COVINGTON. The act, if properly past, is binding; but it is necessary that it be inserted in the books. Private knowledge is not sufficient.

GARDENSTON. In matters of penalties I am for proceeding on clear legal ground: there must be promulgation in order to bind.

On the 6th August 1777, "The Lords, in respect that the regulations were not recorded, suspended the letters *simpliciter*;" altering Lord Kennet's interlocutor.

Act. H. Erskine. *Alt.* G. Ferguson.

1778. *January* 15. JOSEPH KNIGHT, a Negro, *against* JOHN WEDDERBURN, Esq.

SLAVE.

State of a Negro brought into this country from the Plantations.

[*Faculty Collection, VIII.* 5; *Dictionary*, 14,545.]

HAILES. I had a preliminary doubt in this cause, which is not altogether removed, viz. what evidence is there that Captain Knight acquired this unhappy negro by any *modus acquirendi dominii* known in African jurisprudence; and what evidence is there that Mr Wedderburn acquired him from Captain Knight. To say that he is a slave, because he is a black, and the property of Mr Wedderburn, because in the possession of Mr Wedderburn, is too hasty logic.

In what I am to say on the cause itself I shall use the famous opinion of Talbot and Yorke as my text in general. I agree with the opinion of those great lawyers, unless in one particular, where I see a statute against it, not an English but a Scottish statute; and thus their opinion may be perfectly just with respect to the law which they had in their eye, although it may not be altogether applicable to our law, which they had not in their eye:—

"We are of opinion that a slave, by coming from the West Indies, either with or without his master, to Great Britain or Ireland, doth not become free; and that his master's *property* or *right* in him is not thereby determined or varied."

Here I agree in opinion; because a right acquired is not lost, nor a contract made, in any degree invalidated through the change of the residence of the parties acquiring or contracting; yet a change of place may have the effect of suspending the exercise of the right. Thus, to illustrate my proposition by a familiar example:—Vows, in the Romish church, considered as a contract, are rather more solemn things than any bargain about a negro boy between a Captain in the African trade and a West Indian planter. If a Spanish monk should come to this country, either for his health by permission, or clandestinely for his pleasure, his superior would not be heard in our Courts, should he attempt to *reclaim* him; and yet I know no law with us which prohibits a Spaniard from

taking the vows of celibacy and clerical obedience. When the Spaniard returns to Spain he will fall back into his former state.

Again, if a Mahometan should come here with two wives, I suppose the Consistorial Court would not oblige both of them to adhere to him. Should the wives go back to Turkey, they would be obliged to adhere.

In like manner, as to this negro, I think that the right of his master is not determined or varied, but that the exercise of his master's right is suspended while the negro continues in Scotland.

"And baptism doth not bestow freedom on him, nor make any alteration on his temporal condition in these kingdoms." To this part of the opinion also I subscribe. I do not like to introduce Scripture in arguments of law: I shall only mention what a poor Christian slave said in the second century:—One Euelpistus was brought to trial before Rusticus, the Præfect of Rome; the Præfect, according to the form of judicial proceedings, asked what his condition was: Euelpistus made answer:—"*Servus quidem Cæsaris sum, sed et Christianus a Christo ipso libertate donatus.*" Thus he at once asserted that he was *servus et libertate donatus;* and *this* I hold to be orthodox theology.

"We are also of opinion, that the master may *legally* compel him to return to the plantations." *Here* I hesitate: the opinion may be a just one, as the case was put; but it deserves consideration, Whether a difficulty might not have arisen, had this circumstance been added, "that the negro had a wife and child in Britain." By being in Britain he has committed no offence; in marrying he has committed no offence; and he is not forced to return to the plantations for any offence. Now, what is to become of the wife and child of this negro? and what is to be their state if the negro is sent back to Jamaica? The wife cannot go with him: and if she should be permitted to land in Jamaica, the policy of that island would not permit her to cohabit with her husband. This may be no more than an inconveniency, but it is a great inconveniency; for we must hold that the woman is married, and cannot obtain a divorce, and yet she cannot cohabit with her husband,—not through his fault nor hers.

But, in applying the opinion to the law of Scotland, there is not merely an inconveniency, but an absolute bar: and that is the statute 1701, urged by the Lord Advocate on the hearing. The provisions of that excellent statute, are general, and the words do not exclude this negro: how can we introduce an exception not expressly authorised by a statute, which inflicts high penalties on judges who do not take notice of the statute?

KENNET. The pursuer is a slave in Jamaica, but not *here*. The law of Jamaica has no force *extra territorium*: there is no equity in that law concerning negroes: it is founded on mere expediency. The practice in France and Germany rather strengthens the argument than weakens it. Had the pursuer escaped from Jamaica, perhaps there might have been a difference in the decision.

AUCHINLECK. Although, in the plantations, they have laid hold of the poor blacks, and made slaves of them, yet I do not think that *that* is agreeable to humanity, not to say to the Christian religion. Is a man a slave because he is black? No. He is our brother; and he is a man, although not our colour; he is in a land of liberty, with his wife and his child: let him remain *there*.

COVINGTON. As the defender does not offer to prove that he was unlawfully carried off, he must be presumed to have been lawfully acquired. It is said, "that slavery is against the state of nature;" that means, "against the state of men naturally." It is improper, nay, even sacrilege and blasphemy, to say that it is against the law of morality, or the law of God: slavery is agreeable to the Jewish religion,—to the doctrine of Christ and his apostles. Slavery has gone into disuse with us; and I do not suppose that a native of this country can be a slave. A slave coming into this country is not made free; but he is under the protection of our laws: and he must be punished when he offends, by the law of the land, and not according to the will of the master. It was upon that ground that judgment was given by the English judges, in the case of *Somerset*, where the opportunity of determining the general question was purposely waved. The master has a right to carry back his slave.

KAIMES. If the slave is the property of his master, he may use him as his property. If he cannot use him as he will, which is certainly the case in Scotland, then his property is suspended: slavery is a forced state,—for we are all naturally equal. It is a strange case for a man to bind himself during life: but it is a much stranger for a man to bind all his descendants. Let the laws of Jamaica govern the inhabitants of Jamaica. *We* cannot enforce them; for we sit *here* to enforce right, not to enforce wrong.

JUSTICE-CLERK. Slavery was established in the ancient world, and it is still kept up in the American colonies: but still it is contrary to the spirit, although not to the enactments of our religion. The Roman lawyers themselves admit that it is contrary to the law of nature. Mr Wedderburn claims the property of this slave, as acquired according to the law of Jamaica: he purchased him when an infant, in the most ungenerous manner. Had Captain Knight come to this country by stress of weather, and had any one laid hold of the boy, would Captain Knight have been allowed to carry him off?

If the property is once established, the right would not be changed by change of place; but when the property is brought into Britain, it must be regulated and modified according to the law of Britain. To that extent will the law of the land authorise a master's authority over his servant: slavery cannot be exercised here to a greater extent. Every German and French author, even with their imperfect notions of liberty, reject slavery as inconsistent with the laws of their states. We have not a *Code Noire*, but our law gives the benefit of the Act 1701 to all men,—to a natural-born subject, to a Frenchman, or to a black. The law of our land does not allow an express covenant, even of consent, for a servant to serve during life without wages, much less an implied covenant without consent.

PRESIDENT. By the laws of the West Indies this negro was the bonded servant of Mr Wedderburn. The question is, Whether must this service be considered as ended by his coming into this country? When he comes to British land he is a servant, but *sub modo*; for he is a temporary subject. What hinders a man to become bound as a servant for life? The master is bound to aliment and clothe him. I deny, that, if Captain Knight had come to Britain, any one could have reclaimed the boy, or invaded the Captain's property. The Court cannot interpose to send the negro away; for it cannot encroach on civil liberty. Without a cause this may hurt the master's property; but there

is no help for that: it is the consequence of the law, to which the master must submit.

GARDENSTON. My opinion is upon a simple principle: Slavery is abolished by the law, or at least by the manners of this country, although in some places it is permitted from reasons of expediency. All rights of subjects in this country must be regulated by the law of this country; and it was so determined yesterday, in two cases of succession. If a person, in this country, should take some of his bounden colliers to England, to work a coal-mine, such colliers would not be obliged, by English judges, to return back to Scotland. Had there been a covenant between the pursuer and the defender, it would have been regulated by the law of this country.

BRAXFIELD. That the pursuer was a slave by the law of Jamaica, I do not controvert. The positive enactments, however, do not operate *extra territorium*. The question then comes to be, Whether is slavery agreeable to the principles of equity? Many of the laws given to the Jews were merely municipal. Besides, no case like the present occurs in the Jewish law. Mr Wedderburn's right of property depends altogether on the municipal law of Jamaica; but how came the pursuer to be subject to that law? Plainly by violence: for he was not of an age either to suffer slavery for offences, or as a prisoner of war, or through consent.

MONBODDO. If the defender is found to have a right to the pursuer's service, he may take him with him to Jamaica: if the pursuer is a slave by the law of Jamaica, it matters not whether this is by contract or without contract: if, in the law of a foreign country, there is nothing *contra bonos mores*, we ought to give execution to that law. The law of nature, with the civilians, means the original state of all animals. From this they distinguish the *jus gentium*: slavery, therefore, stands on the same footing as government and property: *they* are not of the law of nature, but of the *jus gentium*: unless it can be proved that slavery is contrary to the *jus gentium*, there never can be turpitude in it. Slavery is not the mode among barbarians: they either kill or adopt their prisoners. Religion says nothing against slavery; on the contrary, St Paul delivers this clear maxim, "*servants*, obey your masters." There were no servants in the *orbis Romanus*, in his time, who were not also slaves.

The negro must be the servant of Mr Wedderburn without wages; but Mr Wedderburn cannot exercise his right over him contrary to the laws of the land.

ELLIOCK. Whether slavery is *contra naturam* or expedient, are things nothing to the present purpose. *Here* there is a servant bound for life: there is no moral turpitude in this; but the powers which Mr Wedderburn might exercise in Jamaica cannot be exercised here.

WESTHALL. After so much as been said, I have only to declare my opinion for liberty in its full extent. A natural-born slave in Jamaica might be supposed to carry the law of the country along with him: but the case is different as to one who is confessedly not a native.

The Sheriff found, "That the state of slavery is not recognised by the laws of this kingdom, and is inconsistent with the principles thereof: and found that the regulations in Jamaica, concerning slaves, do not extend to this kingdom; and repelled the defender's claim to perpetual service."

On the 15th January 1778, "The Lords remitted to the Sheriff *simpliciter.*"
Act. A. Crosbie. *Alt.* R. Cullen.
Reporter, Kennet.
Diss. Covington, Monboddo, Elliock, President.

N.B. The judgment of the Court ought not to have adopted the whole of the Sheriff's judgment; and probably it did not.

1776, *March* 8, and 1778, *January* 20. EARL of SELKIRK *against* ROBERT NAESMITH.

SALE—ARBITRATION.

A reference of the Price, in a Contract of Sale, to Arbiters, found to be binding on the Heirs of the Referrer.

[*Fac. Coll., VIII,* 9; *Dict.,* 627.]

GARDENSTON. There is a just distinction between *arbiters* and *arbitrators.* An *arbiter* is named to determine to whom the subject shall belong; an *arbitrator* to value the subject,—it being already determined to whom the subject shall belong. By the death of one of the parties submitting, the office of *arbiter* ceases, but I do not see why the same rule should prevail as to *arbitrators.*

On the 8th March 1776, "The Lords stopped the sale of the lands in controversy."
Act. A. Crosbie. *Alt.* W. Craig.

1778. *January* 20. GARDENSTON. Parties may conclude a bargain by reference to *arbitrators. Arbiters* determine as to matter disputed, but arbitrators as to the extent of what parties agree in.

PRESIDENT. *Res non erat integra* by any means: much money had been actually paid in part of the price. Had the arbiters died, the Court might have named other arbiters.

BRAXFIELD. The only question is, Whether there was truly a bargain; and whether Lord Selkirk may proceed to an adjudication in implement? When a submission is once entered into, and part of the price paid, *res non est integra.* The death of the arbiters would not vary the matter, for the Court might interpose.

On the 20th January 1778, "The Lords found that there was a concluded bargain, and remitted to the Ordinary."
Act. A. Crosbie. *Alt.* W. Craig.
Reporter, Covington.