating the slave plaintiff. In cases involving the African slave trade Marshall was equally hostile to liberty, almost always siding with defendants, who had participated in the African slave trade in violation of U.S. law.*

https://lawreview.uchicago.edu/online-archive/master-john-marshall-and-problem-slavery. Professor Finkelman is President William McKinley Emeritus Professor of Law, Albany Law School. Much of the material in each essay is reprinted from his book: *Supreme Injustice: Slavery in the Nation's Highest Court* (Harvard 2018).

89. *John Davis* v. *Wood* is one of the seven cases in which Chief Justice Marshall wrote the majority opinion in which the enslaved party lost. The other six, including an earlier 1812 appeal from the lower court of the parties in *John Davis v. Wood*, are: *Scott* v. *Negro London*, 7 U.S. (3 Cranch) 324 (1806); *Scott* v. *Negro Ben*, 10 U.S. (6 Cranch) 3 (1810); *Hezekiah Wood* v. *John Davis and others* 11 U.S. (7 Cranch) 271 (1812), (the same parties as in the 1816 decision, with Chief Justice Marshall ruling, "Stated that the opinion of the Court to be, that the verdict and judgment in the case of *Susan Davis against Swann,* were not *conclusive evidence* in the present case. There was no privity between Swann and Wood; they were to be considered as perfectly distinct persons.

Wood had a right to defend his own title, which he did not derive from Swann); *Mina Queen* v. *Hepburn*, 11. U.S. (7 Cranch) 290 (1813); *Sally Henry, by William Henry v. Ball*, 14 U.S. (1 Wheat.) 1 (1816); and *Francis LaGrange v. Pierre Chouteau* 29 U.S. (4 Pet.) 287 (1830).

90. See, for example, "*Esther & children* v. *Bernard H. Buckner*," *O Say Can You See,* https://earlywashingtondc.org/cases/oscys.caseid.0466.

91. N.9, *supra*.

92. Summary in "Priscilla Queen v. Francis Neale," *O Say Can You See,* https://earlywashingtondc.org/cases/oscys.caseid.0025.

93. Cook, "Maryland Jesuits and Slavery," pp. 8-9 on the Corporation's decisions and Bishop Carroll's ire.

94. Date of death, Jesuit Plantation Project, at https://jesuitplantationproject.org/s/jpp/item/976?page=2#resources-linked; Location of burial, Kelly, *History of Holy Trinity Parish,* p. 15.

95. Descendants of Jesuit Enslavement, entries for Priscilla Queen, available at: https://jesuitenslavement.us/getperson.php?personID=I132473257001&tree=1715

Megan Howell and Catherine Kelly, "Podcast: Humanizing the Narrative – The Queen Family," recording at 9:36 -10:06, Georgetown University Slavery Archive, item 190, http://slaveryarchive.georgetown.edu/items/show/203.

96. Descendants of Jesuit Enslavement, entries for Mina Queen, available at: https://jesuitenslavement.us/getperson.php?personID=I132473257002&tree=1715.

97. Cook, "Maryland Jesuits and Slavery," page 2, citing O'Donnell, "Jesuits in the North American Colonies and the United States," and Leon, "Jesuit Estates."

98. Sklansky, supra, at 446.

99. (14 Stat. 27-30, enacted April 9, 1866, reenacted 1870); (16 Stat. 140-146, May 31, 1870); (16 Stat. 433-440 February 28, 1871); (17 Stat. 13, April 20, 1871); and (18 Stat. 335-337, March 1, 1875), respectively.

100. 83 U.S. 36 (1873).

101. Ibid, at 79-80.

102. Ibid, at 78.

103. Ibid, at 83. The text is extracted from the full paragraph, which reads:

The amendment does not attempt to confer any new privileges or immunities upon citizens, or to enumerate or define those already existing. It assumes that there are such privileges and immunities which belong of right to citizens as such, and ordains that they shall not be abridged by State legislation. If this inhibition has no reference to privileges and immunities of this character, but only refers, as held by the majority of the court in their opinion, to such privileges and immunities as were before its adoption specially designated in the Constitution or necessarily implied as belonging to citizens of the United States, it was a vain and idle enactment, which accomplished nothing and most unnecessarily excited Congress and the people on its passage. With privileges and immunities thus designated or implied no State could ever have interfered by its laws, and no new constitutional provision was required to inhibit such interference. The supremacy of the Constitution and the laws of the United States always controlled any State legislation of that character. But if the amendment refers to the natural and inalienable rights which belong to all citizens, the inhibition has a profound significance and consequence.

104. Congressman John A. Bingham of Ohio, the primary author of the first section of the 14th Amendment, intended that the amendment also nationalize the Bill of Rights by making it binding upon the states. When introducing the amendment, Senator Jacob Howard of Michigan specifically stated that the privileges and immunities clause would extend to the states "the personal rights guaranteed and secured by the first eight amendments." Historians disagree on how widely Bingham's and Howard's views were shared at the time in the Congress, or across the country in general. No one in Congress explicitly contradicted their view of the amendment, but only a few members said anything at all about its meaning on this issue. For many years, the Supreme Court ruled that the amendment did not extend the Bill of Rights to the states. National Archives, Milestone Documents, 14th Amendment to the U.S. Constitution: Civil Rights (1868), available at: https://www.archives.gov/milestone-documents/14th-amendment.

105. Cornell Law School Legal Information Institute, "Fourteenth Amendment, Privileges or Immunities Clause" at https://www.law.cornell.edu/wex/fourteenth_amendment_0.

106. 92 U.S. 214 (1876).

107. "United States v. Reese." *Oyez,* www.oyez.org/cases/1850-1900/92us214. Accessed 17 Oct. 2024.

108. *United States* v*. Cruikshank*, 92 U.S. 542 (1876).

109. Ibid, citing as well *Minor* v*. Happersett*, 88 U.S. (21 Wall.) 162 (1875) in which the Court unanimously "decided that the Constitution of the United States has not conferred the right of suffrage upon anyone, and that the United States have no voters of their own creation in the States," at 555-556. Mrs. Virginia Minor, one of "hundreds of women across the United States," in the 1872 presidential election, "went to the polls and attempted to vote. They based their right to vote not on state law, which uniformly

denied women the right to vote, but on the 'privileges and immunities' clause of the 14th Amendment." She was refused, sued, lost, and appealed to the Supreme Court. University of Minnesota Twin Cities, at http://users.hist.umn.edu/~bywelke/Minor%20v%20Happersett.htm.

110. United States Senate, "Landmark Legislation: Civil Rights Act of 1875," available at: https://www.senate.gov/artandhistory/history/common/generic/CivilRightsAct1875.htm.

111. "The Civil Rights Cases." *Oyez,* www.oyez.org/cases/1850-1900/109us3. Accessed 17 Oct. 2024.

112. 163 U.S. 537 (1896).

113. *The Slaughterhouse Cases* 83 U.S. at 78.

114. "Plessy v. Ferguson." *Oyez,* www.oyez.org/cases/1850-1900/163us537. Accessed 17 Oct. 2024.

115. See, in general, Equal Justice Initiative, "Segregation in America," a report available at: Segregation in America (eji.org).

116. James Baldwin, *The White Man's Guilt*, Baldwin, *Collected Essays*, Library of America (1988), available at: https://archive.org/details/JamesBaldwinCollectedEssaysLibraryOfAmerica1998.