AT LEAST SOME RIGHTS THE WHITE MAN WAS BOUND TO RESPECT: *BLAND V. BEVERLY* AND A CONTRACT FOR FREEDOM IN THE AGE OF SLAVERY

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ABSTRACT

By law in Maryland, slaves could not enter into legally binding contracts. Nonetheless, in 1833 Beverly Dowling struck an agreement with his owner, Sophia Bland, for his freedom in exchange for $200. Dowling paid $173 towards his end of the agreement before being arrested as a runaway and sold to a slave trader. Beverly Dowling petitioned the Baltimore city court for his freedom, and a jury found that he was free because he had, in the process of raising the money to pay his owner, traveled to the state of New York to work. I survey the law of manumission in Maryland and analyze the opinion of the court of appeals (Maryland's highest appellate court) in Bland v. Dowling (1837). I conclude that the case was both narrower and broader than scholars have surmised. It was narrow in the sense that the court of appeals relied on a straightforward reading of Maryland law to create a limited holding of freedom for Beverly Dowling. But in the process, it recognized the right of free blacks in Baltimore to work, keep wages, sue and be sued, and to travel. Twenty years before Dred Scott v. Sandford (1857), the Court of Appeals of Maryland had declared that black people had at least some rights that the white man was bound to respect.

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I. INTRODUCTION

Chief Justice Roger Brooke Taney (in)famously declared in Dred Scott v. Sandford (1857) that African-Americans had "no rights that the white man was bound to respect."[1] Taney's loathsome phrase invoked the weight of history and formal law, suggesting even more than his ultimate conclusion that no descendant of a slave could ever be a citizen of the United States, but also that black people had never had rights, or at least not judicially enforceable ones. Whatever we think of Taney's decision as a matter of constitutional law—and there has been a remarkable scholarly rehabilitation of Taney's decision as being good constitutional law in antebellum America[2]—it does seem to assess accurately the abhorrent nature of slavery jurisprudence in the American legal system, at least prior to the Civil War Amendments. But a serious examination of the historical record gives the lie to Taney's seemingly authoritative pronouncement. This is not because Taney had misstated the brutal legacy of slave law, or underestimated the depth of some Americans' (including many Founders') commitment to principles of white supremacy. On the contrary, attempts to critique Taney's opinion as faulty originalism generally fall flat.[3] Rather, it is because Taney simply

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[1] Dred Scott v. Sandford, 60 U.S. 393, 407 (1856).

[2] For persuasive scholarly arguments that Taney's opinion was rooted in antebellum constitutional law, *see* AUSTIN ALLEN, ORIGINS OF THE DRED SCOTT CASE: JACKSONIAN JURISPRUDENCE AND THE SUPREME COURT, 1837-1857 (2006); MARK A. GRABER, DRED SCOTT AND THE PROBLEM OF CONSTITUTIONAL EVIL (2006); Paul Finkelman, *Was Dred Scott Correctly Decided - An Expert Report for the Defendant*, 12 LEWIS & CLARK L. REV. 1219 (2008); Michael A. Schoeppner, *Status Across Borders: Roger Taney, Black British Subjects, and a Diplomatic Antecedent to the Dred Scott Decision*, 100 J. OF AM. HIST. 46 (2013).

[3] Daniel A. Farber, *A Fatal Loss of Balance: Dred Scott Revisited Symposium: Supreme Mistakes*, 39 PEPP. L. REV. 13; Harry V. Jaffa, *Dred Scott Revisited*, 31 HARV. J.L. & PUB. POL'Y

ignored the ample evidence that people of color had refused to accept white supremacy and had struggled mightily to assert their rights.[4]

Chief Justice Taney would have found it difficult to square his legal logic with the story of Beverly Dowling, whose freedom suit arrived before the Court of Appeals of Maryland twenty years before Dred Scott. Dowling had been the slave of Sophia Bland. Sophia Bland was a propertied woman,[5] a descendant of the Fitzhugh family of Virginia and the sister of Theodorick Bland, the chancellor of Maryland from 1824-1846.[6] She lived in Annapolis, but she collected the wages of her slaves resident in Baltimore. Beverly Dowling was a person without rights in Maryland law, one subject to the whims of his owner. As his freedom petition would lay out, he nonetheless had bargained with his owner for his freedom. He had paid her $173 and received receipts for it. He had kept his own business and traveled in and out of the state of Maryland without a travel pass from her. And when these facts were put to a jury against the claims of absolute ownership by his enslaver, Beverly Dowling won. The Court of Appeals of Maryland would later affirm the jury's verdict. An African-American, it would seem, did have some rights in antebellum America that even slave courts were willing, if not bound, to respect.

The case of Beverly Dowling is extraordinary, to be sure, but it is not a legal anomaly to be dismissed as out of the main currents of the antebellum law of freedom and bondage. Rather, the case reveals some inconvenient truths about both the law and the practice of slavery in antebellum Baltimore. The formal law did treat slaves as being people without rights (whether respected by the white man or not).[7] Moreover, the Court of Appeals of Maryland had a dismal record when it came to

197 (2008).

4 The literature on African-American antebellum history, and in particular on the struggle for human rights, is far too broad to reproduce in a footnote. Among the best new works on this subject, *see* R. J. M. BLACKETT, THE CAPTIVE'S QUEST FOR FREEDOM: RESISTANCE TO THE 1850 FUGITIVE SLAVE LAW (2017); LESLIE M. HARRIS, IN THE SHADOW OF SLAVERY: AFRICAN AMERICANS IN NEW YORK CITY, 1626-1863, (2003); MARTHA S. JONES, BIRTHRIGHT CITIZENS: A HISTORY OF RACE AND RIGHTS IN ANTEBELLUM AMERICA (2018); KELLY M. KENNINGTON, IN THE SHADOW OF DRED SCOTT: ST. LOUIS FREEDOM SUITS AND THE LEGAL CULTURE OF SLAVERY IN ANTEBELLUM AMERICA (2017); ANNE SILVERWOOD TWITTY, BEFORE DRED SCOTT: SLAVERY AND LEGAL CULTURE IN THE AMERICAN CONFLUENCE, 1787-1857 (2016); LEA VANDERVELDE, REDEMPTION SONGS: SUING FOR FREEDOM BEFORE DRED SCOTT (2014); KIMBERLY M. WELCH, BLACK LITIGANTS IN THE ANTEBELLUM AMERICAN SOUTH (2018); Ariela Gross and Alejandro de la Fuente, *Slaves, Free Blacks, and Race in the Legal Regimes of Cuba, Louisiana, and Virginia: A Comparison,* 91 N.C. L. REV. 1699 (2013).

5 An Act for Relief of Sophia Bland, ch. 186, 1810 Md. Laws 1809, providing Sophia Bland a special dispensation to bring her slaves from Virginia into Maryland.

6 C.A. FITZHUGH, *The Fitzhugh Family (Continued)*, 7 THE VA. MAG. OF HIST. & BIOGRAPHY, at 425.

7 ANDREW FEDE, PEOPLE WITHOUT RIGHTS: AN INTERPRETATION OF THE FUNDAMENTALS OF THE LAW OF SLAVERY IN THE U.S. SOUTH (1992).

freedom petitions. It applied the law rigidly when freedom petitioners might have benefited from laxity but relaxed rules when it profited slaveholders. Regardless, Beverly Dowling won his case, and in the process demonstrated just how out of touch was the formal law with reality. Baltimore's enslaved population may have been without formal rights, but they could and did assert themselves and they did seem to have numerous informal privileges which the courts were in no position to ignore. Both the Baltimore city court and the court of appeals confronted this problem when adjudicating Beverly Dowling's case.

II. THE FACTS OF BLAND V. DOWLING

If we limit our inquiry to the appellate record, the facts of Bland v. Dowling appear simple enough. In the early summer of 1833, Beverly Dowling agreed to pay Sophia Bland $200 for his freedom. He promised $100 up front and another $100 in six months.[8] On August 17, 1833, Dowling made his first payment of $100.[9] On June 15, 1834, Sophia Bland appointed a new agent, Isaac Mayo, to handle her business interests in Baltimore.[10] Shortly after that, Mayo sought Beverly Dowling's arrest. On October 25, 1834 (fourteen months after his first payment), Dowling made another payment of $23.[11] On June 1, 1835, Dowling made another payment of $50.[12] He then traveled via steamboat to New York, working as a waiter to raise the rest of the money he owed Sophia Bland. He returned to Baltimore and attempted to make a payment of $27 (the final payment), and was arrested as a runaway.[13] While in jail, Isaac Mayo arranged for Dowling's sale to Austin Woolfolk.[14] Dowling filed a petition in October 1835 alleging his freedom against Woolfolk and Bland, and the issue was joined.

These facts raise a number of problems. Slaves could not, under any theory of law in Maryland, be parties to contracts. But an agreement clearly existed, and the agreement itself reveals that Beverly Dowling held at least a little power, even for an enslaved person. Such self-purchase agreements were rare in the appellate record (of Maryland or any other state) but were quite common in Baltimore. How they became

[8] Bland and Woolfolk v. Negro Beverly Dowling, 9 G. & J. 19 (Md. 1837) [hereinafter Bland v. Dowling].

[9] *Id*.

[10] *Id*. at 23.

[11] *Id*. at 19.

[12] *Id*.

[13] *Id*. at 19, 20.

[14] Andrew Fede pointed out to me that Austin Woolfolk was a notorious slave trader. See WILLIAM CALDERHEAD, *The Role of the Professional Slave Trader in a Slave Economy: Austin Woolfolk, A Case Study*, 23 CIVIL WAR HISTORY 195.

common was connected to Baltimore's rapid economic growth in the 1790s and 1800s, which created a demand for labor at precisely the same time surrounding plantations had a labor surplus, owing to their transition from tobacco to wheat.[15] Baltimore owed much of its economic success to this pipeline of labor from the country to the city.[16] Many of the enslaved who arrived found themselves under minimum control. By one estimate, nearly half of the 2,843 enslaved persons living in Baltimore in 1800 were held by absentee owners.[17] Self-hire, prohibited by Maryland law,[18] was a common occurrence.[19] Masters began registering deeds of manumission with increasing frequency, often in exchange for cash payments or service for a term of years.[20] Such deeds created a kind of quasi-slavery in Baltimore, a "middle class" (in the words of Nicholas Brice, chief judge of the Baltimore city court) that enjoyed legal protection of their promise of future freedom.[21] The legislature recognized as much when it passed a law preventing the sale of any enslaved person entitled to freedom upon contingency to a buyer from out of state.[22]

An examination of Dowling's agreement with Bland demonstrates that he did not bargain from a completely subservient position. The very fact that Dowling had money of his own meant that he had kept some of his wages from his owner. Dowling had initially agreed to pay $300 for his freedom, but then took ill and renegotiated the price to $200.[23] Bland accepted this loss. Dowling was supposed to pay $100 by the first week of June in 1833 and the remainder within six months, but he was never timely. His first payment of $100 did not arrive until August 7. Two months later, Sophia Bland's agent in Baltimore (James Law) wrote Bland, in exasperation, "as to Beverly I hardly know what to say. I have for some time past endeavored to see his lordship but without success."[24] "His lordship" (that is to say, Beverly Dowling) was working as a waiter on a steamboat that was traveling to, among other places, Washington

[15] CHRISTOPHER PHILLIPS, FREEDOM'S PORT: THE AFRICAN AMERICAN COMMUNITY OF BALTIMORE, 1790-1860 (1997), 11–13.

[16] T. STEPHEN WHITMAN, PRICE OF FREEDOM: SLAVERY AND MANUMISSION IN BALTIMORE AND EARLY NATIONAL MARYLAND 160 (2015); SETH ROCKMAN, SCRAPING BY: WAGE LABOR, SLAVERY, AND SURVIVAL IN EARLY BALTIMORE 36–37 (2009).

[17] PHILLIPS, *supra* note 14, at 18–19.

[18] An Act to Prevent the Inconveniencies Arising from Slaves Being Permitted to Act as Free, ch. 33, 1787 Md. Laws 19.

[19] PHILLIPS, *supra* note 14, at 24 (1997).

[20] PHILLIPS, *supra* note 14, at 51–52; WHITMAN, *supra* note 15, at 99–101.

[21] PHILLIPS, *supra* note 14, at 30–31.

[22] An Act to Prevent the Unlawful Exportation of Negroes and Mulattoes, and to Alter and Amend the Laws Relating to Runaways, ch. 112, 1817 Md. Laws 116.

[23] Negro Beverly Dowling, 4239-3 Md. St. Archive.

[24] James O. Law to Sophia Bland, October 26, 1833 in Baltimore City Court Transcript, October 31, 1835; Negro Beverly Dowling, 4239-3 Md. St. Archive.

D.C. In short, he was traveling freely in and out of Maryland and Sophia Bland knew about it. James Law promised to find Dowling and "shall inform him unless he pay you the balance of his purchase that what he had paid shall be appropriated to his wages."[25] But James Law had made no progress by December. "I am extremely sorry that I am unable to give you as satisfactory an account of Beverly as I would wish. I have not been able to see him for some time," he reported. "I shall soon have more leisure and will be able to hunt him up.[26] Yet he reported no progress in a letter dated June 7, 1834.

Dowling was acting like a free man. He kept a storefront, providing bootblack services and selling oysters. James Law could not find Dowling because he regularly worked as a waiter on a steamboat that traveled to Frenchtown, and to Washington D.C. Granted, Dowling was in Baltimore much of the time, so why had Bland's agent been unable to find him? While any answer would be speculation, one gets the sense from James Law's letters that the relations between the white and black communities were more complicated than one might think. When James Law wrote Sophia Bland on June 7, 1834, it was to inform her that he could no longer act as her agent. The reason? She had requested that he arrange for the sale of her Baltimore slaves. "I would have written to you before with regard to Rachel and her son," he wrote, but he found the prospect of personally seizing them "by no means agreeable to my feelings." He listed the difficulties involved, not just in finding them, but in having to confine them in the jail, under his own order. "The odium of the thing would fall on my shoulders for a hue and cry would be raised by the blacks that they were going to be sold to Georgia."[27] James Law feared for something, whether it was his physical safety, a blight on his reputation, or just his own clear conscience.

Did Beverly Dowling know that his freedom was in jeopardy? It is difficult to imagine not. News traveled fast in Baltimore. Sophia Bland herself said that she had spoken with Beverly Dowling's sister Harriet.[28] She had also appointed a new agent, Captain Isaac Mayo (her niece's husband), on June 15, 1834 to "act as he thinks best" with all of her Baltimore slaves. She wrote vivid descriptions of them. "I have been always much attached to the whole family," Bland wrote, "the mother was my maid from my childhood." Such deep personal connections were the frequent consequence of domestic slavery. "I have indulged them too

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[25] *Id*.

[26] James O. Law to Sophia Bland, December 23, 1833 in Baltimore City Court Transcript, October 31, 1835; Negro Beverly Dowling, 4239-3 Md. St. Archive.

[27] James O. Law to Sophia Bland, June 7, 1834 in Baltimore City Court Transcript, October 31, 1835; Negro Beverly Dowling, 4239-3 Md. St. Archive.

[28] Sophia Bland to Isaac Mayo, June 15, 1834 in Baltimore City Court Transcript, October 31, 1835; Negro Beverly Dowling, 4239-3 Md. St. Archive.

much," Sophia Bland surmised, "my feelings have ever been rather tender. Capt. Mayo will please act as he thinks best with these negroes."[29] Tender feelings apparently only went so far. For his part, Capt. Mayo promptly gave instructions to a constable to arrest Dowling and inquire what price he might fetch at auction.[30] That he did not succeed in his purpose for over one full year suggests either inattention on his part (we can imagine him an ambitious and busy young man if we like) or inability or even incompetence. The result was the same.

If Beverly Dowling did know that his freedom was in jeopardy, he did not act the part. Some four months after Isaac Mayo called for his arrest, Dowling sought out James Law, Bland's former agent, with an additional payment of $23 toward his freedom. James Law bluntly informed Dowling that "his mistress was not satisfied with his conduct, and would not ratify the contract she had made to set him free."[31] Dowling offered to pay interest on the overdue amount, although the court record is unclear whether James Law ever communicated this to Sophia Bland. Regardless, Dowling continued to act as if the agreement was in effect. Dowling made another payment of $50 on June 1, 1835 (eight months later), but this time took it directly to the cashier of the Bank of the Chesapeake, Jonathan Pinkney. All other payments had passed through James Law.[32] At trial, Pinkney testified that he learned of the arrangement regarding Beverly Dowling's freedom directly from Sophia Bland on June 1, 1835.[33] It was sometime after this that Dowling departed on a steamboat for New York, working as a waiter.

This fuller account of the facts helps explain why Beverly Dowling had a case, despite the agreement between him and Sophia Bland being unenforceable at law. The agreement was fully admissible as evidence to prove that Dowling had Bland's consent to act, for all intents and purposes, as a free black man. This included, arguably, her consent for him to leave the state. As we will see, the case came to pivot on this consent. But Dowling's lawyers still had a big hill to climb.

III. THE LAW OF MANUMISSION IN MARYLAND, CIRCA 1837

Maryland, like most states, carefully regulated the freedom, actions, and movements of its black population. The Maryland legislature had created very strict guidelines for releasing people from bondage. It could

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29 *Id.*

30 *Bland v. Dowling*, 9 G. & J. at 23.

31 *Bland v. Dowling*, 9 G. & J. at 22.

32 Receipts, filed as part of petitioner's bill of exceptions, December 3, 1835, in Baltimore City Court Transcript, October 31, 1835; Negro Beverly Dowling, 4239-3 Md. St. Archive.

33 *Bland v. Dowling*, 9 G. & J. at 23.

only be done by last will and testament, or by a deed of manumission.[34] If a free black was claimed as a slave, they had to file a petition alleging their freedom and could only do so in the county court of their residence (or their alleged master's residence).[35] Petitions for freedom in Maryland courts generally admitted four ways of proving one's freedom: 1) a deed of manumission; 2) freedom by last will and testament; 3) descent from a free person; or 4) residence in a free state. It will be instructive to treat each section in detail.

A. Freedom by Last Will and Testament

By statute, owners could free slaves only under strict rules. One means was to grant freedom by last will and testament. Several hard rules governed this gift of freedom. No manumission could prejudice creditors of an estate, nor could a bequest free someone who was over 50 years of age or unable to work and gain a sufficient livelihood.[36] The court of appeals, which was the highest appellate court in Maryland over both law and equity courts, applied strict rules of interpretation. Wills that directed the manumission of slaves had to meet the law's requirements at the time of the testator's death, not at the time the will was made. Thus, a woman who was freed by a will drafted in 1811 lost her freedom because she was over 45 when her former master died in 1815.[37] Another lost her freedom because she was deemed unable to work when her former master died.[38] The court of appeals was uniformly strict in its interpretation of the requirements for freedom by last will and testament, even when it meant subverting the slaveholder's intent.

In one case, the court of appeals did interpret the law favorably for an enslaved person who had been granted freedom by a will where the case could have reasonably gone either way. Benjamin Hall of Prince-George's County executed a will in 1803 that promised manumission for "old Basil."[39] When Benjamin Hall died, however, old Basil was over the age of 45, which meant that he could not be manumitted by the will. Nonetheless, no one claimed him as a slave and he lived as free. In 1810, Benjamin Hall's son arranged for old Basil to purchase his daughter, Dolly Mullin, after which old Basil manumitted her. In 1817, Henry L. Hall executed a will that granted Dolly and her son 140 acres of land. When Henry Hall died, his son sued for the land granted to Dolly

[34] An Act Relating to Negroes, and to Repeal the Acts of Assembly therein Mentioned, ch. 67, 1796 Md. Laws 57 (*see* § 13 and § 29) [hereinafter An Act Relating to Negroes].
[35] *Id*.
[36] *Id*.
[37] Burroughs's Adm'r, v. Negro Anna, 4 H. & J. 262 (Md. 1817).
[38] Hamilton v. Cragg, 6 H. & J. 16 (Md. 1823).
[39] Hall v. Mullin, 5 H. & J. 190 (Md. 1821).

Mullin.[40]

Hall v. Mullin contained a core problem that could be traced back to Benjamin Hall's will. If "old Basil" had not been manumitted by Benjamin Hall's will (Basil being over the age of 45 at the time of the testator's death), then he could not have made a contract to purchase his own daughter.[41] On this, the court of appeals was quite clear—old Basil had not been freed by Benjamin Hall's will, and as such could not contract for his daughter's purchase, ergo her deed of manumission was invalid. But the court of appeals still held for Dolly Mullin, adjudging her free and in possession of the land. The opinion of the court was quite generous, holding that there were multiple ways of interpreting the will that would give effect to Dolly Mullin's freedom and inheritance. First, there was a residuary clause in Benjamin Hall's will that freed the "remainder" of his slaves. The court interpreted both the manumission and the inheritance as occurring simultaneously, thus allowing Dolly Mullin to take her freedom and her 140 acres. In a second line of reasoning, the court said that even if the residuary clause did not exist, the gift of land would have created "freedom by implication" which would be "indispensably necessary to give efficacy to those clauses of the will."[42] In a concurring opinion, Chief Justice Chase limited his rationale to the first line of reasoning. Regardless, Hall v. Mullin (1821) indicated that the court of appeals would give effect to wills that provided for emancipation (and property inheritance) that had technical difficulties, provided they did not conflict with statutory commands.

B. Freedom by Deed of Manumission

Deeds of manumission had several statutory rules to be considered valid. First, they had to be witnessed by two people; second, they had to be recorded within six months of execution. Maryland's court of appeals interpreted both requirements strictly. In 1807, the court rejected an argument that parol evidence was sufficient to prove the requisite number of witnesses (two) signed a deed of manumission.[43] The court's application of strict rules to deeds applied as well to interpreting deeds

40 *Id*.

41 *Id*. at 194.

42 *Id*. at 194.

43 Negro James v. Gaither, 2 H. & J. 176 (Md. 1807). The Maryland legislature changed this rule in 1810, but directed that the change would not disturb any settled cases on the matter. ANDREW FEDE, ROADBLOCKS TO FREEDOM: SLAVERY AND MANUMISSION IN THE UNITED STATES SOUTH 209–10 (2011). In one instance regarding a contract for manumission, the court of appeals did admit parol evidence, but it should be noted that the contract in question was between two white men. Negro Cato v. Howard, 2 H. & J. 323 (Md. 1808).

executed in other states.[44] This strict rule of interpretation, however, did not extend to contracts between white people, even if a slave was the beneficiary of a contract that promised manumission at a future date.[45] This exception betrayed the court's fundamental distinction based upon color—even if the slave was the beneficiary of the contract, the contracting parties (white people) had rights that the court could not ignore.

The court of appeals also rejected the power of the chancellor to use equitable principles to cure defects in deeds of manumission, on the grounds that such petitions could only be brought before courts of law.[46] In 1805, Richard Darnall executed deeds of manumission for several of his slaves, but died soon after and before he could record the deeds. Darnall's heirs claimed the slaves as property, and the slaves initiated a chancery proceeding seeking a declaration of their freedom.[47] Chancellor William Kilty had justified his decree on the grounds that Maryland law gave the high court of chancery the power to order the recording of deeds that had been executed, but not properly recorded according to the forms of law.[48] Chancellor Kilty had interpreted the statute broadly as applying to all property deeds, including those conferring freedom. The court of appeals, however, distinguished manumission deeds as being materially different from property deeds, and not comprehended within the meaning of the word "deeds" in the statute.[49]

But the case was not just about statutory construction. Chancellor Kilty had laid out an expansive theoretical reading of the right of freedom, claiming that it vested the moment that the deed of manumission was executed. Failure to record it might divest the person of his right to freedom, but the right had still existed and could be restored if a remedy was available. Chancellor Kilty likened this to the right to maintain an action of ejectment, which might be similarly lost and recovered.[50] The analogy was instructive—if a person's freedom was a property right, one

44 Negro Clara v. Meagher, 5 H. & J. 111 (Md. 1820).

45 Negro Cato v. Howard, 2 H. & J. 111, 323 (Md. 1808).

46 Wicks v. Chew, 4 H. & J. 543 (Md. 1819).

47 The chancery proceedings was by petition and filed by Araminta Chew, et al., by John Davis their next friend against the heirs and devisees of Richard Darnall. Wicks v. Chew, 4 H. &. J. 543 (Md. 1819).

48 Chancellor Kilty's decree is reprinted in the Maryland reports. See Wicks v. Chew, 4 H. & J. at 545. The statute in question is the Supplement to the Act to Enlarge the Powers of the High Court of Chancery, ch. 41, § 3, 1792 Md. Laws 18, 19.

49 Wicks v. Chew, 4 H. & J. at 548. This reading collected the sense of the word "deed" from the words used in the statute, which did in another section refer to real estate, and the language of the original act that this one supplemented. *See* An Act for Enlarging the Power of the High Court of Chancery, ch. 72, 1785 Md. Laws 48.

50 Wicks v. Chew, 4 H. & J. at 545.

that vested and was recoverable by equitable remedy, then it would necessarily encourage more liberality in construing and protecting that right.[51] The court of appeals rejected this reasoning flatly. It was "the recording of a deed of manumission within the time prescribed by law" which created the right to freedom.[52] No right vested at the time of the deed's execution. If there was any doubt about what this meant, the court spelled it out: "A master may execute and acknowledge a deed of manumission, and afterwards destroy it, or keep it, and refuse to have it recorded, and the slave remains a slave without redress."[53]

The court of appeals had used a strict formalism to prevent equitable jurisdictions or principles from encroaching on the power of slaveholders, but it did not deploy that same formalism in favor of freedom. The Maryland legislature had passed a law on February 23, 1835 that provided for the recording of certain deeds of manumissions from Anna Maria Tilghman to Henry Wright, Anna Maria Wright and Maria Wright.[54] The deeds in question had been executed on May 18, 1832, but were not recorded.[55] For her part, Anna Maria Wright lived as free, outside of Tilghman's possession. Nonetheless, Anna Maria Tilghman sold her interest in Anna Marie Wright to her son, Tench Tilghman on May 2, 1833. Tench Tilghman was aware of the executed (but not recorded) deed of manumission. Tench Tilghman then sold Anna Maria Wright (with a general warranty) to Lloyd N. Rogers for $100.[56] Apparently, neither Anna Maria Tilghman nor Tench Tilghman had taken possession of Anna Maria Wright before Tench Tilghman sold her to Lloyd Wright. Anna Maria Wright recorded her deed of manumission on March 21, 1835, under the auspices of a statute that declared "that said deeds, when respectively recorded as aforesaid, shall be as effectual as if the same had been duly acknowledged, and the acknowledgment thereof had been, respectively, certified."[57]

Despite having a legislative warrant for her freedom, the Baltimore County Court ruled against Anna Maria Wright, declaring her the slave of Lloyd N. Rogers. On appeal, Anna Maria Wright's lawyer argued that the title was defective, and that the act of the legislature would have been

[51] Southern courts during the period were eager to keep manumissions a matter of state policy, and not governed by the more liberal notions that underlay property law. *See* THOMAS D. MORRIS, SOUTHERN SLAVERY AND THE LAW, 1619-1860 (1996), 372–73; ANDREW FEDE, ROADBLOCKS TO FREEDOM: SLAVERY AND MANUMISSION IN THE UNITED STATES SOUTH 12–13 (2011).

[52] Wicks v. Chew, 4 H. & J. 543, 547 (Md. 1819).

[53] *Id*. at 548.

[54] An Act to Record Certain Deeds of Manumission, ch. 95, 1834 Md. Laws 108.

[55] Negro Anna Maria Wright v. Rogers, 9 G. & J. 181 (Md. 1837).

[56] *Id*. at 182.

[57] An Act to Record Certain Deeds of Manumission, ch. 95, § 2, 1834 Md. Laws 108.

just as good against Tench Tilghman as it would against his mother. Why should it not apply to Lloyd Rogers? After all, the facts of the case would have made title suspicious. Anna Maria Wright was not in Tench Tilghman's possession, and the amount of the sale—only $100—was well below the market price.[58] Anna Maria Wright had "a fair moral claim to freedom" and Rogers was not an innocent purchaser.[59] Opposing counsel focused instead on the doctrine of vested rights. Because the letter of the law had not been followed after the original deed of manumission had been executed (back in 1832), no right to freedom had vested in Anna Maria Wright. On the contrary, the bills of sale had vested a property right in Lloyd N. Rogers. In this reading, the statute in question had violated the Contracts Clause of the U.S. Constitution.[60] The court upheld the Baltimore County Court judgment without comment, thus avoiding a direct clash with the legislature while rendering its order void.

In what might have been the cruelest example of the court of appeals' strict application of its rules of interpretation regarding manumissions, Julia Ann Baily lost her freedom in 1836. Her mother, Lucy, had been manumitted by Gideon Longfellow in 1803 with the condition that she be bound to service until she reached the age of 30 (in 1822). The deed also declared that any of Lucy's children born before she arrived at age 30 would be free as well.[61] Lucy was then sold to Henry Taylor and she remained with his family until she turned thirty, after which she became free by her deed of manumission and departed for Baltimore. She took with her four daughters, Julia Ann being one of them, where they lived in freedom for over ten years. That is, before the husband of one of Henry Taylor's daughters claimed ownership of Julia Ann and had her arrested as a runaway. Julia Ann Bailey petitioned for her freedom, and the Baltimore city court set her free. But the court of appeals reversed the decision. Because Julia Ann had been born while her mother was a slave, and thus before her mother could take care of her, this prevented the deed of manumission—which specified that she was to be free at birth—from being able to apply to her. Judge Stevenson Archer (the same judge who would later write the opinion in Bland v. Dowling) wrote for the court.[62]

58 Negro Anna Maria Wright v. Rogers, 9 G. & J. 181, 183 (Md. 1837).
59 *Id*.
60 U.S. CONST. art. 1 § 10.
61 Anderson v. Negro Julia Ann Baily, 8 G. & J. 32 (Md. 1836).
62 *Id*. at 35.

C. Freedom by Descent from a Free Person

Absent a deed of manumission it was quite difficult to prove one's freedom. Maryland law presumed people of color to be slaves, so even if a person of color was born free, the burden of proof rested with that person to prove freedom. Proving that one's ancestor was free could be done by producing her deed of manumission, but what if one could not find an ancient deed? In the absence of direct evidence, the best possible evidence would be admitted. In freedom cases, this often meant creating a hearsay exception for the petitioner's "reputation in the neighborhood." In Shorter v. Boswell (1808), the court of appeals reversed the Charles County Court's exclusion of hearsay evidence and ordered a new trial.[63] The court of appeals reversed itself, however, not a decade later.[64] The reversal followed a famous ruling by Chief Justice John Marshall in a Washington D.C. freedom suit in which he overruled the hearsay exception.[65] Chief Justice Marshall's reversal of the hearsay exception was a pro-slavery pivot, as it closed an avenue for those petitioning for their freedom.[66] But a rule was still a rule, and had to apply to both parties. In Walls v. Hemsley (1817), the court ordered that hearsay evidence establishing a slaveholder's claim to ownership based on the reputation of the neighborhood also had to be excluded.[67]

The Maryland courts applied strict rules to petitioners seeking freedom, but the same was not true for slaveholders who had run afoul of Maryland's ban on the importation of slaves. In Baptiste v. De Volunbrun (1820), the court of appeals heard a case involving a slaveholder who had fled Haiti with several people she claimed as slaves.[68] She had landed first in New York, where she faced an ongoing lawsuit over her property claims.[69] She fled New York, ostensibly because she found the climate insalubrious, and landed in Baltimore. There she found herself in court yet again. But the court of appeals validated her property claim by invoking the doctrine of necessity to explain her emigration from New York. Regarding the petitioners' claim to have been free by the laws of France, which had abolished slavery in Saint Domingue in 1794, the court

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[63] Shorter v. Boswell, 2 H. & J. 359 (Md. 1808). In 1799 the Court of Appeals had also let stand a county court's admission of hearsay evidence to establish a freedom case without comment. Mahoney v. Ashton, 4 H. & McH. 295 (Md. 1799).

[64] Walls v. Hemsley, 4 H. & J. 243 (1817).

[65] Mima Queen v. Hepburn, 11 U.S. 290 (1813).

[66] PAUL FINKELMAN, SUPREME INJUSTICE: SLAVERY IN THE NATION'S HIGHEST COURT 62–68 (2018).

[67] Walls v. Hemsley, 4 H. & J. at 244.

[68] Baptiste v. De Volunbrun, 5 H. & J. 86 (Md. 1820).

[69] Martha S. Jones, *Time, Space, and Jurisdiction in Atlantic World Slavery: The Volunbrun Household in Gradual Emancipation New York*," 29 LAW & HIST. REV. 1031, 1032-33 (2011).

dismissed it as "not proved."[70] In support of its position, the court cited an unreported case, De Fontaine v. De Fontaine (1818).[71]

In at least one case involving a claim of descent from a free person, the court of appeals proved receptive to presuming a deed of manumission where one could not be found: Burke v. Negro Joe (1834).[72] The court of appeals had held that it was appropriate for a court to instruct a jury that a deed of manumission could be presumed, but the case was restricted "within a very narrow compass."[73] Admittedly, Maryland case law rejected presumptions of freedom for people of color,[74] but the law in this case would follow the general doctrine of presumption that applied to patents and deeds. It could be established on the basis of "acts inconsistent with a state of slavery, known to the owner, and which can be rationally accounted for, upon a supposition that he had intended to free his slave."[75] One was not to arrive at such a presumption lightly. There had to be evidence that the slaveholder had been aware of, and tolerated, his former slaves acting free. In Burke v. Negro Joe, the evidence was quite strong, as the petitioner was a descendant of former slaves who had been purportedly freed by their owner. Their long enjoyment of unmolested freedom, whilst living within several miles of their former master's domicile, and the subsequent settlement of his estate with no claim being laid upon them or their children, was more than enough evidence to justify the presumption of a deed of manumission for Joe's mother, and to vindicate his claim to freedom. In a final flourish, the court noted that Joe's mother's long enjoyment of freedom could only be interpreted one of two ways. Either the master had consented to her freedom, or the master was in violation of the Maryland law that made it a crime for masters to allow their slaves to roam free.[76] The law does not presume an illegal act without evidence, and this presumption outweighed the need for a deed of manumission in this case.[77]

Burke v. Negro Joe was an exceptional case, both in the sense that it created a narrow exception to the rule that a deed of manumission could not be presumed and that it was a case where the court of appeals chose to relax its strict reading of the law in favor of freedom. But it should be

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70 *Id*. at 1059.

71 *See De Volunbrun*, 5 H. & J. at 99.

72 Burke v. Negro Joe, 6 G. & J. 136 (Md. 1834).

73 *Id*. at 141.

74 Wilson v. Negro Ann Barnet, 8 G. & J. 159 (Md. 1836).

75 Burke v. Negro Joe, 6 G. & J. at 142 (Md. 1834).

76 An Act to Prevent the Inconveniencies Arising from Slaves Being Permitted to Act as Free, ch. 33, 1787 Md. Laws 19.

77 WILLIAM MAWDESLEY BEST, A TREATISE ON PRESUMPTIONS OF LAW AND FACT: WITH THE THEORY AND RULES OF PRESUMPTIVE OR CIRCUMSTANTIAL PROOF IN CRIMINAL CASES 64 (1845) 64.

understood as an exception, one that upheld a jury verdict, and one that was accompanied by language narrowing the exception "within a very narrow compass."

D. Becoming Free by Another State's Laws

Maryland's 1796 law forbidding the importation of slaves created another avenue of freedom for petitioners. If a slaveholder left Maryland with a slave and took up residence in another state—or if the slaveholder sent the slave to live with someone in another state and that slave acquired a residence in that other state—then the slave could not be "imported" as a slave back into Maryland.[78]

This was not quite the same thing as admitting the principle inherent in the celebrated case of Somerset v. Stewart (1772).[79] Somerset began when Charles Stewart traveled from Virginia to London with his slave, James Somerset. Somerset absconded while in London, and Stewart arrested him and had him forcibly detained on board a ship bound for the West Indies.[80] Somerset filed for a writ of habeas corpus. The chief justice of King's Bench, the celebrated jurist Lord Mansfield, ordered Somerset's release. His opinion from the bench contained some stirring phrases that fired the nascent antislavery imagination. Slavery was "odious," and was no part of the common law. It was against natural law. The legal basis of Somerset's release had to do with the doctrine of comity. In free jurisdictions, Somerset was a doctrine that antislavery judges might deploy against slaveholding.[81] Curiously enough, slave jurisdictions began adopting the principle that freedom, if it attached to a person in another state, should be admitted as a matter of comity if the slave returned to that jurisdiction.[82] Residency in a free state conferred freedom upon an enslaved person, and slave jurisdictions often recognized that freedom in freedom suits. This was the original basis for Dred Scott's freedom petition, and the St. Louis court initially held in his

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78 An Act Relating to Negroes, *supra* note 33.

79 Somerset v. Stewart, (1772) 98 Eng. Rep. 499 (Eng.).

80 For a brief review of the case and its place in the law, *see* William M. Wiecek, *Somerset: Lord Mansfield and the Legitimacy of Slavery in the Anglo-American World*, 42 U. CHI. L. REV. 86 (1974).

81 The Somerset doctrine was not formally adopted in the courts, even when antislavery judges began taking natural law seriously. *See* Emily Blanck, *Seventeen Eighty-Three: The Turning Point in the Law of Slavery and Freedom in Massachusetts*, 75 NEW ENG. Q. 24 (2002); ROBERT M. COVER, JUSTICE ACCUSED: ANTISLAVERY AND THE JUDICIAL PROCESS 42-61 (1975); H. ROBERT BAKER, PRIGG V. PENNSYLVANIA: SLAVERY, THE SUPREME COURT, AND THE AMBIVALENT CONSTITUTION 21-27 (2012).

82 PAUL FINKELMAN, AN IMPERFECT UNION: SLAVERY, FEDERALISM, AND COMITY 187–235 (1981).

favor.[83] Missouri courts had been approving freedom petitions on this basis for some time.[84]

The court of appeals considered the Somerset case in Mahoney v. Ashton. Granted, it considered the case within the narrow compass of a freedom suit that involved a claim of freedom based upon descent from a free ancestor. The ancestor in this case had traveled to, and resided in, England, where presumably the Somerset doctrine would have made her free. But, as the court of appeals noted, she had lived in England between the years 1678 and 1681, before Somerset had been decided. At that point, there was no clear freedom principle, and "a diversity of opinions prevailed on that subject."[85] And even if the ancestor had a claim to freedom, the condition of slavery would reattach should the slave return to a slave jurisdiction.[86] In short, the only invocation of Somerset v. Stewart and the freedom principle in Maryland rejected implicitly the idea that residency in a free jurisdiction might dissolve the obligations binding the slave to the master.

The court did prove receptive to freedom claims that more closely adhered to positive law, however. In 1813, the court of appeals upheld a decision for freedom based on the laws of Virginia.[87] The slaveholder in the case had been in the habit of taking his slave to work in a stone quarry he owned in Virginia for several weeks at a time, the total of which amounted to more than one year. By Virginia law he was free, and the court of appeals upheld that freedom without comment. In Sprigg v. Negro Mary (1814), the court upheld without comment a jury instruction stating that the petitioner was entitled to freedom if her master had sent her mother to reside in another state and she had been born out of state.[88] In a companion case, Sprigg v. Negro Presly, the court upheld a similar jury instruction for a petitioner who was three years old when sent to reside in another state.[89] It should be noted, however, that in both these latter cases, the court of appeals overturned jury verdicts in favor of the petitioner on the grounds that the county court had not properly instructed the jury on the separate issue that a residency in a foreign state could not be acquired if the slaveholder was in infancy, or otherwise did not consent

[83] DON E. FEHRENBACHER, THE DRED SCOTT CASE: ITS SIGNIFICANCE IN AMERICAN LAW AND POLITICS (1978).

[84] TWITTY, BEFORE DRED SCOTT.

[85] Mahoney v. Ashton, 4 H. & McH. 295, 323 (Md. 1799).

[86] *Id*. at 325. FEDE, ROADBLOCKS TO FREEDOM, 295–96, 341–42; DEREK A. WEBB, *The Somerset Effect: Parsing Lord Mansfield's Words on Slavery in Nineteenth Century America*, 32 L. & HIST. REV. 483 (2014).

[87] Stewart v. Oakes (Md. 1813). The case is not with the reports for 1813, but can be found in *Davis v. Jacquin & Pomerait*, 5 H. & J. 100 (Md. 1820).

[88] Sprigg v. Negro Mary, 3 H. & J. 491 (Md. 1814).

[89] Sprigg v. Negro Presly, 3 H. & J. 491, 493 (Md. 1814).

to the slave's travel.[90] In 1820, a petition for freedom based on residency in the state of Pennsylvania was rejected by both a jury and the court of appeals precisely because it was the guardian of the slaveholder (herself a minor) who sent the enslaved person to live in Pennsylvania.[91]

While the case law regarding freedom by residency in another state was quite sparse, at least two things were clear. First, if a slaveholder took, or sent, a slave to live in another state and acquired a residency there, that slave could not be returned to Maryland without violating the 1796 law prohibiting slave importations.[92] Second, the slaveholder's consent in such cases was necessary.[93] Both these principles proceeded from positive law, and not from the adoption of Somerset v. Stewart (1772) or any other doctrine that would have favored liberty.

IV. THE FREEDOM TRIAL OF BEVERLY DOWLING.

The trial record for Beverly Dowling's freedom petition is, unfortunately, scant. It consists of the official actions of the court (issuance of subpoenas, empanelling of the jury, court costs, and the attorney's issuance of subpoenas). But it is fuller than the appellate record, and gives us some insight into the contradictory mesh of law and reality that faced the judges of the Baltimore city court. On the one hand, both statute and case law had treated manumission cases strictly. Even if a judge did personally favor freedom, there was little in the way of wiggle room for individual judges to use procedural or substantive tricks for aiding petitioners. Not that the court or its justices showed any patience with abolition. Nicholas Brice, the chief justice of the Baltimore city court, had complained in a public letter in 1827 about contingent deeds of manumissions, which he said had created a "middle class" of people not free, but wholly unfit for slavery because they believed they were free.[94] In the same year, Brice praised the slave trade in open court, in part because it "removed a great number of rogues and vagabonds" from the state.[95] Brice was not, in short, a judge predisposed to rule in favor of

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[90] In *Sprigg v. Negro Mary*, 3 H. & J. 491 (Md. 1814). The county court instructed the jury that the petitioner was entitled to freedom even if it were true that her mother's reputed owner had been an infant at the time that the petitioner's mother had been sent abroad. This ignored ch. 67, § 7, 1796 Md. Laws 57, which created an exception to the ban on slave importations for any slave "carried out of this state during the infancy, or without the knowledge, authority or consent, of the real owners or proprietors of the same." In *Sprigg v. Negro Presly*, 3 H. & J. 493 (Md. 1814), the county court reversed on similar grounds.

[91] Davis v. Jacquin & Pomerait, 5 H. & J. 100 (Md. 1820).

[92] An Act Relating to Negroes, *supra* note 33.

[93] An Act Relating to Negroes, *supra* note 33.

[94] PHILLIPS, *supra* note 14, at 30.

[95] The case was *Maryland v. Woolfolk* and involved an assault and battery. Austin Woolfolk attacked the editor of an abolitionist sheet for sullying his name. It is likely (but not proven) that

petitioners in freedom suits.

But the facts that came out in trial had brought the reality of Baltimore slavery squarely into the court. The law was that freedom could be obtained only by deed or by last will and testament. The reality was that Beverly Dowling had behaved for two years (and possibly longer) as a free person, keeping his own household, his own business, and traveling freely in and out of Maryland. When it came time to instruct the jury as to their duties, the judges lumped everything together. We can, from the various bills of exceptions, piece together the following list of jury instructions:

> If the petitioner had the consent of the owner to leave the state and became free by New York's laws, then he was free and could not be claimed by Bland without violating Maryland's 1796 law against slave importations.[96]

"That if they should be of opinion from the nature of the agreement between the mistress and the petitioners [sic], and the other testimony in the cause, that she consented to his going at large, and acting as a free man, to earn what he was to pay as the price of his freedom, and that she did not restrict him as to the place of his operations, but left that to his own discretion, she is bound by the use he made of that discretion in going to New York, or any other place, where he could soonest accomplish the object in view, the fulfillment of his agreement; and therefore may be said, to have consented to his emigration to New York, as it was for her benefit, as well as his. And further, that if the jury shall be of opinion, that under the construction of said agreement, her consent was given to his emigration as aforesaid, she could not claim him again, on his return, as a slave, either for sale, or to reside in this state; and, that if the above facts are found by the jury, the petitioner could not be afterwards treated as a runaway, unless, in the interval, his mistress had regained possession of him, and he had left her service without her consent, and against her will."[97]

"Even if they should be of opinion that Sophia Bland the owner of the petitioner had made the agreement given in evidence by Jonathan Pinkney . . . to set said Dowling free on payment of two hundred dollars and that said agreement was in fact concluded by the payments stated in the receipts following (receipts included) the petitioner was not entitled to a verdict in this case without also producing in evidence a deed of

this was the same Austin Woolfolk who later attempted to purchase Beverly Dowling. *The Judiciary of Maryland*, NEW-YORK SPECTATOR, Apr. 20, 1827, at 1.

[96] *Bland v. Dowling*, 9 G. & J. at 20. The statute which this violated was An Act Relating to Negroes, *supra* note 33.

[97] *Bland v. Dowling*, 9 G. & J. at 21. The appellate record quotes the jury instruction directly, in quotation marks, and so I reproduce it here, in quotation marks.

manumission regularly recorded according to the forms proscribed by the Act of Assembly in such cases made and provided."[98]

The jury instructions were contradictory. Or, perhaps more accurately, they pointed to the contradictions in the realities of Baltimore slave law. The second jury instruction obeyed no formal case law, and in fact contradicted Maryland statutory prohibitions against slaves acting as free or traveling without the express, written permission of their masters.[99] Even free blacks had to obtain certificates to travel out of the counties in which they lived.[100] The instruction only makes sense within the context of a Baltimore where conditional manumissions had created a sort of quasi-freedom, and one where the pass laws that governed the countryside were largely ignored.[101] This would have been a world recognizable to the jury. The third jury instruction, by contrast, stated the formal law—that slaves could not make contracts and that the only proper claim for Dowling was a deed of manumission, executed and recorded according to the forms of law.[102] The jury rejected the formal law and recognized the reality. Dowling was free.

V. BLAND V. DOWLING BEFORE THE COURT OF APPEALS OF MARYLAND

Having lost, Sophia Bland appealed the case to the court of appeals.[103] The appeal was made in 1836, and the case was set for argument in the 1837 term. Sophia Bland's lawyers made three arguments. First, they argued that a contract between a master and a slave had no validity "either at law, or in equity." The only way manumission could be effected was "by deed, or by last will and testament."[104] Next the lawyers addressed the question of travel out of state. They started by conceding that if Beverly Dowling had gone out of the state with the consent of his owner, then any attempt by Bland to reassert control over Dowling upon his return would be an impermissible importation under Maryland law. But they argued that such consent must be express, and it should not be left to the jury "upon slight or inconclusive

[98] Petitioner's Bill of Exceptions, December 3, 1835, in Baltimore City Court Transcript, October 31, 1835; Negro Beverly Dowling, 4239-3 Md. St. Archive. This jury instruction, for obvious reasons, was not included in the defendants' bill of exceptions, and is therefore no part of the appellate record.

[99] An Act to Prevent the Inconveniencies Arising from Slaves Being Permitted to Act as Free, ch. 33, 1787 Md. Laws 19.

[100] A Supplement to an Act Relating to Negroes, ch. 66, § 6, 1805 Md. Laws xlvi.

[101] PHILLIPS, *supra* note 14, at 32.

[102] The appellate record has no mention of the third jury instruction, which might lead one to conclude that the freedom trial had greatly favored the petitioner's case.

[103] The Maryland Court of Appeals was the highest appellate court in Maryland.

[104] *Bland v. Dowling*, 9 G. & J. at 24.

circumstances."[105] Because slaves were not allowed to travel at all without the express consent of their masters, "the same principle would exclude the presumption that the owner of this slave consented to his going to New York."[106] Finally, they argued that the letters of Sophia Bland's agent ought to have been admitted as evidence or, if Bland's own letters were required, they should have been called for by the petitioner's lawyers.

Dowling's lawyers first addressed the question of whether the master's consent could be inferred from the agreement. They noted that Dowling had been "permitted to go at large, and to act in all respects as a free man."[107] There was no evidence of dissent on the part of Sophia Bland (although the letters from James O. Law to Bland, which had been excluded, perhaps provided some evidence of her disapproval), and they argued further that dissent should not be presumed. Citing Burke v. Negro Joe, they argued that Sophia Bland had either consented to Dowling's acting as a free man, keeping an oyster shop, and traveling about on steamboats by the agreement itself, or she was in violation of the law for allowing him to do so.[108] This was a clever use of Burke v. Negro Joe, which had turned in part on the principle that one should never presume an illegal act without positive evidence.[109] Dowling's lawyers then mounted an impressive argument that contracts for manumission ought to be enforceable. The legislature had not expressly prohibited such contracts and, in fact, had recognized conditional manumissions and a tacit right to contract in several statutes.[110] Finally, they argued that the letters from James O. Law to Sophia Bland were correctly excluded as "verbal unsworn declarations of the agent."[111]

Judge Stephenson Archer delivered the opinion of the court. He decided three main points of law. On the exclusion of the letters from James O. Law to Sophia Bland, he agreed with Dowling's attorneys that they were hearsay and thus properly excluded.[112] He agreed with Sophia Bland's lawyers that a slave could not make a binding contract, nor could a slave sue in a court of law or equity to enforce a contract. Archer spent some time refuting the arguments of Dowling's counsel, pointing out that the various acts of the legislature which they cited did not recognize, tacitly or otherwise, a right in slaves to make contracts. A 1715 law forbidding slaves to make contracts[113] was designed to prevent traders

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105 *Id*.
106 *Id*.
107 *Id*. at 25.
108 *Id*.
109 Burke v. Negro Joe, 6 G. & J. 136 (Md. 1834).
110 *Bland v. Dowling*, 9 G. & J. at 26.
111 *Id*. at 27.
112 *Id*. at 29.
113 An Act Relating to Servants and Slaves, ch. 44, § 11, 1715 Md. Laws 109.

from encouraging slaves to "purloin the goods of their masters."[114] Likewise, an 1833 act giving effect to "an agreement, or understanding, for the purchase or acquisition of the freedom of the said slave,"[115] did not tacitly recognize the validity of such contracts at law, "else why should they have required a manumission, if the agreement had been treated by them as valid, and binding, and as giving freedom?"[116] Archer's reading of the law on this subject was far more persuasive than Dowling's attorneys', clever though their argument was. The court firmly held that slaves could not make binding contracts, for their freedom or otherwise.

The more difficult question was whether Sophia Bland had consented to Beverly Dowling's travel out of the state. Archer began with the evidence of the agreement, which had been proved by the fact that "upwards of two years [Dowling] went at large and acted as a free man" as well as by the receipts of payment.[117] Taken together, the evidence showed not just knowledge on the part of Sophia Bland, but also "acquiescence," thus indicating permission. "If in the exercise of this permission," Archer concluded, "he should go abroad into another state, with views of more easily fulfilling his agreement, it is but the exercise of that discretion which every free man has; and which, as it is not limited by any just inference from the testimony, the mistress must take the consequence of the exercise of such discretion."[118] As for the argument that Sophia Bland's appointment of a new agent who sought Dowling's arrest before his travel to New York, Archer dismissed it as irrelevant. He noted that, a year after such authority had been given, "the defendant received from Mr. Pinkney fifty dollars on account, according to her receipt, and according to Mr. Pinkney's evidence, on account of said agreement, and in part thereof, thereby still recognizing the agreement as an existing one."[119] The court of appeals affirmed the judgment of the Baltimore city court. Dowling was free, again.

VI. BLAND V. DOWLING, A VICTORY FOR FREEDOM?

Beverly Dowling won his freedom, twice, before the courts of Maryland. Finally free for good, he departed for New York, where he set

[114] *Bland v. Dowling*, 9 G. & J. at 27.
[115] An Act to supplement an act, entitled, an act relating to people of colour in this state, ch. 296, § 4, 1832 Md. Laws 374. The law was passed on March 22, 1833 during the 1832 legislative session, explaining why Judge Archer described the statute as an 1832 law. See *Bland v. Dowling*, 9 G. & J. at 28.
[116] *Bland v. Dowling*, 9 G. & J. at 28.
[117] *Id*.
[118] *Id*. at 29.
[119] *Id*. at 30.

up a new household. But was this a victory for the principle of freedom at law? The record is complex, but we may draw some conclusions.

Dowling's case cemented the principle that slaveholders could not freely leave the state with their slaves (or send them away), acquire a residency elsewhere, and then return with those slaves to Maryland. Given that the court of appeals had shown some leniency to slaveholders who had imported slaves in the past, it was significant that the court chose not to do so in this case. Even more importantly, the slaveholder's consent (critical to the case for petitioners) did not have to be express, but could be implied by the slaveholder's actions. This was a significant holding. Although the court was not specific about what were the necessary conditions for determining implied consent, Dowling's case provided an opportunity for other petitioners who might find themselves in a similar situation.

Bland v. Dowling also established, for the first time in Maryland law, the idea that slaveholders might informally grant their slaves the privileges of freedom. To be sure, free blacks operated under significant legal and civil disabilities. But the court of appeals acknowledged that acting as free included the acts of keeping a business, keeping one's wages and profits, traveling within the state, and traveling out of state. Granted, these were not "rights" in the formal sense of the word. If anything, they ran counter to Maryland's oppressive statutory regime that restricted each of these practices for free blacks. But by acknowledging them as incidents of freedom in Baltimore, the court of appeals had both recognized the reality of black life in Baltimore and laid down a principle that could give breathing room to free blacks in the future. From both a realist and a formalist perspective, Bland v. Dowling can be said to be a victory for freedom.

Such a conclusion, however, must be carefully qualified. For one thing, there was a problem never addressed in the defendant's bill of exceptions and never resolved by the court of appeals. Sophia Bland's attorneys had conceded that, "if the petitioner had gone out of the state with the consent of his owner, and had returned voluntarily or compulsorily, and upon such return had been taken up by her, it would have been an importation under the act of assembly."[120] But had Beverly Dowling acquired a residency in another state? New York law in 1835 prevented slaveholders from bringing slaves to reside within the state, but it defined residency as occurring after a period of nine months.[121] Beverly Dowling's time on the Hudson River could not have been more than three months and was likely shorter. If you read between the lines of Archer's

[120] *Id*. at 24.

[121] Paul Finkelman, *Prelude to the Fourteenth Amendment: Black Legal Rights in the Antebellum North,* 17 RUTGERS L.J. 415 (1986).

opinion, there appears to be some discomfort over this conflation of residency with what could also be considered sojourning. "On the subject of a resumption of the rights of property over the petitioner after his return," Archer wrote, "we have made no comments, because the question was yielded by one of the counsel of the defendants."[122] He added for good measure that "it certainly could not be successfully contended, if a residence in another state was granted by permission of his owner, that rights of property could be resumed on his coming within the limits of the state."[123] This would be true, Archer continued, even if the petitioner had returned to the state against the consent of the former owner. Left unstated, and perhaps purposefully so, was the question of whether Dowling had acquired a residence in New York.[124]

In a subsequent case that term, the court of appeals ran into a somewhat similar fact pattern. A slaveholder named William Black left Maryland with the intent of settling in Missouri. He stopped for some time in Ohio, where he manumitted his slaves. Then he had a change of heart, and returned to Maryland, where he assumed that his property rights in his slaves would resume. The enslaved David Cross, his wife Airy and their children thought otherwise. They filed a petition for freedom in Anne Arundel County. The jury found David Cross (the father) to be free, but his wife and children to be slaves. The petitioners appealed on this basis, but the appeals court affirmed the judgment. In so doing, they had to face down a welter of evidence that showed William Black to have established a temporary residency in Ohio (on his way to Missouri), having executed deeds of manumission for the slaves, and told numerous people that it was his design to free his slaves. Counsel for Airy Cross and her children argued that Bland v. Dowling established the doctrine that Marylanders who transported their slaves (or allowed the enslaved to transport themselves) for the purpose of freeing their slaves could not reimport them into the state. The Court took care to distinguish Bland v. Dowling. "That case went upon the ground that the owner of the slave assented to his leaving the state for a permanent purpose, and thereby placed the slave in the attitude of a non-resident, the assent to his leaving the state being equivalent to his being carried out by his owner, and consummating the design of a permanent removal."[125] William Cross, by contrast, had not consummated his design.

It is difficult to think of more tortured reasoning. In Bland, an informal and unenforceable agreement suddenly bound the master to the position that her slave had, simply by setting foot on a barge in the

[122] *Bland v. Dowling*, 9 G. & J. at 30.
[123] *Id*.
[124] This brings up the uncomfortable proposition that Beverly Dowling owed his freedom to some bad lawyering on his opponent's side.
[125] Airy Cross v.William Black, 9 G. & J. 198 (Md. 1837).

Hudson River, become free. In Cross v. Black, the court ignored stronger evidence of the slaveholder's intent (executed deeds of manumission) in the service of shoring up a slaveholder's right to sojourn out-of-state with his slaves.[126] In Bland v. Dowling, the court of appeals upheld a jury instruction that stated that Dowling, if free by the laws of the state of New York, could not be "reimported" as a slave into Maryland, yet without ever considering whether the residency had been established. In Cross v. Black, the fact of residency in Ohio was much more clearly established, but disregarded. Even worse was the appellate court's attempt to cast the agreement between Sophia Bland and Beverly Dowling as an emancipation project that was being consummated, a position that not only defied much of the evidence, but ignored the master's will entirely. If anything, Cross v. Black revealed that Bland v. Dowling had been wrongly decided, but that the court was not willing to admit that it had made a mistake. The only thing that unites these cases is that they both affirmed jury verdicts.[127]

Taken in conjunction with Cross v. Black, Bland v. Dowling does not seem a leap forward for freedom. The court of appeals was certainly willing to circumscribe the case at the first available opportunity. But it should be remembered that precedents, even narrow ones, have consequences. They certainly did for Lucy Crawford, an enslaved Baltimore woman who made a bargain with her mistress for her freedom in 1841, after her mistress took her to Washington D.C.[128] Lucy was allowed to keep her own wages and she purchased her freedom. Upon their return to Maryland in 1845, her mistress promptly sold her to Hope Slatter. Lucy Crawford petitioned for her freedom, and her attorneys specifically cited Bland v. Dowling. Lucy Crawford won her case.[129]

VII. CONCLUSION

When Roger Brooke Taney declared in Dred Scott v. Sandford that black people had no rights a white person was bound to respect, he was staking out a preferred position rather than making a neutral statement about the formal law. Granted, it was true that people of color in the United States operated under an oppressive legal regime that had denied them many rights and privileges. But, as Bland v. Dowling shows us, even the enslaved could occasionally force the judiciary to recognize their

[126] *Id*. at 213–15.

[127] Andrew Fede argues that the law of Maryland, and of other states, cohered around the principle that it was the master's will that mattered in all these cases. This is no doubt true, except that the master's will was clearly circumvented in *Bland v. Dowling*. Even as a matter of formal law, the court had to stretch to find a rationale that upheld the case.

[128] Lucy Crawford v. Hope Slatter, 4239-26 Md. St. Archives 16 (1846).

[129] *Id*.

rights. Some of these, such as the right to file a freedom petition, were specific grants by the legislature. But others were not. No Maryland statute extended to free black people the right to travel, and certainly not the right to travel in and out of the state. Yet Beverly Dowling's ability to do so was expressly recognized by the court of appeals. The fact that Lucy Crawford could, a decade later, assert the same terms and win her freedom, is significant.

Perhaps more significant is the fact that the court of appeals in 1837 was no more coherent in its jurisprudence than Roger Brooke Taney would be in 1857. The indeterminacy of the law of freedom and slavery was itself born out of the marriage between formal legal principles and a reality that did not comport with those principles. It is undeniable that Maryland law treated slaves as people without rights. But if this were so, then there was no justifying the conclusion that Beverly Dowling had a right to keep his wages, to travel freely, and to evade capture by his mistress's agent. The Baltimore city court had demurred, leaving it to the jury to determine whether to apply the formal law (that is, to require a deed of manumission to prove freedom) or to honor the agreement between Bland and Dowling by other means. It was as good a means as any of treating seriously the interests of both parties. The jury chose the latter, whether out of a sense of fairness, fair play, or some other reason.

If the law is to be a means to protect (let alone achieve) human rights, then it must navigate uncertain terrain by applying formal rules as consistently as possible, but with an eye to how they work in the real world. We may criticize the antebellum Maryland courts for many reasons. They were unrelentingly harsh on freedom petitioners. They bent the rules for some slaveholders. Above all else, they were active enforcers of an unjust system of law in an age when the injustice of slave law was being called out by abolitionists. But in the case of Beverly Dowling's freedom petition, the Maryland courts did their best to square the formal law with the realities of Baltimore slavery. And they did some justice along the way.