ALABAMA COURTS AND THE ADMINISTRATION OF SLAVERY,

1820-1860

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ALABAMA COURTS AND THE ADMINISTRATION OF SLAVERY,

1820-1860

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ALABAMA COURTS AND THE ADMINISTRATION OF SLAVERY,

1820-1860

Daniel Reese Farnell, Jr.

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Daniel Reese Farnell, Jr., son of Daniel R. Farnell and Carolyn W. Farnell, was born on January 22, 1957 in Opelika, Alabama. He attended Auburn University from 1975 to 1978, and the University of Alabama at Birmingham, graduating in 1980 with a Bachelor of Arts in History. He graduated from the University of Alabama School of Law in 1983. He was admitted to the Alabama State Bar in 1984 and is a licensed attorney. He entered Graduate School at Auburn University in September 1998 to pursue doctoral studies in history.

DISSERTATION ABSTRACT

ALABAMA COURTS AND THE ADMINISTRATION OF SLAVERY,

1820-1860

Daniel Reese Farnell, Jr.

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The examination of contemporary legal materials from the slaveholding states, particularly Alabama, shows considerable official involvement of the legislature and the courts in the management of slavery, going well beyond conventional notions of the institution of slavery as based and sustained mainly on private, self-help controls and remedies invoked by planters and their agents.

Utilizing contemporary and current classifications of the standing of slaves as persons and as property as assigned by courts and scholars, statutes and cases in on the subject of criminal law and procedure are examined, with slaves as accused and victims.

The inquiry then turns to civil cases, with emancipations and suits for freedom as a starting point, under which slaves attain limited status and recognition as legal persons. The discussion concludes with other civil matters, concerned with slaves as property and the rights of the slaveholding class in them, augmented by fugitive slave acts and slave patrols acting as adjuncts of the court system and slaveholders.

Original, primary legal materials strongly corroborate current legal-historical studies of the institution of slavery as well as the consensus of historical scholarship spanning several generations and encompassing numerous sources and disciplines, which hold that the institution of slavery and the goals, objects, and processes of government were indivisible, mutually dependent, cooperative, and dedicated to the preservation of slavery, as expressed through the legislature and the legal system.

The resulting historical evidence resolves and confirms perennial questions about the future viability of slavery in 1860 and the inevitability of the Civil War, showing that the effects of slavery were becoming more onerous and pernicious for African Americans and society as a whole over time, and the legal system, a fundamental institution of society functioning as a vehicle of slaveholding interests, was so deeply committed to the preservation of slavery that no peaceful or meaningful reform directed to the abolition of slavery was possible.

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I dedicate this dissertation to my parents, Daniel R. Farnell and Carolyn W. Farnell, for their continued inspiration and support for this and all the other worthwhile projects I have undertaken over the years. I would like to thank Dr. Anthony Eugene Carey, my major professor and committee chair for his continued guidance, support, patience, and advice from the time I began as a graduate student at Auburn in 1998. I also express my sincere gratitude to Dr. Patience Essah and Dr. Robin F. A. Fabel for serving on my committee and offering their kind and insightful comments and suggestions, and Dr. Gerard S. Gryski of the Department of Political Science for reading and evaluating the manuscript.

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DESCRIPTION	EXPLANATION
§, §§	Symbol denoting section or sections of constitutional provision, code, act, or statute
ADAH	Alabama Department of Archives and History
Aikin's Digest	Digest of the Acts of Alabama, compiled by John G. Aikin, 1833, supplemented 1836
Ala.	Alabama Reports, Supreme Court
Ala. Acts	Acts of Alabama, Legislative Session Laws, General, Local, and Special, passed in General Assembly convened (House and Senate)
Ala. Code	Code of Alabama, 1852
Ala. Const.	Constitution of Alabama, 1819
Art.	Article
Cl.	Clause
Clay's Digest	Digest of the Acts of Alabama, compiled by C.C. Clay, 1843
Const.	Constitution
F.Cas.	Federal Cases, U.S. District and Circuit Courts
Ga.	Georgia Reports, Supreme Court
How.	Howard, U.S. Reports, Supreme Court

LG	Record group or series, ADAH
Minutes	City Court of Mobile, trial docket entries, USA Archives
Miss.	Mississippi Reports, Errors and Appeals (Supreme Court)
Mo.	Missouri Reports, Supreme Court
Pet.	Peters, U.S. Reports, Supreme Court
Port.	Porter’s Ala. Reports, Supreme Court
SG	Record group or series, ADAH
Stat.	Statutes at Large, U.S. Congress
Stats. Miss. Terr.	Statutes of the Mississippi Territory, Peter Isler, 1816
Stew. & P.	Stewart & Porter’s Ala. Reports, Supreme Court
Toulmin’s Digest	Digest of the Acts of Alabama and the Mississippi Territory, compiled by Harry Toulmin, 1823
U.S.	U.S. Reports, Supreme Court
U.S. Const.	U.S. Constitution
Wall.	Wallace, U.S. Reports, Supreme Court

INTRODUCTION

The conventional view of the relationship of the government to the institution of slavery in antebellum America is one of a political and legal system which was largely passive, allowing slaveholders to make and enforce the rules governing a “species of property having immense value."[1] The classic phrase frequently associated with slavery, "the peculiar institution[2]," in common usage describes the political, legal, economic and social arrangements of slaveholders and the enslaved; in between these extremes in conditions of liberty and status were non-slaveholding whites and free persons of color, the latter the least numerous of these categories. Integral to the operation of the "peculiar institution" was the unique system of legal controls governing not only slaves, but slaveholders and anyone else coming into contact with them. In recent years, historians have been devoting more attention to legal controls governing slavery as a component of the peculiar institution, under which slaves were treated in the law predominantly as chattel property, but sometimes as human beings. The result of this research lends itself to a revised view of slavery, which according to traditional thought, was an institution carried on as a passive activity, but in fact was heavily regulated and supported by state and federal courts.

The customary depiction of slavery as an activity carried on substantially free of government regulation or intervention has origins in contemporary discussions of the

[1] Mangham v. Cox & Waring, 29 Ala. 81, 88 (1856).
[2] Kenneth M. Stampp, *The Peculiar Institution: Slavery in the Ante-Bellum South* (New York: Alfred A. Knopf, 1972), 3.

character of slavery, reflected in Cobb's *Law of Negro Slavery* and numerous court opinions of the day which described slavery as "municipal and local."[3] The municipal-local fiction was used interchangeably to describe both political and legal conditions under which slavery originated and existed.

The involvement of legislatures and courts on behalf of slavery was a significant factor in the continued existence of the institution, collectively constituting a defense of slavery, which in many respects was more formidable than the many rhetorical and literary defenses published in the antebellum era. Court decrees, more than mere oratory, carried the force and compulsion of law. Legal materials and analysis, supplementing economic and sociological data, indicate that the states and the federal government of antebellum America provided positive support for slavery crucial to its continued existence. An examination of legislation, appellate opinions and trial records of the slavery era indicate that the influence of slavery in the legal system and southern society was reciprocal and pervasive.[4]

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[3] Thomas R. R. Cobb, *An Inquiry into the Law of Negro Slavery in the United States of America: To which is Prefixed, an Historical Sketch of Slavery* , with an introduction by Paul Finkelman (Athens, Ga.: University of Georgia Press, 1999), 82, § 83.

[4] See, e.g., Jenny Bourne Wahl, *The Bondsman's Burden: An Economic Analysis of the Common Law of Southern Slavery* (Cambridge: Cambridge Unversity Press, 1998), 24 ("common law of the South strengthened the shackles of slavery"); Mark V. Tushnet, *The American Law of Slavery, 1810-1860: Considerations of Humanity and Interest* (Princeton, N.J.: Princeton University Press, 1981), 12 (detail in reported cases derived from Catterall and other sources provide "useful vignettes as illustrating what happened in the ordinary course of slave society"); Tushnet, *Slave Law in the American South: State v. Mann in History and Literature* (Lawrence, Kansas: University Press of Kansas, 2003), 6 ("Slavery was an economic system, a social system, and a legal system. . . . The law of slavery supported the economic and social system of slavery."); (Ariela J. Gross, *Double Character, Slavery and Mastery in the Antebellum Southern Courtroom* (Princeton, N.J.: Princeton University Press, 2000), 24-47, passim ("in attendance at courts were men, women and children from every walk of life"; also describing symbiotic relationship between legal profession and planter-slavery culture and economy); Philip J. Schwarz, *Twice Condemned: Slaves and the Criminal Laws of Virginia, 1705-1865* (Baton Rouge, La.: Louisiana State University Press, 1988), 37 ("slave tribunals the most formal and structured manifestation of the power of those who led white society"); James Benson Sellers, *Slavery in Alabama*, with an introduction by Harriet Amos Doss

Evidence showing the symbiotic relationship between the institutions of slavery and government is found in the profiles of judges and lawyers of the period, which reveal a bench and bar who were, as part of a larger slaveholding society, disproportionately slaveholders as to the rest of the free community. Slaveholding was universally associated with men occupying such political positions, to the extent that slaveholding status substantially constituted a requirement of office-holding. Further, although non-slaveholding whites were eligible for jury service, grand jurors and trial jurors selected and seated were usually slaveholders. In capital cases in which slaves were the accused, at least two-thirds of the trial jury was required to be slaveholders. In certain civil and criminal trials involving slaves as the accused or as property, one function exercised by juries comprised predominantly of slaveholders was assessment and valuation of slave property.

Another indicator of the pervasive effect of slavery in southern society was the frequent appearance of slaves in court records both as defendants and victims in criminal cases. In a survey of reported appellate cases in Alabama from the inception of the Supreme Court in 1820 to 1861, the numbers and proportions of appeals related to slavery grew steadily from a handful of cases in the 1820s to about 40 percent of the court's docket in the eve of the Civil War. Although they otherwise had no civil capacity or standing, slaves occasionally filed suits for freedom as plaintiffs. A substantial body of trial and appellate cases shows that slaves were ubiquitous in the court records; as chattel property, they were frequent subject of civil litigation. Numerous statutes and cases reveal slaves involved in a variety of non-agricultural trades and occupations, indicating that slaves were not merely laborers in connection with cotton agriculture. The

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(Tuscaloosa, Ala.: University of Alabama Press, 1994), 39-43 (members of planter class held power disproportionate to their numbers); Thomas D. Morris, *Southern Slavery and the Law, 1619-1860* (Chapel Hill, N.C.: University of North Carolina Press, 1996), 3 ("interrelationship between slavery and law more than policies found in statutes and judge-made legal doctrines—law was practice as well as doctrine").

daily activities of slaves and slaveholding practices often raised novel issues which led to the development of new legal theories and rules; for example, a series of cases concerned with slaves hired out who were injured or killed on common carriers such as railroads and steamboats were the forerunner of workers' compensation statutes enacted in the twentieth century, for which recovery was limited to economic loss and diminution of earning capacity, but excluding pain and suffering. In this type of case, right of recovery belonged to the slaveholder and not the slave, since the slave was deprived of the wages associated with his labor.

Traditional research and publication in the study of slavery has relied on source materials from the fields of political science, economics and sociology. The focus of applied social sciences is the study of group behavior, and inductive analysis by exalting the general over the specific. The analysis of legal materials as historical evidence places unique emphasis on the study of records pertaining to individual conduct and a process that is deductive, complementing the traditional social science disciplines. Legal materials provide an added dimension to the study of American slavery, as the existence of slavery in a civilized society would not have been possible without a comprehensive system of laws supporting the institution.[5]

As with other historical sources, legislation and cases involving slavery reveal significant detail about daily life associated with a slaveholding society, although such view is limited as derived principally from the perspective of the slaveholders rather than slaves. From this body of evidence is derived the character of slavery and the government dedicated to its preservation. Scholars and students usually tend to paint slavery with a broad brush as inherently exploitive, yet, with an emphasis on social sciences which focus on group behavior and minimizes anecdotal evidence, sometimes overlook the best evidence for their case. Trial and appellate records precisely and

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[5] See, e.g., Tushnet, *The American Law of Slavery*, 11-43 (Ch. 1, "Slave Law and Its Uses").

potently illustrate the nature and extent of the basic deprivation of slaves as individuals in ways that are not fully satisfied by traditional political, economic, and sociological data or conventional scholarship.

In addition to direct and substantive involvement with slave matters, legislatures and courts performed important political, ideological, and public relations functions in justifying slavery to the community and the nation. While slavery was vigorously defended, acts of the legislature specified penalties for mistreatment or cruelty to slaves, which in practice were significantly less severe than similar crimes committed by slaves against whites. Although slaves were severely punished when convicted of crimes, slaves were tried and occasionally acquitted by the same court system as whites in connection with serious offenses with many of the same procedures, enabling the state and region to depict the institution of slavery as equitable, just and beneficial for the enslaved, and also for the non-slaveholding white population.

Acts of the legislature and codified statutes provide some evidence of the character of slavery, but of available legal-historical evidence, legislative materials constitute the weakest link, for the reason that an act or statute merely stands for the vote of the legislature on a proposition at a given time, perhaps reflecting popular sentiment at the moment, but not constituting any evidence that the law was ever enforced, or in what manner it was enforced.[6] To some extent, the application and enforcement of acts and statutes can be corroborated by their citation in trial records and reported appellate cases. As a practical matter, research of trial and appellate records shows that the vast majority of legislative acts bearing on slavery was implemented and enforced substantially as written. A question bearing on the reliability of legislative materials as historical evidence of past practices is frequency of enforcement, an issue that arises even today in

[6] Ibid., 18 (quoting Winthrop Jordan for the assertion that "while statutes usually speak falsely as to actual behavior, . . . they afford the best single means of ascertaining what a society thinks behavior ought to be").

an age of arguably better record-keeping—in criminal law, the question would be concerned with alleged criminal acts that are reported but not presented to a grand jury, or acts that occur but are not reported, or not documented. Contemporary reported cases of the era, coupled with sustained scholarship in the ensuing years, reflect a record of consistent enforcement of the slave codes by local, state and federal governments, establishing a connection between legislation and governmental action and impact, most notably on slaves and free persons of color, and to a lesser degree on white persons.

Another potential problem with recourse to legal materials as an evidentiary resource for slavery is that legal materials are sterile in rendition of facts and unduly remote and attenuated in their connection to actual events.[7] In general, as to appellate cases, the rendition of facts recited on appeal is not a contemporaneous record, but far removed from occurrences giving rise to a case, or even the fact-finding process of trial. The fact pattern comprising the reported appeal is often an artificial, stipulated universe created by litigants, lawyers, juries and judges for a narrow purpose, the resolution of the dispute between the parties. The result, while valuable for the primary, intended legal purpose of adjudicating societal disputes, is not the product of an objective historical method or dispassionate, reasoned research, but the result of an adversarial process wherein the litigants necessarily are driven by self-serving motives or pursue narrow objectives often not conducive to the recordation of history. Somewhat in derogation of the fact-finding demanded by historical writing, legal records derived from the slavery era are largely devoid of the mention of slaves themselves, as well as accounts told by them; thus, the parties to a case, whether or not slaves, are often tangential to discussions in appellate opinions. Not only the proceedings and decisions, but the resulting legislative and legal records pertaining to slavery were compiled and the accounts related

[7] Ibid., 13.

by the slaveholding class of society, and slaves had no role or input in the reporting process.

While primary legislative and legal materials relating to slavery seem to abound and have been available for decades, extensive use of these sources for historical research is a relatively new development. Many legal studies of slavery, including early research in the field, have relied principally on analysis or compilations of appellate cases, in some instances by design or compelled by the relative scarcity of trial records, a circumstance, as with other historical documents, which increases over time due to loss or destruction.

Among the first significant contributions to the field was a comprehensive digest of every jurisdiction in the United States issuing appellate opinions relevant to slavery, compiled by Helen Tunnicliff Catterall.[8] In the ensuing years her work has been relied upon as a primary resource. The orientation of the first generation of historical writing relating to slavery based on legal materials was principally descriptive and topical, somewhat lacking a developed historical context, although often providing lucid expositions on the law of slavery.

More recent studies relying on appellate reports, which place greater emphasis on the historical context of the law of American slavery, have been published by Paul Finkelman and Jenny Bourne Wahl.[9] Professor Finkelman is known for aggregating and editing a substantial body of primary legislative and legal materials relating to the slavery

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[8] Helen Tunnicliff Catterall, ed., *Judicial Cases Concerning American Slavery and the Negro*, 5 vols., (Washington, D.C.: Carnegie Institution of Washington, 1926-37); *see also*, Catterall, "Some Antecedents of the Dred Scott Case," *American Historical Review* 30, No. 1 (Oct. 1924), at 56 ("The product which the mills of the law grind out unceasingly is the judicial decision. The vast accumulation of decisions, which the lawyer calls precedents, is fraught with peril for the profession, for which no one mind can hold them all, and in spite of ingeniously devised digests, some point may escape the advocate which his opponent may seize to vanquish him. But what may be poison for the lawyer is meat for the historian. He is not heard to complain of the wealth of material. The more, the better. And he need not travel to distant archives. This vast collection is at his very door, especially if his door opens on a university quadrangle.")

[9] Wahl, *Bondsman's Burden*, 22-25.

era. Professor Wahl in an analysis of appellate cases has taken the cases and concept of Catterall's digest a step further, developing court statistics for slave jurisdictions indicating the relative commitment of slave states to the institution. Wahl has also discussed the law of slavery from an economic perspective and the long-term implications to American labor and employment law.[10]

Another school of historians examine the role of the federal courts and their relationship to the institution of slavery. The landmark case in this area is *Dred Scott v. Sanford* (1857). The consensus of historical writing in this area holds that American slavery was not merely a local or provincial issue, but a national policy vigorously supported by the federal government, a thesis propounded by Don E. Fehrenbacher in *The Slaveholding Republic*.[11] Professor Fehrenbacher also discussed the impact of slavery in the territories in two books concerning the *Dred Scott* case.[12]

Notable studies incorporating trial court records, tending to provide more immediate and contemporaneous evidence of the intersection of slavery with the southern legal system, have been published by James Benson Sellers, Philip Schwarz, Thomas D. Morris, and Ariela Gross. [13] As a matter of historical fact-finding, both methods -

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[10] Jenny B. Wahl, "The Jurisprudence of American Slave Sales," *Journal of Economic History*, 56, no. 1 (March 1996), 143.

[11] Don E. Fehrenbacher, *The Slaveholding Republic: An Account of the United States Government's Relations to Slavery*, completed and edited by Ward M. McAfee (New York: Oxford University Press, 2001), ix ("over time the federal government adopted the position that slavery was a national institution fully protected by the Constitution"); William M. Wiecek, *The Sources of Antislavery Constitutionalism in America, 1760-1848* (Ithaca, N.Y.: Cornell University Press, 1977), 16-17 ("Garrisonians by 1844 maintained that the Constitution supported slavery and was a proslavery compact.").

[12] Don E. Fehrenbacher, *Slavery, Law, and Politics: The Dred Scott Case in Historical Perspective* (New York: Oxford University Press, 1981); Don E. Fehrenbacher, The *Dred Scott Case: Its Significance in American Law and Politics* (New York: Oxford University Press, 1978).

[13] Gross, *Double Character*, 5-7, 16-18, 231; Philip J. Schwarz, *Twice Condemned,* 3-5, 323-35; Morris, *Southern Slavery and the Law*, ix; 525-26; Sellers, *Slavery in Alabama*, xv, 400-401.

utilizing trial and appellate records in concert - are indispensable. On one hand, trial records, while containing brief docket entries, often contain numerous cases and dispositions lending such records to statistical studies; on the other hand, appellate records in some instances provide greater detail in individual cases as well indicating subsequent proceedings and final dispositions. This may be augmented by separate trial records found in the same case reported on appeal, together providing a more complete record of the course of the litigation.

The contemporary description of the character and regulation of slavery as municipal and local implies a system of disparate rules and enforcement, and in turn a lack of involvement in the administration of slavery by state and federal governments, in the end descriptive of an institution that is self-regulating by slaveholders. However, the contrary is suggested. On one hand, the new states of the old Southwest lacked precedent for the development of slavery, but only because the courts had just been established concurrently with the formation of new state governments. Otherwise, ample precedent for slavery existed, beginning with legal controls enacted in colonial Virginia in the 1600s.[14] In developing case law, courts in Alabama and Mississippi often cited cases from the older slaveholding states and resorted to secondary treatises and authorities written by leading jurists such as Kent and Story, a circumstance attended by a certain irony, as Kent was judge in New York, a free state, and Story was widely known for his antislavery views.[15] State statutes in the region relating to slavery were patterned after slave codes in Virginia and the other South Atlantic slave colonies, and Georgia. Eventually, courts relied on acts, statutes and codes of the legislature within their jurisdiction, as well as borrowing and sharing precedent from the tribunals of neighboring

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[14] Morris, *Southern Slavery and the Law*, 39.

[15] The commentaries of Kent and Story make passing reference to slavery in the context of contracts and the reciprocal rights, obligations, and duties of master and servant; the treatises were invoked in adapting general legal principles to the management of slavery as with other forms of chattel property and free laborers.

and regional slave states of the slaveholding region. As a result, the law of slavery and its administration, having subtle nuances and local differences in practice, was in the main characterized by considerable uniformity among jurisdictions.[16]

Research of contemporary legal materials refutes the view that slavery was merely a private or a local matter. Instead, extensive governmental involvement in the administration of slavery and direct support for the institution is indicated. Traditional references to American slavery as "chattel slavery" or slaves as "chattel" evoke impressions or inferences that slaves were much like any other private property which could be bought, managed, or sold at will with minimal oversight by the government. However, the system of slavery also was managed by a comprehensive system of legal controls.[17] To the uninitiated, among the most surprising findings is that legal restraints were imposed on white people in their dealings with slaves - both their own and those of other slaveholders - as well as on the slaves themselves. Thus, the goal of the southern legal system was the total regulation and control of slavery, which in the end included a system of controls over the entire population of a region, an objective that was implemented and largely accomplished, but somewhat undermined by incidents of slave resistance reported in contemporary newspapers and court reports, the most common example being runaway slaves, and private and governmental efforts to apprehend them.

Although deemed municipal and local in regulation, the management and supervision of slavery was more centralized and uniform than imagined. The phrase "municipal and local" actually signified a legal fiction, as the institution and management of slavery under state law depended on the support of the federal government for its continued existence. Adherence to the municipal-local maxim enabled slaveholding

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[16] Tushnet, *The American Law of Slavery*, 10 ("After the institution of slavery was given a firm legal basis, a process that was completed by roughly 1800, the courts worked out a substantive law of slavery that was largely uniform, although with local variants, and that changed little over time.") .

[17] Wahl, "The Jurisprudence of American Slave Sales," 143.

interests to benefit from the best of both worlds--local control of slavery, with the intervention of Congress or the federal courts as needed, such as to assist in the apprehension of runaways.

The involvement of the federal government in the enforcement of the Fugitive Slave Act of 1793, as amended in 1850, represents a national legal and political policy favoring slavery which was actively implemented in the federal courts.[18] Federal intervention in support of slavery was based on article IV, section 2, clause 3 of the U.S. Constitution, which required apprehension and extradition of "fugitives from labor," a phrase synonymous with slaves. The Fugitive Slave Act thus represented direct involvement of Congress and the federal courts in the enforcement of proslavery public policy. Although at first glance, the fugitive slave law, as amended, appears brief and inconsequential, the impact of the legislation was momentous, as reflected in an extensive body of federal case law developed in connection with implementing and enforcing the statute. As a practical matter, congressional fugitive slave legislation extended the jurisdiction and limits of slavery into free states of the Union, meaning that escaped slaves frequently had to flee to Canada or seek refuge in some another country. The significance of the Fugitive Slave Act and the intervention of the federal courts which ensued from its enactment was that regulation of slavery was a national phenomenon, not merely regional in scope. Ultimately, American slavery was neither municipal nor local.

The central point of the Fugitive Slave Act as interpreted in *Prigg v. Pennsylvania* (1842), and the constitutional status of slaves held in free territories *Dred Scott v. Sandford* (1857) was that the federal constitution and statutes overrode state law to the contrary which prohibited slavery; in the ostensibly free states of the north, a runaway slave remained a slave, and slavery was neither municipal, local, nor confined

[18] Fehrenbacher, *The Slaveholding Republic*, 220 (fugitive slave clause of article IV "fundamental . . . without which the adoption of which the Union could not have been formed," quoting Justice Story in Prigg v. Pennsylvania).

geographically to the South. Although slaveholding may have been prohibited outside the South, slaves were not free, unless the freedom of the runaway slave could be favorably determined solely on state law grounds, or the federal statute ignored. In this way, enforcement of the fugitive slave law by the federal government was fundamental to maintaining the existence of the institution of slavery. The existence and enforcement of the fugitive slave acts represented a longstanding national policy on slavery which was not only a program of toleration and acceptance, but evidence of active involvement of the government enforcement through positive law.

On a daily basis, local courts in the South were directly involved with civil and criminal matters bearing on the status of slaves and the character and conditions of slavery. One reason was that the institution of slavery was deeply intertwined with the life, culture and economy of the South, and slaves themselves were numerous and ubiquitous in society.[19] In statistical calculations connected with an assessment of slavery, a dichotomy arises in terms of classifying cases as "of" or concerning" slavery, some of which are not about slavery at all, as the appearance of a slave in certain cases may have been incidental. In terms of statistical reporting, the pertinent issues are identification and counting.[20] In a strict sense, only those cases in which a slave was a party would be deemed to concern slavery; this test would eliminate almost all civil cases mentioning slavery except criminal cases and suits for freedom. Under this standard, by definition, slaves were almost invisible in the court system except on the criminal side. A broader definition of identifying and counting cases relating to slavery, and thereby judging the political, economic and social impact, is to include all cases mentioning slaves or slavery, excluding only the most obscure or cryptic references in the tabulation.

[19] Gross, *Double Character*, 23 ("the courthouse and the slave market . . . were central to southern culture.").
[20] Tushnet, *The American Law of Slavery*, 11 ("Catterall included all cases where a slave is mentioned in the statement of facts.").

Among references to slavery in court records are the administration of wills, trusts and estates in probate court concerning the distribution of slave property, breach of warranty cases relating to the fitness of slaves for labor and child-bearing, contracts for the sale and transfer of slaves and mortgages secured by slave property, damage cases associated with the injury or wrongful of slaves, actions for recovery of income associated with the hire of slaves by administrators or executors of estates, or contractors, suits for freedom filed by slaves, and prosecution of slaves for alleged violations of the criminal law. As part of enforcement of criminal law for offenses committed by slaves, trial and subsequent punishment of slaves, whether by whipping, branding, and on occasion for capital offenses, by execution, was carried out at the county jail or otherwise in close proximity to the courthouse with direct involvement by judges, lawyers, juries, the sheriff and other court personnel, circumstances indicating that control of slaves and regulation of slavery was not merely a private or local matter, but which depended on a comprehensive system of legal restraints enforced by government officials.

In Alabama and elsewhere in the antebellum South, most reported appellate cases concerning slavery were related to the status of slaves claimed by the litigants as property, initiated by and against slaveholders and other claimants who had standing in the courts, while the slaves in issue had no standing or capacity as parties. As a consequence, slaves were directly involved as litigants in few cases. In one sense, cases were not "about slaves" as such, but about their status as property or assets in the probate of an estate or a divorce, or as collateral in connection with a chattel mortgage. Numerous traditional causes of action, such as assumpsit[21], detinue[22], trover[23], trespass[24] and trespass on the case[25] were filed in connection with the recovery of slaves, damages

[21] Civil suit based on simple contract.
[22] Action for recovery of chattels or personal property, as opposed to land.
[23] Suit for damages based on conversion of property.
[24] Action for damages for injury to person or property.
[25] A species of trespass, caused by indirect act or resulting in secondary consequences.

for their injury or loss, or for unpaid wages and compensation in connection with the hire of slaves to third parties, indicating that the institution of slavery was a significant concern for courts and litigants.

Virtually the only occasions when slaves appeared as parties in court were as defendants accused in criminal cases and in connection with the statutory suit for freedom, which altogether amounted to about seventy reported appeals of several hundred reported decisions in the Supreme Court of Alabama from 1820 to 1865. In this category, the reported appellate cases involving slaves as actual parties were almost exclusively concerned with the prosecution of slaves for capital offenses, as most non-capital crimes alleged against slaves were handled by local justice courts. Further, most of the reported death penalty appeals were concerned with slaves convicted of assaults, robberies, rapes, or murders of white persons. To a lesser extent, slaves sometimes appeared in a related category of cases, those concerning slaves as complainants or victims of white persons accused of crimes against slaves.[26]

The role of slaves as direct litigants in antebellum courts is quickly and easily dismissed, as for almost all purposes, their access to the courts was denied and expressly not recognized; by definition and in accordance with their status, slaves had no standing or capacity to sue. In a case decided in the 1850s, and reaffirmed, the condition of the slave was described as a "complete abnegation" of civil capacity.[27] Their only standing as party plaintiffs was in the suit for freedom, a narrow exception recognized only by statute. They appeared on a limited basis as witnesses, but could not testify against white persons or contravene the testimony of white persons. Suits for freedom by slaves

[26] Sellers, *Slavery in Alabama*, 241-43; Morris, *Southern Slavery and the Law*, 218.
[27] Martin v. Reed, 37 Ala. 198, 199 (1861) (promissory note given to slave void).

amounted to only a few appeals, the first of which were heard by the Alabama Supreme Court in 1832, with most opinions on petitions for freedom issued in the 1850s, a decade of noticeable increase. In the broad category of emancipation, another subset of cases involving slaves consisted of testamentary bequests of freedom and emancipation by deed of gift. These cases, also few in number, were rarely successful. In the end, most successful emancipations occurred as the result of legislative relief acts, not as a result of lawsuits brought by or on behalf of slaves, in keeping with an era in which the legislature often exercised more authority than the courts. During the slavery era, slaveholder emancipations, whether by judicial decree or legislative act, were few and inconsequential, having no real impact on the institution of slavery or the slave population. Emancipations, although once permitted by the 1819 Constitution, virtually ceased by 1831 and were prohibited by act of the Alabama General Assembly in 1859, demonstrating the unyielding nature of slavery. Emancipations did not significantly moderate an institution which was lifetime and hereditary, and the legal system provided little recourse for slaves.

Resort to legal materials is necessary to understand the threshold issues in the study of slavery--to define the status of enslaved and free persons, and the conditions of slavery and freedom. On occasion, historical writing in this area launches into a discussion of slavery without defining the status or condition of slavery, the existence of a slaveholder-slave relationship is assumed as fact. As will be seen, this was not the character of antebellum slavery. The value of legal materials to historical research and writing on the subject of slavery is that they help define and explain the status of the slavery and the condition of slavery, between the slave owner and the slave, and the rest

of society as well. Legal materials show that slaves were numerous in southern society and ubiquitous in the annals of political and legal institutions of the region, such that the institution of slavery permeated every segment of daily life. Acts of the legislature, court cases, and other primary materials reflect intensive regulation of slaves as to each another and to every other group in the community by municipal, state and federal governments.

As a rule, among legal materials, trial records are the best anecdotal evidence of slavery. Unfortunately, as with other historical evidence, much of this resource has vanished over time due to loss or destruction. Nevertheless, sufficient materials remain extant such that careful reconstruction and reasonable extrapolation of data thereby derived, coupled with recognition of the inherent deficiencies in these types of records, corroborates a central thesis of scholars engaged in the study of American history, which holds that the management and preservation of slavery was an essential public, governmental function during the antebellum era, and not merely an institution administered as a private matter by slaveholders and their agents.

This dissertation, derived from the study of state and federal legal materials of the antebellum period, corroborates research and writing spanning the past several decades holding that the influence of slavery in southern society was pervasive, permeating all levels of the court system, and that the relationship of the institution of slavery and the legal system was one of mutual dependence. As a contribution to existing scholarship in the field of antebellum legal history and African-American slavery, this discussion builds on preexisting research and writing, utilizing trial records to a greater degree than heretofore undertaken, tracking individual cases from the trial courts through appeal, and, with reference to criminal cases, in some instances to the clemency process, as well as

evaluating statutory changes and developing court decisions from the Mississippi Territory to eve of the Civil War, thus constituting a study that is horizontal, vertical, and linear in the treatment of archival legal materials and historical sources. As a result, legal-historical materials derived from research provide greater context and detail of the interaction of African-Americans in the southern legal system, and more precisely define the contours of the institution of slavery, including the nature and extent of deprivations experienced by African-American slaves, their free counterparts, and their legal relationships with southern society as a whole during the antebellum period.

The following discussion is product of a records survey encompassing the courts of several Alabama counties, conducted at the Alabama Department of Archives and History, the University of South Alabama Archives, and the courthouses in Dallas and Macon counties. Printed volumes of federal and state appellate reports were reviewed at the Alabama Supreme Court and State Law Library, Jones School of Law, and Ralph Brown Draughon Library, Auburn University. Legislative materials were provided by Auburn University Archives and Special Collections, and the Bounds Law Library, Special Collections, University of Alabama School of Law.

CHAPTER 1

COLONIAL, TERRITORIAL, AND STATE CODES AS A SOURCE OF STATE LAW AFFECTING SLAVES AND THE INSTITUTION OF SLAVERY

To a considerable degree, the management of slavery was most associated with ordinances, acts, statutes and codes, since the vast majority of cases involving slave matters were adjudicated by justice courts and other inferior courts that were not courts of record with few resulting appeals which might have resulted in a permanent historical record. Acts of the Mississippi Territory were the principal origin of legislation governing slavery in antebellum Alabama. A comparison of colonial and territorial slave codes, and state law of Alabama and neighboring slave states, indicates generic provisions constituting common elements associated with the management of slavery among the jurisdictions.

An initial question pertaining to the early colonial period in North America, as an antecedent to slavery in nineteenth-century Alabama, is whether laws and legislation preceded or followed the introduction of slavery, or were contemporaneously promulgated. The apparent answer is that slavery appeared first, sometimes closely followed by rules on the subject which were local in nature and effect, an assessment supported by the observation that slavery arose and evolved in wilderness areas of the Americas remote from European colonial powers and their proxies involved in

slave trading, such as England, France, Spain, Portugal, and Holland. However, this evaluation must be qualified when the enslavement of Indians in the Americas, preceding the introduction of African slavery, is considered. More specifically, in early seventeenth-century Virginia, among the first bonded servants were Native Americans, although few in number. This experiment was brief, and contemporaneous indentured servitude of white persons was supplanted by African slave labor on a much larger scale.

Some texts assert that the first recorded arrival of Africans in Jamestown in 1619 were "indentured servants," an assumption which can not be firmly supported or refuted, in part because there were no royal or colonial laws on the subject of slavery governing Virginia to provide a point of reference. These African individuals were most likely regarded as slaves, much like their counterparts in the slave colonies of the British and French Caribbean islands. Among the first benchmarks for legal control of African slavery was the enactment of a slave code in Barbados in 1661, having origins in a 1636 order in council on that island. Virginia enacted a slave code in 1663, closely resembling if not actually patterned on the slave code of Barbados, thereby removing all doubt as to the status of Africans at that juncture and according official recognition to their condition. In brief, colonists and colonial governments had experience with slaveholding even before the concept of African slavery was firmly established. Initially, since the master-slave relationship originated on the west coast of Africa, accomplished by force or deception associated with kidnapping and ransom, positive law was not required to establish or sustain African slavery since the condition of bondage arose from extralegal acts, independent of existing law, or in the complete absence of law on the subject of slavery.

Earlier forms of slavery, not necessarily involving Africans, declined and disappeared in western Europe, and in England after the Norman Conquest, and were supplanted by feudalism. A series of royal edicts prohibited slavery in France well before significant exploration of the Gulf Coast and lower Mississippi Valley. The African slave trade as conducted by Europeans, beginning in the sixteenth century, occurred in a legal vacuum, since by that time slavery was virtually unknown; thus, there was no apparent legal justification or precedent for the practice. Thus, the question as to European slave trading and slaveholding activities in Africa and the Americas is largely one of jurisdiction. As has been noted that the United States Constitution "stops at water's edge," while slavery may have been prohibited or was otherwise non-existent in the nations of western Europe or England during the early colonial period, such laws were limited by territorial boundaries and land-based, inapplicable to maritime activities on the high seas, on the African continent, or in North America. Hence, for over two hundred years, African slavery arose and developed by self-help and without significant royal regulation or control.

As has been widely noted, slavery in the Americas was first attempted by European colonial powers with the enslavement of Native Americans. Eventually, slavery shifted to Africans and persons of African descent; by 1700, the identification of slavery with individuals of African ancestry, and the corresponding exclusion of white persons as indentured servants and Indians, became fixed as a fundamental component of the institution.

Well in advance of recorded or clearly-defined slave codes applicable to North American colonies, early explorers and travelers to the southeast were customarily

accompanied by African slaves and encountered instances of slaveholding of Indians by other Indians, constituting some evidence that slavery could exist beyond the auspices of government or formal legal controls. Expedition parties organized by the French along the Gulf Coast often consisted of a few African slaves. The eighteenth-century naturalist William Barttram, who journeyed among the southeastern Indians in the 1700s, recorded the occasional presence of slaves in his party, who worked as deckhands aboard ship and then ashore as laborers, occurring in frontier areas of disputed control and conflicting claims of the colonial powers, largely in the absence of rules governing slavery and well beyond the reach of conventional courts. Early governance of the frontier was established and maintained by military rule, then by colonial governors operating largely unchecked by legislatures, or as in the early days of the Mississippi Territory, without any legislature whatsoever.

The substantive and procedural law governing slavery implemented in the Mississippi Territory had a variety of sources. In addition to British colonial influence and states in the region, the colonial slave codes of France and Spain had an impact, although of less consequence. While the legislation of preexisting neighboring slaveholding jurisdictions of the United States and the antecedent British colonies was the most pervasive influence in the Mississippi Territory, in addition to British administration, the origins of the antebellum slave code in Alabama were colonial slave codes adopted by France and Spain, particularly in southwest Alabama. Before the Mississippi Territory was organized, the earliest royal, executive, legislative and legal slave controls along the Gulf Coast were French and Spanish slave codes. The averred differences between the French and Spanish slave codes, on one hand, and the subsequent

enactment of the slave code in the Mississippi Territory, on the other, have been overstated to some degree, particularly as to the availability of emancipations. Specifically, it has been suggested that under the French and Spanish slave codes, emancipations were more readily obtained; yet, the French, Spanish, and Virginia slave codes concurrently moved in the same restrictive direction, first by prohibiting manumissions based on Christian baptism, occurring decades before the Mississippi Territory was established in 1798. In the final analysis, when comparable eras of slavery in the respective colonies are compared, colonial manumissions were negligible in mitigating the effects of slavery in areas under British, French, or Spanish control.

Further, the adoption of the slave code in the Mississippi Territory, having origins in the older slaveholding states and former British colonies, beginning in Barbados in 1636, eventually superseded and subsumed French and Spanish law, notwithstanding preexisting provisions and practices, such as emancipation by contract, which was never recognized in Alabama. When concurrent time periods or eras of slavery regulation in the colonies are compared, the differences among them are nominal, and in essential provisions, one slave code was as rigid as another in circumscribing the population. The fundamental provisions of the French and Spanish slave codes closely resembled the British counterpart, particularly in comparisons of corresponding colonial slave codes of the same era. Further, examination of the Spanish administration of slavery in West Florida after 1763 reveals slave codes and practices closely resembling the institution of slavery as established in the Mississippi Territory.

The thirty-first parallel, the southern boundary of the Mississippi Territory as first established, was substantially the extension of the southern boundary of Georgia to the

Mississippi River near Natchez. South of this boundary, the intersecting influences of Britain, France, and Spain, the principal European powers active in the region, must be considered, most notably as to present-day southwest Alabama. This area, although claimed by the United States under the 1803 Louisiana Purchase and occupied in 1812, on the basis that French Louisiana had once extended to the Perdido River, was not formally incorporated into the territory until the Spanish cession of West Florida under the treaty of 1819.[28] From the 1680s to 1803, this territory along the Gulf Coast changed hands among France, Spain, Britain, and then the United States.

Among the three colonial powers, the administration of slavery by France in Louisiana was more centralized and subject to royal controls than under subsequent Spanish rule, and in the British colonies, including West Florida. Spanish rule after 1763 in the region resembled the former French administration. Essentially, the *Code Noir* of 1685, and edict of the king, was a product of work begun in 1681 by intendents[29].or counsellors to Louis XIV to respond to the growth of slavery in the French colonies of the Caribbean by promulgating ordinances to regulate the practice, although in France

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[28] Treaty with Spain (Adams-Onís Treaty), 1819, ratified Feb. 19, 1821, 8 Stat. 252, 254, art. 1 (cession of all territories east of the Mississippi River "known by the name of East and West Florida").

[29] Royal legal or fiscal officer, colonial administrator. According to Palmer, "Slave law emanated from four sources within the French colonial system: edicts and *ordonnonces* issued by the king, decrees of the governor-general and intendant of all the islands, local regulations (arrêts) issued by Sovereign Councils [at Martinique, Guadeloupe, and St. Christophe], and customs and usages which arose on particular islands. *As the instructions to the drafters acknowledge, there was no royal legislation about slavery prior to 1681. The Code Noir was the first and most conspicuous example of this type of legislation.*" Vernon V. Palmer, "The Origins and Authors of the *Code Noir*," in *The Louisiana Purchase Bicentennial Series in Louisiana History, Vol. XIII, An Uncommon Experience in Law and Judicial Institutions in Louisiana, 1803-2003*, Judith Kelleher Schafer and Warren Billings, eds. (Lafayette, La.: Center for Louisiana Studies, University of Southwestern Louisiana, 1997), 334-37 (emphasis added).

proper, slavery was prohibited. Spanish and British colonial slave codes arose under similar conditions, as slavery, while established in the colonies, was not recognized in Britain or Spain.[30]

While the manumission provisions of the *Code Noir* of 1685 are sometimes characterized as liberal, the developing parallel trend in the colonies of Britain, France, and Spain was the secularization of subsequent colonial slave codes pertaining to slaves, reflected by the imposition of increasing restrictions on manumissions, a development characterized by Vernon Palmer as a "retrenchment," evident in the adoption of the Louisiana Black Code of 1724. Under the Black Code, baptism was precluded as a means of emancipation, as had occurred in Virginia in 1705.

Under the *Code Noir*, once slaves reached twenty years of age, slaveholders could liberate slaves by most any method, intervivos[31] or testamentary[32] acts, unilaterally and without any intervention of the government. However, by the royal Ordinance of October 24, 1713, this program of manumission was repealed; afterward, slaves could be freed only with permission of the governor-general and the intendant. The eligible age for manumission was raised to age twenty-five. These restrictions were incorporated into the Louisiana Black Code of 1724.[33]

Among other provisions, the *Code Noir* of March 1685, governing the Caribbean colonies, stated that an unmarried slaveholder fathering a child “in concubinage" with his

[30] Ibid., 338-343.
[31] act during the lifetime of the slaveholder to liberate a slave, usually by contract or deed.
[32] act of emancipation by last will and testament of slaveholder, effective at his death.
[33] Palmer, "Origins and Authors of the *Code Noir*," 349.

slave should marry the mother, and the children would be manumitted.[34] Although slave marriages were solemnized by a church wedding ceremony, slaveholder consent was required, and consonant with the status of slaves, such marriages were not accorded legal recognition.[35] Children of a slave husband and free mother followed the condition of their mother, "free like her." Slaves were forbidden to be parties in civil suits.[36] A slave striking "his master or the wife of his master, his mistress or their children to bring blood, or in the face," was punished with death.[37] In certain respects, the *Code Noir* contained liberal manumission provisions. Slaveholders twenty years old were able to effect manumission of their slaves by deed or will without being required to provide the reason for manumission. Slaveholders at least twenty-five years old did not need the permission of their parents to manumit slaves.[38] Also under the Code, children made "universal beneficiaries" by their masters, or named "executors of their testaments" or "tutors of their children," would be "held and regarded as manumitted."[39] Additionally, manumissions enacted in the French Islands were intended a substitute for free birth as French citizens; accordingly, manumitted slaves did not need "letters of naturalization" to

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[34] *Code Noir, ou, Recueil d' édits, déclarations et arrêts concernant les esclaves négres de l' Amérique: avec un recueil de réglemens, concernant la police des isles françoises de l'Amérique & les engages (Paris: Les libraries associez, 1743) [Code Noir of France, Edict of the King concerning the enforcement of order in the French American Islands from the month of March 1685, Registered at the Sovereign Council of St. Domingue, May 6, 1687*] (New Haven, Conn.: Goldsmith-Kress Library of Economic Literature, Research Publications, 1974) (microfilm), no. 8002.2, First Article, IX, 6-7; 354, n. 56.
[35] Ibid., XI, 7.
[36] Ibid., XXXI, 16.
[37] Ibid., XXXIII, 17.
[38] Ibid., LV, 25.
[39] Ibid., LVI, 25-26.

enjoy the advantages of French subjects in the kingdom, land and countries under control of the king, although born in "foreign lands."[40]

While the timing of the first "actual importation" of slaves into the Alabama Gulf Coast is uncertain, their arrival occurred by 1721 and prior to the adoption of the Louisiana Black Code of 1724. Between 1701 and 1721, Bienville, the lieutenant governor of French Louisiana, pressed for the importation of slaves, but was initially refused. Sellers notes that in 1716 a few slaves resided on Dauphin Island and in Mobile. In March 1721, the ship *Africane* arrived in Mobile with 120 slaves. The *Marie* brought 338 more slaves in 1722.[41]

Officially, the *Code Noir* of 1685 applied only to the French Caribbean islands. As slavery was introduced on a larger scale along the Gulf Coast, the royal response was the issuance of a new edict regulating slavery in the mainland colony of Louisiana in 1724, known as the "Edict Concerning the Negro Slaves in Louisiana." The Black Code of 1724, comprised of fifty-five articles, closely resembled the provisions of the *Code Noir* of 1685. Certain elements of the Black Code were continued by the Spanish on assuming control of Louisiana in 1763[42]

Spain, like France, had a slave code which in certain respects resembled the French slave code, particularly in provisions for the emancipation of slaves and children who were the issue of slaveholder and slave unions. The status of this class of inhabitants was implicated in various ways as the United States acquired the Gulf Coast by a series of treaties. By the Treaty of San Lorenzo in 1795, Spain ceded lands which

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[40] Ibid., LVII, 26.
[41] Sellers, *Slavery in Alabama*, 4.
[42] Alcée Fortier, *A History of Louisiana*, 2d ed., edited by Jo Ann Carrigan, (Reprint, Baton Rouge, La.: Claitor's Publishing, 1966), vol. I, 87-94.

constituted part of claims by the state of Georgia which, in turn, were ceded to the United States and became part of the Mississippi Territory. Likewise, under the Adams-Onís Treaty in 1819, Spain transferred West Florida which included Mobile and surrounding territory, a portion seized during the War of 1812 on the grounds that the area was part of the Louisiana Purchase. Under treaties with Spain, Creoles[43], or persons of mixed Spanish and African ancestry residing in the subject territory, were deemed free, on the basis that although having African ancestors, those ancestors had never been slaves. Therefore, such descendants inherited the freedom of their ancestors by custom, tradition and by virtue of international treaties which were adopted by the United States in connection with the creation of the Mississippi Territory.

Accordingly, the Code of Alabama (1852), in reliance on preexisting treaties and territorial ordinances, provided that the "preceding sections of this article [II, relating to free negroes] do not apply to, or affect any free person of color, who by treaty between the United States and Spain, became a citizen of the United States, or the descendants of such."[44] The practical effect of treaties and state law on the subject was considered incidentally in *Tannis v. Doe* (1852)[45] and *Lodano v. State* 1854)[46]; collectively, the cases reflected the view that free persons of color who were previously inhabitants of Spanish possessions acquired by the United States were vested with the same privileges and

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[43] The term "Creole," as used herein, refers to persons of mixed European and African ancestry, more particularly, individuals of combined Spanish and African American origins, inhabiting the Gulf Coast after Spain acquired Louisiana and West Florida from the French in 1763 and in the subsequent transfer of the territory to the United States.
[44] Ala. Code § 1037 (1852).
[45] Tannis v. Doe, 21 Ala. 549 (1852).
[46] Lodano v. State, 25 Ala. 64, 66-68 (1854) (conviction in the City Court of Mobile for the sale of liquor to a free person of color whose mother and grandfather were inhabitants of Mobile before Spanish cession, affirmed).

immunities as other citizens, and treaties and laws related such transfers of sovereignty neither augmented nor diminished the rights of this segment of the free black population. The principal benefits which inured to Creoles with the Spanish cession was not enhanced personal rights as free persons of color, but in land grants and titles established under French and Spanish colonial rule, and their rights to assert them, as indicated in several early Alabama cases. The *Lodano* case suggests that as a matter of custom, the Creole descendants of inhabitants of the Spanish territory may have enjoyed an enhanced status in the community, although not recognized by the courts.

Thus, the free black population on the Gulf Coast, concentrated in the Mobile area and New Orleans, constituted a community which arose from hereditary status, descent, and the product of natural increase, independent of voluntary slaveholder or legislative emancipation, which in the Mississippi Territory, was subject to increasing restrictions. The significance of this circumstance bears on the origins and efficacy of the state's manumission and emancipation policies, and the size of the state's resulting resident free black population. Although negligible, the state's free black population was more the result of international treaties and preexisting manumissions, subsequently recognized by state law, as noted above, than any public policy favoring emancipation; which was the reverse--manumissions were discouraged. When permitted, freed slaves under the act of 1834 were required to leave the state within six months, and free persons of color entering the state after February 1, 1832 and failing to depart on demand of the sheriff, justice of the peace or other judicial officer within thirty days faced imprisonment of two

years, and after discharge, if failing to leave, could be imprisoned for another five years.[47] By 1860, emancipations were prohibited.

Slavery provisions antecedent and parallel to Mississippi territorial statutes and the laws of Alabama are found in Virginia, South Carolina and Georgia. Virginia, with the earliest and most comprehensive slave code and the first law regulating slavery in 1630 (anti-miscegenation act), strengthened by subsequent codes in 1662, 1699 and 1705, provided the model for the regulation of slavery which moved south and westward with settlers.

In Virginia, the oldest slaveholding colony, an act regulating slavery was passed in 1663. Some authorities maintain that the Virginia slave act was patterned on legislation enacted in 1636 and 1661 on the island of Barbados. By 1705, Virginia adopted a comprehensive slave code. Emerging British colonies, such as South Carolina and Georgia, emulated the slave codes of Barbados and Virginia.[48] After the American Revolution, the component slaveholding states carried forward the colonial slave codes with few variations.

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[47] Ala. Code. § 1033 (1852).

[48]Bradley J. Nicholson, "Legal Borrowing and the Origins of Slave Law in the British Colonies," *American Journal of Legal History* 38, no. 1 (Jan. 1994): 49-53. "The Barbadian slave code was enacted in 1661; as with the French in St. Domingue, slave controls were effected by local regulations promulgated by provincial governors in council. The South Carolina slave code was directly based on the slave code of Barbados, and in turn, Georgia relied on the South Carolina code. The Virginia slave code, effective 1705, arose independently of the Barbados slave code." Ibid.at 53. *See also,* Hilary McD. Beckles, *White Servitude and Black Slavery in Barbados, 1627-1715* (Knoxville, Tenn.: University of Tennessee Press, 1989), 76-77 ("Legal codes for the control of all unfree laborers were widespread in colonial America, although . . . such codes were most severe in the case of black chattel slaves. Barbados did not develop slave and servant codes until 1661, by which time the numerical and economic significance of servants in the society was rapidly vanishing.").

Despite the influence of French and Spanish colonial rule in the Gulf Coast area later included within the Mississippi Territory, except for Louisiana, the emancipation provisions of French and Spanish colonial edicts were not adopted. Instead, under the Mississippi Territory, a meritorious act by the slave was required, followed by an act of the legislature.[49] Restrictive manumission provisions of Virginia, South Carolina and Georgia were adopted, such as the principle *partus sequitur ventrum*, meaning that a child assumed the status of his mother (1662), and Christian baptism did not change the slave status of the convert (1667).

The provisions of a new colonial South Carolina slave code of 1740, called the "Negro Act," passed in response to the Stono slave rebellion of 1739, was the basis for the first Georgia colonial slave code enacted in 1755. The Georgia slave code was amended in 1765 and 1770, and, along with the South Carolina slave code, may have had some influence on the slave provisions of the Mississippi territorial acts and the subsequent Alabama Constitution of 1819. On sources of southern slave law, Morris establishes the enactment of the North Carolina slave code as occurring in 1741. South Carolina's "first provision" on the status of mulattoes as slaves was enacted in 1712. By 1770, Georgia adopted "not only slavery but the legal code of South Carolina."[50]

Initially, slavery was permitted in most of the British-American colonies, including New England, Pennsylvania, New Jersey and New York. The slave code of colonial New York, with a slave population greater than any other northern colony, "equalled the severity of the codes in operation below the Potomac" from 1712 to the end

[49] Sellers, *Slavery in Alabama*, at 215, citing Toulmin's Digest (1823), *passim*.
[50] Morris, *Southern Slavery and the Law*, 46.

of the eighteenth century.[51] New York emancipated all slaves born after 1799 and a gradual Abolition Act of 1817 was passed, which freed all slaves born before July 4, 1799. In the meantime, restrictions on emancipation in the southeastern slaveholding states were tightened.

Mississippi territorial acts relating to slavery resembled pertinent provisions of the New York slave code in force during the 1700s. For example, even as late as 1815, chattel slavery was articulated as a basic doctrine when a justice of the New York Supreme Court stated in the opinion of *Cocklin v. Havens* that "slaves are considered, on questions in relation to the right of property in them, as goods and chattels, and consequently, *such questions are to be decided as the same legal principles as a applicable to that sort of property*."[52] Other elements of the New York slave code, such as certain crimes committed by slaves against white persons made capital, prohibitions against entering into contracts, making a will, getting married, testifying for or against white persons, as well as other legal disabilities, bear a striking resemblance to the slave codes of the Mississippi Territory and as later enacted in Alabama.

Criminal procedure applied to the cases of slaves accused of capital crimes in the Mississippi Territory resembled New York practice in the eighteenth century. As in the Mississippi Territory and Alabama, the justice of the peace and justice courts played a central role in the administration of slavery. In New York, the slave was brought before the justice of the peace on a warrant. If the slave appeared guilty on summary examination, he was committed to jail. The commitment was treated as an indictment; as

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[51] Edwin Olson, "The Slave Code in Colonial New York," *Journal of Negro History 29*, No. 2 (April 1944), 147.
[52] Ibid., 148 (emphasis added).

in the courts of the Mississippi Territory, no grand jury presentment or indictment occurred preceding the trial of slaves. The slave was tried by at least two justices of the county and five freeholders. No peremptory challenges were permitted. If the slaveholder paid a fee, the case would be tried by a jury of twelve. On conviction, an appraisal procedure to value the condemned slave was conducted, a procedure resembling a valuation process used in Alabama.[53] As procedure for the trial of slaves evolved, in slaveholding states such as Alabama, slaves accused of capital crimes were accorded a grand jury indictment and a trial by jury in circuit court, and allowed peremptory challenges.

With Georgia as a state contiguous to the Mississippi Territory, which was created from the Georgia Cession of 1802, examination of Georgia constitutional and legislative provisions during the same period is warranted. Georgia was unique as the only colony to prohibit slavery as a matter of public policy until 1751, when slavery was permitted. A provisional slave code was replaced in 1755 by a code that was virtually identical to the South Carolina slave code.

The 1777 Georgia Constitution made no mention of slavery. Subsequently, article IV of the Georgia Constitution of 1798 prohibited the "future importation of slaves" into the state. Also, the legislature had no power to "pass laws for the emancipation of slaves without the consent of each of the respective owners," a provision emulated in the Alabama Constitution of 1819. The legislature could not prevent emigrants from bringing their slaves to Georgia from other states.[54] For protection of slaves from cruelty, article IV also provided that "[a]ny person who shall maliciously

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[53] Ibid., 149-51.
[54] Ga. Const. (1798), art. IV, § 11.

dismember or deprive a slave of life shall suffer such punishment as would be inflicted in case the like offence had been committed on a free white person, and on like proof, except in case of insurrection by such slave, and unless such death should happen by accident in giving such slave moderate correction." Similar language is found in the antebellum Alabama Constitution and statutes.[55]

Article III of the Georgia Constitution of 1798 established superior and inferior courts which were to be established by the legislature. Under article III, justices of the inferior court were appointed by the general assembly. Justices of the peace were nominated by the inferior courts of the counties, "two for each captain's district," having the power to try all cases of a civil nature not exceeding thirty dollars in controversy.[56] Although criminal jurisdiction was unspecified, implicitly justices of the inferior courts and justices of the peace would exercise criminal jurisdiction commensurate with common law. Alabama emulated the justice model in the antebellum statehood era.

Amendment II to the 1798 Georgia Constitution, ratified on December 13, 1811, provided that the judicial powers of the state of Georgia were "vested in a Superior, Inferior and Justices Courts," and other courts as established by the legislature, giving the justice courts constitutional standing. Further, Superior Courts were conferred with "exclusive and final jurisdiction in all criminal cases except as relates to people of color . . . which shall be vested in such judicature or tribunal as shall or may have been pointed out by law, which shall be tried in the county where the crime was committed . . . .[57]

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[55] Ibid., art. IV, § 12
[56] Ibid., art. III, §§ 5, 6.
[57] Ibid., amend. II, ratified Dec. 13, 1811.

Another source of influence in the Mississippi Territory was Tennessee, the staging point for military activities relating to the War of 1812 and the Creek War. The Tennessee Constitution of 1796 contained no specific mention of slavery, but in defining qualified electors and officeholders, and setting forth the declaration of rights, made references to free persons. Under article 5, superior and inferior courts were authorized, including courts of law and equity, to be established by the legislature. Judges of the superior courts were designated as justices of oyer and terminer.[58] The system of court organization contemplated a county court system and justices of the peace. The 1796 Constitution specified a court organization similar to that adopted in the Mississippi Territory, but the relationship of the court to the management of slavery is uncertain.[59]

Likewise, the Tennessee Constitution of 1834 made no express mention of slavery. As an added provision, at variance with Alabama law in the same period, article IV, section 1 defined an eligible voter as a "free white man," and went on to state that "no person shall be disqualified from voting in any election on account of color, who is now, by the laws of this State, a competent witness in a court of justice against a white man. All free men of color shall be exempt from military duty in time of peace, and also from paying a free poll-tax."[60]

The Mississippi Constitution of 1817 reflected the common source of the Mississippi territorial ordinances for Mississippi and Alabama, and ensuing legislation and judicial decisions in the area of slavery. Under the 1817 Constitution, equality of

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[58] Oyer and terminer: trial courts having criminal jurisdiction; derived from English jurisprudence and implemented in the colonies; the origin of specialized justice courts later adapted for the trial of slaves in the Mississippi Territory.
[59] Tenn. Const. (1796), art. V, §§ 1, 4, 7, 12, adopted Feb. 6, 1796, eff. June 1, 1796.
[60] Ibid., art. IV, § 1.

rights was conferred on "freemen."[61] Under article V, the judicial department, consisting of a supreme court and superior and inferior courts in each county, as established by the legislature was authorized. Chancery jurisdiction was vested in the superior courts. Separate law and chancery courts were established under the Constitution of 1834. Justices of the peace were appointed for each county. Civil jurisdiction was defined as cases with an amount in controversy not exceeding fifty dollars. No specific authority of the legislature or the courts to regulate slavery was mentioned.

The language of the slavery provisions of article VI of the Mississippi Constitution, as with the Alabama Constitution of 1819, tracked preexisting territorial statutes. In turn, article VI of the Alabama Constitution of 1819 was patterned after the slavery provisions of article VI of the Mississippi Constitution. In section 1, the General Assembly had no power to pass laws for the emancipation of slaves without the consent of their owners, unless the slave rendered to the state some distinguished service. If a slave were emancipated, the owner had to be paid "a full equivalent" for the slaves emancipated. Importation of slaves from other states was not allowed unless they were the property of such "immigrants." Laws could be passed to prevent introduction of slaves convicted of high crimes in other states.

The legislature was authorized to pass laws to permit emancipation of slaves, saving the rights of creditors and preventing emancipated slaves from becoming a public charge. Owners were required to treat slaves with humanity, provide them with necessary clothing and provision, to abstain from all injuries to them extending to life or

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[61] Miss. Const. (1817), art. I, "Declaration of Rights," § 1, adopted July 7, 1817

limb, or in case of their neglect or refusal to comply with the benefit of such laws, to have such slaves . . . sold for the benefit of the owner . . . ."[62]

In the prosecution of slaves for crimes, section 2 of article VI provided that "no inquest by a grand jury shall be necessary, but the proceedings in such cases shall be regulated by law, except that in capital cases, the General Assembly shall have no power to deprive them of an impartial trial by petit jury."[63]

An act for the government of United States territory south of the Ohio River was passed in 1790.[64] The Mississippi Territory was created by act of Congress on April 7, 1798.[65] The provisions of the Northwest Ordinance of July 13, 1787 were adopted for governance of the territory, "excluding the last article of the ordinance" which prohibited slavery north of the Ohio River, thereby allowing slavery in the new territory.[66] Although importation of slaves into the territory from foreign ports was prohibited, slaves could be brought in from other states.[67]

On May 7, 1798, President John Adams appointed Winthrop Sargent of Massachusetts, formerly secretary of the Northwest Territory, as governor of the Mississippi Territory. Peter Bruin, a resident of Natchez, Daniel Tillton[68] of New

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[62] Ibid., art. VI, "Slaves," § 1.
[63] Ibid, art. VI, "Slaves," § 2.
[64] 1 Stat. 123, May 26, 1790.
[65] *An Act for the Amicable settlement of limits within the state of Georgia, and authorizing the establishment of a government in the Mississippi territory*, 1 Stat. 549, April 7, 1798.
[66] Ibid., 1 Stat 549, 550, § 3, § 6.
[67] Ibid., § 7. Carrying on the slave trade from the United States to "any foreign place or country," or "exportation," was prohibited in 1794. 1 Stat. 347, March 22, 1794. The Congressional ban on importation of slaves into any port or place within the jurisdiction of the United States became effective January 1, 1808. 2 Stat. 426. March 2, 1807.
[68] Sic. Alternate spelling "Tilton." *Sargent's Code: A Collection of the Original Laws of the Mississippi Territory Enacted 1799-1800 by Governor Winthrop Sargent and the*

Hampshire, and William McGuire of Virginia were appointed territorial judges. The panel of judges, along with Sargent, functioned as the appointed, unelected territorial legislature until 1801, a source of unpopularity among settlers. McGuire, the only lawyer of the group, virtually withdrew from participation and had no apparent involvement in the promulgation of the initial territorial laws in 1799 and 1800.

In January 1799, Sargent, Tillton and Bruin began to issue laws for the territory. McGuire had minimal involvement with the process, as he left the territory in September 1799; hence, the ensuing enrolled laws of 1799-1800 bear only the signatures Sargent, Tillton and Bruin. The resulting enactments from 1799 to 1800, commonly known as *Sargent's Code*, were, according to one source, except for provisions relating to slaves, predominantly based on the laws of the Northwest Territory, a likely conclusion due to Sargent's previous service as secretary of the Northwest Territory and reference in the act of Congress establishing the Mississippi Territory to the Northwest Ordinance.[69] The precise origin of Sargent's Code, in particular provisions relating to slavery, is unknown.

On October 30, 1800, Sargent, and Mississippi territorial judges Seth Lewis and Bryan Bruin issued an omnibus court reorganization act consisting of fifty sections, making the law the longest and most comprehensive issued in the period from 1798 to 1800. The act fixed sessions of the Supreme Court of the Mississippi Territory at Natchez in Adams County. Previously the Supreme Court convened in various counties across the territory. The act contained references to the conduct of the court of quarter sessions in Adams County, and duties of the justices of the inferior courts in issuing

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Territorial Judges (Jackson, Miss.: Works Progress Administration, National Records Survey, 1939), i-ii; William L. Jenks, "Territorial Legislation by Governors and Judges," *Mississippi Valley Historical Review* 5: no.1. (June 1918), 36-50.

[69] *Sargent's Code*, i-ii.

attachments in conjunction with the courts of common pleas and quarter sessions.[70] Under Section 25 of the act, "all statutes of England and Great Britain for amendment of the Law, commonly called the statutes of Jeofails, which are received and enforced in the state of North Carolina, as the Laws of said state, be, and the same are hereby adopted and declared to be in force in this territory."[71] The significance of the adoption of "jeofails," or the allowance of amended or corrected pleadings, is that the provision shows the adoption of certain provisions of North Carolina law, a slaveholding state, in the territory, as well as the common law of England which exerted considerable influence on antebellum jurisprudence.

In accordance with the initial territorial ordinances, three courts were established—the court of general quarter sessions, the court of common pleas, and a supreme court of appeals on which not less than two territorial judges were required to sit.[72] The origins of the courts of common pleas and the court of general quarter sessions, and their relationship to the administration of slavery, are not clear, although such courts were previously known in the British-American colonies, Atlantic seaboard states in post-Revolutionary America, and in medieval and Early Modern England. Sargent, a Massachusetts native, may have been inspired by colonial and post-Revolutionary Massachusetts, which had courts of common pleas, general sessions, and a supreme court of judicature, terms which appear in connection with the first territorial courts established.

[70] Ibid., 136-57, *A Law to alter, and amend a law heretofore passed in this Territory, entitled 'A Law fixing the place where the Supreme Courts for this Territory shall be held, the number of Sessions and the time of holding them,' and for other purposes*, §§ 2, 5,35-36; § 19, 141-42; § 26, 146; § 35, 149-50.
[71] Ibid., § 25, 145-46.
[72] Ibid., ii, 121, Sept. 21, 1799.

The first slave code for the territory was adopted on March 13, 1799. Under the slave code, the justice of the peace exercised jurisdiction over slave matters. A review of the early court organization of the territory indicates the manner in which the tribunals were adapted to the supervision of slavery. The justices of the peace were connected with the court of common pleas, presiding in a manner similar to justices of the quorum, or county court judges sitting as justices of oyer and terminer in slave matters later in the territorial period. Ostensibly, designation of courts of "general" quarter sessions seems to rule out participation by justices of the peace, as such dockets were general, not special, the latter associated with slave tribunals. Alternatively, in England and in colonial America, a court of quarter sessions was sometimes referred to as a court of quarter sessions "of the peace," the suffix indicating the use of special dockets and jurisdiction as might be required to try slave offenses.

The character of the court of general quarter sessions in suppressing treasonable and seditious language is associated with criminal jurisdiction. The labels of court of common pleas and quarter sessions may have been derived from the courts of existing states, colonial courts, or England. Territorial judge Daniel Tillton of New Hampshire may have influenced initial court organization in the territory; New Hampshire had courts of common pleas and quarter sessions. Kentucky, a slave state, had courts of common pleas, quarter sessions and oyer and terminer, all variously associated with the administration of slavery. Courts of common pleas also existed in the slave states of Georgia and South Carolina. Tennessee, a state contiguous to the territory, convened courts of quarter sessions.

During the colonial and early national period, most of the states constituting the original thirteen colonies had courts of common pleas, quarter sessions, or oyer and terminer. Throughout the antebellum era, even post-Revolutionary state courts operating under other designations regularly cited the practices of English courts of common pleas, quarter sessions, and oyer and terminer as precedent. In the end, the duration of courts of common pleas and quarter sessions in the Mississippi Territory was brief. After Sargent was removed as territorial governor and replaced by William C. C. Claiborne in 1801, courts of common pleas and quarter sessions were abolished and replaced by a varied system of territorial county, circuit, and superior courts, with justices of the county court and justices of the peace presiding as courts of oyer and terminer over the trials of slaves.[73]

Under “A Law establishing courts of Judicature,” issued by Governor Sargent and two of the three territorial judges, Peter Byran Bruin and Daniel Tillton, on February 28, 1799, the court of the General quarter sessions of the peace was established.[74] The law further provided for a “competent number” of Justices in every county, nominated and commissioned by the governor. Three of the justices constituted “the quorum" which convened “General Sessions of the peace" and held special sessions “when, and as often" as required. The act also authorized a court of oyer and terminer and general Gaol delivery, or oyer and terminer, as well as a justice of the peace system.

Oyer and terminer courts, essentially criminal courts, became associated with the charging and trial of slaves for criminal offenses. Under subsequent territorial law, justices of the quorum of the county courts, along with justices of the peace, constituting

[73]*Sargent's Code*, 121.
[74]Ibid., 6, Act of Feb. 28, 1799.

a panel of three judges, sat as courts of oyer in terminer in the trial of slaves, but with important differences. Historically, operating in England, the American colonies and the post-Revolutionary period, oyer and terminer courts were characterized by (1) a panel of justices of the county court or justices of the peace, usually three in number presiding over trials; (2) criminal jurisdiction; (3) special sessions and dockets, as opposed to general sessions; (4) recognizance, bail, and habeas corpus; (5) grand juries, presentment, and indictment; (6) petit trial juries, comprised of twelve members.

After 1801, the courts of common pleas and the court of general quarter sessions were superseded by a county court system operating in conjunction with justices of the peace, sitting in oyer and terminer in slave trials. The oyer and terminer courts used for the trial of slaves accused of crimes lacked the traditional common-law elements associated with the trial of free persons for similar offense, namely as to points (4), (5) and (6), above, relating to bail and habeas corpus, grand jury indictments, and petit juries, all of which were eviscerated from the procedures utilized in the trial of slaves. Initially, all oyer and terminer courts convened for the trial of slaves were non-jury, with three justices of the quorum, three justices of the peace, or a combination thereof.

Later in the territorial period, trial by jury of slaves for capital offenses was instituted. With the adoption of the 1819 Alabama Constitution, jury trials were authorized for slaves accused of the commission of offenses over petit larceny. Oyer and terminer juries convened by special justice slave courts were comprised of five to seven jurors, depending on the county, while slaves were tried by twelve-man juries only in capital cases. While white persons were tried without a jury when only a nominal fine could be imposed, or before juries of five of seven jurors for comparatively minor

offenses, whites were tried predominantly by twelve-man juries in almost all criminal cases.

After adoption of the 1819 Constitution, most civil jury trials were conducted by twelve-man juries. Hence, slave courts convened as courts oyer and terminer were not in fact oyer and terminer courts as known at common law. Due to their fundamental status as chattel property, the incarcerated slave had no standing to petition for bail or a writ of habeas corpus, although occasionally slaveholders intervened to secure release of slaves held in pretrial detention, constituting a request to the court analogous to a claim of trover or detinue for return of property wrongfully withheld from the owner. In the territorial period, slaves were not deemed entitled to grand jury presentment and indictment for any offense, and trial by jury was not implemented until 1814, and then only for capital crimes. Additionally, when trial by jury was authorized for slave offenses above petit larceny under the 1819 Constitution, such trials convened in justice court under oyer and terminer jurisdiction were conducted by empanelling five to seven jurors, depending on the county, instead of the twelve jurors required by common law and accorded to white persons in antebellum statehood period, and for the balance of the slavery era, grand jury indictments were required only for slaves accused of capital offenses.

The Mississippi territorial act of March 30, 1799, established the pattern for subsequent slave codes enacted and enforced during antebellum slavery, characterized by a series of comprehensive restraints imposed on free persons as well as slaves. The territorial slave code was the forerunner of state codes of the antebellum period, with many sections of the territorial slave code carried forward and adopted in their entiretyas state law. The origin of the antebellum slave code, including criminal provisions, were

territorial ordinances which dated from the congressional act of 1798 and acts beginning in 1802.[75]

Under specific provisions of the territorial slave code, a slave could not leave his residence without "a pass, or some letter or token" of authority from his "master, owner or overseer."[76] Conversely, a slave was prohibited from entering and remaining on another plantation without permission from his owner.[77] A slave could not "keep or carry" any "gun powder, shot, club, or other weapon whatsoever, offensive or defensive" without written permission to carry arms of ammunition.[78] Riots, routs, unlawful assemblies, trespasses and seditious speeches by slaves were punishable by up to thirty lashes.[79]

A "master, mistress or overseer" who allowed any slave not owned by him to remain for more than two hours without permission of their slaveholder was fined four dollars per slave holding over, and two dollars per slave in excess of five slaves remaining at one time past the two-hour limit.[80] White persons, free negroes or mulattoes "in company" with slaves at any "unlawful meeting" were subject to a fine of ten dollars per offense, and on default, subject to twenty lashes by order of the justice of the peace.[81] Trading with slaves of any "coin or commodity" without written consent of the owner of the slave was punishable by a fine of ten dollars or ten lashes.[82] A slave "lifting his hand in opposition" to "any person not a negro or mulatto" was, on conviction, punished by

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[75] Sellers, *Slavery in Alabama*, 215.
[76] Sargent's Code, 44, *A Law for the regulation of Slaves*, Act of March 30, 1799.
[77] Ibid.
[78] Ibid., 44.
[79] Ibid, 45.
[80] Ibid.
[81] Ibid.
[82] Ibid., 46.

thirty lashes.[83] An owner "licensing" a slave to go at large to trade as if free" or "offering his services for hire at his owner's consent" was subject to a fine of ten dollars for each offense.[84]

If a slave absented himself from his usual place of service or without leave of his owner, the slaveholder was required to notify the justice of the peace under penalty of one dollar for each day of delay. Runaway slaves who were apprehended and carried before the justice of the peace were jailed or turned over to their owners, who were charged six dollars.[85] Slaves were forbidden to keep dogs; offending slaves were subject to ten lashes, and owners who permitted slaves to keep dogs were fined five dollars.[86] Slaves were also prohibited from keeping horses and hogs running at large.[87] The concluding section of the slavery act prohibited the infliction of "cruel and unusual punishments" on any slave in the territory, punishable by a fine of not more than one hundred dollars.[88]

Early provisions of this type as set forth in the territorial acts hereinabove described were the origin for status offense provisions later enacted as state law, and somewhat later as municipal ordinances in Montgomery and Mobile, which peculiarly related to restraints on slaves and free persons of color, and to some degree governed the conduct of white persons as well.

Despite legislative pronouncements prohibiting cruel and unusual punishments of slaves, corporal punishment, which could include severe whippings and maimings of

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[83] Ibid., 46-47.
[84] Ibid., 47.
[85] Ibid.
[86] Ibid., 47-48.
[87] Ibid., 48.
[88] Ibid.

slaves inflicted under color of law, as not deemed cruel or unusual by virtue of this legal fiction, was prevalent and tolerated. One factor underlying this circumstance was that free persons were also subject to corporal punishment, a practice which diminished after statehood and adoption of the state constitution recognizing white men as having a preferred legal and political status. Further, establishment of courthouses brought the construction of county jails, and by the 1830s, a state penitentiary was established at Wetumpka. The result was a divergence of punishments inflicted on slaves and free persons. Corporal punishments persisted for slaves, while whippings and brandings were gradually abandoned for white persons, supplanted by fines or confinement.

Philip Schwarz contends that the penal reform movement of the 1830s which resulted improved conditions for free persons in Virginia, another slave state, "could" have reduced the incidence of capital punishment on the "unfree." He continues that the "general movement for reform of penal systems made possible a large reduction in the number of executions of black and free white convicts"; in 1796, Virginia restricted capital offenses to first-degree murder for whites and free blacks. Transportation was used increasingly in the nineteenth century in lieu of execution of slaves.[89] Although fewer slave executions occurred, the penal reform movement in Alabama during the same period merely elevated the status of whites and to some degree, free blacks, the condition of slaves was not improved, and as to capital offenses, once accused, they were more likely to be convicted and executed than whites during the 1850s as is apparent from a study of the City Court of Mobile. As Schwarz seems to suggest, a decline in the

[89] Schwarz, *Slave Laws in Virginia*, 73-74.

execution rate of slaves was attributable more to transportation than benefits realized by slaves from prison reform.

Under territorial law, slaves and white persons alike convicted of non-capital crimes were subject to corporal punishment, including whippings and brandings. Upon conviction of theft, slaves could be "burned" on the hand or the face by the sheriff in open court. Whether the "burning" inflicted on a convicted slave was the equivalent of "branding" of a convicted white person is unclear, but likely, as it appears the terms were used interchangeably to describe the punishment of branding. Stocks and pillories were also used to punish both convicted slaves and free persons. Under the territorial acts, whites could be accused and convicted of a wide variety of capital crimes for which the death penalty could be imposed. On conviction, whites were exposed to corporal punishment similar to whippings inflicted on slaves. However, the penalties prescribed for slaves convicted of perjury were more severe. Upon conviction, one ear was to be nailed to the pillory for an hour, and then cut off. The same was repeated for the other ear. The convicted slave could also be whipped and branded with a "P" on the hand.

One of the principal disabilities imposed on a slave and free persons of color was the rule prohibiting testimony by a person of African descent against a white person, later codified under state law as section 2076 of the Code of Alabama (1852). Like many slavery provisions, the origin of the rule was colonial, finding its way to the Mississippi Territory by the Virginia, South Carolina and Georgia slave codes. The rule excluding such was substantially the corollary of the principle that slaves and free persons of color were incompetent to undertake an oath or testify in any event. As an allowance, testimony of slaves and free persons of color was permitted under certain conditions.

Under the rationale that slaves were deemed incapable of taking a conventional oath, they were queried by the trial judge as to their awareness of the difference between truth and falsehood, and the penalties of committing perjury. The form of questioning, prescribed by statute, was designed to impress such awareness and apprise the slave of the penalties, as follows:

> You are brought here as a witness, and by the direction of law I am to tell you before you give your evidence, that you must tell the truth, and if it be found that you tell a lie, and give false testimony in this matter, you must for so doing have your ears nailed to the pillory and cut off, and receive thirty-nine lashes upon your bare back, well laid on, at the common whipping post.[90]

Apparently, such punishment of slaves for perjury was authorized by statute as late as 1833.[91] By 1843, under chapter 15 of the Penal Code relating to "slaves and free negroes," maiming or dismemberment as a sanction for perjury was abandoned but whipping retained as under prior practice.[92]

The foregoing oath and prescribed punishment for perjury highlights the relative early conditions of free and slave, and the principal distinction in the enforcement of territorial criminal laws--slaves could be maimed or dismembered, made to stand in stocks, pilloried, whipped, or branded, or some combination thereof, while maiming or dismemberment exceeding mere branding of white offenders was forbidden after adoption of the Alabama Constitution of 1819. During the territorial period,

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[90] Harry Toulmin, ed., *A Digest of the Laws of the State of Alabama: Containing the Statutes and Resolutions in Force at the End of the General Assembly in January, 1823* (New York: J & J Harper, 1823), *An Act for the Punishment of Crimes and Misdemeanours,* § 61, 185, Feb. 6, 1807.
[91] John G. Aikin, ed., *A Digest of the Laws of the State of Alabama: Containing all the Statutes of a Public and General Nature, in Force at the Close of the Session of the General Assembly, in January, 1833* (Philadelphia: A. Towar, 1833), § 74, 113-14.
[92] Ibid. § 9, 473.

manslaughter by a white person was punished by branding on the hand with the letter "M" in open court, standing in the pillory for two hours, and imprisonment for six months.[93] Thirty-nine lashes and a fine of five hundred dollars were prescribed for white persons convicted of being accessory after the fact to a capital offense.[94] Conviction for theft of property under twenty dollars in value required restitution and up to thirty-nine lashes.[95] Horse thieves were punished with fines, imprisonment, whippings, brandings, or some combination thereof.[96] Stealing livestock such as cattle or hogs resulted in twenty-five lashes for the first offense; one second offense, thirty-nine lashes were inflicted, and the defendant was required to stand in the pillory for two hours.[97] Also, penalties of fines and imprisonment were imposed on whites but not slaves. No state penitentiary existed, and none was built until the Penal Code of 1841 authorized a state prison at Wetumpka. Hence, convicted prisoners were incarcerated at a few existing territorial county jails, and sentences were brief.

Further, the development and evolution of territorial laws on slavery show the transition of society from two classes of individuals – free persons and slaves, the former category regarded as inclusive of free persons of color. Most of such persons were not free as the result of emancipation or manumission, but were the descendants of Creoles settling and inhabiting the territory generations earlier. Under treaties with Spain recognized by Congress, the Mississippi Territory, and the state of Alabama, the Creole population was regarded as free on the basis that neither they nor their ancestors were

[93]Toulmin's Digest., 224, §1, Dec. 12, 1812.
[94] Ibid., 207.
[95] Ibid., 208, § 15.
[96] Ibid., 208-09, §. 22.
[97] Ibid., 209, § 22.

ever slaves in the first instance. Consequently, Creoles of the territory, for purposes of legal and political rights, were treated virtually the same as white persons of British or European descent. Over time, a small class of emancipated blacks emerged; these persons were gradually reduced in status more resembling slaves than free persons, as their legal and political rights were restricted, and their activities in the community monitored by pass laws and other restraints..

The courts of quarter sessions and oyer and terminer, having origins in Britain and the American colonies, were adapted to the management of slavery during the territorial and antebellum statehood period, although some important historic features associated with oyer and terminer were eviscerated from the process, such as the writ of habeas corpus, bail, grand jury presentment, indictment, and, in many instances, struck juries, all deemed inapplicable to slaves due to their unique status.

The provision of jury trials for slaves was embodied in the Alabama Constitution of 1819. Slaves were permitted jury trials in allegations of crimes exceeding petit larceny, but on a warrant of a justice of the peace, still without presentment and indictment. In contrast, free persons were entitled to presentment and indictment for almost all offenses, with many cases triable before a circuit court jury. Slaves accused of capital offenses were indicted and tried in county court, with preliminary proceedings held in justice court. By the 1830s, slave accused of capital crimes were tried in circuit courts in the manner of white persons accused of similar offenses. For all offenses above petit larceny, slaves were entitled to defense counsel. Attorney's fees for this purpose, in

the amount of ten dollars per case, were paid by the state if the slaveholder failed to retain a lawyer for the accused slave.[98]

Under the early territorial acts, accused slaves were tried by justices of the quorum, usually three to five justices of the peace, without a jury trial, or indictment. The first instance of a legislative provision of jury trials for slaves accused of crimes was the territorial Act of December 21, 1812, which provided that "for the trial of slaves charged with treason, or other crimes, or misdemeanors" any three justices of the quorum, or two justices of the quorum and one justice of the peace presiding, a "jury of good and lawful men of the vicinage" would be summoned and empanelled, with the trial to proceed without presentment or indictment.[99]

The adoption of the 1819 constitution and early legislative acts gradually reduced the number of capital crimes applicable to free persons. As late as the 1830s, white persons were still prosecuted for the commission of robbery, burglary, arson and rape as capital crimes as well as slaves.[100] Under territorial law, white persons were exposed to capital punishment for an array of offenses, among them willful murder, arson of dwellings, horse barns, stables or other structures attached to or part of the curtilage of a dwelling, robbery, burglary, treason, and insurrection or rebellion. White persons convicted of manslaughter were branded on the hand in open court and fined by the jury.[101] Meanwhile, slaves were exposed to the death penalty in a greater array of offenses, most in the alleged commission of crimes by slaves against white persons.

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[98] Sellers, *Slavery in Alabama*, 215-16.
[99] *Statutes of the Mississippi Territory, General Assembly* (Natchez, Miss.: Peter Isler, 1816), Act of Dec. 21, 1812, (Stat. 75), 173, § 1, 192-93.
[100] Aikin's Digest, §§ 1-13, 162.
[101] Toulmin's Digest, "Crimes and Misdemeanors," 1807; passed 1802, reenacted 1807.

The 1819 Constitution and subsequent state legislation enacted to the early 1830s effectively phased out the corporal punishment of white persons, especially whippings, the result of the construction of county jails across the state, and eventually, by the establishment of the state penitentiary which were intended to house white offenders, but not slaves, for whom corporal punishment was continued in lieu of incarceration. As late as 1833, whippings of white persons convicted as "accessories after the fact" of capital offenses could be imposed "at the discretion of the jury,"[102] but in practice, whippings of white persons were apparently rarely administered at this juncture. Whippings of white persons as an official sanction were phased out with the adoption of the 1841 Penal Code. Imprisonment, in addition to fines, became the mode of punishment for free persons convicted of crimes. Treason, aiding insurrection and first-degree murder remained as capital offenses, while all other crimes were punishable by life imprisonment or lesser sentences.[103]

Additionally, the 1819 Constitution and subsequent acts eliminated stocks and pillories for all classes of convicts, and abolished dismemberment, maiming, or “burning” of slaves, although “branding” was retained and occasionally used into the 1850s, as reflected in trial records of the City Court of Mobile. While whippings ceased for free persons, such punishment, and less frequently, brandings, persisted as a mode of punishment for convicted slaves, who were jailed only in connection with being held for

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[102] Aikin’s Digest, § 14, 103.

[103] C. C. Clay, ed., *A Digest of the Laws of the State of Alabama: Containing all the Statutes of a Public and General Nature, in Force at the Close of the Session of the General Assembly, in February, 1843* (Tuscaloosa, Ala.: M. J. Slade, 1843), "Penal Code," ch. III, "Of Offences against the Persons of Individuals," § 1, 412.

extradition or pretrial detention, but not for punishment; jails and prisons were intended for white persons and free persons of color.

Another characteristic of the criminal laws of the territory was that no apparent distinction was made between slaves and free persons of color; the criminal provisions applicable to these classes referred to "negroes and mulattoes." Hence, the prosecution and punishment of all persons of color were handled identically. Upon the ratification of the 1819 constitution and enactment of early criminal laws, some divergence in treatment of the two classes is observed. Eventually, free persons of color were subject to prosecution in fewer classes of capital cases than slaves, and whippings and brandings were eliminated, in some respects resembling the treatment of white persons. However, the rights and status of free persons of color effectively converged with slaves by the 1850s; as a result, the condition of free persons of color resembled that of slaves.

In the matter of any alleged offense or attempt by a slave in which a "free white person" was the accuser or alleged victim, the territorial Act of January 15, 1814 provided the following sweeping provision:

> 197. Sect. VI. If any slave shall maim a free white person, or shall attempt to commit a rape on any free white woman, or shall attempt to commit any other capital crime, or shall be a voluntary accessory before, or after the fact, in any capital offense, or shall be guilty of the manslaughter of any free person, or shall be guilty of burning any dwelling house, out house, barn or stable, or shall be accessory thereto, or shall be guilty of any crime made capital by law, or shall be accessory to any crime herein named, shall, on conviction, suffer death.[104]

The act of January 14, 1814 was the basis for later state law on the subject of charging and punishment of capital crimes, as Section 197 thereof set forth the essential charging and sentencing scheme for serious offenses committed by slaves who remained

[104] Stats. Miss. Terr., Act of Jan. 15, 1814, Stat. 9, 197, §.VI, 199-200.

the rule for the slavery era. An array of offenses committed by white persons, including inchoate or attempted capital crimes, were charged and punished non-capitally, while slaves accused of attempts associated with capital offenses faced death on conviction, even if death did not result. As a practical matter, over time, with mitigating circumstances, whippings were inflicted on conviction of attempts to commit capital crimes, if no death or serious injury resulted from the offense. Such extenuating circumstances were sometimes the basis for a recommendation of clemency from the trial jury, or a grant of same by the governor to ameliorate the rigidity of the charging and sentencing scheme of death penalty statute as applied to slaves.

At first glance, the 1819 Constitution seemed to treat slaves equally with free persons in punishment and procedure for alleged crimes: "Any person who shall maliciously dismember or deprive a slave of life, shall suffer such punishment as would be inflicted in the case of like offence committed on a free white person, and on the like proof; except in the case of insurrection of such slave."[105] The exception for insurrection proved to be broad. Any manifestation of slave resistance enabled slaveholders or their agents to whip slaves under the doctrine of moderate correction, without incurring criminal liability for assault or like crimes, while vitiating and altering the common-law right of self-defense by slaves. Thus, in the master-servant relationship, the slave was essentially powerless to defend himself except in cases of attacks by slaveholders which were truly life-threatening or tending to inflict permanent personal injury. Unfavorable presumptions of procedure and evidence weighing against slaves and free blacks obtained in all courts. Many factors undermined the guarantees of grand jury indictment, trial by

[105] Ala. Const. (1819), art. VI, "Slaves," § 3.

jury, and the protection against slave dismemberment or loss of life, such as the inability of slaves to testify against whites, as well as the fact that no African-American, even a free person of color, could sit on grand juries or trial juries. Neither a slave nor a free person of color could testify against a white person.[106]

Race and status were the dividing lines between prosecution and punishment of slaves, free persons of color, and white persons constituting the cornerstone of law as applied to slaves. According to Morris, "it was vital to adopt some presumption . . . whenever there was a question about a person's status," a sentiment that which heightened with the spread of manumission.[107] Essentially, the dividing line is readily identified by observing the differing punishments imposed on the three groups of defendants for acts constituting the same alleged criminal conduct. Of the three groups, slaves were punished the most harshly. This disparity came to bear most acutely when a slave was accused of committing a crime against a white person.

Procedurally, one of the main differences between the charging of accused white persons and accused slaves was that white persons and free persons of color were entitled to a grand jury indictment in all crimes, whether misdemeanor or felony, except in minor offenses, such as municipal ordinance violations. Slaves, on the other hand, were entitled to an indictment only in capital cases, although under the Code, this still included a relatively wide array of offenses, since many more varieties of criminal conduct by slaves were deemed capital offenses than offenses committed by free persons. The chief result of this scheme meant that white persons and free persons of color received jury trials in

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[106] John J. Ormond, Arthur P. Bagby, and George Goldthwaite, *The Code of Alabama* (Montgomery, Ala.: Brittan and De Wolf, 1852), § 2276.
[107] Morris, *Southern Slavery and the Law*, 25.

all circuit court – a trial court of general jurisdiction - cases taken to trial, while slaves received jury trials only in capital cases. A slave accused of a non-capital offense constituting a higher grade than petit larceny and punishable by imprisonment if committed by a white person was denied a jury trial, and tried instead by the probate judge and two justices of the peace.[108] As a result, justice of the peace courts were the workhorse of the trial courts in the trial of slaves, except for capital offenses, and even then, justices of the peace played a considerable role in the bringing preliminary charges and conducting arraignments.

Morris has traced the origin of the justice of the peace system, integral to the management of slavery in Alabama, from 1680, when the burgesses of the Virginia colony extended jurisdiction of single justices concurrently with the increase of African slavery. Magistrates, or justices, could render summary convictions against slaves and impose up to thirty lashes. By 1705, the act was further enlarged to include any "negro, mulatto, or Indian, bond or free."[109]

Sellers reports a similar practice in slave trials in regard to justice courts in antebellum Alabama:

> There were the inferior courts, of a more or less amateurish character . . . . The lower courts, in the early days, often consisted only of a justice of the peace, not always well informed even in matters of law. . . . [tending] to administer a rough-and-ready type of justice. . . . the processes of the court were marred by a lack of proper witnesses and evidence.[110]

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[108] Ala. Code § 3316 (1852).
[109] Morris, *Southern Slavery and the Law*, 211, passim.
[110] Sellers, *Slavery in Alabama*, 243. Alternatively, Sellers observes that judges of the superior courts (circuit and chancery) usually possessed “genuine ability." Ibid. To an extent, criticism of antebellum justice courts for informality in practice, characterized by summary and expedited dispositions is misplaced, in effect, assailing justice courts for operating as they were designed in connection with the trial of minor cases arising in the court system. The core of the problem pertaining to procedure in the trial of slaves

When jury trials were provided, all members of the jury were white, whether the defendant was a slave or a free person of color, since persons of at least one-eighth African descent were regarded as non-white and thus barred from jury service. A slave accused of a capital offense was allowed fewer peremptory challenges (twelve) than a white defendant (twenty-four), although the prosecution was in either case restricted to four strikes. Further, in the circuit court trials of slaves accused of capital crimes, and the trial of white persons accused of cruel treatment of slaves, a trial jury comprised of at least two-thirds slaveholders was required.[111]

The punishment imposed for capital offenses, usually first degree murder, treason or participation in a slave insurrection, committed by whites or free persons of color, was death or life imprisonment. All other felony offenses were non-capital, punishable by imprisonment, except that free persons of color convicted of rape or attempted rape of a white female received a mandatory death sentence. In sum, the charging and sentencing scheme applicable to slaves, on one hand, and free persons, on the other, meant that more criminal acts committed by slaves were punishable by death than for criminal conduct by white persons, or even free persons of color, with the exception noted above for rape or attempted rape of a white woman. In regard to non-capital offenses, free persons of color were more likely to be incarcerated like white offenders. In low-level offenses, free persons of color could be subjected to corporal punishment. Although in many respects as to accusation and punishment, free persons of color were treated like white defendants,

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accused of minor offenses was that appeals from justice courts were unavailable to slaves and the judgments rendered were final. Further, as Sellers suggests, some justice court trials of slaves accused of non-capital offenses were not conducted at the courthouse.

[111] Ala. Code §3319 (1852).

repeated, or even occasional or minor offenses, could lead to problems of status—the free person of color could be sold into slavery or required to leave the state. As jails and prisons were intended for free persons, slaves were not jailed for punishment, but sometimes were held for pre-trial detention.

A person causing the death of a slave with "malice aforethought" was guilty of first-degree murder; however, a death sentence was possible, but not mandated.[112] In addition, for offenses crossing racial lines, such as alleged offenses against a slave victim, the white defendant was entitled not only to a trial by jury of white men, but also a jury panel of two-thirds slaveholders.[113] The basic statutory scheme under the Code of 1852 for enhanced punishment for slaves, and on occasion, free persons of color, for the same conduct if committed by white persons, usually in connection with criminal offenses alleged by slaves against white persons, in serious cases mandated the death penalty, and life imprisonment or less if committed by white persons.

The preface to the slave code, set forth in section 3305, established the basic principle that the prescribed punishments—fines, costs, and imprisonment—imposed on free or white convicts were inapplicable to slaves convicted of the same or similar conduct as white defendants. Instead, the mode of punishment authorized for slaves was whipping, branding, transportation, or execution, depending on the level of offense, and the race or status of the alleged victim. As to the free persons of color, defendants in that category fell somewhere in between, subject to some provisions of the white and slave category. The criminal code applicable to white persons applied to free persons of color in imposing fines and penitentiary sentences on conviction; free persons of color were

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[112] Ibid., §3295.
[113] Ibid., §3299.

subject to the slave code, in a few instances treated more like slaves, in those cases in which white persons were alleged victims of serious offenses, and in allegations that free persons of color were aiding or abetting a rebellion or insurrection.

The 1841 Penal Code, applicable to white persons and free persons of color but not slaves, provides a dividing line for the decades from the territorial period through the 1830s on one hand, and from the early 1840s to the end of the slavery era, reflecting significant divergence in the authorized punishment of slaves, which meant that corporal punishment for white persons, as well as for free persons of color, upon conviction for serious crimes was finally phased out and supplanted with penitentiary sentences, while corporal punishment of slaves was substantially retained as a penal practice, virtually unchanged from territorial times. Additionally, the Penal Code of 1841, carried forward to the Code of 1852, indicates the development of a greater disparity in charging and sentencing between slave and free defendants, accomplished primarily by improving the condition of white convicts, while leaving unchanged existing law applicable to slaves. In a departure from prior law, the Penal Code of 1841 and Clay's Digest defined serious offenses by grade or degree for the first time - for instance, murder in the first and second degree - making possible penitentiary sentences in lieu of the death penalty for those persons convicted or pleading guilty in the first instance, and also permitting juries to be charged for consideration of lesser-included offenses, thereby mitigating the ultimate punishment imposed. However, as this gradation of offenses was applicable only to free men, the gap in the rights of free men and slaves increased by the decade of the 1840s and the ensuing years of slavery.

As to prosecutions and penal sanctions, the area of greatest disparity of treatment between free and slave was in regard to status offenses, which for most purposes did not apply to whites, except in certain analogous instances, usually related to trading with slaves. Status offenses also defined free persons of color as a third or intermediate class. In accusations of more serious crimes, free persons of color were treated somewhat like white persons, in that upon conviction, they were sentenced to imprisonment and not whipped. In conduct amounting to relatively minor criminal offenses and related to status, in the interactions of free persons of color with slaves, other free persons of color, or whites, they were subjected to penal sanctions more resembling slaves. The principal effect of status offenses on these individuals was that the freedom of movement of the free black population was severely restricted. Status offenses were minor criminal acts for which slaves and free persons of color could be punished, but for which white persons were not held accountable.

Research relating to status offenses from the territorial period to the late or upper era of southern slavery, indicates that the law governing the daily conduct of slaves and those who came into contact with them, free persons of color as well as white persons, remained virtually unchanged from the territorial period; in fact, if increased restrictions on manumissions and emancipations are considered, the conclusion that slavery as a system of societal control became more comprehensive and repressive of the population for the benefit of slaveholders, and the brunt of this burden fell upon the free black population in the closing years of slavery.

From the territorial period to the end of the antebellum era, comparison of the foregoing data as to applied procedure and prescribed punishments for the three principal

classes of defendants, namely white persons, free persons of color, and slaves, reveals the following:

(1) In an absolute sense, over time from territorial days to the eve of the Civil War, authorized criminal sanctions applied to slaves remained static, or were somewhat ameliorated, in that maimings as a mode of punishment were abandoned.

(2) Punishments applied to white persons, and to a lesser degree, free persons of color, in the territorial era were mitigated by substituting incarceration for whippings or other corporal punishment of free persons as a substantial result of the prison and penitentiary reform movement of the 1830s, from which whites, and to some degree, free persons of color benefited, but which provided no benefit to slaves.

(3) Over time, the condition of accused slaves subjected to authorized punishments regressed or deteriorated in comparison with white persons charged and convicted of the same or similar offenses, mainly as a result of the penitentiary and prison reform movement which tended to elevate whites and free blacks even further above the slave class, as noted in (2), above.

(4) For minor offenses, authorized corporal punishment of free persons of color persisted, while free persons of color were imprisoned in the manner of white persons upon conviction of serious crimes.

(5) In matters of criminal procedure, prosecution and trial of white persons remained relatively static after the adoption of the 1819 Constitution, which in substance meant that whites were entitled to the full panoply of rights and liberties accorded to free men, including, but not limited to, prosecution by indictment and jury trials for almost

every offense, habeas corpus and bail, and more frequent appeals of convictions; white men could serve on juries while slaves and free persons of color could not.

(6) The procedures accorded slaves in the prosecution of serious offenses improved slightly after 1819; under the 1819 Constitution, slaves were accorded trial by rudimentary juries comprised of white men in all cases exceeding petit larceny; in capital cases only, grand jury presentment and indictment were required, and some slave appeals of capital convictions to the Supreme Court of Alabama are noted, a trend which accelerated after the 1820s.

(7) In criminal trials, slaves were deprived of essential elements of substance and procedure, such as bail and the writ of habeas corpus, associated with free men; in all non-capital cases, no indictment of accused slaves was required.

(8) In matters of evidence bearing on the trials of slaves and free persons alike, the prohibition of testimony by any person of African descent (defined under state law as the third degree of lineal kinship; i.e., a witness having one African great-grandparent as an ancestor), against white persons remained the unaltered rule from the territorial era until the end of slavery, thereby substantially undermining the efficacy of the entire process when slaves or free persons of color were the accused, or when these same classes were victims.

(9) Throughout the slavery period, free persons of color were subject to the same or similar strictures of status offense ordinances as slaves, and which significantly increased over time, effectively blurring any distinctions existing between the two classes during the territorial period, as well as the relative lack of freedom experienced by slaves and free blacks, and their respective status.

Consistent with the conclusions derived from independent research of primary materials as noted above, the resulting evidence corroborates leading published studies. From the best available evidence, slave trials in justice courts were based on expediency and influenced by prejudice.[114] The depiction by Sellers of slave justice courts as summary, arbitrary and "amateurish" is reinforced by Morris. In Virginia, in a 1792 statute that was "widely copied," the magistrate or justice of the peace could order up to thirty-nine lashes for slaves involved in riots, routs, unlawful assemblies, trespasses and seditious speeches."[115] Jurisdiction over slaves accused of crimes was reposed in oyer and terminer courts, or tribunals of equivalent jurisdiction, sitting as specialized slave courts.[116] Fundamentally, the methods and procedures associated with the prosecution and punishment of slave crime were the same among the slaveholding states, and the incidence of conviction and severity of punishment were disproportionate in comparison with white persons.[117]

[114] Sellers, *Slavery in Alabama*, 243.
[115] Morris, *Southern Slavery and the Law*, 211.
[116] Schwarz, *Twice Condemned*, 38-39, 123.
[117] Ibid., 14-15, 39-42, 133; Schwarz, *Slave Laws in Virginia*, 63-96.

CHAPTER 2

THE ALABAMA POLITICAL SYSTEM AND COURT ORGANIZATION IN THE SLAVERY ERA

As a basic proposition, jurisdiction and organization of the court system, insofar as slaves and free persons of color were affected, were of little consequence, as African Americans, and slaves in particular, had no significant rights the courts would recognize. For instance, a fundamental tenet relating to the standing and capacity of slaves in the civil courts was that they had none. Numerous contemporary appellate cases and historical accounts confirmed that under the law slaves were considered "things," and opinions rendered by the Supreme Court of Alabama in the 1850s reflect this view, one opinion characterizing the condition of the slave and his relation to the civil courts as one of "entire abnegation of civil capacity."[118] When accused in criminal cases, however, slaves became "persons" deemed capable of the commission of crimes with the necessary volition possessed by a free person.

This dual standing of the slave in southern courts is reflected in *The Law of Negro Slavery* (1858) by Thomas R. R. Cobb. According to Cobb, the slave in Roman law was a "mere chattel." By contrast, the slave in America was “protected by municipal law,"

[118] Martin v. Reed, 37 Ala. 198, 199 (1861).

and occupied a "*double character* of person and property."[119] The slave was depicted as capable of the commission of crimes like free persons, yet having no civil status or standing in the courts except where permitted by a few rare and narrow legislative exceptions, such as the statutory suit for freedom recognized in Alabama. Although Cobb's book was principally a political polemic or exposition in defense of slavery, and was published too late in the slavery era to have any significant impact on antebellum jurisprudence, the description of the status of the slave as one of double character was an accurate description of existing case law in the southern states. The analysis of the status of slaves as one of dual or double character, logically suggested by cases of the day, has been adopted by many modern scholars of slavery jurisprudence, the term incorporated into the title of a book in one instance.[120]

In evaluating the dual character of the status of the slave, and to some extent, free persons of color, study of the political and judicial system governing slaveholding jurisdictions indicates that slaves and the institution of slavery were a pervasive influence in the courts and in society in general, despite the fact that most white men in the region were non-slaveholding yeoman farmers. Although the judicial administration of slavery is most associated with justice courts, and as well being the forum for most legal issues of the day, regardless of race or status of the parties, slaves appeared all courts of the state, the only difference being in the manner in which slaves and white persons came into court. As indicated, aside from criminal courts, wherein slaves were either the accused or victims in their proper person, evidence of slaves, and hence, the pervasive institution of

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[119] Cobb, *Law of Negro Slavery,* § 84a, 83 (emphasis added)..
[120] See, e.g., Ariela J. Gross*, Double Character,* 1-5; Morris, *Southern Slavery and the Law* (Part II, "Slaves as Property," 59-158; Part III, "Slaves as Persons," 159-423.).

slavery in society, could be found in most any court in Alabama. This point is driven home by Jenny B. Wahl and countless other scholars, who cite repeated instances of the ubiquitous nature of slavery, as reflected in the reported slave cases of southern jurisprudence. According to Wahl, of nearly 11,000 reported cases concerning slavery to 1875, one-sixth related to slave sales which spawned litigation.[121]

In procedure and substance, the Alabama Constitution of 1819 and subsequent legislative acts substantially incorporated and carried forward territorial ordinances which governed slavery during the antebellum era. Most of the changes which ensued in the next forty years in acts of the legislature and cases construing them were largely cosmetic in effect as to the governmental administration of slavery, and had little perceptible beneficial impact on slaves or free persons of color. The state constitution was amended three times, in 1830, 1846, and 1850, and then superseded by the 1861 constitution, which was essentially a wartime document, constituting a dividing line for the study of Alabama slavery, as thereafter the character of the institution was significantly altered by the Civil War. Thus, the Constitution of 1819 was the operative document and framework for slavery in Alabama.

Slavery and the laws governing the institution existed in the overall political context of the government established by the state constitution and by legislative acts establishing county and municipal governments in the ensuing years. In sum, the political and legal system of antebellum Alabama and neighboring slaveholding states constituted a "herrenvolk democracy," or more precisely, a "white men's democracy," a

[121] Wahl, "The Jurisprudence of American Slave Sales," 143-44. The end date of 1875, relating to the 15 slaveholding states and the District of Columbia, includes cases pending after the ratification of the Thirteenth Amendment, concerning matters such as the validity of property bequests to slaves in connection with manumissions.

society ruled by white men, whether slaveholding or non-slaveholding, comprising an elite class.[122] The enabling act of the Alabama territory concerning to the election of delegates to the 1819 constitutional convention in Huntsville mandated "white manhood suffrage" for territorial voters, defining the class entitled to the exercise of full political and civil rights, and, by implication, those classes who would be excluded.[123]

The key components of the relationship of slaves and free persons of color to the slaveholding class are found in the Declaration of Rights of the 1819 Constitution. The resulting "social compact" created by the constitution was among "freemen" who were deemed equal; by negative implication - and through positive, more explicit provisions set forth elsewhere in the document and by subsequent acts of the legislature - slaves and free persons of color were excluded, as well as members of Native American tribes and women to a lesser extent.[124]

Under the constitution, references to the terms "person" and "citizen" meant white men, unless stated otherwise, usually by subsequent legislative act; to varying degrees and in certain limited instances such terms could include one or more of the classes of women, free blacks, and slaves. Provisions for protection from unreasonable searches and seizures, procedural safeguards relating criminal prosecutions and similar rights had no application to slaves, subject to certain rudimentary exceptions as permitted by the legislature, such as the statutory and judicial recitals directing that in capital cases, slaves

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[122] Anthony Gene Carey, *Parties, Slavery, and the Union in Antebellum Georgia* (Athens, Ga.: University of Georgia Press, 1997), xvi.
[123] Malcolm C. McMillan, *Constitutional Development in Alabama, 1798-1901: A Study in Politics, the Negro, and Sectionalism* (Chapel Hill, N.C.: University of North Carolina Press, 1955. Reprint, Spartanburg, S.C.: The Reprint Co., 1978), 30.
[124] Ala. Const. (1819), art. I, §1.

were accused and tried in the manner of white persons, which meant grand jury presentment and indictment, trial by jury, appeal and assistance of counsel.[125]

Article III, concerning the Legislative Department, known as the General Assembly, provided that no person could serve as a representative unless he were a "white man."[126] The fundamental requirement for a qualified voter was a "white male person," thereby excluding everyone else.[127] The chief political innovation of the 1819 Alabama constitution was the abolition of property requirements as a condition of voting; thus, the character of the Alabama political system and qualified electorate during the antebellum era was defined as "universal white male suffrage."[128] As in other newly-admitted states, the adoption of the state constitution strengthened the powers of the legislature in relation to the executive branch; in the territorial era, significant powers were reposed in a territorial governor dominant over the legislature. Additionally, property requirements to hold office then effective in the older states were rejected. Also rejected was the three-fifths federal ratio for state legislative apportionment adopted by Georgia; instead, apportionment based only on the resident white population was approved.[129] As qualifications for voting were co-extensive with jury service, only white men could sit on grand juries or petit juries, thereby excluding slaves, free persons of color, Native Americans, and women. Articles IV and V, relating to the Executive and

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[125] Ala. Const. (1819), art. I, §§ 9-14.
[126] Ibid., art. III, § 4. (requirement applied to both House and Senate).
[127] Ibid., § 5. (also, at least twenty-one years old, one-year residency, not disqualified by certain criminal convictions or certain other disabilities; see, e.g. Article VI, § 3 [enumeration of disqualifying criminal convictions for holding office and voting]).
[128] McMillan, *Constitutional Development in Alabama*, 35-36. At this time, Alabama and Kentucky were the only two southern states which did not require property ownership as a condition of suffrage.
[129] Ibid, 36-37; cf. Carey, *Parties, Slavery, and the Union,* at 21.

Judicial departments, respectively, made no express mention of race or other indicia of status as constituting a requirement to hold office, although article IV required that the governor be a "native citizen" of the United States and a resident of Alabama for four years preceding his election.[130] The tenor of articles I-III indicated that only white men could vote or serve in the General Assembly or otherwise hold public office. Inasmuch as only white men were qualified as electors, and only those persons who were qualified electors could hold office, persons who were not white men were barred from every branch and level of government or political participation.[131] Under article VI, "every white male person above the age of twenty-one years" was deemed a "qualified elector" and "every [resident] white male person" was "entitled to hold any office or place of honor, trust or profit . . . ."[132]

Part of article VI, entitled "Slaves," while recognizing the existence of African slavery, does not address the civil or political status of slaves, but from the discussion therein the complete deprivation of rights as to the slave class is assumed and reasonably inferred. Instead, sections 1 through 3 of this part are concerned with emancipations, provisions for adequate food and clothing, prohibitions against cruel treatment, and trial by jury in criminal prosecutions of a higher grade than petit larceny, all to be discussed herein.[133]

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[130] Ala. Const. (1819), art. IV, § 4.
[131] See Ala. Const.(1819), art. IV("Executive Department," requirements for governor, secretary of state, attorney general); art. V ("Judicial Department," requirements for supreme court, circuit, chancery, probate courts, justices of the peace, other inferior courts), passim.
[132] Ibid., art. VI, "Schedule," §. 6.
[133] Ibid., art. VI, "Slaves," §§1-3.

Thus, by the principle of express mention and implied exclusion[134], white men were accorded full civil, legal and political rights, and the remaining classes - women, free persons of color, slaves - were recognized as having comparatively few or no rights, depending on their class or status. During the antebellum statehood period, the difference in the operation of legislation, as contrasted with state constitutional theory, is that the character or subsequently-enacted acts and statutes were more expressly prohibitive and onerous in denying recognition of the rights of the classes not explicitly identified or enumerated in the state constitution.

Provisions of the Code of Alabama (1852) concerning court organization and management, and the intersection of slavery with the court system, may be regarded as cumulative of antebellum legislation enacted after 1819, although some significant changes from the Mississippi Territorial period to the later antebellum period are evident. The ubiquitous and pervasive nature of the institution of slavery was signified by the frequent appearance of slaves, regarded as "persons" as the accused in criminal court, sometimes as victims, and as an object of chattel property in civil, equity and probate courts lacking any standing or capacity; thus, essential elements and implications of slavery can be found in most courts, regardless of jurisdiction or label, as shown in contemporary court records.

Territorial judges were appointed for good behavior, generally regarded as a lifetime appointment, but keeping judges in the territory was difficult as many resigned or departed.[135] This stands in contrast to a judiciary that by 1850 was elected, with the

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[134] A maxim usually associated with statutory construction, but providing an analogy descriptive of the exclusionary nature of the 1819 Constitution.
[135] McMillan, *Constitutional Development in Alabama*, 8-9.

exception of the Supreme Court of Alabama and chancellors.[136] At the inception of the Mississippi Territory in 1798, no appeals court existed in the region. In 1803, superior courts were established. While not a distinct territorial appellate court, superior courts resembled circuit courts in operation as trial courts of general civil, criminal and equitable jurisdiction, and as courts of last resort for decisions of inferior courts of the territory, such as justice courts, county courts and orphans' courts. Later in the territorial period, a Supreme Court of Errors and Appeals was organized. Law and equity jurisdiction were consolidated in territorial circuit courts which functioned as general trial courts.

During this period and into the era of statehood, orphans' courts were involved with the administration of estates, the assets of which could include slaves once owned by the deceased. Later, some estate administration functions of the orphans' courts were assumed by county courts. In the 1820s, the trial of slaves for capital crimes in county court was transferred to circuit courts. By 1850, the jurisdiction of county and orphans' courts over estates and related matters was abolished and replaced by probate courts.

New state courts authorized by the Constitution of 1819 and enabling legislation were patterned on territorial courts. The Supreme Court of Alabama, general trial courts and inferior courts of the state judiciary were established and authorized by article V of the 1819 Constitution, and through subsequent legislative acts. Initially, the Alabama Supreme Court consisted of circuit judges appointed from each of the five judicial circuits who presided as a statewide panel, resembling a form of district representation, similar in operation to the territorial superior and supreme courts. A three-judge supreme

[136] Chancery or equity court judges.

court with statewide appellate jurisdiction based upon at-large judicial appointments was organized in 1825 and convened for the first time in 1826.[137] Each justice was "elected" by the General Assembly for six year terms, in substance an appointive process, and was not subject to popular election. Judges could not succeed themselves. The appointment of the Supreme Court by the legislature continued to the end of slavery; the office was not made elective until the ratification of the 1868 constitution. The state had no intermediate appellate court. As the only appeals court, the Supreme Court was the court of last resort for all cases originating in the lower courts, such as criminal, law, equity and admiralty cases not originating in federal court. Although broadly considered an appellate court, a term associated with judicial review as a matter of right, being automatic or mandatory, most cases were considered on a writ of error or, less often, on other writs, such as certiorari, mandamus and prohibition, meaning that the court was not obliged to consider most requests for review, even in capital cases.

In addition to the Supreme Court, the trial court system in the antebellum era was comprised of chancery courts, circuit courts, county courts and orphans' courts, courts of the justice of the peace, and "such other inferior courts as . . . established by law".[138] As an impact on the structure and organization of the state judiciary, the constitutional amendment of 1850 had the greatest effect.[139] Under the amendment, functions of the county courts and orphans' courts relating to probate and minor guardianship were consolidated and a court of probate established. Civil jurisdiction of county courts was transferred to circuit court and the county court system abolished. As carried over from

[137] John C. Anderson, "Centennial of the Supreme Court of Alabama," *Alabama Law Journal* 2, no. 3 (May 1927), 146.
[138] Mobile, Ala., City Code § 559 (1859).
[139] Ala. Const. (1819), amend. III, 1850; Acts, Feb. 11, 1850.

the territorial period, under the new constitution, circuit courts initially exercised both law and equity jurisdiction. In 1825, equity and law functions of circuit court were separated and chancery courts were created to handle equity cases. County courts and orphans' courts, originating during the territorial period, were carried over into the early statehood period. At first, orphans' courts were freestanding courts charged with the administration and probate of estates and supervision of minor guardianships. Later, the functions of orphans' courts were consolidated and subordinated into the county courts. A new system of county probate courts replaced the probate functions of orphans' court.[140] As a result, orphans' court was transformed into a court inferior to county court, with the clerk of the county court handling the filings of orphans' court. County courts and orphans' courts were abolished by the constitutional amendment of 1850.[141]

Other functions of county courts, previously exercised in concurrent jurisdiction with circuit courts in other matters, were assumed by circuit courts. This was the result of a natural progression as during the first thirty years of the state, successive legislative acts gradually eroded the jurisdiction of county courts in favor of circuit courts and to some extent, chancery. For example, early slave appeals in capital cases originated in county court, while later, circuit courts tried capital cases of accused slaves, beginning in the 1830s. Additionally, as the county court system evolved, the subject-matter jurisdiction of county courts was fragmented, and appeared to function both as an inferior court and a trial court of general jurisdiction. Remaining county court cases and records were transferred to circuit courts.[142] The resulting trial court system consisted of justice

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[140] Ibid., § 1 et seq.
[141] Acts 1850, No. 3, Feb. 11, 1850, 24, §. 35, 34-35 (Pamphlet Acts 34).
[142] Ibid.

courts, municipal and mayors' courts operating as inferior trial courts, orphans' and county courts, depending on the type of action or case, sometimes functioning as inferior courts, but usually as courts of record, as many direct appeals from orphans' court sitting in original jurisdiction to the Supreme court are noted during the existence of orphans' court from 1820 to 1850.

Review of judgments of justice courts was had by appeal to county or circuit court, depending on the nature of the case. Occasionally, after an adverse judgment or action in justice court, proceedings in chancery sitting in original jurisdiction would ensue by one of the parties filing a bill in equity. Appellate review of circuit court judgments was initiated by a petition for a writ error to the Supreme Court parties. The grant of the writ of error was discretionary, and most trial judgments were not reviewed.

As a holdover from the territorial period, law and equity were merged in circuit courts, with circuit judges sitting in equity to hear chancery matters. Subsequently, in 1825, separate divisions and distinct courts of law and equity were created in most counties by local act, with chancery jurisdiction sometimes divided into circuits encompassing more than one county, with chancellors presiding in separate chancery courts. In some counties, such as Tuscaloosa, circuit court judges continued the practice prevalent in the territorial and early statehood periods of sitting specially in equity. Judgments of chancery courts could be appealed directly to the Supreme Court.

The constitutional amendment of 1850 and the Act of February 11, 1850 implementing the amendment, in addition to abolishing county courts and orphans' courts, and creating probate courts, also provided for the popular election of probate and judges as part of a nationwide effort for court reform, known as the Jacksonian

movement, associated with the "jurisprudence of popular sovereignty," by which all states admitted between 1845 and 1912 provided for popular election of judges.[143] Thus, with the exception of chancellors, all trial court judges, which included justices of the peace, were elected. The impact of this court reorganization, resulting in an elected judiciary, on the status of slaves and free blacks was negligible, as slaves were pressed down to the lowest common denominator and free blacks were disenfranchised. The changes, which most directly and immediately benefited the non-slaveholding white yeomen class, were not fully realized until after the end of slavery. Although the trial judiciary was predominantly elected at this juncture, the Supreme Court, as the only appellate court, decided and defined the law which trial courts were bound to enforce. Nevertheless, the change authorizing elections for most judicial offices in the state was potentially revolutionary for the litigants, as most cases and legal matters, with the exception of chancery, were finally decided in justice courts and other trial courts without any review by the Supreme Court, regardless of whether slaves were involved, and in the dynamics of trial practice, the lines between judges and juries were blurred in an era in which juries of were actively involved not only with judging guilt or innocence, but in determining the severity of punishment imposed.

No specific authority for municipal or mayors’ courts appears in the 1819 Constitution or the 1852 Code. Municipal and mayors' courts were the creature of acts of the legislature, mainly the result of enabling acts adopted for each municipality by separate enactment, arising under the catch-all provision of the state constitutional

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[143] Christopher Waldrep and Donald G. Nieman, eds., *Local Matters: Race Crime and Justice in the Nineteenth-Century South* (Athens, Ga.: University of Georgia Press, 2001), xii.

authority of the legislature to create such inferior courts as deemed necessary. The details of the local court systems resulting from enabling acts were supplied by municipal ordinances enacted by city councils, sometimes referred to as the "common council." Municipal and mayors' courts were essentially trial courts of inferior jurisdiction, charged with adjudicating minor, non-indictable misdemeanors and "petty offences," substantially resembling justice of the peace courts in jurisdiction and operation - informal, non-jury proceedings, with the route of appeal to circuit court for discretionary review by *certiorari*.[144] In most cases, particularly as to slaves and free persons of color, municipal and mayors' courts were courts of last resort; hence, few appeals ensued.

The basis for the mayors' courts, most prominent in Mobile and Montgomery, was an enabling act of the legislature creating the municipality and a subsequent ordinance enacted by the common council establishing the court. The jurisdiction of mayors' courts in municipalities resembled the jurisdiction of justice courts in counties and unincorporated areas of the state. Many of the enabling acts authorizing towns set forth express provisions for managing the slave population and free persons of color, as well.

The courts of county commissioners performed some judicial functions, but had little direct impact on the regulation and control of slaves, as their jurisdiction was largely in the area of assessment of taxes. However, under state law, county commissioners could require slaveholders to provide slaves for road construction and repairs in the county.

[144] Mobile Code § 559.

Whether the judiciary was appointed or elected may have had negligible impact on the system of slavery, as only white men could vote, an electorate co-extensive with the legislators who selected the appellate judiciary. In the final analysis, white men, among them slaveholders, were virtually represented in the selection of judges by the General Assembly by reason of the direct election of legislators by the same constituency, although in a popular election, conceivably more nonslaveholders would have had input into the judicial selection process. As with jury selection, racial identification, and the attainment of the socioeconomic status associated with slaveholding, were determinative in judicial qualifications. While slave or other property ownership was not a prerequisite to holding judicial office, the typical profile of an appointee or candidate was characterized by substantial wealth, which invariably included slave assets, so property ownership and chattel slaves were synonymous. Thus, the qualification of property ownership for holding public office was virtually a slaveholding requirement, as reflected in profiles of judicial officeholders. Due to all of these factors, the interests of slaveholders received protection from the governmental institutions of society.

The Supreme Court as an appointed tribunal was the one constant in the judicial administration of slavery. The Supreme Court became elected with the 1868 Constitution, roughly coinciding with the end of slavery. Although most trial judges, with the exception of chancellors, were elected after 1850, the nature of the Supreme Court as the appellate court of last resort and defining precedent binding on all the trial courts of the state and the parties appearing before them was in substance an appointive system. The Supreme Court as an appointive tribunal is associated with the era of

slavery. Additionally, for the first thirty years of the existence of the state judiciary, and for much of slavery era, most judicial offices were appointed in any event. The impact of an appointed appellate court is unclear, only that this method of judicial selection for the statewide appeals court is most associated with the institution of slavery in Alabama history.

Some patterns do emerge, however, in connection with the widespread election of trial judges in 1850. The first statutory suit for freedom—distinguished from voluntary slaveholder emancipations effected by the passage of legislative relief acts—was reported on appeal in 1832. However, most cases of this nature arose after 1850. Also, in accordance with longstanding criminal procedure dating from territorial acts, slaves received a trial by jury in circuit court only in capital cases. By the late 1850s, a few slaves were indicted and tried in the City Court of Mobile and other circuit courts for non-capital cases, apparently at variance with pre-established practice. Whether this development occurred as the result of the transition from appointed to elected trial judges, variances in local practice, or substantive changes in state law, such as those resulting from the adoption of the 1852 Code, acts of the legislature, or external political factors, is unclear. Nevertheless, whether the trial courts were staffed with appointed or elected judges, the system of justice was headed by the Supreme Court, an appointed tribunal, a constant in the antebellum period, providing the cohesion and stability necessary for the effective administration of slavery.

Among the inferior courts established germane to the administration of slavery, the most important were justice of the peace courts, which were not only the principal

courts for slave matters, but the citizenry as a whole.[145] Justices of the peace, presiding over justice courts, among the principal local trial courts organized by statute, were elected for three-year terms, a constant from the adoption of the 1819 constitution. Justice courts were the linchpin in the administration of slavery, occasionally adjudicating in concert with probate judges in certain cases involving slaves, handling the trials of almost all non-capital offenses of accused slaves, and most other matters pertaining to slavery, such as dealing with runaways.

Justice courts were at the center of the regulation and administration of slavery. Justice courts had limited criminal and civil jurisdiction. Most matters involving slaves - accused of crimes or as victims of crimes, or in disputes over a slave having some connection the status of a slave as property - were most likely to end up in justice court.

During the slavery era, justice courts fulfilled important functions in the administration of slavery. Justices of the peace handled the trials of nearly all civil and criminal matters relating to slaves and slavery, and due to the infrequency of appeal, were often the court of last resort for slaves and free persons alike. Among the cases tried and decided by the justice courts relating to slavery were the setting of bonds in civil cases in connection with the trial of the right to slave property, detention of runaways, cases for damages stemming from trover and conversion of slaves, and the trial of all non-capital accusations against slaves, as well as crimes against slaves by white persons. In matters relating to the prosecution of slaves, the preliminary jurisdiction of the justice court in a capital murder case against a slave for the homicide of a white person was to consider bail or commitment of the accused based upon a finding of probable cause.

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[145] Ala. Const. (1819), art. V, “Judicial Department,” § 1.

About 130 civil cases originating in justice courts and having an established connection to slavery were appealed from 1820 to 1861, coursing through the circuit, county, and chancery courts of the state en route to the Supreme Court,. By comparison, the number of reported capital cases involving slaves as defendants for the same period, such cases originating in county or circuit court is less than 60 opinions, along with a few statutory suits for freedom.[146] As to justice court matters and slave matters in general, such cases having origins or connections with slavery are vastly underreported. The 130 cases on the civil side or in equity, touching on justice court and slavery, stand in contrast to criminal cases involving accused slaves, and other criminal cases, wherein whites in the reverse are charged with crimes against slaves. The frequency of civil appeals was related to the status and wealth of the parties involved, wherein slaves appeared as property and were the object of various legal and equitable actions as noted above, such as levy, attachment and execution, garnishment, trespass, trover and conversion. Civil claims by wealthy individuals and business firms, having greater access to the courts, are more prominent in the reports and arise with greater frequency than slaves tried for non-capital offenses, for which almost no appeals are reported.

Sellers and Morris have suggested reasons for this circumstance, which may be summarized, as follows: (1) justice courts were not courts of record; (2) recordkeeping was sporadic and often nonexistent, and even more so in regard to slave prosecutions; (3) the nature of punishment imposed, usually whipping inflicted upon conviction, rendered the judgment moot or otherwise not amenable to appeal; (4) as an inferior court, the justice system was not designed or intended to foster appeals, especially in slave cases;

[146] Repeated or successive appeals involving the same parties or litigation are counted as separate cases.

and (5) the obvious, slaves had no resources to prosecute an appeal. Sellers reports that much slave crime was handled by trial and whipping, or hanging in a capital case, at the place where the crime occurred, although study of the 1852 Code suggests that the county sheriff was charged with infliction of punishment, including executions, which were to take place at the county jail or the environs, and further, slaves were to be tried in the manner of white persons, with the implication that this proviso included execution of sentence at the hands of the sheriff. As another consideration bearing on underreporting, slaves were charged and punished capitally for many offenses, which, if committed by a white person against a slave, were likely to go unpunished.

The foregoing justice court cases comprise part of a grand total of over 1,700 reported appeals, spanning 1820, the first session of the Supreme Court, through the June Term of 1860, having some connection to slavery. As the total volume of cases reviewed increased with the growth of the state, the slave case totals increased not only in absolute numbers, but as a greater proportion of the court's caseload, such that by 1861, appeals relating to slavery constituted over 25 percent of the court's docket.

Reviewing the work of two scholars in the field of the law of slavery, Wahl and Gross, reveals a common denominator and theme. The common element of the research on the subject is analysis of civil, equitable, and probate cases; Wahl, examining appellate reports across several slaveholding states, and Gross reviewing trial records, principally relating to Adams County, Mississippi. This is a relevant methodology as among other reasons, the trial and appellate records derived from cases various forms of property the most potent evidence available in the discussion, and in any event, along with Morris, show quite clearly that the investment of the region in slavery was

substantial, and the mutual and reciprocal influence of the political and legal system on one hand, and slavery on the other, was pervasive, complementary, and for the elite of Southern slaveholding society, lucrative and beneficial.

Wahl's area of inquiry and expertise, slave sales and slave hiring, and the collateral consequences of these practices, such as personal injuries sustained by slaves in various activities, is premised on the substantial economic impact of slavery as reflected in the business of the courts.[147] As stated by Gross: "So much of the daily business of Southern courts involved the commercial law of slavery—about half of the trials in the Adams County [Miss.] Circuit Court—that we cannot understand the place of law in Southern culture without visiting the courthouse during a trial for breach of warranty of a slave."[148]

Under the state constitution and the Code of Alabama, justices of the peace were elected for three-year terms.[149] Until 1850, most trial court judges were appointed by the legislature. The Supreme Court remained appointive until 1868. Thus, the role of the justice courts in the administration of slavery was, until 1850, somewhat unique, in that elected tribunals on the local level were involved
in the daily administration of slavery, while a largely appointive system administered matters unrelated to slavery, or slaves.

Justice courts adjudicated matters of the retrieval of escaped or runaway slaves in conjunction with activities of slave patrols and the county sheriff. According to the state constitution, jury trials were mandated for slaves for all crimes exceeding petit larceny,

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[147] Jenny B. Wahl, *The Bondsman's Burden* ("Judicial regard for contracts agreed to by those trafficking in human flesh yielded efficient law," at 4.).
[148] Gross, *Double Character*, 23.
[149] Ala. Code § 179 (1852).

but the character and conduct of slave trials was streamlined and perfunctory in comparison with the trial of white persons. Justice courts considered cases of slaves accused of petit larceny not exceeding twenty dollars; in such cases, slaves were tried by a single justice of the peace. Ordinarily, unless a capital offense was involved, justices of the peace, not county or circuit judges, presided over jury trials of accused slaves. Only in the case of a capital offense was an accused slave subject to indictment and tried with a county or circuit judge presiding.

Although cases involving slaves might be filed in other courts, such as in civil matters, justice courts were the trial courts of the community, hearing most cases at the local level. Overall, in volume, justice courts heard more cases than any other court, and more cases regarding slave matters were filed in justice courts than in any other court.

The training of justices of the peace was consistent with practices of the day. While supreme, chancery, circuit and county court judges were trained as lawyers, justices of the peace were not required to be lawyers, but some were, in an era in which law schools and formal legal training were uncommon, and most preparation for admission to practice was by apprenticeship and study with an experienced lawyer.

Compensation of justices of the peace was derived from fees collected directly from litigants in civil cases and fines exacted from defendants in criminal cases, with payment of the justice of the peace contingent on the outcome of the case. In most cases, civil or criminal, the losing party could be taxed with costs. However, the direct collection of fees from litigants in cases, as with probate judges after 1850, was peculiar to justice courts. Receipts and collections associated with docketed cases constituted the judicial income and compensation of justices of the peace. In regard not only to

disposition of cases against slaves, fines and court costs incurred by convicted slaves were taxed to the owners, since, by definition and consistent with slave status, no slave could own anything of value by which to satisfy a judgment. Thus, in justice courts, as well as other trial courts, convicted slaves were sold to satisfy fines or costs left unpaid by the slaveholder, or in cases in which the slaveholder could not be found.

Due to such factors, practice and disposition of cases in justice court was subject to a high degree of informality and expedition. This characteristic was accentuated even more with the formation of specialized justice courts, dating from territorial times, to consider accusations of crimes against slaves. In non-capital cases exceeding allegations of petit larceny, accusations were without indictment and trial occurred before a panel of three justices of the peace. On conviction, the potential route of appeal, usually by a petition for a writ of error or sometimes by certiorari*,* was to the Supreme Court, a remedy which was rarely taken, as evidenced by a review of reported appeals.

The slave's owner was obliged to pay for the slave's defense costs only in capital cases; in default of the owner to retain counsel for the slave, attorneys' fees were paid to appointed counsel only in a capital case. As a result, any non-capital crime alleged by a slave, whether constituting misdemeanor or felony, proceeded by a "short, plain statement" of the complaint drawn up by the justice of the peace, without a grand jury indictment. Bail was rarely granted a slave; on occasion, slaves were released to the custody of their owners pending trial.

Trials of cases constituting petit larceny or lesser offenses were without a jury, before a single justice. Three justices, sometimes more, were empanelled to preside over jury trials for non-capital cases exceeding petit larceny. Procedure for the trial of slaves

varied in the ensuing decades. Early procedure under the 1819 Constitution called for three or more justices presiding over a jury of twelve men in non-capital cases exceeding petit larceny. Before the adoption of the 1852 Code of Alabama, special slave courts to try slaves accused of capital crimes, comprised of two justices of the peace and the probate judge in the jurisdiction where the crime was alleged to have been committed, were empanelled. This circumstance is contrasted with the accusation and trial of white persons, who even in all but minor misdemeanor cases received a grand jury indictment and a trial by jury. As might be expected, most white defendants had access to financial resources, and in turn to counsel at trial and on appeal, although in rare cases, slaves, aided by sponsorship of their slaveholders, might have more ready access to counsel and a defense. As a rule, reported appeals by convicted white persons were more frequent.

Justice courts, like most trial courts of the period, while handling the bulk of litigation filed in the courts, also present problems in contemporary research and historical evidence of their operation. First, in most instances, justice courts operated as inferior courts, not functioning as courts of record; as a consequence, no record transcript was created for purposes of appeal. Additionally, justice courts, by design, were conducted with a minimum of paperwork generated, with a reliance on oral testimony, with docket books and brief entries and witness subpeonas comprising the record of proceedings, providing little in the way of an historical record. The methods of record keeping as to the trial of slaves are even more deficient with reference to historical preservation. Of the few records which were kept, most justice court records were lost or destroyed, and with them information concerning slaves, although some evidence of

justice court practice and disposition of cases related to slavery may be found in reported appellate cases.

One case involving the prosecution of a slave in justice court is the case of Pompey, an unreported case, preserved as an archival record of justice court proceedings preliminary to indictment and trial, with two justices of the peace and other members of a panel, which included local physicians, conducting a jury of inquest relating to a homicide investigation. One value of the record of the proceedings of the jury of inquest is that the proceeding shows that justices of the peace did more than preside over cases of slaves accused of minor offenses. Additionally, the jury of inquest record is one of few relatively complete extant records of justice court proceedings involving a slave. Another matter of interest is that the jury of inquest, a proceeding preliminary to an indictment, in operation, resembled a jury trial accompanied by relatively extensive proceedings, with two justices presiding and a two physicians present, as well as several witnesses who were subpoenaed.

The purpose of the jury of inquest was to investigate the death of Patrick Maxwell at the Emerson plantation near Marion Junction in Dallas County. The slave Pompey had been apprehended as a suspect; however, the first area of inquiry was to determine whether a homicide in fact occurred; in other words, the cause of death. The second phase of the hearing was to determine whether there was probable cause to believe Pompey committed the crime, and if so, whether the case should be referred to a Dallas County grand jury.

The proceedings in Dallas County justice court prior to indictment of the slave Pompey for the homicide of a white man, a capital crime, read together with reported

capital cases involving slaves and proceedings of justice courts, suggest procedures that were typical of the operation of justice courts, usually the court of first instance for the handling of slave prosecutions. This particular proceeding, a jury of inquest, seems to have been characterized by more formality and deliberation, undoubtedly due to the gravity of the offense, and the potential punishment.

In 1859, during the preliminary proceedings against Pompey for murder, Dallas County had three justices[150] who handled the trial of civil cases presenting claims not exceeding fifty dollars, petit or minor criminal offenses, bail, commitment, and preliminary hearing matters in serious offenses.[151]

According to records, numerous witnesses, some of whom on close inspection appear favorable to the accused, were summoned for a jury of inquest. The records of justice court suggest that the case was referred to the Dallas County grand jury for indictment. Witnesses were subpoenaed for the inquest proceeding. Later, a circuit court

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[150] As identified through research and investigation.

[151] Generally, capital crimes were defined as those having no statute of limitations for the commencement of prosecution (e.g., the return and filing of an indictment) and punishable by death upon conviction. Under the 1852 Code of Alabama, the codification operative at the trial of Pompey, capital punishment was mandated for a variety of offenses, not merely intentional, willful, malice aforethought murder of a white person. A slave convicted of any type of murder or assault with intent to kill a white person, regardless of requisite intent, would receive the death penalty. § 3312. A maiming inflicted or poisoning attempted upon a white person by a slave not otherwise constituting an assault or intent to kill would result in a death sentence. § 3311. A sentence of death was imposed on a slave convicted of arson of certain structures and conveyances, and for the nighttime burglary of a dwelling. § 3308. Intentionally killing another slave warranted execution. Conviction of a slave for the rape or attempted rape of a white woman would result in a death sentence. § 3307. Any killing, as well as the commission of other violent acts, and even complicity in mere conspiracy, by a slave deemed arising from a rebellion or insurrection would result in execution, with perfunctory, expedited justice imposed; i.e., trial was set not more than fifteen days from commitment, and the execution of a slave convicted of rebellion or insurrection was required not later than twenty days after sentencing. Hence, all appeals from a conviction for rebellion or insurrection were effectively barred. §§ 3306, 3321, 3330.

trial date was set, indicating the filing of an indictment against Pompey, consistent with practice required by law in the case of a slave accused of a capital offense.

On July 22, 1859, the jury of inquest convened and issued a recommendation to justices James J. Gilmer, Jr. and John W. Taggert with reference to the deceased and Pompey's possible connection to his death.[152] Patrick Maxwell, a white man, died in an open field at the Emerson plantation in Dallas County on July 14, 1859. For this reason, the jury of inquest convened at Emerson plantation. The jury of inquest ruled that Maxwell was the victim of a homicide. Although the record does not specifically indicate, a finding of probable cause was issued, suggesting that Pompey was the perpetrator.

The inquest into the death of Patrick Maxwell was the first step in the prosecution of Pompey. According to the verdict of the jury of inquest, Patrick Maxwell

> came to his death by violence, inflicted by a blow or blows on the back of his head, & also the appearance of some wounds on his breast, but owing to the body being so much decomposed, [the jury] could not fully determine . . . . But it is the opinion & belief of said jury, that a felony has been committed on the body of said Maxwell, as above stated, and from the circumstances before them [the jury], it is their opinion & belief that strong suspicion rests upon a certain negro man slave by the name of Pomp[ey] the property of John P. Clay, of said County, as having been guilty of said offense of homicide (or felony).[153]

Following the inquest, a subsequent proceeding was conducted by Justice Gilmer on July 28, 1859 at Pisgah Schoolhouse[154] to determine probable cause for commitment of Pompey and to refer the case to Circuit Court for consideration by the grand jury for

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[152] Ala. Code §§ 3763-3773 (1852).
[153] ADAH LG 5534 (emphasis in original). The appearance of Dr. W.D. Wiley and Dr. A.M. Purnell on the principal witness list indicates their role as physicians in the inquest to offer their professional opinion under Ala. Code § 3765 (1852) as to the cause of Maxwell's death, and also ties the witness list to the inquest proceeding.
[154] West of Selma near Marion Junction in Dallas County.

indictment, and, if necessary, for a trial by jury at the Dallas County Courthouse. The documentary evidence shows such action was taken by Gilmer.

A review of available records such as circuit court subpoenas and docket entries indicate that Pompey was bound over to the Dallas County grand jury and indicted for capital murder of Maxwell.[155]

The Pompey case does not appear among the reported cases of the Alabama Supreme Court or in the clemency files of the governor. The absence of a subsequent record of the case in Dallas Circuit court indicates that Pompey could have been acquitted. Alternatively, many death penalty convictions were not appealed during this era; thus, his ultimate fate can not be determined. The significance of the Pompey is that his case illustrates pretrial procedure in the disposition of allegations of serious crimes by slaves, the role of justice courts in dealing with the alleged conduct of slaves affecting the community, and that the consequences of slavery were frequently not merely a private matter

[155] The filing of subpoenas in circuit court is noted, indicating grand jury indictment or presentment of the case after a justice court disposition.

CHAPTER 3

THE CIVIL STATUS OF SLAVES AND FREE BLACKS: MANUMISSION, EMANCIPATION, AND THE SUIT FOR FREEDOM

From the colonial period to the antebellum era, the character of slavery remained relatively constant, with a few variations. One change occurred in regard to government policies governing slave manumissions. When African slavery was introduced in colonial times, manumissions were viewed as the prerogative of the slaveholder without regulation from the government, based on the fact that the slave was the property of the slaveholder; thus, the right to acquire slaves implied the unqualified right to liberate them. This view was quickly abandoned in a succession of legislative acts, as evidenced in the slavery provisions of the Virginia act of 1705. In addition to abolishing emancipation by Christian baptism, the 1705 act formalized a system of inheritance which solidified the status and value of slaves as property, functioning as a further deterrent to manumissions. This model was adopted in other slaveholding colonies and later in emerging slave states of the southeast. The Mississippi Territory and the resulting states of Mississippi and Alabama followed the colonial model, with two exceptions, which made emancipation even more difficult in practice.

In colonial Virginia, slaves were considered real property. By the 1800s, slaves were classified as personal, or moveable, chattel property as opposed to a type of real

estate. One effect of the personal property classification was to cause slaves to be more readily bought, sold, and transported among the southern slaveholding states, which accelerated in the 1800s, which discouraged manumission attempts. The other difference between colonial Virginia and the slaveholding states of the 1800s was not merely that slavery and limitations on manumission were recognized by acts and statutes as in Virginia, but were further extended and accorded greater potency by state constitutional recognition. The 1819 Constitution provided that the General Assembly had "no power to pass laws for the emancipation of slaves without the consent of their owners," or without payment to such owners the full equivalent in money" for the slaves emancipated.[156] Thus, limitations on slave emancipation were the subject of constitutional law, not merely statute, and such restrictions were extended to governmental as well as private acts.

As a rule, apart from criminal law, while slaves could be held accountable in their own persons for criminal offenses, and could complain as victims of crimes, slaves had no standing or capacity in the courts as civil litigants. A statutory exception was created by the territorial legislature in the form of the suit for freedom, and as substantially carried forward in the digests and the 1852 Code of Alabama. A few reported appeals in the Supreme Court were recorded beginning in the 1830s relating to the suit for freedom. In the suit for freedom, slaves actually appeared as party plaintiffs in the manner of white persons in other civil lawsuits. Construed more broadly, those cases in which the person

[156] Ala. Const (1819), art. VI, "Slaves," §1.

of the slave was considered more than as a mere object of property included *inter vivos*[157], and testamentary[158] acts of manumission.

The term "emancipation" as used in statutes and opinions, as applied to slaves, was a misnomer. In the usual sense, for an adult white man, emancipation was associated with reaching the age of majority, with freedom to contract, hold property, vote, and serve on juries.[159] The status of emancipated slaves was highly circumscribed and restricted. As stated by Justice Lumpkin of the Georgia Supreme Court in *Bryan v. Walton* (1853):

> .[t]he act of manumission confers no other right but that of freedom from the domination of the master, and the limited liberty of locomotion . . . it does not and cannot confer *citizenship*, nor any of the powers, civil or political, incident to *citizenship* . . . .[160]

The distinction of the suit for freedom on one hand, and manumission and emancipation, on the other, was that in the former, the putative slave was accorded status of a plaintiff, while in the manumission or emancipation process, the slave proceeded under the auspices of and with rights derivative of his slaveholder, who functioned as the "plaintiff" or petitioner on behalf of the slave. Most importantly, the suit for freedom was a vigorously contested case between the individual claimed as a slave and the putative slaveholder. The statutory manumission process was necessarily more cooperative since, in the end, freedom of the slave, accompanied by generous conditions, depended on an act of the General Assembly, approved by both the House and Senate. In the manumission process, the slaveholder or the representatives of his estate acted as a

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[157] Effected by deed of the slaveholder during his lifetime.
[158] By last will and testament of the slaveholder, effective at death.
[159] Age eighteen for most purposes, twenty-one for voting, jury service, and holding public office.
[160] Morris, *Southern Slavery and the Law*, 371-72 (emphasis in original).

type of sponsor; in this situation, the actual or potential adversaries to the slave seeking freedom were third-party creditors, as all manumissions confirmed by legislative act were conditioned on satisfaction of creditors of the slaveholder or his estate.

Actions classified as manumissions or emancipations altogether amounted to about thirty-five reported appeals. The terms manumission and emancipation are often used interchangeably. A possible distinction between the two terms is that manumissions are associated with private, voluntary acts or attempts by the slaveholder, while emancipations are associated with a governmental act, such as a legislative relief act or a judicial decree, or sometimes a combination of the two procedures, as in a testamentary bequest of emancipation adjudicated in county courts, and beginning in 1850, probate court. Decrees of emancipation entered before 1834 were confirmed by legislative act.

The Act of 1834 changed the emancipation procedure to an entirely judicial process, eliminating the need for individual legislative enactment. Insofar as requiring some type of governmental action to effect freedom, such as a legislative act or judicial decree, all slaveholder attempts to liberate slaves could be categorized as emancipations, especially in view of the constitutional restrictions imposed by article VI upon emancipations, which from territorial days required the averment of a "meritorious act" by the slave as a predicate to emancipation.

In substance, the suit for freedom, having origins in the territorial act of 1805, was an involuntary emancipation attempt, an overtly contested case between the alleged slaveholder and the individual claimed as his slave, filed by a putative slave or person of color in county court, or circuit court after 1850. In certain respects, the suit for freedom was a species of a petition for writ of habeas corpus filed by a free person of color

claimed as a slave, a writ which was ordinarily denied accused slaves incarcerated in connection with pretrial detentions. In practice, the writ of habeas corpus had no application to post-conviction incarceration of slaves; as a practical matter, the prescribed criminal punishments imposed on slaves were whipping or death, and occasionally transportation rather than confinement, and slaves had no interests of liberty or property the courts would recognize in any event.

The usual fact pattern of the suit for freedom involved a plaintiff of color who subjectively believed himself free and, moreover, was frequently regarded as free person of color by others in the community, sometimes living undisturbed for many years, while a putative slaveholder appeared claiming the individual as a slave, in effect seeking enslavement or re-enslavement, depending on the circumstances, of the person of color. The source of this predicament for the free person of color is found in section 2042 of the 1852 Code of Alabama, traced to the origins of African slavery, which codified the legal presumption of slavery as associated with persons of the "negro" or "African" race, or simply stated, that persons of African descent were presumed slaves.[161] The presumption of slavery attending a person of color meant that in a contested court case, the burden of proof and evidence was upon the person of color; thus, the plaintiff effectively had to prove himself free. Coupled with the presumption of slave status for a person of African descent, a challenge to the status of a free person of color could be invited by alleged defects in a chain of manumission instruments, such as deeds, wills, and court decrees, especially if such documents and orders originated in other states, thereby making such evidence more difficult to obtain. Essential and often remote documents and decrees

[161] Ala. Code §2042 (1852).

conferring freedom on ancestors of free persons of color, and in turn, upon free persons of color by descent, were unattainable due to loss or destruction resulting from substantial passage of time.

The discussion of manumission, emancipation, and the statutory suit for freedom is ultimately related to the effect of these measures on the resident free black population of Alabama and other slaveholding states. Most evidence suggests emancipations tended to slightly increase the free black population in absolute numbers, but proportionately, the impact on the slave population in Alabama was trivial. Additionally, study of emancipation and free blacks leads to consideration of their status and activities in comparatively more urbanized areas of the state such as Mobile and Montgomery. For instance, according to one account based on census records, the free black population of Mobile 1860 was 817 persons, and was predominantly female.[162] Additional data reflect the free black population of Mobile increasing from 372 in 1830 to 715 persons in 1850. Moreover, while increase in the white population remained constant from 1840 to 1860, the percentage increase of slave and free blacks in Mobile dropped sharply in the 1850s. Finally, as a percentage of the population of Mobile, free blacks constituted 11.6 percent of the population in 1830, but only 2.8 percent in 1860. During the same period, the proportion of slaves in the population remained relatively constant, exceeding 25 percent in 1860. These figures, which apparently relate to the city of Mobile, may not account

[162] Wilbur Zilensky, "The Population Geography of the Free Negro in Ante-Bellum America," *Population Studies* 3, no. 4 (March 1950), 400.

for residents of Mobile County and obviously do not account for free blacks in neighboring Washington and Jackson counties.[163]

Whether classified as manumissions, emancipations, or suits for freedom, an additional significance of emancipations was whether these procedures had any significant effect on the resident slave population, whether reducing it in absolute numbers or proportionately. The data shows that the effect of emancipations on the overall slave population was negligible. Emancipations declined in absolute and relative numbers in comparison to the resident slave population after the Act of 1834, which required slaves emancipated after that time to leave the state within twelve months of a decree of manumission.

Some thirty appeals on issues of emancipation and about sixty criminal cases involving slaves as defendants or victims, even if reasonably or substantially extrapolated to account for an undetermined number of cases involving criminal matters and emancipation not appealed from trial court decisions, indicates about 100 of some 1,700 appellate cases reported from 1820 to 1860 touching on some element of slavery, or less than 6 percent of the total cases relating to slavery. In such cases, slaves nominally achieve the status of persons in the law or substantially function as litigants in their proper persons, as opposed to mere objects of property. The remainder of the 1,700 grand total, about 1600 cases, are concerned principally or wholly with slaves as property, and related issues of sale and warranty, transfers by bill of sale, wills, descent and distribution, deeds of gift, mortgages, executions, garnishments, attachments, and levy, and a branch of cases involving personal injury or death sustained by slaves, usually

[163] Harriet E. Amos, *Cotton City: Urban Development in Antebellum Mobile* (Tuscaloosa, Ala.: University of Alabama Press, 1985), 86.

in the course of working on common carriers such as railroads or steamboats or performing other labor hired out to third parties. This is an important point bearing on the essential elements of slavery and the status of the slave - the condition of slavery being lifetime and hereditary, and the potential of political and legal processes and remedies to break or arrest the cycle.

In the great balance of cases, the financial and economic incentives associated with the value of the capital and labor of the slave to the slaveholder and prospective slaveholders perpetuated the cycle of slavery and deterred most emancipations, one reason the colonization movement was deemed a failure by 1831. In many cases, despite the earnest intention of the slaveholder to free the slave, such attempts were defeated by creditor claims in satisfaction of debts and judgments or by heirs and beneficiaries of estates who wanted the slave as part of an inheritance or bequest. The evidence is overwhelming that emancipation by whatever means was wholly ineffective to reduce the slave population, or even to prevent increase in the enslaved population, for a number of reasons.

Under the Act of 1805 governing the Mississippi Territory, in connection with a voluntary emancipation, a slaveholder seeking to emancipate a slave was required to (1) prove to the satisfaction of the General Assembly that the slave had done some meritorious act for the benefit of the owner or the territory and (2) give bond and security to the governor so as to ensure that the slave would not be a charge on the public.

However, the slave so emancipated was liable to be taken by execution to satisfy any debt contracted by the emancipating slaveholder.[164]

Section 2 of the act , an involuntary procedure as to an unwilling slaveholder, or a suit for freedom, initiated by the slave, provided that any slave claiming his freedom must petition the county or circuit court of his slaveholder's residence for same.[165] During the pendency of the case, the slave was to remain in service of his slaveholder. The slaveholder or other person claiming the slave was required to post a bond for security for costs.[166] Section 2 was amended in 1815 to require suits for freedom to be filed exclusively with superior courts of law and equity, with judges of the territory empowered to accept bonds in or out of court.[167]

The Constitution of 1819 empowered the General Assembly to pass laws to permit owners to emancipate slaves, but "saving the rights of creditors and preventing [slaves] from becoming a public charge."[168] Legislative acts of emancipation were known as "private" or "local" laws, or relief acts, as opposed to acts of a general nature affecting only a few individuals.

As voluntary slaveholder emancipation of slaves was dependent on legislative enactment, the effectiveness of emancipation during the territorial period is gauged by resort to acts granting freedom to slaves, usually separate acts by individual, sometimes

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[164] Toulmin's Digest, 259, 632 (1823); Chapter II, Act of July 20, 1805, "An Act to prevent the Liberation of Slaves, only in cases hereafter named, and for other purposes," § 1.
[165] John V. Denson, *Slavery Laws in Alabama* (Auburn, Ala.: Alabama Polytechnic Institute Historical Studies, 3rd Series, Reprint, 1908), 3-4.
[166] Toulmin's Digest, 632, Ch. 2, Act of July 20, 1805, § 2.
[167] Ibid., 638, Ch. VIII, "An Act to amend the Act entitled 'An act to prevent the Liberation of Slaves,'"etc., § 1.
[168] Ibid., Ch. IX; Ala. Const. (1819), "Slaves," § 1.

more than one slave liberated by a single slaveholder, usually family members. From the establishment of the Alabama territory, records reflect that fifty-nine slaves were emancipated by some seventeen separate legislative enactments from 1818 to the end of 1822.[169] Several of the acts of emancipation suggest special or exceptional circumstances: a free person of color liberating his slave wife and children and "mulattoes" or "quadroons" freed by white slaveholders.[170] During early statehood period, the profile of liberated slaves were those individuals held or claimed by free persons of color, or the slaves of white persons and their children of mixed blood.[171]

The 1805 territorial act, incorporated into state law, remained effective until substantially amended by the Act of 1834. The principal changes to prior law were (1) elimination of the requirement to have emancipations approved by legislative enactment, and (2) required emancipated slaves to leave the state within one year of the effective date of their emancipation.[172]

Under the 1834 act, a slaveholder intending to emancipate a slave published such notice in a newspaper of the county of his residence for sixty days prior to filing the petition - in county court prior to the 1850 court reorganization; after the abolition of the

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[169] Ibid., 632, Ch. XIII; 644, Act of December 8, 1822 (9 slaves freed), Ch. XVI; 645, Ch. XVII, Dec. 12, 1822 ; 645, Dec. 28, 1822, Ch. XVIII; 645-46, Dec., 20, 1822, Ch. XIX; 646, Ch. XX, Dec. 5, 1822.
[170] In this instance, it is unclear whether emancipation was accomplished by purchase or the relationship of the petitioner to his family was one of slaveholder; a few instances of free persons of color holding slaves are noted.
[171] See, e.g., Toulmin's Digest, 642, Act of Dec. [n.d.] 1819 (". . . Cesar Kennedy, a free negro of Madison County, was authorized to manumit and set free the following slaves, his property, viz: Hannah, his wife, and her seven children, Maria, John, Mary Ann, William, Cesar, Russel [sic.], and Thomas."); 642, Act of Nov. 27, 1819 ("John Bethany was authorized to emancipate the negro Lydia and the following mulattoes, viz.: Eliza, Elizabeth, William, Daniel, Amelia, Margaret, and Lemuel, a quarteroon.")
[172] Ala. Acts 1833-34, 29, Jan. 17. 1834.

county court system, in probate court. Service to the slaveholder with "fidelity" or other "good cause" was sufficient to grant the petition and enter judgment that the slave was free. Under section 1 of the 1834 act, the freed slave was required to leave the state within twelve months of entry of judgment of emancipation. Section 2 set forth provisions for the arrest, imprisonment, and auction, or re-enslavement for life, of emancipated slaves who remained in the state after the twelve-month deadline and were admonished to leave by the sheriff, but failed to do so within thirty days of such notice.[173]

Emancipation by legislative enactment as provided by the act of 1805 was of no consequence in increasing the numbers of free persons of color or otherwise having any impact on the slave population. In addition to the data cited above for the territorial and early statehood periods, a survey of acts of the General Assembly from 1830 to 1834, preceding the superseding emancipation act which eliminated the requirement for emancipation by private or relief acts, reveals two principal enactments, one enactment for emancipation in 1830 involving thirteen slaves of Nathaniel Clarke,[174] and the other in favor of Jack and several other slaves of James Doran by the Act of January 20, 1832. In the latter case, Doran died in 1840. Litigation involving estate claims and the freedom of his slaves ensued, resulting in the reported case of *Jack v. Doran's Executors* (1861), discussed below.[175]

For the balance of the slavery era, emancipations were infrequent, although the precise extent of emancipations is difficult to gauge for several reasons. As to suits for

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[173] Denson, *Slavery Laws in Alabama*, 6-7; see also citations to subsequent enactments relating to Act of 1834, e.g., Denson, 5-6, n. 4, Acts 1833-34, 29, Jan. 17, 1834; Clay's Digest (1843), 545, §§ 37, 38, 40; Ala. Code §§ 2044-2048 (1852).

[174] Act of Jan. 10, 1832, 100-101 (amending Act of Jan. 20, 1830; thirteen slaves of Nathaniel Clarke emancipated).

[175] *Jack v. Doran's Exrs.,* 37 Ala. 265 (1861).

freedom, putative slaveholders or creditors who received an adverse judgment in the trial courts usually instituted the few cases appearing as reported appeals. On the other hand, due to an obvious lack of resources, persons of color claimed as slaves could not mount an appeal. Thus, the reported appeals are likely to constitute a fair approximation of the frequency and incidence of efforts for judicial emancipations. An examination of trial records in the City Court of Mobile, a type of circuit court, reveals only two suits for freedom spanning 1850 to 1860; both of these cases resulted in appeals to the Supreme Court.

Despite the Act of 1834, which no longer required emancipation by private legislative act, emancipation by enactment continued, seeking special conditions or exemptions, namely as a result of section 2 of the 1834 act, which, for the first time, required the liberated slaves to leave the state. Virtually all emancipation acts examined contained express references to the filing of bonds and security, usually tendered by the manumitting slaveholders. Refraining from becoming a "charge" to the community and "good behavior" were implicit in the terms and conditions of emancipation.

In 1841, under the last will of Reges Bernody, the slaves Hortense Collin, Francis Voltair, Louise Bandin, and her children, Eugine, Hortense Marie Adelaid and Registe, were set free. In accord with the usual conditions, they were allowed to remain in the state upon the filing of bond and security in the amount of three thousand dollars in the County Court of Mobile, and provided that they were never to become a charge to the state or any county or town therein. Apparently, the slaveholder, or if deceased, the administrator of his estate posted the bond customarily required in emancipations on

behalf of free slaves allowed to remain in the state.[176] An 1843 act confirmed the emancipation by the last will and testament of Joseph Johnston of his slave Baptiste of Washington County. The act recited "faithful services" rendered by Baptiste to Johnston, including "aid . . . to [Johnston] in a conflict with a band of runaway outlawed slaves." In connection with the emancipation of Baptiste, the administrator of Johnston's estate, was required to file a bond of five thousand dollars in the County Court of Washington County, accompanied by the standard conditions that Baptiste was never to become a charge to the State of Alabama or any town, city or county thereof, and "to be of good behavior." The act concluded, "Baptiste shall not be required to leave the State of Alabama."[177] Charles, the minor son of the slave Marie of Mobile County who was previously emancipated by Faustin Collin and Maximillian Collin, was not required to leave the state by an act of 1843.[178] An 1844 emancipation act pertaining to the slave Gertrude, which required the slaveholder Julie Allain to file security of two hundred dollars with the County Court of Mobile, implying that Gertrude intended to remain in Mobile County.[179] The 1845 emancipation conditions pertaining to Esther of Autauga County suggested that she would be permitted to remain in the state.[180]

Subsequent private emancipation acts under the 1834 emancipation act providing for similar special conditions were approved. In 1845, Nora and his wife Dinah of Baldwin County were emancipated and allowed to remain in the state, with a bond filed

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[176] Acts 1841, No. 196, 157, Dec. 31, 1841.
[177] Acts 1843, No. 279, 192-93, Feb. 10, 1843.
[178] Acts 1843, No. 263, 186, Feb. 14, 1843.
[179] Acts 1844, No. 4, 5, Dec. 18, 1844.
[180] Acts 1845, No. 240, 168-69, Jan. 27, 1844.

in the County Court.[181] The slave Horace King of Russell County by an act of 1846 was likewise not required to leave the state.[182] In 1854, John Bell, a slave held by the estate of William R. King, was set free and allowed to remain in the state.[183]

Other provisions related to the details of emancipation were set forth in an 1845 private act which extended to January 1, 1850 the time for compliance with the twelve-month requirement removal from the state pursuant to the April 20, 1842 decree of freedom entered in the County Court of Clarke County as to former slaves Cecily, Mary, Squire, Pena, and David.[184]

A few emancipation acts imposed additional restrictions. In 1845, the child William, of Mobile County, was emancipated, but subject to the following condition: "if said William shall at any time hereafter remove beyond the limits of Mobile County, he shall forfeit all the rights and benefits conferred by this act, unless such removal be beyond the limits of this state."[185] In 1844, Abraham Shanklin, a free man of color, was authorized to manumit and set free his wife, Keissey, reserving the rights of creditors. Among other conditions, the act specified that Mr. and Mrs. Shanklin "shall continue to reside in the County of Mobile," although it is unclear whether this particular condition was permissive or precatory, thereby allowing the couple to live outside Mobile County. At first glance, the manumission of a spouse by a free person of color appears novel, but such instances are encountered in several emancipation acts.

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[181] Acts 1845, No. 36, 23, Jan. 11, 1845.
[182] Acts 1846, No. 292, 207-208, Feb. 3, 1846.
[183] Acts 1854, No. 231, 144, Jan. 19, 1854.
[184] Acts 1845, No. 232, 165, Jan. 25, 1845.
[185] Acts 1845, No. 17, 12, Jan. 6, 1845.

A relief act passed in 1845 provided that free persons of color Venus Hassell, Caroline Hassell, and Josephine Hassell of Montgomery were authorized and permitted to continue to live in the state "without being subject or liable to any pains, penalties or forfeitures, on account of such residence." The necessity for this particular relief act was not disclosed, but may have been related to their prior manumission or residency elsewhere, as in the case of James Jones, below.[186]

A legislative relief act was required to permit a free person of color to enter the state and establish residency, somewhat the reverse of situations regulated by the 1834 act for emancipations. James Jones, a free person of color and resident of Georgia, was the subject of an 1854 relief act which authorized Jones to "remove" to Alabama and "enjoy all the rights and privileges and be under all the liabilities of persons of like description that are now citizens of this state."[187]

Slave emancipations occurred during two principal eras of legal regulation - the first from the territorial period to the Act of 1834, and afterward to the Act of January 25, 1860, which prohibited all emancipations by any method.[188] While the requirement of private legislative acts to effect emancipations was abandoned, new obstacles were erected by judicial decision, beginning with the case of *Trotter v. Blocker*, decided in 1838.[189] The issues considered in this line of cases by the Supreme Court related to manumission or emancipation by will, a troublesome area, especially for the slaves, and often their descendants, who were expecting freedom under the will of their late

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[186] Acts 1845, No. 241, 169, Jan. 27, 1845.
[187] Acts 1853-54, No. 164, 108, Feb. 18, 1854.
[188] Acts No.36, 28, Jan. 25, 1860.
[189] Trotter v. Blocker, 6 Port. 269 (1838).

slaveholder. Frequently, years or even decades later free persons of color found they had to prove their status, and occasionally were unsuccessful, even after protracted litigation.

During colonial times, it was thought that because a slaveholder had an absolute right in the person and labor of the slave as his property by implication, the slaveholder was free to liberate the slave without restriction from the government. However, in cases decided by the Supreme Court after adoption of the 1819 Constitution, the provisions of article VI concerning slavery were construed as imposing a "positive inhibition" on the emancipation of slaves by slaveholders, and reciprocally, limiting the state government from freeing slaves without just compensation paid to slaveholders. Consequently, the right of slaveholders to manumit slaves was only by exceptions as may have been granted from time to time by the legislature, and as allowed by the courts.

The essential facts of *Trotter v. Blocker* began with the will of William Butler, signed in 1832. Butler died in 1836. Butler's will provided that his twelve slaves were to be emancipated upon his death. Although the will was valid in form, duly executed and witnessed, as to the emancipation provisions, which included cash and other property bequests to his slaves, the court observed that the Alabama Constitution inhibited emancipations by slaveholders, and the power of the legislature to regulate emancipations was "potent." By the adoption of the Act of 1834, only those methods strictly complying with the act were valid, and all other forms of emancipation, including those in use before the passage of the act, were prohibited. The court found that if a bequest of freedom constituted a "legacy to slaves," the emancipation, and the accompanying property bequests, could not be sustained, in accordance with the fundamental rule that because slaves were themselves property, they were incapable of accepting any type of direct

bequest, such as Butler's bequest of freedom. This was consistent with the principle that a slave could not enter into contract for freedom with his slaveholder, associated with emancipation by purchase.

Another judicial rule governing slave emancipations in Alabama, particularly as to wills, was the requirement that no slave could be manumitted and then allowed to remain in state, except by express legislative exemption, as shown by various private emancipation acts passed after 1834. Stated another way, testamentary manumissions, if allowed at all, had to be effected by promptly taking the slave to a free state, in parallel to the requirements of the 1834 act relating to judicial emancipation applications filed in county or probate court. In the case of wills, the method employed the testator was to direct the administrator of the estate or another designated person to physically transport the slave to a free state after the death of the slaveholder. The creation of testamentary trusts in this connection appears in some cases.

The practical effect of *Trotter v. Blocker* was to vitiate manumission by will, and under the rationale of the decision, potentially any method of manumission attempted. However, in the 1854 case of *Prater's Administrator v. Darby*, the Court overruled that part of the *Trotter* decision, which had stated that the Act of 1834 prescribed the exclusive means of emancipation, and permitted none other, thereby sustaining an 1826 bill of sale of certain slaves, which included a contract to emancipate the slaves by taking them to Illinois. The *Darby* case demonstrates the principle that the slaveholder could liberate a slave simply by taking him to a non-slaveholding jurisdiction.[190]

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[190] Prater's Admr. v. Darby, 24 Ala. 496, 507 (1854).

A reading of *Prater* and similar cases suggests hypothetical and perhaps actual situations in which the slaveholder and the slave would travel to a free state on a sojourn, and the slaveholder would return to Alabama, leaving the slave behind, bypassing the 1834 act, thereby saving time, attorney's fees, and court costs. Under *Prater*, the 1834 Act did not expressly preclude this option, and other cases appear to suggest the practice as a method of emancipation. However, among the factors militating against such a practice would have been considerations of self-interest of the slaveholder and the slave. For the slaveholder, a decree in county or probate court offered protection against allegations of defrauding creditors and functioned to discharge slave property as collateral; for the slave, the decree constituted proof of freedom for the slave and his descendants. Additionally, such a decree was necessary for any free person of color intending to remain in the community rather than move to a free state.

The first reported appeal, denominated a "suit for freedom," involved Sidney, the plaintiff, who was claimed as a slave in the case. At trial, the jury ruled for the claimant. Sidney appealed, but the judgment was affirmed. According to the facts of the case, William Patterson of Delaware manumitted the woman slave Phillis by will, on the condition that she was to remain in servitude until age thirty-one; at such time, her freedom would become effective. Phillis was taken to Tennessee, a slave state. Afterward, but before she turned thirty-one, she gave birth to Sidney in Tennessee. Thereafter, Sidney was sold as a slave to an "innocent purchaser" named White. Presumably, this meant that the buyer was unaware of the existence of the Patterson's Delaware will or the provisions therein. White died, leaving Sidney to his wife.

The court took notice of Tennessee law effective at Sidney's birth and when his mother reached age thirty-one, which differed from Alabama law and appeared to support his position at trial. Specifically, if Sidney had remained in Tennessee until his mother turned thirty-one, under the Tennessee case of *Harris v. Clarissa*, he would have been free. Otherwise, under Alabama law, the provision of the Delaware will was not retroactive to the birth of children occurring before his mother attained age thirty-one.

However, since the issue of Tennessee law and supporting evidence had not been introduced at trial, nor the jury charged on this point, there was nothing for the Supreme Court to review. The result was that the Court upheld Mrs. White's claim to Sidney; moreover, while unstated, it appears that at the same time, Phillis was free under the Delaware will, while her son was a slave.[191]

Another case involved free woman of color Milly[192] Walker of Tuscaloosa, which ensued as successive appeals, the second appeal which included her children. The first appeal, *Field v. Walker*, was decided in 1849.[193] The second appeal, *Fields v. Walker*, was decided in 1853.[194]

The underlying facts of the *Walker* appeals were typical of the legal thicket associated with the suit for freedom, but not even constituting the worst case, which encompassed generations of families spanning decades, sometimes over a century, evidencing complex fact patterns associated with quiet title actions, estate contests, and the like. Indeed, such cases were often entangled in obscure, remote deeds, wills and court judgments spanning several states. The *Walker* appeals originated as a petition for

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[191] Sidney v. White, 12 Ala. 728, 731-32 (1848).
[192] Also shown as "Milley" in the 1853 opinion.
[193] Field v. Walker, 17 Ala. 80 (1849).
[194] Fields [sic] v. Walker, 23 Ala. 155 (1853).

freedom filed in Tuscaloosa County against Richard Jones. In September 1833, a jury ruled in their favor.[195]

In 1848, Richard W. Fields of Brunswick County, Virginia obtained a federal warrant for the apprehension of Milly Walker and her children under the Fugitive Slave Act of 1793. The connection between Jones and Fields, if any, is not apparent from the opinions.

In November 1848, the Walker family was arrested and incarcerated in the common or county jail of Tuscaloosa on a commitment order issued by a panel of three justices of the peace. The order issued on December 12, 1848 granted custody of Milly Walker and her children to Fields, on the basis that the family were slaves under the laws of Virginia and thus belonged to Fields.

The first action, preceding the 1849 opinion, was filed by the Walkers as a habeas corpus petition in the County Court of Tuscaloosa. The County Court granted the writ. Another appeal by Fields was taken to avert the next step, a trial on the merits in County Court to establish the freedom of the Walkers. In the resulting opinion, the Supreme Court overturned the grant of habeas corpus. While possibly appropriate in a criminal case for a free person of color whose status was not questioned, as with a white person facing a criminal charge, the Walkers were using the writ of habeas corpus to challenge allegations of their slave status, an impermissible use of the writ, for which County Court was without jurisdiction. The Supreme Court directed County Court to vacate the order granting the writ, dismiss the petition, and "remand" custody of the Walkers to Fields.[196]

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[195] Ibid.
[196] Field v. Walker, 17 Ala. 80, 84 (1849).

After the first appeal, the Walkers filed a third suit, this time a petition for freedom in the Circuit Court of Tuscaloosa County to try the case on the merits. They received a favorable judgment; Fields appealed again.

In the 1853 appeal, the Walkers were successful. The Court found that the Walkers did not "escape from [the] service" of Fields or flee from the state of Virginia; therefore, the Fugitive Slave Act of 1793 had no application, and "the proceedings before the justices of the peace of Tuscaloosa County [under color of the Fugitive Slave Act of 1793][were] wholly without authority in law."[197]

The Fugitive Slave Act is commonly depicted as a device employed to apprehend runaway slaves in free states. In the *Walker* cases, the act was invoked by a putative slaveholder in an attempt to compel extradition of persons claimed as slaves between two slaveholding states. In substance, with repeated resort to the Fugitive Slave Act in the courts of the slaveholding states, the legislation constituted an interstate compact for the management of slavery. Although the Walkers prevailed on the merits, the continued use of the Fugitive Slave Act between slaveholding jurisdictions, at variance with its apparent intended purpose, was not precluded.

Suits for freedom were considered in the cases of *Bloodgood v. Grasey* (1858) and *Farrelly v. Maria Louisa* (1859), both cases appealed from judgments rendered in the City Court of Mobile. These appeals prompt examination of the nature and origins of the free black population in the area, and the possible connection to the efficacy of manumissions and their parallel, the suit for freedom. Southwest Alabama, including Mobile, had the greatest concentration of free persons of color in the state. However, a

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[197] Fields v. Walker, 23 Ala. 155, 167 (1853).

great many of this segment of the population were Creoles or other persons of mixed blood inheriting a free status linked to the treaty of cession with Spain, and subsequently confirmed by state law. Thus, in the end, the fact that the Mobile area was home to a notable population of free blacks did not signify liberal or effective manumission policies by the legislature or the courts which were calculated to, or which did in fact, directly result in a significant free black population in Mobile or anywhere else in the state.

In the first case, Grasey, a woman of color, was claimed as a slave by Hildreth Bloodgood and his wife. In support of her suit for freedom, Grasey offered evidence of a 1787 deed of manumission, characterized as a "prospective emancipation," issued by Josiah W. Dallam under a 1752 Maryland statute. Among the several slaves Dallam manumitted was Hannah, the maternal grandmother of Grasey. Under the deed, Hannah's manumission was to become effective after thirteen years. Hannah gave birth to Matilda, Grasey's mother. Grasey was born in Kentucky, a slave state, in 1820. Matilda filed a successful suit for freedom in 1831. At trial, a dispute arose concerning the due execution or validity of the 1787 deed of manumission. A single witness witnessed Dallam's signature, although Maryland law effective at the time apparently required two witnesses to the deed. Additionally, Bloodgood objected to evidence of the Kentucky judgment offered. Bloodgood raised an issue similar to that arising in *Sidney v. White*—that the plaintiff was born before the rendition of the judgment of emancipation, and that the judgment was not retroactive; thus, the manumission failed as to the plaintiff. Alexander McKinstry, Judge of City Court, essentially charged the jury that one witness was sufficient, the execution of the deed complied with Maryland law then effective, the

Kentucky judgment was effective, and Grasey offered sufficient proof of the facts. The jury returned a verdict for Grasey.

The Supreme Court reversed the favorable jury verdict for Grasey, directing a new trial. As with the will providing for future emancipation of the mother in *Sidney v. White*, the Kentucky suit for freedom and judgment preceded the birth of Grasey; since she was not a party to the case, the resulting judgment benefited only her mother and provided no estoppel effect in defending her attempted enslavement by the Bloodgoods.[198]

In 1836, the Supreme Court of Missouri decided the case of *Paca v. Dutton*, a suit for freedom by Dutton. The rendition of the facts of the case indicate that Dutton in Missouri and Grasey in Alabama had common lineal or collateral ancestors who were held as slaves by Joseph William Dallam of Maryland, who manumitted them by the same 1787 deed, and were thus related by blood or marriage. In the recitals of both opinions as to the 1787 deed of manumission issued by Dallam, the facts of the Grasey and Dutton cases are identical. The result reached in Dutton, however, was different. The case of Dutton, who prevailed at trial, turned entirely on the validity of the Dallam deed, which was sustained with proof of a single witness. The Missouri Supreme Court, while reversing and directing a new trial, suggested that on retrial, in the absence of reversible error, the laws of Maryland governing deeds of gift should be accorded full force and effect in Missouri, and on that basis, the Dallam deed should be sustained, depending on the resolution by a jury of the disputed facts of execution and acknowledgment at a new trial. Further, as a private act of manumission, the deed would

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[198] Bloodgood v. Grasey, 31 Ala. 575, 590-91 (1858).

stand on its own and suffice to effect emancipation, without a favorable judgment resulting from a suit for freedom, as was required from Grasey.[199] Another factor in the relative success of Dutton was that the 1836 appeal, by definition, resulted from earlier proceedings that were less remote in time from the manumission deed and thus less likely to be plagued with unfavorable intervening circumstances such the loss or destruction of crucial evidence over the passage of time. Additionally, the state courts of Missouri, a border slave state, were more receptive to claims of freedom than states of the Deep South, as shown by the *Dred Scott* case, which originated in Missouri state courts. In 1858, manumissions in Alabama were more difficult to obtain than in the 1830s; in 1860, all emancipations were forbidden. The appearance of Grasey and Dutton in the annals of the appellate reports of far-flung slaveholding states, as representatives of the extended family liberated *in futuro* by Dallam in 1787, suggests a certain degree of cooperation among family members across state lines, as well as reflecting possible influence of antislavery interests and their attorneys in southern courts in coordinating litigation.

In the case of *Farrelly v. Maria Louisa*[200], also a suit for freedom under section 2049 of the 1852 Code, the court stated that any person claimed as a slave was entitled to file a petition for freedom, not merely persons of color or African ancestry. In the context of the suit for freedom as a cause of action, the reverse of this statement apparently meant that potentially anyone was subject to enslavement, but section 2049 was a remedy available to refute such claims.

The testimony at trial was that Maria Louisa was born in New Orleans about 1835. Her mother, a person of Indian or Mexican descent having a "yellow complexion,"

[199] Paca v. Dutton, 4 Mo. 371, 375 (1836).
[200] Farrelly v. Maria Louisa, 34 Ala. 284 (1859).

lived as a free person and died when Maria Louisa was about a year old. Her father was a white man.

Ultimately, a jury verdict favorable to Farrelly was reversed and a new trial in City Court directed. The reversal centered upon jury instructions that a preponderance of evidence indicating that Maria Louisa was not of African descent defeated the statutory presumption of enslavement, effectively entitling her to a verdict. Additionally, the trial court excluded the deposition of Patrick Summer, who alleged Maria Louisa was a slave. The case of *Maria Louisa* demonstrates that the involvement of the courts in enforcing a caste system based on race or color overextended plausible legal theory and was beset with practical limitations.[201]

In 1860, all emancipations of any description or vehicle were abolished in what was essentially a repeal measure, although the title terms the act as an "amendment." [202] In five sections, the act (1) declared void any language of emancipation in wills or any other instrument; (2) any provision of wills or other instruments directing removal of slaves from the state for the purpose of emancipation were void; (3) gifts or bequests of emancipation conditioned on removal of the slave to areas where African slavery did not exist were void; (4) all laws or parts of laws authorizing emancipation by any proceedings before any court were void; the act was prospective in effect; (5) instruments such as deeds and wills effective before the date of enactment, January 25, 1860, were valid.[203]

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[201] Ibid., 287-88 (1859).
[202] Acts 1860, No. 36, 28, Jan. 25, 1860.
[203] Ibid..

As to section 5, deeds were effective as of the date of conveyance, regarded as the physical delivery of the deed or recording at the courthouse; wills were effective as of the date of death of the testator. Thus, acts of emancipation relating a conveyance or death of a testator before January 25, 1860 were valid, those occurring afterward were invalid. Presumably, final judgments of manumission rendered before the effective date of the act remained effective. Initially, the various sections of the act, explaining various permutations of prohibited private emancipation devices, appear redundant and discussion thereon belabored, but the act addressed a variety of recurrent situations previously presented to the Supreme Court in connection with emancipation. Shortly after the 1860 act was passed, the Supreme Court considered the retrospective effect of the act, concluding that it was prospective only, based on section 5.[204]

Ultimately, the incidence of manumissions and the failure of a program of voluntary slaveholder emancipation were linked to prospects for the abolition of slavery. The constitutional and statutory model for regulation of slavery adopted by Alabama in the 1800s had origins in Barbados, Saint Domingue, and South Carolina, systems designed to regulate a slave population which greatly outnumbered relatively few slaveholders in an agricultural economy preoccupied with the cultivation of a single cash crop. In Alabama, antebellum politics, which encompassed manumission policies, was dominated by planters of the Black Belt and other regions of the state, characterized by

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[204] Jones v. Jones, Exr., 37 Ala. 646, 651 (1861) ("the act of 25th February, 1860 [amending the act of Jan. 25, 1860] does not affect the bequest in the will of . . . Jones in relation to the emancipation of slaves . . . [the] will became effectual upon its admission to probate . . . before the passage of the act . . . [thus] expressly saved from operation of the act by the 5th section."); Hall's Heirs v. Hall's Exrs., 38 Ala. 131(1861) (will admitted to probate before Act of Jan. 25, 1860; issue of validity of emancipation provisions not before the court.).

large plantations, concentrated landholding, numerous slaves, and minority white populations. At the beginning of the nineteenth century, many northern states had moved in the direction of abolition. In some slaveholding states, manumission laws were relaxed, and the effect was to notably increase the population of free blacks. However, in the ensuing years, this trend reversed; in Alabama, greater restrictions on emancipation were imposed as part of a program of growing restraints on the antislavery movement. The negligible free black population which resulted from these government policies was associated with the "importance of slavery in the southern economy, the large capital investment in slaves, and the political influence of slave owners [who] conspired against antislavery efforts . . . ." [205]

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[205] Patience Essah, *A House Divided: Slavery and Emancipation in Delaware, 1638-1865* (Charlottesville, Va.: University Press of Virginia, 1996), 63.

CHAPTER 4

APPLYING THE PENAL CODE AND THE SLAVE CODE IN THE TRIAL COURTS: THE CITY COURT OF MOBILE AS A PARADIGM OF CIRCUIT COURTS, 1846-1860

In evaluating legal materials associated with slavery, some reference to trial records is necessary in addition to merely reviewing reported appellate cases. For various reasons, justice courts, the principal tribunals adjudicating matters of slavery, did not generate adequate trial records, and references to slavery in the justice courts, as found in reported appeals, are often oblique and remote. Those records actually generated were often lost or destroyed in the ensuing years. Thus, as a practical matter, any systematic study of a given jurisdiction pertaining to Alabama trial courts in the period are dictated to a considerable degree by the availability of records.

The courts of Mobile County were at once unique and typical of other courts across Alabama in the regulation of slavery. The extant records of the Mobile courts and related appeals are a source of information that significantly contributes to the understanding of slavery in antebellum Alabama. The value of the records of the City Court of Mobile, as with other trial records of the period, is that such evidence considered along with statutes and appellate opinions provides a more complete depiction of the mutual and reciprocal relationship of slavery and the legal system. More specifically, the

Criminal Court of Mobile, later reorganized as City Court, established as a circuit court having jurisdiction concurrent with an existing circuit court, functions as a comparative model in evaluating the operations of antebellum circuit courts across the state as applied to the institution of slavery.

Initially, doubts were raised about the jurisdiction of Criminal Court. The ensuing years, a series of amendatory legislative acts, subsequently interpreted by the Supreme Court, in discussing the specifics of jurisdiction of circuit courts, established as a basic principle that City Court was vested with all the powers of any circuit court in the state, and was empowered to try cases on the same basis.

Consequently, records of City Court establish (1) the actual application of acts, codes, and appellate cases pertaining to matters of slavery in the trial courts, including the operation of grand juries, the return of indictments, selection and empanelling of juries; (2) because under state law in capital cases, accused slaves and free persons of color were, as directed by statute, to be tried in the manner of white persons, in the same court, with the same presiding judge, the processes of the court provide an ongoing constant for comparison among various classes of defendants; (3) an analysis of City Court records, collectively considered in conjunction with statutes and codes, guided by Supreme Court precedent, suggests common approaches and uniformity of decision among state circuit courts in the management of slavery, in relation to capital trials of slaves, offenses committed against slaves, and other substantive and procedural matters touching on slavery as controlled by state law.

Part of the demographic, social, economic, and cultural background of the court system existing in Mobile from 1840 to 1860 was a resident free black population that in

absolute numbers was insignificant in comparison with the slave and white population, but substantial in relation to other areas of Alabama. Additionally, Mobile, as the state's only seaport, was a center of commerce, which turned on cotton exports from the interior regions. As reflected in local court records, free persons of color and slaves were engaged in labor and trades otherwise uncommon in a predominantly agrarian society. These conditions produced a greater variety of cases related to slavery in Mobile than found elsewhere in the state. Among the cases involving slaves and free persons of color adjudicated in local courts were maritime and common carrier personal injury and death cases. Unlike most other areas, justice courts in Mobile exercised limited maritime jurisdiction in connection with harbor activities. Mobile County was at the intersection of various courts not found elsewhere—in addition to orphans', county, probate, circuit, chancery and mayor's courts, the local court system consisted of the City Court of Mobile.

The City Court of Mobile, originally established in 1846 as the Criminal Court of Mobile, renamed in 1850 as City Court, with jurisdiction enlarged to include civil cases, operated as a type of circuit court, having jurisdiction concurrent with the Circuit Court of Mobile County. In court organization, the City Court of Mobile was unique in the state as constituting a second circuit court created within the territorial jurisdiction of an existing circuit court. The records of City Court provide significant information concerning economic and commercial activity in the community bearing on slavery, as well as data specific to individual cases and court operations.

The chief legislative enactments applicable to all cases adjudicated in City Court, including matters related to slavery, were acts compiled in Clay's Digest (1843), the Code

of Alabama (1852), the penal and slave codes incorporated therein, and subsequent enactments approved after the adoption of the Code of 1852. Constitutionally, the creation of City Court in 1850 was associated with statewide judicial reorganization effected by constitutional amendment adopted the same year which established a system of probate courts, abolished orphans' and county courts, and provided for the popular election of probate and circuit judges.

The Criminal Court of Mobile, the predecessor to the City Court of Mobile, was established in 1846 as a criminal division of circuit court within Mobile County.[206] Judges were appointed in the manner of circuit judges. As in circuit and county courts, jury trials were available. Although circuit and county courts tried slaves for capital crimes, and the Criminal Court of Mobile exercised criminal jurisdiction concurrent with the Circuit Court of Mobile, Criminal Court seems to have had little involvement as a tribunal for the trial of slaves in capital case, according to records of grand jury presentments examined from 1846 to 1849. No indictment or trial of a slave is shown until 1848. Most prosecutions in Criminal Court from 1846 to 1850 relating to slavery were brought against white persons rather than against slaves. Among such cases were illegally trading with a slave without the permission or consent of the owner, such consent usually required in writing.

The cases relating to slavery filed in Criminal Court and its successor, City Court, were predominantly illegal trading offenses committed by white persons. Slaves could

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[206] *An act to establish a criminal court in the City of Mobile*, Ala. Acts 1846, No. 26, 29-31, Feb. 3, 1846; University of South Alabama Archives, Roll 15 (microfilm), Minutes, 1846-1849, Book 1 , March 1, 1846. Subsequent references are to dates of entry in the minutes, in lieu of page numbers, which are obscured in many instances in the records of the early years of the court.

not own property. Illegal trading was connected with general prohibitions against a slave possessing anything of value, except those items as allowed by the slaveholder. Contact of third parties with a slave, especially outside the presence of the slaveholder, was considered potentially deleterious, tending to undermine the authority of the slaveholder. Consent was the salient exception to the illegal trading offense; in the alternative, slaves could possess many items with consent of their slaveholders. Even from territorial days, possession of a firearm by a slave was allowed on application of the slaveholder and issuance of a permit by the justice of the peace.

In various ways, the entries in the judgment and minute books of City Court and published appellate cases provide evidence of the important role of the port of Mobile in the sale and export of the state's cash crop, substantiating the comment of one visitor to Mobile who stated that local residents "buy cotton, sell cotton, think cotton, eat cotton, drink cotton and dream cotton."[207] Raw cotton was baled by the use of cotton presses and then loaded at points upriver on steamboats for transport to Mobile for export to British textile mills. As the railroad system improved, cotton was transported by rail. Along the way, many people were involved in the process of sale and shipment of cotton overseas, among them brokers, factors, commission merchants, and buyers. Brokers functioned as intermediaries between planters and buyers. Some planters elected to bypass brokerage and put their cotton on the open market. Planters usually received an advance from brokers or factors for their cotton pending sale. Commission merchants represented buyers and sellers. Buyers were agents for the mills.

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[207] Lynn Willoughby, *Fair to Middlin': The Antebellum Cotton Trade of the Apalachicola/Chattahoochee River Valley* (Tuscaloosa, Ala.: University of Alabama Press, 1993), 13.

The sales price of cotton was determined by prevailing market demand or supply at a given time, grade and weight, measured by the pound. The quality or grade of a bale of cotton was a product of the color, texture, length of staple, and purity. One of the most important individuals in the sales process was the cotton factor. Customarily, the factor was retained on commission by the planter to sell his cotton. Occasionally factors acted as agents for sellers. The factor arranged financing and spent much of his time keeping books and maintaining records of advances from sellers to planters. One of the most important tasks of the factor was to sample cotton. The marketing process associated with buying and selling cotton, involving a long procession of people, places, and transactions, was robust, operating with the fury of a stock exchange. The potential for chicanery and fraud was considerable.

The act to "prevent frauds in sampling cotton" was passed in 1848. As with the act creating City Court, the cotton-sampling act, associated cotton exports, applied only to the port of Mobile rather than the entire state; similarly, by implication, venue for prosecutions under the act was fixed in Mobile Circuit or Criminal Court. The term cotton "sampling" as used in the act and in common parlance described a process in which the cotton factor determined the grade of a bale of cotton, and ultimately, its valuation and market value, by pushing a gimlet, a rod with serrated edges, into the cotton bale and then removing the gimlet from the bale. By this method, the factor determined the grade of the cotton extracted.[208] Bags of cotton samples were provided to prospective buyers for evaluation. Sampling occurred before and after the sale for

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[208] Ibid., 21-22.

comparison as a means of verifying the transaction; a variance in the quality of samples could be grounds for recision of the sales contract.

Section 7 of the 1848 sampling act provided that any person who "engaged, employed, permitted or suffered" a slave or free person of color to sample cotton was guilty of a misdemeanor. The penalty on conviction was a fine of fifty to one thousand dollars.[209] Additionally, under the same penalty, section 8 of the act prohibited any person owning, controlling, or having charge of a cotton press or "pickery" from packing or baling any unpacked cotton for any white person, slave or free person of color other than the owner or the cotton, or his factor or commission agent.[210]

In February 1848, Wragg was indicted in the Criminal Court of Mobile for violating section 7 of the sampling act. Wragg, a buyer acting as an agent, contacted a Mobile factor to purchase cotton. As part of the transaction, Wragg dispatched his "classifier," a white man, accompanied by a free person of color, to sample a bale of cotton. The actual sampling accomplished by inserting and pulling out the gimlet was performed by the free person of color under the direct supervision of the classifier, but outside the presence of Wragg and the factor. At his trial in Criminal Court, Wragg was convicted and appealed. The essential question was whether under section 7 of the 1848 act a free person of color could sample cotton under the direct supervision of a white person without violating the act. The Supreme Court ruled that sampling by a person of color acting under direct supervision of a white person did not violate the act, and reversed Wragg's conviction.[211]

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[209] Acts 1848, No. 42, Feb. 29, 1848, 104-105, § 7.
[210] Ibid., § 8.
[211] Wragg v. State, 14 Ala. 492, 496 (1848).

In addition to section 7 at issue in the *Wragg* case, other sections of the 1848 act concerned with various stages of the series of transactions and other processes necessary to bring cotton from the fields to market and then to mill, reveal the broad and pervasive impact on the legislature and courts of a financial and economic system supported in the first instance by the foundation of slave labor.

In summary, the *Wragg* case exemplified (1) sanctions levied against white persons as well as blacks as part of the overall statutory and regulatory scheme implemented to enforce slavery; (2) the far-reaching and pervasive effects of slavery, and concomitant political and judicial responses; and (3) along with the Free Colored Mariner Law and ordinance, the enactment of laws associated with the administration of slavery governing activities peculiar to Mobile as a seaport and cotton exporting center.

Most cases appearing in Criminal Court related to the enforcement of laws designed to control slaves were not prosecutions of slaves for alleged criminal offenses, but indictments filed against white persons for interfering with slavery. At the inaugural term of Criminal Court in June 1846, three cases involving slavery were returned by the grand jury: one indictment for illegal trading with a slave, and two charges of selling slaves without a license.[212] A second series of indictments were filed in November 1846.[213] In terms of absolute numbers and percentages, the indictments for 1846 related to slavery appear negligible. Illegal trading with slaves amounted to five cases. Selling slaves without a license accounted for four indictments. The court minutes indicate one case of larceny of a slave, a more serious offense, occurred in 1846.

[212] Minutes, Book 1, 1846-1849, 13, 15, State v. Case, State v. Gilliam, State v. Long, June 3, 1846.
[213] Ibid., Nov. 6, 1846.

In all, indictments related to slavery totaled ten cases, or 6.8 percent of the indictments returned for the year. No offenses by slaves are alleged. This would remain the pattern until for the first few years of the court, at least until 1849.

For 1847, seven indictments involving slavery were filed, among them the prosecution of white persons for retailing liquor to slaves.[214] A typical case of the prosecution of white persons for violating slave control laws is shown by an 1847 indictment filed against Nancy Stapleton for selling liquor to the slave Armstead, the property of Martha Hunter, without Hunter's "leave or consent."[215]

Criminal Court, operating as a state circuit court with criminal jurisdiction, served mostly as a forum for the filing and trial of indictments against white persons in violation of state law regulating slavery and who were thus viewed as a threat to the institution by their misconduct. Among the offenses prosecuted against white persons was illegal trading with slaves, sale of liquor to slaves without the consent of the owner, harboring slaves, and selling slaves without a license. Most of these prosecutions were the precursor of similar cases later filed in Mayor's Court, except (1) the defendants were white, not slaves or free persons of color and (2) charges were brought by indictment, not complaint.[216] Meanwhile, from 1846 to 1849, few slaves appeared as defendants, possibly because at this juncture, Criminal Court was a new tribunal, and apparent doubts about criminal jurisdiction, including authority over slave cases, were unresolved.

Although designed to resemble circuit courts in jurisdiction and operation, the

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[214] Minutes, 1846-1849, Book 1, June 12, 1848.
[215] Ibid., State v. Stapleton, March 23, 1847.
[216] Grand jury presentment was not required in Mayor's Court; offenses of this level had to be brought in county or circuit court, or the equivalent, by indictment against a white or free person.

Criminal Court Act of 1846 varied with state law which governed circuit courts. The act did not specifically address the indictment and trial of slaves; in the absence of such express authority, resort was made to state law governing circuit court proceedings, since it appeared from the act that Criminal Court was designed to operate like a circuit court. Criminal Court exercised concurrent jurisdiction with circuit court; slaves accused of capital crimes were indicted in Criminal Court, although no records are found of the trial of a slave in Criminal Court until the successor, the City Court of Mobile, was established in 1850. Otherwise, non-capital cases involving allegations of crimes by slaves were heard by county courts or justices of the peace, sometimes in connection with the probate judge when a freestanding probate court was established in 1850. Conversely, no question was raised about the propriety of the indictment and trial of white persons accused of the commission of crimes against slaves, or for interfering with the operation of slavery by unlawful cotton sampling, trading with slaves, or similar offenses.

The activities of Criminal Court related to slavery are reflected in minute book entries from 1846 to 1849. In addition to *Wragg*, above, cases adjudicated on slavery matters were indictments against white persons for unlawful interference with the institution of slavery, offenses by white persons constituting the reciprocal of status offenses for which slaves and free persons were prosecuted in mayor's court and justice court. At the inception of Criminal Court in 1846, 146 indictments were filed by the circuit solicitor[217]. Ten, or 6.8 percent, were related to slavery. In 1847, 161 indictments were filed; seven, or 4.3 percent, were slave-related. The 1848 court terms resulted in 12

[217] District Attorney.

of 202, or 5.9 percent of indictments filed related to slavery. In 1849, the last year of Criminal Court operations before the tribunal was redesignated City Court with jurisdiction expanded to include civil cases, 88 indictments were filed, eight, or 9 percent of the annual total concerned with slavery. For the years and court terms examined, the annual overall conviction rates ranged from 57 to 69 percent. Conviction rates for offenses related to slavery were consistent with the conviction rates for all cases for each year selected. Again, for Criminal Court indictments having an obvious connection to the administration of slavery, all of the accused were white for the period surveyed, indicating that non-capital cases of a similar grade brought against slaves were tried in justice courts, and that slaves accused of capital crimes continued to stand trial in county or circuit court, without any apparent involvement of Criminal Court.

While section 4 of the 1846 act establishing Criminal Court did not expressly mention the trial of slaves for capital offenses, the act did vest criminal jurisdiction in Criminal Court concurrent with the Circuit Court of Mobile County. By implication, the grant of concurrent criminal jurisdiction included the indictment and trial of slaves, although the early terms of the court did not produce any indictments of slaves, and of the few indictments of slaves filed from 1847 to 1849, two were tried and one resulted in a conviction.[218] Most of the complaints brought against slaves and presented to the grand jury did not result in indictments[219] or were *nolle prossed* on the motion of the solicitor for various reasons, and thus did not go to trial.

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[218] Section 4 provided for "concurrent jurisdiction in circuit courts for criminal law in the county . . ." conferring "same power and authority for the complete exercise of its jurisdiction." Ala. Acts., Feb. 3, 1846, Minutes, 1846-1849, Book 1, March 27, 1846.
[219] *See, e.g.*, State v. Neff a slave, "assault with intent to kill, not a true bill [no indictment returned]." Minutes, 1846-1849, Book 1, Nov., 9, 1846.

At the June Term 1847, the grand jury refused for unspecified reasons to indict the slave James for burglary. The provisions of the 1841 Penal Code, as revised by the 1852 Code of Alabama, relating to graded or differing levels of offenses and corresponding prescribed punishments, did not apply to slaves. Under the slave code, burglary and several other offenses committed by a slave against a white person was an ungraded offense, punished capitally. Implicitly, burglary by a slave was a crime committed against white persons and to the extent that free persons of color owned, leased or otherwise possessed property. The offense as defined could include the curtilage or outbuildings of a dwelling, such as barns and corncribs, or anything connected to the residence. Breaking and entering by a slave into neighboring slave quarters could constitute a capital crime.

A potential jurisdictional issue relating to the trial of slaves in Criminal Court surfaced in the 1847 trial of Reuben Bass. At his trial, the court, based on a special jury verdict, found that Bass was a slave and ordered him "discharged *for want of jurisdiction of the court*."[220]

This result is curious, because the reference to an African-American defendant with a surname in an Alabama court during this era indicates that Bass was a free person of color, although it was possible for a free black person to revert to slave status upon conviction of a crime. While the offense for which Bass was indicted was not specified in the verdict, the underlying basis for the discharge of Bass was that a slave accused of a non-capital offense could not be tried in Criminal Court or other circuit courts. The Bass

[220] Minutes, 1846-1849, Book 1, Nov. 9, 1847 (emphasis added).

case also raises the unanswered question as to the reason his slave status was not immediately recognized when his case was presented to the grand jury.

One of the earliest cases docketed in Criminal Court involving a slave accused of a crime was the case of John, indicted for murder on February 12, 1848.[221] John was arraigned on February 17, and tried on February 24, 1848[222]; after a trial, the slave was acquitted.[223] No slave was convicted of a capital crime and sentenced to death until 1849, well into the history of the court. This case shows the short interval between indictment and trial, particularly in the trial of slaves, in this instance, only a week. Also, as Criminal Court was a relatively new tribunal, few cases had arisen; at the time, most of the cases involving slaves were still being handled in Mobile county and justice courts.

As noted, in 1850, Criminal Court was renamed the City Court of Mobile, vested with jurisdiction expanded to include civil cases concurrent with the Circuit Court of Mobile. In practice, this meant most cases bearing on slavery filed in City Court were related to criminal matters, summarized by the following categories: (1) offenses by white persons and free persons of color relating to various types of unlawful contacts with slaves, usually illegal trading without the consent of the slaveholder; (2) allegations of status offenses and other non-capital crimes by free persons of color; and (3) trial of slaves for capital offenses.

City Court, operating as a circuit court under state law, heard all cases involving white persons accused of indictable offenses, including those committed against slaves and free persons of color. As a matter of comparison, under the 1819 Constitution and

[221] Ibid., Feb. 12, 1848.
[222] Ibid., Feb. 16-17, 1848.
[223] Ibid., Book 1, Feb. 23-24, 1848.

statutes which evolved as the Code of 1852, white persons, and to a lesser extent, free persons of color, were entitled to grand jury presentment and indictment and trial by struck jury, not merely in non-capital cases, but in misdemeanor cases in original jurisdiction. As indicated from the 1852 Code, the charging and sentencing scheme was less onerous than for slaves, for example: (1) under the 1841 Penal Code, as amended and incorporated in the 1852 Code, offenses by white persons were graded by descending degrees, with corresponding lesser ranges of punishment; (2) the death penalty was imposed on white persons for murder in the first degree, and the jury and judge had the option of life imprisonment; (3) the only other capital crimes applied to white persons were treason, rebellion, or aiding a slave insurrection. In contrast, slaves faced a mandatory death penalty in an array of ungraded offenses committed against white persons, not only as to conduct constituting first-degree murder, but all lesser-included homicides, as well as burglary, robbery, rape, and arson, and attempts thereof.

Operations of City Court during the 1850s are reflected in minute book entries for the entire decade, while only judgment books covering criminal convictions from 1854 through 1858 are extant, a fortuitous circumstance, as the 1852 Code relating to slave matters is largely cumulative of prior legislative enactment, and the gaps preceding and subsequent to the judgment books, being largely compiled from the minutes, are readily supplemented by resort to the minutes; hence, central observations and conclusions concerning the operations of City Court in relation to slavery are not significantly impeded.

Among the most important observations gleaned from an examination of the trial records of City Court is that the penal and slave codes of the state were not merely

enacted in a vacuum, but enforced on a systematic basis at the trial level, including as to slaves accused of capital offenses and required to stand trial. As a corollary, given that the City Court, under the 1850 act establishing the court and as subsequently construed by decisions of the Supreme Court, was a typical circuit court operating under state law, empowered to try cases as any other state circuit court, the trial record entries as evidence of court operations can be reasonably extrapolated as constituting strong proof that the penal and slave codes, as consolidated in the 1852 Code and subsequent enactments, were not only implemented in Mobile, but systematically enforced statewide.

During the 1850s, on average, in excess of one hundred indictments per year were filed. The number of slave-related indictments range from six to sixteen annually, comprising as much as 17 percent of the indictments filed annually. This approximates similar activity in the Supreme Court of Alabama during the same period, in which the volume and proportion of opinions issued pertaining to slavery gradually increased, exceeding 25 percent of published opinions by 1861.

The court records, showing an increase in absolute numbers and percentages of slavery related cases, in particular, as to the indictment and trial of slaves for capital crimes alongside white persons and free persons of color, shows that any preexisting jurisdictional questions relating to Criminal Court and the trial of slaves were resolved by the 1850 City Court act and subsequent amendments, and Supreme Court decisions construing same. Various indictments, listed and compiled by category of offense, show illegal cotton sampling as comprising the largest single category, totaling forty-eight indictments one year. In another similar category of relatively minor offenses, thirty-five cases for slave trading without a license were filed, suggesting the relevance of the Gross

and Wahl studies on slave sales and warranties. Additionally, minute and judgment entries show numerous indictments of white persons for conduct interfering with the administration of slavery, not merely indictments of slaves for capital offenses.

Stated in absolute numbers or expressed as a percentage of the Mobile City Court docket, the number of cases directly involving slaves as defendants appears inconsequential. Based on 541 total cases and a total of ten cases in which slaves are named as defendants, the apparent percentage of alleged slave crimes is only about 1.85 percent. However, a component of the overall total indictments filed are offenses which, as a practical matter, could virtually only be committed by white persons, effectively constituting a counterpart for status offenses adjudicated in justice courts and the Mayor's Court of Mobile, prosecutions which, for the most part, targeted only slaves and free persons of color. In other words, the raw case totals and percentages do not adequately report the involvement of slave, free black, and white persons in the system, and corresponding conviction rates. To assess this discrepancy, it is necessary to identify certain types of offenses which, by definition, were unique to offenders of one status or race; in other words, many crimes were defined by reference to the race and status of the defendant and the accuser, resulting in various combinations and classes wherein the law applied to one or more groups, but not others. As most complaints of criminal conduct by slaves were noncapital, such cases were not filed in City or Circuit Court, but in Mayor's and Justice Court.

At first glance, the role of City Court in the management of slavery appears inconsequential. If the docketed cases are identified or classified as relating to slavery, not merely in regard to the race or status of the accused, then the numbers appear more

significant. One area is the prosecution of white persons for, broadly stated, fraternizing with slaves. A frequent representative offense was illegally trading with slaves or providing them goods, liquor, or most anything of value without the consent of the owner. Another type of offense prosecuted in City Court was simple gambling or engaging in some other kind of activity with a slave otherwise permitted to free persons. This type of prosecutable conduct involving white persons was the counterpart of the prosecution of slaves and free persons of color for status offenses, a few such cases appearing in City Court, but most docketed in justice and mayor's courts.

Illegal trading with a slave usually involved supplying a slave with liquor without the consent of his owner, and occasionally with some other commodity. Illegal trading with slaves accounted for sixty-six cases from 1846 to 1848. Engaging in a business without a license was another offense peculiar to whites, as conducting a business by a slave was, by definition, out of the question, since a slave could not own or possess property, much less market or distribute goods or services. As well, few free persons of color had the financial means or opportunity to become a proprietor and engage in retailing or some other business enterprise, if not prohibited outright. Thus, the offense of retailing without a license was, in practice, applied exclusively to white persons, appearing in 128 cases. Of 128 the cases involving illegal retailing by white persons, thirty-five indictments involved the sale of slaves without a license, illustrating some actual connection with slavery. On this basis, 225 of 541 cases should be discounted in accurately assessing the incidence of crime and conviction in certain categories of serious offenses. Using as adjusted total of 316 cases, with seven alleged slave crimes as

numerator, the percentage of slave crime increases to 2.21 percent, which is more plausible in view of the character of appellate decisions.

The analysis of cases listed in the Mobile City Court Final Record and Judgment Book, 1854-1858, consisted of counting indictments listed, most of which were numbered, beginning with Indictment Number 1589, and ending with Indictment Number 2469; a few indictments, not assigned numbers, are counted in the overall total for this study. Using this method, the total number of cases filed from June Term 1854 to October 1858[224], and resulting in judgments, was 545. Four cases, entered as *scire facias*[225] writs, were omitted from the total as inconclusive and not constituting final judgments for purposes of assessing conviction and acquittal rates. One case was nolle prossed. While not constituting a final judgment and not a bar to re-indictment for the same offense, the immediate result was favorable to the defendant, and thus was included in the adjusted total. The seven dismissals noted constituted final judgments, were favorable to the accused, and hence are included in the total cases recorded as final judgments. All remaining judgment entries indicate the accused as either guilty or not guilty. Thus, 541 total cases are identified in Mobile City Court records from 1854 to 1858. For the reason that slaves were only indicted for capital offenses, a white person could be indicted for any offense exceeding a simple violation, and free persons of color were not numerous in the local population, most of the cases docketed in the City Court of Mobile during this period involved white persons.

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[224] Date of last indictment filed; a few entries appear for the Special January Term 1859 concerning cases filed in 1858.
[225] Also, *sci fa*. Judicial writ to show cause.

Evaluation and classification of the docketed cases is necessary for two important reasons: (1) a systematic identification of cases having some connection to the administration of slavery reveals the importance of the institution to southern society, even in a tribunal that at first glance was designed to prosecute white people, not slaves, and (2) raw case totals and resulting judgments relating to white and slave defendants are not meaningful for several categories of offenses due to differences in charging sentencing for equivalent criminal conduct.

The record of cases indicates prosecution for a variety of offenses. Among the cases filed are indictments for horse stealing (1), cow stealing (1), larceny of a mule (1), larceny from a person (5), larceny from a dwelling (9), burglary of a dwelling (4), burglary (dwelling) by a slave (4), robbery (3), robbery by a slave (1), larceny of a storehouse (2), larceny on a steamboat (2), grand larceny (28)[226], embezzlement (2), larceny – false pretenses (5), receiving stolen property (5), forgery (7), murder (11), murder by a slave (3), manslaughter (1), assault with intent to murder (25), assault with intent to murder and larceny (1), assault and maiming (1), affray (2), malicious mischief (1), extortion (5), arson (1), assault and battery (39), assault (5), carrying a concealed weapon (10), public disturbance (church/house of worship) (3), adultery (2), paternity (2), assault with intent to rape (1), trespass (1), bigamy (1), possession of burglar's tools (1), perjury (1), buggery (1), criminal libel (1), resisting process (1), aiding a prisoner to escape (1), operating a disorderly house, (3) various gambling offenses (61), and 128 indictments for retailing without a license, including thirty-five cases involving the sale of slaves without a license.

[226] Total includes all larceny not specified as grand larceny.

From the above summary, the principal categories of interest for purposes of evaluating alleged criminal activity relating to some element of slavery would be alleged crimes by white persons and against slaves, *vice versa*, and among slaves. Another relevant category is the study alleged criminal conduct of free persons of color among themselves, and involving individuals in the former categories, those persons of slave and free white status. Thirty-five docketed cases involve sale of slaves without a license; on this basis, 93 cases of retailing without a license may be summarily disregarded as not constituting any apparent connection to slavery. In addition to offenses listed above in which slaves were named as the accused (two, alleged robbery and murder by slaves, capital offenses), offenses having some connection to slavery included illegal trading with slaves (66)[227], sale of slaves without a license (35), sampling cotton (31), harboring slaves (7), refusal of a free person of color to leave/remaining in the state (2), and cruel punishment of slaves (2).

Although only five of 541 cases listed from 1854 to 1858 directly involve slaves as defendants, 112 cases, including in this number cases involving slaves as the accused are connected in some manner with management of the institution of slavery by the City Court of Mobile sitting in criminal jurisdiction. Collectively, in major areas of concentration and frequency, such cases would be identified as the sale of slaves without a license (35) and sampling cotton (31), or seventy-one cases, more than half the total in the slave category.

As a result, about 20.7 percent of the docket of Mobile City Court during this period was concerned with slavery, a statistic which corresponds with the percentage of

[227] Usually supplying liquor to slaves without consent of the owner, but sometimes involving other commodities.

slave-related cases on the docket of the Alabama Supreme Court during a similar period, reflecting the substantial investment of slavery in the economy, the influence of the institution of slavery on the courts, and the significant involvement of the courts in the management of slavery. Among other considerations in this regard, the frequent prosecutions for selling slaves without a license corroborate contemporary accounts that Mobile was a major slave-trading center in the late antebellum era. The corollary to this evidence is that slaves were valuable not merely for the direct benefits accorded by their labor, but also as a commodity inherent to the slave trade.

At first glance, stated in absolute numbers or expressed as a percentage of the City Court docket, the number of cases directly involving slaves as defendants seems low. Based on 541 total cases and a total of ten cases in which slaves are named as defendants, the apparent percentage of alleged slave crimes is only about 1.85 percent. However, a component of the overall total indictments filed are offenses which, as a practical matter, could virtually only be committed by white persons, effectively constituting a counterpart for status offenses adjudicated in justice courts and the Mobile Mayor's Court, prosecutions which, for the most part, targeted only slaves and free persons of color. In other words, the raw case totals and percentages do not accurately or entirely reflect the incidence of white and black crime and corresponding conviction rates. To remedy this discrepancy, it is necessary to disregard certain types of offenses which, by definition, a slave could not logically commit, usually based on the fact that a slave was forbidden to own or possess money, or anything else of value; indeed, in every reported case in certain categories, the accused is a white person.

Another category of prohibited conduct, operative principally against white persons, was illegal trading with a slave, which usually amounted to supplying a slave with liquor without the consent of his owner, and occasionally with some other commodity. Illegal trading with slaves accounts for sixty-six cases on the City Court docket for the period from 1854 through 1858.

Violations of retail licensing laws were primarily associated with whites. While free persons of color could enter into marriages and other civil contracts, hold and convey property, and write a will, they were deprived of all civil rights such as voting and jury service, and were barred from the professions, many occupations, and restricted in retailing and other commercial activities. As part of this demographic, most accounts of the period describe urban free blacks in southern towns as landless laborers lacking the financial resources to engage in business, although many exceptions are noted, a few in Mobile. Thus, the offense of retailing without a license was, in practice, applied exclusively to white persons, appearing in 128 cases, including thirty-five indictments for the sale of slaves without a license.

On this basis, 225 of 541 cases should be discounted in accurately assessing the incidence of crime and conviction in certain categories of serious offenses. Using as adjusted total of 316 cases, with seven alleged slave crimes as numerator, the percentage of slave crime increases 2.21 percent, which is more plausible in view of the character of appellate decisions.

A reasoned statistical comparison of slave and white defendants should focus on crimes for which slaves and whites would on conviction receive the same punishment. In practice, this is virtually impossible, even disregarding certain offenses such as arson,

burglary, rape and robbery, inclusive also of attempts thereof, which were deemed capital for slaves but non-capital for white persons. In addition, the imposition of corporal punishment, usually lashings, for slaves did not apply to whites or free persons of color, who were fined, jailed or imprisoned upon conviction. Even examining cases of conduct constituting first-degree murder by white persons and slaves, alongside one another, is not amenable to exact comparison.

Conduct amounting to first-degree murder was virtually the only offense for which a white person would receive a death sentence upon conviction, while a death sentence upon conviction was possible and likely for an array of offenses committed by a slave. In practice, the imposition of a death sentence on a white defendant was associated with the murder of another white person.

A slave accused of murder or some other completed offense capital offense generally could not have the jury charged to consider a lesser-included offense (e.g., manslaughter as lesser to murder), and under the charging and sentencing scheme applicable to slaves, reduction to an attempt of the completed offense was often futile, as attempts also carried the death penalty. Later in the antebellum era of City Court, the use of lesser-included offenses applied to slaves seems to have increased, but did not significantly ameliorate the disparities in procedure and sentencing between slaves and free defendants.

Because of the disparity in the charging scheme under which all unlawful killings of white persons by slaves are regarded as ungraded capital offenses, the sentencing patterns apparent as to white and slave defendants are not comparable or meaningful. For instance, a white person upon conviction of murder could receive a life sentence in the

penitentiary, or be convicted of the lesser-included offenses of murder second degree, or manslaughter first or second degree, carrying punishment significantly less than that imposed for murder. Ten murder indictments filed against white persons resulted in two acquittals, a 20 percent acquittal rate, much higher than for slaves.[228]

In one case involving a white defendant, despite a murder conviction, a life sentence was imposed. In another case, the defendant, a white person, was convicted of murder in the second degree, a lesser-included offense to murder in the first degree; hence, no death sentence was imposed. In yet two other cases, trial juries rendered verdicts for manslaughter first degree, with the defendants escaping death. Expressed another way, in ten capital murder cases, white defendants avoided the death penalty in six cases, at a rate of 60 percent.

By contrast, in three identified murder cases implicating accused slaves, all three defendants were convicted and sentenced to death. No record of appeal or commutation is apparent[229]; thus, a strong presumption exists that the sentences were indeed carried out in accordance with the verdict of the jury, the sentence of the court, and the applicable law.

The Mobile City Court judgment books from 1854 through 1858 are concerned with offenses under the penal and slave codes compiled in the 1852 Code of Alabama for which slaves could have been punished capitally on conviction, such as burglary of a dwelling (4) and robbery (1). Despite convictions on every indictment, slaves managed to escape the death penalty in two of five capital cases by reason of commutation by the

[228] One case, a sci fa writ, is not counted because no final judgment or sentence is recorded.
[229] One of the slave defendants, Godfrey, applied for a pardon from the governor but was denied.

governor in one instance[230], and a sentence of one hundred lashes imposed in another case in lieu of hanging by the sheriff in the county jail.

In summary, when capital burglaries (applicable only to slaves) as well as murders are considered among comparative totals for slaves and white persons, whites avoided the death penalty more than 60 percent of the time, while slaves avoided a death sentence in only one of eight cases, or 12.5 percent of the time, if the governor's commutation of the slave named Jake in a doubtful case is disregarded and the case is counted strictly as a conviction and death sentence in the first instance.[231]

The disparity increases further when other crimes, ordinarily deemed capital offenses when committed by slaves, such as burglary of a dwelling or robbery of white persons, are factored into the totals. In the one reported case of robbery by a slave, a guilty verdict was returned and death sentence imposed.[232] In three cases of burglary by slaves identified in the judgment record, five slaves were convicted of capital burglary (dwelling), and were sentenced to hang.[233] One defendant was pardoned.[234] Another category of capital offense for slaves, assault with intent to kill a white person, the counterpart to the offense of assault by a white person with intent to murder, virtually the same offense with the exception of the race of the alleged perpetrator and victim, the

[230] State v. Jack a slave (burglary of dwelling).
[231] If the Jake case is not counted at all, the odds improve slightly to one in seven, about 14.28 percent.
[232] Judgment Book, 1854-58, John a slave, No. 2066 (Mobile City Court, June Term 1856)
[233] Ibid., Alfred a slave, No. 2361 (Mobile City Court, Oct. Term 1857); Tom a slave, No. 2367 (Mobile City Court, Sp. May Term 1858); Albert & Mack slaves, No. 2366 (Sp. May Term 1858) (nighttime burglary of dwelling); Jack a slave.
[234] Jack a slave.

judgment record indicates a conviction of a slave sentenced to hang.[235] Another case, "assault on a slave by a free Negro," resulted in an acquittal. That verdict favorable to the accused was perhaps an anomaly, since both the accused and alleged victim were African-American.[236] Most other cases implicating slaves for capital crimes invariably resulted in convictions.

By comparison, more numerous assault to murder indictments (twenty-four[237], including two with variant counts of maiming and larceny), alleging assault to murder by white persons against other white persons, while producing convictions in every case, under the existing statutory scheme, by definition, resulted in no death sentence, since in each case the alleged perpetrator was not a slave. Despite an apparently staggering conviction rate of 96.15 percent (only one defendant in the group was acquitted) the defendants on conviction by statute suffered no exposure to the death penalty at any stage of the proceedings, escaping a death sentence in every case, and receiving sentences ranging from a five-year penitentiary term to mere fines as low as ten dollars.[238]

More broadly, reviewing indictments of white persons for an array of non-capital offenses for which slaves would by statute receive a death sentence upon conviction reveals the following data: In the category of murder, eleven indictments were filed implicating thirteen defendants. Only one defendant was acquitted, but again, all

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[235] Judgment Book, 1854-58, State v. Joe a slave, No. 1646 (Mobile City Court, Oct. Term 1854) (convicted 10-25-1854).
[236] Ibid., Gabriel a slave, No. 2107 (Mobile City Court, Feb. Term 1857) (not guilty verdict, 2-24-57, Minutes 1857, 540).
[237] Twenty-four indictments naming 26 individuals, including two co-defendants (Case Nos. 1801 and 2084).
[238] Judgment Book, 1854-1858, State v. Hill, No. 2338 (Mobile City Court, Sp. Aug. Term 1857) (Defendant fined $10.00; not based on conviction of lesser-included offense, such as assault and battery). Upon every conviction, the defendant was also required to pay costs, unless remitted, a rare occurrence.

defendants in this category had exposure to the death penalty by statute, but none of the remaining twelve convicted defendants received a death sentence. Consideration of other categories of offenses appearing in the City Court judgment books reveals one case of manslaughter[239] (acquittal), twenty-four cases (twenty-six defendants) of assault with intent to murder (two acquittals), one case of assault with intent to rape (acquittal), two cases of arson (one acquittal), nine cases (ten defendants) of burglary of a dwelling (two acquittals), and three cases (four defendants) of robbery (one acquittal).

The total for all categories of offenses in which white persons were indicted, as noted above, in fifty-eight cases, with nine acquittals, a conviction rate of 84.48 percent. Comparison of this figure alone with that of slaves appears of little consequence, until other factors are considered. For instance, in only fifteen of fifty-eight indictments (25.86 percent) are the white defendants subject to the death penalty on conviction, whereas the risk of exposure to capital punishment for slave defendants for the same offenses by statute is 100 percent. Moreover, in terms of the actual results, state law notwithstanding, in fifty-eight indictments, not a single white defendant was sentenced to hang; in the fifteen indictments of white persons for capital murder, no death sentence was imposed in any case, despite an 86.66 percent conviction rate.

In cases in which slaves were alleged victims, one indictment was filed for an "assault on a slave by a free Negro," resulting in an acquittal.[240] Two other indictments were filed against white persons for cruel punishment to a slave, an offense separate and

[239] Ibid., State v. Galle, No. 2082 (Mobile City Court, Oct. Term 1856). Manslaughter of a white person committed by a slave was deemed an unlawful homicide or killing of a white person; for purposes of punishment, no distinction was made between intentional or reckless homicide.
[240] Ibid., State v. Gabriel a slave, No. 2107 (Mobile City Court, Feb. Term 1857).

distinct from offenses such as assault and battery, aggravated assault, or assault with intent to kill. In both cases the defendants were found guilty; attempts at a comparison may be inconclusive, due to the limitations and brevity of the judgment entries, which provide few facts relating to the details of the offense. In one case, the defendant attacked the slave by "cutting [the slave] with a sharp instrument and whipping him outrageously." On conviction, the fine imposed was $300.00 plus costs, without jail time imposed.[241] In the other case of cruelty, the fine imposed for "infliction of cruel punishment on a slave" was $215.00.[242] If the criminal conduct constituting cruel punishment of a slave is deemed comparable to an assault and battery, the sentence imposed is in line with sentences imposed in other assault and battery cases; in fact, $300.00 would be considered a substantial fine. On the other hand, if the facts of the case suggested an aggravated assault, or assault with intent to kill, then in second-guessing the action of the court, the punishment meted out appears disproportionate and inadequate. Again, the same or similar conduct, inflicted in the reverse by a slave on a white person, would likely be treated as a capital offense under state law. The offense of cruelty to slaves is another component of the statutory scheme creating a dual standard of crime and punishment, whereby legal sanctions against violent crime were vitiated when slaves were victims. By comparison, slave defendants accused of virtually the same offense were imperiled by a death sentence upon conviction, without regard to whether the alleged victim were white or another slave.

The Criminal Court of Mobile and its successor, the City Court of Mobile, functioned as trial courts exercising original jurisdiction, with juries empanelled. Cases

[241] Ibid., State v. Reid, No. 2408 (Mobile City Court, Oct. Term 1856).
[242] Ibid., State v. Bennett, No. 2408, (Mobile City Court, Oct. Term 1858).

interpreting the act and subsequent amendments establishing City Court determined that City Court was empowered with the same authority as any other circuit court in the state. The chief function of City Court was to preside over civil and criminal trials in which white persons were the litigants or the accused. Many white persons were indicted and tried for offenses constituting interference with slavery. Additionally, free persons of color appeared as litigants, among them Grasey and Maria Louisa, women of color seeking freedom.

The significance of City Court in relation to slaves is that the tribunal, acting as a circuit court, conducted jury trials of white persons and free persons of color in most offenses, and capital cases of accused slaves, thus affording the opportunity to study the operation of juries on a systematic basis in this context. A threshold consideration in the trial of slaves in City Court is the definition of "trial by jury" as applied to slaves. At common law, in the trial of white persons, juries consisted of twelve men. In all cases filed in City Court, including the capital trials of accused slaves, trial juries consisted of twelve jurors. Slaves appeared in City Court because they were accused of the commission of capital crimes, which usually meant offenses against white persons. Otherwise, non-capital cases wherein slaves were the accused were tried in justice and mayor's court.

Article VI of the 1819 Constitution provided that slaves accused of crimes exceeding petit larceny, generally termed felony cases, including capital cases, were entitled to trial by jury. By the 1850s, trial by a twelve-man jury was the established practice, but previously, some doubt existed as to the type of trial panel that sufficed for a jury to try a slave, especially if the offense was felony, but non-capital. The petit jury at

common-law consisted twelve men, but local legislative acts, or acts applying to a single county providing for trial juries of five to seven jurors in justice trials, seem to have had no application to slave trials. In the early territorial period before 1812, all trials of slaves, depending on the level of the offense, were conducted by a single justice of the peace or multi-judge panels consisting of combinations of justices of the peace, sometimes accompanied by a county court judge, presiding without juries. After trial by jury in capital trials of slaves was adopted, non-jury justice panels continued to convene in non-capital cases before the adoption of the 1819 Constitution.

The records of City Court show that conventional twelve-man juries were empanelled for the trial of slaves, subject to the two-thirds rule. These were not struck juries in the usual sense, as among other defects, only white men were involved in the process. The abolitionist Goodell contended that trial by jury for the slave was a fraud, and George M. Stroud, a Philadelphia trial judge, in his *Sketch of the Laws Relating to Slavery* (1856) asserted that jury trials of slaves were not in any way a trial by jury of peers, an obvious assessment confirmed by Sellers much later in his 1950 study of Alabama slavery.[243] Stroud did observe a considerable variance among the laws of the several slaveholding states relating to slave trials, finding that Alabama, which at least accorded some constitutional and statutory recognition to trial by jury for slaves accused of serious crimes, was not in this respect the worst of slaveholding states. More recently, Morris cites an "odd experiment" occurring from 1836 to 1852 "with felony trials, apparently with regard to non-capital cases, wherein the trial "jury" consisted of a county

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[243] George M. Stroud, *A Sketch of the Laws of Slavery in the Several States of the United States of America*, 2d ed., with an introduction by Robert Johnson, Jr. (Philadelphia: Henry Longstreth, 1856. Reprint, Baltimore, Md.: Imprint Editions, 2005), 188-90.

judge and "three [justices of the peace], or three [justices of the peace] sitting with a regular jury."[244] The question Morris attempts to address, noted by Goodell and Stroud, is that a slave tribunal consisting solely of a panel of magistrates or justices was in fact acting as *the* jury in many slaveholding jurisdictions, although a reading of the 1819 Constitution, ensuing legislative acts, the 1852 Code, and decisions of the Supreme Court indicate that Alabama was not among them. Under territorial statutes, a panel of justices convened to preside over the trial of slaves was apparently regarded as constituting a "jury."

Among the recurrent entries in the trial records of City Court encountered in relation to the trials of accused slaves were recitals that a jury comprised of two-thirds slaveholders was empanelled, based on the Act of 1841, as compiled in Clay's Digest.[245] Until 1832, slaveholder quotas were not expressly mentioned in regard to constituting grand juries, the *venire,*[246] or trial juries for the trial of slaves. The Act of 1832 authorized the justice of the peace and the judge of county court, or in the absence of the judge of county court, three justices of the peace, to preside at a jury trial of the accused slave. Twenty-four veniremen,[247] one-half slaveholders, were summoned, from which

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[244] Morris, *Southern Slavery and the Law*, 217-18. A procedure probably ended somewhat earlier, as the county court system was abolished in 1850. Either type of tribunal would have required a jury under article VI of the 1819 Constitution; Denson makes no mention of such an experiment, suggesting subsequent changes in the jury system as applied to slaves were insignificant; in capital and non-capital cases, trials exceeding petit larceny were tried before three or more justices of the peace and a jury of twelve men, in county court, and capital cases in circuit court somewhat later. Denson, *Law of Slavery in Alabama*, 15; Act of 1819, 88.

[245] Ala. Code § 3319 (1852) (slave twelve peremptory challenges, state four peremptory challenges, "at least two-thirds of the jury must be slaveholders); Clay's Digest (1843) 473, § 10 (Penal Code, Ch. 15, § 10);

[246] The array or "jury pool" from which trial jurors are selected and seated.

[247] Prospective jurors.

twelve trial jurors were selected and seated. The accused slave had twelve peremptory challenges, and the state four.[248] The Act of 1841, passed as part of the Penal Code of 1841, retained the same provisions for constituting the *venire* by summoning twenty-four men as under the 1832 act, but increased the one-half requirement to two-thirds of the total summoned. The 1841 act also required the resulting trial jury to consist of at least two-thirds slaveholders, as well as the quota required in the *venire*.[249] The two-thirds requirement seems to have been applicable only in capital trials of slaves in circuit court. Logically, the office of the rule was in the valuation of condemned slaves, a procedure unnecessary in non-capital cases.

The two-thirds slaveholder requirement was discussed in *Spence v. State* (1850), an appeal from the Circuit Court of Choctaw County after the conviction of the slave Spence for murder of a white person, with his execution scheduled for the second Friday of February 1850.[250] In jury selection for the trial of Spence, a slave of Thomas G. Cole, for the murder of John Ramsey, a white man, a prospective juror named Scurlock was challenged for cause because he did not own any slaves.[251] Spence had exhausted his twelve peremptory challenges. After eight jurors, four slaveholders and four non-slaveholders had been seated, with four more jurors needed for the trial to proceed. Although not expressly stated in the opinion, it appears the challenge to Scurlock's slaveholding qualifications was interposed by Spence, not the prosecution, as the issue was raised by Spence on appeal.

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[248] Acts 1831-32; January 7, 1832, 10, §§. 2, 3; Denson 17-18.
[249] Clay's Digest, Ch. 15, "Of Slaves and Free Negroes," 473, §§ 10, 11; Acts 1840-41; 189, § 10.
[250] The court issued the decision during the January Term., 1850.
[251] Clay's Digest (1843) 473, § 10 (Penal Code, Ch. 15, § 10)

In responding to questions during jury selection, Scurlock stated that he did not hold any slaves, but his father was dead and his estate under administration. No distribution or settlement of the estate had yet occurred, but Scurlock expected to receive some slaves as his distributive share.

The court, in reversing and remanding the case to Choctaw Circuit Court for a new trial, held that Scurlock was not a slaveholder and thus disqualified under the two-thirds rule set forth in the Penal Code, because his interest the slaves of his father's estate was a mere expectancy, and not vested. The court observed that because the slaves were then assets of the estate, which had not reached a final settlement, many unforeseen circumstances could prevent Scurlock from ever owning or possessing the slaves.

More importantly, in *Spence* the court explained the rationale underlying the two-thirds rule, suggesting that both the both the slave and the state had an interest in strict application of the rule as a benefit to the slave:

> It is manifest that both the State and the slave may be deeply interested in having a majority of two-thirds of the jury slaveholders - persons supposed to be familiar with this species of property, to have obtained a knowledge of their peculiarities and idiosyncrasies from personal observation, as also to be interested from the fact of holding slaves in preserving the rights growing out of the relation of master and slave. . . . [The slaveholding juror] is supposed to possess the sympathies and qualifications required by the spirit of the enactment, and prepared to sit as a juror upon a trial involving the life of a slave.[252]

The *Spence* opinion implies that slaveholding jurors were viewed as more deliberative, capable and less inclined to convict while sitting in judgment on slaves accused of crimes than non-slaveholding white persons. In construing the statute, the Court viewed the statute as beneficial to the slave. The seating of Scurlock as a juror, raised as error by Spence, suggests that lawyers may have regarded nonslaveholding

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[252] Spence v. State, 17 Ala. 192, 193-94 (1850).

jurors as potentially prejudicial to slaves accused of capital crimes against white persons, reflecting the view of Thomas Morris. The *Spence* case shows that slaveholder participation as jurors was regarded as an important to the trial process. More broadly, questions raised concerning Scurlock's qualifications as a slaveholder indicates connections between slaveholding and nonslaveholding white persons--ties of kinship and expectations of acquiring slave property by gift or inheritance, thereby linking many non-slaveholding whites to the institution of slavery. This circumstance lies in the background and in juxtaposition to census data showing most white persons were not slaveholders; thus, census data examined relating to the incidence of slaveholding must be interpreted in this context.

Although not stated in the *Spence* opinion, the practical reason for trial juries of two-thirds slaveholders was the valuation process which occurred if a slave was convicted of a capital crime, whereupon a death sentence automatically imposed since under the penal and slave code, a life sentence was not an option. Juries of slaveholders in certain civil cases performed a similar function. Numerous post-trial valuation entries appear in the records of City Court wherein slaves were condemned as a result of capital convictions. In the valuation procedure, by which the slaveholder of the convicted slave was reimbursed from the state treasury for the loss of the slave, a slaveholding jury functioned as an expert panel in determining the value of the slave. Full recompense was once considered by the legislature, but rejected; one-half or partial reimbursement was the standard, for the reason that the slaveholder should bear part of loss arising from the criminal conduct of his slave. In the reverse, a white person accused of the homicide of a

slave was tried by a jury of two-thirds slaveholders; otherwise, white persons received a standard jury seated without regard to the two-thirds slaveholder rule.

The slave Felix was indicted for murder in 1850. The case of *Felix v. State* was one of the more significant cases involving a slave because (1) the case was one of the first recorded appeals by a slave from City Court and (2) the case is replete with extensive details, both in the trial record and from the full reported opinion on appeal.

Felix was indicted for murder on June 7[253] and arraigned on June 11, 1850.[254] He was tried and convicted. On July 8, Felix was sentenced to hang with his execution date was set for July 27, 1850.[255] The judgment and sentence of death was suspended until February 10, 1851, pending the outcome of his appeal.[256]

Felix was accused of the murder of Francis Saturnia, better known as Spanish Frank, a "free Negro." Felix appeared uninvited at a "ball for colored persons" in Mobile and performed with the band as a bass drummer during the evening of the dance. Saturnia, the manager of the ballroom, tried to evict Felix, and a scuffle ensued. Saturnia was stabbed and died soon thereafter.[257] The principal issue in the case which led to reversal was the refusal of the trial court to charge the jury to consider evidence of the good character of Felix. According to the Supreme Court, Felix introduced two witnesses "who swore that up to the time of this occurrence he had borne an exceedingly

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[253] Minutes, 1849-1852, Book 1A, June 7, 1850.
[254] Ibid., June 10, 1850.
[255] Ibid., July 8, 1850, 133.
[256] Ibid., July 11, 1850, 178.
[257] Felix, a slave v. State, 18 Ala. 720, 721-22 (1851) (Chilton, J.).

good and peaceable character, and that he was of a very quiet and peaceable disposition."[258]

Although Felix was convicted and received a death sentence, procedurally he fared somewhat better in regard to opportunities for post-judgment relief. By comparison, the measures taken by the court in case of Felix represents somewhat of an improvement over the case of Ben.

The appeal of Felix was decided in January 1851 by the Supreme Court of Alabama.[259] The Court reversed the conviction and death sentence imposed in the City Court of Mobile. A comparison of the trial record in the case of Felix with the opinion of the Supreme Court provides shows more detail than the sporadic, brief minute entries of City Court, but the accounts are mutually corroborative.

The Supreme Court held that the refusal of the charge of the peaceable character of Felix by the trial court was reversible error; evidence of the general character of the accused was competent as original testimony.

The murder conviction of Felix was reversed on appeal based on a misdescription or defect in the indictment which improperly identified the deceased as a "free negro" instead of a "bright mulatto"; on this basis the court reversed.[260] Felix was retried and again convicted.

No evidence of a second appeal or a grant of executive clemency by the governor is indicated in the appellate reports or as an entry in the records of City Court.

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[258] Ibid, 722.
[259] Ibid., 720
[260] Ibid., 726 (emphasis added).

Following reversal of the conviction of Felix, the case was remanded to Mobile City Court. Felix was again indicted for the murder of Saturnia in February 1851.[261] Felix was arraigned on April 22, tried on April 26, 1851, and found guilty.[262] The jury recommended clemency for Felix.[263]

The recommendation by the jury for clemency of the accused despite a guilty verdict was a common occurrence, consistent with the active role that juries exercised in sentencing in the nineteenth century. The recommendation of Felix for clemency may have been based in part on evidence of a lesser-included offense; the killing of Saturnia did not constitute murder, but manslaughter, a non-capital offense if committed against a "negro" or "mulatto." The customary punishment for a slave convicted of manslaughter was one hundred lashes on the bare back, administered by the sheriff.

An additional basis for the appeal in *Felix v. State*, previously rejected by the Supreme Court, was that the indictment alleged murder while the conduct of Felix, even if culpable in the death of Saturnia, amounted to manslaughter, but was not accompanied by evidence of malice aforethought requisite to support a murder conviction, also a possible basis for a recommendation of clemency.[264]

On April 30, 1851, the court sentenced Felix to hang, setting an execution date of May 19, 1851.[265] No subsequent entries in the trial records indicate a second appeal or a request for or grant of clemency. No record of a second appeal by Felix appears in the

[261] Minutes, 1849-1852, Book 1A, Feb. 11, 1851, 237.
[262] Ibid., April 22, 1851, 297; April 26, 1851, 307.
[263] Ibid.
[264] Felix a slave v. State, 18 Ala. 720, 723-24 (1851).
[265] Minutes, 1849-1852, Book 1A, April 30, 1851, 311.

Alabama Reports or in the clemency files of the governor, all suggesting that, in the end, the sentence may have been carried out by the county sheriff.

The importance of the Felix case is principally two-fold. First, an examination of the record of the case at trial and on appeal indicates that appeals of slave defendants were gradually accorded extended treatment by City Court in comparison with earlier cases. However, an additional factor leading to review and reversal of the conviction in Felix, the race of the alleged victim, warrants consideration; namely, whether, in the first instance, had the alleged victim in Felix been a white man, would the case have been vigorously and fairly litigated at trial, with an adequate appeal perfected; further, would the conviction have been properly reviewed and reversed. On the issue of appeals brought on behalf of convicted slaves, cases arising during the same period as Felix, involving slaves as accused and white persons as alleged victims, were periodically appealed, with reasonably extensive review accorded by the Supreme Court. Therefore, the Felix case indicates that the courts were, to a limited extent, while operating within the legal constraints imposed by the institution of slavery, in matters of procedure, reasonably thorough and conscientious in the trials and appeals of slaves accused of crimes.

An indictment for murder was filed against the slave Godfrey, a ten-year-old boy, on June 5, 1857.[266] Godfrey was accused of the murder of Lawrence Gomez, a child of four years old. On June 18, Godfrey was tried and convicted.[267] The case was appealed. The issue considered by the Supreme Court was the age and capacity of Godfrey to commit the crime of murder. In the nineteenth century, juvenile courts, which were the

[266] Minutes, 1855-1857, Book 4, June 12, 1857, 630.
[267] Ibid., July 7, 1857, 668.

product of the Progressive movement of the early twentieth century, did not then exist. Juvenile offenders were indicted in the manner of adults accused of crimes and tried by the same courts. Judicial presumptions developed by case law established as fourteen years of age the threshold of the capacity of an accused to commit a crime and for prosecution as an adult. The prevailing contemporary legal presumption, that a child from seven to fourteen years of age was incapable of murder, could be rebutted by evidence that Godfrey had been "fully aware of the nature and consequences of the act which he had committed, and had plainly shown intelligent design and malice in its execution." The propriety of juvenile executions was not raised in the Godfrey case, nor, apparently, in any other known case of the era; the rebuttable presumption doctrine for defendants seven to fourteen years of age, if satisfied, was viewed as permitting prosecution, trial and execution of children for murder. The Supreme Court affirmed Godfrey's conviction, ordering that his death sentence be carried out. No record of a second trial or subsequent appeal is apparent from the record.[268] A petition for clemency was filed with the governor seeking commutation of Godfrey's death sentence. The petition failed. Apparently, Godfrey is the only recorded City Court case involving a child as a defendant.

City Court records also indicate another principle of circuit trial courts--a low rate of appeals in relation to cases tried to verdicts and total judgments. Comparisons of the frequency of appeals must be attempted by comparing appeals for like offenses, but such comparisons are difficult. As mentioned, many capital offenses, and requisite punishments, applicable to slaves had no counterpart for white persons accused of the

[268] Godfrey v. State, 31 Ala. 323, 329 (1858).

same or similar conduct. Slaves convicted of capital crimes amounted to less than fifty 1820 to 1860. Appeals by slaves were possible only in capital cases; thus, no appeals by slaves in non-capital cases were considered.

Comparison of the post-judgment remedies utilized in *Felix v. State* and *Godfrey v. State* is suggested by the case of *State v. Jake, a slave* (1857). In Felix, successive trials ensued and two appeals to the Supreme Court were taken, each resulting in the issuance published decisions. The absence of a minute or judgment entry reflecting a request for clemency from the governor suggests that none was taken. The conviction in the *Godfrey* case was appealed with an adverse judgment; a subsequent judgment entry indicates that a request for clemency was denied.

The case of Jake[269] illustrates the use of a plea for executive clemency by slaves without perfecting an appeal to the Supreme Court. While under the 1852 Code, the death penalty was mandatory for slaves convicted of capital crimes, upon conviction, City Court juries would occasionally "recommend to mercy" a condemned slave, as indicated by several minute and judgment book entries of the court.

The origin of this practice is linked to invoking benefit of clergy, which was available in the courts of England and the American colonies, and carried forward to the Mississippi territorial acts. In actual use, benefit of clergy could be invoked once to spare a slave convicted of a capital crime based on extraordinary mitigating circumstances. As part of the process, the slave would be branded on the chest. Benefit of clergy was also applied to white persons convicted of serious crimes in a similar manner as a one-time remedy. By the 1830s, the practice was phased out, as reflected in Aikin's Digest and

[269] Also, "Jack."

with the adoption of the 1841 Penal Code, which established the state penitentiary, giving judges and juries the option of life imprisonment for white persons and free persons of color, an option not extended to slaves.

Jake, the slave of Raphael Semmes[270], was convicted of a nighttime burglary in Mobile and sentenced to death, to be carried out by hanging on March 25, 1859.[271] No evidence of an appeal is found in either the records of City Court or the Alabama Reports. However, a request for clemency to the governor is noted in the judgment book. The result of the clemency request was a commutation of Jake's death sentence to transportation, meaning Jake was to be removed from the state. Under the terms of clemency, whether Jake was to taken to a free jurisdiction or simply sold to a slaveholder in another state was unspecified.

Jake's petition, presented to Governor Andrew B. Moore in 1859, was endorsed in separate letters from his attorney, the judge of City Court, Alexander McKinstry, and J. W. Holmes, the foreman of the trial jury, joined by the other eleven jurors. In his letter, McKinstry explained as grounds for the pardon that the evidence at trial showed the "dwelling" occupied by a white woman consisted of a "store in front of her sleeping room," indicating that practical terms, the point of entry, a storefront window, was not part of a residence, but a retail establishment. A few articles were taken, but no injury resulted to the store owner.

McKinstry continued:

> The woman is reputed to trade with negroes as it is alleged by the friends of the boy. The boy [Jack] himself said that he had access to her person when he

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[270] U.S. Naval officer, later captain of the C.S.S. Alabama.

[271] Judgment Book, 1854-58, State v. Jake, a slave, Case No. 2303, Mobile City Court (Dec. 1,1857).

> wished. I doubt if I should speak of this, as I have no facts or data to lay before you in reference to it.
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> The jury recommend him to your clemency.
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> I concur with that, on the condition that he is sent and kept out of this state, see case Ex parte Wells, 18 How. U.S. Rep. 307. I enclose letter from the owner to his agent here, which has been handed to me.[272]

On March 11, 1859, in response to Jake's petition, Governor Moore issued a pardon conditioned on transportation of Jake to another state.[273]

An examination of the clemency files reveals periodic requests for pardons filed on behalf of condemned slaves such as Jake, as well as white persons, indicating that executive clemency played a significant role for slaves convicted of capital crimes, often in addition to or in lieu of post-conviction review by the Supreme Court, and at a rate significantly exceeding published decisions relating to slaves appealing capital convictions, which accounted for less than fifty opinions during the slavery era. Of course, many clemency requests, as in the case of Godfrey, were unsuccessful. The clemency requests by slaves were usually compelled by capital convictions, accompanied by death sentences, while white persons petitioned for a reduction of sentence or a full pardon.

The statutory scheme of charging and punishment as applied to slaves resulted in convictions of slaves and imposition of capital punishment for an array of conduct, which if committed by white persons, was non-capital. At trial, in view of the controlling law and the facts in many instances, juries were bound by the charges of the court to convict, and the judge was bound the laws of the state defining criminal offenses. The clemency

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[272] Governor Andrew B. Moore, Pardons, Paroles and Clemency Files, ADAH, SG 24882, SG 6432, Folder 8, Reel No. 5, 1859.
[273] Ibid.

process to a limited extent operated to mitigate harsh provisions of the 1852 Code which made capital several completed offenses, but attempts thereof, if committed by slaves against white persons. From City Court records, the vehicle of clemency was frequently used to mitigate harsh or unjust results, and trial judges and juries cooperated to seek clemency in special cases, taking note of mitigating facts or extenuating circumstances, being those cases in which no loss of life or injury occurred.

As recognized by the jury and the judge, and communicated to the governor, in the case of Jake, the essence of his offense was simple larceny, not burglary of a dwelling. The trial records of City Court and the governor's clemency files reflect many other similar instances. Records show that judges and juries in the trial of slaves were diligent in attempting to avoid or moderate disparate and harsh results worked by the capital crimes provisions of Code, at least to the limited extent of preventing innocent men from going to the gallows, whether black or white.

The records of City Court of Mobile, operating as a state circuit court, provide detailed evidence relating to the indictment and trial of slaves for capital offenses, as well as white persons and free persons of color for all classes of offenses, clearly indicating the fact and mode of enforcement of the Code of 1852 which incorporated the penal and slave codes. Acts of the legislature and decisions of the Supreme Court, establishing and defining the jurisdiction of City Court as concurrent with the Circuit Court of Mobile and co-equal in authority to any circuit court in the state, logically invites comparison with other state circuit courts of the period, shows uniformity of decision and unanimity of public policy in the administration of slavery, and strongly supports reasonable inferences

that practices relating to the legislative and judicial management of slavery were prevalent statewide.

CHAPTER 5

INFERIOR COURTS AND THE TRIAL OF STATUS OFFENSES: MAYOR'S COURT AS AN EXTENSION OF THE JUSTICE COURT

The day-to-day regulation of slavery, as with most of the business of the courts, was carried out in justice and mayor's courts in the regulation of status offenses. Status offenses were associated with minor, often trivial conduct of slaves and free persons of color, while the same or similar conduct was permitted by white persons. White persons were sometimes charged with corollary offenses such as illegal trading with slaves or other interference with slavery. Slaveholders were subject to fines for the equivalent of negligent supervision arising from nuisance complaints about their slaves who strayed from the plantation, and slaveholders were held liable for certain conduct by slaves on their property; as noted, slaves were forbidden to own dogs or livestock, although raising hogs was permitted with limitations. The counterpart to status offenses, restrictions on white persons in their contacts with slaves, is shown in Chapter 4 concerning operations of the City Court of Mobile.

The origin of status offenses and a description of various types of prohibited conduct are found in the Mississippi territorial acts. Status offenses defined under the Act of 1805, as amended in 1807, may be summarized as follows, as applied to slaves:

(1) pass laws requiring letter or token when leaving tenement of master;

(2) entering another plantation without leave of his slaveholder;

(3) carrying or possession of gun or other weapon, except on slaveholder's plantation on application of slaveholder to justice of peace;

(4) riots, unlawful assemblies, trespasses and seditious speeches by slaves, punishable by thirty-nine lashes;

(5) presence of white persons, free persons of color, mulattoes at unlawful meetings of slaves prohibited;

(6) slaves prohibited from keeping dogs, even with permission of slaveholder on conviction carrying a penalty of twenty-five stripes;

(7) slaves prohibited from owning horses, mares, geldings or mules, hogs not to run at large.[274]

Before the advent of municipal courts, prosecutions for status offenses occurred in county justice courts. This practice was continued after the adoption of the 1819 constitution. As indicated from the foregoing provisions, justice courts were traditionally associated with the trial of status offenses which arose in rural areas and locales, on or near plantations in the countryside. As towns and cities were incorporated by legislative acts, provisions were made for mayors' courts to administer ordinances under the enabling act adopted for each municipality. Among the ordinances enacted were status offenses prohibiting certain types of conduct by slaves and free persons of color, and conduct by white persons which tended to undermine the administration of slavery. In substance, mayor's court was an extension of the county justice of the peace, having jurisdiction coextensive with the corporate limits of the town or city.

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[274] Toulmin's Digest, 378, Act of March 6, 1805, rev. Feb. 10, 1807; Stats. Miss. Terr., 382-84.

Relative to maintaining controls on slaves and free persons of color, legislative enabling acts establishing towns and cities contained standard verbiage authorizing the new town to prohibit disorderly assemblies of slaves or free persons of color. The basis of municipal legal controls exerted on this segment of the population were curfews, pass laws and identification ordinances, which were in turn associated with a host of related ordinances governing slaves and free persons of color. The Code of Alabama (1852) constituted the principal statutory authority of municipalities to regulate slavery within their borders, constituting the basis of ordinances enacted by the common council for the regulation and control of slaves and free persons of color within its jurisdiction. Under the Code, towns were empowered to "pass such by-laws and ordinances as . . . necessary . . . not contrary to the laws of this state," to establish night and day watches and patrols," and to "prevent unlawful assemblages of slaves."[275] Town ordinances prohibited slaves from engaging in labor for hire or from "[going] at large."[276] Ordinances adopted by towns pursuant to state law established mayors' courts over which the mayor, or in his absence, an alderman or councilman, presided in the prosecution of slaves and free blacks for violations, minor misdemeanors, or "public offences."[277]

As with more serious offenses, slaves and free blacks were prosecuted and punished for a variety of offenses which, by definition, were inapplicable to white people. Among the offenses punishable under state law were "[r]iots, routs, unlawful assemblies,

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[275] Ala. Code § 1239 (1852).
[276] Ibid., § 1005 (1852).
[277] Mobile, Ala. Code § 5 (1859).

trespasses, and seditious speeches by a slave."[278] The punishments for such crimes committed by slaves ranged from ten to one hundred lashes.[279]

An 1844 act consolidating several acts relating to the city of Mobile authorized Mayor's Court to exercise the following powers:

> [t]he Mayor and each of the Aldermen, and each member of the Board of Common Council, shall be conservators of the Peace in and for the City of Mobile, and shall have the power to examine and commit or discharge on bail, all persons charged with offences not capital, in the same manner as Justices of the Peace, but shall exercise no judicial functions whatsoever. . . . and the Mayor shall have authority concurrent with a justice of the peace, to arrest and commit to prison, deserting seamen and mariners from vessels in the merchant's service under the provisions of [the Free Colored Mariners Act].[280]

The 1844 act relating to the city of Huntsville conferred on the mayor all the powers and jurisdiction of a justice of the peace in civil and in criminal cases, with all acts by the mayor deemed of equal force to those of a justice of the peace.[281] The powers, duties and jurisdiction granted to mayor's courts established around the state in connection with the municipal acts of incorporation conformed to this same general pattern.

Mayors' courts, operating essentially as municipal justice courts within the corporate limits of towns and cities, were fundamentally the same as county justice courts which had been in operation since the territorial days in regard to status offenses. The principal difference between justice and mayors' courts was in regard to jurisdiction. County justice courts were involved in the criminal trials of slaves for felonies and all other non-capital offenses except capital crimes. Mayors' courts were permitted to

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[278] Ala. Code § 1015 (1852).
[279] Ibid., §§ 1005-1032 (1852).
[280] Acts 1844, No. 221, "An Act to consolidate the several acts of Incorporation of the City of Mobile, and to alter or amend the same," § 16, 181, Jan. 15, 1844.
[281] Acts 1844, No. 216, 155, § 5, Jan. 16, 1844.

conduct trials of slaves accused of misdemeanors and minor violations, but not alleged crimes by slaves exceeding petit larceny, which continued to be handled by justice courts in connection with county court and probate judges; in other words, those cases requiring jury trials. Thus, the trials of slaves, free persons of color and white persons in mayors' courts were non-jury in the first instance, with the right of appeal, although as to slaves and free persons of color, appeals were virtually unknown.

Another difference between justice and mayors' courts is in regard to the communities in which justice and mayors' courts were located and the cases over which they presided. While justice courts operated in accordance with state law, compiled as the Code of 1852, mayors' courts applied municipal ordinances, promulgated by the common council, representing innovations of local government and at variance with state practice. Additionally, as with other courts in the area, such as City Court and circuit court, the Mayor's Court of Mobile, located in a coastal area, encountered and adjudicated cases peculiar to the region, such as those related to maritime commerce. Mayor's Court, located in the only seaport of the state, was the principal tribunal for the enforcement of the Free Colored Mariners Act, under which common council ordinances were adopted. Further, Mobile had the only significant free black population of the state. Thus, the administration of slavery as affecting free persons of color is most prominent in Mayor's Court. Also, as a community with a population of almost 30,000 people, the distinctive conditions of urban slavery, as reflected by slaves and free persons of color engaged in non-agricultural trades and occupations, are apparent.[282]

[282] Richard C. Wade, *Slavery in the Cities: The South, 1820-1860* (New York: Oxford University Press 1964), 8.

During this period, although a few Alabama communities were incorporated as "cities," only Mobile would constitute an urban area with an ethnically diverse population for purposes of the systematic study of urban slavery undertaken by Richard Wade, and then subject to some qualification. In 1860, the population of Mobile was 29,258, comprised of 20,854 (71.3 percent) whites, 817 (2.8 percent) free blacks, and 7,567 (25.9 percent) slaves.[283]

In 1860, New Orleans was home to more than 168,000 persons, more than five times the population of Mobile. A key component of the Wade study is the interaction of whites, free blacks and slaves in an urban environment. Considering the vast differences between the two cities in slave, free black and white populations, and the divergent laws of Louisiana and Alabama in regard to emancipation and status offenses, analogies of conditions in New Orleans, as described by Judith Kellher Schafer, to Mobile for the same period are of limited utility.[284]

Proportionately, New Orleans had a much larger free black population which included many Creoles, and Louisiana recognized manumission by contract, a method never recognized in Alabama. Many of the 817 free black residents of Mobile were the descendants of Creole settlers who were declared free by treaties of 1803 and 1819 with Spain, and not the result of voluntary slaveholder manumissions.[285] Further, the percentage of resident free blacks in Mobile declined from 11.6 percent in 1830 to 2.8

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[283] Amos, *Cotton City*, 86.
[284] Judith Kelleher Schafer, *Becoming Free, Remaining Free: Manumission and Enslavement in New Orleans, 1846-1862* (Baton Rouge, La: Louisiana State University Press, 2003), 45-58 (Ch. 3, “Contracting for Freedom and Self-Purchase”; not recognized in Alabama).
[285] Ibid., 100 (Table 4-7. "Residence of Racial Groups by Wards, 1860").

percent in 1860.[286] Alternatively, the proportion of Alabama free blacks residing in Mobile grew from 33 percent of the city's population in 1840 to 50 percent in 1860.[287] Evaluation of the foregoing data in totality suggests that as a percentage and in absolute numbers in the overall population, the presence of free black residents in the state was negligible. By implication, those persons emancipated chose to leave the state, or were forced to do so by operation of state law. While the population of free blacks in Mobile may have been relatively insignificant to warrant comparison with New Orleans, Mobile as a home for half of Alabama's free black population makes the community distinctive in comparison with towns in the interior of the state, inviting study and comparison of the local court system in the disposition of cases affecting slaves and free persons of color.[288]

The powers of the Mayor's Court of Mobile in regulating slavery were derived from the 1844 Consolidation Act, which enumerated as objects:

> [1] to restrain and prohibit the nightly and other meetings of disorderly assemblies of slaves, free negroes and mulattoes;
>
> [2] to punish such slaves by whippings, not exceeding twenty stripes; and
>
> [3] to punish such free negroes and mulattoes, and other persons for such offences, not exceeding fifty dollars for any one offence, and in the case of the inability of such free negro, mulatto or other person, to pay and satisfy any such fine or penalty and costs thereon, to have such free negro, mulatto or other person, to be confined to labor for such reasonable time, not exceeding three calendar months for any one offence, as may deemed equivalent to such penalty and costs, and which said labor shall be designated by the said Mayor, Aldermen and Common Council . . . .[289]

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[286] Ibid., 86 (Table 4-4. "Whites, Free Blacks, and Slaves a Percentages of the Population of Mobile, 1830-60").
[287] Ibid., 90.
[288] Ibid.
[289] Acts 1844, No. 221, § 15, 180-81, Jan. 16, 1844.

At first glance, the organization and operation of municipal and mayors' courts appear local in character and orientation in the regulation of slavery. In substance, city charters, codes, ordinances and the courts which administered them were still creatures and instruments of state law, with local variants, components of a court system comprised of justice courts, county court, probate court, the City Court of Mobile, the Circuit Court of Mobile County, and Chancery Court, all operating under the auspices of state law and exercising interlocking often concurrent jurisdiction in the regulation of slavery. Although municipalities duly organized were granted authority to enact city codes and ordinances governing slavery, some codes and ordinances were essentially reenactments or recapitulations of state law. One example of the direct enforcement of a state enactment by the municipality is the Free Colored Mariners Act. Nevertheless, daily enforcement of these provisions occurred at the local level, with certain conduct by slaves and free persons of color prohibited or controlled by specific supplemental municipal ordinances on the subject, and much of the jurisprudence resulting from custom, habit and practice, without the specific guidance of case law.

The state criminal code operated with the same full force and effect in the cities as in rural and unincorporated areas. Slaves and free blacks accused of more serious crimes not covered by municipal codes were prosecuted in state justice, county and circuit courts having jurisdiction. The jurisdiction of municipal and mayor's courts was concurrent with justice courts. One effect of the establishment of the Mayor's Court of Mobile was to relieve the dockets of county justice courts of minor offenses relating to slave control arising within the city limits; on the other hand, municipal and mayors' courts handled certain cases involving regulation and control of slavery which were peculiar to such

courts. Although established under and charged with enforcement of state law like justice courts, municipal and mayors' courts enforced municipal ordinances which covered areas occasionally not defined by state law, unlike justice courts which merely enforced state law at the local level as a court inferior to circuit court. Also, municipal and mayors' courts handled matters associated with the differing character of slavery in urban areas, resulting from the use of slaves for hire in non-traditional or non-agricultural occupations, uncommon to cases appearing in most justice courts.[290] Municipal ordinances assumed an increasing role as towns and cities developed, accompanied by an influx of free blacks and slaves. Some anecdotal evidence suggests free blacks and slaves lived and worked in urban areas of Alabama with relatively fewer restraints than their rural counterparts, despite comprehensive municipal ordinances regulating their conduct.

The Mobile City Charter of 1858, in setting forth the objectives of slavery controls, essentially reaffirmed similar provisions of the 1844 consolidation act. Under the Charter, the enumerated purposes pertinent to the slave and free black population were:

> to restrain and prohibit the nightly and other meetings or disorderly assemblies of slaves, free negroes, and mulattoes, to punish such slaves by whipping not exceeding twenty stripes, and to punish such free negroes and mulattoes, and other persons for such offenses by affixing penalties not exceeding fifty dollars

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[290] Municipal courts and their state law counterparts, justice courts, were not courts of record. Among the difficulties impeding conclusions regarding the municipal law of slavery is the relative absence of available historical evidence, as illustrated by the following comment: "*To get the legal facts about [the] administration [of the laws] would be a matter of great difficulty, for the courts in which the great majority of slave cases were tried, that is, courts of a justice of the peace, were not courts of record*, and the only facts accessible concerning them would be the personal statements of old citizens [which] would not be authoritative." Denson, *Slavery Laws in Alabama*, 1 (emphasis added).

> for any one offense, and in the case of the inability of any [such person] to pay or satisfy such fine or penalty, and the costs thereon, to have such [person] to be confined for such reasonable time not exceeding three calendar months for any one offense, as may be deemed equivalent to such penalty and costs . . . .[291]

Although the implied intent of the 1858 Mobile City Charter was to limit the imposition of punishment to imprisonment or fines on the free black defendant, infliction of ten to fifty lashes for status offenses was authorized and adopted by municipal ordinance, thereby exceeding the standard maximum punishment of thirty-nine lashes inflicted in justice court pursuant to state law.[292] The foregoing provision also highlights a divergence in the treatment of free blacks in circuit court, in which they were fined or imprisoned in the same manner as white offenders. In relation to minor offenses adjudicated in Mayor's Court, free blacks, like slaves, were sometimes flogged, although less frequently or severely than slaves, constituting an exception to the general rule that free persons of color were prosecuted and punished in the same manner as whites for misdemeanors and felonies in state circuit court – with fines, jail and imprisonment in the state penitentiary. Regarding other non-status municipal offenses, such as disorderly conduct, public intoxication, and gambling, these ordinances were uniformly applied to all classes of defendants. However, although whites were prosecuted and convicted as well, the principal distinction in the application of the ordinance was the mode of penalty or punishment imposed. On one hand, whites were merely fined or imprisoned, while free blacks were fined, imprisoned, or occasionally whipped, and slaves were whipped or

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[291] Mobile, Ala., Charter § 31 (1858).
[292] Ala. Code §§ 1033-1044 (1852). Moreover, a free person of color convicted of writing or furnishing a slave with a pass in aid of an escape was guilty of a felony, punishable by a sentence of three to seven years in the penitentiary; upon release, the defendant was required to leave the state. Ala. Code §§ 1039-1040 (1852).

periodically remanded to the custody of their employer or owner, who would pay the fine imposed in lieu of flogging.

Statistical comparisons in the rates of arrest and conviction of white, free black, and slave defendants, suggesting that free blacks and slaves enjoyed a degree of freedom in the cities, are frequently deficient in failing to consider not merely the mode, but relative severity of punishment imposed for each class of defendant. Further, the efficacy and precision of such studies are seriously impeded by the unavailability of inferior court records. Nevertheless, extant records reflecting pronounced disparities in procedure, evidence, and punishment associated with each class of defendants accused of serious crimes precludes an inference of lenient or fair treatment. The informal and summary nature of slave trials on municipal court is described as follows:

> [N]o trial in the meaningful sense followed. The slave had no right to plead, none to call a witness, indeed, no right to speak unless the presiding officer asked a question. . . . His owner could insist on proof. . . .
>
> But the routine presumed guilt, and the owner often did not bother to appear. The only question to be decided was the sentence.[293]

To some degree, this account should be tempered by the recognition that municipal courts and justice courts, non-jury tribunals not operating as courts of record, were operating consistent with their intended purposes, moving swiftly and expeditiously to dispose of cases, in a similar fashion, whether the defendants were white, free black, or slave. Yet, the essential problem with regard to slaves and free persons of color was not merely that the proceedings were expedited or the trial process amounted to summary justice, but the efficacy of procedures in justice and municipal court presupposed the right of a defendant to an effective appeal to a superior or general court for a trial *de*

[293] Wade, *Slavery in the Cities*, 185.

novo, such as in the City Court of Mobile or Mobile Circuit Court. The nature of punishment inflicted upon conviction, principally whipping, which upon its infliction, rendered the case moot, leaving nothing for an appeal. Also, the lack of resources or counsel precluded appeals by slaves and many persons of color, while frequent appeals by white persons are noted.

Municipal, mayors' and justice courts were essentially patterned on English magistrate courts, which were condemned as a "restraint of the common law."[294] The British jurist Blackstone assailed summary convictions rendered by magistrates as "fundamentally opposed to the spirit of our constitution."[295] However, these criticisms, leveled at the magistrate system as abridging the rights of Englishmen and their progeny, whites of the antebellum South, were not applied in southern courts with slaves or free blacks in mind.

In 1858, the Mobile city government consisted of a mayor, board of aldermen, and the board of common council.[296] Under the city charter, the duty of the mayor was to ensure the due execution of the laws of the city, by holding court once a day each day of the week, except Sundays, for the trial of all offenders against the laws and ordinances.[297]

The City Charter tracked the 1844 act of incorporation in setting forth the powers of mayor's court. The purposes enumerated in the Mobile City Charter concerning the regulation and control of slaves as enumerated correspond with numerous enabling acts for municipal charters passed by the legislature during the antebellum period. Despite the

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[294] Morris, *Southern Slavery and the Law*, 210.
[295] Ibid., 211.
[296] Mobile Charter § 1 (1858).
[297] Ibid. § 34.

stated limitations in the Charter, whippings in excess of twenty stripes were often administered pursuant to ordinance: "In all cases . . . if the offender is a slave, he shall receive any number of lashes not exceeding fifty (except where the number is otherwise expressly provided) unless his owner, employer, or agent, with the consent of the mayor, shall pay the fine and costs.[298]

The charter also sought to "restrain and prohibit nightly and other meetings or disorderly assemblies of slaves, free negroes and mulattoes . . . ."[299] The foundation of slave control was set forth in registration and pass laws applicable to slaves, as authorized by section 104 of the City Charter:

> That all Negroes that are or may be brought within the limits of the city, by any person or persons whatsoever, for sale or hire, shall be duly registered in a book kept in the clerk's office . . . , and the mayor . . . shall have the power to regulate and prescribe the manner and places of selling or hiring such slaves, and the manner and places of exhibiting same for sale or hire.[300]

Restrictions were placed on "free negroes." Every free negro was required to report annually to the mayor's office and provide a complete description of himself and post a bond with the city.[301] A free black could not "go at large" after ten o'clock p.m. without a special pass issued by the city, and could not be out of his residence after twelve midnight in any event.[302]

As an auxiliary of law enforcement and operating as an arm of the courts, citizen patrols of white male citizens over sixteen years old were established under section 238 of the City Code, emulating slave patrols established in counties across the state. The

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[298] Mobile Code § 13 (1859).
[299] Mobile, Ala. Code of Ordinances § 31(1859). The Mobile City Charter and the Ordinances are collectively referred to as the Mobile City Code.
[300] Ibid,. § 104.
[301] Mobile Code § 128 (1859).
[302] Ibid.

patrols were to apprehend and imprison such slaves as "may be found assembled in unseasonable, riotous, or disorderly meetings, or without a pass, after nine o'clock p.m."[303]

The principal provisions regulating slaves were set forth in sections 320 to 322 of the City Code, supplementing parallel provisions of the 1852 Code.

The restrictions placed on slaves were numerous and varied. A person could not "buy or receive from or sell to any slave any commodity or liquid" or any liquor.[304] Free persons were prohibited from associating with slaves at any meeting of slaves. No one was permitted to "secrete or entertain" any slave.[305]

If any slave "absented himself" from his usual place or residence, or his owner or employer's service for twenty-four hours, without a written pass, he was deemed a runaway as provided in the Code of Alabama.[306] Four or more slaves associated together off their masters' premises constituted an unlawful assembly.[307]

The City Code prohibited the following conduct by slaves:

1) rude, violent or blasphemous language, or carry clubs, or any description of weapons;

(2) congregating in the street, except when engaged in the business of their employers;

(3) riding or driving horses at a more rapid rate than a walk or a moderate trot;

(4) smoking any pipe or cigar on any streets of the city;

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[303] Ibid., § 241.
[304] Ibid., § 320.
[305] Ibid., § 321.
[306] Ibid., § 322.
[307] Ibid., § 322.

(5) engaging in seditious speech;

(6) lifting a hand in opposition to any white person;

(7) harboring or concealing any other slave, nor writing for, nor furnishing any other slave with any pass or free paper, . . . being in the streets or away from his employer's premises at night after nine o'clock p.m.; or

(8) owning any horse, mare, gelding, mule, cow, hog, or dog.

The penalty for violating any of the above provisions was up to fifty lashes.[308]

The municipal code not only specified minor offenses associated with the public conduct of slaves, but was also a guide for regulating labor and employment of slaves and free persons of color. The hire and sale of slaves was specified in more detail in section 328 of the City Code, which prohibited a slave from hiring his time or the time of any other slave. Persons having control of slaves hired out to work by the day were required to register the name, age, and sex of such slaves in a book maintained by the city clerk. A slave registered for hire was assigned a number. In all cases except dray drivers, a metal badge with the slave's number was worn on the clothing.[309]

Municipal ordinances were frequently adopted to supplement state law on a given subject. An example of this practice is the Free Colored Mariners ordinance, enforcing section 1045 of the Code of Alabama (1852), originally enacted in 1841, and amended in 1848 and 1861. The repeated amendments to the act by the General Assembly evidence systematic attempts to further restrict free black seamen from entering Mobile, and constituting public policy of the community and the state to suppress the numbers and presence of a free black population in the state as part of the program to maintain

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[308] Ibid.
[309] Ibid., § 330.

slavery.[310] This type of legislation was followed by the General Assembly in other areas as well.

The Free Colored Mariners Act authorized the City of Mobile to restrict by ordinance "free colored mariners" entering the port of Mobile. Similar acts regulating entry of free black mariners were adopted by other coastal slaveholding states. Somewhat like the statute on cotton frauds and sampling, the applicability and enforcement of the law was peculiar to Mobile, which was the only seaport in the state. The Free Colored Mariners statute and ordinance were the most significant assertion of municipal regulation of slavery in the antebellum period. The restrictions, which were unduly burdensome of interstate and maritime commerce, and violated traditional notions of comity, were characteristic of the increasing isolation of the South occurring as a product of the determination to protect domestic slavery.

Under the Free Colored Mariners Act and ordinance, owners or agents of vessels manned by free black seamen approaching the port of Mobile were required to post a bond of five thousand dollars. Other essential conditions were that any vessel manned by free colored mariners could not come within three miles of the city of Mobile nor within one mile of the shore state of Alabama--except to pass through the narrow mouth of Mobile Bay. The free colored seamen could not leave the ship, and no communications were permitted between the seamen and other free persons of color and slaves on shore.[311]

The object of the ordinance was to prevent an influx of free blacks into the community bringing a "contagion" of ideas subversive of slavery, as well as to forestall

[310] Denson, *Slavery Laws in Alabama*, 30-32, 54-55.
[311] Ala. Code § 1045 (1852); Mobile Code § 129 (1859) (unnumbered footnote).

stowaway slaves.[312] The reasoned exception would be port laws necessary to facilitate local maritime commerce and similar regulations to ensure safety. The "Negro Seamen's Acts" were a "source of constant friction" between slave and free states. The first act regulating black seamen was passed by South Carolina in 1822, providing that black crew members of any ship coming into port be arrested and detained while the vessel was in port. Northern political leaders complained bitterly that the restraints imposed by the Negro Seamen's Acts of the southeastern states on citizens of free states were violative of the comity clause.[313]

A review of the sessions of Mayor's Court, appearing about four days per week in the *Mobile Daily Register* prior to the outbreak of the Civil War in 1861, indicate that approximately one-half of the cases in a given session involved slaves or free people of color, focusing on crimes of status.[314] One source reveals that over half the cases before the Mayor's Court in 1855 came under "Negro ordinances," or status offenses.[315] A

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[312] Amos, *Cotton City*, 147 ("The Mobile Harbor . . . law sought to prevent free blacks from entering the state by ship.").
[313] Earl M. Maltz, "Fourteenth Amendment Concepts in the Antebellum Era," *American Journal of Legal History* 32 (October 1988), 340.
[314] The method of classification of slaves and free blacks by newspaper reports was applied on the following basis: From the accounts, the status of slavery was inferred for a particular defendant from the designation of the individual by first name only, contrasted with all other defendants who were referred to by surname as well. Some of those having surnames were referred to by the appellations "f.p.c.," "f.m.c.," or "f.w.c.," signifying "free person of color," "free man of color," or "free woman of color," respectively; i.e., free black persons. Those defendants with surnames and having no such suffix or abbreviation were assumed to be white persons. Additionally, persons accused or convicted of crimes of status were considered either free blacks or slaves. By comparison, published Alabama Supreme Court opinions of the antebellum period customarily refer to white defendants by first names and surnames, free blacks with the suffix "of color" or similar variation, and slaves by first name only, with the designation "a slave." Hence the caption of an opinion may refer to a slave defendant named Aaron as "Aaron, a slave."
[315] Wade, *Slavery in the Cities*, 104.

combination of the classes of free blacks and slaves brought before Mayor's Court, about 28.7 percent, reflects a rate of prosecution and conviction of this group of about 50 percent, a level which was disproportionate in comparison with white defendants.[316]

In most cases corporal punishment was limited to thirty-nine stripes. The fact that the law specified a certain maximum sentence did not imply that such punishment was always imposed. Reports indicate that many offenders received ten or twenty lashes, fines, or, in the case of slaves, were remanded to owners without whippings. Although the data of municipal court dispositions are inadequate[317], a reasonable inference from the court dispositions is that some of those punished were first offenders and were treated with relative leniency, or the court routinely elected to imposed penalties less severe than those accorded by law.

Flogging, a "pivot of the system of discipline," was accomplished by means of a public whipping post, which institutionalized the practice. The whipping post and other methods of corporal punishment, such as stocks and pillories, persisted from territorial days; however, by the 1850s, these devices were mainly used for slaves and occasionally free persons of color, but not white persons. Mobile's public whipping post, located at the heart of town, was constructed like a sash frame.[318] Harriet Amos in *Cotton City* has maintained that municipal slave codes and local courts were viewed onerous yet largely ineffective in managing the conduct of free persons of color, who largely ignored them as a nuisance, with "stolid indifference" and "determined purpose."[319] Studies of urban slavery in North Carolina, Louisiana, Tennessee, and Georgia that show ineffective or

[316] Amos, *Cotton City*, 86.
[317] Wade, *Slavery in the Cities*, 194.
[318] Ibid., 191.
[319] Amos, *Cotton City*, 147.

inconsistent enforcement of municipal ordinances against slaves and free persons of color were reflected in the Alabama experience.[320]

The ordinances of Mobile and Montgomery predominantly provided for corporal punishment. Among the code of ordinances, fines were usually the exception rather than the rule, although court judgments in Mobile make occasional mention of a fine paid by a slaveholder on behalf of his convicted slave, or instances of slaves being "remanded" to owners, presumably without punishment.

In the late 1850s, Mayor's Court had a thriving business, holding court sessions on average of four times per week, and much of the court's activity was related to enforcement of status offense ordinances. A survey of Mayor's Court case dispositions, reported from 1857 to 1861 in the *Mobile Daily Register*, indicate that slaves and free blacks customarily comprised one-half the court docket. Assuming that slaves and free blacks, together amounting to 28.7 percent of Mobile's population according to the 1860 census, comprised 50 percent of the typical Mayor's Court docket, the arrests, prosecutions, and convictions of slaves were disproportionate in comparison with white defendants, especially when the factor of prosecution of slaves and free blacks for status crimes is considered, indicating that these groups were disproportionately charged [overcharged] from the outset. This data, coupled with frequent advertisements and legal notices concerning the apprehension of "runaway" slaves, show that slaves and free blacks occupied a significant proportion of the time and resources of the local officials and the community. For instance, an instructive case resulted in the sentencing of three

[320] Sellers, *Slavery in Alabama*, 257.

people in Mobile Municipal Court to hard labor for trading with slaves in 1859.[321] Municipal laws were both frequently violated and frequently enforced, yet numerous cases indicate the trial and acquittal of many slaves.[322]

A report in the *Mobile Daily Register* shows that slave patrols worked in tandem with mayor's court in apprehending runaways, as in connection with county justice courts. The apprehension of runaways and prosecution of status offenses were part of a comprehensive scheme necessary to maintaining the social order. One entry reflected that "Arthur, being in the city under suspicious circumstances and [remaining] long after the time allowed by his pass, was committed as a runaway."[323] In another case, the slave Isaac was "remanded as a runaway.[324]

Various other violations were prosecuted in Mayor's Court, often the same or similar offenses to justice court cases, although the character of some violations was peculiar to Mayor's Court due to the location of the tribunal in an urban area, and nature of some offenses appearing on the dockets of Mayor's Court reflects a greater sweep of the court in policing certain conduct by Mobile residents that might have been permitted or ignored altogether in rural areas, but was problematic in the city, where people lived and worked in relatively close proximity to one another.

The Mayor's Court, as opposed to county justice court, was more engaged in prosecuting conduct tending to constitute a public nuisance. The promulgation and enforcement of status offense ordinances to suppress the liberties of slaves and free persons of color extended the degree of municipal regulation one step further, as a

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[321] Ibid., 233.
[322] Sellers, *Slavery in Alabama* , 251.
[323] *Mobile Daily Register*, March 27, 1859, 1.
[324] Ibid., April 6, 1859, 1.

measure to control slaves, many of whom were hired out and not under the supervision of their owners, as well as free persons of color who were significantly more numerous than in any other area of the state.

Review of newspaper reports relating to status prosecutions in Mayor's Courts reveals the character of such offenses as trivial violations accompanied by excessive punishments. The slave John was apprehended for smoking in the street, but was released.[325] In another case, Keith was found smoking in the street, was sentenced to ten stripes.[326] Dennis, out after hours, was given ten stripes.[327] Payton and Charles, arrested for being out after hours, were discharged. Another slave convicted of the same offense was sentenced to twenty stripes.[328] In the case of Ellen and Robert, the court found they were "out after hours," and ordered "ten stripes for each."[329] William was given twenty stripes for being out after hours. Augustus, charged with obstructing the street with his wagon, was fined five dollars or twenty stripes.[330]

In discussion of the operations of mayors' and justice courts, comparisons of the two courts reveal that punishments meted out for violations of city ordinances were about as severe as those imposed by justice courts, and any differences which may have existed between punishments inflicted on slaves and free persons of color were negligible. In

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[325] Ibid., April 17, 1859, 3.
[326] Ibid., April 19, 1859, 3.
[327] Ibid., April 23, 1859, 3. The curfew for slaves and free persons of color was 9:00 p.m.
[328] Ibid., April 23, 1859, 3.
[329] Ibid., May 11, 1859, 3.
[330] Ibid., May 21, 1859, 3. The fine imposed indicates Augustus, no surname indicated, was a free person of color, given the option of paying a fine, and also that free persons of color were whipped under certain circumstances upon conviction. On occasion, slaves were discharged or remanded to owners without punishment on payment of costs or restitution, if any.

fact Henry, a slave, was convicted of disorderly conduct and sentenced to thirty-nine stripes.[331]

Reviews of available newspaper accounts of Montgomery and Mobile court dockets reflect disproportionate prosecution of slaves and free persons of color, resulting from the application of status crimes to these classes, and suggesting more rigid enforcement of municipal ordinances.

In summary, the statutory role of municipal government was principally to carry out state law. Consequently, municipal governments were, for the most part, acting in concert with the intent of the legislature regarding the regulation of urban slaves and free blacks. Nevertheless, historical evidence extrinsic to the test of statutes and ordinances, and newspaper reports of court proceedings, suggests that free blacks and slaves enjoyed more freedom than their counterparts in rural areas.

Montgomery, the state capital, provides the other significant example of municipal slavery in the state, evidencing about the same conditions and patterns of enforcement as in Mobile. From the beginning, Montgomery was the center of a slaveowning, cotton-producing region. By 1860, the slave population equaled or exceeded the white population in the city and the county. Of the city's population of 8,843, 4,400 were slaves. In Montgomery County, 23,710 slaves comprised 66 percent of the total population of 35,904.[332] As the city grew, increasing numbers of African American workers appeared, performing non-agricultural occupations.

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[331] Ibid., April 6, 1859, 1.
[332] Paige Holliman Kemp, "Montgomery, Alabama, 1861: A Social History of the Cradle of the Confederacy" (Master's Thesis, Auburn University, 1978), 19.

The 1861 Montgomery City Code tracked section 2 of the 1852 Code of Alabama in defining race and status relating to slaves and free persons of color."[333] As with the state criminal code and the Mobile City Code, the Montgomery City Code differentiated between slave, free black, and white persons, in accordance with the race of the accuser and the defendant.

A person convicted of an assault and battery upon a slave was subject to a fine of ten dollars.[334] An assault on a slave with a deadly weapon carried a fine of twenty to fifty dollars on conviction.[335] On the other hand, a slave committing "an assault or assault and battery" upon a "white person" could receive up to one hundred "stripes."[336] A slave committing an assault and battery on a slave or a "free Negro" could receive up to fifty stripes.[337] Alternatively, a free black committing an assault and battery upon a slave could be fined ten dollars and receive fifty lashes.[338] Additionally, a free black convicted of assault on another free black could be fined ten dollars; if committed with a deadly weapon, the fined was twenty to fifty dollars, with one hundred stripes laid on in default of payment.[339] Finally, a free black committing assault and battery on a white person would receive up to one hundred stripes.[340] Other miscellaneous provisions prohibited ownership of dogs by slaves and free blacks[341], bathing in artesian wells[342], and hiring a

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[333] Montgomery, Ala. Code § 3 (1861).
[334] Ibid., § 11.
[335] Ibid.
[336] Ibid., § 12.
[337] Ibid., § 13.
[338] Ibid., § 14
[339] Ibid., § 15.
[340] Ibid., § 16.
[341] Ibid., §§ 38 and 39.
[342] Ibid., §§ 44 and 45.

horse or vehicle to a slave or free negro without the owner's permission.[343] Apparently, in a departure from other provisions of city ordinances, free blacks were treated more harshly with regard to bathing in artesian wells; free blacks would receive "fifty lashes," while the slave would receive thirty-nine stripes." The reason for this distinction is not clear. Every "person," meaning white persons, would be fined five dollars for illegal bathing. Free black and slave draymen were also prohibited from leaving a vehicle on the street in front of a store or dwelling without consent of the owner. The penalty was thirty-nine stripes.[344]

One significant pattern which emerges in the slave provisions of the Montgomery City Code in contrast to the Mobile City Code and state law is that the Montgomery slave code in more frequent instances authorized the same punishment for slaves and free persons of color, blurring the lines between slave status and free black status. One explanation is that the Montgomery Code was enacted later than the Mobile code, nearer the end of antebellum slavery. Contemporary sources such as legislation and reported appellate cases suggest that free persons of color were subjected to increasing legal sanctions in the 1850s, eroding their status and existence as free persons. By the end of the decade, free persons of color resembled slaves in important respects.

In the prosecution and punishment of free persons of color and slave defendants in Mayor's Court, free persons of color did not fare much better than slaves, with the distinction in punishment between free blacks and slaves obliterated. Pursuant to ordinance, free persons of color were often whipped like slaves upon conviction, and may have had to pay a fine as well.

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[343] Ibid., § 60.
[344] Ibid., §§ 58-66.

Some contend that the extent of slave crimes in the cities was exaggerated because records were more carefully kept in the larger towns than in the rural areas.[345] Under municipal ordinances, in some instances the treatment of free blacks, subject to whippings, resembled that of slaves, although free blacks were allowed to pay fines in lieu of corporal punishment in most instances. As in Mobile, burdensome registration, pass, identification, and curfew ordinances restricted freedom of movement, but some have argued that the status offense ordinances were not rigidly enforced on the slave and free black population. As noted, the background of the Felix case was a late-night dance with a live band in downtown Mobile which until the fracas between Saturnia and Spanish Frank, played well past the curfew.

Undoubtedly, municipal ordinances played an increasingly important role as the numbers of slaves and free blacks in Alabama cities grew at the end of antebellum slavery. The adoption of municipal ordinances reflected the transitional nature of slavery from an agricultural to a nascent urban institution by which the government, acting through municipalities, assumed from the slave owner a greater role in the supervision of the slave. As part of this process, impelled by the increased use of hired slaves, the principal slaveholder was frequently replaced by an agent or contractor, and municipal governments acted under color of law as surrogate slaveholders and overseers. Although the scheme of racially restrictive municipal ordinances was indisputably burdensome, studies by Wade and Amos provide evidence of fewer restraints on slaves in cities and relative freedom for free persons of color.

[345] Sellers, *Slavery in Alabama*, 258.

Municipal slavery forced local government to take cognizance of the social significance of free blacks and slaves to the urban community, independent of slave owners to some degree, by implementing legal controls not formerly contemplated under state law, untrammeled by outmoded connections to agricultural slavery.

Along with justice courts, the operations of municipal and mayors' court illustrate three main themes in the control of slaves and free persons of color. First, municipal codes were designed to deal with peculiar problems associated with slaves working in non-agricultural occupations in relatively close quarters, often as laborers for hire with absentee owners. Second, the cities of Mobile and Montgomery presented the only significant populations of free persons of color. Although the state slave code regulated the conduct of free blacks, municipal codes established a unique regulatory scheme by which the control of free persons of color was a major objective. Third, examination of the operation of municipal and mayors' courts necessarily supplement information relating to prosecution of slaves and free persons of color in other courts.

Impressions of the measure of justice accorded or denied slaves and free persons of color in circuit courts are incomplete without information of case dispositions in municipal and mayors' courts. In circuit court, slaves and free persons of color were customarily represented by attorneys, subject to indictment, and sometimes filed appeals. In the case of free persons of color, the prescribed punishments in circuit court were fines and imprisonment in non-capital cases, leading to a conclusion that free persons of color were not whipped as punishment. This was not the case as free persons of color were sometimes whipped on conviction of municipal ordinances and for state law violations in justice courts. As the vast number of criminal cases handled by the courts was minor

misdemeanors and municipal violations, circuit court cases in which slaves and free persons of color are accorded many of the same procedural protections as white persons are unduly euphemistic in depicting the level of justice dispensed. The data derived from inferior courts which adjudicated most cases affecting slaves and free blacks support assertions that free persons of color were reduced to the status of slaves in connection with a fundamental component of freedom, their treatment in the courts.

Finally, urban slavery and the presence of free blacks in the community, which stimulated a governmental response by the creation of mayors' courts and specific ordinances, indicated that slavery was not merely an agrarian phenomenon, but could be extended to the cities and managed by a rational system of legal controls in commercial and industrial contexts.

CHAPTER 6

SLAVES AND CIVIL CLAIMS:

HIRING, NEGLIGENCE, SALES, COLLECTIONS, AND ESTATES

Of reported Alabama appellate cases, 1,700 of over 6,100 opinions issued from 1820 to 1860 involved slavery. Of this number, less than 100 related to criminal cases and emancipation claims wherein the slave had legal capacity or standing as a criminal defendant or as a civil plaintiff, such cases constituting the unusual instances in which slaves were treated as legal persons in the courts.

Thus, most cases connected to slavery, some 1,600 in number, as with the entire body of law, whether appellate or trial cases, involved civil matters. When inquiries concerning slavery are limited to civil cases constituting the body of reported case law, and slave and non-slave matters are compared, the resulting evidence reveals the substantial and pervasive impact of slavery on the legal system and the rest of society. Consequently, when the records are examined, the ratio of reported civil cases involving slavery to the total number of civil cases exceeds 25 percent annually, the incidence of such cases more nearly corresponding with the African-American portion of the population of the state during that period. This is consistent with the overall status of slaves, who were regarded as property, and the activities of state courts which were predominantly preoccupied with civil claims.

Various cases in which slaves are objects of property, ranging from negligence resulting in injury and death to slaves, to attachments, garnishments, executions, wills and trusts, indicate the pervasive nature of slavery reflected in the courts, and also show the continuing economic disincentives to emancipate slaves whose status as labor and capital rendered them too valuable to slaveholders, heirs, and creditors.

One of the results of urban slavery and the onset of the industrial revolution in the South, mainly evidenced by new modes of transportation such as railroads and steamboats, was the appearance of slaves in new trades and occupations, usually hired out by slaveholders, not associated with agrarian labor on plantations. As a result, new cases and causes of action were considered by the courts in connection with slaves who were injured or killed while at work.

The first reference of the duties of the slaveholder, and by implication, the hirer of the slave to the slaveholder, are found in article VI of the 1819 Constitution, which authorized the legislature to pass laws to "oblige the owners of slaves to treat them with humanity, to provide for them necessary food and clothing, to abstain from all injuries to them extending to life or limb . . . ."[346] Article VI and legislative acts enacted thereafter established the basis for the legal duty required of slaveholders and their agents for criminal liability and negligence as to the treatment of their own slaves as well as hired slaves, and otherwise regulated the conduct of third parties toward slaves. The slave as property did not control the value of his labor, which accrued to the slaveholder. Hence, a negligence suit regarding an injured slave was brought by the slaveholder against the hirer, and any resulting damage award inured to the slaveholder, not the slave.

[346] Ala. Const. (1819) art. VI, "Slaves," §1.

The Code of 1852 set forth five substantive sections concerning abuse of slaves, prohibiting acts ranging from homicide to a duty to care for the slave during sickness, injury, infirmity, and old age. The specified crimes and punishments often depended upon whether the accused was a slaveholder or his agent, or a stranger having no supervisory relationship with the slave. Causing the death of a slave with malice aforethought by cruel whipping or beating, or by any inhuman treatment, or by the use of any weapon calculated to produce death, was murder in the first degree.[347] An owner, overseer, or other person having the "right of correction" who caused the death of a slave by "cruel whipping or beating" or "any other cruel and inhuman treatment" was guilty of murder in the second degree. Likewise, the death of a slave caused by the "use of any instrument calculated to produce death (gun or other deadly weapon), but without intent to cause death" by slaveholders or their agents were guilty of second-degree murder."[348] Section 3297, with particular application to slave hiring situations, prohibited a master or "other person standing towards the slave in that relation," who inflicted or allowed another to inflict any cruel punishment, or failed to provide him with a sufficiency of healthy food, or necessary clothing, or to provide for him properly in sickness and in old age, or treated him in any way with inhumanity, on conviction was fined twenty-five to one thousand dollars.[349]

Trials under section 3297 were conducted with juries consisting of two-thirds slaveholders.[350] The jurors were "the judges" of "cruel punishment" and similar allegations, meaning that the determination was a question of fact based on standard

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[347] Ala. Code § 3295 (1852) ("Offenses against slaves").
[348] Ibid., § 3296.
[349] Ibid. § 3297.
[350] Ibid., § 3299.

practices prevalent among local slaveholders, without reference to express definitions for cruelty under the Code. With such deference to juries and local custom, convictions were often difficult and punishments mild.[351] Section 3300 provided that a person "other than the master" who committed an assault and battery on a slave, "without just cause or excuse," was guilty of a misdemeanor.[352] This is to be compared with the slave code and alleged conduct in reverse, an assault by a slave on a white person. If aggravated, constituting assault with intent to kill a white person, the penalty on conviction was death.

At first glance, the primary purpose of the foregoing provisions was the protection of slaves from personal abuse. However, as shown by slave hiring cases and other cases of third-party negligence, application of such laws produced unexpected consequences. As interpreted and applied in a line of hiring and negligence cases, the 1819 Constitution and statutes established legal duties of care which enabled civil damage claims by slaveholders against hirers and other persons who by negligent or wanton conduct caused the injury or death of slaves. Thus, in substance, actual the beneficiaries were slaveholders, who were entitled to recover economic loss based on the diminution in value of their slave property, while injured slaves or their families had no right to recover. Historical accounts, considering the consequences of slave hiring practices, indicate that the protection afforded slaves as recited in state law was minimal if not vitiated.

The close association between slave trading, or the buying and selling of slaves, and the slave hiring system has been noted. Fredric Bancroft once asserted that "slave

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[351] Ibid., §3298.
[352] Ibid., § 3300.

hiring was a restricted kind of slave trading common in all the Southern States."[353] In some instances, slave hiring was an advantageous alternative to slave trading, particularly in areas experiencing a declining economy and overwrought soil caused by tobacco and cotton farming. Slave hiring was common in the 1850s as the price of slaves dramatically increased. The significance of slave hiring is that the practice served to perpetuate and sustain slave labor in areas that otherwise would have relied more on free labor, and enabled a wider range of individuals to employ slaves.

Slave hiring, complementary to slave sales, further extended the reach of the institution of slavery. Jonathan D. Martin states that slave hiring was "at the center of life in the South." According to Martin, the incidence of slave hiring is understated in the census schedules, and asserts that Charleston, Savannah, Mobile, New Orleans, Natchez, and Montgomery were "hotbeds of slave hiring."[354] More slaves faced the prospect of working for a "temporary master" than being sold to a new owner. Bancroft alleged that in some Virginia towns, more slaves were hired out in a day than sold in a year. Martin cites leading statistical studies reflecting annual rates of slave hiring at 5 to 15 percent. By comparison, slave sales averaged about 3 percent of all slaves per year. Over time, the chance of being sold increased significantly for slaves who reached thirty-five years of age. As a matter of comparison, the prospect of being hired out was "three to five times greater" than being sold.[355]

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[353] Fredric Bancroft, *Slave Trading in the Old South*, with a new introduction by Michael Tadman (Columbia, S.C.: University of South Carolina Press, 1996), 145.
[354] Jonathan D. Martin, *Divided Mastery: Slave Hiring in the Old South* (Cambridge, Mass.: Harvard University Press, 2004), 7-8.
[355] Ibid., 8.

Slave hiring cases show slaves engaged in a variety of non-agricultural occupations. Although slave hiring was more prevalent in urban areas and in connection with commercial activities, slave hiring was a longstanding practice in relation to farm labor. Hirers of slaves were expected to be prudent in their treatment of slaves, and upon a showing of liability and damages, courts often held for slaveholders against hirers who exceeded or abused their authority. By contrast, employers of free laborers usually escaped responsibility for employee injuries by asserting assumption of risk, contributory negligence, and the fellow-servant rule. Consequently, slaveholders were more likely to recover for injuries to their slaves than free laborers for their own injuries. While slaveholders and hirers were obligated to provide adequate medical care and necessaries to slaves, employers were not required furnish similar care to free workers who became ill or injured.[356]

Slave hiring was commenced by written contract as a standard practice, although some instances of parol[357] "loans" initiating the hire of slaves are noted, the latter more likely to engender litigation. Out of an abundance of caution and conscious of the statute of frauds[358], slaveholders usually resorted to written agreements in hiring out their slaves. The term of the hiring could be "at will" or for a term of one year. Sometimes the initial fixed term of hiring was renewed by mutual agreement. Another line of hiring cases were concerned with decedent's estates in which the administrator, executor, or creditors

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[356] Wahl, *The Bondsman's Burden*, 58.
[357] Oral agreement.
[358] Statute requiring conveyances and certain agreements to be in writing. See, e.g., Upson v. Raiford*,* 29 Ala. 188, 196 (1856); Clay's Digest (1843), § 255 (borrower of goods in possession for three years requires execution of will or deed by seller/lender to be valid as against creditors).

of the estate sought to reclaim slaves in the possession of third parties[359], or rents and profits generated by the slaves and owed under the hiring contract by hirers previously in possession.[360]

The case of *Seay v. Marks* (1853) illustrates the provisions of a hiring contract, essentially a promissory note with conditions attached, which read:

> "$170. On or before the first day of January next, we promise to pay E.W. Marks, or order, the sum of one hundred and seventy dollars, for the hire of King until the 25th day of December next, when he is to be re-trained, having first been provided with a summer and winter suit of clothes, hat, blanket and pair of shoes; the said Marks to pay physician's bills. "Given under our hands, this 1st day of January, 1852.
>
> "(Signed)
>
> Jesse J. Seay,
> "John Compton,
> "Geo. F. Marberry[361]

The *Seay* case is typical of a branch of hiring cases in which the hirer acquired the slave for a particular type of work, but in violation of the hiring contract and the contemplation of the parties, put the slave to work at another task or occupation, usually more hazardous, injury or death resulted thereafter. In *Seay*, the slave King was hired by Seay, Compton and Marberry to work in a livery stable. According to custom, hired slaves were sometimes rehired by the hirer to work by the day or by the week. King was rehired to Nance to assist him in rafting lumber down the Alabama River. King and five others crossing the river in a skiff drowned. The court reversed in favor of the hirers,

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[359] See, e.g., Fenner v. Kirkman, 26 Ala. 650 (1855) (suit in detinue by administrator to recover hired-out slave).
[360] E.g., Mason v. Hall, 30 Ala. 599 (1857) (suit for money owed on hiring contact).
[361] Seay v. Marks, 23 Ala. 532 (1853).

finding that the contract was general in its terms and did not restrict the type of work required of King by the hirers or their assigns.[362]

Death of a hired slave by accident or sudden occurrence, as opposed to illness, was considered in *Deens v. Dunklin* (1858). Sarah K. Deens hired out Abe and Jake for the year 1855 to W. A. T. Dunklin and J.R. Hartley, secured by a promissory note in the amount of $300. Abe and Jake were put to work at a steam saw-mill in Covington County. Abe was killed in an accident involving the mill machinery. Deens appealed a judgment in circuit court which held that she could recover only money due under the hiring contract, but not the value of the deceased slave Abe in trover for conversion. The Court, reversing, held that Deens could recover the value of Abe based on a wrongful act by Dunklin and Hartley, and was not limited to the damages of the hiring contract.[363]

In *Moseley v. Wilkinson* (1854), Robert A. Moseley hired out two slaves to Beverly Wilkinson. Under the hiring contract, beginning February 1, 1844 and ending January 1, 1845, Wilkinson agreed to treat the slaves with due and proper care and attention, and in the case of sickness, with proper medical treatment and attendance. One of the slaves, Adeline, was hired by Wilkinson as a cook. Wilkinson rehired Adeline to Hughes who put her to work as a field hand on a plantation. Adeline became sick and died. Moseley alleged neglect in failing to provide Adeline with adequate medical care. During her illness, no physician was called, and the overseer attempted to treat her. In reversing in favor of Moseley, the Court held that if a slave hired to work as a cook was instead employed to work in the field, and died because she was thus employed, "from

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[362] Ibid., 535.
[363] Deens v. Dunklin, 33 Ala. 47, 50-51 (1858).

the want of proper care, or from improper treatment, the plaintiff [Moseley] would be entitled to recover," based on a breach of duty by Wilkinson.[364]

On January 1, 1852, John E. Burke hired his slave Allen to work for the Alabama and Tennessee Rivers Railroad Company. as a laborer. By the terms of the contract the railroad promised to clothe Allen; the conditions of re-hire or work varying locations was not specified. At first, Allen was employed as an ox-driver hauling saw-logs to a steam-mill near Selma. Later, Allen was placed under the control of the Bibb County Steam-mill Company doing the same job in Perry County. In November, Allen became sick and sent back to Selma by railroad during cold, damp, and inclement weather. On learning of Allen's illness, Burke requested a one Marlow in Selma to take Allen to his house for care and treatment. A physician was called in, who diagnosed Allen with "dropsy of the chest." Allen died forty hours later.

The Supreme Court reversed a trial judgment for Burke in favor of the railroad. The most important elements of the case were extensive testimony and evidence regarding the conditions under which Allen worked and the adequacy of medical care provided him. Allen's removal from Perry County to Selma in Dallas County after it was evident that he was too ill to be moved was also placed in issue by Burke as aggravating Allen's sickness.[365]

The responsibility of a hirer for providing medical care to a slave under a hiring contract was discussed in *Howard v. Coleman* (1860). Mary E. Howard, a single woman, with her mother Martha E. Howard acting as her agent, hired out the slave George to Allen W. Coleman for the year 1857. George died of smallpox. Howard filed suit

[364] Moseley v. Wilkinson*,* 24 Ala. 411, 416 (1854).
[365] Ala. & Tenn. R. R. Co. v. Burke, 27 Ala. 535, 540-41 (1855).

against Coleman for negligently exposing George to smallpox and failing to provide adequate medical care to George during his illness.

In the spring of 1857, Coleman traveled to the North to buy goods. While on his trip he contracted smallpox, but the disease was not manifested until his return to Alabama. Coleman's wife and two of his servants came down with smallpox, and the disease was communicated to George, who died two weeks later.

Under the hiring contract, the Mary E. Howard, the slaveholder, agreed to pay George's medical expenses. Essentially, testimony showed that Mrs. Coleman was in constant attendance, providing treatment at George's bedside until his death; thus, the Colemans were not liable either for medical expenses or in negligence in failure to provide adequate medical care to George. Trial testimony recounted difficulty in obtaining a doctor and precautions, such as quarantines, undertaken in managing smallpox, a highly contagious disease. Mrs. Howard and her daughter, informed of Mrs. Coleman's care of George, in the same manner Mrs. Coleman had successfully provided to her husband and one of their own servants, assented to Mrs. Coleman's personal attendance of George as adequate without summoning a physician.[366]

Other cases were concerned with the responsibility of the slaveholder and hirer for the payment of expenses for medical services provided during the hiring term. The hiring contract in *Smith v. Knox* (1850) read as follows:

> "I have this day hired from John R. Drish, of Tuscaloosa, his boy William for the balance of the year, 1848, at a rate of six hundred dollars per annum, and do further agree to find said boy William summer and winter clothing and his board.
>
> Montgomery, 21st January, 1848.
> "William Knox."

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[366] Howard v. Coleman, 36 Ala. 721, 727 (1860).

During the spring and summer of 1848, William became extremely ill with "brain fever" at the home of a Mr. Norment. Drish, on learning of William's illness, which by that time had lasted three weeks, dispatched a doctor to attend to him. Although the general rule was that the hirer of a slave for a specified time where no agreement to the contrary was made assumed responsibility for medical services rendered the slave, expenses of medical treatment rendered at the request or insistence of the slaveholder was the responsibility of the slaveholder under a contract of hire which did not expressly require the hirer to provide it, or for medical services the hirer did not request.[367]

In 1847, Hooks hired a female slave from Smith for the calendar year. On July 15, 1847, the slave drowned. Smith sued for damages under the hiring contract and for trover based on the conversion of the slave resulting from her death. The rules of recovery as developed by the court for this situation--the death of a slave during the pendency of the hiring contract--were (1) the plaintiff could recover damages due under the hiring contract up to the death of the slave, but not afterward; (2) the death of the slave constituted a conversion, vesting title in the defendant; (3) the plaintiff did not have to wait until the expiration of the hiring contract in December 1847 to commence a suit.[368]

In *Perry v. Hewlett* (1837), the death of the slave Fanny from apparently natural causes not the fault or negligence of the hirer was held not a breach of the covenant in the

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[367] Sims v. Knox, 18 Ala. 236 (1850).
[368] Smith v. Hooks, 19 Ala. 101 (1851).

contract of hire to return Fanny to the slaveholder at the end of the hiring term, but the hirers were held liable to pay $150 due the slaveholder under the hiring contract.[369]

In *Ricks v. Dillahunty* (1837), a case for debt arising under a hiring contract, the agreement read as follows:

> "$348. On or before the first day of January next, we, or either of us, promise to pay Abraham Ricks administrator of Isaac Ricks, the just and full sum of three hundred and forty-eight dollars, for the hire of three negro men; namely, Dick Lockhart, Willis and Godfrey. Witness our hands and seals, this the 13th day of February 1834.
>
> "HARVEY DILLAHUNTY,
>
> "AMOS JARMAN."

The slave Willis died about five or six weeks into the hiring contract. No evidence of the slave's "unsoundness" or misrepresentation was shown. As hirers, Jarman and Dillahunty were liable for money owed covering the duration of the hiring contract relating to Willis, even if resulting from an "act of God."[370]

Civil claims of wrongful death for reckless or intentional killing of slaves, the parallel of the homicide of slaves under sections 3295-3297 of the Code were also decided.

In *Nelson v. Bondurant* (1855), the Bondurant family sued Nelson and other defendants for trespass *vi et armis* in causing the death of their slave named Sam by an unlawful beating and killing. Sam was hired by Nelson from the Bondurants for the year 1850. On a Saturday night in April, Sam requested a pass to go to his wife's house, presumably at the Bondurants. Nelson alleged that he told Sam not to go to his wife's house until the next morning because the creek he had to cross to get there was too

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[369] Perry v. Hewlett, 5 Port. 318 (1837).
[370] Ricks v. Dillahunty, 8 Port. 133, 140-41 (1838).

dangerous at night. Sam appeared at John F. Bondurant's, who inflicted about "thirty blows with a handful of switches." Sam returned to Nelson's farm on Monday. When Nelson attempted to punish Sam, he pulled a knife, and a fracas ensued that included Nelson's wife and a woman slave helping Nelson. In the process, Sam cut Nelson's wife in the face, and Sam was thrown, hitting his head on a stump. Sam was subdued, tied up, and whipped by Nelson, Jackson, and Booker in succession, inflicting between thirty and forty blows, some of which cut the skin. Afterward, Sam walked about the house and yard, complained of being sick and was unable to work. He died the next Sunday morning.

The post-mortem examination of Sam was conducted by several physicians, some of whom testified that the whipping by Bondurant caused his death; others testified that Sam's fall on the stump during the fight, hitting his head, caused his death. As to the incident, Nelson claimed that he did not know Sam had been previously whipped by Bondurant.

In reversing the judgment for the Bondurants for a new trial, the Court determined that the question of liability depended on the character of the act. If lawful, no liability resulted; if unlawful, the actor was liable to the slaveholder for the extent of the injury:

> The owner of the slave has the absolute right of punishment and correction, being responsible to the law for its abuse; and in hiring to another person, in the absence of any express stipulation, he delegates to such person the same rights in respect which he himself possesses; and the master by hire is only liable when he exceeds or abuses the authority which the owner and law concede to him. He has the right to correct, but he has no right to be barbarous or cruel . . . .[371]

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[371] Nelson v. Bondurant*,* 24 Ala. 341, 352 (1855).

The facts of Nelson highlight the limits of the court system in the deterrence of wrongful conduct, and adequate apportionment of liability and damages after the fact under a system of slavery. In some cases, dual considerations of "humanity and interest," in relation to obligations to provide basic medical care in the event of injury or illness of a slave could function as an incidental benefit under the hiring contract, thereby potentially preventing illness or injury, and also providing adequate medical care in the event of illness or injury. For the slave Sam, no relief was provided. The parties sought to avoid and shift liability for a series of superseding but contributing causes, initiated by the slaveholder who sought recovery. Logically, if the hirer "stood in the shoes" of the slaveholder as articulated in a number of cases, the converse must have been true; as such, it was incumbent on one of both of the parties to accept responsibility for Sam's death. Although the court alluded to criminal liability arising from the murder of a slave under Clay's Digest, no indictment against either party apparently followed.[372]

The slave hiring cases involving personal injury and death suffered by slaves, as well as instances of negligence relating to inadequate medical treatment, are significant for several reasons. The hiring cases show slaves engaged in a variety of non-agricultural occupations. From the hiring cases, it appears that the practice of hiring out slaves and an increase in job-related injuries suffered by slaves, as shown in the reported cases, may have had a direct relationship, as slaves in such situations were more likely to be working with or around dangerous machinery, near or on the water on vessels as deckhands, or in other hazardous conditions not encountered in connection with agricultural, non-mechanized labor. While the point is not addressed in the cases, slaves may have been

[372] Ibid., 352 (citing Clay's Digest, 431, §1)

hired out to perform hazardous work that free laborers shunned; however, Frederic Law Olmsted, in his 1853 travels through Alabama, observed that free labor was preferred over slave labor in the performance of hazardous work, such as the construction or dredging of canals—if slaves were injured or killed on the job, slaveholders were due substantial compensation, but free laborers were due nothing except the day's wages. This point is corroborated by Wahl; curiously, a system presaging the workers' compensation statutes adopted during the Progressive Era was more developed as to slaves than free labor, although the benefits and recovery of the slave compensation system inured to slaveholders rather than slaves. The character of the hiring cases as relating to industrial accidents suggests a counterpart to injuries suffered by free laborers doing the same or similar work, particularly in cases arising after the Civil War. Alternatively, injuries suffered by slaves working for their own slaveholders would not have engendered litigation, as slaveholders in such cases would bear their losses, while in hiring situations slaveholders sought damages from third parties, thereby giving rise to lawsuits.

In *Foster v. Holly* (1861), the wrongful death of the slave Alfred was caused by the negligence of a schooner traveling in Mobile Bay at excessive speed, leaving a wake which caused Alfred's boat to capsize, and Alfred to drown. A white man in the boat with Alfred was able to survive. The case reinforces the principle that in the injury or death of a slave caused by a tortfeasor, the right to recovery and relief lies not in the slave (nor his estate, since he would have none), but with the slaveowner.[373]

[373] Foster v. Holly, 38 Ala. 76 (1861).

The case of *Gimon v. Baldwin* was decided in June 1861. The Gimon case shares facts somewhat similar to those recited in Foster. Dominick Gimon filed an action for trover and conversion against Henry C. Baldwin concerning the hiring out of Gimon's slave Brister in 1858 as a deckhand on the steamboat *Lucy Bell*. Brister drowned in the course of working for Baldwin, the captain of the vessel. The trover count of the complaint was for the value of labor performed by Brister for Baldwin and due Gimon at Brister's death. As slave property, Brister was valued at $1,500.00, relevant to the conversion count of the complaint. On appeal, the Supreme Court reversed on grounds of the inadmissibility of certain conversations among Baldwin, Brister, and another slave deck hand relating to the hiring arrangement between Gimon and Baldwin. As in Foster, the Gimon case shows that the right of recovery on the injury or death of a slave was a property right in the reposed in the slaveowner, not in the slave, his family or his estate.[374]

A large proportion of cases related to slavery involved sales of slaves as the immediate issue before the court, or one or more sales as antecedent transactions. In the former category, the validity of slave sales was in issue in over eighty reported cases. Expanding the category of slave sales to include cases with references to prior transactions such as transfers by deed or will results in over 800 cases, or about one-half of all cases identified as relating to slavery. Many slave sales were associated with levy, attachment, and execution proceedings initiated in connection with enforcement and satisfaction of civil judgments, which resulted in slave auctions. Slave sales also

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[374]Gimon v. Baldwin , 38 Ala. 60 (1861).

occurred in the exercise of the power of sale in connection with foreclosure. On occasion, slave sales were associated with hiring contracts. In some instances the hirer had the option of buying the slave upon the expiration of a fixed term of employment.

In evaluating the significance of the slave sale cases, the status of slaves as chattel should be revisited. Of the two principal divisions of property, the first being real, or realty, and the second personal, or personalty, Alabama slaves were classified as personal, or chattel property, as with most slaveholding states; the chief significance of this classification was that slave chattel was fully moveable and transferable at the will of the owner, subject to any preexisting mortgages or liens. For a time, Virginia adopted the concept that slaves were part of the realty or affixed to realty for purposes of dower and inheritance. In an era of non-mechanized cotton agriculture, human labor was essential to cultivate the land; thus, the rule reflected the theory that land should be conveyed or devised with slaves intact. This rule was never adopted in Alabama, although many instances of conveyances and devises involved mixed transfers of land, slaves, and other property. This same pattern occurred in conditional sales and mortgages, although as stated, a transfer of land was not required or integral to the transaction, and many sales and mortgages secured solely by slave collateral occurred.

Slave sales were important for other reasons. The prevalence of slave sales in the reports suggests the immense value of slaves, both as a source of labor and capital assets to planters and southern society. From the sales cases, the prevailing market value of slaves at a given point in time was readily ascertained, particularly in regard to negotiated, arms-length transactions. Evidence of slave sales, often describing the job skills of slaves for which they were acquired, show that slaves were engaged in a variety

of trades and occupations, not merely farm labor. Among other jobs, slaves worked as blacksmiths, hammer-men, carpenters, wheelwrights, and deckhands. A major consideration at the time of sale was the skill or expertise of a slave to perform a particular job. In one instance, cancellation of the sales contract was sought because the slave was not a good cook as represented.

Slave sales represented the counterpart to slave hiring. Slave sales fostered the continuation of slavery in areas such as Maryland, Kentucky, and Virginia where agricultural labor based on slavery had become less profitable and frequently operated at a loss. Income and profits from "slave-rearing" and the export of slaves in these states to the lower South often exceeded ordinary farm income and became the principal enterprise of the exporting states, while actual agricultural cultivation and crop production utilizing slaves was relegated to a secondary activity.[375] Planters in other states, such as Alabama, followed this pattern as the state matured and much of the population moved westward. Bancroft quotes one Alabama planter as stating that his slaves had been "generally healthy and very prolific, and their increase is no small matter in the item of profits."[376] The slave-rearing element underlying the domestic slave trade is represented by a considerable number of the unsoundness and warranty cases, some of which are discussed herein.

Although importation of slaves in the United States was banned effective in 1808 and interstate slave trading was gradually restricted, the sales cases reflect a sustained and brisk domestic slave trade during the antebellum period, providing some evidence that existing legal restraints were ineffective to slow or halt slave trading. Ariela Gross

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[375] Bancroft, *Slave Trading in the Old South*, 67-68.
[376] Ibid. 75.

estimates that from 1830 to 1860, over a quarter million slaves were brought to the Deep South for sale in Charleston, Natchez, and New Orleans. Local sales accounted for about one half of all slave trading. Although Mississippi and several other slaveholding states suspended slave trading, the bans were always overturned and "did not make a dent" in the slave trade.[377] Slave trading, along with devices and instruments used to effect transfers in ownership, such as conveyances by deed, transfers by wills, and the creation of trusts by either of these methods, shows that financial and economic motives and incentives were so potent and overriding as to preclude the possibility of large-scale or meaningful programs of emancipation, thereby explaining the failure of colonization attempts by the 1830s which have been widely noted by historians.

As a contested case, the most common slave sale issue was the “soundness” of the slave at the time of purchase. Soundness of a slave related to a variety of factors, such as physical and mental health, temperament, disposition, and the experience and ability of the slave to perform a particular trade or occupation. In the bill of sale or sales contract, some parallels with hiring contracts are observed. In hiring contracts, fewer instances of warranty language are noted. Without express provisions warranting the soundness of the slave or other language of warranty, the hirer was liable to the slaveholder for the entire amount due under the hiring contract, even upon the death of the hired-out slave during the pendency of the contract. Hiring contracts were relatively simple, straightforward cash transactions, with fewer instances of financing, while slave sales were often consummated on credit, financed by various methods, such as conditional sales agreements, purchase-money mortgages, and bills of exchange, sometimes coupled

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[377] Ariela J. Gross, *Double Character*, 30-31.

with contemporaneous hiring agreements. In contracts or bills of sale for slaves, warranty language offered by the seller was more frequent, usually in the form of a warranty for title, warranty of soundness, or both. At auctions, only a warranty of title might be offered. In either case, warranties relating to sales were not implied or did not arise from operation of law, but had to be created by explicit, express language set forth in the bill of sale. Most sales cases were disputes over warranty language, usually involving the soundness of the slave as complained by the purchaser. Contests over the soundness of slaves usually related to latent, chronic, or terminal medical conditions of slaves undisclosed at the time of sale, as affecting their fitness to work. The unsoundness issue usually arose as a defense to a suit on a promissory note brought against the buyer. In such financed sales, notes were often assigned or sold to third parties, with the buyer of the slave as the debtor or promisor. In the event of default by the buyer of the slave, the assignee or holder of the note would sue the buyer for the balance of the money owed for the slave. In resulting cases, among the questions considered were the available defenses which could be asserted. One defense was the unsoundness of the slave. Slave sale cases reflect frequent financing arrangements accomplished by the execution of notes as purchase-money transactions, suggesting that slave trading necessary to the continued operation of the cotton economy was dependent on a system of credit.

In an early case concerning the issue of unsoundness, McMillion in 1828 sued Pigg and Marr in Tuscaloosa Circuit Court, in Chancery, relating to his purchase of an unsound slave for $350 from Pigg. McMillion paid $150 at the time of sale and signed a promissory note for $200 in favor of Pigg, who assigned the note to Marr. Marr attempted to collect on the note, so McMillion sued Marr to enjoin collection. McMillion

alleged that the note contained language of warranty of soundness and that Pigg was aware that the slave was unsound. The slave was unsound as to both of his legs and other parts of his body, such that he was unable to support his maintenance. Pigg, the seller, lived outside the state and could not be found. The Supreme Court, in affirming the judgment against McMillion, held that the matter did not belong in chancery court, and that he remained liable to Marr on the note. The opinion noted that Pigg was absent from the state and could not be found, illustrating the interstate character of slave sales and trading.[378]

In *Duff v. Ivy* (1830), another case filed in Tuscaloosa, Ivy signed and delivered the following bill of sale to Duff:

> "Received of Abraham Duff three hundred and fifty dollars in full payment for a negro named Charity, which I warrant and defend unto the said Duff."
>
> "Thomas Ivy"
> "Teste [witnessed by] William Cavert"

Charity died of disease before Duff filed suit in 1828. The question was whether the statement "I warrant and defend" was sufficient to constitute a warranty of soundness from Ivy to Duff. In this situation, the bill of sale created a warranty of soundness as well as of title. In the sale of personal property, such as slaves, warranty of title was implied. By offering an additional, express warranty, the intent of Ivy, the seller, was to warrant soundness.

In an 1832 case, Richardson bought three slaves, a man, woman, and child, the purchase secured by three separate promissory notes. The slave woman was "diseased" or sick at the time of sale. Richardson and the seller stipulated that if the slave woman

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[378] McMillion v. Pigg, 3 Stew. 165, 167 (1830).

failed to recover, Richardson would owe nothing on the note. The notes were assigned to Tarver, who sued Richardson for payment. The Court found that the sale agreement was not a warranty of soundness, but an acknowledgment of the vendor of unsoundness, disclosed to Richardson.[379]

In another instance, the seller executed a bill of sale for an "absolute" warranty of soundness. The slave died eight days after the sale. In a suit against the buyer on the note, the case was dismissed based on the absolute character of the warranty; circumstantial evidence of fraud was noted.[380]

Cozzins bought a slave named Anthony under the following bill of sale:

> "Know all men by these presents that I, William H. Whitaker . . . for and in consideration of five hundred dollars, lawful money of the United States, to me in hand, well and truly paid, by Brown Cozzins, the receipt whereof is hereby acknowledged, hath granted, bargained, sold, released, and conveyed, unto the said Cozzins, his heirs . . . a certain negro man, named, Anthony, said to be about eighteen years old, (warranted sound in body and mind, and a slave for like,) hereby warranting the title of said negro man, to the said Cozzins from the lawful claims of all and every person or persons. In testimony, whereof . . . . (Signed) W. H. Whitaker."

Cozzins filed suit against Whitaker for fraud and deceit. The slave was represented by Whitaker as having good qualities, being honest, industrious and free from vice. Cozzins alleged that instead, the slave was just the opposite, and Whitaker was aware of these defects in character at the time of sale, and concealed them from Cozzins. The court viewed the complaint as founded on fraud and deceit, rather than with respect to a breach of warranty. The deceit perpetrated by Whitaker did not arise with respect to the written warranty, but as to the "lazy habits" and "vicious practices" of the slave, upon

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[379] Tarver v. Richardson, 2 Stew. & P. 331, 333 (1832).
[380] Morehead v. Gayle, 2 Stew. & P. 224, 227 (1832).

which the bill of sale was silent, which Whitaker concealed and actively misrepresented.[381]

A warranty for soundness of the "person" of a slave included soundness of mind.[382] The purchaser of a slave warranted as sound but actually unsound at the time of sale from illness, and then after the sale, the slave recovered, was entitled to recover of the seller reimbursement of medical expenses incurred in treating the slave.[383]

Representations of an attorney acting agent for the seller as to the soundness of a slave were binding on the principal. A warranty of soundness binding the principal was found in the following bill of sale:

> "Know all men by these presents, that I, Isaac Hughes, for and in consideration of one thousand dollars, have this day bargained, sold and delivered, unto William B. Gunn, a negro man named Ned, supposed to be thirty years of age; which said negro I warrant to be sound in body and mind--and do further warrant and defend the right and title of said negro to the said William B. Gunn, his heirs, &c. for ever. In witness whereof, I have hereunto set my hand and seal.
> (Signed,)
>
> "I. Hughes, [seal.]
>
> "Att'y for Livingston Skinner."[384]

The case of *Stringfellow v. Mariott* (1840), another bill of sale with standard warranty of soundness language:

> "Received of James M Stringfellow, one note of hand, for twelve hundred dollars in full, for the purchase of one negro girl Violet, aged twenty-two years. I warrant the said negro sound in body and mind. I also warrant the right and title unto the said James M. Stringfellow, his heirs and assigns, forever, 17th November, 1836.
>
> [Signed]

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381 Cozzins v. Whitaker, 3 Stew. & P. 322, 327 (1833).
382 Caldwell v. Wallace, 4 Stew. & P. 282, 285 (1833).
383 Hogan v. Thorington, 8 Port. 428 , 430-31 (1839).
384 Skinner v. Gunn, 9 Port. 305, 307 (1839).

S. R. Marriott [agent]

For B. Marriott" [principal]

The authority of an agent acting under power of attorney for the seller included extending to the buyer a warranty of soundness, even though warranty language was not expressly mentioned in the power. A power of attorney read:

> "I hereby authorize C. Cockburn to sell a negro boy named Jackson, about sixteen or seventeen years of age, and to make good titles to the purchaser of purchasers, warranting them to be slaves for life, and to perform all and every other matter or thing that may be necessary touching the premises; hereby promising to ratify and confirm whatever he may do, in virtue of the power conferred by this instrument. In testimony whereof, I have hereunto set my hand and affixed my seal, this 5th day of October, 1833.
>
> J. McKINLEY
>
> [SEAL.]"[385]

Under authority of this document, Cockburn negotiated a bill of for the sale of two slaves to W. B. P. Gaines, as follows:

> Received of W. B. P. Gaines, the sum of one thousand and fifty dollars, the sum for the purchase of two negro men; that is to say, the sum of five hundred and twenty-five dollars, for the purchase of John, about twenty-seven years of age; and five hundred and twenty-five dollars, for the purchase of a negro man Jackson, about seventeen years of age. The above described and above named negroes, I warrant and forever defend, unto the said W. B. P. Gaines, the same to be slaves for life, and I further warrant the same to be sound in body and mind, and slaves for life.[386]

As evident from the terms of the power of attorney granted by McKinley, Cockburn's authority to negotiate and effect the sale of the slaves, including the offer of a warranty of soundness in connection with the sale, was exceedingly broad; thus,

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[385] Gaines v. Mckinley, 1 Ala. 446 (1840).
[386] Ibid.

McKinley was held bound by the acts of his agent, acting with express written authority in this situation.[387]

In January 4, 1838, the administrator of the estate of Stewart sold the slave Billy with a warranty of soundness, despite the fact that Billy was afflicted with a disease described as a spinal infection. Billy died on August 3, 1839. In the resulting case, it was determined that an administrator could make such a warranty, and that he was chargeable in his representative capacity upon the breach.[388]

In 1841, George G. Henry purchased the slave Tom as evidenced from the following bill of sale:

> "Received, Mobile, 5th July 1841, of George G. Henry, two hundred and fifty dollars, in full for a negro man named Tom, aged about twenty-four years, which negro I warrant a slave for life--the title to defend against the claims of all persons, and I believe free from any disease.
>
> KIAH B. SEWALL."
>
> "Witness, J. A. Roberts."[389]

A second writing or memorandum connected to the transaction read:

> "Mobile, July 5, 1841, I have this day witnessed an agreement between Mr. K. B. Sewall, and Mr. George G. Henry, in which it is understood that the latter will sell to the former a man named Tom, aged about twenty-four years, for two hundred and fifty dollars, if applied for on the first day of January next. J. A. Roberts."

After the sale, Henry hired out Tom to work on a steamboat. Henry left the state and traveled to the north. While Henry was gone, Tom ran away from his hirer; subsequently, he was recovered. Sewall argued the documents collectively constituted an agreement giving him the right to repurchase Tom if exercised by January 1, 1842. Upon

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[387] Ibid., 447 (1840).
[388] Craddock v. Stewart's Adm'r., 6 Ala. 77 (1844)
[389] Sewall v. Henry, 9 Ala. 24 (1846).

his return, Henry filed an action of detinue against Sewall in Mobile Circuit Court seeking return of Tom.

At trial, one witness, said to be a previous owner of Tom, testified that the slave was worth $400 or $450. This testimony was relevant to the character of the transaction as evident from the documents - whether an absolute sale, a conditional sale, or a mortgage. In other words, evidence that Tom was valued at well more than $250, the consideration tendered, suggested that the parties agreed to a mortgage. According to Roberts' testimony, both the bill of sale and the memo he signed were in Henry's handwriting, indicating the documents constituted a single agreement.

At trial, the jury was charged that both writings were made simultaneously and should be construed together as constituting a single agreement, but the documents did not amount to a mortgage. On appeal, the court found that the writings constituted an agreement for a sale and resale. The resulting contract did not give rise to a mortgage, but a conditional sale, and if all the conditions of the contract were satisfied, the right to possession of the slave revested in Sewall.[390]

The warranty of soundness was often associated with allegations of fraud by the seller, and a buyer sued on a note frequently asserted fraud as a defense. Foster sold a slave on credit to Albritton, asserting that he was as "sound as any slave." About a week after purchase, Albritton discovered that the slave was badly diseased in one leg, a condition that appeared to be longstanding, and was suffering from dysentery. The slave died about three months later. Foster later died. About a year after the death of the slave, Foster's administrator, Huckabee, demanded payment from Albritton, who said he needed

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[390] Ibid., 35.

time to sell his growing cotton crop to raise the money. With no payment forthcoming, Huckabee filed suit in assumpsit to collect on the note for Foster's estate. Although soundness of the slave was not offered as an express warranty, the inducements of the seller constituted fraud, causing the buyer not to insist on a warranty. Therefore, the judgment for Albritton was affirmed.[391]

Another suit on a note in a relating to an 1845 slave sale produced detailed medical testimony on the condition the slave. In *Stewart v. Hood* (1846), a physician testified at trial regarding his observations of the slave Henry. The witness saw Henry at the home of Sims, the slaveholder, in July 1842. Henry was sick and laboring under an "affection of the liver." Sims told the physician Henry had "always had been delicate." Sims died, and Henry was sold by Sims' administrator to Hood as part of the estate auction. The witness testified that on February 14, 1843, he saw Henry after the sale. Henry had a "sickly languid look," and "any prudent man" could see he was ill. About six weeks later, the witness was called back to the Hood house "in his capacity as a physician" to treat Henry, who died. In addition to the testimony noted, the doctor testified as an expert witness on the soundness issue, stating that the symptoms of Henry's disease were aggravated, and in his opinion as a physician, the slave was "unsound and worthless at the time of sale." Another witness observed Henry wheezing and struggling with a load of firewood, concluded that as to contractual value, he was "worthless." Another physician attended Henry is his last illness. Henry was laboring under an "affection" of the heart and was unsound. Numerous other witnesses, including the

[391] Huckabee v. Albritton, 10 Ala. 657, 660 (1846).

overseer, stated Henry was unsound at the time of sale. In rebuttal, the auctioneer, when asked if Henry was sound, stated that "we sell no other kind."[392]

In another estate sale, suit was filed on a note for $480, the sale price of a female slave. An unsoundness defense was raised. Testimony as to the estimated value of the slave ranged from $300 to $600. The seller testified that he had announced publicly that the slave was sick, and that he could not offer a warranty. The buyer was held liable for the purchase price even though he prepared the bill of sale which contained a warranty recital.[393]

An action of attachment was permitted to recover for a breach of warranty of the soundness of a slave. A bill of sale read:

> "We have this day bargained and sold, unto Philip J. Weaver, a negro man named Green, whom we warrant to be sound and healthy in very respect, and title good, for the sum of seven hundred dollars."

The measure of damages for breach of warranty was the value of the slave as warranted at the time of the sale, less his actual value.[394] The court noted that sum was "capable of ascertainment, and of which the plaintiff might make affidavit."[395]

In *Clopton v. Martin* (1847), a slave was sold by Martin to Clopton on December 17, 1841 for $700, unaccompanied by a bill of sale. About 1839, the slave had suffered from spasms or fits, of which Martin told Clopton prior to the sale. The sales price reflected a reduction based on the condition of the slave as disclosed to Clopton. On December 20, at the request of Clopton, Martin issued a bill of sale containing a warranty of title and the statement, "and said negro man I warrant to be sound at this time."

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[392] Stewart v. Hood, 10 Ala. 600 (1846).
[393] Rivers v. Dubose, 10 Ala. 475 (1846).
[394] Weaver v. Puryear, 11 Ala. 941, 942 (1847).
[395] Ibid, 942.

Because the slave's illness was too remote from the time of sale and had abated, the warranty was extracted from Martin after the sale, and the warranty not part of the sale, a judgment for Martin was affirmed.[396]

In an unsoundness case illustrating resort to extraordinary medical measures and extensive testimony, the slave Major, was sold in December 1843 and died in June 1844, at which time a physician performed an autopsy ("dissection") to determine the cause of Major's death. The physician testified at trial that Major had been "diseased" several years and had "repeated attacks" of the disease, adequately proving diminution in value.[397]

The central role of expert medical testimony in a case of a "false warranty of soundness" was shown in novel testimony proffered in *Tullis v. Kidd* (1847). Kidd's expert, a lawyer, was offered to give his medical opinion on the soundness of a slave by reference to his prior education, experience and medical skill: prior to the year 1831, he had attended a course of medical lectures, and had obtained his license from the state board of physicians, practiced for a year, abandoned medicine for law, but he continued to read medical works, had kept up with the improvements of the science, and felt competent to express medical opinions on the diseases of women.

The 1842 sale of a slave in Stewart County, Georgia for $725 was secured by a mortgage. The buyer defaulted a few months later. An Alabama buyer purchased the slave without notice of the mortgage. The holder of the mortgage sued the buyer in detinue for the recovery of the slave. Estimates of $900 and $1,400 for the value of the

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[396] Clopton v. Martin, 11 Ala. 187 (1847).
[397] Willis. v. Dudley, 10 Ala. 933 (1847).

slave were offered. Recording and registration acts of Georgia were discussed; the law of Georgia governing recordation of mortgages controlled the transaction.[398]

The authority of an agent of a seller to offer a warranty of soundness was questioned in *Cocke v. Campbell* (1848). The sale price of the slave was $900, with $500 down and the balance secured by promissory notes. A warranty was offered by the seller's agent, but the slave was known to the seller as diseased, and the condition unknown to the buyer. The warranty was held binding on the seller as principal, who gave written authority to the agent; a power given to an agent to sell a slave by implied conferred authority to offer warranties of title and soundness to a purchaser.[399]

In another case, six slaves were purchased on a warranty of soundness. About two months later, one of the slaves, Major, received a gunshot wound in the right arm between the elbow and the shoulder which tore the flesh and shattered the bone. Major's wounds, dressed by physicians, were not considered serious. However, the wound became infected and gangrenous. With "mortification" ensuing, his arm was amputated. Major died a few days later. The issue considered was the significance of a medical ailment, described as a "chronic affection" of the lungs, which preceded the sale. A debate ensued to whether Major's longstanding lung disease hastened his death. Another of the slaves sold along with Major, a slave named Jenny, said to evidence the same symptoms as Major, was exhibited to the jury as part of the buyer's case. The buyer was held entitled, at most, to recovery of diminished value of Major at the time of sale.[400]

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[398] Beall v. Williamson, 14 Ala. 55 (1848).
[399] Cocke v. Campbell, 13 Ala. 286 (1848).
[400] Marshall v. Gantt, 15 Ala. 682 (1849).

Transactions involving conventional chattels were sometimes applied by analogy to slave sales. In *Barnes v. Blair* (1849), the court considered a bill of sale which read: "Received, Mobile 24th April 1845, James Barnes, six hundred and fifty dollars for a negro slave named Joe, about twenty-five years old, sound and healthy, the title to the same I fully guarantee." In finding no warranty of soundness, the court turned to English cases involving the sale of horses for precedent, but ultimately rejected them as not controlling. Likewise, the court mentioned but declined to follow the "almost identical" Kentucky case of *Smith v. Miller* (1812)[401], regarding the unsoundness of a slave, which held that a bill of sale with similar language warranted title but not soundness. Concluding, the court stated:

> These citations are sufficient to show at least, that there is a want of harmony in the decisions on this subject, and we are therefore left free to construe this instrument [bill of sale for the slave Joe], as if the question was res integra.[402]

Three slaves were purchased in 1847 for $2,100, secured by a note. After the sale it was disclosed that one of the slaves, Martin, became sick in July 1846 when he was living with Saunders. Martin complained to Saunders of pain in his head, back and knees, and that he was sick all over. Rowland, the holder of the note, filed suit against Walker, the purchaser, who alleged unsoundness. The issue on appeal was whether a witness who was not a physician could testify as to subjective symptoms of pain as related by a slave. The court, while noting that a slave was an incompetent witness and the declarations of a slave were ordinarily inadmissible, sustained the admissibility of testimony concerning the declarations of Martin on the grounds that whenever the bodily

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[401] *Smith v. Miller*, 5 Ky. (2 Bibb) 616 (1812).
[402] *Res integra*: point not covered by earlier decision; entirely new or untouched matter. Barnes v. Blair, 16 Ala. 71, 72-73 (1849).

or mental feelings of an individual are material, the usual expression of such feelings, made at the time in question, are original evidence. The representation, by a sick person, of the nature, symptoms and effects of the malady, under which he is laboring at the time, are received as original evidence, whether made to a medical attendant or any other person, though not accorded as much weight if the person is not a physician. Thus, the declarations of a slave relative to his illness and symptoms, whether made to his slaveholder or a doctor, were admissible.[403]

A slave was sold at auction under a mortgage to secure a debt due to the Branch Bank of Alabama at Montgomery. The seller, John Whiting, an agent and assistant commissioner of the bank, sold the slave to Ware for $550. Afterward, Ware notified Whiting the slave had a "defect" in one eye and was unsound. The slave was resold in a second auction to Gilmer. Gilmer sued Ware for deceit. Gilmer was not entitled to relief because the sale and resale of the slave by the bank was without warranty, and Gilmer had knowledge of the unsoundness of the slave at the time of the sale.[404]

Gingles sold Caldwell a male slave named Joe, eight years age, confirmed by the following bill of sale:

> January 12th, 1842, received of Samuel P. Caldwell three hundred and forty dollars, for one negro boy named Joe; the right and title to said boy I do warrant, and will forever defend, to said Caldwell his heirs and assigns. I do also warrant Joe to be of sound mind and body, with the exception of his legs; and I do hereby bind myself, that, if his legs should injure[405] him from being a serviceable boy at the age of fifteen years, to make him good."[406] Joe had burns on his legs and had difficulty walking. As he grew older, his legs had become "more crooked," one

[403] Rowland v. Walker, 18 Ala. 749, 750 (1851).
[404] Gilmer v. Ware, 19 Ala. 252, 259 (1851).
[405] Sic.
[406] Gingles v. Caldwell, 21 Ala. 444 (1852).

> thigh and hip seemed to have dwindled away, and he could not walk without extraordinary exertion.[407]

Despite his injuries, it was proved that Joe, although not a "full hand," could render valuable service. The warranty by Gingles was special and limited; thus Caldwell was not entitled a full recovery. The measure of damages was the difference between the actual value of Joe, at age fifteen, and what would have been his value if the burn on his legs had not lessened his capability for rendering the service ordinarily required.[408]

In a novel agreement, Benjamin Roney agreed to take care of Samuel Jordan's slave named Alfred who had a sore leg, to effect a cure Alfred for the sum of one hundred dollars, payable within to Roney within six months from the time the cure was effected, or from the date Alfred was returned by Roney. Roney returned Alfred to Jordan in September 1851. The evidence at trial showed that Alfred was not cured on his return to Jordan, but Roney received a verdict in his favor based on the charges to the jury. The court found the charges given to be clearly erroneous and reversed the judgment, ordering a new trial.[409]

Hardy Stevenson sued Asher Reaves for a breach of warranty of the soundness of a woman slave. Stevenson purchased the slave for $540. If sound, the slave was worth $500 to $600, but in her real condition, was not worth more than $50, based on evidence that she was "incapable of conception or bearing children." At the trial, Reaves received a verdict. Instructions that the jury could consider only evidence of a warranty and breach, but not deceit were held erroneous on appeal.[410] In another warranty case, a

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[407] Ibid., 445.
[408] Ibid., 447.
[409] Jordan v. Roney, 23 Ala. 758, 760 (1853).
[410] Stevenson v. Reaves, 24 Ala. 425, 427 (1854).

woman slave and her child were purchased in Macon County. After the sale, the buyer discovered that she had amenorrhcea[411], which lowered her value from $550 to $200.[412]

In *Bush & Co. v. Jackson* (1854), a woman slave Phebe died of chronic pneumonia, which she contracted before she was sold. A physician named Dr. Peebles gave a deposition. He stated the cause of Phebe's death as chronic pneumonia. Additionally, in support of the plaintiff's case, Peebles testified concerning two cases of pneumonia resembling Phebe's case he had previously treated. The trial court excluded the doctor's testimony relating to other cases. This ruling was affirmed on appeal.[413]

In a case appealed from the City Court of Mobile, Augustus Brooks sued to recover his $200 auctioneer commission owed him by Kelly in the sale of a slave. Brooks claimed Kelly accepted the slave. Kelly alleged that Brooks offered a warranty of soundness, but the slave was unsound. A written offer of compromise which consisted of submitting unsoundness questions to two physicians, and in the event of disagreement, to an "umpire," was admitted over Kelly's objection. The case was reversed.[414]

Samuel J. Stewart of Russell County was missing for "eight or ten years" and presumed dead. William J. Davis took out letters of administration in Orphan's Court to open Stewart's estate. At a public estate auction conducted by Davis, the administrator of the Stewart's estate, a slave was sold to Bryant Duncan and George D. Hooper for the price of $1,085, secured by a promissory note, dated January 11, 1851. The slave died in December 1851. Stewart "re-appeared" in Russell County in January 1852. Davis assigned the note to Stewart. Stewart sued Duncan and Hooper on the note in circuit

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[411] *Sic.* Also *amenorrohcea*; a condition adversely affecting child-bearing.
[412] Marshall v. Wood, 16 Ala. 806 (1849).
[413] Bush & Co. v. Jackson, 24 Ala. 274 (1854).
[414]Kelly v. Brooks, 25 Ala. 523, 527 (1854).

court and recovered. On appeal, the court viewed the case as one of first impression, "a very clear one," stating:

> The party on whose estate the letters were granted is not dead; consequently, the court acted without jurisdiction, and the administration was void. Davis, who acted as administrator, was a trespasser, and he stands as a wrong-doer selling property without title; but under such circumstances, the purchaser, while he holds under the contract of sale, cannot resist the payment of the purchase money.[415]

The court held that "the purchaser [Duncan] has got everything he contracted for, and thus complete justice is done."[416]

In a complaint for a breach of warranty of soundness by Bates, a Dr. Peterson testified that he was called by Bates to attend to his ill slave. In a deposition offered by Bates, Peterson related certain bedside conversations and utterances of the slave which were offered to prove that the slave suffered from a preexisting illness before he was sold to Bates. The slave complained of stomach pains and colic. Peterson also testified concerning his post-mortem examination of the slave. A dispute arose as to the admissibility of the slave's declarations to the doctor and declarations made to persons "not skilled in the science of medicine, as to previous attacks and medicines taken. Statements made to a doctor were admissible as original evidence under the principle of *res gestae* and the necessity of the case, but declarations of illness by the patient to lay persons, or persons unskilled in the science of medicine, were inadmissible.[417]

On January 28, 1852, Bowen Bennett purchased three female slaves named Mary Jane, Nancy, and Judy for $2,100, secured by a promissory note. Fail and Patterson sued to collect on the note. Bennett had four physicians examine the slaves, who found them

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[415] Duncan v. Stewart, 25 Ala. 408, 413 (1854).
[416] Ibid.
[417] Eckles v. Bates, 26 Ala. 655 (1855).

to be "diseased," their illnesses existing "anterior" to the sale. Doctors Matheson, Troy and Bythwood examined the slaves for Fail and Patterson. The doctors testified that the slaves were not seriously ill or their value significantly impaired, and the illnesses were curable. Another witness named Quartemus saw the slave Mary Jane at the house of J.H. Campbell, where he was doing repairs. Mary Jane appeared to be healthy. The question was whether an exchange of letters between Bowen Bennett, and Patterson and Fail worked a rescission of the contract. Bennett's letter to Patterson and Fair, stating the slaves were unsound, appeared to be a rescission. Patterson and Fail responded that although Bennett's tender of the slaves in an effort to rescind the sale was made too late, if Patterson could prove a latent or hidden disease, they would be "accountable." Afterward, Bennett continued to retain control over the slaves. Under the circumstances, no rescission occurred and the promissory note was enforceable, subject to a counterclaim for damages for breach of warranty, if any.[418]

A promissory note in the amount of $450 dated January 1, 1850 and payable twelve months later, was given in part for the purchase money of a slave named Malinda, sold by Arrington to Livingston. Afterward, Malinda was found to have ulcers and "dyspeptic derangement of the stomach." Malinda died only six months after the sale.[419]

In connection with the purchase, a bill of sale for $680 was executed; eighty dollars of this amount was for hire of Malinda during the year before the sale. The bill of sale which read, "Received this 16th day of January, 1850, of John S. Livingston, the sum of six hundred and eighty dollars, payment in full for the purchase of a negro girl

[418] Bennett v. Fail*,* 26 Ala. 605, 611 (1855).
[419] Livingston v. Arrington, 28 Ala. 427 (1856).

Malinda, which said negro I do, warrant and defend to him, the said John S. Livingston, his heirs and assigns forever," created warranties of title and soundness.

In *Brooks v. Pollard* (1860), Augustus Brooks made a repeat appearance before the Supreme Court, this time because Thomas Pollard filed a complaint in City Court against Brooks to recover $800.00 as the price of the slave purchased from Brooks on the ground that the transaction was made by Brooks without a license; judgment was entered against Brooks, who appealed. The opinion provides additional evidence of extensive, persistent slave-trading activity in the region, although importation of slaves into the United States was prohibited in 1808, some fifty years before the case of *Brooks v. Pollard*.[420] Thus, as long as domestic slave trade was permitted, the ban on importation was rendered largely ineffective. The continuation of slavery, leading to a demand for slaves and fueling domestic slave-trading evidenced by numerous seizures of slave ships up to the end of the Civil War.[421]

In *Stoudenmeier v. Williamson* (1856), a slave gave birth to a child only ten or fifteen days after the sale. The mother and child were diseased and the child died. The slave was purchased at an administrator's auction. The auctioneer "publicly proclaimed" that the sale was made without warranties for title or soundness. However, the day after the sale, Stoudenmeier and Williamson signed a bill of sale which contained warranties of title and soundness.[422]

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[420] Brooks v. Pollard, 36 Ala. 573 (1860).
[421] See, e.g., United States v. The Amistad, 40 U.S. (15 Pet.) 518 (1841); The Slavers: Kate, 69 U.S. (2 Wall.) 350 (1865); Sarah, 69 U.S. (2 Wall.) 366 (1865); Weathergage, 69 U.S. (2 Wall.) 375 (1865); Reindeer, 69 U.S. (2 Wall.) 383 (1865);
[422] Stoudenmeier v. Williamson, 29 Ala. 558, 564 (1856).

At a judicial sale of the personal property of Atwood's estate, a slave named Mary Ann was sold for $575, secured by a note. Conversations between the auctioneer and the slave were audible. During the auction, Mary Ann stated that she was "diseased" and had a "knot in her belly"; the auctioneer replied that she was not diseased and had "eaten too many peas or potatoes." Although warranties of title and soundness could be disclaimed, fraud or deceit would lie as a defense to an action on a note.[423]

Elbert H. Sawyer sued Susan A. Caldwell for payment of a promissory note executed by her. Caldwell countered with fraud and misrepresentation in the sale, and breach of warranty of soundness. The court found that a representation by the seller that a slave woman was a good cook, knowing that the slave woman was not a good cook, but unknown to the buyer, who was induced to buy on this basis, was fraud.[424]

Thomas G. Fleming filed suit against Joseph M. Roberts for breach of warranty of the soundness of a slave, named Frances. Fleming bought Roberts in December 1853 for $1,000. A Dr. Connor examined the slave about two months later, on or about February 15, 1854, finding her in a "diseased condition." Connor stated that he would not have her, as the medical bill for attention to her "would exceed the profit she could render to her owner." Under the circumstances, appropriate damages would be the difference between the actual value of the slave, and the value of the slave as represented. Medical bills incurred in the care of a diseased or ill slave were part of the plaintiff's damages.[425]

William L. Buckley sued Columbus Cunningham and La-Fayette Morrow for breach of warranty of the soundness of a slave named Will. Dr. Ross testified that he had

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[423] Atwood's Adm'r. v. Wright, 29 Ala. 346, 352-53 (1856).
[424] Caldwell v. Sawyer, 30 Ala. 283, 285 (1857).
[425] Roberts v. Fleming, 31 Ala. 683, 686 (1858).

been called in to examine Will on March 19, 1856, recently purchased by Buckley. Testimony by Ross that the slave must have been unsound at the time of purchase was objected to by Buckley, but overruled. On appeal, the court ruled the responses of Ross inadmissible.[426]

Thomas S. Cotton sued Caleb Holloway for breach of warranty of soundness concerning the slave Maria. In March 1854, about two months after the sale of Maria to Cotton, Phillips, Cotton, and Maria were weeding hillside ditches. Maria complained of sickness, shortness of breath, her eyes rolled back. Later she was bedridden. A tumor was discovered. Physicians for the plaintiff testified that Maria, if sound, was worth $400, but in her condition at the time of sale was "valueless." One Sunday night in the middle of March 1854, Maria was badly burned as a result of her clothes catching fire, and died about ten of fifteen days later as a result of her burns. Maria's statement to Phillips that she had been "that way, off and on, for the last year or two," admitted at trial, was held inadmissible on appeal. The court also found error in instructions that required the jury to award the full value of the slave in the event of a finding of liability.[427]

Under a contract of exchange, Ezekiel Stewart delivered a slave, a mare and a promissory note for $35 to Williams for a horse, wagon and a yoke of oxen. Williams recovered a judgment of 173.53. On rehearing, it was averred by Stewart that the bill of sale for the slave, providing both warranties of title and soundness, was due to a mistake in execution. The mutual intent of the parties was for Stewart to provide only a warranty

[426] Buckley v. Cunningham, 34 Ala. 69, 72 (1859).
[427] Holloway v. Cotton, 33 Ala. 529, 533 (1859).

of title. Thus, the judgment, based on alleged unsoundness of the slave Stewart conveyed to Williams, should have been set aside. The judgment for Williams was affirmed.[428]

Phyllis, a woman slave, was sold by J. McCaleb Wiley to James Glawson on February 18, 1856. Phyllis died in April 1857. Two physicians conducted a post-mortem examination of Phyllis, concluding that complications associated with scarlet fever, and the chronic character of the disease, were important factors contributing to her death, in turn suggesting that Phyllis has contracted the disease before her sale. Glawson sued Wiley, judgment was entered for Wiley.[429]

Burrell Blackman and James Blackman issued a bill of exchange to the order of Edward Johnson as part of the purchase money of $800 for a slave named John. The bill of sale warranted John as sound in mind and body, with a specific exception. Doctors examining John said he had an advanced, incurable illness, and that surgery might be necessary. Crowder, a witness to the sale, overheard Johnson tell the defendant that the illness could be cured without any difficulty. Declarations of physician treating John were properly excluded, or statements by the slave or his resort to prayer were inadmissible. An opinion that John would die was not relevant. The declaration of a slave to his physician about specific remedies once resorted to was not competent evidence.[430]

In November, 1857, F. P. Coleman sold the slave Henry to Stephen B. Barker for $1,000. The bill of sale contained an express warranty of soundness. After the sale it was disclosed that Henry, the property of the estate of Henry Jones, was appraised as

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[428] Stewart v. Williams, 33 Ala. 492, 493 (1859).
[429] Glawson v. Wiley, 35 Ala. 328, 330 (1859).
[430] Blackman v. Johnson, 35 Ala. 252, 255 (1859).

unsound, having a value of about $600. The records of probate court showed that Henry was sold for $500 at public auction in 1856. At that time, the slave had a bloated, swollen, sickly appearance. In February or March, 1858, Henry was hired out to work on the grading of a railroad by digging dirt and moving it with a wheelbarrow. Henry became sick after five or six days. A Dr. Ulmer examined him and observed that Henry could not stand exposure or hard labor. The slave's declarations of previous illnesses were properly excluded. Testimony by lay witnesses concerning obvious symptoms of illness, obtained through the senses, or first-hand observations, were admissible.[431]

A promissory note for $500 was given in part payment for the purchase money of the slave Matilda, sold on February 14, 1857 for the price of $1,100. Matilda gave birth three of four weeks after her sale. Dr. Ponder, as physician, examined Matilda, determining that because of her mental condition, she lacked capacity to perform the duties for which she was hired; namely, cook, washer, ironer, and seamstress. In rebuttal, several witnesses stated she was a good cook, had been recommended as a good house servant, and was able to do field work, such as "working cotton." The court held that a slave supposedly lacking ordinary sense "usually found among slaves," if able to the do the work, does not amount to a breach of warranty of soundness.[432]

A. B. Oxford sued W. R. Rand for conversion of a slave named Sarah. Oxford sold Sarah to Rand for $999 in January 1854. Rand tendered Sarah back in rescission of the contract of sale; Oxford refused tender. The court found that the facts did not support a conversion. Rand carried Sarah back to his plantation and allowed her to work at her pleasure with the other hands. Moderate labor required of the slave after the seller's

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[431] Barker v. Coleman, 35 Ala. 221, 225 (1859).
[432] Athey v. Olive, 34 Ala. 711, 714 (1859).

refusal of tender was not unlawful interference with the dominion of the owner, nor inconsistent with the nature of the bailment.[433]

John T. Cureton sued Elizabeth W. Clement to recover damages for breach of warranty for unsoundness of a slave. Cureton exchanged his slave Louisa for Clement's slave Burrell. Cureton, a slave-trader, was doing business without a license; on this basis, Clement alleged that the transaction was void. The material question presented was whether the contract between was an exchange, as contended by Cureton, or a sale, as averred by Clement. Burrell was claimed to have died from dysenteric typhoid fever. The judgment of the Circuit Court of Greene County in favor of Clement was reversed. The sale or exchange issue was material to the question of whether a warranty of soundness was offered by Cureton to Clement in the delivery of Burrell.[434]

Lewis Cunningham sued Christopher Kelly to recover damages for the breach of warranty for the soundness of a slave named George, sold by Kelly to Cunningham on January 1854. Brown, a witness for Kelly, testified that he had known George from 1851 up to the time of his death in November or December of 1857, that George had dropsy as a longstanding condition. The bodily feelings of a person and the representations of a sick person of the nature, symptoms and effects of the malady under which he is laboring at the time are received as original evidence. Such declarations of the patient were admitted on the principle of necessity. The right of the plaintiff to recover reasonable charges of the physicians who treated the deceased slave did not depend on the fact of plaintiff's payment of them.[435]

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[433] Rand v. Oxford, 34 Ala. 474, 477-78 (1859).
[434] Clement v. Cureton, 36 Ala. 120, 124 (1860).
[435] Kelly v. Cunningham, 36 Ala. 78, 79 (1860).

The slave sales and trading cases noted above show that slaves, representing both capital and labor necessary and central to the economy, were, to paraphrase Tushnet, driven more by the market forces of interest than humanity. By law, slaves were classified as personal, chattel property. Under this system, it was apparent that by the 1850s the institution of slavery was thriving and stronger than ever, showing no signs of withering away. The demand for slaves and the labor provided assured that emancipations would be infrequent. Slave sales reflected a larger agricultural economy which was supported by numerous transactions conducted under a system of credit. Many slaves were bought and sold through a combination of cash and credit sales by the use of purchase-money mortgages. The sales prices shown in specific transactions indicate that the price of slaves increased over time, from less than $500 to over $1,000 during the 1850s.[436]

The system of slave trading, in addition to merely keeping slaves in bondage, was also highly invasive and intrusive to the privacy and persons of slaves, especially in regard to the unsoundness cases, in which slaves were extensively examined by doctors who testified as expert witnesses on behalf of opposing parties in cases which were driven primarily by financial and economic concerns of the parties, not the welfare of the slave patients. Among reported cases, unsoundness cases were notable for extensive expert medical testimony and evidence.

As a broad category, many cases involving slaves were related to collections. Along with other types of cases noted herein, collections cases indicate that slaves as property were ubiquitous and prominent in the courts whenever money was involved,

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[436] See, e.g., Martin, *Divided Mastery*, 118 (noting that slave prices "soared" during the 1850s).

which in practice meant numerous civil cases as well as many chancery cases. In this category were attachments, levies, garnishments, and executions, all devices and methods used to satisfy judgments. These collection devices, used to directly seize property of a judgment debtor or property held by a third party for the judgment debtor to satisfy a judgment, were initiated by writs, such as writ of attachment, writ of execution, and writ of garnishment. Attachments and executions were related to seizure of land and tangible personal property. Garnishments were used to seize money or accounts held by third parties for the benefit of the judgment debtor. Frequently the property seized through these types of legal process was slaves.

A significant factor in the prominence of the justice courts at all levels of the court system was the writ system prevalent in nineteenth-century jurisprudence, associated with the issuance of attachments and executions in the process of obtaining satisfaction of judgments. Attachment and execution cases show the central role of justice courts and their ongoing relationship with various officials of the court system, such as constables and sheriffs, as well as slave patrols, which performed a quasi-judicial role. Because the justice courts considered virtually all non-capital cases of accused slaves, with and without juries, coupled with daily involvement of the justice courts in civil matters through the issuance of various writs, the role of justice courts in the court system, particularly in regard to matters of slavery, was pervasive. If the commencement or initiation of cases is included in the consideration of this role, justice courts were involved at some phase of nearly every case filed in the court system.

The usual procedure followed in initiating and serving writs was that after a final judgment was entered, the judgment creditor, or his attorney, would prepare a request for

a writ of attachment or execution and present the petition to the justice of the peace. If granted, the process and writ would be served or delivered by the sheriff on the judgment debtor, the property seized and turned over to the creditor, with the endorsement of the sheriff and return of the papers made to circuit court. On occasion, constables would serve and return process and writs. Slave patrols, sometimes acting in concert with the sheriff, apprehended runaway slaves and brought them to the justice of the peace. Slaves who could be identified were restored to their owners; those who could not be identified and remanded to their owners were sold at public auctions by the sheriff to satisfy apprehension and court costs.

The incidence of attachments and executions of slave property filed in justice courts and other trial courts, constituting a substantial proportion of all such matters filed from 1820 to 1860, reveals significant involvement of the courts litigation of slave property and the seizure of such property to satisfy judgments in connection with contracts, torts, and probate matters.

From 1820 to 1860, over 1,000 appellate cases of attachment, execution, or garnishment were filed in connection with the satisfaction of judgments by the seizure of slave property, representing over one-half of the total cases involving slavery for the period, with attachment cases relating to slaves constituting in excess of 30 percent of all such cases filed with the Supreme Court.

Viewed as a composite, the foregoing cases indicate that the practices of slave sales and hiring extended the reach of slavery in a number of ways. Slave sales and hiring were complementary, and significantly augmented the expansion of slavery through the South. The central issue in the North Carolina case of *State v. Mann* (1830),

the subject of an essay by Mark Tushnet, was the excessive use of force against slaves; as Martin points out, the case arose in a hiring situation. Slave sales and hiring expanded the territorial boundaries of slavery, "ushered many more white Southerners into the slaveholding ranks," and, as shown by *State v. Mann* in the case of hired slaves, increased the incidence of cruelty and mistreatment at the hands of hirers.[437] Collectively considered, slave sale, warranty, attachment, and personal injury cases show the pervasive economic incentives and motives inherent in the institution of slavery, in which financial interest often outweighed considerations of humanity. More broadly, in absolute and proportionally, the numbers reveal that the court system was unduly preoccupied with the administration of slavery as a matter of law and official policy.

[437] Tushnet, *Slave Law In the American South*, 20; Martin, *Divided Mastery*, 119-20.

CHAPTER 7

SLAVE PATROLS, STATE REMEDIES, AND THE FUGITIVE SLAVE ACTS

A longstanding maxim is that courts will not enter a judgment or render a decree that cannot be enforced. Slave patrols and fugitive slave acts, along with sheriffs and constables, supplemented the activities of the justice courts in the enforcement of slavery. While the authority of slave patrols was based on state law, performing local functions, and the fugitive slave acts were based on federal law, slave patrols and the federal fugitive slave acts were components of a comprehensive scheme to regulate slavery, with interrelated functions. The activities of slave patrols show methods by which slave laws were actually applied and enforced on a daily basis.[438]

Slave patrols acted as a rural police force, enforcing the slave code, apprehending and punishing slaves and free persons of color who were found without a pass or identification. Slave patrols also pursued and captured runaways.[439]

All white male owners of slaves below the age of sixty years, and all other free white males between the age of eighteen and forty-five years not subject to exemption or

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[438] Sally E. Hadden, *Slave Patrols: Law and Violence in Virginia and the Carolinas* (Cambridge, Mass.: Harvard University Press, 2001), 2.
[439] Sellers, *Slavery in Alabama*, 284.

infirmity were required to serve on slave patrols.[440] A member of the patrol could send a suitable substitute.[441]

Justices of the peace in each precinct of the state were charged with annually compiling a list of men subject to patrol duty. From the list, detachments of four to six men were organized; in each detachment, one person was designated the leader.[442] Each detachment served from two to three weeks patrol duty, amounting to consecutive terms of service.[443] When all detachments had served during the year, service rotated to the top of the list compiled by the justice of the peace.[444] Each detachment patrolled the precinct at night at least once a week, and as necessary, such as in response to threats or outbreaks of insurrection or unlawful assemblies of slaves.[445]

The enumerated powers and duties of the slave patrol under the 1852 Code were as follows:

> [the power] to enter in a peaceable manner, upon any plantation; to enter by force, if necessary, all negro cabins or quarters, kitchens and out houses, and to apprehend all slaves who may be there found, not belonging to the plantation or household, without a pass from their owner or overseer; or strolling from place to place without authority.[446]

The patrol had the power to punish slaves found under the circumstances set forth above, by inflicting up to thirty-nine stripes per offense.[447] Other provisions described the activities of the slave patrol in connection with runaways. The patrol upon receiving information that any person was harboring a runaway slave, were to search for the slave

[440] Ala. Code § 983 (1852).
[441] Ibid., § 991.
[442] Ibid., § 984.
[443] Ibid., § 986.
[444] Ibid, § 988.
[445] Ibid, § 990.
[446] Ibid. § 992.
[447] Ibid. § 993.

and apprehend him. The slave was committed to jail if the slaveholder could not be determined.[448]

Patrol leaders were responsible for compiling and reporting to the justice of the peace the activities of the patrol during the term of patrol service, the details thereof relating to the number of patrols conducted and persons shown as eligible for patrol duty but absent. Patrol members or leaders absent from patrol were fined ten dollars. Patrol leaders who failed to appear for patrol duty for their term of service or who refused to serve after appointment were subject to a fine of twenty dollars. Patrol leaders who failed to file the written report with justice court at the end of their patrol term were guilty of a misdemeanor, subject to a fine of not less than twenty dollars.[449]

The slave patrol act also imposed duties and sanctions on justices of the peace and constables. Justices of the peace and constables failing to perform duties required the patrol act were guilty of a misdemeanor, the justice subject to a fine of not less that fifty dollars and the constable fined at least twenty dollars on conviction.[450]

Despite being vested with official authority by statute through the justice of the peace, slave patrols did not have blanket immunity from suit. Section 1004 provided that the patrol, "if sued for any act done in the performance of patrol duty, may give this law in evidence under the general issue[451]; but are liable in damages to any person aggrieved, for any unnecessary violence committed under color of performing any patrol duty, either

[448] Ibid., §994.
[449] Ibid., §§ 997, 998, 999, 1001.
[450] Ibid., § 1002.
[451] *General issue*: a request for dismissal of a civil suit; in this instance, a dismissal sought on the grounds that patrollers acted within the scope of their official duties.

by unnecessarily breaking or entering houses, or for excessive punishment inflicted on any slave."[452]

The authority granted slave patrols in the infliction of summary punishment under color of law was a hybrid of policy of moderate correction permitted private slaveholders as to their own slaves, on one hand, and official proceedings of justice courts, on the other. Private slaveholder correction and slave patrol punishments both occurred without a hearing or trial. Punishments of up to thirty-nine stripes by slave patrols corresponded with the range of sentencing imposed by justices of the peace and mayors' courts in connection minor offenses not exceeding petit larceny committed by slaves, and were tried without juries. Consideration of the three principal modes of slave "correction"—trial and sentencing before the justice of the peace, apprehension and punishment by slave patrols, and discipline of slaves by private slaveholders—revisit the issue of whether slave control was accomplished predominantly by self-help or summary remedies, with a minimal level of involvement by justice courts. Although justice courts were associated with inadequate record-keeping and retention, the absence of records did not suggest minimal involvement by justice courts in slave control. Particularly in regard to slave matters, justices of the peace played a significant role in the administration of slavery along with slave patrols and private slaveholders. Runaways, apprehended and remanded to jail by slave patrols, were brought before the justice of the peace for

[452] Ala. Code § 1004 (1852). An example of the potential operation of this exception was a claim by the slaveholder of the slave being pursued for excessive use of force resulting in personal injury or death to the slave, or claims by landowners for willful or wanton destruction of property committed by the slave patrol in the course of a pursuit across their land.

disposition.[453] The authority vested by statute in slave patrols, permitting the infliction of summary punishment on slaves under color of law by individuals not in any sense constituting a legal tribunal, tested fundamental concepts of Anglo-American law, under which even tribunals constituted by magistrates conducting perfunctory trials and inflicting summary punishments were considered odious as applied to white persons, but permitted slave patrols by statutory exception in the case of slaves. Although unlicensed assemblies encountered by slave patrols could be punished by whipping the participants on the spot, exceptions were made. In Mobile, slaves were taken into custody, jailed, and brought into the next session of Mayor's Court.[454]

Slave patrols were often ineffective, especially in towns, where it was difficult to distinguish between slaves, who were required to wear badges, and free persons of color, who did not wear badges, but carried "freedom papers." In certain respects, urban slave patrols were the forerunner of the city police, except that patrollers were drawn or drafted from the citizenry. In some cases, slave patrols in towns had additional duties resembling the activities of fire departments. Many persons were exempt from patrol duty, and as inferred from the code provisions, some individuals disliked patrol duty and avoided service.[455]

The counterpart, and complement to the state slave patrol system was the Fugitive Slave Act of 1793, as amended in 1850. The slave patrol provisions of the 1852 Code contained no references to the Fugitive Slave Act of 1793, but the effect of the Fugitive

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[453] Sellers, *Slavery in Alabama*, 217.
[454] Amos, *Cotton City*, 144-45.
[455] Hadden, *Slave Patrols*, 114-115.

Slave Act was to extend the reach of the slave patrols beyond the jurisdiction of slave states and into free states, federalizing the law of slavery.

The basis of the Fugitive Slave Act was article IV of the United States Constitution, which read:

> No person held to service or labor in one state, under the laws thereof, escaping into another, shall, in consequence of any law or regulation therein, be discharged from such service or labor, but shall be delivered up on claim of the party to whom such service or labor may be due.[456]

The Fugitive Slave Act, as approved February 12, 1793, was entitled "An Act respecting fugitives from justice, and persons escaping from the service of their masters."[457] Sections 1 and 2 of the act were concerned with persons who were charged with treason, felony or other crime, fleeing from justice and found in another state, thus having no direct bearing on the apprehension and extradition of runaway slaves.[458] Sections 3 and 4, constituting the core of the act, pertained to recapture of slaves. Section 3, usually in issue in cases of runaway slaves arising under the act, provided that a person "held to labour" in any of the United States or territories on the northwest or south of the river Ohio escaping into any other of the states or territories, the person to whom such labor or service may be due, his agent or attorney, was empowered to "seize or arrest such fugitive from labour, and to take him or her before any judge of the circuit or district courts of the United States, residing or being within the state, or before any magistrate of a county, city, or town corporate," wherein such seizure or arrest was made, and upon such proof to the satisfaction of such judge or magistrate, either by oral testimony or affidavit taken before and certified by a magistrate of any such state or territory, that the

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[456] U.S. Const. art. IV, §2, cl. 3.
[457] 2 Stat. 302-305, Feb. 12, 1793.
[458] U.S. Const. art. IV, §2, cl. 2.

person so seized or arrested . . . under the laws of the state or territory from which he or she fled, owed service or labour to the person claiming him or her. Upon such proof, the judge or magistrate was to issue a certificate to the claimant, agent or attorney, constituting a sufficient warrant for removing the "fugitive from labor to the state or territory from which he or she fled."[459]

Section 4, the last section of the act, was a penalty provision which stipulated that any person obstructing or hindering a claimant from seizing or arresting a fugitive from labor, or rescuing, harboring or concealing such fugitive, was subject to a penalty of five hundred dollars.[460]

The anticipated use of section 3 was the apprehension of fugitive slaves in the border slave states or free states, such seizure, arrest and extradition to be effected by federal courts, as occurred in *Prigg v. Pennsylvania* (1842), *Jones v. Van Zandt* (1847), and *Ableman v. Booth* (1859). However, as previously shown in *Fields v. Walker* (1853), a second petition for freedom filed in Tuscaloosa Circuit Court by the children of Milly Walker, Richard W. Fields, a resident of Brunswick County, Virginia claimed the Walker family as his slaves, alleged them to be runaways, and sought their return to Virginia, based on an 1848 certificate issued by three Tuscaloosa County justices of the peace. The court rejected the certificate issued by the justices under the Fugitive Slave Act, finding that the Walker children were not fugitives from labor or slaves escaping service as defined under the act.[461] The facts in the opinion are consistent with the observations

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[459] 2 Stat. 302-305, §3.
[460] Ibid., §4.
[461] Fields v. Walker, 23 Ala. 155, 164-66 (1853).

of Joseph Nogee[462] and Paul Finkelman[463] that jury trials were unavailable in a defense to an arrest under the Fugitive Slave Act of 1793, which was silent on the issue, rejected in *Prigg v. Pennsylvania* (1842), and expressly denied in provisions of the Fugitive Slave Act of 1850.[464]

The Fugitive Slave Act of 1850, essentially a series of amendments to the Fugitive Slave Act of 1793 enacted as part of the omnibus legislation known as the Compromise of 1850, was drafted by Senator John Y. Mason of Virginia, and served mainly to antagonize antislavery and abolitionist interests.[465] The efficacy of the 1793 Act was questionable, due to the "lack of judges and magistrates to accommodate the slave owners and the uncooperativeness of many" by the 1830s.[466] The capture of a "genuine fugitive" was a rare event in New England.[467] The principal utility of the Fugitive Slave Act, as amended, was to expedite the capture and extradition of slaves among the slaveholding states, a device which was nevertheless rejected in the *Milly Walker* cases arising in Tuscaloosa.

The Fugitive Slave Act of 1850, consisting of ten sections, was more comprehensive than the 1793 Act. Section 1 provided that any persons previously or thereafter appointed commissioners by the Circuit courts of the United States were

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[462] Joseph Nogee, "The Prigg Case and Fugitive Slavery, 1842-1850: Part I," *Journal of Negro History*, 39: No. 3 (July. 1954), 188-89.
[463] Paul Finkelman, "Bondage, Freedom & the Constitution: The New Slavery Scholarship and Its Impact on Law and Legal Historiography: Slavery and Legal Ethics: Legal Ethics and Fugitive Slaves: The Anthony Burns Case, Judge Loring, and Abolitionist Attorneys," *Cardozo Law Review* 17 (May 1996), 1801.
[464] Most remedial acts of Congress are silent as to the availability of jury trials, an issue which is necessarily decided by the courts.
[465] 31 Stat. 462-465, Sept. 18, 1850.
[466] Nogee, "The Prigg Case and Fugitive Slavery," 187.
[467] Ibid.

empowered as the same as magistrates or justices of the peace of any courts of the United States, including courts of the several states, to carry out and enforce the Fugitive Slave Act of 1850. Section 1 thereby expanded the ranks of officials to whom slaveholders could petition for arrest and return of escaped slaves, addressing an important concern of slaveholders in interstate enforcement.[468]

Under Section 2, Superior courts of territories could appoint commissioners to take acknowledgments relating to bail and affidavits, and take depositions, vested with the same powers and duties as commissioners appointed by United States Circuit courts.[469]

Section 3 authorized Circuit courts and Superior courts of the territories to enlarge as necessary the number of commissioners to accommodate, process, and reclaim fugitives from labor.[470]

Section 4 granted concurrent jurisdiction of all commissioners appointed under the Act as amended with judges of the Circuit and District courts of the United States and the judges of the Superior courts, "collectively and severally . . . in vacation," meaning that judicial authority under the act was delegated without supervision or oversight by article III judges or courts; consequently, the commissioners acted as federal judges and their decrees operated as final judgments in regard to fleeing slaves.[471]

Further attempting to address enforcement problems encountered in free states, each refusal of a marshal or deputy marshal to receive and serve warrants or other

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[468] 31 Stat. 462, § 1.
[469] Ibid., § 2.
[470] Ibid. § 3.
[471] Ibid., § 4.

process under section 5 of the act carried a fine of one thousand dollars.[472] Additionally, commissioners were empowered to appoint "any one or more suitable persons" to serve process and to summon and to call to their aid the bystanders, or *posse comitatus* of the proper county when necessary to ensure a faithful observance of [the act]."[473] In effect, the concept of *posse comitatus* in connection with section 5 of the act authorized conscripted federal slave patrols in free states.[474]

Section 6 was concerned with actual trial procedures. Among the most important was the provision that the case of the claimant was to be determined in a summary manner, meaning without a trial by jury. Section 6 also provided:

> In no trial or hearing under this act shall the testimony of such alleged fugitive be admitted in evidence; and the certificates [issued under this act] shall be conclusive of the right of the person or persons in whose favor granted, to remove such fugitive to the State or Territory from which he escaped, and shall prevent all molestation of such persons by any process issued by any court, judge, magistrate, or other person whomsoever.[475]

Section 7 imposed a penalty of one thousand dollars upon any person rescuing or attempting to rescue a slave, or aiding or abetting same, potentially offsetting the recovery costs incurred in retrieving a slave; under the 1793 act, contemporary reports of enforcement attempts reflected that expenses of capture and return often exceeded the value of the slave.[476]

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[472] Ibid., § 5.

[473] Ibid.,§ 5.

[474] *See* Hadden, *Slave Patrols*, 3 ("Patrols were not created in a vacuum, but owed much to European institutions that served as the slave patrol's institutional forbears. Efforts by slave patrols to limit the movements and behavior of slaves evoke memories of *posse comitatus*, the bands of men called out in early modern England to chase down and arrest fleeing felons.").

[475] 31 Stat. 463-64, § 6.

[476] 31 Stat. 464, § 7.

Section 8, similar to section 7, provided for reasonable costs incurred in connection with the arrest and detention of the slave, including a fee of ten dollars for the commissioner, a five-dollar fee per slave arrested, food and lodging for the prisoner, plus fees "usually charged by the officers of courts of justice."[477]

Section 9, in contemplating situations occurring in free states, involving forcible rescue of the slave, provided for the payment for additional expenses incurred in hiring additional persons to deter such rescue attempts.[478]

Section 10 essentially recapitulated the preceding sections of the act, allowing the issuance of certificates authorizing arrest of fugitive slaves based on affidavits as well as oral testimony, reiterating the summary and perfunctory character of proceedings, supported by minimal evidence, and prohibiting the testimony of the slave.[479]

Three Supreme Court cases were decided concerning the Fugitive Slave Act: *Prigg v. Pennsylvania* (1842)[480], *Jones v. Van Zandt* (1847)[481], and *Ableman v. Booth* (1859)[482]. In *Prigg v. Pennsylvania* and *Jones v. Van Zandt*, the Court considered the constitutionality of the Fugitive Slave Act of 1793. In *Ableman v. Booth*, the validity of the Fugitive Slave Act of 1850 was contested. In all three cases, the constitutionality of the Fugitive Slave Act of 1793, as amended in 1850, was sustained.

Among the three opinions, the decision in *Prigg* was the most important as the first defining decision on the Fugitive Slave Act, generating considerable notoriety. In the ensuing years after 1842, the Supreme Court and the lower Circuit Courts did not

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[477] 31 Stat. 464-65, § 8.
[478] 31 Stat. 465, § 9.
[479] 31 Stat. 465, § 10.
[480] Prigg v. Pennsylvania, 41 U.S. 539 (1842).
[481] Jones v. Van Zandt, 46 U.S. (5 How.) 215 (1847).
[482] Ableman v. Booth, 62 U.S. (21 How.) 506 (1858).

waver on the constitutionality of the Fugitive Slave Act, repeatedly sustaining its provisions. The *Ableman* opinion, like *Prigg*, produced comparable controversy.

The background of the *Prigg* case was the adoption of the Pennsylvania Fugitive Slave Act of 1826, which was preceded by the 1820 Act to Prevent Kidnapping.[483] In 1832, Margaret Morgan, a free person of color, moved with her husband from Maryland to Pennsylvania. However, Morgan and her parents had not been formally manumitted. The heiress of the owners of Morgan's parents hired Edward Prigg, an attorney, to bring Morgan back to Maryland. Following the procedures under the Fugitive Slave Act of 1826, Prigg obtained a warrant and brought Morgan before the justice of the peace, who dismissed the case. Afterward, Prigg had Morgan abducted and carried back to Maryland. Prigg was indicted for kidnapping under the Fugitive Slave Act of 1826.

In *Prigg v. Pennsylvania*, the overriding issue was the constitutionality of the Pennsylvania Fugitive Slave Act of 1826 as against the federal Fugitive Slave Act of 1793. Three other related questions were considered: (1) whether the federal constitution precluded trial by jury for Morgan, (2) to what extent could state legislation supplement federal law, and (3) whether Congress had authority to legislate on the subject of fugitives from labor.[484]

In response, the Court stated:

> [The act of 1793] . . . affords the most conclusive proof that . . . legislation on the subject of . . . fugitive slaves was within the scope of the constitutional authority conferred on the national legislature.[485]

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[483] William R. Leslie, "The Pennsylvania Fugitive Slave Act of 1826," *Journal of Southern History*, 18, No. 4 (Nov. 1952), 429-430.
[484] Nogee, "The Prigg Case and Fugitive Slavery, 188.
[485] Prigg v. Pennsylvania, 41 U.S. (16 Pet.) 539, 621 (1842).

In upholding the Fugitive Slave Act of 1793 and striking down the Pennsylvania Fugitive Slave Act of 1826, the Court concluded:

> [The] act of Pennsylvania upon which this indictment [against Prigg] is founded, is unconstitutional and void. It purports to punish as a public offence against the state, the very act of seizing and removing a slave by his master, which the Constitution of the United States was designed to justify and uphold.[486]

In *Jones v. Van Zandt* (1847), Wharton Jones, a citizen of Kentucky, sued John Van Zandt, a citizen of Ohio. Jones obtained a judgment of five hundred dollars, the statutory penalty authorized by the Fugitive Slave Act of 1793, against Van Zandt for harboring and concealing Andrew, a slave about thirty years of age. The Court affirmed the judgment, finding that the Fugitive Slave Act was constitutional and not repugnant to the Ordinance of 1787 concerning the prohibition of slavery north of the Ohio River.[487]

Among the three cases, *Ableman v. Booth* (1859) is distinctive as considering and sustaining the Fugitive Slave Act of 1850, which added provisions for federal "commissioners" acting as magistrates to effectuate the act. Sherman M. Booth was brought before Winfield Smith, a commissioner appointed by the United States District Court for the District of Wisconsin. The government charged that on March 11, 1854, Booth aided and abetted in Milwaukee the escape of a fugitive slave from the deputy marshal, in violation of the Fugitive Slave Act, enacted September 18, 1850. While the case was pending, Booth petitioned the Supreme Court of Wisconsin for a writ of habeas corpus, naming Stephen V. R. Abelman, the U.S. Marshal having custody of Booth, as the respondent. The Wisconsin Supreme Court granted the writ, ordering Booth

[486] Ibid., 625-26.
[487] Jones v. Van Zandt, 46 U.S. (5 How.) 215, 231-32 (1847).

discharged from custody and taxing Ableman with costs. The federal government appealed to the United States Supreme Court.[488]

In reversing the Wisconsin Supreme Court, the U.S. Supreme Court relied on the Supremacy Clause, concluding:

> [The] act of Congress commonly called the fugitive slave law is, in all of its provisions, fully authorized by the Constitution of the United States; that the commissioner had lawful authority to issue the warrant and commit the party, and that his proceedings were regular and conformable to law.[489]

In the context of the operation of domestic or local slave patrols and their extension, the mechanisms established by the Fugitive Slave Act for the apprehension of runaway slaves fleeing across state boundaries, the legislature and state courts responded to interference with in the property rights of slaveholders by third parties in creating criminal liability and recognizing civil claims as remedies and measures intermediary to local slave patrols and the federal Fugitive Slave Act. Runaways who were injured or killed became the basis for injury and wrongful death claims filed by slaveholders against third parties who used excessive force in apprehending slaves or for other acts of negligence in the detention of runaways.

The allocation of costs and expenses in apprehending and detaining runaways was a recurrent issue. Turner filed a suit in detinue against Thrower for recovery of a slave, who was apprehended by the Mobile County sheriff and advertised for sale as a runaway under the act of 1809. The sheriff's notice of sale published on March 19, 1833 in the *Mobile Commercial Register* read:

> Committed to the jail of Mobile County, on the 13th inst. by Benjamin Wilkins, Esq. a justice of the peace in and for said county as a runaway slave a negro man,

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[488] Ableman v. Booth, 62.U.S. (21 How.) 506, 507-509 (1859).
[489] Ibid., 526.

who calls his name William Thompson, and says he is free, and came from the State of Virginia, as the servant of a Mr. Thompson: said slave is five feet, four or five inches high, twenty-five or thirty years of age, black, and has a number of small scars on his face. His owner is requested to come forward, prove property, pay costs and charges, and take him away, otherwise he will be sold according to the statute, in such case made and provided, to pay jail fees.

March 19, 1833

J. Bates [Sheriff, Mobile County][490]

Thrower produced a second sheriff's notice dated September 14, 1833, which recited that Thompson had been in jail six months and that the slave would be sold at noon on October 14, 1833 at the Mobile County Courthouse. On October 12, the sheriff postponed the sale to October 21, but neither of the notices offered by Thrower was posted in the courthouse.

Under the act of 1809 concerning the advertising and sale of runaway slaves, six months from the first notice of confinement of a slave, plus thirty days and successive notices in the local newspaper, had to elapse before sale of the slave. The Court found that this requirement had not been satisfied. Therefore, publication failed, with Turner entitled to recovery of Thompson.[491]

A branch of cases were concerned with harboring or concealing slaves, which was punishable by either criminal or civil sanctions. A person concealing or carrying away of a slave charged with a capital crime was subject to a fine of five hundred dollars.[492] Civil actions were filed for the recovery of runaway slaves. McArthur filed an action for *trespass vi et armis*[493] against Kennedy, alleging that Kennedy carried away McArthur's

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[490] Turner v. Thrower, 5 Port. 43 (1837).
[491] Ibid., 50-51.
[492] State v. Duncan, 9 Port. 260, 262-63 (1839).
[493] Forcible taking or person or property.

slave, and kept the slave for two years. McArthur also complained that Kennedy "seduced, procured, and forced the slave to run away from the service of the plaintiff," then harbored and concealed him.. The judgment in favor of McArthur was affirmed.[494]

Criminal indictments were filed for inveigling or stealing slaves, a capital offense for many years. Presumably, under the Penal Code, the range of sentencing for slave-stealing was set at five to fifty years imprisonment, making the crime non-capital.[495] On March 16, 1842, a trial jury in Montgomery Circuit Court returned a guilty verdict against William Wiley, "alias George Wheeler," for slave stealing. Wiley was sentenced to hang on July 8, 1842, a sentence inconsistent with the Penal Code. Further, the jury recommended Wiley for executive clemency, requesting that he serve a penitentiary sentence "for the shortest legal term." The initial docket entry indicates that Wiley was charged with murder; but the entry was stricken and the charged offense identified as slave stealing. Sellers notes that state law provided severe penalties for the offense, but the law was not rigorously enforced [496]

A variety of the offense of inveigling was by enticement of the slave, by promise of necessaries, or freedom. In Montgomery Circuit Court, Jack Mooney and two co-defendants were convicted of stealing the slave of Francis M. Barnett on the night of March 29, 1844.[497] James Weaver was indicted for "persuading and inducing . . . [the

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[494] Kennedy v. McArthur, 5 Ala. 151 (1843).
[495] Ibid., 296 (Clay's Digest, 419, § 16).
[496] State v. William Wiley, Case No. 76, March 16, 1842, Montgomery County Circuit Court, Minutes, 1832-1843, 181-82. LG4434, ADAH. The entry may indicate a scrivener's error.
[497] Mooney v. State, 8 Ala. 328, 331 (1845).

slave Ann], the property of John Kennedy, to leave her master's premises and employ, with a view to take the slave to another State and concert her to his own use."[498]

Municipal ordinances supplementing felony inveigling and larceny statutes were enacted. Ganaway and Kimball were convicted on June 11, 1850 of violating a Mobile city ordinance which provided that if any white person was found in company or associating with slaves, at any lawful or unlawful meeting of slaves, or if such person harbored, secreted, or entertained slaves without the consent of their owners, a fine of fifty dollars would be imposed. The conviction was reversed due to insufficiency in the complaint, which was appealed from Mayor's Court to Circuit Court.[499]

In 1854, the Supreme Court affirmed a conviction of McElhaney[500] in the City Court of Mobile for harboring or concealing a runaway slave in violation of the Penal Code, which provided that every person who harbored or concealed a "runaway slave" or a "fugitive from his master" was subject to a fine of one hundred to one thousand dollars, or imprisoned up two years. The jury were charged that they must be satisfied that the slave was a runaway, and McElhaney knew of that fact. To constitute harboring, McElhaney must have supported and entertained her, or provided her with a home or place of residence. The evidence showed that McElhaney fed the woman slave or furnished her with shelter to "enable her to remain away from her master or to deprive her master of service," and she remained at Mclhaney's residence the entire time of her absence from her slaveholder, "all the time she had been run away." In defense, McElhaney argued that concealment was not supported because the slave was "frequently

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[498] State v. Weaver, 18 Ala. 203, 296 (1850).
[499] Ganaway v. Mayor, Aldermen of Mobile, 21 Ala. 577, 578 (1852).
[500] Individual defendant identified by surname. In many trial records and appellate reports, only last names are indicated.

in the street, so that McElhaney's neighbors saw her out and about, and she seemed to come and go as she pleased."[501]

Crosby sued Hawthorn for assault and battery, and false imprisonment. Hawthorn signed an affidavit before a justice of the peace to have Crosby arrested for persuading Hawthorn's two hired slaves to leave the premises, in violation of state law, which provided, "Any person who shall knowingly aid any negro or other slave to run away or depart from his master's service, such person, so offending, on conviction, shall suffer imprisonment in the penitentiary, not less than two, and not exceeding five years."[502]

Wisdom was indicted in Dallas County for stealing the slaves Dick and Peter. Venue was changed to Wilcox County where Wisdom was tried, convicted, and sentenced to death. Dick was owned by Matilda Lenoir and hired out by her guardian James H. Lenoir to Charles G. Edwards. Before the theft, Wisdom was observed in Athens, Dallas County, about eighteen miles from where the slave Dick and Peter were stolen. Wisdom was a stranger to Athens with "no apparent business" in the community. A witness testified that on April 9, 1838 between ten and eleven o'clock in the morning, he discovered Wisdom in a field about sixty feet from where Dick was working. Upon being spotted, Wisdom went about one hundred yards to where Peter was working. The slaves disappeared later the same day. Another witness testified that he traced Dick to a mill in Mississippi operated by Wisdom. The conviction was reversed on the grounds that testimony of Wisdom's contacts and conversations with slaves eighteen miles from the alleged scene of the crime was irrelevant to the indictment and prejudicial to the defendant. Also, the jury charge was erroneous because it did not inform the jury that

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[501] McElhaney v. State, 24 Ala. 71, 73 (1854).
[502] Crosby v. Hawthorn, 25 Ala. 221, 222-24 (1854) (citing Clay's Digest, 419, §15).

Wisdom had to be physically present with the slave in Dallas County at the time the larceny was committed. The indictment was filed and the case tried before the adoption of the Penal Code of 1841, which reduced slave stealing to a non-capital offense.[503]

James Williams was convicted in the Circuit Court of Marion County of inveigling and stealing a slave named Albert, valued at five hundred dollars, from the residence of John P. Taggert in Hardiman County, Tennessee. When first adopted, section 18 of the 1841 Penal Code provided a penitentiary sentence of at least ten years for any person convicted of inveigling, stealing or enticement of a slave without the consent of a slaveholder, or hiring, aiding or counseling a person to do same, with a view to convert a slave his own use or the use of another, or to enable a slave to reach some other state or county, where such slave may enjoy freedom. The Penal Code was amended in 1843, providing a sentence of two to five years on conviction. The court reversed because the indictment should have specifically charged larceny of a slave in specific terms, instead of generally alleging a larceny at common law, and the appropriate sentence on conviction was two to five years, instead of ten years.[504]

An indictment was filed in Butler County Circuit Court against Crow for "inveigling, stealing, carrying away and enticing" a slave named Cary, owned by John J. Moorer, with the intent to convert the slave to his own use. Crow resided in Butler County. Moorer had a plantation in Lowndes County where Cary was working. Cary left one day to see his wife, who lived in Butler County, about a mile from Moorer's plantation. On September 13, 1849, Cary was seen on a steamboat at the wharf in Mobile and taken into custody by a city officer. Cary had in his possession a pass dated

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[503] State v. Wisdom, 8 Port. 511, 516-19 (1839).
[504] Williams v. State, 15 Ala. 259, 262-63 (1849).

September 9 and a letter to a Lesesne, signed by Redmond. The letter was in the handwriting of Crow and instructed Lesesne to hire out the slave. The tenor of the letter falsely suggested that Crow owned the slave. The issue was whether Crow was properly indicted in Butler County. The court held that the offense of larceny of a slave was completed in Butler County; therefore, the indictment was proper.[505] In cases involving larceny of slaves, the place at which the offense was initiated, and then completed, was a recurrent issue, in part because the unique nature of slave property, not merely constituting moveable chattel, but characterized by "locomotion."

A slave living in Georgia ran away when his overseer tried to whip him and fled to Alabama. The slave wound up in the possession of Spencer. Spencer was indicted in the Circuit Court of Macon County under section 25 of the Penal Code for the larceny of slave stealing, the act being completed in Alabama. The court reversed Spencer's conviction, stating that the indictment should have been brought under section 18, which was expressly concerned with inveigling or stealing slaves.[506]

William H. Spivey was indicted in the City Court of Mobile for inveigling and stealing the slave Joe, the property of Joseph H. Skinner and George W. Skinner. Spivey was convicted and sentenced to five years in the penitentiary. Spivey's conviction was reversed on the grounds that H. A. Skinner, the father of Joseph and George, gave possession of the slave to Spivey to hold as a bailment.[507]

A review of federal cases during the antebellum era shows the considerable involvement of the federal courts in protecting and fostering the institution of slavery and

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[505] Crow v. State, 18 Ala. 541, 544 (1851).
[506] Spence v. State, 20 Ala. 24, 28-29 (1852).
[507] Spivey v. State, 26 Ala. 90, 99-103 (1855).

slaveholding interests, evidence that slavery was not merely local, but national in scope and regulation, suggesting cooperation among the slaveholding states, and between the slave states and the federal government.

At first glance, the estimated total cases relating to slavery appearing in the federal courts do not appear numerous or significant in comparison with state appeals on the same subject. From 1795 to 1865, about seventy years, 277 appeals to the United States Supreme Court are reported. This is contrasted with 7,526 reported appeals to the Supreme Court of Alabama from 1820 to 1865, only one of several jurisdictions recognizing slavery. More specifically, the U.S. Supreme Court decided 233 appeals during the same period in which Alabama decided 1,891 appeals related to slavery.

From 1799 to 1865, 279 appeals in the Circuit Courts of Appeals are reported. In the time period concurrent with operations of the Alabama Supreme Court from 1820 to 1865, the U.S. Courts of Appeals decided 207 reported cases. From 1795 to 1865, United States District Courts issued seventy-one opinions. From 1820 to 1865, sixty-one District Court opinions were issued and published. Among the reported federal cases bearing some relation to slavery, forty of 233 U.S. Supreme Court cases, beginning in 1824, are connected in some way with Alabama. In the Circuit Court of Appeals, five cases make mention of some element of slavery concerning Alabama, but only one, *United States v. Haun* (1860), an opinion written by Circuit Justice John Campbell, originates in Alabama.[508]

On initial examination, the data, indicating a paucity of cases, seem to support an inference that in the field of slavery, federal courts deferred to the states in the matter of

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[508] United States v. Haun, , 26 F.Cas. 227 (C.C.S.D.Ala. 1860) (No. 15,329) (indictment for the sale of slaves imported into the United States).

administration of slavery. In the words of contemporaries such as Thomas R. R. Cobb and court opinions of the period, slavery was local in outlook and regulation. However, this assessment may not be accurate for several reasons. Comparisons of sheer numbers between an active slave jurisdiction such as Alabama, on one hand, and the U.S. Supreme Court, on the other, may be inapposite and not informative. The U.S. Supreme Court throughout its history and during the slavery era considered relatively few cases in comparison with numerous state tribunals. Most cases reached the U.S. Supreme Court on writ of error or certiorari, which meant that review was not automatic or a matter of right for the petitioner. Appeals in the strict sense of the word were rarely granted.

The assertion and accompanying rationale that slavery was the product of local law is mischaracterized. As such, most law rendered, whether legislative or judicial in origin, was local in any event. Thus, the observation that slavery was local in outlook and regulation is generic to all state law. The principal vehicle for the regulation and enforcement of slavery, whether the prosecution and punishment of status offenses under municipal ordinance, or the prosecution of whites, free persons of color, and slaves for a variety of other more serious offenses prohibited by state law, was criminal law and procedure, a field that, although federalized in recent years, has always been traditionally a concern for the states—a matter of local law and regulation. Hence, to declare that slavery was "local" is a misnomer, as many areas of regulation of the era were the object of local control, and peculiarly the field of criminal law, a tool essential to the regulation of slavery. The prosecution of some crimes was a matter of federal jurisdiction, but most prosecutions were brought under the jurisdiction of state and local authorities.

One striking exception to the assertion that slavery was mainly the subject of local law was the enforcement of the Fugitive Slave Act of 1793, and as amended in 1850. As noted, many of the federal cases relating to slavery arose in federal courts outside the southern slave states. Two illustrative categories were fugitive slave act were Fugitive Slave Act prosecutions instituted in the federal courts of border slave states and free states, and maritime seizures arising in admiralty courts in connection with slave smuggling. Although the estimated 233 cases decided by the U.S. Supreme Court related to slavery during the concurrent period of operations by the Alabama Supreme Court from 1820 to 1865 do not initially appear numerous, the figure seems more significant when measured against the total of 2,509 published opinions issued by the U.S. Supreme Court during the period, amounting to 8.99 percent of the total docket. Even this figure may appear insignificant on first examination, until it is recognized that a slave jurisdiction such as Alabama would logically consider a greater number and proportion of cases involving slavery, while the U.S. Supreme Court drew cases from many—and ultimately, the majority of—jurisdictions constituting free states and territories, with greater populations than the slave South, effectively diluting the proportion and total of slave cases.

Moreover, the objective and result of direct federal involvement in enforcing slavery could be accomplished by the rendition of a relatively few tactical decisions in the law. Among other considerations, a Supreme Court decision, such as *Dred Scott v. Sandford* (1857) would have nationwide impact, so the effect of even a few decisions in the field of slavery would be immediate and lasting. Further, active regulation in only the two major areas mentioned, illegal importation of slaves and the enforcement of the

Fugitive Slave Act, was critical to maintaining the institution of slavery, designed to eliminate any prospect of sanctuary for slaves determined to escape bondage, thereby comprising a crucial component of the system of slavery. In the latter case, support or opposition to slavery by resort to local law and regulation of slavery were vitiated, as free states were forced to become involved in the apprehension and extradition of slaves, providing forums for litigation and enforcement of the act of slaves.

The maritime seizure cases show that as long as slavery existed in the South, a market and demand for slaves thrived as well. The reported antebellum federal cases relating to slavery suggest that the official constitutional and statutory prohibition on slave importation was evaded when even fewer enforcement resources of the federal government were brought to bear.

The enactment and enforcement of the Fugitive Slave Act contradict assertions that regulation and control of slavery were a local phenomenon. In 1800, the District of Columbia Circuit Court of Appeals was established and vested with jurisdiction to administer the provisions of the act. The second fugitive slave act, essentially a series of amendments strengthening the 1793 act, was enacted in 1850.

The apprehension and delivery of fugitives from justice, a phrase contemplating the recovery of slaves, was mentioned as early as the Articles of Confederation. The United States Constitution, statutes and cases distinguished between fugitives from justice" and fugitives from service or labor, the latter category covered by the fugitive slave acts, although the principles and procedure of apprehension and extradition of fugitives from justice and fugitives from service closely resembled one another. Fugitives from justice referred to any accused criminal for whom extradition was sought,

thus the category was applicable to any person, regardless of race or condition of servitude. On the other hand, the Fugitive Slave Act applied peculiarly to alleged runaway slaves, and sometimes to white persons who harbored or secreted such slaves, or otherwise interfered with the apprehension or extradition of slaves to their putative owners, thus complementing laws of the slaveholding states on the subject, such as Alabama, which punished criminally the enticement, harboring, or stealing of slaves by anyone, including white persons.

Although the effectiveness of the Fugitive Slave Act of 1793, as amended in 1850, in free states was subject to some speculation, the Act functioned as a federal compact among slaveholding states for interstate retrieval and extradition of runaway slaves. As shown in *Prigg v. Pennsylvania* (1842), *Jones v. Van Zandt* (1847), and *Ableman v. Booth* (1859), the provisions of the act were strengthened, and the constitutionality of the act was repeatedly sustained, not only before the United States Supreme Court, but in the Circuit and District courts as well. The Fugitive Slave Act and federal cases construing the legislation, constituted part of a rational, comprehensive scheme of enforcement in favor of slaveholding interests which started at the local level with slave patrols and justice courts.

CHAPTER 8

CONCLUSION

The study of legal materials indicates that the mutual and reciprocal influences of the institution of slavery and the court system were pervasive. Comparisons of like cases, such as those involving various corresponding categories of property, show that cases related to slavery comprised a substantial proportion of total reported cases, often exceeding 30 percent of the Supreme Court docket in a given term. As reflected in trial and appellate records, slaves constituted much of the property held in the South, corroborating previous historical research based on political, economic and sociological data.

Slaves appeared as objects of property in a variety of civil and equitable cases, such as conveyances, estates, and trusts, and in attachment, levy and execution actions to satisfy judgments. Slave property was often the subject of ante-nuptial agreements, constituting assets in divorce settlements and the dower interests of married women. In criminal law and procedure, while white persons, and to a lesser degree, free persons of color experienced increased recognition of rights, slaves were exposed to the death penalty, and criminal prosecutions in general, at a greater incidence than other classes of defendants.

The obvious prominence of cases related to slavery in the court system of the period leads to consideration of the relative stance and commitment of the courts to actively support slavery, as was occurring in other sectors of southern society. In a strict sense, the business of the courts of the era merely reflected cases filed or brought to them by the solicitor or litigants. The task of judges and juries was to fairly hear and decide legal contests, and on this basis, cases concerning slavery were no different from any other cases filed at the courthouse. Operating in accordance with the common-law model of jurisprudence, courts of the period did not solicit or seek out cases; thus, the mere appearance of slave-related matters was, from this standpoint, incidental. Courts also exercised self-imposed and historical institutional restraints regulating the variety and volume of cases considered were periodic decisions as to which cases would be tried and identifying those to be dismissed, thereby controlling the dockets. Thus, one may argue that to gauge the level of support of legal institutions for political and economic policies based on the cases that are brought to them is to overestimate the powers of the judicial branch. Nevertheless, courts to some extent reflected conditions existing in the larger society in which they operated.

As might be expected, careful examination of trial records, appellate reports, and the research of Gross and Wahl in other jurisdictions reveals that the quantity and quality of case data varies within and among categories of cases and classes of individuals. For instance, in the extreme are the justice court records relating to slaves, which amount to few cases and for which virtually no detailed anecdotal information is available. According to Sellers, presumably speaking with reference to non-capital cases, slaves were often tried at the scene of the alleged crime, removed from the courthouse, with the

"court" traveling to the place of the hearing. An example of such a hearing involving a slave was the jury of inquest relating to Pompey, convened at a country schoolhouse near the Emerson Plantation where the murder of a white man was alleged to have occurred. Apparently, the last reference to Pompey was a reference to a pending indictment for capital murder, but no evidence was found that he was subsequently tried. If Pompey had been tried on the indictment, it would have occurred at the Dallas County Courthouse in Selma, since he was accused of a capital offense. For purposes of historical research, proceedings conducted away from the courthouse inherently were less likely to result in written records. Reasonably detailed records of the Pompey jury of inquest survive, and were created in the first instance, because justices presiding and the jury of inquest hearing the matter were sitting on a potential capital case that ultimately was referred to a Dallas County grand jury. Therefore, as a matter of analysis, documentation of the proceedings must be regarded as exceptional and atypical of non-capital cases slave cases pending in justice court, particularly in non-jury trials of cases for offenses less than grand larceny, such proceedings were held in conditions which were not conducive to the creation or preservation of records, a factor which is not merely limited to historical research, but bears on the quality of justice dispensed. The conduct of justice court proceedings, which include the specter of trials conducted at locations remote from the courthouse, even in serious cases, raises yet another grave question concerning the level of justice accorded slaves. The reported decisions, substantially limited to discussions of slaves accused of capital offenses, represent the optimum in procedure accorded slaves by the government; thus, such cases must be regarded as exceptional, and the depiction of the criminal justice system affecting slaves as unduly euphemistic.

A comparison of Mobile City Court trial records with reported appeals indicates that as to slaves, few convictions, all initiated as capital indictments, were appealed. Cases which were resolved by conviction on a lesser-included offense resulted in lashings; due to the nature and method of corporal punishment as inherently impeding appellate review, cases of this type were not appealed. Stated another way, no appeals existed for slaves convicted of non-capital crimes or for capital crimes for which capital punishment was not imposed. In contrast, while most convictions of white persons, like slaves, were not appealed, the rate of appeal was higher for white persons than slaves, even within the category of offenses punishable capitally. As mentioned, because the purview of capital crimes for which slaves could be indicted was broader, the rate of prosecution, conviction, punishment, and most notably, exposure to and imposition of the death penalty, was greater for slaves than for whites.

As previously noted, the only appearance of slaves as litigants in civil courts was in the suit for freedom, which first appeared as an appeal in the 1830s. Legislatively, the counterpart of the suit for freedom was the relief act for emancipation. The significance of these matters relates to the counting and comparison of such cases, and in turn, gauging the effectiveness of state manumission policies. Until 1834, the exclusive method of manumission was an act passed by the legislature, which was sometimes coupled with a judicial proceeding, before the enactment of an emancipation act or subsequent thereto in satisfaction of conditions imposed by the act. Because a legislative act was the only vehicle of manumission during this period, the acts may be viewed as accurately representing the rate and actual number of manumissions from 1819 to 1834. However, despite the passage of legislative acts, a few manumissions were defeated due

to apparent non-compliance with the conditions necessary to effectuate manumission as set out in the act. For these reasons, manumissions were negligible, a conclusion supported by census data and other studies.

With the Act of 1834, manumissions were shifted to county and later, probate courts as a result of court reorganization and adoption of the Code of 1852. At first glance, the shift of manumissions from the legislature to the court system would appear to be more conducive to manumissions as not requiring the agreement of a majority of a large, unwieldy legislative assembly, but merely the approval of a local judge, thereby logically resulting in a more numerous free black population. However, emancipation petitions to local courts did not increase the rate or volume of emancipations. Some reports indicate that manumissions actually declined significantly, a trend which accelerated in the 1850s. One consequence of the adjudication of manumissions by the trial courts is that the information relating to them becomes more elusive for purposes of historical research than acts of the legislature, which substantially consolidate as a unified record of manumissions from the territorial period to 1834. Although somewhat less pronounced than the records of justice courts, records of manumission attempts in county and probate courts after 1834 are more dispersed, and the loss or destruction of records greater, with the potential for evidence more anecdotal than statistical. Thus, from 1834 to 1860, greater reliance on reported appeals is necessary, which in practice means only review of accessible, representative cases. Suits for freedom, an emancipation attempt by individual slaves as opposed to a voluntary act of the slaveholder, originated in challenged deeds or contested wills with emancipation provisions, and also failed to make a significant impact on the slave population. Although a variety of the suit for

freedom was first authorized under territorial statutes based on a meritorious act, increased attention accorded the suit for freedom by the courts in the 1830s did not provide a viable or widespread remedy for attaining freedom, nor did the suit for freedom increase the free black population, even after discounting the effects of emigration. Further, the usual fact pattern of the suit for freedom was a free person of color defensively resisting enslavement attempts by a putative slaveholder, rather than a cause of action brought offensively by slaves after a long and continuous period of bondage; thus, the suit for freedom functioned mainly as a device to maintain the *status quo*, potentially avoiding a decline in the free black population.

The only two suits for freedom in the City Court of Mobile, *Bloodgood v. Grasey* (1858)[509] and *Farelly v. Maria Louisa* (1859)[510] were both appealed, suggesting that statewide, reported appeals on this subject were representative of the volume of cases pending in the trial courts, mainly that few were filed between 1834 and 1860, even in a county which had a significant free black population, and generated continuous, reasonably intact court records from 1850 to 1860. Also, the circumstance of vigorously contested suits for freedom arising in Mobile and other counties in the state provides evidence of political and legal conditions which were unfavorable to emancipation; consequently, few occurred.

Aside from appeals specifically denominated suits for freedom, a high proportion of the cases arising from manumission attempts by deed or will were ultimately defeated. The mere fact of recorded deeds and wills conferring emancipation is inconclusive, due to the nature of such instruments and the executory character of a grant or bequest of

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[509] Bloodgood v. Grasey, 31 Ala. 575 (1858).
[510] Farrelly v. Maria Louisa, 34 Ala. 284 (1859).

emancipation. Courts held that a claim to emancipation had to be vested and immediate, and many emancipation attempts failed because these requirements were not satisfied. For these reasons, the ultimate success or failure of emancipation attempts frequently can not be verified.[511]

Across the board, for emancipation, one of the most significant and potent deterrents to emancipation was the rule, established in the Mississippi Territory and continued to 1860, that required satisfaction of creditors of the slaveholder or his estate. Comparison of census records shows that the number of free blacks in the population remained relatively static, and in proportion to the slave and white population in 1860, declined, as shown in Mobile County, the site of the state's largest free black population, a circumstance which was also the result of a reported increasing exodus of free blacks from the state in the 1850s, whether following slaveholder emancipation occurring within the state, being physically transported by the slaveholder to a free jurisdiction and released—a practice which was tacitly condoned by the courts—or by escape and flight to free states. In summary, manumissions as a proportion of the total slave population did not increase after 1834 and were prohibited in 1860.

An element of the system of slavery was the personal ownership of slaves by government officials, including judges and lawyers. Based on examination of census records, personal correspondence, and secondary sources, the majority of the justices of the Supreme Court sitting in a given term were slaveholders, and a similar pattern is

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[511] See, e.g., Deed of manumission of Abram, a slave, from Edmund S. Dargan, to John B. Taylor, April 17, 1858 (setting forth Dargan's instructions to Taylor as trustee to effect release of Abram), Private Papers of Edmund S. Dargan, Box 37, ADAH, Montgomery, Ala; James Murphy, "John Archibald Campbell on Secession," *Alabama Review* 28 (1975): 48-49 (noting Campbell freed his slaves prior to his concurrence in the *Dred Scott* decision).

evident with the judges of the trial courts.[512] Judges, lawyers, and other key officials of the court system were not merely slaveholders, but in incidence of slave ownership, held slaves at a rate disproportionately greater than the rest of the free population, the majority of whom were non-slaveholding yeomen farmers.[513] Slaveholding as a factor of the legal system was also apparent in the composition of juries; in many civil and criminal cases involving slaves, the trial jury was required by law to consist of at least two-thirds slaveholders.

Slaveholding among public officials was both a symptom and a cause of a series of compromises, most notably in the conduct of jurisprudence. Evidence of growing sectionalism, or distinctiveness between the North and the South, was most apparent in the court systems of the respective regions, which in the South meant that there was constant internal tension associated with balancing notions of slaves as persons or property, and in attempts to square slavery in a society based upon the tenets of freedom.[514] In particular, southern courts developed what Tushnet characterizes as "Southern slave law" constituting a separate branch of legal principles and doctrines

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[512] See, e.g., Elizabeth Fox-Genovese, *Within the Plantation Household: Black and White Women of the Old South* (Chapel Hill, N.C.: University of North Carolina Press, 1988), 1-35, *passim* (accounts of plantation life derived from correspondence of Sarah H. Gayle, wife of John Gayle, supreme court justice and governor).

[513] Ten members of the antebellum Supreme Court were slaveholders, according to census records. Sixth (1840), Seventh (1850), Eighth (1860) Decennial U.S. Census, Slave Schedules. John A. Campbell, appointed Associate Justice of the U.S. Supreme Court in 1853, freed his slaves prior to his concurrence in the *Dred Scott* decision. James Murphy, "John Archibald Campbell on Secession," *Alabama Review* 28 (1975): 48-49; Paul Finkelman, *Dred Scott v. Sandford: A Brief History with Documents* (Boston: Bedford Books, 1997).

[514]"In the end . . . using the special category of slave law would not have solved the conceptual problems Southern judges faced, because those problems arose from the contradiction between slave relations and the national political economy into which they were inserted . . . ." Tushnet, *The American Law of Slavery*, 8-9.

which imparted a unique character to southern jurisprudence. According to William Wiethoff, some justices of the appellate courts of Alabama and other states slaveholding states resorted to their "personal experience" as slaveholders to guide their opinions on matters of slavery.[515] For instance, in considering the appeal of a suit for freedom, it was asserted, "Our law recognizes the existence of negro slavery, and protects the owner of such property in its enjoyment."[516] Similar sentiments were expressed in private correspondence.[517]

At the center of the administration of slavery was the justice court system, in organization and practice a paradigm of the local and municipal regulation of slavery. An Alabama justice of the peace was elected for two-year terms by the community he served. Legal training was not required, but many justices were lawyers. The local justice of the peace was more like his constituents than any other member of the judiciary, and in profile and outlook, shared much in common with the typical trial juror in circuit court.

One example of compromises made to accommodate slavery was in the common law definitions of crimes and the manner in which prosecutions were instituted. As to slaves, definitions of common law crimes and gradation of offenses were abandoned, and

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[515] William E. Wiethoff, *A Peculiar Humanism: The Judicial Advocacy of Slavery in the High Courts of Old South, 1820-1860* (Athens, Ga.: University of Georgia Press, 1996), 67-68.
[516] Sidney v. White, 12 Ala. 728, 729 (1848) (Ormond, J.).
[517] "I once thought that nothing would induce me to purchase a slave, but I found it useless for e to continue in that resolution, when by doing so I did them no good, and myself much injury, for they are the most profitable species of property we have. By owning them, I do not increase the evil, but by owning them and treating them kindly, I do them a benefit." Henry Hitchcock, Cahawba, to John N. Pomeroy, Burlington, Vt., April 20, 1820, Private Papers of Henry Hitchcock, Box 1, Special Collections, Alabama Supreme Court and State Law Library, Montgomery, Ala.

a criminal slave code substituted. Slave courts, presumptively acting as courts of oyer and terminer, or criminal courts, were established, but the essential common-law elements of grand jury presentment and indictment historically associated with oyer and terminer courts were absent in application. Thus, in most cases filed against slaves, justice courts supplanted grand juries accorded free persons. With the exception of capital cases, these aberrant features remained a fixture of antebellum prosecution of slaves. At the same time, indictments were required for the prosecution of white persons, and to a lesser extent, for free persons of color, for all offenses except minor misdemeanors and violations. No black person participated in criminal or civil trials in any manner, as judges, lawyers, or jurors. Further, state law prohibited testimony by persons of color in the trial of white persons accused of the commission of crimes; this rule was also applied to testimony in civil cases.

Tushnet holds that slave law became static and was characterized by relative uniformity among the slaveholding states by 1800. To a degree, this observation is reflected in the early ordinances enacted in the Mississippi Territory. However, in the territory, some changes are evident, principally in matters of procedure occurring between the founding of the territory in 1798 and Alabama statehood in 1819. Initially, in criminal cases, depending on the level of offense, slaves were tried by a single justice of the peace or a justice court panel. Most of the innovations instituted were in regard to slaves accused of capital offenses. Later in the territorial period, trial by jury of slaves in capital cases was authorized. Trial by jury was further extended with the adoption of the 1819 Alabama Constitution, by which slaves accused of crimes exceeding petit larceny were accorded juries. In capital cases, an indictment was required. By the 1820s, the

right of appeal, while not automatic, for slaves in capital cases was recognized by the Supreme Court.

In the ensuing decades leading up to 1860, few significant or meaningful changes in criminal procedure occurred concerning slave trials. Due mainly to restructuring of the court system, culminating in 1850 with the adoption of a constitutional amendment providing for court reorganization, trials of slaves in capital cases were gradually shifted from county courts to circuit courts as the county court system was phased out and finally abolished. At the end of the antebellum period, a few slaves indicted for non-capital offenses appeared in the City Court of Mobile, but even at this point, such cases were rare and virtually unknown in any event during the preceding forty years. In summary, the appearance of a slave in a general trial court such as county or circuit court for a jury trial meant that the slave was accused of a capital crime. Otherwise, for non-capital offenses, slaves were tried in justice courts, with juries in cases exceeding petit larceny.

In the accusation and trial of white persons for felony and capital offenses, many were graded; such as murder and manslaughter in the first and second degree. For serious similar offenses, free persons of color were subject to the same graded charging scheme, except when the alleged victim was a white person; in such case, the rules varied depending on the level and character of the offense. For slaves, no offenses were graded; any crime exceeding simple assault committed against a white person was initiated as a capital offense. Serious offenses against free persons of color or against other slaves might be treated as non-capital and punished by whipping.

Other changes are apparent in the infliction of punishments authorized upon conviction of an offense. The Mississippi Territory was organized in 1798 in a frontier

region. The first penal code enacted applicable to the population, varying with the status of the accused, imposed penalties associated with colonial America, authorizing whippings, stocks, and pillories, for free as well as slave offenders, but at all times less frequent for the former than the latter, and a system of fines enabled free persons to escape corporal punishment. In the ensuing years, greater divergence in the use of corporal punishment developed between white and slave offenders. Within the first decade of the adoption of the 1819 Constitution, corporal punishment for white persons was essentially abandoned, replaced by fines and imprisonments in county jails, which were intended for free persons but not slaves. The construction of a state penitentiary and adoption of the penal code in 1841 was part of a legislative program which resulted in the reduction of the number of capital offenses applicable to white persons, limited to first-degree murder, aiding an insurrection, and treason, such that whites convicted of serious crimes were sentenced to the penitentiary and rarely received a death sentence, even for historically capital offenses. One effect of the jail and penitentiary system was to exempt free persons of color for corporal punishment as to serious crimes. They were imprisoned like white persons; on the other hand, as to status offenses relating to municipal violations, whippings were retained and sometimes inflicted on free persons of color in mayors' courts.

Meanwhile, the modes of punishment inflicted on slaves remained relatively static in a system for which fines and imprisonment were reserved for free persons. With the ratification of the 1819 constitution, maimings and dismemberments authorized in the territorial period were phased out as prescribed punishments for convicted slaves, but whippings were retained up to the end of the antebellum era. One hundred lashes for the

conviction of a lesser-included offense to an initial charge of a capital crime was a customary punishment in circuit court during the 1850s. These sentences were sometimes imposed in lieu of death if the victim were another slave, or if no loss of life resulted from the commission of a capital crime. In contrast to improvements for free offenders, slaves still faced a death sentence on conviction for a variety of offenses, most often those in which a white person was the alleged victim, even when no death had occurred. Transportation, or exile of the slave from the jurisdiction, was another type of punishment that allowed slaves to escape the death penalty. Transportation was imposed in some cases for capital crimes not causing death to the victim in lieu of the death penalty. Convicted slaves were sometimes branded for certain offenses; some authorities, such as Sellers, maintain that this practice, still in use in the 1850s, was unrelated to corporal punishment, but a method used to identify repeat offenders.

Statewide, court operations in general and the administration of slavery in particular, while having local variations in practice, were characterized by considerable uniformity in the law, especially with the adoption of the Code of 1852, which standardized procedure and substance to a greater degree than under previous digests and compilations, including the slave and penal codes.[518] As a case study, the operations of the Criminal Court and City Court of Mobile in the adjudication of matters pertaining to slavery point to a degree of statewide uniformity in practice, a conclusion supported by various acts establishing City Court and a series of Supreme Court decisions immediately

[518] "This [the Code of 1852] was the first and only Code of Alabama, strictly speaking." James P. Mayfield, Code Commissioner, "History of the Various Codifications of Statutes and Laws of Alabama," in *Code of Alabama* (1923), vol. 1 (Atlanta Ga.: Foote & Davies, 1923), xii.

following such enactments, which held that City Court was in jurisdiction and practice, with the exception of equity, like other circuit courts across the state.[519]

The significance of this observation is that data and conclusions derived from trial records relating to the disposition of slavery matters in City Court may be regarded as typical of other state circuit courts of the era. This circumstance is critical, for the reason that although extant circuit court records of the era are sporadic, more records of circuit courts are available than justice courts, which in the opposite extreme, few such records exist, particularly relating to slaves. With reference to circuit court records, such as those in Mobile, it may reasonably be asserted that state circuit courts, certainly by the 1850, were the trial courts for slaves accused of capital offenses, characterized by the essential elements noted herein, such as grand jury presentment and indictment, and trial by jury, yet subject to numerous limitations and deficiencies, many obvious, some more subtle, both absolute and comparison with white persons similarly accused. It is literally correct that in rudimentary elements, slaves were tried in circuit court in the manner of white persons as proclaimed by statute. Otherwise, the trial of slaves occurred in justice courts which not only did not operate as courts of record, but maintained few records relating to slaves. The availability of records is further impeded by the fact that virtually no cases were appealed by slaves, a process which would, as a secondary consideration, generate records for historical research. Instead, evaluation of the justice court process involving slaves is based principally on codes, statutes, and acts, without substantial reference to their actual application due to the absence of records. Alternatively, another element of

[519] See, e.g., Nugent v. State, 17 Ala. 496, 523-24 (1850)("jurisdiction [of City Court of Mobile] concurrent with . . . Circuit Courts of the State, in the administration of the criminal law in the county of Mobile . . . .").

slavery jurisprudence is that below the level of circuit court in the justice court, the administration of slavery was largely code-based; thus, the compilation resulting in the Code of 1852 standardized the law and its administration in certain respects. As the only point of reference for many cases involving slaves, this circumstance thereby promoted uniformity, particularly in the area of criminal law, but at the same time, led to local variations and disparate results, since there was little in the way of reported case law to guide decisions.

The analysis and application of slave law, the rules system by which the institution of slavery was administered, and its significance to the management of slavery, can be overstated. Tushnet argues that the "bracketing" of slave law into a separate category was motivated in part by a "pervasive need" to have "simple tools" at the disposal of court officials, some of whom were less than learned in the law to administer an institution that failed to fit nationally or conceptually with the professed values of the founders. Tushnet adds that wrestling with the inherent contradictions posed by the juxtaposition of slavery and freedom proved challenging and difficult even for skilled jurists.[520]

The supposed reliance on precedent or "borrowing" of preexisting law from other jurisdictions or earlier times is likewise of limited application, if not misplaced. In absolutes, the administration of slavery was premised on the systematic deprivation of freedom to a substantial segment of the population; thus, the institution of slavery devised and implemented was based chiefly on denying as many rights and privileges on a wholesale basis as necessary or practicable, a process not requiring an extensive

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[520] Tushnet, *The American Law of Slavery*, 8.

philosophical framework or elaborate legal theories, but emanating from untempered and raw assertions of governmental power. Rational legal theory is more associated with balancing than suppressing rights, although it may be observed that legislatures and courts acting in concert with slaveholders made rational decisions dictated by economic interest which outweighed considerations of humanity. Instead, the institution of slavery and the laws by which slavery was administered were based mainly on the periodic application of force and the need to maintain an ordered society. The role of the courts was to simply to follow and enforce the law as written by the slaveholding class, with minimal regard for equity. This process was reinforced by a code-based system of slavery coupled with extreme deference to acts of the legislature, a characteristic of nineteenth-century jurisprudence. The procedures and laws governing slaves in criminal and civil courts, usually as objects of property, were by design, streamlined and straightforward. In the composite, as to the slave population, courts acted as agents of slaveholders in administering repressive public policy; but, more often, the personal interests of slaves were merely ignored by the court system as part of a policy of benign neglect, as signified by the rudimentary processes of justice court as applied to slaves. In contrast, as revealed by the legion of reported cases, slaves as the property of slaveholders were accorded considerable attention and resources by the courts.

The resort to legal materials as source of history, as pioneered by Catterall and numerous others following in her wake, and recognition of the information thereby derived compels a reexamination of traditional views of the institution of slavery as established and maintained as a system of private property sustained by self-help remedies, with minimal involvement of the government. This conception was perhaps

once warranted with reference to isolated and dispersed instances of slavery in wilderness or frontier areas, such as in the early days of colonial Virginia, or at the inception of the Mississippi Territory. With development of the southeastern United States, characterized by a growing population, and a greater proportion of slaves, a revised paradigm is warranted. In a wilderness state, an organized legal and political system was necessary or in any event non-existent; in such conditions, with few people residing in a vast area, most government was the product of military governors and few laws were needed. As Alabama emerged from the frontier, an agrarian, yet relatively more complex society developed, which included a large resident slave population, who were, for the most part, considered property, with significant regulation occurring by municipal ordinances in urban areas. The business of the courts, particularly taking cognizance of cases in civil jurisdiction, is money and property; frequently the concepts are synonymous. Central to this function is the enforcement of legal promises, which in the antebellum era included bills of sale, warranties, unsoundness, and hiring contracts related to slaves, activities and transactions which constituted the core and sustenance of the institution of slavery. The enactment of more laws and courts to administer them were needed to adjudicate rights in property, which frequently meant slaves. In this context, the court system assumed a greater role in sustaining the institution of slavery than had been necessary decades earlier; thus, in this context, the administration of slavery to 1860 must be viewed as more than a private or passive activity, but as an essential function of government, starting with the courts.

Research and writing in the area of slavery based on legal materials suggest that the traditional view of the institution of slavery as associated with sectionalism may also

be in need of revision. While it is correct that slaves were geographically confined to the southeastern United States and the states of Texas, Arkansas, and Missouri west of the Mississippi[521], the reach and influence of slavery was nationwide. Implicitly, this point underlies Lynn Willoughby's discussion of the factoring, brokering, financing, shipment, and marketing of cotton, reaching from the Chattahoochee Valley to Apalachicola, New York, and London, mirrored by similar activities elsewhere along the Gulf Coast, including the port of Mobile.[522] Corroborating this data is a vast and prominent body of cases in the reports of the Alabama Supreme Court and other slaveholding states of the era, showing the legal character of slaves as chattel property defined by numerous sales and hiring cases, of which financing was an integral part, as evidenced by numerous promissory notes and chattel mortgages, and subsequent assignments, all central to slave transactions. Willoughby describes the system of southern agriculture, consisting chiefly of the marketing and export of cotton, as largely based upon and made possible by an extensive and far-reaching system of credit managed by financial concerns located in the northeastern United States and overseas. The corollary to this thesis is that marketing and trade of slaves was made possible by a national system of credit and financing which was not merely parallel to the cotton trade, but integral to it. As Bancroft, Martin, Gross

[521] This is subject to some qualification; among the issues considered in the *Dred Scott* case was the status of slaves temporarily taken to free territory by slaveholders on "sojourn," without intent to release them, and then returning to slaveholding jurisdictions, a frequent occurrence in those northern states which permitted the practice.
[522] See Willoughby, *Fair to Middlin'*, Ch. 4, "Cotton Banks," 69-89; Ch. 5, "Financing the Cotton Trade," 90-99. "Ultimately credit did not originate in the South at all, but in England whose giant textile industry fed ravenously on southern cotton. . . . This stream of credit from London made its way to the South circuitously. New York grew to eminence as the country's greatest port by rerouting . . . southern products and English financial resources through its facilities . . . by 1860 two-thirds of American exports and one-third of its imports passed through its harbor, and *New York had become the financial capital of the South.*" Ibid. at 90-91 (emphasis added.).

and Wahl have shown, slave trading and concomitant financing were interstate and national in character.[523] Any conception of the institution of slavery must acknowledge that the commercial paper generated by the slave trade was part and parcel of a system of agricultural financing based in the northeast.

Despite the official constitutional ban on the importation of slaves, effective in 1808, a series of federal cases, concluding with *The Slavers* (1865), show that the international slave trade persisted largely unabated with vessels which were built and based in the northern ports of the eastern seaboard; this fleet was not merely operated as whalers and packets. Assisted by the provisions of the Fugitive Slave Act, retrieval of slaves by southern slaveholders was effected within ostensibly free states, overriding state law to the contrary, as shown by the *Prigg* and *Van Zandt* cases. In substance, the passive jurisprudence characteristic of southern state courts which sustained slavery was likewise a hallmark of the antebellum United States Supreme Court. The jurisprudence of the federal courts complemented the proslavery orientation of state court systems.

In the early decades of the state, most adult citizens were not natives of Alabama, few lawyers practicing before 1840 were born in Alabama, and no antebellum justices of the Supreme Court were Alabama natives. Supreme Court justices Henry Hitchcock was born in Vermont and George Goldthwaite and his wife were from Boston. Winthrop Sargent, the first governor of the Mississippi Territory, who was responsible for the first slave code, was a native of Massachusetts. In short, most settlers and slaves immigrated

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[523] See, e.g., Bancroft, *Slave Trading in the Old South*, 296 ("Apparently the most active [slave] dealer in Montgomery throughout the 'fifties was Mason Harwell. . . . He . . . carried on various kinds of slave-trading, including a hiring agency; and, *as a representative of the Knickerbocker Life Insurance Company of New York, he was ready to insure slaves 'at reasonable rates.'"*)(emphasis added).

to Alabama from other states, including those in the North, and the resulting institutions, including slavery were established and shaped by these individuals, many of whom were prominent and influential citizens, including lawyers and judges. The institution of slavery was not a discrete and insular activity confined to the South, but a central component of the stream of commerce between the industrial North and the cotton South, intertwined as a cooperative national enterprise mutually beneficial to the regions and part of the culture and fabric of American antebellum society.

Nevertheless, conceptions of the sectional character of slavery, representing the consensus of historians in the field, retain vitality. Developing fissures between the North and South were apparent by the end of the Mexican War and the Compromise of 1850, the starting point for David Potter's classic, *The Impending Crisis*. In the state court systems of the two regions, the emerging differences were arguably more acute and pronounced than with any other institution in society. The administration of corporal punishment under color of law to inhabitants of the jurisdiction, a practice which had been largely abandoned in the North by the time of the adoption of the United States Constitution, remained a staple of justice in southern courts, regularly inflicted as a standard component of public policy, beginning with the justice courts, the principal tribunal charged with the administration of slavery. To a great extent, Alabama initially adopted a system of criminal justice modeled on colonial Virginia, and for a large segment of the population, subsequently made few substantive changes to effectively bring the state into the nineteenth century, because steadfast dedication to the institution of slavery would not permit any change in practice. While judges and juries in the South periodically convicted and sentenced slaves to brutal lashings, the greatest involvement

of northern courts with slavery was in occasional compliance with the dictates of the federal Fugitive Slave Act.

Above the level of justice of the peace, courts appeared to have little involvement with slaves, except as contested property. By local and municipal controls, courts remained passive, allowing the institution of slavery to advance geographically and prosper financially. In evaluating the law of slavery, Tushnet adopts a construct which casts slavery and its component, the court system, as a *bourgeois* institution. Similarly, Wahl, an economist, analyzes the law of slavery and the principal activity associated with slavery, slave trading and sales, as a manifestation of capitalism supported by the appropriation of labor of the working class. Approached from an economic perspective, southern slavery represented a cooperative experiment, whereby slaveholding interests and institutions of government engaged in unbridled free-market capitalism, and along the way, freedom was often sacrificed and historic liberties abridged to accommodate slavery.

The institution of slavery carried free-market capitalism to the logical and inexorable extreme, driven by the proposition that sellers can sell anything buyers will buy, even human beings, without regard to the consequences or harm inflicted. The corollary to this doctrine is that fundamental rights of the people can be abridged for the sake of profit. The documented operation of slavery, as evident in the administration of the institution by the antebellum court system, discredits this notion.

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