verdict for the defendants,) is of opinion, that, such dismission having been in fact made, by a judgment which is in full force and unreversed, and no judgment having been rendered for the defendants upon the verdict, the dismission and judgment aforesaid form no bar to the present action; and that there is no error in the judgment of the superior court, which is therefore affirmed.".

Butt v. Rachel and Others.

Argued Monday, March 15th, 1813.

1. **Slaves—American Indians.**—A native American Indian, brought into Virginia since the year 1691, could not lawfully be held in slavery here; notwithstanding such Indian was a slave in the country from which he or she was brought.

This was a suit for freedom, by the appellees against the appellant, in the Superior Court of law for Norfolk county.

At the trial, the defendant tendered a bill of exceptions, which was signed and sealed, &c.; stating that "the plaintiffs claimed their freedom upon the ground of their being the descendants of Paupouse, a native American female Indian, who was brought into Virginia about the year 1747; and moved the court to instruct the jury, that no native American Indian, brought into Virginia since the year 1691, could under any circumstances be made a slave; which instruction the court did give;—whereupon the defendant, (who claimed to hold the plaintiffs as slaves,
210 upon the ground *that, though they were alleged to be descendants of the said Paupouse, a native American Indian, the said Indian was alleged to be a slave, and held as such in the island of Jamaica, by the wife of a Mr. Ivey, and brought by the said Ivey into Virginia as a slave, about the year 1747,) moved the court to instruct the jury that a native American Indian, held in Jamaica as a slave, under the laws of that Island, and imported into Virginia by her proprietor in the year 1746 or 1747, might be lawfully held as a slave in Virginia, notwithstanding such person was a native American indian; which instruction the court refused to give; to which opinion of the court the defendant excepted."

Verdict and judgment for the plaintiffs; from which the defendant appealed.

Wickham for the appellant. The only point in this cause arises upon the bill of exceptions, the relevancy of which cannot now be brought in question.(a)

The instruction prayed for was, that no American Indian, brought into this state after the year 1691, could be a slave. The court instructed the jury accordingly, notwithstanding the Indian was brought from Jamaica! This instruction I contend was erroneous.

The 9th section of the Act of 1805,(b) which was supposed to prevent, by implication, the making any Indians slaves, was only intended to establish free trade with the neighbouring Indians. In the 2d volume of Hening's statutes at large, are several acts shewing that Indians might be slaves; for the persons, who could lawfully be held as such, are not described as negroes only, but as any persons "not christians." In the 1st and 2d volumes many laws are found prohibiting and restricting the trade with Indians, in which the words "natives," "savages," and "Indians," are indiscriminately used, as meaning the same thing.(c) The scope and intention of the act of 1691,(d) although in words, it established free trade with all Indians "whatsoever," was
211 plainly to do *away the preceding restraining acts, without contemplating foreign Indians, with whom the people of this country had no trade or connexion.

None of the decisions of this court have any bearing on this case. The only point decided in Jenkins v. Tom and others, 1 Wash. 123, is that, in suits for freedom, hearsay evidence concerning ancient transactions is admissible. That cause was lost for want of a regular bill of exceptions to the judges' opinion. In Coleman v. Dick and Pat, ibid. 233, it was decided that no American Indian could be made a slave in this state, since 1705; but that foreign Indians might. Two of the judges conceived the finding of the jury, (in which it was not said whether Judith was brought in "by sea or land,") was insufficient. The word "American," in that case, is ambiguous, and used, in its limited sense, to mean Indians in that part of America having intercourse with, or neighbouring to Virginia. No such word is found in any of the laws. Was not a Peruvian, a Caraib, or native of Hispaniola, a foreign Indian? Two of the judges evidently thought it necessary to shew that the Indian was brought in by land. The case, instead of being against us, is a direct authority in our favour.

In Hudgins *v.* Wrights,(e) and Pallas v. Hill,(f) the word "American" is used in the same restricted sense. According to those cases, "no native American Indian, brought into Virginia since the year 1691, could be lawfully made a slave." But the Indian Paupouse was not made a slave in Virginia; but was in that condition when brought in.

Wirt for the appellees. The instruction given was correct. Since 1691, no Indian could be held in bondage. I do not contend merely that Indians could not be reduced into slavery, but that they could not be held as slaves. This was the plain consequence of "free and open trade with all Indians whatsoever, at all times and in all places." It was not conferring any boon upon them, but merely acknowledging the rights which God and nature gave. All the acts before 1691 described particular Indians; such as
221 "friendly," *"neighbouring," and other restrictive phrases; but the act of 1691 uses the words, "all Indians whatsoever." Admit Mr. Wickham's construction of the word "American;" the Indian woman Paupouse is declared by the bill of exceptions to have been a "native American Indian," carried from this country to Jamaica, and brought hither from that island. We had no right to declare Paupouse free in Jamaica; but we had the right to say that, when brought into our territory, she should be free.

(a) Shelton v. Cocke, Crawford & Co. 3 Munf.
(b) 3 Hen. Statutes at large, 447.
(c) 1 Hen. Statutes at large, 126, 173, 219, 415; 2 Hen. Statutes at large, 124, 153, 403, 410, 480.
(d) 3 Hen. Stats. at large, 69.
(e) 1 H. & M. 134.
(f) 2 H. & M. 149.

In the case of Hannah and others v. Davis, the General Court decided, in the year 1787, that no Indians brought into Virginia since the passing of the act of 1705 can be slaves in this commonwealth.(a) I am not clear that the Court of appeals did not settle the same point in Jenkins v. Tom, 1 Wash. 123. The principle laid down by the judge is the same with that decided in Hannah v. Davis. That opinion must have been approved by this court; otherwise the judgment would not have been affirmed. Such appears to have been Judge Tucker's construction, according to the opinion pronounced by him in Hudgins v. Wrights, 1 H. & M. 134. In the last mentioned case, the broad principle, laid down in Chancellor Wythe's decree, was approved by this court, so far as relates to white persons and native American Indians.

But all difficulty is removed by the decision in Pallas and others v. Hill and others, 2 H. & M. 149; by which it is settled, that "no native American Indian, brought into Virginia since the year 1691, could, under any circumstances, be lawfully made a slave." If Mr. Wickham's construction prevailed, the law recognizing the freedom of Indians might always have been evaded, by kidnaping Indians, carrying them to Jamaica, and then bringing them to this state.

Wickham in reply. Mr. Wirt contends that Indians are naturally entitled to freedom. So are negroes; but this does not prevent their being slaves. I admit the right to make them slaves must depend on positive institution. Our right is founded on the act of assembly "for the better
213 government *of servants and slaves," (b) the language of which is broad enough to comprehend Indians, as well as negroes. The exceptions to the general rule established by that act apply in favour of neighbouring Indians only. Coleman v. Dick and Pat is a strong case to shew that foreign Indians may be made slaves. In Judge Tucker's report of Hannah v. Davis, it is not said whether the decision related to a native American Indian, or to one brought from the East Indies. It might have related to an Indian of the former description, brought into this commonwealth by land. But that case, being a decision of the General Court only, is not authority in this court.

The cases of Hudgins v. Wright and Pallas v. Hill related only to native American Indians; as to whom it does not appear that they were brought into Virginia from another country in which they were lawfully held in slavery. The points decided in those cases must be understood as extending no farther than the subject in question.

It is said by Mr. Wirt that the Indian woman Paupouse was carried from Virginia to Jamaica. But this cannot be presumed; for it is not so stated in the bill of exceptions. The words "native American Indian" may signify a native of Jamaica, and should be construed with reference to Jamaica, since she was brought from that place. Mr. Wirt's argument, that some law of this state is necessary to justify the holding of a slave in bondage, goes to a dangerous length. It leads to the emancipation of all slaves concerning whom there is no special act of assembly. What I contend for is, that all persons, to whom the general provisions of our slave laws apply, may be slaves here, provided they were slaves by the laws of the country from which they are brought hither.

I admit that an Indian native of Virginia, carried thence to Jamaica, and brought back, would be free, by the very terms of the law. The ambiguity of the bill of exceptions, if it exists, is a sufficient reason for reversing the judgment, as was done in Barrett and Co. v. Tazewell.(c)

214 *Saturday, March 5th, 1814, the president pronounced the court's opinion that the judgment be affirmed.

(a) 1 Tuck. Bl. 2d part, p. 47 of the appx.
(b) See 1 Wash. 124.

(c) 1 Call, 215.

Cloud v. Campbell.

Argued Thursday, March 3d, 1814.

1. **Covenant — Verdict for More Damages than Claimed—Effect.***—In the action of covenant, a verdict for a larger sum than the damages laid in the declaration, or stated in the writ, must be set aside, and a new trial awarded.(1)

An action of covenant was instituted against John Cloud, in the superior court of law for the county of Frederick, by Iver Campbell, administrator of Elizabeth Campbell deceased, who was a devisee and legatee in the last will of John Campbell, upon a covenant executed by the defendant and the said John Campbell in his life time. The breach of covenant charged was the failing to pay certain rents, and the not keeping in repair the premises demised: The damages laid in the declaration and writ were five hundred dollars.

The defendant pleaded "covenants performed," and "covenants not broken;" to which pleas the plaintiff replied generally. The jury found a verdict for 665 dollars 25 cents damages, with legal interest on 400 dollars, part thereof, from the 18th day of November 1788, until paid, and the like interest on 265 dollars 25 cents, the residue thereof, from the 11th day of August 1809, until paid; for which, with costs, the superior court gave judgment; whereupon, a supersedeas was granted by this court, on a petition exhibited by the defendant.

Williams for the plaintiff in error.

George K. Taylor contra.

215 *Friday, March 11th, 1814, the president pronounced the court's opinion, "that the said judgment is erroneous in this, that the verdict has been found, and judgment rendered thereon, for a larger sum than the damages laid in the declaration, or stated in the writ."(2)

*See monographic *note* on "Covenant. The Action of" appended to Lee v. Cooke, 1 Wash. 306.

(1) Note. In Palmer & Eubank v. Mill, 3 H. & M. 502, it was decided that the writ might be referred to for the purpose of amendment. But in actions sounding in damages, the jury cannot find more damages than are laid in the declaration and writ. The rule is otherwise in actions of debt upon bonds with collateral condition. See Payne v. Ellzey, 2 Wash. 143: Johnson v. Meriwether, 3 Call 523; Winslow and others v. the Commonwealth, 2 H. & M. 459.—Note in Original Edition.

(2) Note. A copy of the writ was inserted in the transcript of the record. A judgment by nihil dicit was first entered against the defendant, and writ of enquiry awarded; which was afterwards set aside, upon the defendant's appearing and pleading. But oyer was not prayed of the writ. Yet it seems, that