CHAPTER IV.

COLONIAL STATUTES.

But the colonial legislation on the subject of slavery, was not only void as being forbidden by the colonial charters, but in many of the colonies it was void for another reason, viz., *that it did not sufficiently define the persons who might be made slaves.*

Slavery, if it can be legalized at all, can be legalized only by positive legislation. Natural law gives it no aid. Custom imparts to it no legal sanction. This was the doctrine of the King's Bench in Somerset's case, as it is the doctrine of common sense. Lord Mansfield said, "So high an act of dominion must be recognized by the law of the country where it is used. * * * 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 the memory. It is so odious that nothing can be suffered to support it but positive law."

Slavery, then, being the creature of positive legislation alone, can be created only by legislation that shall so particularly describe the persons to be made slaves, that they may be distinguished from all others. If there be any doubt left by the *letter* of the law, as to the persons to be made slaves, the efficacy of all other slave legislation is defeated simply by that uncertainty.

In several of the colonies, including some of those where slaves were most numerous, there were either no laws at all defining the persons who might be made slaves, or the laws, which attempted to define them, were so loosely framed that it cannot now be known who are the descendants of those designated as slaves, and who of those held in slavery without any color of law. As the presumption must — *under the United States constitution* — and indeed under the state constitutions also — be always in favor of liberty, it would probably now be impossible for a slaveholder to prove, in one case in an hundred, that his slave was descended, (through the maternal line, according to the slave code,) from any one who was originally a slave within the description given by the statutes.

When slavery was first introduced into the country, there were no laws at all on the subject. Men bought slaves of the slave traders, as they would have bought horses; and held them, and compelled them to labor, as they would have done horses, that is, by brute force. By common consent among the white race, this practice was tolerated without any law. At length slaves had in this way become so numerous, that some regulations became necessary, and the colonial governments began to pass statutes, which *assumed* the existence of slaves, although no laws defining the persons who might be made slaves, had ever been enacted. For instance, they passed statutes for the summary trial and punishment of slaves; statutes permitting the masters to chastise and baptize their slaves,* and providing that baptism should not be considered, in law, an emancipation of them. Yet all the while no act had been passed declaring who might be slaves. Possession was apparently all the evidence that public sentiment

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*"*Chastise.*" An act passed in South Carolina in 1740, authorized slaves to sue for their liberty, by a guardian appointed for the purpose. The act then provides that if judgment be for the slave, he shall be set free, and recover damages; "but in case judgment shall be given for the defendant, (the master,) the said court is hereby fully empowered to inflict such corporeal punishment, not extending to life or limb, on the ward of the plaintiff, (the slave,) as they in their discretion shall see fit."— *Brevard's Digest, vol. 2, p.* 130.

"*Baptize.*" In 1712 South Carolina passed this act:

"Since charity and the Christian religion which we profess, obliges us to wish well to the souls of all men, and that religion may not be made a pretence to alter any man's property and right, and that no persons may neglect to baptize their negroes or slaves, or suffer them to be baptized, for fear that thereby they should be manumitted and set free: *Be it therefore enacted,* That it shall be, and is hereby declared lawful for any negro or Indian slave, or any other slave or slaves whatsoever, to receive and profess the Christian faith, and be thereunto baptized. But that notwithstanding such slave or slaves shall receive and profess the Christian religion, and be baptized, he or they shall not thereby be manumitted or set free, or his or their owner, master or mistress lose his or their civil right, property and authority over such slave or slaves, but that the slave or slaves, with respect to his or their servitude, shall remain and continue in the same state and condition, that he or they was in before the making of this act."— *Grimke, p.* 18. *Brevard, vol.* 2, *p.* 229.

In 1667, the following statute was passed in Virginia:

"Whereas, some doubts have arisen whether children that are slaves by birth, and by the charity and piety of their owners made partakers of the blessed sacrament of baptism, should by virtue of their baptism be made free; *It is enacted and declared by this grand assembly, and the authority thereof,* that the conferring of baptism doth not alter the condition of the person as to his bondage or freedom; that divers masters, freed from this doubt, may more carefully endeavour the propagation of Christianity by permitting children, though slaves, or those of greater growth, if capable to be admitted to that sacrament."— *Hening's Statutes, vol* 2. *p.* 260.

demanded, of a master's property in his slave. Under such a code, multitudes, who had either never been purchased as slaves, or who had once been emancipated, were doubtless seized and reduced to servitude by individual rapacity, without any more public cognizance of the act, than if the person so seized had been a stray sheep.

Virginia. Incredible as it may seem, slavery had existed in Virginia fifty years before even a statute was passed for the purpose of declaring who might be slaves; and then the persons were so described as to make the designation of no legal effect, at least as against Africans generally. And it was not until seventy-eight years more, (an hundred and twenty-eight years in all,) that any act was passed that would cover the case of the Africans generally, and make them slaves. Slavery was introduced in 1620, but no act was passed even purporting to declare who might be slaves, until 1670. In that year a statute was passed in these words: "That all *servants*, not being Christians, imported into this country by shipping, shall be slaves for their lives."*

This word "servants" of course legally describes individuals known as such to the laws, and distinguished as such from other persons generally. But no class of Africans "imported," were known as "servants," as distinguished from Africans generally, or in any manner to bring them within the legal description of "servants," as here used. In 1682 and in 1705 acts were again passed declaring "that all servants," &c., imported, should be slaves. And it was not until 1748, *after slavery had existed an hundred and twenty-eight years*, that this description was changed for the following:

"That all *persons*, who have been or shall be imported into this colony," &c., &c., shall be slaves.†

In 1776, the only statute in Virginia, under which the slaveholders could make any claim at all to their slaves, was passed as late as 1753, (one hundred and thirty-three years after slavery had been introduced;) all prior acts having been then repealed, without saving the rights acquired under them.‡

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* Hening, vol. 2, p. 283.

† Hening, vol. 5, p. 547–8.

‡ In 1753 Virginia passed a statute, occupying some twelve or fifteen pages of the statute book, and intended to cover the whole general subject of slavery. One of the sections of this act is as follows:

"That all and every other act and acts, clause and clauses, heretofore made, fo-

Even if the colonial charters had contained no express prohibition upon slave laws, it would nevertheless be absurd to pretend that the colonial legislature had power, in 1753, to look back an hundred and thirty-three years, and arbitrarily reduce to slavery all colored persons that had been imported into, or born in the colony within that time. If they could not do this, then it follows that all the colored persons in Virginia, up to 1753, (only twenty-three years before the revolution,) and all their descendants to the present time, were and are free; and they cannot now be distinguished from the descendants of those subsequently imported. Under the presumption — furnished by the constitution of the United States — that all are free, few or no exceptions could now be proved.

In North Carolina no general law at all was passed, prior to the revolution, declaring who might be slaves — (See Iredell's statutes, revised by Martin.)

In South Carolina, the only statutes, prior to the revolution, that attempted to designate the slaves, was passed in 1740 — after slavery had for a long time existed. And even this statute, in reality, defined nothing; for the whole purport of it was, to declare that all negroes, Indians, mulattoes and mestizoes, *except those who were then free*, should be slaves. Inasmuch as no prior statute had ever been passed, declaring who should be slaves, *all were legally free;* and therefore all came within the exception in favor of free persons.*

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or concerning any matter or thing within the provision of this act, shall be and are hereby repealed."— *Hening's Statutes, vol. 6, p.* 369.

No reservation being made, by this section, of rights acquired under former statutes, and slave property being a matter dependent entirely upon statute, all title to slave property, acquired under former acts, was by this act annihilated; and all the slaves in the State were made freemen, *as against all prior legislation.* And the slaves of the State were thenceforward held in bondage only by virtue of another section of the same act, which was in these words:

"That all persons *who have been*, or shall be imported into this colony, by sea or land, and were not Christians in their native country, except Turks and Moors in amity with his majesty, and such who can prove their being free in England, or any other Christian country, before they were shipped for transportation hither, shall be accounted slaves, and as such be here bought and sold, notwithstanding a conversion to Christianity after their importation."—*Hening, vol. 6, p.* 356-7.

The act also provided, "That all children shall be bond or free, according to the condition of their mothers and the particular directions of this act."

*The following is the preamble and the important enacting clause of this statute of 1740:

"Whereas, in his majesty's plantations in America, slavery has been introduced

The same law, in nearly the same words, was passed in Georgia, in 1770.

These were the only general statutes, under which slaves were held in those four States, (Virginia, North Carolina, South Carolina and Georgia,) at the time of the revolution. They would all, for the reasons given, have amounted to nothing, as a foundation for the slavery now existing in those states, even if they had not been specially prohibited by their charters.

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and allowed; and the people commonly called negroes, Indians, mulattos and mestizoes have (been) deemed absolute slaves, and the subjects of property in the hands of particular persons; the extent of whose power over such slaves ought to be settled and limited by positive laws, so that the slaves may be kept in due subjection and obedience, and the owners and other persons having the care and government of slaves, may be restrained from exercising too great rigor and cruelty over them; and that the public peace and order of this province may be preserved: *Be it enacted*, That all negroes, Indians, (*free* Indians in amity with this government, and negroes, mulattos and mestizoes, *who are now free, excepted*,) mulattoes and mestizoes, who now are or shall hereafter be in this province, and all their issue and offspring born or to be born, shall be and they are hereby declared to be and remain forever hereafter absolute slaves, and shall follow the condition of the mother," &c. — *Grimke, p.* 163–4. *Brevard, vol.* 2, *p.* 229.