

**Article from The Jerry Hynson African American Legacy Journal,
a Publication by the Maryland State Archives**

Issue #2: *Burke v. Joe*

[Continuing on from the Mullin family's efforts to remain free, the case of *Burke v. Negro Joe* tells a different manner of maintaining freedom. While *Hall v. Mullin* showed how freedpersons defended their freedom through self-advocacy and material security, *Burke v. Joe* shows how freedpersons could rouse the neighborhood to their defense through visibly acting as freepersons and playing their part in the community.]

In 1784, William Mackubin claimed two enslaved women: Dinah and her daughter Lavinia.¹ However, by 1797, the two women were “going at large as free-women.”² They appear to have thrived. According to (presumably white)³ witnesses, the two bought land, from which they rented out “tenements.”⁴ They contracted with various parties, collected rent, and initiated proceedings to confiscate debtors’ assets in lieu of payment.⁵ This was all done with the Mackubins’ knowledge: Mr. Mackubin was apparently a “heartly and active” man who often encountered the women in his circuits around the neighborhood.⁶

When William Mackubin died in 1805, he bequeathed all his property to his wife, Elizabeth. Acting as administrator, Elizabeth sorted out her husband’s affairs, a process which never insinuated

¹ *Burke v. Negro Joe*, 6 G. & J. 136 (Md. Ct. App. 1934).

² *Id.* at 137.

³ Maryland law barred Black witnesses from testifying against a white defendant. These witnesses’ presence, couple with the absence of “a Negro” next to their name, indicates they were white. This is not to discount the importance of the Black community in this era. It is quite likely that many of these white witnesses talked gossiped with their Black neighbors, learning what was going on in the world. In this way, Black testimony came into court, spoken by white mouths.

⁴ *Burke v. Negro Joe* Trial Judgments 3, MSA S382-22.

⁵ *Id.*

⁶ *Burke v. Negro Joe*, 6 G. & J. at 137.

Dinah and Lavinia were part of the estate.⁷ Following William's death, Dinah and Lavinia frequently visited Elizabeth Mackubin. Sometimes their visits were as hired laborers, others were social calls.⁸ However, the women "acted as free persons" no matter the visit's character.⁹ When Elizabeth herself died in 1824, Dinah and Lavinia were again absent from the inventory and never considered as assets for paying off creditors.¹⁰

Unfortunately, a deed of manumission was also missing. This gave one of Elizabeth's distant heirs, John Burke, the opening he needed to resurrect Elizabeth Mackubin's settled estate, anoint himself administrator, and kidnap Lavinia's son, Joe, as his slave for life.¹¹ Burke's basic premise is familiar: since there was no deed of manumission, Dinah and Lavinia had died enslaved, therefore Joe was also a slave. A deeply formalist¹² position, Burke was arguing that Dinah and Lavinia's lived independence, and the Mackubins' knowledge of that independence, did not matter without a deed to formalize their freedom. Seeking to dodge *Hall v. Mullin's* respect for the deceased's wishes,¹³ Burke further argued that because allowing an enslaved person to live-as-free was a crime, no length of time could legitimate that liberty.¹⁴ The logic here is similar to ownership of stolen property. No amount of time will give a thief proper title to their loot, as crime cannot formalize rights. Here, the

⁷ *Id.*

⁸ *Id.* at 138.

⁹ *Id.*

¹⁰ *Id.*

¹¹ *Id.* Dinah and Lavinia having both passed by 1832.

¹² That is, sticking to the letter of the law, not its intentions, even if that does not make sense in the current situation.

¹³ Recall that the Court of Appeals figured "Henry Hall was not a fool, so he wouldn't have left an enslaved person all this wealth. Therefore, that enslaved person must be free!"

¹⁴ *Id.* at 139-40; *see also* "Ch. XXXIII: An ACT to prevent the inconveniencies arising from slaves being permitted to act as free," in 204 *Laws of Maryland 1787-1791* 231 (2000). A re-compilation of Frederick Green's *GENERAL ASSEMBLY (Laws), 1785-1791* (Unknown date). (Hereafter Act of 1787).

“criminal” origin of Dinah and Lavinia’s independence therefore meant no span of time could ever grant them true liberty, so they remained slaves.

This reasoning also implicitly conflates the Mackubins’ salutary neglect with Dinah and Lavinia having somehow stolen *themselves*. Usually the self-theft trope was deployed in cases of *gran marronage*, i.e. when enslaved persons escaped to liberty.¹⁵ If enslaved persons were property, and theft was the unlawful appropriation of someone else’s property, then the property had stolen itself. However, Dinah and Lavinia didn’t steal themselves, they were licensed by the Mackubins to live their own lives. Burke’s arguments were therefore more of a dog-whistle designed to raise the jury’s collective hackles and prime them into finding that Joe was enslaved.

For arcane legal reasons, the Maryland Court of Appeals ultimately ruled Joe was a free man born of a free mother.¹⁶ Essentially, there is a common law principle that if a deed is missing, a court can pretend it exists if there is sufficient evidence to do so. As we will shortly discuss, there was plenty of such evidence, so the jury ruled that the Mackubins had filed a deed, it was somehow missing, and so Joe was a free person.

So what was that evidence? Through numerous witnesses, judges and jurors knew Dinah and Lavinia owned and rented properties, all within a few miles of the Mackubin residence.¹⁷ The freedwomen socialized with Elizabeth Mackubin, encountered Mr. Mackubin on his daily walks through the neighborhood, and were never inventoried as part of either Mackubin estate.¹⁸ Each was

¹⁵ Gran marronage was when an enslaved person escaped with the intention of never again being enslaved. Petit marronage was when an enslaved person ran away for a span of time, but did not intend to make their freedom permanent. This often happened to avoid being whipped, visit family, or for any number of reasons.

¹⁶ Essentially, there is a common law principle that if a deed is missing, a court can pretend it actually exists if there is sufficient evidence to do so. As we will shortly discuss, there was plenty, so the jury ruled that the Mackubins had filed a deed, it was somehow missing, and so everyone was a free person.

¹⁷ *Id.* at 142.

¹⁸ *Id.* at 142-43. Each estate named enslaved persons, but Dinah and Lavinia were not amongst them.

an act inconsistent with continued slavery and therefore fertile ground for presuming a manumission. Neither Mackubin were ever prosecuted for allowing the women to live as free, so either Burke was wrong or the criminal legal system had broken down. All told, the judges and jury had good reason to see Dinah and Lavinia as free persons.

At first glance, *Burke* seems to follow a similar path to *Hall*: the patronage of an elite slaveholder was critical for preserving freedom, as that acceptance overrode the absence of a deed. There is some truth to this, as testimony about the Mackubins' enduring links with Dinah and Lavinia formed the heart of the jury and appellate verdicts. However, by the time Burke kidnapped Joe, Dinah, Lavinia, and the Mackubins were all long dead. None of them directly intervened in the case, nor was their posthumous involvement quite as direct or specific as Henry Hall's legacies.

What matters here is what *everyone else* saw, heard, and did. Joe had six witnesses come forward to discuss the Mackubins' relationship with the freedwomen. The Court of Appeals praised the "ingenious and elaborate investigation" done by counsel, so it is very likely that the lawyers spoke to many more folks who knew of Dinah and Lavinia's commercial dealings and social lives.¹⁹ People were well aware what Dinah and Lavinia had been doing ever since their de facto manumission.

But in a state where any Black person was presumptively enslaved, why did people believe their freedom? The answer likely lies in performance. By conforming with societal norms and expectations for free Black women, Dinah and Lavinia avoided censure, close scrutiny of their status, and predatory slaveholders. The benefits take two registers: camouflage and credit-generating performance. Performing a racial role mattered in the antebellum South. Habits, behaviors, etiquette, and speech were all appended to certain racial categories, and white Southerners (and their courts)

¹⁹ *Burke v. Joe*, 6 G. & J. at 141.

prided themselves on being able to intuit somebody's race based on their mannerisms.²⁰ With the proper look (either genetically or through a disguise), some practice and a hefty pinch of luck, one could recategorize oneself simply by acting the part.

In Louisiana, Alexina Morrison's fight for liberty illustrates how one could ward off accusations of slavery by acting the part of a genteel, white lady.²¹ A light-skinned woman, Morrison waged successful legal warfare against her putative owner, despite documentary and testimonial evidence of the claimant-enslavers. How? She charmed her guards and wardens with genteel manners and delicacy.²² She had attended their balls, slept alongside their daughters, and generally fit every behavioral marker of whiteness. Morrison charmed dozens of self-proclaimed experts on discerning race into agreeing she was white.²³ Multiple Louisiana juries agreed: out of three trials, one found her white, and two hung (leaning in her favor). Since racism prevented jurors from believing such a refined lady could be Black, they ruled she was white.

While Morrison's case is unusual in the depth of its record, other confirmedly enslaved persons pulled off similar feats. Uncountably many enslaved persons performed their way onto a steamboat to freedom. Sometimes this was the light-skinned enslaved person using manners gleaned from serving a thousand dinner parties to charm their way into a berth, posing as ambiguously "Spanish."²⁴ Other times it was a working escape, as enslaved persons leveraged steamboat captains'

²⁰ See Walter Johnson, *River of Dark Dreams: Slavery and Empire in the Cotton Kingdom*, Chapters 2 & 5 (2013) (discussing the paranoia and scrutiny of patrolling the color line against performance-based passing); Ariella Gross, *What Blood Won't Tell: A History of Race on Trial in America* at 2-3, 56 (2008) (discussing weight of white-performance and its stickiness once granted).

²¹ Gross, *What Blood Won't Tell* at 1-2.

²² *Id.*

²³ *Id.*

²⁴ Johnson, *River of Dark Dreams* at 138.

tight deadlines and hunger for labor to board as coalmen, firemen, and cooks.²⁵ Spending time at labor fairs helped landlubbing enslaved persons pick up the boating skills or connections necessary to secure a berth (or at least enough to fake it).²⁶ Regardless of form, acting the (racial) part was sometimes enough to clinch the role.

Dinah and Lavinia performed so well, they protected Joe from beyond the grave. Dinah and Lavinia had already entered freedom; they did not need to pass or hustle their way out. Rather, their actions *afterwards* were important for entrenching their status in the minds of others. Enslaved persons did not own land, collect on debts,²⁷ or rent out rooms. Law would not let them. Dinah and Lavinia did, thereby publicly proclaiming their freedom to all who saw an advert for their “tenements,” signed over a deed, or had their property confiscated to cover a debt.

The Mackubins’ relationship with the freedwomen played a key role in the performance. Similar to the Hall-Mullin relationship from our last post, Dinah and Lavinia’s continued relationship with the Mackubins was likely a soft, socially-demanded form of deference and clientage. The freedwomen and their children definitely called on Elizabeth Mackubin during her widowhood, “frequently [visiting] at the place where [Elizabeth] resided.” Other visits were for work, as witnesses attested that the women were “hired by the family in which she lived, and received wages as free persons.”²⁸ Read in one light, these could be the big-hearted kindnesses from one neighbor to another. Alternatively, this was a soft expression of a patron-client relationship in which the freedwomen owed some amount of labor and ostentatious respect. Either way, these are not actions

²⁵ *Id.* at 144.

²⁶ *Id.* at 143-44.

²⁷ *But see* Kimberly Welch, *Black Litigants in the Antebellum South* 10 (2018) (noting rare instances of enslaved persons suing white persons for unpaid debts).

²⁸ *Burke v. Negro Joe*, 6 G. & J. at 138.

which would be taken by enslaved persons, whose constant deference, attention, and labor faded into the background of Southern life. By complying with this expectation of post-manumission deference in a noteworthy manner, Dinah and Lavinia solidified the audience's understanding that they were free.

But performance was also powerful in a second register: the generation of "credit." Coined by Laura Edwards, credit is the abstract sum of reputation, social capital, and goodwill. Everyone had credit, from the most prominent white statesman to the most ill-provisioned enslaved person.²⁹ Credit was important in that it served as a shorthand for someone's trustworthiness, reliability, and moral character. Higher credit indicated better character, and lower credit served as a billowing red flag.

What is important here is how credit was accrued: performance of one's societal role. White men who were generous, wealthy, and reliable breadwinners fulfilled their patriarchal role, and were credited accordingly. So too white women who were deferential, well-mannered, and domestic, or the industrious, obsequious enslaved person, and so on.³⁰ Class also played into credit. Since hard work was conflated with moral fibre, Southerners who supported themselves and their families accrued credit.³¹ Persistent poverty or reliance on others chiseled away at one's credit, as did the "wasted substance" of squandered opportunities, talents, or potential.³²

Freedpersons were certainly within credit's purview, accruing it and losing it just like everyone else. Despite grumbles, white Southerners recognized Black Americans' presence and the

²⁹ Laura Edwards, *The People and Their Peace: Legal Culture and the Transformation of Inequality in the Post-Revolutionary South*, 111 (2009). This universality separates credit from honor (which was the exclusive domain of white men).

³⁰ *Id.* at 121-131.

³¹ *Id.*

³² *Id.* at 170.

roles they played in society. For white Marylanders, this was a source of cheap, seasonal labor perfect to hire for harvests and forget until the next.³³ Judging by Reconstruction-era pearl-clutching, white Southerners also expected deference from Black Americans.³⁴ For enslaved Americans, freepersons were a source of support (both material and emotional), jealousy, camouflage, and other roles frowned upon by white Southerners. These dueling lines of credit raise the intriguing possibility of different “banks,” and that setting mattered for whose peace was to be kept. Regardless, white society demanded some level of ritualistic demeaning from Black Americans, free and enslaved, and therefore one element for assessing their performance of expected social role.

The benefits of high credit were many. It meant neighbors were more willing to give you the benefit of the doubt or interpret a situation in your favor. It meant faux pas and lapses in judgment were forgiven more easily (though a loss of credit meant they were not forgotten). With enough credit, reputable individuals could even create truth simply by stating what their understanding was.³⁵ If someone so reliable believes it, how could it be otherwise?

Dinah and Lavinia had played their roles to perfection. Publicly associated with loyal fealty to their prior slaveholders (and therefore to white society), they fulfilled expected traits of free Black

³³ Fields, *Middle Ground* at 69-72.

³⁴ See Sadiya Hartman, *Scenes of Subjection: Terror, Slavery, and Self-Making in Nineteenth-Century America*, (1997) (Chapter 5 is focused on this topic. Hartman thoroughly explores how post-Emancipation society demanded freedpersons behave deferentially towards white Americans. Without digging too deeply, this was predicated on (1) an imagined debt owed by Black Americans towards their white liberators; (2) Black citizens’ supposed inexperience with industriousness, police society, and domesticity; and (3) paternalist ideas that Black Americans needed stern guidance to improve themselves); Thavolia Glymph, *Out of the House of Bondage: The Transformation of the Plantation Household* (2008) at 167-203 (discussing the changes in household labor, power, and deference engendered by Emancipation, including how freedwomen continuously renegotiated their relationship with hirers to protect and reaffirm their liberty), 204-26 (discussing how shortages of goods and materials led to new commercial and personal relationships between freedwomen and former enslavers, particularly as the latter learned to earn a living through their own labor); Stephanie Jones-Rogers, *They Were Her Property: White Women as Slave Owners in the American South* (2019) at 190-94 (discussing slaveholding women’s struggles to adapt to post-Emancipation America, specifically the independence and self-respect Black women now wielded in labor negotiations).

³⁵ As we shall see in our next entry on *Henderson v. Jason*.

persons. Their clear industry and commercial success further boosted their credit, especially since it bucked the Southern stereotype of free Black persons needing charity to scrape by. There is every indication that the two freedwomen amassed quite the credit balance.

And even after death, this high credit paid dividends. Numerous witnesses were willing to come and testify on Joe's behalf, with many more apparently chatting with his lawyers.³⁶ Each told the same tale: Dinah and Lavinia were free, we knew them to be free, of course those women were free.³⁷ In fact, the only evidence they *were not* free was the absence of a deed; there were no dissenters or doubters on the record. This testimony was based off living memory and community knowledge, as Dinah and Lavinia had both died years prior to the case. Their credit had sustained their freedom and that of their children.

Taken together, we see a new way Black Americans defended their freedom after enslavement. While the Mullin family courted material security from their former enslavers, and later leveraged the documentary evidence in legal argument, Joe called upon his neighbors for support. If one white supporter was good, a whole neighborhood was better.

³⁶ See *Burke v. Negro Joe*, 6 G. & J. at 136-39, 141.

³⁷ *Id.*