LAW AND SLAVERY IN NORTH AMERICA : THE DEVELOPMENT OF A LEGAL CATEGORY

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ABSTRACT OF THESIS (Regulation 6.9)

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Title of Thesis LAW AND SLAVERY IN NORTH AMERICA : THE DEVELOPMENT OF A LEGAL CATEGORY

This thesis involves an analysis of the development of the law relating to chattel slavery in North America from the period of British colonial expansion until the post Civil War era when the legal category officially disappeared from law. My analysis, based on an approach which regards law as a social practice, not only explains the origin and operation of specific laws and legal practices within a specific set of apparatuses but also recognises that law produces its own unique effects. Thus it is through the forms of law that slaves are differentiated from other unfree persons and it is through a definite construction in legislation that the slave is defined as chattel property. This legal definition of the slave status, while neither pre-given by nor totally independent of the political, economic and social conditions of its existence, exerted its own unique effects on the pattern of capitalist development in North America by creating the basis upon which a specifically slave mode of production could develop in the South.

The legality of private property in slaves was recognised in both Southern and Northern colonies and later throughout the United States of America when, in the creation of the federal republican state, the right of slave property was guaranteed under the US Constitution. There was no conflict over the existence of slavery in the USA as a developing capitalist country. The slave-owning regions of the South produced specialist agricultural commodities for distribution through Northern markets. The South depended on the financial and commercial institutions of the North just as the North depended on the commodities produced in the South.

The conflict which developed between North and South, which finally resulted in the Civil War, was not over the legality or existence of slavery as such but was rather over the extent of the expansion of the slave system to new territories - it was a complex political struggle over whose interests would predominate in the government of the USA. The legal definition and refinement of the chattel slave status became central to the ideological struggle and it was through the forms of law that this conflict between North and South over who would rule the USA was primarily fought. Moreover, in the aftermath of the Civil War, it was through the forms of law that chattel slavery officially disappeared. Yet in the process of translating the conditions surrounding the abolition of slavery into legal discourse a particularly potent legacy for the legal category was created - a legacy which has and continues to exert distinctive effects on the definition and recognition of civil rights.

The case of the development of chattel slavery in North America provides an analysis of both why and how, within this particular category, the law functioned as an instance of construction, recognition, regulation and transformation and, in so doing, contributes to our understanding of the nature and effectivity of legal as opposed to other forms of defining and regulating social relationships.

Use this side only

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DECLARATION

This thesis has been composed entirely by myself and is my own work.

Jacqueline Tombs
April 1982

ABBREVIATIONS *

Adm.	Admiralty
App. Div.	Appeal Division
Ca.	California
Cas.	Case(s)
Chs.	Chapters
Cir.	Circuit
Cl.	Clause
Comm.	Commentaries
Comp.	Compiler
Cong. Sess.	Congressional Session
Conn.	Connecticut
C.P.	Common Pleas
Ct.	Court
Dec.	Decisions
Doc.	Document
Econ. Hist.	Economic History
Ed.	Editor/edition
Eng.	England
Fac.	Faculty
F.	Federal
Ga.	Georgia
Ill.	Illinois
J.	Journal
K.B.	King's Bench
Ky.	Kentucky
L.	Legal
La.	Louisiana
L.Q.	Law Quarterly
Mass.	Massachusetts
Md.	Maryland
Mo.	Missouri
N.C.	North Carolina
N.J.	New Jersey
N.Y.	New York
Oh.	Ohio
Pa.	Pennsylvania
Proc.	Proceedings
R. or Rep.	Report
Rev.	Review
S.C.	South Carolina
S. Ct.	Supplementary Citations
Scot.	Scottish
Sec./Sect.	Section
Ser.	Series
Serj.	Serjeant-at-Law
Sess.	Session
Soc.	Society
Stat.	Statute
Sup. Ct.	Superior Court
Tenn.	Tennessee
US(A)	United States (of America)
Va.	Virginia
Vol(s)	Volume(s)

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* Other abbreviations used in this work are fully cited within the text.

ACKNOWLEDGEMENTS

My interest in the substantive area to which this thesis is addressed was originally stimulated some years ago when I was at the University of Pennsylvania, USA. I am grateful to Professor Marvin E. Wolfgang of the Department of Sociology at the University of Pennsylvania for affording me the opportunity to work and study there. It was while at the University of Pennsylvania that I met Judge A. Leon Higginbotham Jnr., who initially raised the question for me about how it was possible for law to define people as property. To him I am indebted not only intellectually, through the impression he created upon me in his teaching and scholarship, but also personally since, in appreciating his commitment to working for civil rights, I grew to understand more fully my own view of the world. Since that time, my understanding has hopefully continued to grow and, in completing this work, I owe a debt to many, both professionally and personally, including my first supervisor, Kit Carson, the staff of various libraries within Britain and the United States, my colleagues both past and present, and Val Chuter who typed this work so well.

There are some people, however, to whom my thanks extend over the years and who have made a special contribution to my completion of this work. My husband, Sebastian Tombs, has lived with my interest in the subject of this thesis as long as I have and has helped and encouraged me to pursue it throughout. My mother, Elizabeth Curwen, and my brother, Richard Curwen, both provided me, at an early age, with a belief in the value of knowledge and for this, amongst other things, I am grateful. My friend, Richard Scott, has, whilst writing his own thesis

over roughly the same period, given me a great deal of support in writing mine. And my supervisor, Peter Young, has, over the years I have worked with him, helped me to understand my own thinking, believe in its significance and believe that I could reach a conclusion. The relationship which we have developed over the years is one which I value. This work is dedicated to all of them with my gratitude and love.

CHAPTER 1 : LAW AND SLAVERY IN NORTH AMERICA :
PROPOSALS FOR ANALYSIS

INTRODUCTION

The substantive area to which this thesis is addressed concerns an analysis of the development of the law in relation to the legal category of chattel slavery in North America. (1) In addition to providing an explanation for the existence of chattel slavery which attempts to resolve the long-standing dispute between scholars who have argued that, fundamentally, chattel slavery is to be explained in terms of racism as opposed to those who have argued, more or less crudely, that economic expediency created this form of slavery, my own approach, focusing on the role of law, attempts to do justice to the complexities inherent in providing an adequate explanation of chattel slavery and, at the same time, to contribute to an understanding of precisely what makes legal forms more or less effective in the practice of other social, political and economic institutions, thereby making a contribution to more general theorising about the nature of law in society.

While the last decade or so has witnessed a considerable resurgence of interest by sociologists in the relationship between law and society, resulting in the proliferation of various kinds of empirical studies and theorising, sociology of law is, nevertheless, still lacking in detailed analyses of: (i) the precise relationships between specific laws and specific social

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1. I am here referring to the development of chattel slavery during a particular period in the evolution of western capitalism. While the case of chattel slavery in the North American colonies, and later the United States of America, provides the substance of the historical evidence, Great Britain is, to some extent, also used as an important source throughout the same period. I must stress that I am <u>not</u> discussing the case of slavery in Classical Antiquity.

formations; and (ii) the point at which, or the conditions under which, distinctively legal regulation assumes a position of pre-eminence in society: that is, analyses which go toward the development of general theories about the nature of the link to be made between law and society. By taking a specific instance, that is, the development of chattel slavery as a legal and social form, this thesis attempts to provide an explanation of the specific relationships between law and society in that particular instance, and also to make some contribution toward more general theorising.

The specific instance of chattel slavery has been chosen as the focus for my analysis for a number of reasons. As Hindess and Hirst have argued, slavery, by definition, is always a legal or customary status and it is through the forms of law that such a status is legitimated or otherwise. (1) While there can be little doubt that slaves were largely excluded from the logic of the law with its standards of equity and universality, the detailed analysis of the legal practices and institutions tells a much more complex and significant story in relation to chattel slavery. This story forms the main substantive part of this thesis, but, at this stage, it is necessary to emphasise that both slaves and their masters appeared increasingly in the courts of justice throughout the eighteenth and early parts of the nineteenth centuries, and that these legal institutions and their

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1. Barry Hindess and Paul Q. Hirst, "Pre-Capitalist Modes of Production", London, Routledge and Kegan Paul, 1975:109.

practices played a critical part in the process of the uneven development of capitalism [1] thus bringing into being a society based on the espousal of ideals concerning the essential nature of human freedom, whilst part of its economic growth was based on what remains perhaps the most extreme denial of human freedom.

If, as I will argue, the legal form is an integral definitive characteristic of the existence of chattel slavery under the conditions of capitalism, where slave property is a special variant of private property in general, it is necessary to explain how legal apparatuses and practices which were formally premised on bourgeois [2] notions of right were able to contain the ideological contradictions between slave property and bourgeois property right (the latter being based on notions of

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1. By the 'uneven development of capitalism' I am referring to the process whereby different regions experience the development of the capitalist mode of production at different rates.

It should be noted that when I use the term 'capitalism' in this analysis, I am following the definition used by Giddens which he constructs on the basis of a review of the approaches of Marx and Weber. Giddens constructs a definition of capitalism as existing wherever:

> "(1) Production is primarily oriented to the realisation or search for the realisation of profit accruing to privately-owned capital.
>
> (2) This process is organised in terms of a market upon which commodities, including labour itself, are bought and sold according to the standards of monetary exchange" (Anthony Giddens, "The Class Structure of Advanced Societies", London, Hutchinson, 1973:142).

This definition incorporates the principal elements of the definitions adopted by Marx and Weber and, as Giddens suggests, is sufficiently broad to allow for the many different patterns of development which are historically evident (1973:33-40; 144-145).

2. The term 'bourgeois' as used here refers to those values associated with the development of the middle-classes in capitalist society, namely individualism, formal legal equality, the proportionality of labour and rewards, and so on.

formal legal equality, equity and so on). While the contradictory nature of precedent and legislation in relation to the status of slave clearly illustrate the capacity which legal systems have to uphold inconsistencies in definition and practice, it is the argument of this thesis that the containment of such contradictions at a substantive level in this case is to be explained by the specific effectivity of legal apparatuses and practices.

This is not, however, to suggest that chattel slavery is to be understood wholly in terms of the legal definitions and practices pertaining to it. This particular form of slavery existed within a wider social and political system and an adequate analysis must predicate itself upon at least a broad reference to the importance of these structures. What I am arguing is that by a detailed study of the law and its practices in relation to chattel slavery much can be learned, not only about the part which law has to play in the production and re-production of social and political relations, but also about the precise manner in which social and political structures shaped the nature of the slave system in question through the forms of law. Indeed, the argument of this thesis is that while capitalist development created the possibility for a particular form of chattel slavery to exist, legal institutions and practices formed, in this case, part of the process of the uneven development of capitalism and, as such, were inextricably linked with the development of the capitalist mode of production.

My analysis of the operation of law in relation to chattel slavery demonstrates that there is, in fact, no inherent contradiction between slave property right and bourgeois property right, and that, on the contrary, the existence of slavery in bourgeois society only serves to highlight the 'dark side' of bourgeois notions of legality. In both its practices and discourse the law pertaining to chattel slavery performed a critical role in defining extreme inequality in social relationships by legitimating the status of master (owner) versus slave (owned). Not only did legal institutions and practices define extreme inequality in this particular social relationship but also they defined a more or less absolute deprivation of liberty. In this sense, as property, as propertyless and as a human being deprived of liberty, the slave provides an ante-type for the propertyless members of the nation states emerging in the sixteenth century who, in turn, came to be regarded as the 'dangerous' classes, and from whose ranks the bulk of the 'convicts' were, and continue to be, drawn. It is in this context that my analysis contributes to an understanding of the importance of slavery to penological/criminological thought.

The explanation, however, for the continued resemblance between contemporary penal systems and slave systems, is not to be found in the accumulation, however well supported historically, of comparative evidential material about the two, [1] but rather in

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1. See, for example, Thorsten Sellin, "Slavery and the Punishment of Crime", in Roger Hood (ed) "Crime, Criminology and Public Policy", London, Heinemann, 1974 and Thorsten Sellin, "Slavery and the Penal System", New York, Elsevier Scientific Publishing Co.Inc., 1976.

the kind of social formations which produced both chattel slavery and criminal punishment. My argument is that in order to provide an adequate explanation of the importance of the link to be made between slavery and punishment it is first of all necessary to explore the significance of the legal apparatuses and practices pertaining to the case of chattel slavery. These apparatuses and practices developed and evolved within the context of values associated with bourgeois society: notions of liberty, individualism, equality, private property and so on. And, within bourgeois society, law defined, refined and finally eradicated the status of 'slave' while, at the same time, it also defined the limits of the penal sanction and the status of 'convict'.

With Kennedy, (1) I will argue that both crime and penal sanction, as we know them, are only possible with the advent of the institutions of western capitalism including the ethic of individual responsibility for conduct. This 'legal fiction' of individual responsibility for conduct makes possible the simultaneous recognition and non-recognition of the status 'slave' in legal practice and discourse. How is it possible for a slave to be owned yet individually responsible at the same time? This possibility is both created and maintained through the forms of law. Similarly, how is it possible to be held individually

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1. Mark C. Kennedy, "Beyond Incrimination: Some Neglected Facets of the Theory of Punishment", in Catalyst: No.5, Summer 1970:1-37.

responsible for 'being a criminal' while it is the State which creates and maintains crime? The forms of law make this possible.

The question which I am addressing is, therefore, how does it come about that law, in the form of legislation, institutions and practices, comes to define social relationships which are clearly based on assumptions of inequality? The role of law in the production and re-production of such social relationships is critical. Moreover, such relationships, based on assumptions of inequality, are, according to my argument, central to the development of bourgeois society. To understand the nature of these relationships and the extent to which the legal definition is inextricably bound up with them, has implications for the understanding of bourgeois society.

Sociological theory has itself included a persistent concern with alternative ways of defining the major elements of social relationships and then finding ways of distinguishing types. For some of the most notable sociological theorists, including Durkheim, Marx and Weber, a prominent question concerns what kinds of social relationships it is necessary to distinguish: what are the properties of social relations and the arrangements they imply? What range of combinations do and can social relations assume? How do these combinations come about, change or cease?

What I am arguing is that by studying the nature of specific social relationships it is possible to understand the structure of lived experience and enlarge upon it to the point where insights

can be gained about the nature of a given social formation. There are, of course, many kinds of social relationships and a variety of ways of characterising them. While the concept of 'social relationship' implies some mutual recognition of reciprocity it does not, by definition, imply equivalence, equality or anything else. Many writers have argued that the development of law under capitalism necessarily involves assumptions about equivalence in social relationships. (1) My own analysis of the operation of law in relation to chattel slavery does not, however, start from such a premise. On the contrary, the examination of the role of law in the production and re-production of this extreme form of social relationship, where neither equality nor equivalence is assumed, suggests that the nature of bourgeois law cannot be explained in terms of an assumed equivalence in social relationships.

I am not, however, arguing that the study of social relationships, in particular those where the legal definition is fundamental, is itself unproblematic. Social relationships are only samples, as it were, of social reality. Their analysis does depend on prior ideas concerning the coherence/differentiation of any particular social formation and the processes whereby this is produced, reproduced and transformed. Nevertheless, to begin with studying the social relationships, in line with a long

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1. See, for example, E.B. Pashukanis, "The General Theory of Law and Marxism" (translated by H. Babb) in J. Hall et al (eds) "Soviet Legal Philosophy", Cambridge, Mass., Harvard University Press, 1951.

tradition of sociological questioning, and end with more general theorising, provides space for imagination and insight, whereas to begin questioning within a framework which itself sets the limits of the possible questions and answers and no room for discovery, seems a somewhat sterile mode of inquiry. Within Marxism, for example, where the main body of work regards law as epiphenomenal, the way to pose the problem of law, that is, to ask the question of the relevance of law as an object of knowledge, is within a scheme which already answers the question. Indeed, much sociological thinking seems suspended between two images: one of these conceives of society as constituted by the social arrangements of sleepwalkers and the other as a play involving both actors and audience, a stage and a realm behind the scenes. Neither of these images is wrong: both are appropriate versions of social reality but both are incomplete. And, although completeness is not necessarily the aim of sociological questioning, it is, nevertheless important to ask the questions in a way which does not limit the possibility of achieving at least a more complete understanding of the social.

Clearly, sociological questioning is bound up with the matter of method: questions imply a method and demand techniques for answering them. The matter of method, however, is not simply concerned with technique. It is primarily concerned with conceptual and theoretical notions. For the purposes of my analysis, therefore, the concept of 'social relationship' should be regarded as a heuristic device which provides the basis upon which to explore

the specific questions about the nature of social life to which this thesis is addressed. By focusing on chattel slavery, and the role of law in defining this extreme form of social relationship, I am able to explore what makes legal forms more or less effective in the practice of other social, political and economic institutions, and, as such, I am able to make some contribution to more general theorising about law and society.

The remainder of this chapter is devoted to an articulation of my proposals for understanding the nature of law and society with specific reference to chattel slavery. My own approach to the problem of law has been constructed within a sociological tradition and attempts to select the most relevant sociological concepts for my analysis. As I mentioned earlier, sociology of law is still lacking in detailed analyses of: (i) the specific relationships between specific laws and specific social formations; and, (ii) the point at which, or the conditions under which, distinctively legal regulation assumes a position of pre-eminence in society: that is, analyses which go toward the development of general theories of law and society. By taking a specific instance, that is, the development of chattel slavery as a legal and social form, this thesis does attempt to provide an adequate explanation of the specific relationships between law and society in that particular instance, and also to make some contribution toward more general theorising about the nature of the relationship between law and society.

Given my interest in recent developments within sociology of law the following section reviews some of the main contemporary approaches within that body of knowledge. Such a review is central to the construction of an adequate theoretical and methodological approach and my objective here is to select those aspects of the approaches reviewed which will be useful in developing a conceptual framework for my substantive analysis of the law and its operation in relation to chattel slavery. Particular attention is given to the concern mentioned above, namely, the extent to which the studies reviewed contribute to our understanding of the specific relationships between specific laws and specific social formations and also to the development of more general theories concerning the relationship between law and society.

APPROACHES TO THE STUDY OF LAW AND SOCIETY

Although the studies referred to in this review do not necessarily address themselves explicitly to my particular concerns, I select those aspects which are useful to the development of my own approach. The studies reviewed are grouped under three broad headings depending on the orientation adopted to the law/society problematic. Broadly speaking, I have grouped studies in terms of the types of questions they pose: the law in action; the emergence of law; and theorising law and society.

The studies which I review in the following sections have not been chosen because they represent the 'best' or the 'worst' but

rather because they typify what is most useful, theoretically and methodologically, to the development of my own approach. For example, the fact that I do not discuss Hall's classic study, 'Theft, Law and Society' (1) under the heading, Emergence of Law, does not mean that I do not regard it as important within the literature on the emergence of law, but rather that my aim is to illustrate how sociological concepts have been used in this literature and other studies are more centrally related to my purposes. Again, the fact that I do not discuss, in detail, either the Durkheimian or Weberian approaches under the heading, Theorising Law and Society, does not mean that I regard these approaches as unimportant but rather that other approaches are more helpful in the development of an adequate conceptual framework for the analysis of the law and its operation in relation to chattel slavery.

Law in Action

Studies considered under this heading are those empirical studies which have characteristically not been related to any explicit theoretical concerns. Such examples of 'socio-legal' work have tended to be heavy on design and technique and light on theoretical reflection. Their main intellectual effort has gone into emphasising the central importance of knowing operative law, that is, 'law in action', as opposed to positive law, that is, 'law

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1. Jerome Hall, "Theft, Law and Society", 2nd edition, Indianapolis, Bobbs Merrill, 1952.

on the books'. The 'law on the books' is simply regarded as some unproblematic and unexplored standard from which the 'law in action' deviates to a greater or lesser extent. This central concern reflects the underlying rationale to many socio-legal studies: that the sociologist of law, by virtue of some sort of technical expertise based on methodological, analytical and statistical skills, is able to clarify, hence alleviate, problems which lawyers, administrators and politicians regard as important. (1)

A good deal of research effort has therefore been conducted in areas regarded as demanding the immediate applicability of results. For example, studies of plea-bargaining, (2) of bail, (3) of legal-aid assignment procedures, (4) of lawyers, (5) and most of the studies of the 'access of the poor to the law', (6) and 'legal needs' (7) are mainly concerned to demonstrate the effects of social and organisational differentiation on the administration of justice. While these studies have provided us with

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1. Jerome H. Skolnick, "The Sociology of Law in America: Overview and Trends", in Social Problems, 1965, Vol.13:20.

2. John Baldwin and Mike McConville, "Negotiated Justice", Oxford, Martin Robertson, 1977.

3. M. King, "Bail or Custody", Harmondsworth, Penguin, 1972.

4. B. Abel-Smith and J. Stevens, "In Search of Justice", London, Allen Lane, 1968.

5. Jack Ladinksky, "Careers of Lawyers, Law Practice and Legal Institutions", in American Sociological Review, 28, February 1963, 53-54.

6. Murray L. Schwartz, "Foreword:Group Legal Services in Perspective", U.C.L.A. Law Review, 12, January 1965, 279-80.

7. P. Morris, R. White and P. Lewis, "Social Needs and Legal Action", London, Martin Robertson, 1973.

documentary results about various procedures, there is little that is stimulating about their findings, either theoretically or philosophically. This is also true of the many impact studies which examine the effects of introducing particular schemes, such as duty solicitors or law centres, into specific areas.

The majority of such studies accept the notion of 'legality' as unproblematic and, as such, notions of 'the rule of law', 'equality before the law' and the like are simply assumed. From these unexplicated assumptions, 'socio-legal' studies of the kind mentioned above go on to attempt to demonstrate how, in fact, the law in action does not correspond to certain implicitly understood ideals of justice such research holds to. Carlen suggests that the aims of such 'correctionalist' approaches to law are, however, quite explicit:

> Based upon an implicit assumption that legality is potentially analagous with distributive justice, and that both can be achieved independently of change in the material social relationships wherein such notions are resolved, normative-correctionalist studies aim at a notional adjustment of present day laws and procedures so that their material manifestations might be seen to conform more nearly to their own jurisprudential claims and connotations. (1)

In other words, such studies accept the law as given and make no attempt either to explain the substance and procedure of law itself or to consider why law as such is an object of knowledge. What they do is to document how the law operates in this or that

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1. Pat Carlen (ed) "The Sociology of Law", Sociological Review Monograph, 23, University of Keele, December 1976, 2.

context. Indeed, as Hunt [1] points out, an orientation toward empirical studies is one of the most pronounced features of the recent resurgence of interest in the sociology of law, both in Britain and the United States. The criticism to be made here is not about empirical studies as such but rather about the 'methodological empiricism' upon which such studies are based. For example, in an overview of trends in the sociology of law in America, Skolnick states that, "the most important work for the sociologist of law is the development of theory growing out of empirical, especially institutional, studies". [2] This sentiment has been endorsed by many others who, like Selznick, [3] have stressed the need for much greater attention to theory as central to the development of sociology of law. Campbell has stated this position categorically in suggesting that, "if characterised by inter-disciplinary research, with little attention given to general sociological theory, and motivated by reformist ideas and a missionary zeal to educate lawyers and law students, sociology of law is likely to contribute little of lasting value". [4]

While it is true to say that much of this empiricist work is

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1. Alan Hunt, "Perspectives in the Sociology of Law", in P. Carlen (ed) 1976:29.

2. Skolnick, 1965:24.

3. Philip Selznick, "The Sociology of Law", in Journal of Legal Education, 12 (4), 1960:521-31; and P. Selznick, "Law, Society and Industrial Justice", New York, Russel Sage Foundation, 1969.

4. Colin Campbell, "Legal Thought and Juristic Values", in British Journal of Law and Society, Vol.1., No.1., 1974:8.

characterised by the lack of an explicit theoretical framework it does, of course, have some sort of implicit theoretical framework. The implicit theory behind these studies is one which views law as a means of social control based on widespread value consensus. (1) In this perspective, law is an embodiment and reflection of societal values, and the central question for these students is to document the extent to which law is administered in accordance with these assumed values. But how does it come about that the law does reflect societal values? What are the processes involved in the ascription of legitimacy to the legal order? Are we to understand legitimacy as based on some sort of understanding of the 'fair and just' operation of specific legal practices and against what standards are we able to judge this? How are we to begin to understand the relationship between law and social organisations? Such questions have not been asked far less answered in the context of 'law in action' type studies and yet they are only a few of the questions which any sociology of law must address itself to. As Carson notes, "law is not merely something that by dint of its relationship with other social phenomena may justifiably be subjected to sociological analysis, it also converges at many points with central sociological concerns". (2) This concern with wider theoretical considerations is reflected in those studies grouped under the second broad heading - emergence of law.

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1. Hunt, 1976:29.

2. W.G. Carson, "The Sociology of Crime and the Emergence of Criminal Laws", in P. Rock and M. McIntosh (eds) "Deviance and Social Control", London, Tavistock Publications, 1974:67.

Emergence of Law

Broadly speaking, within the sociology of law, there have been a number of studies which undertake to explain specific laws in terms of their emergence and development. The emphasis in these studies is on how the content of specific laws relates to wider social, political and economic interests. The questions which they address themselves to range from attempting to understand the conditions under which specifically legal controls come into operation in specific instances, that is, the evolution of legal as opposed to other social controls within society, to explanations of how the particular content of certain laws results from the differential distribution of interest and power in any given society.

All of the studies discussed under this heading involve at least some explicit sociological reflection and go some way toward the development of useful concepts concerning the analysis of law in society. Unlike the studies considered under the heading 'law in action', (the 'socio-legal' approach), studies of the emergence of law have made an important contribution to the development of theory in the sociology of law. For those of us who seek an explanation of the 'social', studies which can treat the emergence of specific laws as sociologically problematic, resulting from the struggle of interest groups with differential access to power, as manifesting state constraint and the like, are an important step forward. Thus by considering in more detail the approach and contribution of such studies the particular problems to which this

thesis is addressed can be thrown into sharper relief.

Many of the studies which attempt to explain the emergence of law - in terms of origin and development - adopt what can loosely be described as a theoretical framework which conceptualises law as the product of the competition between interest groups seeking to influence the emergence and/or development of law in accordance with their particular needs. Many such studies have been oriented towards documenting the wide range of interest groups involved in legal changes, (1) but very few have taken the explanatory power of such an approach much further. Some have reached Quinney's somewhat unsurprising conclusion that, "power, or the ability to determine the conduct of others, is unevenly distributed in society. Those groups which are powerful are able to shape the laws in accordance with their interests". (2) These tautological and commonsense conclusions about the nature of power, conflict and coercion in the emergence of law, are arrived at, in work like Quinney's, because of a failure to address certain central questions about the nature of legal change/development: for example, why is it that certain interests arise at certain times under certain social conditions? How does it come about that certain interests attain power over others at these times? What is the precise locus of the power of these interests?

Carson has pinpointed some of the deficiencies in this kind of analysis of the emergence of law and has attempted to demonstrate

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1. See, for example, Richard Quinney, "The Social Reality of Crime", Boston, Little, Brown and Co., 1970:43-97.

2. Ibid., 43.

how the concepts of conflict, power and interest can be used to develop a sociological understanding of the emergence of law in society. He notes that many sociologists have come to adopt, "the twin themes of conflict and power as the main organizing framework for their analyses of criminal laws", (1) and that, on balance, their emphasis is upon, "criminal law as mirroring diversity of interests, shifting distributions of power and the maintenance of social order through the use of the state's most efficient apparatus of coercion". (2) He cites Turk, for example, who, while acknowledging that coercion and conflict are not the sole bases of social order, finds it useful to "view social order as mainly a pattern of conflict rather than the expression either of consensus or of sovereign wisdom and will". (3)

Again Chambliss, while conceding the extremity of a position which asserts that legal norms are, "simply a device by which persons in positions of power maintain and enhance their advantaged position by using state power to coerce the mass of people", (4) still states that he must conclude, on the basis of the case studies he presents that, "many, if not most of the laws emerge through the efforts of vested interest groups", and that,

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1. Carson, 1974:69.

2. Ibid., 70.

3. Austin Turk, "Criminality and Legal Order", Chicago, Rand McNally, 1969:50.

4. W.J. Chambliss, 'Introduction', in W.J. Chambliss (ed) "Crime and the Legal Process", New York, McGraw-Hill, 1969:8.

"more often than not, the views of the groups in power will be expressed in criminal legislation simply because their perspective prevails among those who make the laws". (1) As noted earlier, Quinney's version of this kind of approach to the study of the emergence of law is even more crudely put when he states that criminal law is "formulated and administered by those segments of society which are able to incorporate their interests into the creation and interpretation of public policy". (2)

While such conclusions may be valid, many emergence studies of law fail to develop the notions of power, interest or conflict into explicit theoretical concerns. Indeed, it is precisely this lack of development of such concerns which leads to some of the gross over-simplifications contained within some of the studies of the emergence of criminal law. While Carson notes that it is not

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1. Chambliss, 1969:10. In Chambliss' own study, "A Sociological Analysis of the Law of Vagrancy", in Chambliss, 1969:51-63 he considers the main periods of change with respect to the English law of vagrancy and relates each period/change to developments in the economic structure of English society. Within the analysis, Chambliss places his notions of power and interest in the context of broad historical and institutional developments: he traces the emergence, successive declines and resurrections of the law in different socio-historical contexts. Nevertheless, the main part of his analysis and the conclusions from the specific study focus on how this instance demonstrates the impact of "vested interest groups" and "status groups" on the law (1969:62). Thus while his work shows an awareness that the study of the development of the law of vagrancy reveals the processes involved in the emergence of specific interest groups, how they achieved and used power, how problems arose within specific structural contexts and generated concerns with the law and effected specific changes to the law (1969:61-63), Chambliss does not develop these issues into explicit theoretical concerns.

2. Quinney, 1970:39.

surprising that a link should be drawn between the emergence of criminal laws and power since, "if power involves the ability of some individuals or groups to impose their will on others, then law with an organized and authoritative apparatus of coercion might seem to provide a highly expedient mechanism for its exercise", (1) he also draws attention to the lack of subtlety in a fairly crude power/conflict approach to the emergence of laws. On a strictly empirical level he demonstrates that the issues of how power and interest are related to law creation in the criminal area are complex. For example, criminal liability is imposed upon powerful interest groups in Great Britain under a variety of statutes such as the Companies Act, the Factories Act and the Pure Food and Drugs Act. In discussing his own work and that of others, (2) Carson notes that, while there are only infrequent criminal proceedings under such statutes, barriers to the efficient implementation of such laws may be built in at the legislative stage itself, and there are examples of criminal laws which, on the surface, seem antithetical to the interests of the powerful or irrelevant to such groups. One explanation for this, says Carson,

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1. Carson, 1974:71.

2. See, in particular, W.G. Carson, "White Collar Crime and the Enforcement of Factory Legislation", in British Journal of Criminology, 10 (4):383-98; R. Hofstadter, "What Happened to the Anti-Trust Movement", in J. Gusfield (ed) "Protest, Reform and Revolt", New York, Wiley, 1965; V. Aubert, "Some Functions of Legislation", in Acta Sociologica, 10 (1-2), 1966:98-120; and G. Kolko, "The Triumph of Conservatism", New York, Quadrangle Books, 1967.

is that there are, for example, as Duster [1] and Gusfield [2] have argued, often symbolic functions to legislation. Clearly, the question of how power, conflict and interest are related to the emergence/development of legislation is a much more complex one than some of the studies mentioned earlier would suggest.

Carson goes on to conclude that:

> For me the process may be more accurately portrayed as one in which many powerful groups compete and from time to time coalesce, giving rise to legislation frequently distinguished by compromise rather than by outright victory. (3)

He demonstrates that there is a substantial consensus over a range of criminal laws at any stage in time and suggests that this fact raises the need for a, "meaningful sociological differentiation between types of criminal law", an approach which treats, "the emergence of consensus as problematic and for a sociology of law that concedes the centrality of social change". [4] He goes on to make the very significant and critical point that:

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1. T. Duster, "The Legislation of Morality", New York, Free Press, 1970.

2. J.R. Gusfield, "Symbolic Crusade: Status Politics and the American Temperance Movement", Urbana, University of Illinois Press, 1963.

3. Carson, 1974:81.

4. Ibid., 82.

> The distribution of power is obviously itself a dependent variable, a fact which must ultimately draw the sociologist of law back to a wider analysis of the social order. As with any other sub-division of the field of sociology, the sociology of law will only realise its true potential by maintaining its allegiance to the mainstream of sociological thought. (1)

For example, citing Lenski, (2) Carson notes that criminal law has many self-defeating properties when used "merely as a coercive means to the ends of acquiring and retaining power". (3) Drawing on the Weberian tradition, he argues that a justification for any system of domination must be made in terms of an appeal to the principles of its own legitimation, and concludes that, as far as the criminal law is concerned, the "commonest form of legitimacy derives from belief in legality itself". (4)

Carson's work on the emergence of criminal laws represents an important step forward from some of the other studies mentioned earlier, insofar as he draws our attention, in an explicit way, to some of the central theoretical concerns within sociology of law. He realises, for example, that the distribution of power is itself a dependent variable, that the ascription of legitimacy to the legal order is problematic and that, "where societies approximate to the legal-rational, claims to authority cannot be divorced from legality, nor can the constraints which the latter imposes upon the

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1. Ibid., 82.
2. G. Lenski, "Power and Privilege", New York, McGraw-Hill, 1966.
3. Carson, 1974:83.
4. Ibid., 83.

exercise of authority be ignored", and again, that, "to talk of legality as distinct from the substantive content of specific criminal laws leads into realms of thought in which contemporary sociologists have not been notably prone to wander". (1) Yet it is into precisely these realms of thought that sociologists of law must wander in order to develop adequate theoretical and conceptual tools for the study of law in society.

While Carson does recognise that the notion of legality is problematic and is linked in some sort of way to the development of legal-rational types of society, he does not specifically address himself to an explanation of the nature of this link. Rather, he concludes with Selznick that:

> Properly understood, the concept of legality is more critical than celebrationist ... An affirmative approach to legal values need not accept the defensive rhetoric of men in power. On the contrary, it offers principles of criticism to evaluate the short-comings of the existing system of rules and practices. (2)

But what is this concept of legality, under what conditions does it emerge and what is its significance?

To put it another way - what is there about a system of norms and rules that makes it distinctively legal? In contradistinction to Weber's notion that the distinctively legal emerges when there exists a coercive apparatus for norm enforcement,

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1. Ibid., 84.

2. Selznick, 1969:14.

Selznick argues that the key concept is <u>authority</u> not coercion. For him:

> The legal order is pre-eminently an authoritative order, and the fundamental problems of jurisprudence stem from the puzzles and ambiguities associated with identifying the sources of authoritative rules, the authoritative application of rules, and the nature of authoritative change in existing rules. To understand the distinctively legal we must look to a special kind of obligation, an obligation to act in accordance with authoritatively determined norms. (1)

Such a position is, as Skolnick remarks, "related to a 'natural law' conception of legality", (2) in which legality is regarded as an instance of a 'normative system', a 'master ideal' which is implemented in accordance with rational norms. Skolnick argues that from Selznick's position one may, in principle, conceptualise degrees of legality, and moreover, that there "may be a tendency toward legality as an inherent characteristic of human society - as man strains toward freedom, so too may he aspire toward a rule of law". (3)

Skolnick draws our attention to the importance of the distinction between the notion of legality and the operation of law:

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1. P. Selznick, "The Sociology of Law", <u>in</u> D. Sills (ed) "International Encyclopedia of the Social Sciences", Vol.9., New York, Free Press, 1968:51.

2. Skolnick, 1965:29.

3. Ibid., 29.

> It is common for sociologists to ignore the rule of law in society. This tendency derives from a too facile dismissal, indeed misunderstanding, of the nature of legality arising out of the obvious limitations of rules in maintaining social order. Such writers do not comprehend a distinction between order and law, between conformity to rules and a commitment to restraints upon arbitrary authority. There is a confusion of legalism with legality, of rules of law with a rule of law. (1)

It is his view that for sociology of law to develop we should be concerned to understand the nature of legality and the conditions under which it emerges as an ideal. He calls for the development of a "meaningful set of comparative categories" which will enable sociologists to study the "conditions under which different types of legality tend to emerge". (2)

While Skolnick makes the important distinction between rules of law and the notion of 'the rule of law', legalism and legality, the rationale behind his argument is one which, with Carson, Selznick and others, is simply to view legality as an ideal to be striven for - legality is the ideal of the legal order which provides the basis on which there can be a reduction in the degree of arbitrariness in the operation of positive law. This approach, however, not only masks the ideological nature of the notion of 'the rule of law' but also side-steps the very important prior question which they all touch on, that is, to furnish the

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1. Ibid., 38.

2. Ibid., 39.

development of the notion of legality and legal regulation with an adequate explanation.

Although the studies discussed under the heading 'emergence of law' do not address themselves to the problem of providing an explanation of why legal regulation is necessary they do make an important contribution to our understanding of the emergence and development of specific laws insofar as they see the processes of law creation and its application in definite historical and institutional contexts, thereby drawing attention to the wider societies from which such laws emerge. The law is no longer regarded as somehow 'given' in some unproblematic way, but rather as being created by men, albeit by men with powerful positions in any given society, and later adhered to, as legitimate, by most members of that society. Such analyses have drawn attention to the role of conflict, power, interest and consensus in society in the formation and continuance of specific laws. Nevertheless, while such concepts have proved to be useful heuristic devices in the analysis of the origin and development of specific laws they have not been articulated within a coherent theoretical framework. Power, conflict, interest and consensus are, in themselves, derivative concepts in the sense that they are dependent on some (either explicit or implicit) notion of the nature of society, social relationships and the like. In this sense they are not fundamental concepts to our understanding of law and legal forms but are premised upon some other concepts which are not usually articulated.

Thus, while concepts such as 'power', 'domination' and 'interest' are certainly useful in attempting to articulate and explain how specific laws and their contents emerge and persist within the context of legal regulation as a generalised form they do not, in themselves, help us to explain why legal regulation exists as a form in our society and what part it plays in that society's very existence. It could, for example, be argued that legal regulation is essential to bourgeois society in the sense that both come into existence simultaneously and their conditions of existence are mutually interdependent. It is not enough to investigate the content of specific legal regulations during specific periods nor to provide detailed analyses which distinguish between types of criminal laws (though such studies are also required). The problem which remains, and which the studies considered under the 'emergence of law' heading do not address themselves to, is <u>why law</u>? While not wishing to underrate the importance of analyses of legal processes, this is certainly one of the central concerns of sociology of law: why this particular form (that is, the legal) rather than any other? Legal regulation itself is a definitive social/historical form which requires an explanation.

Generally then, studies of the emergence of law have passed over any consideration of whether or not it is possible to create formal definitions of general theories of law in society. Instead, attention has been focused on the specific content of legal norms and the historical development of particular legal institutions.

Thus we are provided with detailed accounts of the specific content of the law in this or that particular period, that is, the law at a given stage in the course of its development. The explanation and understanding of law is therefore regarded exclusively from the point of view of its content and the problem of the legal form as such remains unposed.

As Pashukanis argues:

> If we abjure the analysis of basic juridic concepts, we shall get merely a theory which explains for us the emergence of legal regulation from the material demands of society, and shall consequently get a conformity between legal norms and the material interests of particular social classes. But legal regulation itself - notwithstanding the wealth of the historical content which we pack into this concept - will remain as a form and unanalyzed. (1)

Thus, the studies considered under the heading 'emergence of law' cannot form the basis for attempting to develop general theories of law and society. These studies presume their object of knowledge - they do not ask the question, why law? Law is simply assumed to exist and is not treated as the fundamental problem requiring explanation.

Theorising Law and Society

Within the recent body of literature concerning sociology of law many of the studies which attempt to confront theoretical issues derive from or are compatible with Marxism. Such studies/

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1. Pashukanis, 1951:116-7.

perspectives generally provide at least some explicit theorising about the relationship between law and society, and, as such, go some way toward the development of explanatory concepts. To focus on these studies is not, of course, to deny the importance of other sociological traditions, notably Weberian and Durkheimian, in theorising the relationship between law and society, but merely to emphasise how these approaches relate to the concerns of this thesis. The studies/approaches considered under this heading present a challenge, either explicit or implicit, to what Carlen refers to as the belief in the "essential and ultimate morality of legality which continues to provide the immanent rationale for the increasing number of socio-legal studies ..." (1)

In Carlen's collection of papers on the sociology of law, it is suggested that each article is "partly constitutive of the major theme which predominates, the analysis of law as a mode of reproduction of the social order". (2) Hunt, for example, in a paper titled, 'Perspectives in the Sociology of Law', (3) articulates many of the assumptions which he claims lie behind what he terms 'normative analyses of law', and, in the process of doing so, explains what he considers to be the main problematic for a materialist approach to the study of law, that is, to

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1. Carlen, 1976:1.

2. Ibid., 4.

3. Alan Hunt, "Perspectives in the Sociology of Law", in Carlen (ed) 1976:22-44.

demonstrate, theoretically, how law is a mode of reproduction of the existing social order.

Law as a means of domination is the specific problem reflected on by Hunt in his consideration of law as a mode of reproduction of the social order. Relying heavily on the work of Gramsci, and in particular the distinction which Gramsci makes between 'hegemony' (1) and 'direct domination', Hunt spells out the theoretical importance of the difference between 'ideological' and 'repressive' domination. Essentially Hunt puts forward the hypothesis that:

> In the pure form of the bourgeois democratic state the primary role in the maintenance of the social order is fulfilled by the process of ideological domination and that repressive domination plays a secondary and reinforcing role. (2)

While acknowledging that some of the features of law as a means of domination are consistent with many of the functional analyses of law he has criticised, Hunt claims that the distinctive features of his approach stand out when related to Gramsci's concept of 'hegemony'.

For Hunt, the crucial aspect of Gramsci's notion of 'hegemony' is that it is an active process in the sense that it designates the process of the creation and mobilisation of consent as well as

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1. Gramsci defines hegemony as: "the 'spontaneous' consent given by the great mass of the population to the general direction imposed on social life by the dominant fundamental group (ruling class)". (See, A. Gramsci, "The Intellectuals", Prison Notebooks, Lawrence and Wishart, London, 1971:12, cited by Hunt, 1976:42).

2. Hunt, 1976:37.

the fact of consent and further, that social classes contend in the exercise of hegemonic control. Such a concept is useful to the elaboration of a theoretical framework for the sociology of law:

> By using the concept of 'hegemony' we see that neither consent nor dissent are regarded as 'natural' - rather, they are the result of the activities that constitute the hegemonic struggle in society, and in which law participates. (1)

While such materialist explanations of law can theorise law, in terms of such concepts, as being a mode of reproduction of social order, as a form of ideological and/or repressive domination or as manifesting state constraint, we are still faced with the problem of the necessity of legal as opposed to any other form of regulation. In Hunt's particular contribution he makes no claim to have developed or articulated a general theory of law as such but rather to have provided some concepts which are useful in elaborating a conceptual framework for the study of law. Nevertheless, the ultimate usefulness of such concepts cannot be adequately assessed without some attempt to address the logically prior question - <u>why law</u>?

Indeed it is precisely this question which Pashukanis confronts when he states that:

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1. Hunt, 1976:43.

> Marxist theory must indubitably not merely investigate the material content of legal regulation during definite historical epochs, but furnish to legal regulation itself - as a definite historical form - a materialist interpretation. (1)

As Hirst notes, Pashukanis is concerned to "explain law in the specificity of its form". (2) Pashukanis criticses other general theories of law, such as natural law and legal formalism, which, while acknowledging the specificity of the legal form, fail to analyse law as a definite historical form. Such theories, he argues, tend either to eternalise law in the form of some sort of representation of fundamental values or to translate it into a product of juridic reasoning. (3)

Pashukanis also criticises sociological and psychological theories of law which, while attempting to explain law in terms of its social and historical emergence and development, do not address themselves to the question of the specificity of the legal form. As Pashukanis notes, such theories apparently go toward providing a materialist explanation of social phenomena by casting the explanation of law in the context of a struggle of interests, manifesting state constraint and the like, and indeed, many Marxist writers have adopted this kind of methodology in their explanation of law along with the introduction of the Marxist notion of class struggle. However, in such explanations, the result is, "a history of economic forms with a more or less faint

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1. Pashukanis, 1951:116.
2. Paul Q. Hirst, "On Law and Ideology", London, Macmillan, 1979:106.
3. Pashukanis, 1951:115.

juridic coloration, or a history of institutions - but by no means a general theory of law". (1)

One of the principal difficulties in attempting to understand the Marxist theory of law concerns the apparent variability in expressions which at times suggest a very high degree of determination of law by the economic 'substructure' of society and others which suggest that law has a great deal of autonomy. For example, statements such as:

> The jurist imagines that he is operating with <u>a priori</u> principles, whereas they are really only economic reflexes, (2)

are not easily reconciled with arguments which stress that in the modern state the law:

> Must also be an <u>internally coherent</u> expression which does not, owing to inner contradictions, reduce itself to naught. And in order to achieve this, the faithful reflection of the economic conditions suffers increasingly. All the more so, the more rarely it happens that a code of law is the blunt, unmitigated, unadulterated expression of the domination of the class. (3)

Nevertheless, despite the variability of statements about the degree of determination of law by the economic substructure, the Marxist <u>theory</u> of law "conceives it as a 'superstructure' brought into existence by the private possession of the means of production

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1. Pashukanis, 1951:116.

2. K. Marx and F. Engels, "Selected Works", Moscow, Foreign Languages Publishing House, 1950, I:482.

3. K. Marx and F. Engels, "The German Ideology", Moscow, Progress Publishers, 1968:645.

and the consequent division of society into classes". (1) But what then is meant by 'law' conceived of as a 'superstructure' in the Marxist sense?

The definition of the state as the institution controlling organised force and the means of legitimation within a society is central to the conception of law in much Marxist theorising. Many Marxist writers agree with Lenin's assertion that "an essential feature of the state is its inseparable connection with the law". (2) Thus, laws are defined as rules specified and enforced by the state. The connections between mode of production, class, state and law are exemplified in the following:

> Law and the state are not two distinct phenomena - one preceding the other - but are two sides of one and the same phenomenon: class dominance, which is manifested (a) in the fact that the dominant class creates its apparatus of constraint (the state), and (b) in the fact that it expresses its will in the shape of rules of conduct which it formulates (law) and which - with the aid of its state apparatus - it compels people to observe. (3)

In the last instance then, laws are enforced by the coercive apparatus of the state - the feature which Weber identifies as the definitive characteristic of law:

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1. Hirst, 1976:96.

2. V.I. Lenin, "Democracy as a form of Government of Society", in A. Spirkin (ed) "Lenin on State and Democracy", Moscow, Novosti Press Agency Publishing House, 1967:19.

3. S.A. Golunskii and M.S. Strogovich, "The Theory of the State and Law" (translated by H. Babb) Moscow, The Institute of Law of the USSR Academy of Sciences, 1940:366.

> An order will be called law if it is externally guaranteed by the probability that coercion (physical or psychological), to bring about conformity or avenge violation, will be supplied by a staff of people holding specially ready for that purpose. (1)

Moreover, laws will necessarily reflect the conditions which determine the nature of the state, that is, the class structure and the mode of production by which it is determined:

> Your jurisprudence is but the will of your class made into a law for all, a will whose essential character and direction are determined by the economic conditions of existence of your class. (2)

The nature of law is thus regarded as a product of the nature of the substructure which itself determines the manner of the determination of class relations.

The status of law as practices which reflect the interests of the dominant class does not, however, necessarily imply that the formative interests will be nakedly exposed. The nature of the relationship between class interests and law will to a greater or lesser extent be masked to both members of the dominant class and the underclass by virtue of the proposition that perceptions of social order are conditioned by the prevailing

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1. Max Weber, "Max Weber on Law in Economy and Society", edited by Max Rheinstein, Cambridge, Mass., Harvard University Press, 1966:5. Weber's definition can be regarded as being more open to criticism than the Marxist definition insofar as, unlike the latter, "he offers no satisfactory theoretical ground for identifying the requirements of the legal order as he does" (Selznick, 1968:51).

2. Marx and Engels, 1950, I:47.

dominant-class ideology. For example, as Poulantzas [1] and Miliband [2] both stress, it is for precisely this reason that the personnel of the state - the legislators, the executive, the judiciary etc. - need not be drawn exclusively or even overwhelmingly from the dominant class itself. Personnel from the underclass may be drawn into the state hierarchy on grounds of merit, but since merit is assessed in terms of the state ideology, maintenance of the status quo is not placed at risk.

Nevertheless, whatever the degree of sophistication, the dominant tendency in 'materialist' analysis has involved the reduction of law to the state and to class coercion and, as Hirst notes, "in this reduction the specific social necessity of the form of law disappears, it becomes mere legality, a legitimisation for class oppression". [3] From his analysis of this dominant tendency in Marxist theory, which regards law as either a means by which the relations of production are regulated or as having the function of regulating the class struggle, Hirst concludes that, "law is uncovered as an economic necessity and as a cloak for class violence", and, as such, "both forms of analysis reduce the legal forms to exigencies of the mode of production of which they are an effect". [4]

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1. Nicos Poulantzas, "Political Power and Social Classes", (translated by T. O'Hagan) London, NLB and Sheed and Ward, 1973.

2. Ralph Miliband, "The State in Capitalist Society", London, Quartet Books, 1973.

3. Hirst, 1979:107.

4. Ibid., 97.

Pashukanis, however, in calling for a materialist explanation of the specificity of the legal form attempts to break with the tendency in Marxist theory to view law as epiphenomenal: that is, the reduction of law to the state and to class coercion. For example, in commenting upon Stuchka, the Soviet jurist, Pashukanis states:

> Stuchka was perfectly correct in putting the problem of law as a problem of social relationship. Instead, however, of starting to search for the specific social objectivity of this relationship, he reverts to the ordinary formal definition ... Law no longer figures in this general formula furnished by Stuchka as a specific social relationship; its character (as is the case with all relationships in general) is that of a system of relationships which answers to the interests of the dominant class and of safe-guarding that class with organized force. Within this class framework, consequently, law as a relationship is indistinguishable from social relationships in general ... question: how do social relationships become juridic institutions? How is law converted into itself? ... Stuchka's definition ... discloses the class content comprised in juridic forms, but fails to explain why this content takes such a form. (1)

He therefore criticises the Marxist theory of law for its failure to develop any clear concept of law, and where such concepts have been articulated, Pashukanis attempts to demonstrate how they are misguided. For example, he criticises Renner, who places, "at the foundation of his definition of law the concept of an imperative addressed to the individual by society (considered as a person)". (2)

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1. Pashukanis, 1951:139-40 - emphasis in original.

2. Ibid., 117.

Renner's study of the 'Institutions of Private Law and their Social Functions', (1) regarded as the classic Marxist text on the law of property, (2) derives from an adherence to formalist legal philosophy which, as Hirst notes, was "put to work in the body of his Marxism". (3) The formalist thesis about the autonomy of legal concepts is used by Renner in such a way that he can treat the "institutions of private law as an independent legal totality, recognising the specific legality of their interrelations rather than reducing them term by term to the economic facts they reflect". (4)

What Renner does is to demonstrate that there is not necessarily a constant and immediate correspondence of legal institutions and economic forms. For example, he starts his analysis of the way in which legal institutions serve economic functions by a consideration of the social relations of simple commodity production where he finds that the institutions of private law do correspond to the categories of the economy. Non-correspondence is produced by the advent and evolution of capitalism until it creates the conditions for a new correspondence between socialist legal forms and a planned economy. Thus, while there is not an immediate and constant correspondence between legal

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1. Karl Renner, "The Institutions of Private Law and their Social Functions", London, Routledge and Kegan Paul, 1949.

2. Hirst, 1979:122.

3. Ibid., 122.

4. Ibid., 122 - emphasis in original.

institutions and economic forms, Renner can still maintain that legal institutions are a direct expression of economic needs. (1)

Although Renner does make the important distinction between the form of law and the social functions which legal institutions perform, his understanding of the form is by no means analagous to Pashukanis' attempt to analyse the specificity of the legal form. What Renner means by the form of law refers to the form of the terms and specifications of the law. What Pashukanis means by furnishing the legal form as such with an explanation refers to some concept of law-as-origin, that is, when did the specifically legal form originate and why? Thus, for Pashukanis, Renner's conception of law is misguided since it cannot address itself to the question of the origin of the legal form.

In his analysis, Pashukanis claims that private law, the law of property in particular, is the point of origination of the form of law. He poses the problem of law as a problem of social relationships - a specific social relationship. Thus, he asks:

> Where shall we search for the unique social relationship whose inevitable reflection is the form of law? We shall seek infra to prove in greater detail that the required relationship is the relationship of possessors of goods. (2)

For Pashukanis then:

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1. Hirst, 1979:123-4.

2. Pashukanis, 1951:138.

> The specific fact distinguishing the legal order from every other social order is that it is based upon private isolated subjects. A norm of law acquires its differentia specifica - which distinguishes it from the general mass of governing rules (including moral, aesthetic, and utilitarian rules) - by the fact that it presupposes a person endowed with a right and, moreover, actively asserting a claim. (1)

This general concept of law allows Pashukanis to make an analytical distinction between public and private law and to insist that private law defines the essence of the legal form. In private law, right can be understood only by analogy with possession: right is a defining characteristic of the legal subject. As Hirst notes, "it is in pursuit or defence of a right that its possessor appears in law and it is as the sphere of regulation of this possession between subjects that the law itself comes into existence". (2)

Thus, for Pashukanis, law arises as a form of mediation/resolution of disputes between separated individuals over exclusive possession, and it is the characteristics of commodity exchange which create the possibility of disputes taking a form which is formally resoluble. The concept of legal subject (the possessor of a right) is a development from the subject of commodity exchange (the possessor of alienable things capable of entering into an exchange of equivalents with another possessor). Thus, for Pashukanis, "the form of law emerges directly from the commodity form: it is an effect of the social relations of

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1. Pashukanis, 1951:153 - emphasis in original.

2. Hirst, 1979:108.

commodity production". (1)

Hirst criticises Pashukanis' conception of law by turning the latter's posing of the problem of law as a problem of form against him. Pashukanis uses his concept of law as form to attempt to establish the specificity of legal norms thereby avoiding their reduction to mere ideology. Nevertheless, Hirst points out that Pashukanis':

> Construction and defence of the form also involves a particular content: in being defined in its form law is given a unitary origin, nature and social function. Possessive right, the essence of the legal form, is a derivative of commodity relations between economic subjects. One reductionism, of law to class oppression, is rejected in the interests of another, of legal form to commodity form. (2)

Thus Pashukanis, in seeking a general theory of law, fails to break with the dominant tendency in materialist explanations of law which regard law as epiphenomenal, since, ultimately, his argument leads to the reduction of the legal form to commodity form. In confining his theory of law to a perspective which regards law as an expression of the relationships of commodity-capitalist society, Pashukanis is unable to explain the existence of law in other societies. Moreover, a theory which explains law as recognising and regulating prior social relationships is unable adequately to account for "significant instances of the

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1. Ibid., 119.

2. Ibid., 110.

construction in legislation and application of categories of subject". (1) Indeed, this thesis is addressed to an explanation of one significant instance of the construction in legislation, where law not only created but also refined, regulated and transformed, the relationships involved in the case of chattel slavery.

In his critique of Pashukanis' posing of the problem of law as a problem of form Hirst recasts the problem in terms of legal institutions and practices: "to conceive the law as certain institutions and practices is to raise the question of their conditions of existence and operation". (2) From this position, he suggests that both law and legislation must be conceived of as processes (3) where various conditions, for example, of access, and influences, which act upon the process, are effective insofar as they are given form through legal procedures. However, "conditions and influences are not themselves legal forms or effects: it is only through and as legislation and legal practice that they are effective. Legislation is not an expression, it is a translation into another and specific language". (4) In arguing that: "legal apparatuses and categories have political

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1. Paul Q. Hirst, "Law, Socialism and Rights", in Pat Carlen and Mike Collison (eds) "Radical Issues in Criminology", Oxford, Martin Robertson, 1980:60.

2. Hirst, 1979:113.

3. Hirst uses the term process in the sense of Marx's definition in 'Capital' as meaning a "synthesis of many determinations".

4. Hirst, 1979:113.

and other conditions of existence and effectivity, but within these conditions (however limiting) they constitute a specific sphere of effectivity which synthesises rather than merely reflects the determinations acting on it" (1) Hirst is able to provide us with a perspective which neither views law as essence-in-origin nor as simply reducible to ideology, coercion and the like.

In Hirst's perspective we are no longer concerned with the question of law-as-origin as such but rather primarily with the question of the nature and effectivity of legislative/legal systems. In effect, this means that we must consider the various processes of enactment and adjudication, understand the conditions necessary to them and explain the effects which they produce. (2) For Hirst:

> The general categories for such an analysis must be limited to specifying what is involved in the determination of those processes and conditions. What law and legality is cannot be defined as a general concept independent of legal system ... Legal institutions work through and as definite bodies of discourse (although they and their effects are not reducible to discourse and discursive effects); definite categories are part of the action of these institutions as social relations. Law is defined in and by its discourses and categories. (3)

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1. Ibid., 113-4.

2. To some extent this is what some of the studies considered under the heading Emergence of Law attempted to do but without explicitly addressing themselves to the question of why legal regulation in the particular instance or what the precise effects of legal regulation might be.

3. Hirst, 1979:112.

In other words, this perspective suggests that the question to be asked is why law in specific instances rather than why law in some general sense. Such a perspective is developed throughout this thesis since the central concern of this work is to explain why and how law, in the form of legal institutions and practices, created, regulated, transformed and ultimately eradicated, the social relationships involved in the system of chattel slavery which existed from the colonial period in North America until the post Civil War era. In the following section, the type of analysis proposed and the extent to which it relies on a theoretical orientation which regards law as a social practice which is produced and reproduced at the same time as it produces and reproduces social relations, is more fully discussed.

PROPOSALS FOR THE ANALYSIS OF LAW AND SOCIETY

On the basis of the preceding review of the three main approaches which have broadly characterised the recent resurgence of interest in the sociology of law, I now propose to attempt to articulate an adequate conceptual framework for the analysis of the relationship between law and society. As mentioned earlier, sociology of law is still lacking in detailed analyses of the specific relationships between specific laws and specific social formations and more general theorising which is 'grounded' in such analyses. The approaches which have been considered tend, to some extent, to be polarised between those which generate somewhat

isolated case studies which, though often established well enough empirically, are largely unconcerned with the development of concepts within the context of more general theorising, and those which are concerned to provide general, all-embracing theoretical positions on the nature of law but which are by no means unambiguously substantiated by detailed research.

It is the purpose of this thesis to attempt to go some way toward bridging this gap. By analysing a specific instance, namely, the emergence and development of chattel slavery as it existed and was defined in Great Britain and the North American colonies throughout the eighteenth and nineteenth centuries, an attempt will be made to provide an explanation of the specific relationships between law and society in that particular instance, and also to make some contribution toward more general theorising about the nature of the relationship between law and society. In order to undertake such an analysis, however, it is clearly necessary to indicate, from the outset, the broad conceptual framework within which the analysis will proceed. In outlining the framework, I am primarily concerned, at this stage, to specify those aspects of the approaches reviewed which inform my own perspective and to provide some definition of the concepts to be employed in my analysis.

As was noted earlier, studies of the 'law in action' tend to devote their efforts to an attempt to document how operative law corresponds (or otherwise) to the 'law on the books'. The

central question addressed by such studies is to describe the extent to which law is administered in accordance with certain implicitly understood ideals of justice to which such research holds. As such, these studies, either explicitly or implicitly, present a discontinuous and disjointed understanding of the nature of the relationship between law and society. In various forms, and with varying degrees of elaboration and sophistication, those who adhere to a 'law in action' type of approach, present us with a view of law as existing somewhere 'out there' though clearly subject to a number of social pressures which may act upon it producing a variety of social consequences. Clearly, a position which states that there are a multiplicity of pressures acting upon law (however conceived and expressed) producing a multiplicity of social outcomes, without giving any theoretical account of the nature of the relationship between these pressures, the law, and outcomes, is not a fruitful basis upon which to explore the complexity of the relationship between law and society.

Studies of the emergence of law have, however, demonstrated concern for wider theoretical issues and have provided some important insights into how to study the relationship between law and society. In their attempt to explain specific laws/legal practices in terms of their emergence and development, studies of the emergence of law have located their explanations within definite historical and institutional contexts. The emergence of specific laws is regarded as sociologically problematic: law is

no longer viewed as somehow 'given' in some sort of unproblematic way, but rather as being created by men in definite and specific historical and institutional contexts. While it was noted that such studies do not address themselves to an explanation of the need for legal regulation as such, that is, the question - why law? - the approach adopted does have a contribution to make to the analysis of the relationship between law and society.

Some of the attempts to explain the emergence of laws/legal changes post facto have generally been made in terms of the use of concepts such as 'conflict', 'power', 'interest' and 'interest groups', and many of these attempts have resulted in explanations characterised by tautology and triviality. This, however, is not to suggest that the notions, in themselves, cannot be developed in a useful way. For example, the problems encountered in Quinney's approach are largely attributable to his failure to develop any adequate conceptual scheme which could account for the appearance of particular interests at specific times in specific contexts or which could provide a satisfactory explanation of the distribution of power and of changes in the distribution of power which could account for the ability of various 'interest groups' to achieve their desired ends. Nevertheless, since laws are clearly created by men acting in specific ways then notions of power, interest and conflict are of importance in the sense that they provide a means of articulating the nature of the link to be made between the emergence/development of specific laws and the specific social formations of which they are a part.

It is not, however, enough merely to provide explanations in terms of these notions: the nature and appearance of power and interest must also be explained. Reference to some broader sociological and historical process - such as the development of capitalism - which may account for the nature of power and the effectivity of interest groups must be made in order to take the explanatory power of these concepts beyond tautology. Moreover, sociological explanations of the emergence and development of specific laws cannot simply refer to other social phenomena as providing the explanation without accounting for the human actions through which such laws come about. The context in which laws are negotiated must be examined if adequate explanations of the nature of the link to be made between law and society are to be given. In other words, the impact of structural changes on legal development requires to be traced in some detail. As Rock suggests, "between 'social structure' and legislation there are many mediating activities which cannot be simply dismissed or guessed at". (1)

One of the criticisms made of studies concerning the emergence of law was that many did not explain what was meant by 'power', 'interest' and the like. To the extent that such concepts will be utilised in my own analysis it is therefore necessary to provide some definition of what I take these concepts to mean. What I take the concept of <u>power</u> to mean is largely predicated upon

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1. Paul Rock, "Deviant Behaviour", London, Hutchinson, 1973:8.

Giddens' [1] definition. For Giddens the conception of power is logically related to the conception of action. Action involves the application of "means" to achieve specific outcomes and power represents the capacity of the actor to assemble resources which will constitute these "means". In this sense, "power refers to the transformative capacity of human action", where the actor can intervene in a series of events and alter their course if he so chooses. In a narrower sense, however, power can be defined as a property of interaction where the capability of any given actor to secure an outcome depends on the capability of another actor in resisting the claim in question. This is the sense in which men have power "over" others, and it is in this sense that power is synonymous with domination. [2]

In both the above senses, the concept of power refers to capabilities and there is no intrinsic implication within that concept of the necessary existence of conflict. This definition of power is consistent with what is perhaps the most famous definition of power in the sociological tradition, namely that of Weber, who defines power as, "the capacity of an individual to realise his will, even against the opposition of others". [3] Thus, the relationship between power and conflict is defined as a

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1. Anthony Giddens, "New Rules of Sociological Method", London, Hutchinson, 1976.

2. Giddens, 1976:108-112.

3. Weber, 1966 (ed) 224 - my emphasis.

contingent rather than a necessary one. As Giddens notes, many authors who have quoted and claim to have adopted Weber's definition of power have significantly omitted the word "even". He cites, for example, Parsons, who, in his omission of this word has argued that power, by definition, presupposes conflict, because power can only exist when the resistance of others has to be overcome and controlled. (1)

The concept of interest, however, is directly related to the concepts of conflict and solidarity. Although power and conflict are often associated with each other in social life, it is not because one inevitably implies the other, but rather because power is theoretically linked to the pursuit of interests in society and men's interests do come into conflict. Thus, while power is characteristic of every form of human interaction, division of interest is not necessarily so, as evidenced by the fact that men's interests are often shared in common, resulting in solidarity. The use of power in interaction must be understood as the capacity to bring resources into interaction which can direct its course, including the possession of "authority" and the threat of force. (2)

While such concepts will be useful in my analysis of the emergence and development of the law pertaining to chattel slavery it should be emphasised that they are of use only within the context of an attempt to understand the importance of legal

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1. Giddens, 1976:112.

2. Ibid., 112-3.

regulation in the context of more general theorising about the nature of the relationship between law and society.

In reviewing some of the recent theoretical approaches to understanding the relationship between law and society it was noted that the dominant tendency in materialist analyses of law is reductionist in the sense that law is reduced to the state and to class coercion. For such analyses the question of the specificity of the legal form is irrelevant insofar as it is regarded as 'mere' legality - a legitimation for class oppression. Legal forms are simply reduced to the status of exigencies of the mode of production of which they are an effect. Even sophisticated analyses, such as Renner's classic work on the law of property, can lead to a similar conclusion. Thus while Renner, through his analytical distinction between the form and social function of law, emphasises that legal categories and legal practice and its social effects do not necessarily correspond and demonstrates that there is no necessary immediate and constant correspondence between legal institutions and economic forms, legal institutions are, nevertheless, regarded as a direct expression of economic needs.

In an attempt to break with this tendency in Marxist analysis, Pashukanis concerns himself directly with an explanation of law in the specificity of its form. He argues that while materialist explanations can disclose the class content in legal forms they cannot provide an adequate explanation of why this content takes

this specific form. And, although Pashukanis does not himself solve the problem of the relationship between form and content, he does draw attention to the central question for sociology of law - why law? That is, under what conditions do specifically legal controls develop in society and why? And what are the consequences of legal regulation for that society, that is, what is the precise nature of the effectivity of legal regulation?

Pashukanis also makes an important contribution in posing the problem of law as a problem of social relationships. However, it is in answering the question he sets himself about what kind of social relationship defines the legal form that he falls into the same trap he criticises others for. Hirst argues that because Pashukanis poses the problem of law as a problem of form this leads Pashukanis to analyse law-as-origin. In so doing Pashukanis reaches the conclusion that possessive right is the essence of the legal form and such right is premised upon commodity exchange taking the form of equivalence. Thus, Pashukanis ends up by substituting one form of reductionism by another - in this case the legal form is reduced to commodity form. Nevertheless, in posing the problem of law as a problem of social relationships, it is not inevitable that we come up with Pashukanis' answer. Where Pashukanis goes wrong is in his assumption that bourgeois law is defined by equivalence in social relationships. This is clearly not the case as any legislation on strict liability offences amply illustrates as does Hirst's analysis of the importance of the legal form of corporate property

in the limited company. (1) In fact, I would also like to pose the problem of law as a problem of social relationships but from a quite different angle. In effect, the question I am addressing myself to is how does it come about that the law - in the form of legislation, legal institutions and practices - can define social relationships which are clearly not based on equivalence, which are based on assumptions of inequality?

Indeed, Hirst also turns round Pashukanis' posing of the problem of law in suggesting that Pashukanis is misguided in attempting to assign to law an organic origin in society. In attempting to solve the problem of law-as-origin, law is given an essence thus a unitary origin, nature and social function, and the process of legislation is simply reduced to the status of being a phenomenal form. Instead, "is not the origin of and operation of the laws within a specific set of apparatuses itself a specific form which requires explanation?" (2) In fact, Hirst's critique of Pashukanis' understanding of the legal form opens the door to what Pashukanis tried to do, that is, to break with the dominant materialist tendency which regards law as ephiphenomenal. Instead of attempting to develop some concept of law-in-general which necessarily essentialises law and ascribes its essence to conditions outside it, Hirst suggests that we regard law as a social practice. In so doing, we recognise that there is a

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1. Hirst, 1979:127-144.

2. Ibid., 110.

definitive effectivity to legislation and legal practice, which means that "law can outrun and redefine its discursive and categoric forms". (1) From this perspective it can be argued that law does not merely reflect the political, economic and other conditions of its existence but rather that, within these conditions, legal apparatuses and categories constitute their own specific sphere of effectivity which synthesises the determinations acting on it and thereby can produce its own unique effects. What this implies is that in studying law and society it is necessary to consider the various processes of enactment and adjudication in relation to specific laws, understand the conditions necessary to such enactment and adjudication, and explain the effects which they produce. The general concepts to be used in such an analysis are not concepts of law-in-general but rather those concepts which specify what is involved in the determination of the processes of enactment, for example, and the conditions necessary to it. (2)

To follow the kind of perspective advocated by Hirst in his critique of Pashukanis does not necessarily imply that the question of why law is being abdicated. Rather, it suggests that an understanding of the nature of law and society must be predicated upon an understanding of what law is and why it exists in specific instances. It is upon this basis that more general theorising

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1. Ibid., 112.

2. Ibid., 112-114.

about the nature of law and society can proceed. To study law as a social practice is to recognise its dynamic nature, that is, it allows us to view law as something which is produced and reproduced in given societies while, at the same time, it provides us with a means of understanding the part which law plays in the production and reproduction of society.

The notion that social life is produced and reproduced appears to be consistent with the Marxist conception of praxis: "as individuals express their lives, so they are. What they are, therefore coincides with their production, both with what they produce and with how they produce". (1) However, as Giddens points out, in order to detail the implications which the Marxist ontology of praxis has for our understanding of social life, it is necessary to think of the term 'production' in its widest possible sense and in doing this we must go beyond what is strictly available in Marx's own works. He notes, for example, that many sociologists have elaborated positions which suggest that the production and constitution of society is not only a skilled accomplishment of its members but also that this production does not take place under conditions which are completely intended or understood by them. And, it is in this context that Giddens comments that the "key to understanding social order ... is not the 'internalization of values' but the shifting relations between the production and reproduction of social life by its constituent actors". (2)

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1. Marx and Engels, 1968 (ed) 42 - emphasis in original.

2. Giddens, 1976:102 - emphasis in original.

The definition of reproduction contains within it the definition of production - both notions are conceptually interdependent. Every act of production contributes to the reproduction of society and, at the same time, contains within the act the possibility of innovation and change. This conception locates the origins and necessary conditions of reproduction in the material facts of human existence, that is, in the re-procreation of the species and the transformation of nature. For Marx, human beings 'freely' produce in relation to nature, while, at the same time, they are forced to actively transform the material world in order to survive in it. This is so because human beings, unlike animals, do not possess an instinctual framework which would permit a purely automatic response to their material environment. Ultimately, however, the central distinguishing characteristic of human beings is their ability to reflexively systematize their environment, this being possible, above all, through the medium of language. (1)

While the argument here is, like that advanced by many members of the interpretative school of sociology, that the production of social life is always an accomplishment by society's members, such a view has not often managed to accommodate the equally important proposition that if men do in fact create society they do not simply do so under conditions of their own choice. Giddens notes that this dichotomy, between voluntarism and determinism, has always been central to social thought and suggests that one way of

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1. Ibid., 103.

resolving this apparently irreconcilable opposition is to complement the idea of the production of social life with that of the social reproduction of structures. (1) By focusing on the idea of social reproduction it becomes apparent that it is not possible to treat society as something that 'is'. Society is possible and maintains itself only insofar as the sets of activities, interactions, relations and institutions which are constitutive of it are reproduced. Thus, it becomes possible, in this perspective, to move away from a static and reified conception of society to one which is dynamic and capable of explaining both persistence and change in social processes.

With others, Hunt (2) has claimed that this perspective has considerable potential in its application to the study of law. One of the main defects in legal theory, he says, has been the tendency to reify law, thereby treating it as an autonomous force within any given society. On the other hand, by suggesting that the general function of law is related to the reproduction of social life, we are also suggesting that the law itself is reproduced. Law is therefore not merely conceived of as an institution or system of rules but rather as a social process itself, and as such, it is dependent on the functioning of other social processes. On certain levels the reproduction of law is quite obvious, such as in the recruitment and training of legal personnel or in the creation and enforcement of rules of law.

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1. Ibid., 104-105.

2. Hunt, 1976:33.

However, law also reproduces itself on the level of the reproduction of social relations which form the core of its subject matter and upon which it acts. As Hunt comments, to adopt a reproduction perspective in the study of law is to view the law as both determined and determining within a wider set of social processes. (1)

It should also be noted that in adopting a conceptual framework which contains within it the idea of the production of social life and the idea of the social reproduction of structures (2) it is recognised that every act of production is, in an important sense, a novel enterprise, which may be transformative by altering the structure at the same time as it reproduces it. If a reproduction perspective is adopted then a fundamental issue becomes the nature of the part, if any, that a specific social activity, relationship or institution, has to play in the reproduction of a particular society. Thus, if we are concerned with the part which law has to play in the process of the reproduction of given societies, then we must ask - what law and in which particular society? It is not society in general that is reproduced but rather certain societies which are historically

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1. Ibid., 34.

2. Following Giddens' use of the concept of 'structure' I am referring not to classical functionalist analysis of the relations of interaction which 'compose' collectivities, but rather to 'systems of generative rules and resources'. It must be emphasised that although 'structures' are considered as 'impersonal' and 'out there' for analytical purposes it is essential to note that 'structures only exist as the reproduced conduct of situated actors with definite intentions and interests' (Giddens, 1976:121).

specific instances. The question then becomes - what role does law have to play in the overall process of the reproduction, or indeed transformation, of any given society?

This conceptualisation of social life as a continuous process of production and reproduction is compatible with an approach to the study of law in society which concerns itself with the question of the nature and effectivity of legislative/legal systems as specific forms, which, of course, requires an explanation of the origin and operation of specific laws within a specific set of apparatuses. If we regard law as a social practice, which, as such, is part of the continuous process of the production and reproduction of social life, then we can recognise that there is a distinctive effectivity to legislation and legal practice. Moreover, if we do then accord a distinctive effectivity to law, we are not necessarily forced into a reductionist perspective. On the contrary, it now becomes possible to argue that law is not merely a reflection of the economic, political and other conditions of its existence, but rather that, within these conditions, legislation and legal practice can constitute their own particular sphere of effectivity. Although created by its conditions of existence (for example, economic and political), the law's specific sphere of effectivity is not simply an expression of these conditions but is, rather, a translation of the conditions into another and quite specific language, (the legal form). As a specific language and discourse, legislation and legal practice represent the translations which have their own

distinctive effectivity and, as such, can impose constraints and limits on, for example, the political aims sought through them. As Hirst notes, clearly the form and degree of such constraints and of access to the legislative process, for example, vary enormously within and between legal systems. Nevertheless, because law does have its own distinctive sphere of effectivity, it synthesises the determinations acting upon it and, in so doing, produces its own unique effects which can then impose constraints and limits on the economic, political and other spheres. (1)

I have been arguing that, in order to bridge some of the gaps within the body of knowledge referred to as the sociology of law, my work will attempt to provide an explanation of the specific relationships between law and society in a particular instance - chattel slavery - and also will attempt to make some contribution toward more general theorising about the nature of the relationship between law and society. For the purposes of such an analysis, I have suggested that in explaining the emergence and development of specific laws and legal practices, attention must be given to the specific historical and institutional contexts within which specific legal forms are generated. This involves reference to some broad sociological and historical development, such as the acceleration of the capitalist mode of production, as well as reference to the specific stages in such a development.

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1. Hirst, 1979:113, 146-50.

Within such an analysis it is important to consider the role of human agency. Since laws are created by men acting in specific ways, I have argued that notions such as power, interest and conflict, have heuristic value in explaining the processes of mediation between social structure and legislation.

It has been stressed that my analysis does not adopt a reductionist perspective which views legal forms as exigencies of the mode of production of which they are an effect, as 'mere' legality, a legitimation of class oppression and the like. Rather, the approach I adopt attempts to address itself to an understanding of the precise nature of the effectivity of legal regulation in a specific instance. While, with Pashukanis, I agree that the problem of law should be posed as a problem of social relationships, I disagree with his assumption that bourgeois law is defined by equivalence in social relationships and his reduction of the legal form to commodity form. By contrast, I am asking the question quite differently - how does it come about that legislation, legal institutions and practices can define social relationships which are based on assumptions of inequality? In this context the concern is with the question of the nature and effectivity of legislative/legal systems as specific forms. This involves an explanation of the origin and operation of specific laws within a specific set of apparatuses, where social life is conceptualised as a continuous process of production and reproduction.

In this thesis it will be argued that the limitations,

constraints and supports imposed on political, economic and other practices by legal forms and procedures varied both within and between the legal systems and constitutional forms of North American and British societies throughout a specific period. In particular, an examination of the legal sphere, in the context of the United States constitutional form which asserts the 'separation of powers', (1) is central to the purpose of this work in analysing the nature of the effectivity of legal regulation in relation to chattel slavery. Such an analysis should therefore contribute to an understanding of what exactly makes legal forms more or less effective in the practice of other social, political and economic forms.

THE SPECIFIC INSTANCE : CHATTEL SLAVERY

The preceding discussion has aimed to provide the broad conceptual framework within which the substantive analysis of the relationships between chattel slavery, law and the wider social formations of which they were a part will be undertaken. In accordance with the position outlined, my interest lies in attempting to understand the precise nature of the effectivity of certain aspects of the legal system during a particular stage in the development of western capitalism. I have argued that the

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1. Hirst has argued that the degree of constraint offered by the legal system, to, for example, political practices, is highest where the 'separation of powers' is effective in the practice of other social, political and economic institutions (1979:146, Note 8).

orientation adopted in this work regards law neither as epiphenomenal nor as an exigency of the mode of production in question. While, with Durkheim, (1) I agree that law is one of the main indicators of social organisation, it is also more than this. Law represents a translation of the various social, economic and political determinations acting upon it and the process of this translation produces a sphere with its own particular effectivity, thus giving law a transformative as well as reproductive capacity. It is the purpose of my analysis, therefore, to contribute to an understanding of precisely what makes legal forms more or less effective in the practice of other social, political and economic forms, thereby making some contribution to more general theorising about the nature of law in society.

The specific instance, that is, the law and its operation in relation to the development of chattel slavery (2) in North America, has been chosen as the focus for my analysis since, in accordance with the position outlined earlier in this chapter, which suggests that this work will contribute to an understanding

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1. Emile Durkheim, "The Division of Labour in Society" (translated by George Simpson) New York, The Free Press, 1947, has argued, for example, that mechanical and organic solidarity, as two specific forms of social organisation, differ by virtue of the relative role of repressive and restitutive law, the amount of the division of labour, the degree of individuality possible within them, and the immediate conspicuousness of a binding social consensus constraining the members of this society.

2. I am here referring to the development of chattel slavery in the North American colonies and not the case of slavery in Classical Antiquity. See Note 1, page 1.

of the nature of the effectivity of legal forms, it was necessary to focus substantively on a status to which legal definition and regulation was central. From the period of British colonial expansion to North America until the post Civil War era, legal institutions and practices were central to the creation of the slave status and its subsequent regulation and control. Moreover, if legal institutions and practices could not only recognise, but also create, an extreme form of social relationship which denied any basis of equivalence, then law cannot be defined or explained in terms of assumptions of equivalence. The case of chattel slavery clearly demonstrates that legal rhetoric not legal practice is imbued with notions of equivalence.

Legal rhetoric, as Hay (1) and Thompson (2) have argued, became critical in eighteenth century England where the law assumed a position of pre-eminence as the central legitimating ideology of the social order, displacing religious authority and the other sanctions of previous centuries. As Thompson demonstrates, in his detailed analysis of the Black Act, the rhetoric of eighteenth century England was certainly saturated with the notion of law, and tremendous efforts were made to project an image of a ruling class which was itself subject to the 'rule of law' and whose legitimacy in fact rested upon the equity and

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1. D. Hay, "Property, Authority and the Criminal Law", in D. Hay, P. Leinebaugh and E.P. Thompson (eds) "Albion's Fatal Tree: Crime and Society in Eighteenth Century England", London, Allen Lane, 1975:17-65.

2. E.P. Thompson, "The Crime of Anonymity", in Hay et al, 1975:255-308.

universality of the legal forms. (1)

If this is true of eighteenth century Britain then it is certainly no less true of the eighteenth century in the North American colonies. The rhetoric of the 'rule of law' not of men reached its zenith on that continent in 1787 when the Constitution of the United States of America was explicitly framed and written in a language which placed all men (sic) as subject to the rule of law. Indeed, the rhetoric of the rule of law was to provide the central forum for the resolution of the major issues in relation to slavery both before and after the Civil War.

In order to understand the significance of the rhetorical and practical consequences of the rule of law in relation to chattel slavery it is necessary to indicate how the definitional and conceptual issues concerning slavery are to be resolved. Clearly, the forms which human bondage can take, and indeed has taken, are extremely varied and, for this reason, it is essential to specify how the term 'chattel slavery' is used in this work. Chattel slavery refers to a form of legal sub-ordination in which the owner has rights of property over another human being, his slave. In this case the slave is a variant of private property deriving from the existence of private property as a general form. Nevertheless, despite the fact that a slave is a legal non-subject, his value as <u>property</u> depends on his having the attributes of a

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1. E.P. Thompson, "Whigs and Hunters: The Origin of the Black Act", London, Allen Lane, 1975.

human subject, such as being able to act under instruction. (1) The fact that legal systems are able to uphold such contradictions and inconsistencies in definition and practice is clearly illustrated by the contradictory nature of precedent and legislation with regard to the status of slave and slavery to be analysed in the following chapters. Nevertheless, whatever the inconsistencies and anomalies, there can be no doubt that it was primarily as a form of property that the slave was regarded in law and in practice.

If slavery is then a legal form of property which gives the owner certain rights, however variable, over the person of the slave, then the question to be addressed is - within what particular form of state or community is this legal form having these particular rights created, reproduced or transformed and how are such processes accomplished? By a detailed analysis of the law, in terms of its definitions and practices, much can be learned, not only about the part which law has to play in the production and re-production of social and political relations, but also about the precise manner in which certain social and political structures shaped the nature of the slave system in North America through the forms of law. Indeed, the argument of this thesis is that while capitalist development created the possibility for a particular form of chattel slavery to exist in North America, the operation of law and legal institutions was, in this case, part of the process of the uneven development of

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1. Hindess and Hirst, 1975:112.

capitalism and, as such, was inextricably linked with the development of the capitalist mode of production.

Many writers (1) have explained the Civil War in North America as a conflict primarily between two distinct and incompatible economic forms and social systems arguing that a mode of production based on slavery cannot co-exist with a capitalist mode. However, with Hindess and Hirst, I would argue that chattel slavery, as it existed in North America, required the existence of private property as a generalised social and economic institution. Indeed, they argue that the slave mode of production was, in fact, present in the Americas as a subordinate mode to the capitalist mode of production within both the international division of labour and the world market created by capitalism. Contrary to the assumption that capitalist and slave systems are necessarily antagonistic, they argue that slave production appears under specific conditions as a subordinate form to the capitalist mode of production. (2)

Under the conditions of capitalism then, slave property is a special variant of private property in general and while in formal terms the ideological basis of bourgeois right, that is, formal legal equality, equity and so on, is apparently contradicted by

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1. See, in particular, Eugene Genovese, "The Political Economy of Slavery", New York, Vintage Books, 1967; "The World the Slaveholders Made", New York, Vintage Books, 1971; "American Slaves and their History", in A.J. Lane (ed) "The Debate Over Slavery: Stanley Elkins and His Critics", Urbana, University of Illinois Press, 1971a:293-321.

2. See Hindess and Hirst, 1975:148-162.

slave property, in fact, these contradictions were successfully confined and contained ideologically. Central to this containment and lack of substantive contradiction were the legal forms and practices associated with the development of chattel slavery. Indeed, it is this lack of substantive contradiction which is to be explained by the specific effectivity of legal apparatuses and practices.

In a very important sense the co-existence of slave property right and bourgeois property right is not contradictory at all. On the contrary, the existence of slavery in bourgeois society only serves to highlight the 'dark side' of bourgeois notions of legality. The rhetoric of the 'rule of law' with its standards of equity and universality is a transparent mask and, in the case of chattel slavery, it is through the forms of that law that the shadows of the unequal are both created and maintained. In its practices and discourse the law pertaining to chattel slavery performed its own unique task in defining extreme inequality in social relationships by legitimating the status of master (owner) vs. slave (owned). How then does it come about that law, in the form of legislation, institutions and practices, comes to define social relationships which are clearly based on assumptions of inequality and the deprivation of liberty?

In answering this question it must be stressed that my argument is not based on the idea that bourgeois notions of right necessarily make assumptions about equality. While some

writers [1] have based their arguments about slavery on the conception that its distinguishing characteristic is inequality, I would agree with Fine that:

> This formulation would be misleading. For, as far as the social relations of slavery operated, the question of equality or inequality could not even emerge, for there was no common element between master and slave that would allow for any such equation. Equality implies something that one is equal in with another (or unequal in); it implies commensurability. (2)

The important conception within bourgeois notions of right for my argument concerns the issue of liberty/freedom which is posited at the base of common humanity and democratic formations. Only within a context where the deprivation of liberty is itself regarded as contrary to the notions of what it means to be human is it possible to talk about the contradictions inherent in a society based on the espousal of ideals of human freedom while it simultaneously tolerates slavery: the possession of one human being by another.

The importance of this argument relates not only to the explanation of the importance of legal forms in the definition of the status 'slave' but also to those which define the status

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1. See, for example, Carl N. Degler, "Neither Black nor White", New York, Macmillan, 1971.

2. Bob Fine, "Objectification and the contradictions of bourgeois power: Sartre and the modern prison", in Economy and Society, Vol.6., No.4., 1979:419.

'convict' and it is within this context that the importance of slavery to penological/criminological thought lies. Sellin, for example, has argued that the physical punishments which characterised the treatment of slaves were gradually extended to cover free men and concludes that contemporary penal systems retain the essential hallmarks of these formerly slave punishments, most notably in the existential qualities associated with convict status and its imputed diminution of social honour. (1) Sellin's argument is based on a great deal of historical evidence supporting his thesis concerning the resemblance between modern penal systems and slave systems in these respects. Nevertheless, both slave and convict status require an adequate prior explanation - it is clearly of limited explanatory value to simply explain one in terms of the resemblance it bears to the other.

With Morris, (2) I would argue that the importance of the comparison between slave and convict status does not lie in an explanation which demonstrates the transference, over time, of such factors as methods of punishment. Instead it lies in the exploration and elaboration of the idea that the slave, being propertyless, provides an ante-type for the propertyless members of the nation state that emerged in the sixteenth century and who, in turn, became variously regarded as the lumpenproletariat or 'dangerous' classes of industrial society. The critical point

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1. Sellin, 1976:197.

2. Terrence Morris, Review of Thorsten Sellin's "Slavery and the Penal System", in British Journal of Criminology, Vol.18., No.3., July 1978.

to be made here is that the propertyless in bourgeois society are not simply regarded as having no substantial rights in civil society, "but that they are treated as if they were themselves property". It is this conception of human beings as property, most obviously defined in the case of slavery, which is of interest to penological thought. While conceived of primarily as property the slave also required to function as a human being - he must labour. (1) Clearly there are critical explanatory links to be made between the trade in slaves, for example, and the trade in convicts. Both slavery and transportation provided a labour supply for colonisation and capitalist expansion.

The explanation for the continued resemblance between contemporary penal systems and slave systems is not to be found in the accumulation, however well supported historically, of comparative evidential material about the two, but rather in the kind of social formations which produced both chattel slavery and the penal sanction. The link to be made then between slavery and punishment does not lie at the level of particular treatments given to slaves and convicts but rather in terms of the social organisation which produced them. My argument is that in order to explain the importance of the link between slavery and punishment it is first of all necessary to explore the legal apparatuses and practices pertaining to the case of chattel slavery. These apparatuses and practices developed and evolved within the context

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1. Prison labour is still compulsory and refusal to work is a disciplinary offence.

of values associated with bourgeois society: notions of liberty, individualism, equality, private property and so on. In such societies, law defined, refined and finally eradicated the status of 'slave' and, at the same time, defined the limits of the penal sanction and the status of 'convict'.

In a detailed argument, Kennedy (1) develops the thesis that crime and the penal sanction (which defines punishment) arose together in post 15th century Europe as a function of the advent of formally rational states. He traces the roots of crime and penal sanction, along with other political, economic, religious and familistic transformations generally, to the transformation from the ethic of shared responsibility for human conduct, the 'co-operative ethic', to the ethic of individual responsibility:

> In part as the legacy of the collapse of feudalism and in part as a consequence of the rise of capitalism which this collapse afforded, individualism as a generalized social movement emerged from a fact of institutional chaos to a social philosophy and a normative order and transformed, as it grew, the whole of Western society and its culture. (2)

Thus individualism, Kennedy argues, found its expression in all aspects of social life: politically, with the birth of formally rational states, citizenship, the theory of the social contract and the development of calculable law both civil and criminal.

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1. Kennedy, 1970.
2. Ibid., 38.

In making these profound transformations to all social institutions, the emergence of the ethic of individual responsibility for conduct transformed both social and interpersonal relations. Thus each person became solely responsible for his own conduct and its consequences and this 'legal fiction' became, "reified both at the level of self or personality and at the level of law and judicial practice. Individualism as an attitude of self is basic to guilt, and as a premise of both civil and criminal law it is elemental to the whole legal practice of incrimination". (1)

The thesis which Kennedy attempts to support, historically and cross-culturally, is that crime and the penal sanction are twin products of the origin and continuity of the State and citizenship, that these institutions, founded on emergent civil and criminal law emerged as a cluster of new institutions, such as entrepreneurship, private property and the market system, all of which were originally the social manifestations of the ethic of individual responsibility for individual behaviour. Thus, he argues, it follows that in the absence of the State, in the absence of its laws, crime and the penal sanction do not exist, and, in the absence of the institutions of capitalism, their special features cannot exist.

Kennedy's argument is based on a detailed discussion of feudalism, its breakdown and the beginnings of capitalism. He

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1. Ibid., 38.

demonstrates how, in feudalism, customary law possessed no norms bearing similarity to the civil and criminal laws of post 15th century Europe. The notion that each person is a citizen of the State and alone responsible for his conduct and its consequences was not to be found either in court procedure, in the characteristics of custom, or in judicial decisions. And, with Rusche and Kirchheimer, (1) Kennedy argues that the power to pardon, even until the mid 16th century, lay with the offended party and not the State.

With the birth of capitalism, the State came to recognise and guarantee, as well as create, civil laws relating to market conditions, private property, labour and imports, and, at the same time, it came to have full power to create and impose criminal laws which related to the same institutions of capitalism. Violation of the criminal law came to be regarded as a harm against the State which itself obtained a monopoly over the processing of acts of violence and the power to pardon. In this way, and by this process, the State came to play an ever-increasing role in the determination of crime and the penal sanction. (2)

For the purposes of my argument, the main point of Kennedy's thesis is the significance he attributes to the 'legal fiction' of

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1. Georg Rusche and Otto Kirchheimer, "Punishment and Social Structure", New York, Russell and Russell, 1968 ed.

2. Kennedy, 1970:46.

individual responsibility. It is this 'legal fiction' which makes possible the recognition and non-recognition of the status 'slave' in legal practice and discourse: how is it possible for a slave to be owned yet individually responsible at the same time? This possibility is both created and maintained through the forms of law. Similarly, how is it possible to be held individually responsible for 'being a criminal' while it is the State which creates and maintains crime? The forms of law make this possible. The question then becomes: what kind of social organisation creates the forms of law which make possible both slavery and crime/punishment? Kennedy's conclusion is that crime and penal sanction, in being limited to specific countries and to a period of Western history, are not universal but are a function of the emergence of formally rational states, of citizenship under such states, and of the transfer of the power of pardon from communities based upon the ethic of shared responsibility to a political or territorial community founded upon the 'fiction' of individual responsibility. While the general characteristics of crime are determined by the emergence and continuation of the State and citizenship, special characteristics, for example, acts proscribed, are determined by the kinds of institutions, such as socialist or capitalist, which the State supports. In Kennedy's study, these special features are determined by the emergence of the institutions of capitalism and by guaranteed commercial codes corresponding to emergent criminal laws which are meaningful only within a context where the market system, private property and

private laws of contract predominate. And, with the power to pardon in the hands of the State, politicality and penal sanction emerge as the chief definitional characteristics of criminal law. It is, says Kennedy, only then that crime, as defined by the State, becomes possible. (1)

If, as Kennedy argues, the special features of criminal law, are determined by the kinds of institutions which the State supports, in this case the institutions of capitalism, then the question of providing an explanation for crime in any specific social formation is, as Mäkelä (2) argues, analytically linked to an articulation of the relationship between law and the mode of production in question. Mäkelä criticises much of the Marxist tradition for its failure to point out that criminality varies under different historical conditions and its failure to consider the question of the tasks of the system of penal law in the maintenance of the prevailing mode of production. He also criticises the classical functionalist theory of crime, deriving mainly from Durkheim, and argues that it is meaningless to speak, as this orientation does, of the functions of crime in general and of the maintenance of society in general. Instead, he argues, that criteria must be used for the identification of the system one is talking about, and, in line with the Marxist tradition, he argues that the main criterion for the identity of

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1. Kennedy, 1970:62-3.

2. Klaus Mäkelä, "The Societal Tasks of the System of Penal Law", in "Scandinavian Studies in Criminology", Vol.5., London, Martin Robertson and Co. Ltd., 1974:47-65.

any given social formation is the dominant mode of production. (1)

Mäkelä's contribution to my argument concerns his raising the question of the relationship between law and the mode of production in question. In other words, both how law is influenced by the conditions prevailing under the mode of production in question and how the system of law contributes toward the maintenance of a given mode of production. I am not, however, arguing that there is a simple determinative relationship between the mode of production and law. With Foucault (2) I would agree that there is no simple relationship between penal systems and the organisation of production. This is not to say that economic factors do not play an extremely important part in the maintenance or change in penal systems but rather that the economic does not have any pre-given place as a determinant in the last instance or as a general paradigm. There is a space between the mode of production and the system of law in question and within this space the translations from economic to legal and from legal to economic forms take place. But there is no reason to assume that the economic determines the legal expression in any simple or direct way. As was noted earlier, one of the main criticisms to be made of many of the contemporary materialist analyses of law concerns the determinism of the structuralist problematic they confront. (3)

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1. Mäkelä, 1974:47-59.

2. Michel Foucault, "Discipline and Punish: The Birth of the Prison" (translated by Alan Sheridan), London, Allen Lane, 1977.

3. P. Rock and D. Downes (eds) "Deviant Interpretations: Problems in Criminological Theory", Oxford, Martin Robertson, 1979.

What the mode of production does is to provide the setting for the determination of the realm of the possible in the sense in which individuals "make choices and pursue strategies within given limits". (1) While this position recognises the importance of structural limitations it leaves enough space for the simultaneous recognition of the negotiated, ambiguous and symbolic features of social relations and permits us to agree with Rock's comment that:

> Laws do not arise full-grown children of the dragon's teeth. They do not enjoy an uncomplicated and unproblematic relationship with the settings and intentions of their original drafting. Rather they undergo natural histories whose unwindings shape them in ways unanticipated by their first authors. (2)

While such 'natural histories' create much that is unique about particular laws, thus giving law its own distinctive sphere of effectivity, this effectivity is limited to a greater or lesser extent by structural constraints emanating from the productive order. The relationship between structure and action is therefore regarded as a dialectical one where no pre-given place is attributed to the economic as determinant in the last instance.

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1. S. Lukes, "Essays in Social Theory", London, Routledge and Kegan Paul, 1979:29.

2. Paul Rock, 'Foreword' to Ingeborg Paulus, "The Search for Pure Food", London, Martin Robertson, 1974.

CONCLUSION

My argument is, that within a specific social formation, a slave mode co-existed with a capitalist mode of production and that the operation of law in relation to slavery in that particular instance demonstrates that law cannot be theorised as epiphenomenal or as an exigency of the mode of production of which it is an effect. Rather, legal apparatuses and practices have their own sphere of effectivity producing their own unique effects which are neither pre-given by nor totally independent of the mode of production in question. In the case of chattel slavery it will be seen that the unique effects of law concerned what was apparently the site of a fundamental conflict within bourgeois ideology. The part which law itself played in the creation of this apparent conflict as well as its role in the resolution and containment of ideological contradictions and the basis which it provided for the ultimate transformation of structures are all explored in this thesis.

As was argued earlier, the legal status is considered fundamental to the development of a specifically slave mode of production subordinate to the capitalist mode. The development of the slave mode itself created the conditions necessary for the uneven development of capitalism in a particular instance: the North American colonies and by implication the development of international capitalism. The following chapters of this thesis trace out exactly how this was accomplished by exploring, in a substantive way, the role of law in both indicating and constituting

the kind of social organisation evident in a specific period.

In accordance with the position outlined in the earlier sections of this chapter, my interest lies in attempting to understand the precise nature of the effectivity of certain aspects of the operation of law in relation to chattel slavery during particular stages in the development of western capitalism. I have stressed that an adequate explanation of the emergence and development of specific laws and legal practices must pay particular attention to the specific historical and institutional contexts within which definite legal forms are generated. This necessarily involves reference to broad sociological and historical developments, in this case, the acceleration of western capitalism, as well as reference to specific stages in such a development.

In the substantive analysis of the law and its operation in relation to chattel slavery, the methodological proposals outlined in this chapter will be used where possible. The study will consist of an analysis of the main phases in the legal definition of chattel slavery and the systems of slave production founded on this which developed in North America in particular. To analyse the phases, however, is not to suggest any necessary evolutionary unfolding of either the legal definition or of a system of slave production, but rather to suggest that there were, in fact, certain distinct and conjunctural systems of production based on slave labour to which the legal definition was integral.

The study begins in Chapter 2 with a critical examination of the common law debates surrounding the 'slave' status in Great

Britain which were to provide the central precedents to which the North American colonies would refer in establishing the legality of slavery on that continent. The central issues raised in these legal debates concerning the rights of property versus those of liberty would be raised and referred to time and again from the establishment of the constitutional form of government in the United States of America, in connection with the legality of slavery, through the 19th century up to the post Civil War era. In Chapter 3 the forms of colonial expansion to North America are discussed with particular reference to the legal definition of the forms of bondage in the colonies. The legal differentiation between black 'slave' labour and other forms of 'unfree' labour is already evident in the early colonial period, albeit in an ambiguous and inconsistent way. Chapter 4, focusing on the later colonial period, discusses why a resolution of the ambiguities surrounding the 'slave' status was necessary and discusses how effectively the status of slaves as akin to chattel property was accomplished through the construction of the slave status in legislation. Chapter 5, which deals with the birth of the nation state of the United States of America through the excessive use of constitutional law, explains how slave property right became guaranteed in constitutional law and how this guarantee was effective in the practice of political and economic forms. Chapter 6, in focusing on the international slave trade and the expansion of the slave system to the Western Territories, explains how legal institutions and practices effected

the expanded reproduction of the slave system. The implications of this expansion for a fully developed slave mode of production in the Southern States of the USA are discussed in Chapter 7 which, in analysing the legal debates surrounding the issue of whether the rights of property are exclusive to the definition of chattel slaves, concludes that legal forms ensured that such rights were paramount and that they were effectively guaranteed throughout the USA. Chapter 8 examines the conflict in law and ideology which ultimately led to Civil War and the abolition of the slave system and argues that this conflict was not a conflict of capitalism versus slavery but was rather a political conflict over the further expansion of the slave system and over who would rule the USA. In Chapter 9 the concluding chapter, the legacy of the chattel slave status as a legal category is analysed in terms of how legal institutions and practices have analogised between the slave and other unfree statuses and it is argued that my analysis of law in relation to chattel slavery has demonstrated just how law can function as an instance of construction, recognition, regulation and transformation with specific effects on the practices of other social, economic and political forms.

CHAPTER 2 : THE SETTING : COMMON LAW AND SLAVERY

INTRODUCTION

In this chapter, the context within which the legality of slavery would be established in the North American colonial dominions of Great Britain is examined. This context not only provided the legal basis upon which these colonies could develop using slave labour but also the legal discourses and practices which permitted an articulation of the master/slave relation under the constitutional form of government ultimately established in the United States of America. Through a critical analysis of the common law debates surrounding the 'slave' status in Great Britain, in the context of the social, political and economic structures within which these legal issues were resolved, this chapter demonstrates that legal practices can uniquely effect the nature of the development of social and economic relationships. The issues raised at common law, concerning the rights of property versus those of liberty in relation to the legal status of slavery, were to form the central legal precedents which would be referred to time and again in North America from the establishment of the British colonies there until the post Civil War era. The legal practices analysed in this chapter and the scope of particular legal decisions will therefore be referred to throughout this thesis and the precise effects of the common law debates surrounding slavery, in establishing the basis upon which a slave system of production could develop in North America and on the constitutional debates within law concerning the legality of slavery under the US

ution, will become evident in subsequen ers. (1)
ile England was, in contrast to other W European
es, late in entering the international s cade, (2)
de was firmly established by 1663 when a oly was
to the Company of Royal Adventurers fo years.
the Royal Adventurers had become bankr a new
, the Royal African Company, was establ y Royal
. In 1698 the Royal African Company l monopoly
nd thereafter the "right of a free trad aves was
sed as a fundamental and natural right ishmen". (3)
698 English participation in the inter slave
ncreased dramatically making Britain th slave
in the world by the mid-eighteenth cent)
lave trading was of profound significanc itish
l expansion, (5) to the tremendous accu n of
ile wealth throughout the eighteenth ce nd to the
f domestic economic intercourse within itself. For
, by 1795, the city of Liverpool had be onomically

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ee, in particular, Chapters 5, 7 and 8.

lthough the first English slave-trading ion set sail
under the leadership of Sir John Haw tain did not
pate vigorously in the trade until 10 ater. (See
ly, Eric Williams, "Capitalism and Sl th ed., New
Penguin Books, 1966).

illiams, 1966:30-32.

r a fuller discussion of this, see Wil 66:21-34;
pter 6.

r a fuller discussion of the importan ve labour to
l expansion, see Chapter 3.

dependent on and centrally involved in the business of slave trading. The city's ships were used solely for the transporting of slaves and it was responsible for five-eighths of the British slave trade and three-sevenths of the European trade. (1) One consequence of the extent of this kind of participation in the slave trade was the number of slaves residing in Britain itself - approximately twenty thousand living in London alone by 1764. (2)

Many of the slaves living in Britain were the personal slaves of masters returning from the colonies, either permanently or temporarily, whilst others were the 'property' of slave trading merchants. (3) Slave auctions at which such 'merchandise' was openly bought and sold were commonplace in the larger cities engaged in slave trading activities, these auctions typically being advertised in local newspapers. Thus Williamson's Advertiser of June 24, 1757 contained the following advertisement:

> For sale immediately, One stout Negro young fellow about 20 years of age, that has been employed for 12 months on board a ship, and is a very serviceable hand. And a Negro boy, about 12 years old, that has been used since Sept. last to wait at a table, and is of a very good disposition, both warranted sound. Apply Robert Williamson, Broker. (4)

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1. Williams, 1966:34.

2. This estimate derives from the Gentleman's Magazine - cited by Gomer Williams, "History of the Liverpool Privateers and Letters of Marque", London, Heinemann, 1897:477.

3. For a discussion of the slave population resident in Britain throughout this period, see F.O. Shyllon, "Black Slaves in Britain", London, Oxford University Press, 1974.

4. As cited by Gomer Williams, 'History of the Liverpool Privateers', 1897:475.

Yet, despite the fact that such slave auctions were a regular occurrence the rising slave population in Britain did pose some critical issues about the legality of such transactions and indeed about the legality of slavery itself in Britain.

When English courts were first confronted with slavery cases in the seventeenth century they began to consider a wide range of questions within the context of the familiar forms of the common law and without any significant guidance from either Parliament or the Privy Council. For example, the courts asked whether slavery had an adequate legal foundation in the indigenous law of England itself. If not, did colonial slave laws mean that English law must recognise the legality of claims to slave property? Indeed what was the status of a slave and the rights of his master on returning from the colonies to England? Could a slave claim any rights under English law? Was a contract for the sale of a slave capable of enforcement in the English courts? (1) Clearly the answers to such questions were central not only to the issue of the legality of slavery under English law but also to the legality of the slave trade itself. Legal rulings on the issue of slavery then could critically affect not only the status of 'slaves' in England but also the legitimacy of a particular form of colonial

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1. For a discussion of the significance of these questions to the development of American constitutional and conflict of laws theory, see W.M. Wiecek, "Somerset: Lord Mansfield and the Legitimacy of Slavery in the Anglo-American World", in University of Chicago Law Review, Vol. 42., No.1., Fall 1974: 86-146.

expansion and the immense profits of the 'triangular trade'. (1)

It was against this background that the English (2) courts handed down a series of apparently contradictory (3) judgments throughout the seventeenth and eighteenth centuries with regard to the question of the legality of the status 'slave' at English common law. Throughout this period court decisions concerning the legality of slavery in England had at worst established contradictory precedent and at best "very special conditions in applying individual liberty concepts to slave-master disputes". (4) When deciding the issues in question, courts rarely confronted directly the legality of slavery as such but instead relied on creating a special form of pleading in relation to the master-slave relationship. Thus, the issue of whether or not one man could legally <u>own</u> another was seldom addressed and judgments were based on technical matters of pleadings, such as whether the writ

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1. The term 'triangular trade' refers to the exchange established in the 17th and 18th centuries whereby England, and to some extent the North American colonies, supplied the exports and the ships; Africa provided the slaves; and the plantations provided the raw materials. The triangular trade was geared to the interests of Britain and formed the basic tenet of the mercantile system. (See generally, Williams, 1966:51-84).

2. While the cases discussed in the body of this chapter are predominantly English, several important Scottish cases are also referred to.

3. E.Fiddes, 'Lord Mansfield and the Sommersett Case', 50 L.Q. Rev., 499 (1934), for example, argues that the pre-1772 (pre-Sommersett) precedents on slavery were in hopeless disagreement on the legal issues regarding slavery in England.

4. Higginbotham, A.L., Jnr., 'In the Matter of Color: Race and the American Legal Process: The Colonial Period', New York, Oxford University Press, 1978:315.

in question was in the correct 'legal form' to establish ownership of a slave or a right to his services. The critical factor in whether or not a judge found in favour of the alleged 'slave' was not whether or not slavery was in fact recognised at common law but rather whether the proper form of common law pleading had been chosen. (1)

It was not until June 22, 1772, that Lord Mansfield, Chief Justice of the King's Bench, in the case of Sommersett v Stuart, (2) was to set a common law standard which was to take on "a life of its own and [enter] the mainstream of American constitutionalism". (3) But, as will be discussed later in this chapter, even the Sommersett decision was itself very narrowly constructed, though the interpretation placed upon it by contemporaries, both within Britain and in the North American colonies, gave the case a significance in subsequent litigation right up to the outbreak of Civil War in the USA.

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1. Higginbotham, 1978:320.

2. King's Bench: 12 George III A.D. (1771-72) Lofft, 20 Howell's State Trials 1, hereafter referred to as How. St. Tr.

3. Wiecek, 1974:88.

In delivering a brief oral opinion in the case of Sommersett v Stuart [1] on the issue of whether James

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1. 20 Howell's State Trials, 1. This is a verbatim copy of Capel Lofft's version of the Sommersett case. Legal cases in the late eighteenth century were not officially reported. Judges delivered their opinions orally, and whether their deliberations survived depended on whether a lawyer or other person was present to take notes. Wiecek (1974:141-146) notes that there are apparently four variant reports taken down by persons present when Mansfield delivered his opinion on June 22, 1772. These reports contain some significant textual variations, thus controversy has arisen amongst scholars about which version ought to be regarded as the 'authentic' or 'authoritative' version. The four different versions are:

(i) Lofft 1, 18-19, 98 Eng. Rep. 499 (K.B. 1772) and 20 Howell's State Trials, 1;
(ii) An account in the 'Gentleman's Magazine', 293-94, June 1772;
(iii) An account in 34 'Scots Magazine', 297, June 1772. This version is reprinted in Shyllon, 1974:108-110; and
(iv) An unsigned handwritten document in the Granville Sharp transcripts, New York Historical Society, titled, "Trinity Term 1772. On Monday 22 June 1772 In Banco Regis". This document is reprinted in Prince Hoare 'Memoirs of Granville Sharp', 2nd ed., London, Henry Colburn, 1828.

The modern controversy began with the publication of Jerome Nadelhaft's 'The Sommersett Case and Slavery: Myth, Reality and Repercussions' in 51 J. Negro Hist. 193 (1966). In opting for the Gentleman's Magazine version, Nadelhaft argues that Lofft (and hence the verbatim copies) attributes arguments made by Hargrave (counsel for Sommersett) to Lord Mansfield. David Brion Davis, "The Problem of Slavery in the Age of Revolution, 1770-1823", Ithica, NY, Cornell University Press, 1975, and F.O. Shyllon (1974), suggest that the Scots Magazine may be a more authentic version than Lofft's. However, when Sommersett is discussed in this work reliance is placed on the version as reported by Lofft because of Wiecek's (1974) convincing arguments accepting Lofft as the authority on this case. Wiecek notes that Lofft was a recognised 'expert' on the subject he was reporting on as opposed to other un-named anonymous persons. If Lofft erred in reporting then it was on the side of inclusiveness rather than abbreviation; his technique was to attempt to report verbatim and his accounts square with those of his contemporaries. (See Wiecek, 1974:143-145). Perhaps more importantly, I agree with Wiecek when he claims that, to a large extent, the debate over what Mansfield really said is of secondary importance. What is at issue is what Mansfield was taken to have said in terms of establishing, within law in the form of judicial precedent, a basis upon which it could be argued by later jurists that slavery was inconsistent with both British and North American bourgeois constitutional forms and social institutions.

Sommersett, a black alleged to be the runaway slave of Charles Stuart, was entitled to a writ of habeas corpus to prevent Stuart from seizing and detaining him in England for shipment to Jamaica to be sold, Mansfield held:

> The only question before us is, whether the cause on the return is sufficient? If it is, the negro must be remanded; if it is not, he must be discharged. Accordingly, the return states, that the slave departed and refused to serve; whereupon he was kept, to be sold abroad. So high an act of dominion must be recognised by the law of the country where it is used. The power of the master over his slave has been extremely different, in different countries. The state of slavery is of such a nature, that it is incapable of being introduced on any reasons, moral or political, but only by positive law, which preserves its force long after the reasons, occasion, and time itself from whence it was created, is erased from memory. It is so odious, that nothing can be suffered to support it, but positive law. Whatever inconveniences, therefore, may follow from the decision, I cannot say this case is allowed or approved by the law of England; and therefore the black must be discharged. (1)

This particular holding, as developed by both British and North American jurists would take on an equivocal, ambiguous, if not totally contradictory status, in the process of its subjection to shifting considerations of jurisprudential theory and legal reasoning; articulated by men whose political views spanned the entire spectrum of pro and anti-slavery arguments and sympathies; and as used within the rhetoric of both pro and anti-slavery crusades. To a large extent the Sommersett decision is indicative of the ambiguities involved in the case law on slavery

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1. 20 How. St. Tr. 1 at 82.

as opposed to the statutes which were created to regulate both the international trade in slaves and the conditions of slavery itself. The statutes governing the status of slaves, as developed in the North American colonies (and later the USA), were precisely constructed and directed at regulating the detail of daily life for slaves as opposed to free people. Yet the early case law on slavery, in particular the English common law precedents, was remarkably fluid and could be used as precedent for or against the compatibility of slavery with British and colonial notions of legality.

In fact, within the realm of legal discourse, the Sommersett decision settled only two narrow, technical legal points on slavery: a master on bringing his slave to England could not remove his slave from England against the slave's will; and a slave could secure a writ of habeas corpus to prevent that removal. (1) Yet this holding was and continues to be variously represented as establishing the dictum that 'as soon as a slave sets foot on English ground, he becomes free'; as not only abolishing slavery in England but also as legally challenging its existence in the colonies by establishing the freedom giving qualities of the 'pure air' of England; and, if not establishing that slavery was illegal everywhere, at least establishing that where slavery existed it did so in violation of natural law. (2)

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1. For a detailed discussion of the legal points settled, see, E.C. Thomas, 'Leading Cases in Constitutional Law', 3rd ed., London, Stevens and Haynes, 1901:67-68.

2. For a discussion of how contemporaries represented Lord Mansfield's decision in Sommersett, see, Shyllon, 1974:141-76. For a discussion of how historians continue to represent the Sommersett decision, in particular on the origins and prevalence of the now commonplace misunderstandings, see, Shyllon, 1974:ix-x.

Sommersett provided a powerful precedent which could be, and often was, cited as posing fundamental constitutional problems for the legality of slavery in British colonies; it gave the abolitionist movement a legal authority which could be used as an ideological weapon in the crusade against slavery; it provided North American slave state judges with the difficulty of finding a legal basis for the existence of slavery at common law, thus necessitating a construction of the status 'slave' in legislation to be compatible with the holding that the state of slavery "is so odious that nothing can be suffered to support it, but positive law"; it had a lasting impact on American conflict of law theory and influenced the development of interstate legal regulation in the American federal system; and, by a simple twist of fate, it represented a significant expansion within law of the scope of habeas corpus and the development of the law on personal liberty.

This chapter then, by examining the pre and post 1772 British case law on slavery in relation to the social, political and economic structures within which these legal decisions were made, attempts to analyse the precise nature of the effectivity of legal practices, by an articulation of just how the translation of the slavery issues into the realm of legal discourse uniquely affected the direction in which British colonial expansion, through the use of unfree labour, was to develop. In an important sense this chapter sets the parameters of the tension between slavery as a mode of supplying

colonial labour needs and the ideological foundation of bourgeois notions of legality, which, in terms of the formal conditions of bourgeois right - the recognition of individuality, the proportionality of labour and reward, liberty and so on - is antagonistic to slavery.

For slavery to be effective, however, as a mode of colonial expansion within bourgeois society it required a legal form. Without such a form, contracts for the sale of slaves could not be enforced in legal practice nor could the trade in slaves be legitimated. But how could Great Britain, which did not require a slave labour force domestically, create the legal basis upon which it was possible to assert the incompatibility of the slave status with common law, yet, at the same time ensure the legality of its interests in slave-trading as an integral aspect of the developing capitalist economy and its interests in supplying the colonies with slave labour? It did so within law by a translation of the apparently incompatible issues surrounding the existence of slavery into distinctive legal categories.

Thus it was primarily through legislation that the legality of the trade in slaves, as trade, was established. Within this realm slaves were simply another form of merchandise subject to the forms associated with the legal regulation of any commercial transaction involving merchandise. As a source of the supply of labour for colonial expansion, the legality of slavery could be upheld by arguing that the legal status 'slave' was municipal in character, thus while English courts could not legitimate a

master's claim to forcibly remove a slave from England, they could recognise the master's right to a slave's services in England and his absolute rights of property in the colonies. As such, the British precedents on slavery, as will become clear later on in this chapter, provided the basis upon which the North American colonies were able to construct, within law, the slave status; to define the agents, master and slave; and to regulate the precise nature of that particular relationship.

DOMESTIC v COLONIAL LEGAL FORMS

> We have no slaves at home. They why abroad?
> And they themselves, once ferried o'er the wave
> That parts us, are emancipate and loose'd.
> Slaves cannot breathe in England; if their lungs
> Receive our air, that moment they are free:
> They touch our country, and their shackles fall.
> That's noble, and bespeaks a nation proud
> And jealous of the blessing - Spread it then,
> And let it circulate through every vein
> Of all your empire, that where Britain's pow'r
> Is felt, mankind may feel her mercy too!
>
> Cowper's Task

By the eighteenth century, England prided herself for the alleged personal freedom which English people enjoyed under the common law. Yet, at the same time, she promoted and legally sanctioned, both through statutes regulating her involvement in the international slave trade and through the acts of colonial legislatures, a system of slavery in her colonies. It was therefore inevitable that the question would arise concerning whether a slave brought to England would be regarded as free under

the common law, or whether the legal status of 'slave' under colonial law would still adhere. This issue was hardly likely to be resolved by uttering metaphoric statements concerning the freedom-giving properties of either English soil or air. But how exactly was it to be solved?

While by the end of the sixteenth century villenage (1) in England was almost an extinct social institution, a new economic and social institution which violated conceptions of human freedom was to emerge - the growth of racial slavery in the North American and other British colonies and the vast organisation of the international slave-trade. And, although Britain was not deeply implicated in the slave-trade when it began in the sixteenth century, there were notable exceptions: for example, the Elizabethan adventurer, Sir John Hawkins. (2) In fact, black slaves had appeared in England at the end of the sixteenth century, as an aftermath to the Spanish wars during the reign of Elizabeth I, but in July 1596 the Privy Council

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1. The main legal treatises on the institution of villenage in England include: Littleton, "Tenures", (1268); Cowell, "The Interpreter", (1607); and Coke, "Institutes of the Laws of England", Vol.1. For a general discussion of the legal system of villenage in England, see P. Vinogradoff, "Villainage in England: Essays in English Mediaeval History", at chs. i--iv, (1892). The pre-Elizabethan poor laws contained a short-lived experiment with domestic slavery for vagabonds - 1 Edw. 6. c. 3 (1547), repealed by 3 & 4 Edw. 6. c. 16 (1551) - see M. Davies, "Slavery and Protector Somerset: The Vagrancy Act of 1547", 19 Econ. Hist. Rev., 2nd ser. 533-49 (1966).

2. See, Shyllon, 1974:1-2.

ordered the removal of a number of them for economic reasons. (1) There is, however, no record of the number removed nor of the number who remained. Indeed, no record is available to indicate exactly what happened to any of these slaves.

By the middle of the seventeenth century, however, England began to organise the business of slave-trading on a larger scale, (2) and it was not long before she became the greatest slave-trader if not slave-owner in the world. From the sources of slave-trafficking, wealth poured into Britain, particularly to its great ports: Liverpool; Bristol and London. To this traffic in human beings the British Government gave not only its approval but also it exerted pressure to ensure both maintenance and expansion. In 1750, for example, a statute was passed to secure the supply of blacks at a 'reasonable' (sic) rate to the plantations, and, on numerous occasions, import duties on slaves imposed by colonial legislatures were disallowed by the British Government. (3)

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1. The Privy Council declared that: "understanding that there are lately divers blackamoores brought into this realme, of which kinde of people there are allready here too manie, considering how God hath blessed this land with great increase of people of our owne nation as anie countrie in the world, whereof manie for want of service and means to sett them on worke fall to idleness and to great extremytie ... that those kinde of people should be sent forth of the lande ...", as cited in John Roche Dasent, ed. "Acts of the Privy Council of England (New Series) 1596-7", xxvi, London, 1902:16-17.

2. For a discussion of England's involvement in the international slave trade and the legal issues involved, see Chapter 6.

3. Fiddes, 1934:500. Import duties on almost everything were disallowed in accordance with mercantilist theory.

Given the organisation of slavery in the British colonies, it is hardly surprising to find that slaves were often brought to Britain by their masters. Consequently, the question of how far their status as slaves continued in Britain was raised in the courts and by the mid eighteenth century a series of court rulings on the legal issues concerning slavery had been established in which the judges not only apparently contradicted each other, but also, on occasion, themselves. (1)

For well over a century there was a legal pendulum swinging between whether or not the colonial legal status 'slave' continued under British law and, if it did, to what extent could this legal title to slave property be applied? Throughout this period the courts seldom addressed themselves to the question of the legality of slavery as such in any direct way. Instead they relied on whether the particular writ was in the proper form: to establish ownership of a slave, a suit in trover; to establish a right to the services of a slave, a suit per quod servitium amisit; or to establish a right to the recovery of damages for non-performance of a contract, a suit in assumpsit. The choice of the specific form of common law pleading, the various forms of which had developed over centuries of adjudication, often became the critical legal issue in the court's ruling for or against the alleged slave. Legal practices in relation to these writs and their appropriateness or otherwise to slavery cases not only had a distinctive effectivity on the question of the legality of

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1. Helen T. Catterall (ed) "Judicial Cases Concerning American Slavery and the Negro", 5 vols., reprinted, New York, Negro Universities Press, 1968:1:1-52.

slavery but also on the development of common law in terms of the judicial endorsement of the motto, in favorem liberatis, that is, that all parties be presumed free until proven otherwise.

The first legal decision concerning the compatibility of slavery with English law was handed down in 1569. In the Cartwright case [1] the Court held that the slave in question, imported from Russia, must be manumitted because "England was too pure an aire for slaves to breathe in". [2] Exactly why this air was considered to be too pure is not recorded, if it was ever stated, but these words would become subject, in later legal decisions and in political debates, to constant reiteration and interpretation. Although the race of Cartwright is not stated in the brief report, it is unlikely that the slave in question was black, [3] thus the first recorded case involving black slaves was not heard until 1677. In Butts v Penny [4] English courts were, for the first time, presented with the issue of whether or not black slavery was sanctioned by English law. In the event, the Court did not rule on this issue in Butts but instead ruled on the issue of whether or not and under what conditions black slaves constituted personal property to the extent that an action in trover could be maintained. Trover, a

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1. 2 Rushworth 468 (1569).

2. Ibid.

3. See Higginbotham, 1978:321.

4. 2 Levinz 201, 83 Eng. Rep. 518 (K.B. 1677), also reported with variation in 3 Keble 785.

form of action in common law pleading that would lie for recovery of damages for the wrongful taking and detainer of specific chattels, required plaintiffs to have a property right in the chattels. (1) The plaintiff therefore, in Butts, required to have a property interest in the slaves (2) he claimed had been taken from him, if his suit for the recovery of damages was to be sustained.

In a special verdict for the plaintiff, in which the judges of the King's Bench held that there might be property rights in slaves sufficient to maintain trover, since black slaves were "usually bought and sold among merchants, as merchandise" and because they were also "infidels", the earlier precedent of Cartwright was not referred to. The judgment for the plaintiff was given "nisi Causa, this Term" (emphasis in original) indicating that the judgment was valid unless the party affected came to show cause within the specified time why it should not stand. In other words, the ruling was not necessarily final, though no record exists of any further adjudication on this specific case. (3) The absence of any final judgment in this particular case meant that it was, at best, a shaky precedent,

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1. A trover is an action to recover for wrongful interference with or detention of the goods of another, (3 Steph. Comm., 425); and also a common law remedy to recover the value of personal chattels wrongfully converted by another, (1 Burr 3).

2. In Levinz the action was recorded as being for 200 blacks, whereas Keble and the original records list the number to be 10. See, Keble 785.

3. Further complicating its status was a problem common to all 17th century decisions - the informal character of the reporting, (Wiecek, 1974:90).

and, at worst, no precedent at all. (1) This however did not prevent a reliance on it as precedent within legal discourse in subsequent slavery cases.

Nevertheless, while the Court in Butts v Penny, in common with the other pre-Sommersett cases, gave judgment in terms of the technicalities of common law pleadings, counsel used the issue of whether trover was the appropriate form of action for the recovery of a group of black slaves to address the substantive issue of whether it was legally possible to hold property in human beings.

In discussing this substantive issue, counsel in Butts considered what would become the most commonly cited precedent for the New World legal institution of slavery - the ancient

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1. For a full discussion of the precedential issues in the case see Higginbotham, 1978:321-2.

English feudal form of bondage - villenage. (1) The defence counsel in Butts had argued that an action of trover would not lie for any person (hence not for a slave) since the laws on villenage only permitted the acquisition of a property right in a person by virtue of either conquest or compact but in the present case there was no evidence adduced to show that Butts had acquired the slave, Penny, in either of these particular ways. (2) While the court, in the event, ruled against the slave's defence and gave

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1. The ancient system of villenage, having its roots in forms of feudal tenure, provided an arguable legal and social precedent for slavery in England. (For a discussion of an analogous form of bondage in later centuries in Scotland, see p. 136, Note 1 infra.) Legal treatises, such as Littleton's work on "Tenures" (1268), Cowell's legal dictionary, "The Interpreter" (1607), and Lord Coke's first volume of "Institutes of the Laws of England", continued to be used as sources of reference throughout the eighteenth century and continued to include writings on villenage within their texts, thus making it possible to suggest that however loosely interpreted, slavery and villenage could be related giving slavery some form of precedential support. As chattel slavery in the colonies became more developed, English lawyers tended to characterise the institution of slavery as a New World version of villenage, (See, Davis, 1975:469-522). The feudal villenage labour system bound the worker (villein) to the master's land/estate in a status analagous to that of a serf, and in some ways to the status of a slave. A villein was attached to the manor, performed work for his lord and was, to all intents and purposes, his lord's property. The lord possessed a limited right of physical power over both the villein and his direct descendants through the male line. There were basically two types of villeins - villeins in gross who were annexed to the person of the lord and could be transferred by deed from one owner to another; and villeins regardant who were annexed to the manor of the lord and were serfs. (See Black's Law Dictionary, 4th edition, p.1741). For a discussion of the social and legal rights of villeins in the middle ages as compared with those of the New World black slaves, see, Winthrop Jordan, "White Over Black", Chapel Hill, University of North Carolina Press, 1968.

2. Higginbotham, 1978:322.

no indication of its views concerning whether or not villenage could be regarded as a legal precedent for slavery, the issue of whether or not villenage could be viewed as relevant precedent was to be discussed time and again in relation to slavery cases.

Another issue which had been raised in Butts which apparently made it possible for one person to hold property in another concerned whether the person claimed to be a slave was a 'heathen'. Two subsequent cases, Noel v Robinson, 1687 (1) and Gelly v Cleve, 1694, (2) recognised the legality of claims to property interests in slaves who were not Christians. The court in Noel v Robinson implicitly upheld the master's property interest in black non-Christian slaves in deciding that Sir Martin Noel's devise of a moiety (one of two equal portions) of his plantation, including slaves, was a legally valid disposition of property. (3) In Gelly v Cleve the court was more explicit in holding that the law recognised a property interest in black slaves (4) who were heathens in judging that:

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1. 1 Vernon 453 (1687).

2. 1 Ld. Raym. 147 (1694).

3. For a discussion of this case, see Higginbotham, 1978:324.

4. It must be emphasised that the word 'slave' changed its connotations of status as the slave system in the colonies developed, thus references to 'slaves' in the 17th and 18th centuries and in different locations mean very different things.

> Trover will be for a Negro boy; for they are heathens, and therefore a man may have property in them, and that the court ... will take notice that they are heathens. (1)

Two years later, in the 1696 case of Chamberlaine v Harvey, (2) the King's Bench qualified the master's legal right of property in slaves. In Chamberlaine, suit was brought in trespass (3) against the defendant, Harvey, for detaining a slave allegedly owned by Chamberlaine. The slave had originally been owned by Chamberlaine's father, a planter in Barbados. In Barbados a slave was legally considered as real estate rather than as chattel property. (4) Chamberlaine's father had died leaving the slave to Chamberlaine's mother. The mother subsequently remarried and moved to England, taking the slave with her. While in England, the slave was baptised without Chamberlaine's permission and when the latter's mother died, her second husband "put the negro out of his service". (5) The

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1. 1 Ld. Raym. 147 (1694) - emphasis in original.

2. Three reports of this case exist: Carthew 396, 90 Eng. Rep. 830; 5 Mod. 186, 87 Eng. Rep. 598; and 1 Ld. Raym. 146, 91 Eng. Rep. 994 (K.B. 1697). I adopt 1 Ld. Raym. for the report of Holt's decision and 5 Mod., for the arguments of counsel because they are the fuller version.

3. Trespass was an action for financial redress for unlawful injury done to the plaintiff's person or property by the improper act of the defendant.

4. For a discussion of the significance of this distinction, see Chapter 3 which notes the Barbadian heritage in the early colonial period in South Carolina, and Chapter 4 which analyses the shift from regarding slaves as real estate to chattel property.

5. 3 Ld. Raym. 133.

slave subsequently hired himself out to several masters and, when the current suit was instituted, he was working for wages for Harvey.

Counsel for Harvey explored several of the issues which were to be examined in Sommersett almost a century later. Firstly, he argued that slavery was contrary to the "law of nature" and whilst this alone did not render the status illegal in England the thrust of the common law was in favour of liberty and presumptions about personal status must run in favour of freedom. Slavery, he argued, could therefore only exist by "the constitution of nations". Counsel for Harvey also argued that in England it was not possible for one person to have absolute property in another, "because by Magna Carta, and the laws of England, no man can have such a property over another". Lastly, and this is where he explored the implications of colonial versus common law - the nature of the imperial relation (1) - he insisted that the law making the particular individual in question a slave was merely lex loci, (2) whose force dissolved when the slave was removed from the jurisdiction or when the slave was baptised. (3)

Chamberlaine's counsel, on the other hand, argued that,

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1. This issue was not resolved, within law, until the Sommersett case.

2. The law of the country in which the relation originated. Municipal law, on the other hand, is the law of the country where the case is being tried.

3. For a fuller discussion of opposing counsel's arguments, see Wiecek, 1974:91-92.

"though the word 'slave' has but a very harsh sound in a free and Christian country" slavery could nevertheless be legitimated there by a quasi-contract under which the master derived "power" over the slave in return for providing him with food and clothing. Such a quasi-contractual relation, argued counsel, found its precedential support from the ancient law of villenage. (1) The specific feature of Barbadian law which regarded a slave as real estate made such a slave equivalent in status to a villein regardant, that is, a villein attached to the manor of his lord. Since a villein regardant had to be formally manumitted by his lord before he could be considered free to take up other employment, so too, said counsel, must the slave in this particular case. The slave had not been, thus any manumission would have to be implied or constructive either from the slave's baptism or from his having been brought to England. Chamberlaine's counsel argued, however, that baptism should not be construed as conferring freedom because such a construction would "endanger the trade of the plantations, which cannot be carried on without the help and labour of these slaves".

The court, however, in deciding the case in favour of Harvey, did not address the question of whether baptism conferred freedom nor did it confront the issue of whether a slave's migration to

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1. Although villenage was extinct as a viable social form by the mid sixteenth century, lawyers continued to draw on its analogies with slavery regardless of whether or not they were arguing for or against the legality of slavery. For a fuller discussion of this issue, see Jordan, 1968.

England granted freedom. Instead Chief Justice Holt relied on the technical issue of whether the correct form of common law pleading had been adopted in the present case. Holt rejected the precedent of Butts v Penny in asserting that neither trover (as in Butts) nor an ordinary action in trespass (as in the present case) would lie for the taking of a slave. He suggested that the master's proper remedy was a suit per quod servitium amisit - a suit claiming loss of the services of a servant. Nevertheless, whilst relying on technical matters of pleading in the judgment, the distinction between trover and per quod servitium amisit had significant implications for the legal status of a 'slave' in England. Within law, a slave could be recognised as a chattel if an action in trover were sustained. If however the correct form of pleading was to be per quod servitium amisit then the 'slave' would be analagous in status to a bond servant rather than to vendible merchandise. (1)

The extent to which English law would recognise the legality of claims to slave property right in England as opposed to within its colonies (2) was further qualified in two subsequent decisions of Chief Justice Holt. In Smith v Brown

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1. For somewhat differing interpretations of the significance of Holt's judgment in Chamberlaine v Harvey, see Higginbotham, 1978:324-5; and Wiecek, 1974:90-92.

2. Whatever challenge there was to the legality of slavery in England, the legality of slavery in the colonies was not seriously questioned in the English courts.

and Cooper, [1] Holt, for the Court, held that the plaintiff could not sue in assumpsit (an action for the recovery of damages for the non-performance of a contract) for the purchase price of a slave because, following the reasoning of Cartwright and Chamberlaine, "as soon as a negro comes into England, he becomes free; one may be a villein in England, but not a slave". [2] This particular decision has been variously interpreted as having abolished slavery in England [3] or as having found the colonial law to be inconsistent with metropolitan law. [4] Such interpretations however are misguided given that, in dialogue with counsel, Chief Justice Holt attempted to suggest an alternative procedural mode by which the claimant might be able to recover the value of the slave sold, in order to preserve a legal mechanism for the selling of slaves in England. [5] Moreover, as in Butts, there was no final judgment in Smith v Brown and Cooper,

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1. 2 Salkeld 666, 91 Eng. Rep. 566 (K.B. 1701). The case is also reported at Holt K.B. 495; 90 Eng. Rep. 1172 (K.B. 1701).

2. 2 Salkeld at 666.

3. See W. Holdsworth, "Some Makers of English Law", Cambridge, Cambridge University Press, 1966 ed:156.

4. See A. Sutherland, "Constitutionalism in America: Origin and Evolution of Its Fundamental Ideas", 1965:129; as cited in Wiecek, 1974:92, Note 22.

5. Wiecek, 1974:93. This interpretation is supported by the fact, for example, that in 1689 C.J. Holt had signed a report concerning the maintenance of the slave trade against the Spanish in which black slaves were explicitly considered as merchandise, (Fiddes, 1934:501, citing the Calender State Papers, America and the West Indies, Nov.11, 1689).

making its precedential value somewhat dubious. (1)

In another case before the King's Bench, Smith v Gould, 1706, (2) Chief Justice Holt again gave judgment in terms of mechanistic common law pleadings. The Smith plaintiff had brought suit in trover for, amongst other things, a de uno Aethiope vocat (a ~~singing~~ so-called Ethiopian). The Court held, in line with the defendant's argument, that trover was not an appropriate form of pleading for the recovery of a slave because, "the owner had not an absolute property in him; he could not kill him as he could an ox ... Men may be the owners and therefore cannot be the subject of property". (3) After further noting that, "by the common law no man can have a property in another, but in special cases, as in a villein, but even in him not to kill him: ... there is no such thing as a slave by the law of England", (4) the Court went on to suggest just how title to a slave could be asserted by analogising between the status of slave and servant. Thus, "if a man's servant is took from him, the master cannot maintain an action for taking him, unless it is laid per quod servitium amisit ...". (5)

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1. Holt suggested that the plaintiff could obtain relief if he amend his complaint to show that at the time of the sale the black was in Virginia and subject to Virginia laws -- "by the law of that country, negroes are saleable" (2 Salkeld 666).

2. 2 Salk. 666; 91 Eng. Rep. 567 (K.B. 1705); and 2 Ld. Raym. 1274; 92 Eng. Rep. 338 (K.B. 1706).

3. 2 Ld. Raym. 1274 (1706).

4. Ibid.

5. Ibid., - emphasis in origina.

Moreover, the Court explicitly overruled the opinion of the Court in Butts v Penny which had held that trover would lie for the recovery of a slave. Nevertheless, although an action in trover could not be sustained whereby slaves would have been legally regarded as chattel property under English law, the fact that a writ of trespass for loss of services (per quod servitium amisit) could be,meant that the legal title to a black 'servant' acquired through purchase could still be upheld.

Against this background of judicial opinion concerning the legality of slavery, the Attorney-General, Sir Phillip Yorke, and the Solicitor-General, Charles Talbot, gave their comments on slavery to a delegation of merchants and planters who attended a special dinner at Lincoln's Inn Hall in 1729. (1) According to these authorities the merchants and planters had little cause for worry on legal grounds: a slave coming to Great Britain with or without his master, was not liberated; the master's property right in that slave whilst in Great Britain was not "determined or varied"; baptism neither liberated a slave nor changed his temporal condition; and "the master may legally compel him to return again to the plantations". (2)

While the Yorke-Talbot position could not, of course, overrule judicial precedent, in the case of Pearne v Lisle,

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1. For a more detailed discussion of this event and the circumstances surrounding it, see Fiddes, 1934:502.

2. The joint opinion is quoted in full in the Scottish case of Knight v Wedderburn, 8 Fac. Dec. 5, Mor. 14545 (Scot. Ct. Sess. 1778). For a discussion of this case see pp.137-140. The opinion is also referred to by Lord Mansfield in Sommersett v Stuart, 20 How. St. Tr. 1.

1749, (1) Yorke, now Lord Chancellor Hardwicke, was able to place his interpretation in the realm of official legal discourse. In Pearne, the plaintiff had hired out fourteen black slaves to the defendant in Antigua at a yearly rate of £100. Pearne (the plaintiff) claimed that the defendant had refused to pay for the slaves and had refused to return them. Lord Hardwicke ruled that Pearne would be required to pursue his claim in the colonial court in Antigua and, although it was unnecessary for Hardwicke to rule on any other issues, he re-affirmed his earlier position in relation to the question of the legality of slavery. Thus, in his opinion he held that trover would lie for a negro slave just as it had for villeins since "it (the slave) is as much property as any other thing", (2) citing Butts v Penny as precedent. Moreover, Hardwicke maintained that Holt's ruling in Smith v Gould only turned on a procedural error by the plaintiff: there were no legal differences between enforcing the service contracts of English servants or villeins and black slaves. He further remarked that slaves did not become free by landing in England nor were they liberated by baptism. (3)

In addition to these reflections on the legal status of slaves in England, Hardwicke clearly demonstrated that his view

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1. Ambler 75; 27 Eng. Rep. 47 (1749).

2. Ambler 76 (1749).

3. For a fuller discussion of Hardwicke's opinion, see Higginbotham, 1978:327-8.

that trover would lie for a slave was based on the extent to which such 'things' were unequivocally regarded as chattel property. Thus his opinion closes in Pearne v Lisle with the observation that the delivery of the specific slaves at issue:

> Is not necessary, others are as good; indeed ... The Negroes cannot be delivered in the plight in which they were at the time of the demand, for they wear out with labour, as cattle or other things; nor could they be delivered on demand, for they are like stock on a farm, the occupier could not do without them, but would be obliged, in case of a sudden delivery to quit the plantation. (1)

The opinion however was qualified in some measure less than thirteen years later by Lord Chancellor Henley in the case of Shanley v Harvey, 1762. (2) Shanley, owner of the defendant Harvey, had brought Harvey as a child to England in 1750. Shanley gave the slave to his niece who baptised him and gave him money before her death. After her death, Shanley tried to resume control over Harvey but Harvey resisted. Lord Chancellor Henley ruled that Harvey could exercise the rights of a free man since "as soon as a man sets foot on English ground he is free: a negro may maintain an action against his master for ill usage and may have a Habeas Corpus if restrained of his liberty". (3) The

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1. Ambler 77 (1749).
2. 2 Eden 125; 28 Eng. Rep. 844 (1762).
3. 2 Eden 126 (1762) - emphasis in original.

significance of this decision was that Henley did not rely on the baptism for holding Harvey to be entitled to the legal rights of a free man but rather on the fact that Harvey had "set foot on English ground" and, this being the case, Harvey's liberty could be protected by Habeas Corpus. (1) Applications by 'slaves' for Habeas Corpus would subsequently become central to the question of the legality of claims to slave property in Great Britain.

Shanley v Harvey also represents a new feature in litigation concerning slavery in Britain - one of the parties involved in the court action was the claimed slave himself. Until this case the highest courts of both common law and equity, the judges and counsel, had spoken on many of the legal issues presented by a form of colonial expansion which involved the incorporation of the ownership of persons into a legal system based on the ideology of the common law motto - in favorem liberatis - without any of these 'owned' persons being direct parties in the legal actions. This, however, was to change throughout the 1760s: partly because of the beginnings of the antislavery crusade with abolitionist leaders taking an active part in supporting slaves to bring suits for freedom in the British (2) courts; and partly due to the

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1. The Habeas Corpus Amendment Act of 1679, 'An Act for the better securing the Liberty of the subject and for Prevention of Imprisonment beyond the Seas', 31 Car. 2. c. 2., had explicitly extended 28 Edw. 3. c. 3 (1354), itself an extension of Magna Carta's provisions to all men, in declaring that "no man of what estate or condition that he be, shall be put out of land or tenement, nor taken nor imprisoned, nor disinherited, nor put to death, without being brought in answer by due process of the law".

2. Such suits occurred in Scottish courts also, see pp.137-140 infra.

fact that with the development of the plantation economy in the colonies, more planters were bringing their personal slaves to Britain. These slaves, while in Britain, frequently ran away from their masters, who, unable to apply the punishments which were legally sanctioned in the colonies, (1) adopted the method of seizing and forcibly shipping runaway slaves back to the plantations. (2) As will be discussed in the following section, these factors together with the tremendous escalation of Britain's involvement in the international slave-trade made it more problematic for legal institutions to avoid confronting the issue of whether the legal rights of property or of liberty would predominate.

THE LEGALITY OF CLAIMS TO PROPERTY v LIBERTY

By the 1760s Great Britain contained a large residential slave population, (3) in addition to a number of free blacks, mostly begging in London and known as the "St Giles' blackbirds". (4) The slave-trade itself had escalated to tremendous proportions in the 1750s and 60s. Liverpool's eighty-

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1. See Chapter 4 for a discussion of the special legal procedures applied to criminal slaves.

2. Gentleman's Magazine, 1764, 493.

3. See Shyllon, 1974:3-16, for a discussion of the black slave population in Britain. See also G. Williams, "History of the Liverpool Privateers", 1897:473-497.

4. Wiecek, 1974:95.

seven slave-traders alone had the capacity to hold at least 25,000 slaves though the number actually shipped in these vessels:

> If not actually delivered 'in good order and condition' was probably much higher, as it was customary to overload, with the most frightful results. (1)

As was discussed in the introduction to this chapter, this traffic in human beings became one of the most lucrative branches of the commerce of cities like Liverpool and, in addition to newspapers carrying advertisements relating to the articles, such as shackles, necessary for a slave voyage, and for the sale of slaves, there were also numerous adverts concerning the return of runaway slaves in Britain. For example, the Williamson's Advertiser of February 17, 1758, carried the following:

> Run away from Dent, in Yorkshire, on Monday the 28th August last, Thomas Anson, a negro man, about 5 ft. 6 ins. high, aged 20 years and upwards, and broad set: whoever will bring the said man back to Dent, or give any information that he may be had again, shall receive a handsome reward from Mr Edmund Sill, of Dent; or Mr David Kenyon, merchant, in Liverpool. (2)

The 1760s however was also a period in which signs of protest against trading in slaves began to emerge and newspapers began to comment on the sale of slaves in a critical way. Thus, in the Stamford Mercury, 1771:

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1. Williamson's Liverpool Memorandum Book, cited by Williams, 1897:473.

2. Ibid., 475-6.

> At a sale of a gentleman's effects at Richmond, a Negro Boy was put up and sold for £32; ... a shocking instance in a free country. (1)

Such comments paralleled the beginnings of the abolitionist movement and it was in this period that Granville Sharp, one of the most influential abolitionists, began to take up the question of the legality of slavery under English law. Sharp's (2) involvement in litigation concerning slavery began following his discovery of an abandoned and badly beaten slave, Jonathan Strong, in 1765. (3) Lisle, a planter from Barbados who owned Strong, had discarded the slave when he no longer considered him fit for labour. Sharp had helped Strong to regain his physical health but in 1767 Lisle kidnapped Strong, sold him to a Mr Kerr who planned to take Strong to Jamaica, but was prevented from doing so due to Sharp's success in preventing Strong's re-enslavement. Lisle, however, subsequently brought suit against Sharp and his brother claiming £200 damages for the deprivation of his property in Kerr and Lisle v Sharp and Sharp,

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1. Ibid., 497.

2. Granville Sharp was born in Durham, one of fourteen children, to an eminent ecclesiastical family. He was originally apprenticed to a draper, became a linen merchant for a short time and then a clerk in the Ordnance Department, until his resignation in 1776 because he was no longer able to make out orders for shipping munitions to combat the revolting colonists whose cause he supported. His wealthy older brothers were leading philanthropists who assisted him in his crusade against slavery. See, Prince Hoare, "Memoirs of Granville Sharp Esq. Composed From His Own Manuscripts", London, H. Colburn, 1828, 2nd ed, 2 vols.

3. Hoare, 1828:32-37.

1767. [1] In the event, Lisle dropped his suit against the Sharp brothers although Sharp's chance to argue that no action could be brought for detainer because the master could not have a property right in a slave would soon come again.

After two years of research Sharp produced 'A Representation of the Injustice ... of Tolerating Slavery' in which he condemned slavery as a "gross infringement of the common and natural rights of mankind" and as "plainly contrary to the laws and constitution of this kingdom" because no laws "countenance(d)" it and others, in his analysis, made it actionable. [2] On this last point, Sharp drew on the traditions established under Magna Carta which, in its 39th chapter, had provided that no freeman should be killed, imprisoned or disseised, "except by the lawful judgment of his peers or ... by the law of the land". [3] By a 1354 statute [4] these provisions were extended to all men, not just free men, and by the Habeas Corpus Amendment Act of 1679 [5] the provisions had been further extended to "any person or persons". Sharp therefore argued that these provisions enabled all persons in England, including slaves, to contest in court any restraint in their persons, through the writ of habeas corpus.

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1. The story of the Strong litigation is told by Shyllon, 1974: 24-39.

2. Granville Sharp, "A Representation of the Injustice and Dangerous Tendency of Tolerating Slavery: Or of Admitting the Least Claim of Private Property in the Persons of Men in England" 1769, hereafter cited as Sharp, 'Representation', London, B. White and R. Horsefield.

3. The translation is from C. Stephenson and F. Marcham, "Sources of Constitutional History", 2nd. ed., 1972, Vol.1:121 - cited by Wiecek, 1974:97, Note 36.

4. 28 Edw. 3. c. 3 (1354).

5. 31 Car. 2. c. 2 (1679).

If this procedural point was accepted then the substantive issue of the legality of slavery would also require to be addressed. Sharp's analysis dissolved the distinction within legal discourse between procedural and substantive due process since the claim which would permit a slave to get into court, that is, that he was a protected 'person' deprived of his liberty without due process of law, would ipso facto if not ipso jure challenge the legal basis of his enslavement. (1) Indeed, the due process clause of the 14th Amendment of the US Constitution can be traced to this kind of reasoning. (2)

Sharp, however, also had to consider the numerous parliamentary statutes regulating the slave trade, granting concessions to slavers, and confirming the master's property right in slaves, (3) which afforded legality to the ownership of man by man. In considering these laws, Sharp argued that where statutes create injustice, courts should regard them as superceded by statutes favouring liberty since these are of superior obligation. To back up this reasoning Sharp appealed to

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1. Wiecek, 1974:98.

2. For a discussion of the 14th Amendment, see Chapter 9.

3. See 5 Geo. 2. c. 7 (1732); 23 Geo. 2. c. 31 (1750); 25 Geo. 2. c. 40 (1752). These statutes define slaves and Negroes as goods, assets, or property. The charter of the new Royal African Company, 1672 (see Chapter 6) defined 'slaves' and 'negroes' as 'goods' and 'commodities'. (See Calendar of State Papers, Colonial Series, America and West Indies, 1669-1674, at 409-12, W. Sainsbury ed. 1889).

natural law and justice which could not legitimate the deprivation of liberty. (1)

In preparing his 'Representation' Sharp also consulted Sir William Blackstone whose 'Commentaries' (2) was regarded as the definitive work on the laws of England. In the first edition of his Commentaries, Blackstone argued that slavery in its pure form "does not, nay cannot, subsist in England" nor could English legal traditions recognise as legitimate the origins of slavery which continental writers had found to legitimise the legal status 'slave'. (3) Citing Smith v Brown and Cooper, (4) Blackstone argued that "a slave or negro, the moment he lands in England ... falls under the protection of the laws and without regard to all natural rights becomes eo instanti a freedman". (5) This position however was qualified insofar as Blackstone, while denying that continental justifications for the legitimate origins of slavery (captivity in war, self-sale, inherited status) had any force under English law, went on to suggest that slavery could have a contractual

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1. Sharp, 'Representation', 26-7; 38.

2. William Blackstone, "Commentaries on the Laws of England", 1st ed. 1765, Oxford; 3rd ed. 1768, Oxford.

3. Blackstone, 1765 ed., 123, 411-2.

4. This case, decided in 1701, has already been discussed at p.109 of this chapter.

5. Blackstone, Commentaries, 1st ed. 1765:123 - emphasis in original.

basis and that whatever rights an English master derived on this basis continued in England and were unaffected by baptism. (1)

By the time of the publication of the third edition of the 'Commentaries' in 1768 Blackstone had further qualified his views concerning the legality of slavery in England. He modified the passages referred to in such a way as to remove the implications that slavery depended on contract or that a slave was entitled to liberty under English law. Thus he stated that "whatever service the heathen negro owed to his American master, the same is he bound to render when brought to England and made a christian"; and he revised his earlier position that a slave becomes free upon coming to England by amending that passage to read that a slave merely comes under the "protection of the laws, and so far becomes a freeman: though the master's right to his service may possibly still continue". (2)

Sharp's 'Representation' also considered the implications of the colonial statutes, particularly those of Virginia, (3) for

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1. Ibid., 412.

2. Compare, Blackstone, Commentaries, 1st ed. 1765 at 123, with 3rd ed. 1768 at 127.

3. Sharp, however, failed to explore a passage in Virginia's first comprehensive slave code, the Act of 1705, c. 49:6, 3 Hening 448 (1823), providing that a slave's "being in England" would not work an automatic emancipation without other proof of emancipation. For a fuller discussion of the creation of the status 'slave' in legislation in colonial America, see Chapter 4 and for a discussion of its roots in early colonial legal form, see Chapter 3.

the question of the legality of slavery at common law. He noted that "wheresoever the bounds of the British Empire are extended, there the Common Law of England must of course take place", (1) urging that the colonial legislatures have greater respect for the common law principles underlying the British Constitution, but failing to explore the avenue which later American abolitionists (2) would - the fact that colonial charters had stipulated that the colonial legislatures could enact only those laws which were "not contrary to the laws of this realm of England". (3)

Sharp distributed free copies of the 'Representation' to lawyers in order to propagate his interpretation that slavery was totally at odds with English legal traditions. However, while numerous cases involving the question of the liberty of black slaves presented themselves in the late 1760s where, according to Thomas Clarkson, (4) liberty was secured in each case, none of this litigation ruled explicitly on the issue of

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1. Sharp, 'Representation', at 70-71.

2. For a discussion of American abolitionism in relation to this point, see Chapter 8.

3. This wording is from the Connecticut Charter of 1662, as cited in C. Stephenson and F. Marcham, 2, 1972 ed. at 590.

4. T. Clarkson, "The History of the Rise, Progress, and Accomplishment of The Abolition of the African Slave-Trade by the British Parliament", Philadelphia, James P. Parke, 1808: 74-5.

whether a slave becomes free when brought to England. (1) Nevertheless, in Rex ex rel. Lewis v Stapylton, 1771, (2) a typical case involving the usual pattern of kidnapping and attempted shipment to the colonies, some of the directions in which the law of slavery might move became evident. Lewis, the former slave of Robert Stapylton, was seized by his former master and two watermen hired for the purpose, and placed on a ship bound for Jamaica where he was to be sold into slavery. Sharp was able to procure a writ of habeas corpus in order to halt the deportation and to have an indictment issued by the Grand Jury at Middlesex against Stapylton and the watermen for assault and false imprisonment for having seized Lewis for transport and sale outside the realm. (3)

R v Stapylton and Others was heard before Lord Mansfield, (4) Chief Justice of the King's Bench, who evaded the issue of whether

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1. See, for example, the case of Hylas v Newton, 1768, cited by Shyllon, 1974:40-43. Hylas and his wife had been black slaves in Barbados. Both were brought to England by their respective masters; they married in England with their owners' consent and Hylas' owner set him free after his marriage in 1758. In 1766, after living together for 8 years, Hylas' wife was kidnapped and sent to the West Indies to be sold. Sharp took up Hylas' cause for the return of his wife and the case was tried in the Court of Common Pleas in December 1768, under an action for the recovery of damages. The court found in favour of Hylas but only awarded 1 shilling damages (despite the fact that under the Habeas Corpus Act damages were set at £500) and Newton was bound to return Hylas' wife either by the first ship or within 6 months. The case, however, only decided that since Hylas had been freed he was entitled to his own liberty as well as that of his wife.

2. This case is not officially reported but is cited in detail in E. Lascelles, "Granville Sharp and the Freedom of Slaves in England", London, Oxford University Press, 1928:29 et seq.

3. For a discussion of the circumstances in this case, see Clarkson, 1808:I:73.

4. The same judge as in the Sommersett case.

or not the law recognised a right to property in slaves by charging the jury to decide on whether there was evidence of Stapylton's ownership: if there was then Stapylton must be acquitted; if not then the jury should find him guilty. While the jury found that the evidence did not support Stapylton's contention that Lewis was his slave and thus issued a verdict of guilty on Stapylton as charged, (1) Lord Mansfield, in conversation with Dunning, counsel for Lewis, remarked:

> You will see more in the question (whether there is a legal right of property in slaves) than you see at present. It is no matter mooting it now; but if you look into it, there is more than by accident you are acquainted with. There are a great many opinions given upon it; I am aware of many of them: but perhaps it is much better it should never be finally discussed or settled. I don't know what the consequence may be, if the masters were to lose their property by accidentally bringing their slaves to England. I hope it will never be finally discussed; for I would have all masters think them free, and all Negroes think they were not, because then they would both behave better. (2)

Thus, even although in his remarks to counsel, Lord Mansfield was concerned with issues other than evidence as to Stapylton's ownership, in his initial encounter with the issue of whether a slave could be forcibly removed from England to the colonies, he avoided ruling on whether the right to slave <u>property</u> could be upheld under English law. This issue, however, would be raised

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1. Judgment, however, was not delivered on Stapylton, and Mansfield advised that future proceedings would be dropped. (See Hoare, 1828:78-92).

2. Minutes of the Trial of Thomas Lewis, 20th February, 1771, in the possession of the African Institution, as cited by Hoare, 1828:92.

again in less than a year when Granville Sharp and other abolitionists took up the cause of another runaway slave, James Sommersett.

The case of Sommersett v Stuart, 1771-72, [1] argued before the King's Bench with a total of five separate hearings, involved a factual background similar to that involved in the Lewis case. Sommersett had originally been purchased in Virginia by Stuart who had brought his slave with him to England in 1769. In October 1771 Sommersett escaped but was seized by Stuart's agents in November of 1771 and chained in a Jamaica-bound ship, commanded by Captain Knowles. Through the intervention of Sharp and several others [2] a writ of habeas corpus was secured from Lord Mansfield on Sommersett's behalf ordering Knowles to bring Sommersett before the full court and justify the detention. On December 9, 1771, upon producing Sommersett before Lord Mansfield, Captain Knowles replied that Sommersett was owned by Charles Stuart and that Sommersett had been a slave in Africa even before he was purchased by Stuart. Knowles also stated that Sommersett had "without the consent, and against the will of the said Charles Stuart, and without any lawful authority whatsoever, departed and absented himself from the service of the

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1. 20 Howell's State Trials, 1. This is the version of the Sommersett case referred to in this text unless otherwise stated. For a discussion of the various reports of this case, see Note 1, p.91 of this chapter.

2. Three English citizens - Thomas Watkins, Elizabeth Cade and John Marlow - submitted affidavits in support of a motion to Lord Mansfield for a writ of habeas corpus against Captain Knowles.

said Charles Stuart." (1)

On February 7, 1772, Mr Serj. Davy and Mr. Serj. Glynn argued, on Sommersett's behalf, against the return made by Knowles. (2) Lord Mansfield postponed the other arguments by counsel on both sides until the Easter term, these being heard on May 9, 14 and 21, although Mansfield himself did not give judgment until 22 June, 1772, in the Trinity Term. (3) Throughout these proceedings Mansfield attempted to get the parties involved in the litigation to make an out of court settlement in order to avoid establishing a precedent of wide applicability. (4) Both sides: Sommersett who was backed by Granville Sharp and other abolitionists; (5) and Stuart who was backed by the West India merchants; (6) however, were either unable or unwilling to settle the issue in this way so that finally Mansfield exclaimed "fiat

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1. 20 How. St. Tr. 1:19-20, 22.

2. Ibid., 23.

3. For a detailed discussion of the chronology of the case including a synopsis of the daily arguments of counsel together with extracts from newspaper reports on the progress of the case, see Shyllon, 1974:77-124.

4. Hoare, 1828:133, reports that at least twice in the course of the proceedings Mansfield suggested that some arrangement be made whereby the slave could be set free so that, in his own words Mansfield thought "the master might put an end to the present litigation by manumitting the slave".

5. See Shyllon, 1974:77-90.

6. See Wiecek, 1974:102. The West India Interest, a very powerful political force at this time, was a combination of planters resident in the colonies and the metropolis, together with merchants trading in the colonies, and their agents, lawyers and spokesmen in the metropolis. (See, E. Williams, 'Capitalism and Slavery', 1966).

Justicia, ruat coelum" [1] - let justice be done whatever the consequences.

The specific legal issue presented in Sommersett concerned whether it was legal for a slave owner from another country to forcibly remove his slave from England. And while it was unnecessary for the court to give a general determination on the legality of slavery in England, the ruling on the precise issue may bear on the more general one. Thus, counsel on both sides had to discuss the issue of removal within the context of which laws were to be applied to the enforcement of restrictions on foreign slaves being transported through or held in England. Was it English common law or the laws of the country from which they had been imported or purchased? The decision as to which law would be binding involved the field known as conflicts of law and Mansfield had to determine whether the King's Bench would uphold the laws of Virginia, which sanctioned slavery and under which Sommersett had been purchased, or whether the court would rely solely on the laws of England, where the case was being prosecuted, in deciding on the legality of claims to slave property in England. Moreover, if the common law was chosen as the relevant standard the Court had to determine just how this would be interpreted to apply to the facts of Sommersett. [2]

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1. 20 How. St. Tr. 1 at 79 - emphasis in original.

2. See Higginbotham, 1978:334.

Hargrave, [1] counsel for Sommersett, presented an argument based on the premise that the common law forbade slavery on English soil. He did not attack the legality of colonial slavery or the legality of the extinct villenage system of feudal England. What he focused on was his assertion that slavery on English soil was unenforcible in English courts. He emphasised the extent to which slavery was antagonistic to the traditions of English common law by arguing that foreign slavery could not be imported to England without fundamentally undermining the common law doctrine in favour of personal rights and freedom for all Englishmen. While acknowledging that villenage and slavery had certain features in common, Hargrave argued that those very aspects of common law which had limited and finally eradicated villenage applied with equal force to the New World version of slavery. He also noted the differences between the ancient system of villenage and contemporary slavery, such as the legal protection afforded to villeins, as further substantiating his view that chattel slavery in England was illegal. [2]

Hargrave also found supporting evidence for his anti-slavery argument based on the precedent of villenage in the legal presumption against slavery by the law of contracts. He explained that the English courts had refused to enforce contracts of self-

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1. Francis Hargrave made his legal reputation with his argument in this case which he subsequently published. He was also in correspondence with Granville Sharp from 1769 and was allied with the anti-slavery movement. See Shyllon, 1974:84-85.

2. 20 How. St. Tr. 1 at 24-48.

enslavement [1] - the law of contracts would not permit an individual to enslave for life both himself and his posterity, nor permit him to subject himself to other incidents of slavery, such as salability. If English law would not permit this slavery by consent, said Hargrave, then other, more extreme forms, such as those based on captivity and introduced from another country, could not be legally sanctioned. [2]

Hargrave, however, did not contest the legality of colonial slavery thus he was able to argue that if the American colonies were exempt from British law then the English legal system was exempt from the enforcement of foreign slave laws. The legality of slavery was limited to the boundaries of the colonies - slavery could not be sanctioned by the common law of England nor had it any statutory authority in England since the only act of Parliament giving official sanction to slavery implied that slavery was exclusively in the colonies. Thus, "in the instance of slavery, the lex loci [the law of the country in which the relation originated] must yield to the municipal law [the law of the country where the case is being tried]". [3]

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1. Ibid., at 50. At the centre of Hargrave's argument against the legality of slavery by contract lay a distinction between ordinary wage contracts and the slave 'contracts' challenged in Sommersett. He argued that although the courts may enforce a contract to serve for life, this was the "ne plus ultra of servitude by contract in England". The courts, however, would not "allow the servant to invest the master with ... arbitrary power ... In other words, it will not permit the servant to incorporate into his contract the ingredients of slavery", at 50.

2. Ibid., at 50.
3. Ibid., at 60 - emphasis in original.

On the other hand, Dunning, [1] counsel for Stuart, argued that the case was exclusively concerned with the legal enforcement of the performance of certain services which might have been required of a servant but, in the present case, happened to be exacted from a slave. Dunning's argument for the legality of Sommersett's slavery began with asserting that it was possible that Sommersett had initially been enslaved in Africa as punishment for crime. It was the plaintiff's (Sommersett) burden to prove that he did not fall under this legal category of slavery. [2] However, even if this was not the method by which Sommersett's slavery had commenced, Dunning maintained that other bases for slavery had precedent under English law. In particular, Dunning argued that the laws protecting villenage, though now extinct, continued to permit forms of involuntary servitude. The fact that common law rules had developed to prevent the formation of any new villenage system, as Hargrave had argued, was irrelevant. All that mattered here, said Dunning, was that the legal institution of slavery found precedent in England - the process by which any particular slavery came into being was irrelevant to the

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1. Dunning had argued for the freedom of the slave in the Lewis case in 1771. However, in accordance with the English Bar code of practice, a barrister was obliged to accept a client unless otherwise retained.

2. 20 How. St. Tr. 1 at 73. Hargrave had noted that slavery, as punishment for crime, was the only form which the law could uphold. The significance of this attribution of legality to penal slavery is discussed in Chapter 9 in the context of my concluding discussion of the legacy of the legal category 'slave'.

judiciary. (1)

What the Court was being asked to do in the present case was simply to affirm the legality of requiring reasonable service from a slave - it was not being asked to support the sale or physical abuse of a slave, in Dunning's view. The restrictions on slaves, he said, were fundamentally no different from those found in most service contracts. (2) A refusal to enforce these "obligations" would be equivalent to a refusal to enforce ordinary English contracts that take effect abroad. Slave owners should sue for the services of their slaves (per quod servitium amisit) not for their property.

After hearing the arguments of the other counsel on both sides, (3) Lord Mansfield, Chief Justice of the King's Bench, delivered the opinion of the court on June 22, 1772, to a packed gallery of spectators. (4) Lord Mansfield, one of the most able

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1. Ibid., at 73.

2. Ibid., at 74-5. Dunning compared the service contracts of slaves with those of apprentices bound out by their parishes who could choose neither their trade nor their employer. Hargrave, however, noted that the idea that slaves entered a 'service contract' was a legal fiction - slaves had not been party to any contract since their status denied them the power to make one.

3. The other counsel emphasised the points made by Hargrave and Dunning. I have selected the arguments of Hargrave and Dunning because theirs illustrate most clearly the kind of reasoning being adopted.

4. Hoare, 1828:134.

18th century judges, (1) had made it clear that he was reluctant to establish judicial precedent in this area. He had, for example, encouraged the parties in Sommersett to make an out of court settlement noting that "in five or six cases of this nature, I have known [the controversy] to be accommodated by agreement between the parties". (2) In rendering the decision, therefore, he noted the conflicting arguments on both sides and emphasised the legal and practical liabilities to the enforcement of any aspect of slavery as well as the "disagreeable" effects which the emancipation of 14,000 - 15,000 slaves in England would

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1. William Murray, later Lord Mansfield, was born at Scone Abbey on March 2, 1705, into a Scottish Jacobite family - his brother James, known as the Earl of Dunbar, would have been Prime Minister if the 1745 Rebellion had been successful. Throughout his life Murray was accused of Jacobite sympathies, but he always denied this. Educated at Perth Grammar School, The Westminster School and Oxford, he was called to the English Bar in 1730. Murray also became an influential politician and was a member of various Whig administrations until he was made Chief Justice of the King's Bench in 1756 and elevated to the peerage. He continued to be politically active though he became more famous for his judicial decisions - indeed, he has been credited with the formation of much of the commercial law of England. Despite his development of the commercial law, Mansfield is noted for a number of controversial decisions in relation to personal liberty issues. He upheld the rights of religious dissenters in Rex v Webb, 1767; Chamberlin v Evans, 1769; and Atcheson v Everitt, 1775. This may explain why his house in Bloomsbury Square was burned down during the 'Gordon Riots' in 1780. Mansfield also reversed the outlawry of Wilkes in 1768, though he affirmed the verdict of guilty for the libellous publication against King George III. He had considerable independence as a jurist, and was unlikely to be influenced in Sommersett by popular sentiment. (See, for example, J.C. Campbell, "Lives of the Chief Justices of England", Boston: Estes & Lauriat, 1873; and C.H.S. Fifoot, "Lord Mansfield", Oxford, Clarendon Press, 1936.)

2. 20 How. St. Tr. 1 at 79. Shyllon, 1974:119-24 discusses the reasons for reluctance.

have. However, in disposing of the Sommersett case he made sure that he reduced the legal issue to the narrowest possible scope. Firstly, he re-affirmed one point of English law which he took to be well settled, that the "contract for sale of a slave is good here; the sale is a matter to which the law properly and readily attaches", and went on to suggest that the West India Interest should apply to Parliament to have other points of the law resolved by statute. (1) Secondly, he reduced the legal issue before him to the narrow question of whether "coercion can be exercised in this country, on a slave according to the American laws?" Moreover, this question was to be determined solely on the basis of the pleadings, that is:

> The only question before us is, whether the cause on the return [to the writ of habeas corpus] is sufficient? If it is, the negro must be remanded; if it is not, he must be discharged. (2)

In explaining his reasoning, however, that the cause on the return to the writ of habeas corpus was not sufficient and that "I cannot say this case is allowed or approved by the law of England; and therefore the black [Sommersett] must be discharged", (3) Mansfield's utterances went into much broader legal questions than the narrow point on which he made his

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1. Ibid., at 80. (The planters did have a bill introduced in Parliament to legitimate the slave relation in England, see Fiddes, 1934 at 503).

2. Ibid., at 81-82.

3. 20 How. St. Tr. 1 at 82.

decision - that is, whether any legitimate authority could be exercised in England on a slave under colonial laws. Firstly, in arriving at his decision that Sommersett must be discharged, Mansfield had argued that "so high an act of dominion [seizing a slave in England for sale abroad] must be recognised by the law of the country where it is used". (1) This statement, in relation to the question of conflict of laws, laid down the general rule that the lex domicilii by which a person is held in slavery does not alone determine the slave's legal status in England, even although the legal systems of both countries are based on the same general body of statutory and common law, as was the case with the British metropolis and its colonies.

The remainder of his opinion, (2) however, which touched on the relation between natural and municipal law, would be repeated in countless American legal decisions and pro and anti-slavery pamphlets for decades, producing its own unique effects on US constitutional law:

> The state of slavery is of such a nature, that it is incapable of being introduced on any reasons, moral or political, but only by positive law which preserves its force long after the reason, occasion, and time itself when it was created, is erased from memory. It is so odious that nothing can be suffered to support it, but positive law. (3)

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1. Ibid., at 82.

2. For a full analysis of Sommersett and the legal issues involved, see Wiecek, 1974:101-108. See also, Higginbotham, 1978:333-355.

3. 20 How. St. Tr. 1 at 82.

Now that slavery was labelled as requiring the authority of the positive law of the jurisdiction in which the legality of the status 'slave' was claimed, it became possible for England not to enforce the municipal law of the colonies in England. Moreover, in his implicit reliance on natural law to establish the 'odious' nature of slavery, Mansfield had laid the foundations whereby natural law could serve as a standard of justice against which exogenous legal forms could be tested to determine their appropriateness for incorporation into English law.

Despite the fact that, technically speaking, Mansfield's holding in Sommersett was narrowly restricted to the ruling that a master could not forcibly send his slave out of the realm and that habeas corpus could be granted to the slave in question to forestall such removal, the initial reaction to the decision, both in terms of public opinion (1) and judicial decisions, was to place a much wider interpretation on Sommersett. Thus in the case of Cay v Crichton, 1773, the judge held that the Sommersett decision had a retroactive effect so that slavery had never had a legal basis in England. (2) In the Scottish case of Knight v Wedderburn, 1778, (3) the Court of Session was unequivocal in holding that both slavery and/or perpetual unremunerated service

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1. For an interpretation of the public's reaction to the Sommersett decision, based on an analysis of contemporary newspapers and periodicals as well as correspondence between pro and anti-slavery propagandists, see Shyllon, 1974:141-176.

2. This case is not officially reported but it is referred to in the Granville Sharp Transcripts, New York Historical Society, New York, cited by Wiecek, 1974:108, Note 76.

3. 8 Fac. Dec. 5 Mor. 14545 (Scot. Ct. Sess. 1778).

was illegal in Scotland. (1)

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1. The significance of this decision relates not only to black slavery but also to the legal form of perpetual servitude which Scottish colliers had endured since 1606. As T.C. Smout, "A History of the Scottish People, 1560-1830", London, Collins, 1969, has noted, "the workmen in the coal mines and salt pans: ... suffered a degradation without parallel in the history of labour in Scotland" (180). By an Act of the Scottish Parliament of 1606, employers were forbidden from hiring a collier or salter without leave of their masters, duly written or attested. If any collier or salter left his master's service without a certificate or testimonial he could be reclaimed within a year and a day and punished as a thief, (he had stolen himself away from his master). The new employer was forced to surrender him, within 24 hours, under penalty of a fine, and the collier/salter would be punished in his body. (On this last point compare the fact that 'criminal' black slaves in N. America were punished in their bodies - see Chapter 4 infra.). Lastly Parliament gave "power and commission to all masters and owners of coal-heughs and salt-pans to apprehend all vagabonds and sturdy beggars to be put to labour" - as cited in R.P. Arnot, "A History of the Scottish Miners", London, Allen and Unwin, 1955: 4. A new Act of Parliament, of November 6, 1641, ratified the Act of 1606 and extended its scope. Acts of 1647 and 1661 restricted holidays and the Act of 1701 (known as the Scottish Habeas Corpus Act) explicitly denied habeas corpus to colliers. In effect Scottish colliers and salters, just like a piece of mining equipment, could be bought, sold, and inherited by the master. Moreover, through the practice of 'arling' which was used to bind the children of the colliers/salters to follow their parents in the mines, the serfdom became hereditary. The status of these colliers/salters was upheld in a series of legal decisions, (see Smout, 1969:431 for references) up to the Act of 1774 which provided for their gradual emancipation. (On this point compare the tendency for Northern American colonies/states to pass gradual emancipation statutes in the case of black slaves - see Chapter 4 infra.) This Act proved more or less wholly ineffective in emancipating the colliers/salters but it was not until 1799 that a new Act unconditionally removed the condition of legally authorised perpetual servitude. For a fuller discussion of this legislation and the conditions of colliers/salters, see Arnot, 1955; Smout, 1969; J. Barrowman, "Slavery in the Coal-Mines of Scotland", Mining Institute of Scotland:XIX: 1897-8; and J. McKechnie and M. Macgregor, "A Short History of the Scottish Coal-Mining Industry", Edinburgh, Pillans and Wilson, 1958.

Although there had been earlier cases involving litigation concerning black slaves in Scotland, (1) Knight v Wedderburn, 1778, was the first in which a conclusive judgment was given. Wedderburn had bought Knight in Jamaica when the latter was about 12 years old. Knight later accompanied Wedderburn to Scotland where he acted as the latter's personal servant. Several years later Knight left and Wedderburn apprehended him on a warrant from the justice of the peace whereupon Knight petitioned the Sheriff for his liberty. The Sheriff granted Knight's petition holding that "perpetual service, without wages, is slavery" and that "the state of slavery is not recognised by the laws of this kingdom, and is inconsistent with the principles thereof". (2) The case then moved to the Court of Session,

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1. For example, a case brought before the Court of Session in 1757, Sheddan v A Negro (Faculty Collection of Decisions:II: No.xxxiv, 4 July, 1757) concerned the issue of whether a slave, purchased in Virginia and subsequently living in Scotland, could be forcibly sent back to Virginia. During the hearing the slave died so no final ruling was given in the case. In a later case, a negro slave Spens, originally purchased in the West Indies, applied to the Court of Session for his liberty in 1770, (as cited in W. Ferguson, "Scotland:1689 To The Present", Edinburgh, 1968: at 188). Spens' case was supported by the funds gathered by the local colliers and salters, (Smout, 1969:433; Ferguson, 1968:188) who were themselves taking initiatives to secure their own emancipation, (see Smout, 1969:433 et seq.). Spens' master died before a decision was reached and thus ended "what had obviously been regarded as a test case applicable not merely to negro slavery in Scotland" (Smout, 1969: at 433). By the Act of 1774 the colliers and salters were to be gradually emancipated on application to the sheriff courts, a provision which made such emancipation unlikely, thus it was not until 1778, the year of the Knight v Wedderburn decision that the first collier serfs were actually freed from bondage. And while the Act of 1799 abolished the colliers' serfdom, it said nothing about the conditions of labour, thus maintaining a de facto serfdom for much longer. (See Ferguson, 1968:189 et seq.). This de facto serfdom can be compared with the de facto slavery which existed in the USA post the passage of the 13th Amendment to the US Constitution abolishing slavery - see Chapter 9 infra.

2. As cited in Shyllon, 1974:178.

where counsel for both Knight and Wedderburn argued along similar lines to Hargrave and Dunning in Sommersett. For the master, Wedderburn, it was argued that "in this case, the master is not insisting for the exercise of rigorous power. He only demands, that he shall be entitled to the personal service of the negro in this country, during life ..." (1) On behalf of Knight, the slave, it was argued:

> The only title on which any right of dominion is claimed over this African, is the institution of the municipal law of Jamaica ... but the municipal law of the colonies has no authority in this country. On the grounds of equity, the Court, in some cases, gives effect to the laws of other countries; but the law of Jamaica, in this instance, will not be supported by the Court; because it is repugnant to the first principles of morality and justice ... It is plain, that, to give the defender [Wedderburn] any right over the pursuer [Knight] the positive law of Jamaica must always be resorted to; consequently the question recurs, Whether that law ought to be enforced beyond its territory? But a service for life, without wages, is, in fact, slavery. The law of Scotland would not support a voluntary contract in these terms ... (2)

Counsel for Knight also argued, in response to Wedderburn's contention that he was entitled to send Knight out of the kingdom without his consent, that the 1701 Act, known as the Scottish Habeas Corpus Act, applied to all persons - including Knight - within the realm. Citing the precedent of Sommersett as his chief authority, he stressed that Knight could not be sent out of the country without his consent.

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1. Ibid., at 178.

2. Ibid., at 179.

The Court of Session upheld all of the submission made on behalf of Knight and held that:

> The dominion assumed over this negro, under the law of Jamaica, being unjust, could not be supported in this country to any extent: that, therefore, the defender had no right to the negro's service for any space of time, nor to send him out of the country against his consent: that the negro was likewise protected under the Act 1701, c.6, from being sent out of the country without his consent. (1)

Thus, Knight v Wedderburn endorsed the view taken by Mansfield in Sommersett, that a slave was entitled to habeas corpus; it followed the reasoning which made it possible to regard slavery as a municipal regulation whereby, in any issue involving the conflict of laws, the law of the country where the case is being tried would prevail; it made a distinction between natural and 'unjust' municipal laws so that an exogenous legal form could be rejected; and it went much further than Sommersett in asserting that the master had no legal right to even exact services from the slave in Scotland. (2)

Just how long this interpretation and expansion of Sommersett would be allowed to stand, however, was another issue. Was the granting of habeas corpus to black slaves in Britain, in order to test the legality of his alleged master's claim to him, a serious threat to British colonial expansion and Britain's interests in

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1. As cited in Shyllon, 1974:179.

2. Boswell, in his 'Life of Johnson' noted that Knight went much further than Sommersett addressing "truly the general question, whether a perpetual obligation of service to one master in any mode should be sanctified by the law of a free country", (cited in Shyllon, 1974:183).

the international slave trade? Clearly, the fact that habeas corpus could be granted meant that British legal institutions and practices recognised the personality of 'slaves'. But did this recognition of slaves as persons make it impossible for the law to simultaneously recognise slaves as property? Did the assertion that only 'positive law' could establish the legal status 'slave' mean that Parliament had actually to establish slavery rather than simply recognise its existence in the slave trade statutes? In the discussion which follows it will become clear just what the 'liberty' of slaves in Britain actually meant - the legality of claims to property right in slaves could still be upheld despite the 'purity of English air'.

THE LEGAL RIGHTS OF PROPERTY PREVAIL

Indicative of the extent to which the legality of claims to slaves as chattel property were circumscribed in England, post Sommersett, are the legal practices involved in questions concerning the insurance of slaves 'obtained' through the slave trade. By the law of insurance at the time in relation to slaves:

> The insurer takes upon him the risk of the loss, capture, and death of slaves, or any other unavoidable accident to them: but natural death is always understood to be excepted: by natural death is meant, not only when it happens by disease or sickness, but also when the captive destroys himself through despair, which often happens: but when slaves are killed, or thrown into the sea in order to quell an insurrection on their part, then insurers must answer. (1)

Just how this law would be interpreted was put to the test in the case of Gregson v Gilbert, 1783 (2) otherwise known as the case of the Slave Ship Zong. In this case an action was brought in the Guildhall, London, by a firm of slave-ship owners, (3) against the underwriters, to recover the value of 132 African slaves 'lost' (by the captain and crew throwing them overboard) in transit between the Coast of Guinea and Jamaica. It was argued by the owners that the throwing overboard of the slaves had been necessary for the preservation of the rest of the slaves (due to lack of water supplies caused by the additional time involved in the journey on account of conditions at sea).

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1. J. Weskett, "A Complete Digest of the Laws, Theory and Practice of Insurance", London, 1781: at 525. Later statutes, Acts of 28 G.3. c. 54, 1788; 30 G.3. c. 33, 1790; and 34 G. 3. c. 80, 1794, regulated the insurance of slaves so that cargoes of slaves could not be insured for any purposes other than against the perils of the sea, piracy, insurrection, destruction by fire or capture by the King's enemies. These statutes made it clear that insurers would not have to pay when slaves were thrown overboard by those acting for the owners.

2. 3 Dougl. 233; 99 Eng. Rep. 629 (1783).

3. The vessel belonged to a large and influential firm of Liverpool slave-ship owners - Messrs W.J. and J. Gregson, E. Wilson and J. Aspinall.

The Court ordered the underwriters to pay £30 per 'lost' slave [1] to the owners of the Zong. The underwriters, however, refused to pay claiming that, on the facts, the throwing overboard of the 133 slaves (one survived) by the commander and crew of the ship was a fraud on the insurance policy - they had thrown the slaves overboard when there was sufficient water for survival thus the throwing overboard was not a genuine act of jettison to save the ship.

The underwriters applied to Lord Mansfield in the Court of King's Bench for a second trial and the application was heard on 21-22 May 1783. Counsel for the underwriters argued that there had been no sufficient necessity justifying the captain and the crew in throwing the Africans overboard but counsel for the owners said that the only issue was whether it was necessary to throw "this property" overboard for the preservation of the rest (at the time of throwing overboard it was claimed that 60 slaves had already died of sickness). Counsel for the owners argued that "this is a case of chattels or goods" [2] and it would appear that Lord Mansfield concurred in this view when he ordered a new trial. Although there is no official report of the second trial, one contemporary in court noted that at the second trial judgment was found in favour of the insurers on the

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1. The slaves had been insured at £30 per head.

2. As cited in Shyllon, 1974:190.

basis that the evidence presented at trial by the owners differed from the pleadings. (1) The central question at issue, however, was still that of property or cost and the Court held that there was nothing in the transaction which constituted a murderous act: (2) the case was legally of exactly the same kind as if it had been horses thrown into the sea - costs would have been assessed in gross. (3)

Only two years later, in the case of Jones v Schmoll, 1785, (4) Lord Mansfield was presented with another case involving the killing of slaves on board a Bristol owned slave-ship, where the question of an insurance policy on the slaves 'lost' was at issue. The slaves were about to be shipped from Africa to the West Indies when a mutiny broke out. Some of the slaves at issue in the case died during the mutiny; some died as a result of wounds; and some 'hung out' from the sides of the ship. In Lord Mansfield's direction to the jury, he treated the issue in the case as a standard commercial matter of construing rights under an insurance policy in accordance with the Law of Insurance at that time. Thus the

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1. Shyllon, 1974:191, notes that the second trial is not reported. W.E.H. Lecky, in, "England in the XVIIIth Century", Vol.VI, New York, Appleton and Co. 1887: at 286, uses notes taken during the trial to discuss the case.

2. Granville Sharp and other abolitionists attempted, unsuccessfully, to have the Captain, crew and/or owners of the Zong indicted for murder. See Shyllon, 1974:184-202.

3. Lecky, 1887:286; Hoare, 1828:355.

4. 1 Term. R. 130, 99 Eng. Rep. 1012 (1785).

verdict of the Court was that all slaves killed in the mutiny or dying of their wounds were to be paid for by the insurers. However, those slaves who had swallowed salt water, leapt into the sea, hung out of the ship or died of "chagrin" were not to be paid for. (1)

While these cases, involving the insurance of slaves, indicate that in this instance the law clearly regarded slaves as chattel property - indeed the kind of property which could be paid for in gross - other cases, concerning the legal status of slaves resident in England as opposed to those in the slave trade, demonstrate just how narrowly Sommersett would be interpreted as precedent. Lord Mansfield himself had the opportunity, in Rex v Inhabitants of Thames Ditton, 1785, (2) to articulate the precise limits of his prior ruling in Sommersett and to decide whether the broad rationale of the Knight case would be adopted in England. In the Thames Ditton case, the issue before the Court was whether a parish was responsible, under the poor laws, for the support of a pauper slave, Charlotte Howe. The slave had been purchased in America by a Captain Howe who brought her to England in 1781. She continued in his service until his death in 1783 and then lived

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1. 99 Eng. Rep. 1012. The case of Tatham v Hodgson, 6 Term. R. 656, decided before Lord Kenyon, Chief Justice of the King's Bench in 1796, was an action on a policy of insurance in the common form similar to the one in Jones v Schmoll. In Tatham, decided after the passage of the insurance acts (see Note 1, p.141) it was held that "starvation" was not due to the "perils of the sea", hence no insurance.

2. 4 Doug. 300. 99 Eng. Rep. 891 (K.B. 1785).

with his widow for about 6 months. She then left and 'served' as a pauper in the parish of St Chelsea and subsequently filed suit for wages due from the parish.

In the course of an involved argument about the interpretation of the poor laws, counsel suggested that King's Bench had never decided that a slave was bound to serve his master in England. Mansfield, however, interjected with a very precise and narrow construction of Sommersett: "the determination got no further than that the master cannot by force compel him to go out of the kingdom". (1) Counsel then suggested that the slave relationship implies a hiring, but again Mansfield ruled this line of reasoning out noting that:

> The case of Sommersett is the only one on this subject. Where slaves have been brought here, and have commenced actions for their wages, I have always [denied the plaintiff's claim]. The condition of slavery is not totally rescinded by their coming to England. With regard to the right to wages it still subsists. 1 Blackst. Com. 425. But wages are no necessary part of the contract for the purposes of a settlement. It cannot be contended that this was a voluntary hiring, and therefore not a service; and if the service with the captain be admitted, it continues with his widow. The odious part of slavery, which is contrary to the law of England, determines on the slave coming to England; and if the relationship of master and servant subsists on the coming to England, the master has the common legal remedy for his servant being taken from him per quod servitium amisit: Chamberlain v Harvey. The reason why a negro is not entitled to wages is because there never was a contract for wages ... (2)

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1. 4 Doug. at 301.

2. Ibid., at 301-2 - emphasis in original.

Mansfield's decision to deny the pauper slave's claim, while turning on a question of statutory interpretation which did not necessarily involve the question of the legality of slavery in England, gave him the chance to set the record straight about what Sommersett actually meant in law. In Thames Ditton, Mansfield rejected the broad interpretation of Sommersett relied on in Knight and he qualified his view that slavery existed only where sanctioned by positive law. While in Sommersett he had argued that a master did not have the power, under English law, to forcibly remove a slave from the realm, in Thames Ditton he clearly articulated that the master did have power, under English law, to require a slave's services whether or not the slave was provided for. He did not acknowledge, for example, that a service or hiring by contract and chattel slavery were "mutually exclusive legal and economic categories". (1) Thus, the scope of habeas corpus in relation to slaves as well as other 'unfree' persons remained elusive and the issue of the incompatibility of earlier precedents on the question of the legality of the status 'slave' as chattel property in Britain was not resolved.

Slave owners visiting England with their slaves managed to circumvent even the narrowest possible construction of Mansfield's holding in Sommersett: that a slave could not be forcibly removed from England by his master. In giving judgment in Sommersett, it will be recalled that Mansfield noted that the law

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1. Higginbotham, 1978:358.

would recognise a contract for the sale of a slave made in the colonies. (1) By implication the master-slave relation could persist on the basis of the law of the country in which the contract was made rather than the law of the country in which the master and his slave were living. Thus masters who wanted to take their slaves temporarily with them to England began to get their slaves to sign or mark an indenture contract (2) under which the 'slave' could be held as an 'indentured servant' for a given period, and required to return, with his master, to the colonies, where his slave status would reattach. (3) This practice became very common and, for example, in Keane v Boycott, 1795, (4) the Court of Common Pleas upheld the legality of a 5 year indenture of this kind.

In a later case, Williams v Brown, 1802, (5) the legality of an indenture contract entered into by a runaway slave was upheld, though on this occasion the Court of Common Pleas also noted that, while indenture contracts were always upheld, no

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1. See p. 133 of this chapter.

2. Indentured servitude was a typical form of bondage in Britain and as a means of colonial expansion throughout the 17th and 18th centuries. For a discussion of its relevance to North American colonial expansion and the legal form of chattel slavery which developed there, see Chapter 3.

3. See J. Walvin, "Black and White: The Negro and English Society 1555-1945", London, 1973:135 - cited in Wiecek, 1974:108.

4. 2 H. Blackstone 512; 176 Eng. Rep. 676, (C.P. 1795).

5. 3 Bos. & Pul. 69, 71; 127 Eng. Rep. 39, 41 (C.P. 1802).

English court could uphold a contract for slavery since slavery was not recognised in England. Williams, the runaway slave, became a sailor and joined a ship in London bound for Grenada. When the ship arrived in Grenada Williams was claimed as a runaway by his former master, a Mr Hardman. At a meeting between Williams, Hardman and Brown, the ship's master, it was agreed that Hardman would manumit Williams if Brown paid a certain sum to Hardman. In return, Williams, describing himself now as a "free black man of the island of Grenada" entered into an indenture to serve Brown for a set salary for 3 years. When Williams arrived in London after the 3 year period he sued for wages commensurate with the value of the services he performed. While the judges in the case all concurred in the view that Williams was capable of making a binding contract and the Court ruled that Williams could claim no more wages than he had agreed to by the terms of the indenture, Judge Chambre noted that it was possible that a runaway slave, when bargaining for his freedom, may not be able to strike a fair bargain with respect to wages in an indenture agreement. However, he found the contract in question to be legally valid, not on the grounds of fairness but rather on the grounds that if such contracts were not enforced then masters may be less able to manumit slaves. (1)

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1. For a discussion of Judge Chambre's views on the desirability of such manumissions, see Higginbotham, 1978: 359-60.

Further clarification of exactly what the temporary residence of slaves in England actually meant to the legality of the slave status in the colonies was given in the 1827 case of Rex v Allan, (1) known as The Slave Grace. In 1822 a Mrs Allan from Antigua, brought her female slave, Grace, to England where they resided for a year. Grace then 'voluntarily' accompanied Mrs Allan back to Antigua where she continued as Mrs Allan's slave until 1825 when she was seized by customs officials as illegally imported. The officials' assumption was that she had become free because of her residence in England and was thus a free person being brought into slavery (without import duties being paid). The trial judge ruled that Grace was to be returned to Mrs Allan and on appeal to the High Court of Admiralty in England Lord Stowell affirmed this decree by holding that Grace was "not a free person" nor could liberty be claimed by virtue of a "mere residence in England". Grace therefore reassumed her status as a slave in Antigua, which had only been suspended, not terminated, by her residence in England. (2)

In Stowell's long and detailed opinion in the case of Slave Grace he strictly qualified the Sommersett decision. He noted that "the personal traffic in slaves resident in England had been

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1. 2 Hagg. 94; 166 Eng. Rep. 179 (Adm. 1827).

2. 2 Hagg. 94 et seq.

as public and as authorised in London as in any of our West India islands" [1] and that, although the master-slave relation did not exist in English law, slavery did have a legal existence in the colonies. The maxim which the anti-slavery interpretation of Sommersett held to, "Once free for an hour, free for ever", [2] had, said Stowell, "never been once applied, since the case of Sommersett, to overrule the authority of the transmarine law". [3] Moreover, even although the legality of the master-slave relation as it existed in the colonies was to some extent incompatible with English law, this incompatibility extended no further than to confer on the slave a "sort of limited liberty" in England which completely dissolved on the return to the colonies.

By juxtaposing the legal discourse of Lord Mansfield in Sommersett, about the 'odious' nature of slavery, with Lord Stowell's in Slave Grace, about the 'limited liberty' of slaves in England, English legal institutions and practices were able to contain an apparent contradiction between the espousal of the common law motto, in favorem liberatis, and a form of colonial expansion which treated human beings as articles of merchandise, whose value in insurance cases could be assessed in gross. As Davis has noted:

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1. Ibid., at 105 - emphasis in original.

2. This common law maxim had originally developed in relation to villenage.

3. 2 Hagg. at 127.

> English law was flexible enough to recognise the validity of slave property, to uphold contracts for the sale of slaves, and to provide room for a qualified servitude, even a servitude without wages. It simply told masters that they should not make Stuart's mistake of locking a slave in irons for forcible shipment out of the country ... regardless of legal forms, English courts endorsed no principles that undermined colonial slave law. (1)

CONCLUSION : THE LEGACY FOR COLONIAL LEGAL FORMS

A few years after the decision in The Slave Grace, the British Parliament, by the Abolition Act of 1833, (2) removed the 'limitations' and granted liberty to slaves in the colonies. (3) While this colonial emancipation provoked considerable resistance from slave-owners in the colonies and a good deal of constitutional debate about the extent to which the British Parliament could legislate for the colonies, (4) it was

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1. Davis, 1975:500-501.

2. 3 & 4 Will. 4. c. 73 (1833).

3. It must be emphasised that by the Act of 1807, Great Britain had outlawed British involvement in the international slave trade. While the political and economic reasons for abolition at this time are discussed in Chapter 6 infra., it is worth noting here that British Abolitionists' fervour was placed, in the first instance, on the slave trade rather than slavery itself. While at the time it made economic sense, (see Williams, 1966) to outlaw the slave trade, to outlaw slavery in the colonies at that time would have been to destroy an extremely profitable mode of production based on slavery in the colonies, (see Chapters 4 and 7 infra., in particular).

4. See, for example, S. Romilly, "The Life of Sir Samuel Romilly", edited by his two sons, 3rd ed., London, John Murray, 1842:Vol.II.

ultimately accepted by colonial legislatures that Parliament did, indeed, have the power to bind the colonies. (1) However, one particular group of colonies, the North American ones, had, almost half a century before, shed the yoke of the colonial power. And, what was settled for Great Britain and her colonies in 1833 had still been inchoate in 1776 when the American colonies fought for their independence from the imperial relation. At that time, the Lord Chief Justice of the King's Bench in England had rendered a judgment in the case of Sommersett v Stuart which found slavery to be incompatible with the principles behind the unwritten British Constitution. The fact that, within legal discourse, that particular decision (or indeed any other one) did not in any way undermine the legality of colonial slave law did not prevent the North American colonists from fearing that, if incompatible with the British Constitution, slavery might also be illegitimate in the colonies. Did a colonial statute or custom recognising slavery, for example, require any greater authority than the parliamentary statutes encouraging the slave trade or creating the Royal African Company? (2) Did the common law exist in full force in the colonies and, if so, was slavery not recognised

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1. Wiecek, 1974:112.

2. For a discussion of the formation of the Royal African Company, see Chapter 6.

by this standard? These imperial constitutional problems [1] were not even touched upon by Sommersett or any other judicial decision - indeed only the surface of the British constitutional questions in relation to slavery had been addressed.

Nevertheless, the decision and the arguments of counsel in Sommersett became known almost immediately in the mainland colonies of North America. Extracts from both Sharp's 'Representation' and Hargrave's 'Argument' were reprinted in Philadelphia and Boston in 1773 and 1774 respectively. [2] The impact on the North American colonies, in particular in Massachusetts, was for black slaves to bring suits for freedom in rapidly increasing numbers [3] and for anti-slavery propagandists to cite Sommersett as declaring that colonists were forbidden to pass laws inconsistent with common law. It led to the articulation of two particular strands in what would become an almost century long anti-slavery crusade in North America: an appeal to the privileges and immunities of all Americans, including those treated as 'slaves'; and the view that constitutional guarantees of due process had their foundations in natural law concepts. Lord Mansfield's statement in Sommersett that slavery was "so odious, that nothing can be

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1. While the notion of an imperial constitution may be debateable, I have followed Wiecek's use of the term, (1974:112) in viewing a constitution as a set of written and unwritten principles guiding the working of any government's polity. In this sense the British empire had an imperial constitution.

2. As cited in Wiecek, 1974:114.

3. For a discussion of these suits, see Chapter 4.

suffered to support it but positive law" was interpreted by anti-slavery ideologues in North America to the extent that they created a new "neo-Sommersett" (1) doctrine which argued that, since slavery was contrary to natural law, it could not be attributed with legitimacy unless it was explicitly established by positive law. Pro-slavery jurists, on the other hand, argued around this doctrine and ultimately repudiated it altogether. (2)

Even although Sommersett did not threaten the legality of the North American colonial forms of slavery, since it did not even outlaw slavery in the metropolis nor did it hold squarely on the issue of whether slavery was incompatible with the common law, (3) British legal institutions and practices exerted their unique effects on just how the legality of slavery would be established within the North American colonies, how it would be maintained in the new republic of the USA post 1776, and finally how the status 'slave' was eradicated from US Constitutional law. The common law debates, within British legal discourse, about the rights of liberty versus property in the case of chattel slavery, were to be referred to time and again by North American judges

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1. I am indebted to Wiecek, 1974, for the use of this particular term to explain how the Sommersett doctrine was elaborated.

2. See Chapters 7 and 8 for a discussion of this repudiation in law.

3. Even if British courts had held conclusively on these issues it was not clear what the implications of such rulings would have been for the colonies particularly since, in the case of the North American colonies, the Sommersett decision was handed down at a time when these colonies were in the embryonic stages of revolution -see Chapter 5.

and legislatures throughout the 18th and 19th centuries in the creation, refinement, regulation and transformation of the slave system. In the following chapters it will become clear just how the British precedents on slavery formed the basis upon which the North American colonies and the republican state of the USA were able to construct, within law, the slave status; to define the agents, master and slave; to regulate the precise nature of the master-slave relation and ultimately to transform it.

CHAPTER 3 : COLONIAL EXPANSION TO NORTH AMERICA : LEGAL DEFINITION OF THE FORMS OF BONDAGE

INTRODUCTION

As was indicated in the previous chapter, slave labour constituted one of several sources of labour initially used to supply the British colonies with their labour needs. In the case of many of the North American colonies, slave labour would become the primary source of unfree labour and these colonies would become major purchasers of the slaves 'obtained' through British involvement in the international slave trade. In the context of capitalist forms of credit, banking and so on, commercial transactions in relation to the slave trade required legal regulation and for a system of production to develop on any significant scale, it was necessary to give the agents in the labour process - master, slave - a legal status. Without legal definition and regulation, contracts for the sale of slaves could not be enforced nor could larger trading transactions be legitimated. The legal status, however, was not simply created by one statute or body of statutes. Laws and legal practices did not simply evolve to recognise prior realities or existing relationships between 'masters' and 'slaves'. In this instance, that is in the case of the development of chattel slavery in North America, legal institutions and practices espoused within English common law traditions, played a central role in the definition of the agents in the labour process and in creating the basis upon which a fully-fledged system of production based on slavery could develop.

In the early colonial period, however, the plantation system

of production had not yet developed and the legal definition of master/slave was evident only in an ambiguous and embryonic form. Throughout this period, various forms of unfree labour, including indentured servants, transported convicts and slaves, (1) were used to supplement the labour of the settlers in the cultivation of farms and estates. During the first half of the 17th century production on these farms and estates was primarily for subsistence and only a small portion of the product was fitfully sold for trade. Any 'slaves' working on these farms were not held to have a status completely antithetical to that of 'free' persons, rather there were various conditions of freedom versus unfreedom and, within the latter category, several gradations were recognised by legal institutions and practices. Nevertheless, in the discussion which follows, which places the early legal definitions of the slave status in the context of colonial expansion and forms of bondage generally, it is clear that, very early on in the development of both Southern and Northern colonies in North America, legal institutions and practices differentiated between blacks and other bonded persons. The reasons for this differentiation, either in judicial decisions or legislative practices, were not articulated nor were they wholly consistent, but by the end of the 17th century, when the plantation system of production was forming, the definition of 'slaves' as a legally distinct category from other forms of servitude had begun to develop.

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1. The term 'slave' as used here has a different meaning in law and practice from the fully-fledged system of slavery discussed in later chapters.

This chapter then, traces the ambiguities of status in relation to black 'servants' or 'slaves' as opposed to other persons in bondage. In the context of the case materials discussed and the statutes of both Northern and Southern colonies it becomes clear that, in controlling the unfree labour market, legal practices differentiated between black unfree labour as opposed to any other unfree labour. While, for example, runaway white servants would be given an additional 3 years of service by the courts, black runaways would be given life or, later, no addition in service but simply punished in their bodies. The fact that no addition of service could be given in these cases indicates that these 'servants' were already 'serving for life'. This kind of differentiation in treatment is evident in both Northern and Southern colonies though different patterns of development emerged which would later require to be resolved. (1) For this reason this chapter discusses the patterns of development in a number of Northern and Southern colonies and, in analysing the early cases and legislation pertaining to the legal regulation of unfree colonial labour, demonstrates the central role of law, from the beginning, in creating the basis upon which a distinctive system of production based upon chattel slavery could develop.

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1. The form which this resolution would take, by the construction of the slave status in legislation, is fully discussed in Chapter 4. The construction in legislation was necessary to define clearly the agents in the labour process - master/slave - and to resolve the ambiguities in existing legal practices.

COLONIAL EXPANSION : THE FORMS OF BONDAGE

From the late 16th century English expansion to the colonies faced problems associated with the shortage of labour. Throughout the mercantilist period, (1) in particular, the Government adopted numerous measures restricting the liberty of individuals in order to overcome the need to pay higher wages to a limited labour force. The State established maximum wage scales, for example, to halt the rise in wages resulting from free competition in the labour market, it prohibited the emigration of labour outside the realm, it fostered the development of child labour and, in some instances, it introduced forced labour. (2) Against such a background in the metropolis, Britain needed to look for some other sources of labour for the colonies. One source of labour, tried in the case of the North American colonies, but of more effect in the later colonial expansion to Australia, (3) was the labour of transported convicts.

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1. For a discussion of the perceived shortage of labour in this period, see M. Dobb, "Studies in the Development of Capitalism", London, Routledge and Kegan Paul, 1975; K. Knorr, "British Colonial Theories 1570-1850", Toronto, Toronto University Press, 1944; and B. Semmel, "The Rise of Free Trade Imperialism", Cambridge, Cambridge University Press, 1970.

2. For a fuller discussion of these points see, Rusche and Kirchheimer, 1968 ed:26-33.

3. For a discussion of the importance of transportation to colonial expansion to Australia, see E. O'Brien, "The Foundation of Australia", London, Angus and Robertson, 1950.

From the beginning of the 17th century convicts, under sentence of death, were sent to the North American colonies, Virginia in particular. Governor Dole of Virginia, for example, wrote to the King in 1611 asking that prisoners under sentence of death be sent to that colony for 3 years. (1) And, by an Order of the Privy Council of 1617, reprieve and stay of execution could be granted to those persons convicted of robbery who were strong enough to be employed in service 'beyond the sea'. By the middle of the 17th century conditional pardons were frequently given to prisoners consenting to be transported to the North American plantations for a number of years and this practice, at first mainly confined to clergyable offences, was later extended to cover all offences by the statutory basis provided by the 1679 Habeas Corpus Amendment Act. (2) Between 1655 and 1699 at least 4,431 prisoners on 'praying' for transportation, actually 'benefitted', as did many judges and

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1. As cited in Rusche and Kirchheimer, 1968 ed:59. A form of transportation had been introduced by the Act of 39 Eliz. c. 4 (1597) entitled 'An Act for Punyshment of Rogues, Vagabonds and sturdy Beggars'. For a discussion of this Act and its relation to the control of labour, see W.J. Chambliss, "A Sociological Analysis of the Law of Vagrancy", in Social Problems, Vol.12. 67-77, 1964.

2. 31 Car. 2. c. 2. s. 14, which stipulated that "if any Person or Persons lawfully convicted of any Felony, shall in open Court pray to be transported beyond the Seas ... such Person ... may be transported into any Parts beyond the Seas ...". For a discussion of the use of such conditional pardons, see L. Radzinowicz, "A History of English Criminal Law", Vol.2, London, Stevens and Sons Ltd.; 1956:108-110.

clerks since such transported convicts were profitable. (1)

A further extension of transportation came with a statute of 1717 which provided that offenders convicted of certain offences could be transported to American plantations for seven years and that those convicted of other (non-clergyable) offences, but conditionally pardoned, could be transported for fourteen years of for any other term specified in the pardon. (2) The reason given for the change was the "great need for servants to develop the colonial plantations". (3) Although the number of transported convicts shipped to North America was considerable, the labour needs of these colonies could not be satisfied in this way. Throughout this period large numbers of indentured servants were also shipped to the North American colonies even although this policy was resisted by those who thought that the practice of indenture diminished the labour pool at home. (4)

There were various forms of indentured servitude, each permitting differing degrees of control and discipline in the terms of service. At its most basic level indentured servitude was a form of bondage in which the 'servant' was obliged to serve a master for a certain period, usually from 4 to 7 years. Typically, the potential servant was brought over from Britain to the colonies by some merchant or ship's captain who gave free passage on

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1. As cited by Rusche and Kirchheimer, 1968 ed:60.
2. Act of 4 Geo. 1. c. 11, 1717.
3. As cited by Rusche and Kirchheimer, 1968 ed:60.
4. Ibid., 59.

condition that he could defray his cost and make a profit by leasing the servant to a colonist through an 'indenture contract' for a certain period. In effect the 'master' paid the 'servant's' fare to America, and, throughout the period of indenture, was required to provide basic subsistence for the servant. When the servants landed in the colonial ports they were 'sold' for the period of their original indenture contract to the highest bidder (1) - the new masters were typically bound by the terms of the original contract, though some added a section to the indenture which provided that the servant would be given, at the end of the service, a specified award known as 'freedom dues'.

The early indentured servant system was based primarily on a contractual agreement between two parties, which, like any other contractual agreement, could be modified at any time during the service on the agreement of both parties. Before the middle of the 17th century printed indenture forms were commonplace only requiring that the blank spaces be filled out in individual cases detailing specifics such as names and length of service. Some servants were able to obtain agreements which specified wages in addition to food, clothing and shelter, and, in the indentures of children, some were able to obtain clauses which specified a basic

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1. For a discussion of the labour contracts known as indentures and the conditions applying to various forms of indenture, see Abbot Emerson Smith, "Colonists in Bondage", Chapel Hill, University of North Carolina Press, 1947. While the conditions and treatment of indentured servants varied enormously the fact that they possessed some sort of 'contract' meant that they were entitled to certain basic legal and civil rights.

education. (1) There were, of course, many abuses of this system of supplying the colonies with a labour force, most notably in the practice of kidnapping and the corruption of judges and justices of the peace who would commute sentences to transportation when, in reality, convicts were being sold to merchants and ship's captains. (2) In part such abuses led to the creation of a colonial board in 1661 to regulate the trade in indentured servants, though by this time another source of labour which would not reduce the labour force at home was being tapped - black labour obtained through England's involvement in the international slave trade.

Nevertheless, this new source of labour had not yet become the primary source of labour for the plantations, so that in the latter part of the 17th century a modification of the earlier indentured servant system, known as redemption, was developed. While the indenture system remained the primary means whereby white labourers could be obtained for the plantations which were developing, redemptioners went to the colonies in increasing numbers. Redemptioners, unlike indentured servants, could usually pay part of their fares and they normally went as families. On arrival in the colony they would be given a certain period of time in which to find the rest of the money owing to the ship's captain for their passage. If they were

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1. For a discussion of these arrangements, see Smith, 1947: 183-9.

2. Williams, 1966:70-74, discusses these abuses and the subsequent establishment of the Colonial Board on Indentured Servants.

unable to raise the money they would be 'indentured' as servants for a period of time equivalent to the amount of money still owed. (1)

The main purpose, of course, behind indentured servitude or redemptioner systems, as is arguably the case with the system of the transportation of convicts, was that of obtaining a viable and economic labour supply for the colonies. Colonists had also attempted to enslave the native population from the earliest period of settlement. The early settlers had bought Indians from other Indians, who took captive slaves in inter-tribal wars, but also from other colonists. Thus, a Maryland colonist in June 1648 notes that:

> Mr Sowth (of Virginia) ... desyred him to sell him an Indian. This Dep't answered him he had none to sell. And then he desyred this Dep't to goe with him up to Wicocomco, and gett him an Indian (girle), and hee would give him content. And upon these speeches they went with the Sloope. (2)

However, the colonists did not depend on traffic or kidnapping for the supply of Indian slaves but took them captive in wars between the settlers and the Indians. Through intensive guerilla raids between the Indians and the settlers, disease,

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1. For a discussion of the redemptioner system as opposed to the indentured servant system, see Higginbotham, 1978:394-5.

2. As cited in Catterall, 1968 ed., Vol.1:62.

and extremely severe compulsory labour when settlers did enslave Indians, the native population was quickly decimated on the seaboard colonies - the bulk of the remainder being driven inland to the vast, unsettled, open territories. (1)

If then the native population could not be enslaved or forced to labour in an economically productive fashion, and if the import of servants and convicts could not supply the labour demands of the colonists, the basis for the importation of another labour force had been created. Given the fact of England's involvement in the international slave trade by the middle of the 17th century and the massive scale which England ensured, in international agreements, (2) that such involvement would take, the possibility had been created that the colonies could be provided with an economically viable unfree labour force - only the precise nature of that 'unfreedom' remained at issue and it is in this context that legal institutions and practices exerted their own unique effects.

From the evidence available, it appears that blacks were first imported in the North American colonies in the first half of the 17th century. Exactly what the status of these first blacks was, however, has been subject to very different interpretations as has the chronology of the development of

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1. C. Degler, "Slavery and the Genesis of American Race Prejudice", in 'Comparative Studies in Sociology and History', 2, October 1959:52.

2. See Chapter 6 for a discussion of the agreements in the slave trade.

chattel slavery in the North American mainland colonies. For example, while Bruce [1] assumed that the first blacks, arriving in Virginia in 1619, came as slaves, Ballagh [2] argued that they arrived as servants and that enslavement only began in 1660 when the statutes concerning black slavery were passed in Virginia. While later scholarship [3] has perpetuated this debate, it is clear that:

> No specific date marked the legal establishment of slavery in the South but there were few obstacles in the way of its development. Neither the provisions of their charters nor the policy of the English government limited the power of colonial legislatures to control Negro labor as they saw fit. Negroes did not have the benefit of written indentures which defined their rights and limited their terms of service... More than anything else, however, the landholder's growing appreciation of the advantages of slavery over the older forms of servitude gave a powerful impetus to the growth of the new labor system. (4)

The fact that a system of production based on slave labour, as opposed to any other form of unfree or indeed free labour,

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1. P. Bruce, "Economic History of Virginia in the Seventeenth Century", New York, Macmillan, 1896:Vol.2.

2. J.C. Ballagh, "A History of Slavery in Virginia", reprint of the 1902 ed., New York, Johnson, 1969.

3. See, for example, Oscar and Mary Handlin, 'Origins of the Southern Labor System' in William and Mary Quarterly, VII, 1950, pp.199-222; and J.H. Franklin, "From Slavery to Freedom : A History of Negro Americans", 3rd. ed., New York, Vintage Books, 1969.

4. K. Stampp, "The Peculiar Institution", New York, Vintage Books, 1956, p.16 et seq.

developed, as the basis of the production of agricultural commodities in the plantations of the North American colonies, is to be attributed to a variety of conjunctural reasons. In particular, given English involvement in the international slave trade by the mid 17th century, this "merchandise" could be used to supply the colonies with a labour force when alternative sources of 'unfree' labour, such as the labour of indentured servants or indigenous peoples, were either insufficient or unsuitable to the nature of labour demands. In addition, in the absence of the monopoly ownership of land, a system of production based on free wage labour was unlikely to develop in the agricultural regions since free labourers would tend to become independent proprietors and artisans. (1) Nevertheless, the system of production based on slave labour which did develop in North America was not merely a substitute for any other system of production based on free wage labour or indentured labour. The introduction of slave labour, in the manner in which it developed through the forms of law, had distinct and definite effects on the system of production and on other social/political structures. The analysis which follows, therefore, focusing on the legal regulation of labour in the early

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1. For a fuller discussion of this point, see Hindess and Hirst, 1975:158-9. The reasons why slave labour as opposed to any other form of unfree or free labour formed the basis of the plantation system of producing agricultural commodities are more fully discussed in the Introduction to Chapter 4 in the context of the development of the large scale cultivation of crops in the later colonial period.

colonial period, demonstrates how legal institutions and practices served to create the space for a definition of the agents involved in the labour process.

In this discussion it will become clear that, from the early beginnings of North American colonial settlement, both Northern and Southern colonies created the possibility that the legal title to slaves as chattel property could be created and maintained. While Northern and Southern colonies would take different forms of economic development, the former being based on the capitalist mode of production and the latter on the slave mode, there was no necessary antagonism between slavery and capitalism. The factors which were constitutive of the legal status of slave as chattel property in North America were not peculiar to the productive system of the South, as some scholars have argued. (1) On the contrary, the development of both Northern and Southern colonies was dependent on the development of the capitalist mode of production in North America and on the development of international capitalism. Both North and South were mutually interdependent in terms of economic growth and Northern colonies were as heavily involved in

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1. See, in particular, the work of Eugene D. Genovese where he argues that North and South came into conflict because the South's economy was necessarily antagonistic to that of the North. In particular, see "The Political Economy of Slavery", New York, Vintage Books, 1967; see also, "The World the Slaveholders Made", New York, Vintage Books, 1971; "American Slaves and Their History" in 'The Debate Over Slavery : Stanley Elkins and His Critics', pp.293-321, edited by A.J. Lane, Urbana, University of Illinois Press, 1971; and "Materialism and Idealism in the Study of Negro Slavery", in Journal of Social History, Vol.1., No.4. 1964, pp.371-94.

the slave trade as Southern ones were on slave labour for the plantation.

Nevertheless, within this context, different patterns of development would emerge both between and within these colonies. These different patterns would create specific problems requiring resolution before a fully-fledged productive system based on slavery, with an effective guarantee to the legality of claims to slaves as chattel property, could develop. An understanding of the different patterns of development and the ambiguities surrounding the early 'slave' status is central to an understanding of just how these ambiguities were resolved within the heritage of English common law, which asserted the liberty of subjects, at a later period, through the legal definition and control of the agents in the labour process - master and slave. In the discussion which follows, therefore, consideration is given to the patterns of development in the creation of a legal basis to slavery within some Southern and some Northern colonies.

THE LEGAL BASIS : THE SOUTH

As was noted in the preceding discussion, the North American colonies exhibited different patterns of development both between North and South and within these divisions. Various forms of unfree labour were used to supplement the labour of the early settlers in the cultivation of farms and estates in both Northern and Southern colonies and 'slaves' represented only one such form.

The status of these 'slaves' was by no means clear and colonies differed in the way in which 'slaves' were differentiated from other unfree persons. However, what did not differ, either within the Southern and Northern colonies or between them, was that legal institutions and practices did differentiate between slaves and other people in bondage, and while this differentiation was by no means clear or unambiguous, the fact of differentiation itself created the basis upon which it would become possible to construct, within law, the legal relation of master/slave. The mode of this differentiation in some Southern colonies is discussed in this section and the next section of this chapter discusses the mode of differentiation in some Northern colonies.

Virginia

As one of the first colonies on the North American mainland, Virginia provided a model for other colonies to follow in terms of its economic, social and agricultural development. At the same time Virginia pioneered colonial legal institutions and practices, allegedly not contrary to the spirit of English common law, which would come to guarantee the legality of claims to slaves as chattel property within its own territory and which would provide a blueprint for other colonies to follow or adapt to their own specific needs. As will be discussed more fully in Chapter 4, Virginia's construction of the status 'slave' in legislation would provide the basis upon which other colonies

could cite a precedent for the legal articulation of the precise nature of the master/slave relation.

From 1619 (1) to 1660, however, there appears to have been no unambiguous effort to legally define the status of negro labour as opposed to other forms of unfree labour. The legal decisions produced in the following discussion of litigation in this period involving negro 'servants' or 'slaves' often failed to articulate clearly the basis upon which a judicial decision had been reached. Whether the decisions reached were based simply on a finding on the facts of the case, of consequence solely to those persons directly involved in the litigation, or whether the decisions were judicial pronouncements of binding legal principles which were to set precedents upon which the legal status of negro labourers in the colony would be decided, was seldom explicitly stated.

Nevertheless, while these early cases do not provide an unambiguous legal definition of negro as opposed to other unfree labour, they do provide an illustration of the fact that, in the early legal regulation of negro as opposed to other forms of colonial labour, there was a clear differentiation in the treatment and control of this particular category of 'servants', and that this differentiation and ambiguity made not only possible but also necessary the construction of the slave status in

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1. The date recorded of the arrival of the first negroes in Virginia, as cited in John Smith, "Travels of John Smith", eds. E. Arber and A.G. Bradley, Edinburgh, Grant, 1910., Vol.2. 41. Smith cites an entry made by John Rolfe, Secretary and Recorder of the Virginia colony , in the records in 1619 to the effect that "about the last of August, there came to Virginia a Dutchman of Warre that sold us twenty Negers".

legislation which was to occur in the slave codes which emerged in the late seventeenth and early eighteenth centuries. (1)

The early colonial cases decided in Virginia were heard before the General Court, the Court of Chancery and the Court of Appeals. During the colonial period the General Court consisted of the colonial governor and council, the council having existed since the establishment of the colony, and its members, including the governor, being appointed by the Virginia Company in London. (2) The first recorded (3) case, specifically referring to negroes was Re Davis, (4) a criminal case where the offence was sexual and the full official report noted:

> Hugh Davis to be soundly whipt before an assembly of negroes and others for abusing himself to the dishonour of God and shame of Christianity by defiling his body in lying with a negro, which fault he is to actk Next sabbath day. (5)

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1. For a full discussion of this construction in legislation of the 'slave' status, see Chapter 4.

2. See H.R. McIlwaine, ed., 'Minutes of the Council and General Court of Colonial Virginia, 1622-1632, 1670-76', Richmond, Virginia, Richmond Colonial Press, 1924 x, xi. The General Court was the highest judicial body in the colony, though for some years, in the earliest period, the general assembly had concurrent jurisdiction with that of this quarterly court, thus criminal cases involving life or member were tried in whichever convened first. In 1641 the civil jurisdiction of the assembly was limited mainly to appellate cases, and, after 1682 appeals to the assembly were discontinued by royal charter (Catterall, I, 1968 ed:75).

3. The original records of the General Court of Virginia were destroyed in the burning of the state capitol building in April 1865 when Richmond was evacuated by Confederate troops (McIlwaine, 1924 ed:Preface).

4. McIlwaine 479, September 1630.

5. Ibid.

While this report tells us nothing about the status of Davis, nor about his race, nor about why he was to be 'whipt' before a group of negroes, it does indicate that law distinguished, even at this very early date, between negroes and other persons. There was something which already the law regarded as distinctive about negroes. Whether this was because they were 'heathens' or because they were black or because they were in some distinctive condition of servitude is not stated - only the distinction is articulated.

In another criminal case, involving fornication, Re Sweat, (1) decided in 1640, the report provides a little more detail. The full official court report in this case notes:

> Whereas Robert Sweat hath begotten with child a negro woman servant belonging unto Lieutenant Sheppard, the court hath therefore ordered that the said negro woman shall be whipt at the whipping post and the said Sweat shall tomorrow in the forenoon do public penance for his offense at James city church in the time of devine service according to the laws of England in that case provided. (2)

While again this report tells us nothing about Sweat's race or status, it does tell us that the negro woman in question is a 'servant'. Exactly what the condition of her servitude is cannot be ascertained but the nature of the punishments

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1. McIlwaine 477, October 1640.

2. Ibid.

respectively given indicate that the differential sentences imposed by the court had some sort of explanatory basis, however ambiguous. And although these early cases only indicate that some kind of differentiation was evident in legal practices, in relation to race, (1) subsequent cases involving the running away of servants from their masters are indicative of just how this differentiation in the treatment of people in bondage began to create and define, within law, a unique form of bondage known as slavery.

In Re Negro John Punch, (2) a criminal action involving three runaway servants from Virginia, two white and one black (Punch), who had been captured in Maryland in 1640, the court in Virginia decided to impose a lifetime servitude on the black runaway alone while the other two runaways were given an additional 4 years servitude each. Thus while the 'dutchman' and the 'Scotchman' were to serve their respective masters for an additional year and the colony for a further three years on the expiry of their indentures, Punch "being a negro ... shall serve his said master or his assigns for the time of his natural life here or elsewhere". (3) Punch had the status of servant, like the other servants in the case, but when sentence was imposed he was clearly in a distinctive category.

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1. Higginbotham, 1978:23, notes that the usual practice, in recording court decisions in this period, was to consistently make reference to the race of the person when that person was a negro.

2. McIlwaine 466, July 1640.

3. Ibid.

In the same month, July 1640, the General Court of Virginia, in the case of Re Negro Emmanuel, (1) handed down a decision which indicates that at this time there were already at least some blacks who were serving 'for life'. This criminal case involved a black (Emmanuel) who, with six other white servants, participated in a conspiracy to run away and who, along with the others, stole "the skiff of Pierce and corn, powder, and shot guns" and sailed down the Elizabeth River where the group were caught. The court sentenced the leader of the group, a Dutchman, to wear shackles for a year and with the others, with the exception of Emmanuel, all were sentenced to extra service to the colony for from one to seven years in addition to being 'whipt and branded'. Emmanuel was whipt, branded with an R and was required to wear shackles for one year but he got no addition of service. Why? The only reasonable assumption to make here for the differential sentences imposed on the runaways is that no addition of service could be made in Emmanuel's case because he was already serving his master for life.

These cases, involving groups of runaway servants, illustrate not only that legal practices differentiated between black as opposed to other servants but also that such practices were already integral to the developing productive system. This period witnessed an increase in both white indentured labour and black bound labour and the colonial masters, dependent on an increasingly unfree labour force, had to prevent the possibility of any

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1. McIlwaine 467, July 1640.

alliance in this labour force. To make one group or category less free than the others through a differentiation in treatment was one way of ensuring that such an alliance could not develop. (1)

Nevertheless, while by the middle of the 17th century it is evident that negro 'servants' were already less free than other servants, insofar as some were serving for life, and others, when given additions in service, were given life, it was still possible for negroes to purchase their freedom just as indentured servants could buy their way out of an indenture. Thus, in the 1641 civil case of Re Graweere (2) it was possible for Graweere, a negro, to purchase the freedom of his child to a "negro woman belonging to Lieut. Robert Sheppard". The Court granted Graweere permission to purchase his child's freedom only if the justices could be assured by the child's godfather that the child would be "made a Christian". However, there is no indication in the report of Graweere's status. He was certainly some sort of servant but the fact that his master allowed him to "keep hogs" and half of the income deriving from the hogs, as well as the fact that he was allowed to bring suit in the courts, indicates that the nature of his bondage was not that different from that of other 'indentured servants'. And, if this is the case, then the fact that he had to purchase the freedom of his

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1. The importance of preventing such an alliance and how this was achieved through a thorough construction of the status 'servant' as opposed to 'slave' in legislation is discussed more fully in Chapter 4.

2. McIlwaine 477, March 1641.

child to a "negro woman belonging" to Sheppard indicates that this woman had a somewhat less free status than Graweere and that her status was definitive of the child's. If the negro woman's status defined the status of her child then this was already a departure from the traditions of English common law where the status of a child followed that of the father. Indeed, within the legal definition of chattel slave which later developed in North America, legal institutions and practices clearly articulated that with slavery the status of a child follows that of the mother not the father. (1)

Ambiguities of status, such as those involved in the Graweere case, where the legality of a degree of economic autonomy for Graweere was upheld yet where, at the same time, the legality of a departure from common law traditions in relation to the status of his child was also upheld, were evident in legal practices and institutions in the early period. In litigation involving wills, contracts and inventories of estates, the legal right of masters to the perpetual servitude of blacks was upheld. For example, a 1646 contract authorised the sale, by a Francis Potts, of a black woman and child to a Stephen Carlton, "to the use of him forever". (2)

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1. The significance of this departure from common law traditions and its construction in legislation is discussed in Chapter 4. The degree to which this was upheld by state legal institutions and practices as well as within constitutional law is discussed in Chapter 7.

2. As cited in Higginbotham, 1978:26.

And, in 17th century inventories of estates two significant distinctions regularly appear in assessing the value of 'indentured servants' and 'negro servants': firstly, negroes are uniformly assessed as being more valuable than any white servants; and secondly, in naming white servants, a notation of the number of years of service remaining is made whereas no such notation appears for negroes. (1)

Evidential support for the argument that legal practices existed in the early period which were increasingly differentiating between the status of negro as opposed to other forms of unfree labour is provided by examples of early legislation concerning runaway servants: in the Virginia statutes of 1661-2 dealing with punishments for runaway servants, in particular, the 1662 statute, which provides that "in case any English servant shall run away in company of any negroes who are incapable of making satisfaction by addition of a time ..." the servants would be required to pay compensation to the master of such negro 'servants' for every one lost or dead. (2) The reference to negroes "incapable of making satisfaction by addition of a time" suggests that they were already serving for life. Another 1662 statute further differentiated between negroes and other persons by providing that the status of

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1. For a full analysis of such inventories and their significance in relation to the legal definition of slavery in North America, see, Carl N. Degler, "Neither Black Nor White", New York, Macmillan, 1971:59 et seq.

2. For the detail of these statutes, see, William W. Hening, "Statutes at Large of Virginia", Vol.2., Richmond, Virginia, Franklin Press, 1819-1820:270.

the negro mother would pass to any child, [1] thus ensuring that the master class could reproduce its own labour force.

However, despite this differentiation in treatment, there was, as yet, no clear and consistent legal definition of negro labour as constitutive of a distinct category. It was still possible for negroes to bring civil suits for freedom in the courts, for example. Thus, in the case of Negro Mozingo v Stone, [2] decided in 1672, Mozingo, described as "an apprentice by Indenture", was granted his freedom from Stone on the expiry of his 28 year indenture. While the length of Mozingo's indenture, in comparison to the average term of five years for white indentured servants, [3] is indicative of a more excessive degree of unfreedom, the fact that he could sue for freedom at all is evidence of a liberty which would later be denied to chattel slaves. This degree of liberty was subsequently upheld in another freedom suit in 1673. In the case of Moore v Light [4] not only did Moore gain his freedom but also the Court awarded him damages from Light because the latter had held him in service for longer than the original 5 year indenture. In a similar case, that of Negro Phillip Gowen v Lucas, [5] decided in 1675, the Court granted Gowen his freedom because of an illegal

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1. Ibid., at 170. See also Note 1, p.178 of this chapter.
2. McIlwaine, 316, October 1672.
3. Catterall, 1968 ed.1:58.
4. McIlwaine, 354, October 1673.
5. McIlwaine, 411, June 1675.

indenture to Lucas, since Gowen's former master had liberated his 'servant' by the terms of his will. The Court rendered the indenture invalid and ordered Lucas to pay compensation to Gowen. However, in the 1676 case of Negro Bowze v Bennett, (1) although the Court upheld Bowze's petition for freedom under the terms of his now deceased master's will this was only done on condition that "the Said Negro Give Security for payment of 800 lb. [of tobacco] per Annum [to the heirs] dureing his life from his masters decease and that he yearely give Security and payment of the same". Presumably if Bowze defaulted on these conditions he could be reclaimed into servitude to the heirs, for the duration of his life.

Thus, although there were many inconsistencies and ambiguities involved in the legal treatment of negro 'servants' in the early colonial period in Virginia so that some enjoyed a limited service whereas others were held for life and some others inherited a 'servant' status from their 'servant' mothers, there can be little doubt that legal institutions and practices differentiated between negro bondage and other forms of bondage. Indeed, although Virginia, very early in its establishment as a colony, enacted laws fixing limits to the terms of indenture for servants who entered the colony without written contracts,

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1. McIlwaine, 437, March 1676.

negroes were not included in these provisions. (1) Such differentiation in treatment, in both legislation and judicial decisions, created the basis upon which the legality of slavery could be established. And, although the precise nature of the slave status as chattel property would not be articulated within law until a later date, these early legal decisions and piecemeal legislative enactments provided the basis upon which

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1. For a discussion of these laws, see, O. and M. Handlin, 1950:210. For the detail of their content, see, Hening 'Statutes', 1, 411, 539. While it is beyond the scope of my analysis to attempt to provide a detailed explanation as to why blacks, as a category, were singled out for differential treatment in this way, it must be emphasised that a considerable amount of scholarship has gone into attempting to answer this particular question. The early writers on slavery, notably Bruce (1896) and Ballagh (1902, reprint edition 1969), agree that racial prejudice explains the enslavement of black Africans while Ulrich B. Phillips, in, "American Negro Slavery", Baton Rouge, Louisiana State University Press, 1966, originally published in 1918, explains slavery as resulting from a necessary process of socialisation for immigrant Africans. Later writers on slavery have continued to disagree about the role of racial prejudice in the origins of black slavery, thus Oscar and Mary Handlin (1950) argue that, in the early colonial period, no strong racial prejudice existed, whereas Degler (1959: 1971) concludes that such prejudice contributed decisively to the development of racial slavery. Williams (1966 ed.) and Stampp (1956) argue that racial differences provided ideological justifications for the enslavement of blacks and that the enslavement was primarily based on economic interest, and Jordan (1968) argues that racial slavery in North America is to be explained in terms of a process of interaction between economic interest and racial prejudice. My own view is that racism provided ideological support for slavery but that the slave system cannot be explained in these terms. Given the extremely lucrative nature of the slave trade and the need for labour to work in the colonies, Africans provided one ideal source of labour since they had no roots in the new lands and by legally differentiating between them and other white unfree labourers the seeds of a very powerful racist ideology could be sown, so that poor whites and blacks would not group together and become a political force to be reckoned with.

the first slave codes of any colony would be passed in Virginia in 1680-82. These early slave codes, in synthesising judicial decisions and legislative enactments, also incorporated some of the stringent controls adopted for the supervision of the colony's white indentured servants, and, in addition, denied certain basic civil rights, such as the right to own property or to sue in the courts. (1) Various other repressive measures were enacted including the colony's legal right to kill a negro slave if that slave ran away from his master's service and resisted lawful apprehension. (2) The 1682 Act included further prohibitions such as the one sanctioning the punishment of any slave who remained on the plantation of a white man other than his master for more than four hours without permission. (3) Nevertheless, while these codes went some way towards a resolution of the ambiguities surrounding the status of negro labour, many ambiguities remained, and it was not until the dawn of a new century that these ambiguities would be resolved in a comprehensive construction in legislation of the slave status as akin to that of private property. (4)

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1. Hening, 'Statutes': I, 1680 Act.

2. Hening, 'Statutes': I, Act X, 1680.

3. Hening, 'Statutes': II, 1682 Act at 18.

4. This construction in legislation and an explanation as to why it was necessary is fully discussed in Chapter 4.

South Carolina

The proprietary government for the colony of Carolina [1] had a constitution drafted in 1669 [2] for the governing of the colony, a document which explicitly provided for slavery and guaranteed to protect the interests of slave-holders in slaves:

> Every Freeman of Carolina shall have absolute power and authority over Negro slaves, of what opinion or Religion soever. [3]

And, although this constitution never became legally operative in South Carolina since it did not receive the required approval from the colonists as laid down in the colonial charter, it did provide the accepted customary standard regarding the legitimacy of slavery from the establishment of the colony. [4] Thus, it is not surprising to find that the first blacks came to the colony as

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1. Until 1719 South and North Carolina were one colony - Carolina. In this chapter when discussing South Carolina it should be noted that the legislation applied to North Carolina also. I do not discuss the impact in North Carolina because it had different natural resources and a different pattern of development and because South Carolina is focused on exclusively in Chapter 4. In 1719 South Carolina overthrew the proprietary government, establishing a provisional one until 1729 when a new government was formed under Royal charter. North Carolina remained under proprietary rule until 1729. See Edward McCrady, "The History of South Carolina under the Proprietary Government, 1670-1719", New York, Macmillan, 1897.

2. The drafters of this document, The Fundamental Constitution, were John Locke and the first Earl of Shaftesbury, working under the direction of the Carolina proprietors, four of whom were members of the Royal African Company which held a monopoly in the British African slave trade, (see McCrady, 1897:643).

3. Thomas Cooper and David McCord, eds., 'The Statutes at Large of South Carolina', Columbia, S.C., 1836-41, Vol.1. page 55.

4. McCrady, 1897:110.

slaves, bought mainly in the West Indies (though a small number were bought in England). (1)

Although South Carolina did not import black slaves in large numbers until the rapid development of the rice economy from the 1690s onwards, (2) in the early colonial period, when the colony's settlers largely came from the West Indian colonies, in particular Barbados, (3) where the legality of slave labour as the basis of production was already firmly established, settlers either brought black slaves with them or purchased slaves to work the land they obtained. And, while South Carolina, like all the developing North American colonies, originally relied on white indentured servants in the main to supplement the labour of the colonists, (4) by the turn of the 18th century, black slaves outnumbered whites (both free and bonded). Indeed, South Carolina was unique among the North American colonies in becoming, at this early date, and in remaining so throughout the colonial period, the only colony where black slaves represented the majority of the colony's population. (5)

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1. Peter H. Wood, "Black Majority", New York, W.W. Norton, 1974:45.

2. Wood, 1974:45.

3. The early South Carolina economy, in the production of goods, was very much based on the needs of the Barbadians and, in this period, the Barbadian settlers brought many of their traditions with them (Wood, 1974:32).

4. Warren B. Smith, "White Servitude in Colonial South Carolina", Columbia, S.C., University of South Carolina Press, 1961:5.

5. Wood, 1974:144.

Many different explanations have been given as to why black slave labour overtook white indentured labour and Indian enslavement [1] so early on in the development of the colony. It has been argued, for example, that because many of the early migrants to South Carolina came from Barbados and because of the colony's economic dependence on Barbados, these South Carolinians brought their own established traditions on slavery. [2] Others have argued that because South Carolina legislated for both procedural and substantive rights for servants, the attraction of this kind of indentured labour to colonists was reduced since their burden in maintaining standards for servants was increased. [3] And others have argued that profit was the sole determinant in the decision to enslave blacks as opposed to obtaining a different source of labour. [4]

The fact that black slave labour increasingly became the most important source of labour in South Carolina is not, however, to be attributed to any single cause, but rather to a variety of complex conjunctural reasons including: its dependence on the Barbadian economy and traditions; the difficulties involved in obtaining an adequate supply of indentured labour and/or in enslaving natives in their own lands; and the rapid escalation in

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1. South Carolina did, in fact, enslave much larger numbers of Indians than any of the other North American colonies but these 'slaves' were not typically put to labour in the colony - most were sold in the West Indies (McCrady, 1897:399).

2. Wood, 1974:32-45.

3. McCrady, 1897:8.

4. Higginbotham, 1978:164.

the profits to be made through involvement in the slave trade. Nevertheless, despite any alleged long term advantages to be gained through the use of slave labour, the purchase price of slaves was much higher than 'purchasing the labour' of an indentured servant for a specific period. (1) This requirement for a higher initial investment in slave labour, however, was offset to a large extent by the Proprietors of the colony. In the early years of settlement the Proprietors, many of whom were shareholders in the Royal African Company which held a monopoly in the English involvement in the international slave trade, modified the 'head-right' system, that is, the system giving land grants to new colonists. (2) Through this modification, new colonists were eligible for land grants if they imported black slaves. Those arriving prior to March 25, 1670, for example, received 150 acres of land for every manservant or male slave imported (3) thus enabling Barbadian planters to import increasingly more slaves into the colony and automatically acquire larger tracts of land. (4) And although the statutory amendments to the 'head-right' system of 1671, 1672, 1679 and 1682 gradually

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1. Wood, 1974:48.

2. Ibid., 19-20.

3. William J. Rivers, "A Sketch of the History of South Carolina to the Close of the Proprietary Government, 1719", Charleston, S.C., 1856:347.

4. Wesley F. Craven, "The Southern Colonies in the Seventeenth Century, 1607-1689", in W. Stephenson and E.M. Coulter, eds., "A History of the South", I, Baton Rouge, Louisiana State University Press, 1949:338.

reduced the number of acres granted to colonists for themselves and for the importation of slaves and/or servants, (1) this system of granting massive tracts of land to planters importing large numbers of unfree labourers was to provide the basis upon which a fully-fledged system of slave production could develop.

With the development of credit in the colony, planters were, in the years between 1670 and 1682, able to take full advantage of the 'head-right' system without any immediate capital outlay. This system, of course, served economically to depress small farmers and led to an escalation of the larger planters' importation of slaves and their control of large tracts of land. Thus the planter "could buy Negroes on credit; for the merchant knew that for every slave ... his debtor would receive free fifty acres of land from the government, which increased his ability to pay". (2)

Despite this importation of black slaves in the latter part of the 17th century, however, there was as yet no distinctive category of labour to which these 'slaves' were assigned. Until the specific development of the rice economy in South Carolina from the 1690s onwards, most slaves worked alongside Indian and white labourers. There was no strict division of labour nor was

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1. By 1682 each free person received 50 acres of land and an additional 50 acres for every slave or servant imported under the 'head-right' system, (Smith, 1961:11).

2. David D. Wallace, "South Carolina, A Short History 1520-1948", Chapel Hill, University of North Carolina Press, 1951:147.

there any specific effectivity to the legal status 'slave' as distinct from other forms of bonded labour. Although the 1690 statute, (1) the first slave law on the records of South Carolina, provided that slaves were to be "accounted as freehold" except "when other goods and chattels [were] not sufficient to satisfy" the debts of a master or in the settlement of certain estate matters, (2) these provisions were subsequently disallowed by the Proprietors. (3) Had this legislation remained in effect it might have had considerable significance in relation to the specific effects of the legal status on the development of the slave system. If slaves were afforded freehold status then, in principle, the law might have developed in such a way that the master had a right only to the services of the slave and not an absolute right over the person of a slave as property, as is the case with personal or chattel property. (4) As 'freehold' the slave was recognised in law to have human qualities and was legally differentiated from other chattels such as horses or cattle. (5)

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1. Cooper and McCord, 'Statutes at Large', 1836-41, Vol.7., 343-47.

2. Ibid., at 343-4.

3. M. Eugene Sirmans, "The Legal Status of the Slave in South Carolina, 1670-1740", in Journal of Southern History 28, 1962:465.

4. Ibid., at 465.

5. This 'freehold' concept for slaves was borrowed from the Barbadian slave code (Sirmans, 1962:464). In this context it is significant to note that many of the judicial decisions concerning slavery in England were premised on the notion that suits involving slaves should be brought per quod servitium amisit (for services) rather than in trover (for property). For a discussion of the significance of this distinction, see Chapter 2.

The issue, however, as to whether in law slaves would be regarded as chattel property or whether they would retain the temporary freehold status granted in 1690 would be resolved in South Carolina's first major slave code passed in 1712. As will be discussed in the next chapter, the 1712 South Carolina slave code established the basis upon which the status of slave as chattel property was constructed in legislation thereby defining the agents involved in a distinctive labour process - master and slave.

Georgia

Although Georgia's charter as a colony was not issued until 1732, which is, compared to the other colonies, a late date, (1) it is nevertheless the case that the legal definition of slavery in the colonial period is analytically separable into two distinct phases. As with the other colonies, slavery, in the early colonial period in Georgia, occupied an ambiguous status, though in the later colonial period there was a definite resolution of ambiguity through the construction in legislation of the exact nature of the legality of slavery.

Georgia, however, stood alone amongst the original thirteen colonies insofar as, very early on in the colony's settlement, Georgia passed legislation which explicitly outlawed slavery in the colony. The original goals of the colony, as set forth in

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1. Georgia was the last founded of the original thirteen North American colonies.

the charter, were to aid the British poor, to protect the mercantile system, and to provide military defence, particularly to South Carolina. The legislative proposal for the foundation of Georgia had, in fact, originated from a British Parliamentary Committee charged with investigating the conditions of debtors in English prisons. One of the recommendations of this committee was that the emigration of English debtors to a new North American colony would give these poor a second chance at economic self-sufficiency. The actual proposal for the Georgia charter was later made by 21 petitioners, ten of whom were on the committee investigating the conditions of debtors in English Prisons. (1) Despite the intentions, however, no more than a handful of debtors were ever sent to Georgia (2) and most of those actually financed by the Trustees to go there were the 'worthy poor'. (3)

Georgia colonisation, according to 18th century mercantile theory, was also thought to provide a market for the export of British products, and, at the same time, a source of the supply of various commodities such as silk and grapes. (4) Thus, from

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1. Albert Saye, "New Viewpoints in Georgia History", Athens, Ga, University of Georgia Press, 1943:10-26.

2. Ibid., 31-42.

3. Kenneth Coleman, "Colonial Georgia: A History", New York, Scribner's, 1976:22.

4. Allen D. Candler, ed., "Colonial Records of Georgia", Atlanta, Ga, Franklin Printing and Publishing Company, 1904, Vol.1:11.

the outset, Georgia was thought to be a region where specialised commodities could be produced and was dependent on obtaining enough labour to make this production profitable.

Under the terms of the original charter, the twenty-one English petitioners became a Board of Trustees for the colony with special powers to guide the development of Georgia. (1) The Trustees had absolute ownership over all the land in the colony and extensive political authority, for a period of twenty-one years, to establish and direct the government of Georgia. (2) Unlike the charters in other colonies the Georgia charter did not require the establishment of a local colonial legislature, thus leaving the Trustees to formulate their policy on the legality of slavery without any institutional opposition from a local legislature. (3) Moreover, the terms of the charter with regard to the personal financial affairs of the Trustees, which stipulated that no Trustee could reap financial gain from his position, insulated them, to some extent, from any direct personal economic gain to be made from the introduction of slaves to the colony. For example, no grant of Georgia land could be made to any Trustee as an individual and no person having an interest in such land could become a Trustee. (4)

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1. Acts of Privy Council, Vol.III:305.

2. Coleman, 1976:89.

3. Saye, 1943:56-7.

4. Candler, ed., 'Colonial Records of Georgia', 1904, Vol.1: 16, 22.

In the early period of Georgia's settlement the Trustees regarded the existence of slavery as inconsistent with the purposes of the colony. If the purpose of settlement was to give the 'worthy poor' a chance to undertake 'honest toil', and these people were to represent the main labour force, then the introduction of black slaves would have undermined this objective. Thus, while there is evidence that slave labour was used in the early period of settlement, (1) the Trustees attempted to ensure that this labour force would not grow by passing, in 1735, only three years after the foundation charter had been granted, its first explicitly antislavery law. (2) This law banned the importation of blacks into the colony after June 24, 1735, and prohibited the use of any blacks within the colony as slaves.

In the preamble to the 1735 Antislavery law it is clear that the prohibition of slavery in Georgia was based on the desire to increase the numbers of white settlers who could "alone ... in case of a War be relyed on for ... Defense and Security ..." and because of the fear of alliances between poor whites and black slaves which may result in revolts and insurrections. (3) Despite this prohibition, however, other provisions of the 1735 law make clear that the Georgia colonial government was not against the existence of slavery in other colonies, thus runaway slaves

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1. Ibid., Vol.3 :63.
2. Ibid., Vol.1:49-52.
3. Ibid., Vol.1:50-52.

from other colonies found in Georgia had to be returned to their previous owners, and, if these owners failed to claim the slave in question, the 1735 law provided for the sale of any blacks [1] found in Georgia into slavery outside the colony. The 1735 law therefore, while prohibiting slavery in Georgia, at the same time recognised the legality of slavery to the extent that slaves could be sold there for transportation outwith the colony and claims to property in slaves made by non-Georgia residents could be upheld in Georgia courts.

Although most of the pre-1776 Georgia court opinions have been destroyed or lost, Higginbotham [2] has provided an analysis of the degree to which the 1735 law was enforced, this analysis being based on entries in Stephens' journal - Stephens was a Trustee of the colony from 1737-1750. [3] For example, in the cases reported on, it is clear that Georgia courts permitted the sale of captured blacks into slavery outside the colony; that there was a policy of vigorously enforcing the 1735 clause on runaway slaves from other colonies; [4] and that the policy of Georgia courts in returning runaway slaves to South Carolina was in direct opposition to the failure of South Carolina officials to return Georgia runaway

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1. The 1735 law assumed that any black was a slave placing the burden of proof on the black in question to prove that he was, in fact, free. See Candler, ed., 'Colonial Records of Georgia', 1904:Vol.1:50-52.

2. See, Higginbotham, 1978:227-232.

3. See, Coleman, 1976:95-96.

4. In particular, from South Carolina.

white indentured servants. (1) Moreover, there are a number of instances recorded where the use of slaves in Georgia itself had been brought to the attention of the courts, but where the courts failed to deal with violations of the explicit provisions of the 1735 Antislavery law. For example, in the 1739 case of Davis v Pope, (2) where the existence of Davis' slave was central to the issue of the legality of Davis dismissing Pope, the fact of Davis owning a slave was ignored by the Court. In another case, decided in 1741, (3) two slaves, owned by a Mr Kent, were committed for crimes. The Court, however, does not appear to have considered the illegality of Kent's ownership of slaves in Georgia, nor does it appear to have fined him for breach of the antislavery law.

The Georgia courts also accommodated the illegal ownership and use of slaves in Georgia by upholding the legality of fraudulent claims of South Carolina citizens to captured Georgia slaves. This accommodation was made possible through a fraudulent 'leasing' system whereby Georgians 'leased' slaves from South Carolinian owners for 100 years - the advance lease payment made being equal to the purchase price of a slave. If the slave was captured by the authorities in Georgia, the courts sanctioned the return of these 'leased' slaves, as runaways, to their original South

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1. Higginbotham, 1978:227-8.
2. As cited in Higginbotham, 1978:230-2.
3. Ibid., 232-3.

Carolinian owner who reimbursed the appropriate Georgian for his loss. (1) Throughout the period of the 1735 antislavery law, slaves were frequently transported back and forth from South Carolinian and Georgian plantations in the process of being 'rented' or 'sold' to Georgian planters. And, by the close of the Trustee period, magistrates themselves were so favourably disposed to the introduction of slaves into Georgia that the 1735 statute was virtually a nullity. (2)

This failure of judicial and administrative officials to enforce the provisions of the 1735 law outlawing slavery in Georgia, coupled with the failure of the Trustee government to encourage an adequate supply of white labourers to emigrate to the colony, despite the creation of a number of special schemes to

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1. John C. Hurd, "The Law of Freedom and Bondage in the United States", Boston, Little, Brown and Company Ltd., 1858:Vol.1:149.

2. Charles C. Jones, "History of Georgia", Boston, Houghton, Mifflin and Company, 1883:Vol.1:421-2.

promote white labour in the colony, (1) was paralleled by a growing political opposition to the 1735 antislavery law. Throughout the 1730s and 1740s political opponents presented a series of pro-slavery petitions to the Trustees. For example, a 1738 petition from a group of Savannah freeholders, known as the Memorialists, (2) blamed the 1735 antislavery law for the slow rate of economic development in the colony as compared with that of South Carolina. In addition, this petition specified that the land policy adopted by the Trustees was detrimental to economic development. In a series of restrictions on land, the

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1. The Trustees had tried several methods of increasing the number of white residents in the colony to ensure an adequate and reasonably cheap labour supply. For example, they financed the transportation to Georgia of free unindentured persons, called 'charity colonists', and granted them up to 500 acres of land (see, Daniel J. Boorstin, "The Americans: 1 : The Colonial Experience", London, Penguin, 1965:81); another group of emigrants called 'adventurers' paid their own passage and received up to 500 acres of land (Candler, ed., 'Colonial Records of Georgia', 1904:Vol.1:20-22); loans were advanced to help freeholders pay for their servants' passages; and inducements of land on completion of service were offered to encourage enlistment as indentured servants (Coleman, 1976:137-8). All these measures however, proved to be inadequate to meet the labour demands of the colonists. This problem was further aggravated by the fact that many white indentured servants escaped from Georgia into South Carolina whose courts did not enforce claims for the return of white indentured servants to Georgia. South Carolina, of course, already recognised the legality of slavery, and it was in her interest to encourage slavery in Georgia. To encourage slavery in Georgia meant that it was necessary to cut off, to whatever extent possible, the supply of any reasonably cheap white labour force - mostly indentured servants. For a discussion of judicial decisions which demonstrate the extent to which South Carolina protected white runaway servants from Georgia, see Higginbotham, 1978:238-9.

2. Candler, ed., 'Colonial Records of Georgia', 1904, Vol.3: 422.

Trustees had prohibited the selling or bequeathing of land to anyone other than male children, in order to prevent the formation of large plantations. The Memorialists petitioned for free title or fee simple ownership of land plus the legal right to import black slaves. (1) The Trustees denied this petition, but it was not long before another Savannah based group, known as the Malcontents (2) filed another petition in 1741. This 1741 petition broadened the attack on the Trustees' regulation of slavery and land title by also challenging land rents and the control over the location of individual settlement. (3) However, for the Malcontents, the "chief error" was the trustees' denial of "the use of negroes" and they argued that their legal right to slaves had been granted under the terms of the Georgia colonial charter which gave Georgians the rights of British citizens. Indeed, in 1741, an emissary was sent by the Malcontents to petition the Crown and Parliament, and, although the British Parliament did not officially outlaw the 1735 antislavery law, it did cut off appropriations to the Trustees. (4)

By the latter part of the 1740s, many planters were closing farms in Georgia and were moving to South Carolina, and it was

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1. Boorstin, 1965:89 et seq.

2. Clarence L. VerSteeg, ed., "A True and Historical Narrative of the Colony of Georgia With Comments by the Earl of Egmont", Athens, Ga, University of Georgia Press, 1960:157.

3. Ibid., 157-61.

4. Ruth Scarborough, "Opposition to Slavery in Georgia", Nashville, Tenn, George Peabody College for Teachers, 1933:46-7, 56-7 - as cited in Higginbotham, 1978:240.

only a matter of a few years before the enactment of the 1750 Slavery Law which guaranteed that Georgians had a legal right to import and use black slave labour in the colony. As will be discussed in Chapter 4, the fifteen year 'experiment' against the use of slave labour for the colonisation of Georgia had failed and, through a fully-fledged construction of the slave status in legislation, from 1750 onwards, the plantations of Georgia, like those of South Carolina, were legally capable of developing on an exclusively slave-based labour force.

THE LEGAL BASIS : THE NORTH

In the preceding section the modes of legal differentiation between 'slaves' and other unfree labourers in the early colonial period in Southern colonies with different patterns of political and economic development were discussed. To these patterns of development in the South there are illuminating comparisons to be made with the Northern colonies in the early colonial period. While it has often been argued (1) that those factors which were constitutive of the slave status in North America were peculiar to the productive system of the South and that, because the North's developing productive system was essentially different and those factors were lacking, the Northern colonies were antagonistic to slavery, my argument is that there was no necessary antagonism between North and South over the existence or development of

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1. See, in particular, Genovese, 1967.

slavery. On the contrary, from the beginning, North and South were mutually interdependent in terms of economic growth and both differentiated in law between 'slaves' and other people in bondage to the extent that the basis was created upon which both would be able to recognise the legality of claims to slave property right.

Massachusetts

Unlike Virginia, for example, where it took its first half century of existence before legislation explicitly sanctioned the legality of the status 'slave', the Massachusetts Bay and Plymouth colonies statutorily sanctioned slavery as part of the Body of Liberties in 1641 only three years after the first recorded instance of negroes in that area. (1) While the 1641 Body of Liberties outlawed "bond slaverie, villenage or captivities" among the settlers, there were notable exceptions: those who could lawfully be held in bondage included "lawful captives taken in juste warres, and such strangers as willfully sell themselves or are sold to us ...". (2) The first reference, however, to any form of slavery in colonial New England, is in connection with an Indian, Chousop, who, in 1636 was to be "kept as a slave for life to worke, unless we see further cause" as a punishment for committing crime. (3)

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1. Lorenzo J. Greene, "The Negro in Colonial New England", New York, Columbia University Press, 1942:17.

2. Ibid., 63.

3. Catterall, 1968 ed., Vol.4:455.

From the establishment of the colonies in New England a system of penal slavery was in operation. Penal slavery could be applied to all races and could be given for a definite number of years; for the life of any particular individual; or until restitution was made. (1) This type of slavery could be imposed and subsequently lifted, thus, in a 1638 case, Re Andro(w)s, (2) Andro(w)s was "delivered up a slave" as a punishment for assaulting his master, and in a subsequent case of Re Andro(w)s in 1639, (3) the same man was "released (upon his good carriage) from his slavery ... to serve Mr Endecot(t) the rest of his time". A number of similar instances are noted in the court records of the time, (4) the last recorded imposition of penal slavery on a white person occurring in 1659 in Re Southwicke (5) for the non-payment of a fine, though in the 1665 case of Re Laborne, (6) the General Court of Massachusetts authorised the enslavement of a debtor to ensure repayment to creditors.

The Massachusetts courts did, however, continue to punish Indian criminals by penal slavery for a term of years or for life,

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1. For a fuller discussion of the system of penal slavery, see Higginbotham, 1978:66-68.

2. N. Shurtleff, ed., "Records of the Governor and Company of the Massachusetts Bay in New England", Boston, 1853, Vol.1:246 (1638) - hereafter cited as Mass Recs.

3. 1 Mass. Recs. 269 (1639).

4. See Catterall, 1968 ed., Vol.4:455 et seq.

5. 4 Mass. Recs. (Part 1) 366 (1659).

6. 4 Mass. Recs. (Part 2) 153 (1665).

perpetual servitude being imposed on an Indian and his family for the first time in Re Indian Popanooie, 1677 (1) and in Re Indian Slaves, 1678. (2) By the later 17th century some blacks were also perpetual slaves and that status was transmitted to their children but it appears that, at this stage, there was no unambiguous legal distinction between 'slaves' and 'servants'. (3) Black slaves, like white servants, were able to petition the court for protection against their masters and they were able to enjoy certain basic civil rights such as the ability to give evidence in court. Black slave labour was not at this time, nor at any subsequent time, an important factor, in and of itself, in the development of the productive system in the New England colonies, thus, arguably the need for a clear differentiation within law of this form of labour as opposed to any other form was virtually non-existent. However, what was critical to the economic development of these colonies was the trade in slaves.

Throughout the 17th century a violent international struggle was maintained on the west coast of Africa between European trading companies and combinations, each trying to corner the

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1. Higginbotham, 1978:70.

2. Ibid.

3. See, Jordan, 1968:66 et seq.; and Higginbotham, 1978: 71-75.

markets for the supply of slaves to the Americas. (1) Massachusetts Bay Colony merchants survived this struggle, and by the early 1700s New England colonies had become the most heavily involved of any of the North American colonies in the slave trade. (2) To ensure that this merchandise could be legally purchased, New England had a direct interest in upholding the legality of commercial transactions involving the sale of slaves, thus, if not explicitly, then at least implicitly, the legality of claims to slave property must be upheld by their own specific legal institutions and practices. Not surprisingly then, a statute passed in 1705 permitted the attribution of the legal status of chattel to black slaves, and, as will be discussed more fully in Chapter 4, this statute, plus subsequent legislation in Massachusetts, resolved many of the ambiguities surrounding the colony's massive involvement in, and dependence on, the slave trade, while, at the same time, it was more or less totally independent of any need for slave labour itself in that colony.

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1. In 1696 the English Parliament revoked the monopoly granted to the Royal African Company (referred to in Chapter 2 and more fully discussed in Chapter 6) for slave trading, thereby enabling all Englishmen to engage legally in the international slave trade. In 1713, by the Treaty of Utrecht, Britain gained the Asiento from Spain, that is, an agreement with Spain to have the monopoly on the supply of 4,800 black slaves per year for 30 years to Spain's American colonies. The colonists in New England lost no time in seizing this opportunity to make maximum use of their shipbuilders, sailors and merchants.

2. Greene, 1942:20-3.

New York

From its establishment as a colony in 1623 under Dutch colonial control, New York, then known as the New Netherlands, developed a 'half-freedom' status for black slaves imported by the Dutch West India Company (1) into the colony. The labour of the slaves introduced by the Dutch West India Company was used as a means of supplementing the labour of the settlers: there was no particular division of labour based on the slave status (2) and there was no legal distinction in terms of rights between freedom and slavery. Thus 'slaves' were able to own real property, they were able to seek judicial relief when unlawfully held in bondage and they were able to bring suit in the courts for the non-payment of wages. (3) At the same time, this 'half-free' status relieved the Dutch West India Company of the burden of providing for several adult 'slaves', since these 'half-frees' were allowed to work for other masters and receive wages, paying a percentage to the company which 'owned' them. Moreover, the 'half-freedom' system assured the company of a labour force to undertake public works since the 'slaves' were also obliged to perform certain tasks for the company. (4)

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1. The Dutch West India Company was heavily involved in the slave trade and itself owned a large number of slaves.

2. E.B. O'Callaghan, "Voyage of the Slaver St John and Arms of Amsterdam", Albany, J. Munsell, 1867.

3. E. McManus, "A History of Negro Slavery in New York", Syracuse, Syracuse University Press, 1970:12 et seq.

4. E.B. O'Callaghan, "Laws and Ordinances of New Netherlands 1638-1674", Albany, New York, Weed Parsons and Co., 1868:36-7.

This 'half-free' status for black slaves in New York under Dutch colonial control was one where the company, through legislation, in particular a statute passed in 1644, (1) defined a hybrid status for blacks in the colony. These 'slaves' could enjoy certain basic civil rights but, at the same time, if they failed to meet their annual quotas of wheat, for example, as payment for their 'half-freedom' from the company, they could be returned to a state of total servitude to the company. In addition, the children of 'half-free' blacks were obliged to serve the company as 'half-frees' themselves. Nevertheless, the company did not own the person of these slaves, nor were they ever regarded in law as akin to chattel property. What the company did have was certain rights of ownership over the labour of these slaves, and the terms 'freedom', 'half-freedom' and 'slavery' were used simply to denote different kinds of labour obligations.

In 1664, however, the Dutch surrendered the colony proper to the English and by 1669 the entire territory of the New Netherlands had been ceded to the English and renamed New York. (2) In 1665, the new English governor, the Duke of York, (3) wrote and enacted what came to be known as the Duke of York Laws, which represented

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1. Ibid.

2. W.F. Craven, "The Colonies in Transition 1660-1713", New York, Harper and Row, 1968:70-88.

3. The Duke of York (the future King James II), had personal financial interests in the Royal African Company, the British trading company with a monopoly on the British involvement in the international slave trade in the latter part of the 17th century.

the foundation of the legal system in colonial New York. These laws had a significant impact on establishing the basis upon which slavery in the colony could be regarded not only as legitimate but also as highly desirable. The laws encouraged the increase in the number of slaves in the colony as well as a change in the role of slave labour, through limitations imposed on the use and desirability of white indentured labour and the granting of port privileges and warehouse priorities to ships participating in the international slave trade.

The increase in the number of black slaves in New York, immediately following the British take-over, was a direct consequence of several statutes whose effect was to curtail the economic feasibility of indentured servant labour. For example, by limiting terms of indentured servitude in the colony to a specific length of time, costs were increased, thereby decreasing the viability of this source of labour. Moreover, the Duke of York Laws also limited indentured servitude to those who would willingly sell themselves into bondage for a period. Indians were also excluded from the potential labour force when, in 1679, the colonial assembly prohibited the enslavement of Indians. (1) Thus, by the latter part of the 17th century, one source of cheap labour remained - black slaves. And, although the legislature in this period tended to deal with specific problems as they arose, increasingly regulations were imposed on the freedom of movement

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1. Smith, 1947:35.

given to these slaves. For example, in 1682 the General Court of Assizes passed an ordinance prohibiting slaves from leaving their masters' homes or plantations on Sundays or "any other unreasonable time" without the consent of their masters in writing, and no one was allowed to trade with a slave without the master's permission. (1) In another ordinance of 1683 the General Court of Assizes further restricted the movement of slaves by forbidding more than four slaves to gather together at any time outwith their master's service and masters were fined if this happened. (2) And in 1684, the general assembly of the colony enacted legislation curtailing the economic opportunities open to slaves by prohibiting them from trading. (3)

Thus, although the exact nature of slaves as property had not yet been unambiguously articulated in legislation or judicial practices, it is clear that by the end of the 17th century, restrictions on the activities of slaves plus the legal articulation of the view that baptism did not confer freedom on slaves "after [they] had been bought", (4) provided the basis upon which it became possible to construct the status of slave as chattel property. This process of construction in legislation began, as will be discussed in Chapter 4, in 1702 when the New York colonial

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1. Higginbotham, 1978:117.

2. Ibid.

3. McManus, 1970:18, 41, 42.

4. A 1674 statute, enacted by the colonial legislature, provided that "no Negro slave who becomes a Christian after he had been bought shall be set at liberty" - as cited in Williams, 1966:139.

legislature enacted the first statute which clearly indicated that the law would treat slaves as chattels.

Pennsylvania

When Pennsylvania passed under English authority in 1664, slavery was recognised for a brief period under the Duke of York's Laws which sanctioned "bond slavery" and "servants ... for life" (1) for heathens. And, while this limited statutory recognition ended after the arrival in the colony of William Penn and his fellow Quakers in 1682, there is a considerable body of evidence in legal records, such as wills, indicating that de facto slavery continued to exist. (2) For example, in comparison to Virginia where the available records indicate that some of its early blacks were indentured servants, there is no evidence in Pennsylvania records that blacks were held in bondage for anything other than lifelong terms. (3) Thus, while the Pennsylvania legislature passed statutes in 1682, 1683 and 1692 (4) relating to indentured servants, in litigation concerning the legal rights of servants under these statutes, the only parties involved in the litigation were white servants. While numerous judicial decisions concerning

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1. Gail McKnight Beckman, ed., 'The Statutes at Large of Pennsylvania in the Time of William Penn, 1680-1700', New York, Vantage Press, 1976, Vol.1:78.

2. Edward R. Turner, "The Negro in Pennsylvania", Washington D.C., The American Historical Association, 1911:2, 18, 26.

3. Ibid., 22.

4. Beckman, ed., 'Statutes at Large of Pennsylvania', Vol.1: 154-56.

the care, protection, indenture and discharge of servants throughout this period are recorded, no case appears where the legal rights of black 'servants' were the subject of litigation. (1) This absence of litigation in relation to the rights of black servants as opposed to whites is indicative of the extent to which black 'servants' were already differentiated from whites.

Nevertheless, in the early colonial period, prior to 1700, legal institutions and practices failed to take any explicit position on the legality of slavery in Pennsylvania, thus making the legal status of blacks in the colony an ambiguous one. However, when Pennsylvania courts had to decide on cases involving runaway slaves from other colonies, they had to decide on whether they would uphold the legality of slavery in these colonies. For example, in 1688 the Bucks County Court in Pennsylvania tried George, a runaway slave from Virginia, for theft. George was sentenced to be whipped; to serve 15 years for the colony; and, after serving these 15 years, to be returned to his Virginia master if he should be claimed. (2) Such cases indicate that Pennsylvania courts were quite prepared to acknowledge the legality of slavery in other colonies at a

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1. For a fuller discussion and analysis of these decisions, see Higginbotham, 1978:275-9.

2. Higginbotham, 1978:275, provides a full discussion and citation of this case and from 272-77 discusses other cases indicative of the differentiation in treatment.

time when there were no inter-colonial agreements concerning the return of runaway slaves and when, in the specific instance of George, no Virginia master appeared to claim his runaway.

The differentiation in law as between white and black servants was further articulated in 1700 when the Pennsylvania legislature passed 'An Act for the better regulation of servants in this province and territories' which, while punishing white servants who stole from their masters by the addition of time to their servitude, noted that black servants were to be "severely whipped" in public. (1) Presumably the fact that no addition of time was made in the case of black 'servants' who could only be punished in their bodies meant that these 'servants' were already serving for life. (2) Indeed the problem of punishing blacks for criminal acts became more acute for the Pennsylvania courts with an ever increasing number of petitions from masters asking for the commutation of their black servants' sentences. These masters were anxious not to lose the labour of their black servants - any such loss being detrimental to the economic viability of their investments. (3) In response to this need to protect investments in blacks an act of 1700 was passed which established a special court exclusively for the trial of negroes. (4) All blacks, in whatever state of bondage

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1. Pennsylvania Laws, Vol.1:13.

2. A similar omission in sentencing blacks is to be found in some of the early Virginia judicial decisions (see p.176 of this chapter).

3. Colonial Records of Pennsylvania, Philadelphia 1838-1853, Vol.1:61.

4. Beckman, ed., 'Statutes at Large of Pennsylvania', Vol.2: 77-79.

they found themselves, were to be tried before these special courts. In addition, the 1700 Act also established special crimes and punishments for blacks in accordance with the desire to protect, as far as possible, the labour of these persons for their masters.

Thus, while in the early colonial period, there was no unambiguous legal articulation of the status 'slave', it is evident that legal institutions and practices differentiated between people in bondage to such an extent that by 1700, not only were blacks generally serving for life while others were serving for around 5 years, but also special courts had been created to mete out a special form of justice to these labourers. And while Pennsylvania had not provided in law for a distinct legal category of 'slave' it was, as will be more fully discussed in Chapter 4, to provide in legislation a series of protections for a master's investment in slaves in Pennsylvania or elsewhere.

CONCLUSION

In this chapter it has been argued that black 'slave' labour was originally simply one form of unfree labour used as a resource for British colonial expansion in the 17th century to North America. However, from the beginning, in both Northern and Southern North American colonies, this form of labour was differentiated from other forms of labour in a variety of ways depending on the particular nature of social, economic and political development in the different colonies. In all the

colonies, however, the process of this differentiation occurred through the forms of law: legal institutions and practices playing a central role in the early regulation of colonial labour. Thus, it is through judicial practices that blacks are defined as 'serving for life' in Virginia; it is through legislative enactments that South Carolina limits the possibilities of obtaining alternative sources of indentured labour thus ensuring that black slave labour will form the basis of the productive system; it is through judicial practices that Georgia manages to subvert the conditions of the original charter and subsequent legislation outlawing slavery in that colony; it is through the legitimation of penal slavery and the international slave trade that Massachusetts is able to uphold the legality of claims to slave property; it is through legislative discouragement of other forms of labour and self-conscious encouragement of black slave labour that New York aids the development of the slave system; and it is through the creation of special criminal courts for the trial of blacks that Pennsylvania ensures that a master's property interests in his investment in slaves can be guaranteed.

Nevertheless, while it is clear that legal institutions and practices did, in both Northern and Southern colonies, differentiate between black and other bound persons, it is also clear that the nature of this differentiation, in either judicial decisions or legislative practices, was by no means consistent or unambiguous. These inconsistencies and ambiguities concerning

the legal status of black 'slaves' in the colonies created specific problems requiring resolution before a fully-fledged system of production based on slavery could develop. This resolution was itself to take a specific form and, as will be discussed in the next chapter, the ambiguities would be ironed out by a definite construction of the slave status in legislation as akin to that of chattel property.

CHAPTER 4 : THE CONSTRUCTION OF THE SLAVE STATUS IN LEGISLATION

INTRODUCTION

In the previous chapter it was argued that throughout the early colonial period in the North American mainland colonies, both North and South, the legal process differentiated between black and other forms of unfree labour. This differentiation within law, however, was by no means consistent in either judicial practice or legislative enactments, rendering the exact legal status of black labour in the colonies ambiguous if not problematic. The colonial courts presented ambiguous, and sometimes contradictory, definitions vis-a-vis a master's property interest in his slaves, particularly when creditors, for example, sought to collect on judgments for the master's debts. And, although certain relationships existed between masters and 'slaves' the exact nature of the master/slave relation required a resolution within law if slave labour was to be purchased as a commodity; if masters were to be able to obtain credit to invest in slaves; and if masters were to be protected in their property so that civil actions for damage to that 'property' could be maintained.

Thus while certain aspects of the master/slave relation had been articulated through legal forms those same aspects were also sometimes denied through legal forms. However, as will be discussed in this chapter, law itself, in particular through a definite construction in legislation in the later colonial period, unequivocally resolved the ambiguities inherent in the master/slave relation and created the basis upon which a mode of production based upon developed chattel slavery could be

accomplished. In this particular instance law did not simply function as a recognition or expression of relations already existing outside it as between masters and slaves but rather it constructed the definition of the agents in the labour process based on slavery and provided the basis upon which this labour process could be organised. (1) In an important sense then, the construction of the slave status as akin to chattel property, in the later colonial period, not only provided the means whereby the market in slave labour could be directly controlled (2) and the way in which a system of production based upon slave labour could be organised, but also it categorically established the means of production themselves.

The construction of the slave status as akin to chattel property through legislation was neither pre-determined nor planned. Law defining the master/slave relation did not simply arise because it was necessary to any existing system of production nor did it arise to regulate a pre-given labour process. (3) On the

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1. This understanding of law accords with that of Hirst, 1980: 58-105, when he argues that there are "significant instances of the construction in legislation and application of categories of subject" (60) - emphasis in original.

2. Chambliss, 1964:67-77, has argued, for example, that legislation in relation to vagrants served to control directly the market for labour in that particular instance.

3. Pashukanis, 1951, for example, has argued that law arises because it is necessary to the system of production that individual subjects be guaranteed full recompense for the alienation of the fruits of their labours. As such, law is the means whereby the social process of production is regulated. Hirst (1980:59-61) however, in his critique of Pashukanis, shows how this analysis reduces law to being both historically specific to and as a necessary expression of the relationships of commodity-capitalist society - a reduction which can only view law as recognising and regulating prior realities and relations.

contrary, in this particular instance, legal institutions and practices themselves created the master/slave relation and, as such, defined the nature not only of the agents in the labour process but the form of the labour process itself. Through an analysis of legal practices themselves [1] in the later colonial period in North America this chapter demonstrates precisely how effectively the chattel slave status was constructed in legislation and how this construction provided the basis upon which a specifically slave mode of production could develop.

In the discussion which follows, therefore, particular emphasis is placed upon those major legislative practices, the issuance of the Slave Codes, which played a central part in constructing the chattel slave status in both Northern and Southern North American colonies. Relevant judicial decisions in this period, that is, from the early 18th century until the end of the colonial era, are also considered, as illustrative of the extent to which the construction in legislation had resolved the previous anomalies and contradictions, so much so that the status of slaves as chattel property had been firmly established in all legal practices by the end of the colonial period.

The process of construction within law occurred in conjunction with the development of the capitalist mode of production in the North American colonies: where the Northern colonies were becoming increasingly involved in commercial and industrial developments; and the Southern colonies were becoming

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1. Hirst, 1979, has argued that it is through the analysis of legal practices themselves that we can understand law.

increasingly involved in the production of agricultural commodities through the development of the plantation system worked by slaves and where slave labour was purchased as a commodity. Indeed, the slave-worked plantations of the South came into existence as the units of production of a specialist agrarian commodity producing region, a region which was itself premised on the growing international demand for items of domestic and industrial consumption by the most developed capitalist regions. (1)

But why slave labour? Specialist agrarian producing regions are not by definition dependent on slave labour. Other regions specialising in the production of agricultural commodities have come into existence on the basis of free peasant proprietorship or capitalist farming using free wage labour or indentured labour. In this particular instance, however, there are, as was noted in Chapter 3, a number of conjunctural reasons which explain why slave labour formed the basis of the Southern plantation system of production. In particular, both the legality of the international slave trade and the legality of slavery itself had been established prior to the extensive development of large-scale crop production in the South. Moreover, since the investment of merchants' capital in the slave trade promoted slaves as a commodity, and the slave trade was

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1. This argument is in accord with that of Hindess and Hirst, 1975; at 157-8, who provide an excellent analysis.

itself capable of more or less indefinite expansion, there were virtually no limitations to the supply of slave labour power. On the other hand, as was discussed in Chapter 3, alternative sources of labour, such as the labour of indentured servants or the labour of indigenous peoples, were either insufficient to the demands for labour, as in the former case, or unsuitable for translation to this kind of production, as in the latter case. (1)

Nevertheless, while this explains why slave labour formed the basis of the plantation system of production instead of another 'unfree' labour system, it does not explain why capitalist agrarian production based on a free labour force or production based on free peasant proprietorship did not develop. Capitalist farming, however, could not be directly imported to these areas since capitalist relations of production could not simply be exported to the North American colonies. In particular, in the absence of the monopoly ownership of land by a class of non-labourers and the existence of vast expanses of land free for cultivation, the separation of the labourer from the means of production on the basis of wage payment, a condition definitive of capitalist relations of production, was not possible. (2) Production based on free peasant proprietorship was also unlikely to develop on a significant scale because of the

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1. As was discussed in Chapter 3, p.168 efforts at the enslavement of North American Indians proved disastrous.

2. For a full discussion of this point, see Hindess and Hirst, 1975:158-9.

nature of the forms of co-operation and division of labour required by the production of crops, such as tobacco, rice, cotton and sugar, on a large scale. Given the extensive scale of organisation which could be achieved using slave labour to work the plantations, any competition from free peasant settlers could only prove ineffectual.(1)

Once established, the introduction of slave labour had definite effects on the kind of productive system which developed and formed the basis of the Southern economy. Slave labour came to form the basis of that productive system: slaves working on the plantations were totally separated from the means of production by legal institutions and practices which prohibited them from owning anything; they were legally defined as unfree direct producers; legal institutions and practices regarded slave labour as a commodity and the slave as a form of capital; and the product of slave labour was sold as a commodity.(2) Moreover, in both North and South the system of production based on slavery was dependent on the development of capitalist financial institutions - banking, credit and commerce. Northern merchants were responsible for the export of agricultural commodities as items of domestic consumption to European markets and it was

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1. This argument is most convincingly made by John E. Cairnes, "The Slave Power", 1863, reprinted by David and Charles, Newton Abbot, 1968.

2. These particular effects of the introduction of slave labour are also identified by Hindess and Hirst, 1975, Chapter 3, as the ones which demonstrate that the slave mode of production is present in the social formation.

through the forms of credit created by merchants' capital that Southern planters were able to invest in slave labour. It was also through the Northern commercial involvement in the international slave trade that slaves were promoted as the labour form for Southern plantations.

In this chapter therefore, it is necessary to consider the patterns of development in the Northern as well as the Southern colonies, since these areas, while following different courses, were mutually interdependent in terms of economic, social and political development. Moreover, it is also necessary to consider the different patterns of development within and between Northern and Southern colonies because the process of the construction of the slave status as akin to that of chattel property which was systematically accomplished in the South was mirrored by a reversal process in the North at a later stage when the deconstruction of the slave status through legislation and judicial practices was accomplished. (1) As will become evident, the processes of construction and deconstruction were central to the different forms of production developing in the Northern and Southern colonies.

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1. This process of the deconstruction of the slave status in legislation and judicial practice in the Northern colonies demonstrates that Pashukanis' (1951) argument, that the subjects recognised and the nature of the activities regulated by law are already in existence prior to legal definition and regulation is, while sometimes and to some extent the case, clearly not a wholly adequate explanation for the nature of law. Hirst's argument, on the other hand, that regulation is definitive of agents and that law, as such, imposes requirements of action upon agents and, establishes a relation between agents and the 'public power' (1980:59-61) can accommodate the notion that law can create as well as destroy the definition of agents as agents.

THE CONSTRUCTION IN LEGISLATION : THE SOUTH

In the early colonial period, Southern courts and legislatures handed down a series of contradictory definitions regarding the legal status of slaves within their own territories. However, as the numbers of slaves increased in the Southern colonies and as these slaves became an increasingly important source of labour for the developing plantation system of producing agricultural commodities, courts and legislatures were increasingly being asked to resolve disputes which concerned slaves, in particular, where creditors sought to collect on judgments for a slave master's debts. And, while certain relationships between masters and slaves had been legitimated by legal institutions and practices, it remained unclear as to whether the slave was primarily an item of property or whether he was to be regarded as a person with certain labour obligations. This issue was to be fully and clearly resolved within law in the later colonial period when legal institutions and practices, particularly legislative practices, constructed a definition of the slave as akin to that of any other chattel property and where the application of this definition to slaves ensured the development of a mode of production based on slavery where the slave was a variant of private property in general. Exactly how this was accomplished in some Southern colonies (1) is now discussed in order to illustrate just how complete the process of construction within law was in the instance of chattel slavery.

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1. The colonies discussed are the same as those discussed in Chapter 3, that is Virginia, South Carolina and Georgia.

Virginia

The first legislative enactment in any of the North American colonies, North or South, which made a clear and unambiguous distinction between the legal status of 'slave' and that of 'servant' was a statute passed in 1705 by the Virginia legislature in which slaves were assigned to the classification of real property. (1) Prior to the passage of this statute the issue of the legal status of slaves had been left to the discretion of the courts, as stated, for example, in a statute passed in 1671 where the legislature were attempting to deal with the specific case of how to distribute an orphan's estate. (2) Thus, in considering whether slaves were to be regarded as real estate or personal property, the 1671 statute noted:

> In a former act it is provided that sheep, horses, cattle should be delivered in kind to an orphan when he comes of age, to which some have desired that Negroes be added; this Assembly considering the difficulty of procuring Negroes in kind as also the value and hazard of their lives has doubted whether any sufficient men could be found who would engage themselves to deliver Negroes of equal ages if the special Negroes should die, or become by age or accident unserviceable; it is enacted, that at discretion of the courts Negroes may be appraised, sold at an outcry, or preserved in kind, as it is deemed most expedient for the preservation or advancement of the estates of orphans. (3)

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1. William W. Hening, 'Statutes at Large of Virginia', Richmond, Va., Franklin Press, 1819-1820, Vol.3:333-35.

2. Hening, 'Statutes at Large of Virginia', 1671 Statute.

3. Ibid., 1671 Statute, Act IV; as cited in Higginbotham, 1978:51 - my emphasis.

Unlike jewelry or other undeveloped real estate which could be held without any significant depreciation in value until an orphan was allowed to hold title to the property at 21 years, slaves, like horses and cattle, did grow older and die thus presenting the problem of how to preserve the value of an estate for an orphan. The 1671 statute, however, did not resolve the issue as to whether slaves were like horses and cattle or whether they were like real estate. Instead, the legislature in 1671 left this decision to the "discretion of the courts".

The issue then, before the Virginia legislature in 1705, was not whether or not slaves could be legally held as property but rather precisely where, in terms of the legal differentiation amongst particular kinds of property, to place slaves: did they belong in the same legal category as a man's personal property or in the real estate category of a man's estate? If slaves were to be regarded as if they were personal property (such as horses or cattle) then they could be sold, for example, to satisfy non real estate debts. On the other hand, if slaves were to be treated as real estate, they could be sold to pay off the mortgage and other real estate debts when the owner defaulted in payments. (1) The Virginia legislature removed all ambiguity from the discretionary actions of the courts when the 1705 statute created a definition in law which made slaves hold an equivalent status to

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1. In a real estate context, the creditor who held a mortgage on real estate usually had priority over other creditors in realising what he could by foreclosure on that particular property. Thus, he would be able to sell the real estate to collect the amount owed, even if other creditors (without mortgages) had obtained court judgments against the owner of real estate.

real estate:

> Chapter XXIII. All Negro, mulatto, and Indian slaves within this dominion shall be held to be real estate and not chattels and shall descend unto heirs and widows according to the custom of land inheritance, and be held in "fee simple". (1) Provided that any merchant bringing slaves into this dominion shall hold such slaves whilst they remain unsold as personal estate. All such slaves may be taken on execution as other chattels; slaves shall not be escheatable. No person selling any slave shall be obliged to have the sale recorded as upon the alienation of other real estate. Nothing in this act shall be construed to give the owner of a slave not seized of other real estate the right to vote as a free-holder. (2)

Thus while the 1705 statute clearly held slave property as akin to real estate this status was somewhat complicated by the exceptions noted above. Unsold slaves, retained by slave merchants, were to be treated as chattels in any litigation involving their value. Moreover, the statute clearly states that ownership of slaves, without the ownership of any other real estate, would not render the owner a 'freeholder' with any entitlement to vote. Thus, although slaves are defined as property akin to real estate, the mere ownership of such slave real estate does not carry the same rights as the ownership of

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1. Fee Simple is an ownership interest in land where the owner is entitled to the entire property with unconditional power of disposition during his life and descending to his heirs and legal representatives.

2. Hening, 'Statutes at Large of Virginia', Vol.3:333-35, 1705 Act - emphasis in original. Chapter XXIII as quoted of the 1705 Act was repealed in 1748 (Chapter II), the 1748 provision relegating slaves to the status of personal property. For the full text of the 1748 statute, see Hening, 'Statutes at Large of Virginia', Vol.5:432-54.

other real estate - specifically the right to vote or wield political power. To own slaves and have political power meant that any slave master had also to own something else - land.

Another problem inherent in the 1705 statute with regard to the legal definition of the slave status as equivalent to real estate concerns its failure to indicate what was to happen when the number of slaves in a man's estate increased due to births, or decreased due to deaths, after the master's death. This problem was not addressed in the several revisions of the 1705 slave code made in the Virginia statutes of 1710, 1723, 1726 or 1727. (1) Indeed it was not until the 1730 court decision in the case of Tucker v Sweney (2) that this particular issue was addressed. The precise issue before the Court in this civil action was whether the increase in blacks born to slaves after the death of their owner, the debtor, could be sold to pay off his debts or whether their value as slaves could be given in settlement of the debts. In the event the Court held that:

> Negroes notwithstanding the Act making them Real Estate remain in the Hands of the Ex'ors by that Act as Chatels and as such do vest in them for payment of Debts So that in this Case they are considered no otherwise than Horses or Cattle, And there is no doubt but the Increase of any living Creature after the death of the Testor, are looked upon as part of his Estate, and are liable to be taken for his Debts. (3)

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1. For the full text of these revisions to the 1705 Virginia slave code, see Hening, 'Statutes at Large of Virginia', 1710 statute, Chapters 16, 17, Vol.3:537-40; 1723 statute, Chapter 4, Vol.4: 126-34; 1726 statute, Chapter 4, Vol.4:169-75; and 1727 statute, Chapter 15, Vol.4:222-28.

2. Rand, Sir G. 39 (April, 1730).

3. Ibid.

This case demonstrates that while a slave could be regarded in law as either real estate or chattel property there remained no doubt that it was in terms of the property status that legal issues were resolved. When compared with the 17th century cases discussed in Chapter 3, Tucker v Sweney clearly illustrates how effectively the 1705 legislation and subsequent revisions had constructed the precise nature of the slave status. And, while it is true that the working out of the exact legal status of slave property took some time from its definition as real estate in the 1705 Act to its definition as chattel property in the Act of 1748, (1) it is certainly true that it was as property that the slave was created and regarded in law and within the logic of law from the enactment of the first slave codes. Considerations about the state of slavery, other than those pertaining to the status of the slave as property disappeared and what remained, "was his status as property - in most cases a chattel though for special purposes real estate". (2)

The 1705 statute, representing the first major slave code of any of the colonies, also made a very clear distinction in law between servants and slaves. Many direct provisions were passed to codify the duties masters owed to servants, such as, to "find and provide for their servants wholesome and competent diet"; (3)

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1. Hening, 'Statutes at Large of Virginia', 1748 Statute, Chapter II, Vol.5:432-54. See also, Hurd, 1858, Vol.1:179, 297, 303. For a discussion of the period between 1705 and 1748, see Degler, 1959:49-66.

2. Oscar and Mary Handlin, 1950:218.

3. Hening, 'Statutes at Large of Virginia', 1705 Statute, Vol.3:448.

masters were precluded from discharging servants who became sick or lame before their term of indenture was completed; masters were required to pay "freedom dues" to servants at the end of any servant's term who did not receive a yearly wage; and various provisions of the like. The rights of servants were legally guaranteed, thus the statute provided that servants had the legal right to bring suit against their masters in the county court for non-payment of proper wages, (1) and it also guaranteed that servants had access to the judicial process to ensure that their legal rights could be effectively pursued. (2) Moreover, neither master nor servant could extend the term of the original indenture without court approval. (3) In contrast to this extension of various legal rights to servants, however, was the fact that the 1705 statute did not specify a single obligation owed to the slave by his master.

This extension of legally guaranteed rights to servants in the early 18th century occurred alongside the construction of the slave status in legislation and can be attributed to a complex variety of factors. With the development of the plantation economy and the potential labour supply created through the definition of slavery, other forms of servitude became increasingly less important to that particular kind of productive system.

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1. Hening, 'Statutes at Large of Virginia', 1705 Statute, Vol.3: 448.

2. Ibid., 448, 449.

3. Ibid., Sect.12:450.

Commercial involvement in the international slave trade provided a ready source of supply for the demands for labour to the developing tobacco plantations in Virginia, whereas sufficient numbers of white servants were more difficult to obtain at an 'economic' cost. And, while the reasons for the inadequate supply of white labour are themselves complex, (1) this shortage of white labour can in part be attributed to the reversal in mercantilist thought on the question of emigration at the turn of the 18th century. By the end of the 17th century the emphasis within mercantilism had shifted from the accumulation of, for example, the precious metals, as the main aim of British national economic policy, to the development of industry within Britain, the promotion of employment and the encouragement of exports. (2) The mercantilists argued that the best way to reduce the costs of industry, and thereby compete with other countries, was to pay low wages, which itself required a large labour pool. (3) In this context then, the extension of rights to servants can be viewed as a rational approach to encouraging the use of slave labour - masters would not choose to have expensive servants as compared to the better investment in slave labour where the slave had no rights in law.

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1. These reasons are discussed in Chapter 3, pp.160-166.

2. For a discussion of the changes in mercantilist thought throughout this period, see, Knorr, 1944; and Semmel, 1970.

3. Williams, 1966:15-16.

In direct contradistinction to the extension of rights to servants in the 1705 statute, the same statute, which was silent about any rights of slaves, clearly specified the degree to which the master had control over slaves. For example, the statute provided that if a master killed his slave in an attempt to correct some aspect of the slave's behaviour then the master would not be held to have committed a crime. (1) Slaves could not leave the plantation without the master's written permission nor could they own any property. Indeed the statute specifically authorised the seizure and sale of all slaves' cattle and other livestock. Moreover, in the case of runaway slaves, it was provided that two justices of the peace, upon receiving information that a runaway slave was in the area, were authorised to empower sheriffs to search for the runaway and this proclamation was to be made public by nailing it to the church doors on the Sabbath day. Once the proclamation had been made public it was:

> Lawful for any person or persons whatsoever, to kill and destroy such slaves by such ways and means as he, she, or they shall think fit, without accusation or impeachment of any crime for the same. (2)

And, in order that the master class were able to protect their economic investment, the legislature made provision for

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1. Hening, 'Statutes at Large of Virginia', 1705 Statute, Chapter 34, Vol.3:459.

2. Ibid. In addition the 1705 statute also authorised dismemberment to terrify "others with like purposes", that is, running away. (See Chapter 37, Vol.3:460-61).

compensation to be given to masters for slaves killed or put to death:

> Provided always, and it is further enacted, that for every slave killed, in pursuance of this act, or put to death by law, the master or owner of such slave shall be paid by the public. (1)

In general and specific terms, the Virginia statute of 1705 was the first clear and unambiguous definition of exactly how the status slave was to be interpreted within law - as property. And, although this slave code was subject to various revisions by a number of Acts (2) passed throughout the 18th century, none of these subsequent statutes made any substantial change to this definition. Furthermore, the 1705 Virginia slave code, in creating the property definition in relation to the status of slaves, established a firm precedent in legislation to which the other colonies could refer.

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1. Ibid., Chapter 38, Vol.3:461.

2. Hening, 'Statutes at Large of Virginia' : Acts of 1710 (Chapters 16, 17, Vol.3); 1723 (Chapter 4, Vol.4); 1726 (Chapter 4, Vol.4); 1727 (Chapter 15, Vol.4); 1732 (Chapter 3, Vol.4); 1732 (Chapter 6, Vol.4); 1732 (Chapter 7, Vol.4); 1744 (Chapter 12, Vol.5); 1744 (Chapter 13, Vol.5); 1748 (Chapter 32, Vol.6); 1748 (Chapter 2, Vol.5); 1748 (Chapter 14, Vol.5); 1748 (Chapter 21, Vol.5); 1748 (Chapter 41, Vol.6); 1748 (Chapter 38, Vol.6); 1753 (Chapter 7, Vol.6); 1765 (Chapter 24, Vol.8); 1765 (Chapter 26, Vol. 8); 1769 (Chapter 27, Vol.8); 1769 (Chapter 37, Vol.8); 1769 (Chapter 19, Vol.8); 1778 (Chapter 1, Vol.9); 1782 (Chapter 21, Vol.11); 1782 (Chapter 32, Vol.11); 1785 (Chapter 78, Vol.12); 1786 (Chapter 78, Vol.12); 1787 (Chapter 22, Vol.12); 1787 (Chapter 37, Vol.12); 1789 (Chapter 45, Vol.13); Samuel Shepherd, ed., 'The Statutes at Large of Virginia', Richmond, Va., Franklin Press, for the Acts of 1792 (Chapter 41, Vol.1); and 1792 (Chapter 42, Vol.1).

South Carolina

As was noted in Chapter 3, by the early 1700s the black slave population outnumbered white inhabitants. (1) This tremendous increase in the numbers of slaves at the turn of the 18th century paralleled the development of the rice economy in South Carolina, where the large-scale production of crops became primary to the development of the Southern economy. The major part of crop production rapidly became organised along plantation system lines with a division of labour in which slaves worked the plantations as field labourers and non-slaves worked as overseers etc. (2) Throughout this period slave labour to work the plantations was purchased as a commodity and, as was discussed in the introductory section to this chapter, the slave system of production had itself become an effect of commerce in the sense that merchants' capital dominated the export of agricultural commodities as items of domestic consumption to Europe and, at the same time, promoted the trade in African slaves to supply the plantations with a labour force. (3)

Within this context, the economic viability and development of the colony of South Carolina in the later colonial period, that is, from the turn of the 18th century, became increasingly dependent on slave labour. And, this increased dependence on slave labour

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1. McCrady, 1897:688.

2. Smith, 1961:21-22.

3. This phase of development in the slave mode of production is fully discussed in Hindess and Hirst, 1975:157 et seq. See also Williams, 1966, Chapter 1.

occurred in conjunction with a clear articulation within law of precisely what the slave status implied. Up to the early 18th century there had been no unambiguous definition of the slave status as akin to chattel property. On the contrary, the main legislative enactment on this subject in the late 17th century had regarded slaves as entitled to freehold status. (1) However, as the rice economy escalated in importance it became necessary to define more clearly just what the 'ownership' of slaves meant in law: how far were slaves to be separated from the means of production? If slaves were to be purchased as commodities then their legal status must preclude them from owning property. To what extent were they to be regarded as capital, and, if so, how could this be accomplished? These issues, which would determine just how the large-scale development of the rice economy could proceed were confronted in the first comprehensive slave code enacted in South Carolina in 1712. In the preamble to the 1712 code, the insistence on the need for slave labour is clearly one of perceived economic necessity:

> Whereas, the plantations and estates of this Province cannot be well and sufficiently managed and brought into use, without the labor and service of negroes and other slaves. (2)

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1. This freehold status was granted in the 1690 statute discussed in Chapter 3, p. 189.

2. Thomas Cooper and David McCord, eds., 'The Statutes at Large of South Carolina', Columbia, South Carolina, 1836-41, Act of 1712, Vol. 7:352.

Relatively early in its history then, (1) South Carolina made use of the legislative process as the primary mode for constructing and shaping the slave system. Only twenty years after the foundation of the colony, the 1690 Act had been drafted to regulate the activities of slaves. And, although this Act had subsequently been disallowed by the proprietors, (2) it had provided that slaves were to be "accounted as freehold" except "when other goods and chattels (were) not sufficient to satisfy" the debts of a master or in settlement of certain estate matters. (3) The significance of the freehold status was that, theoretically, the master was entitled to the services only of the slave: he did not have an absolute right over the person of the slave as is the case with personal or chattel property. (4) The 1712 Act, however, repudiated any vestiges of the freehold conception of slavery. To regulate the legal status of slaves it provided that:

> All negroes, mulatoes, mustizoes or Indians (who were or will be bought and sold as slaves) are hereby declared slaves, to all intents and purposes. (5)

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1. Carolina was founded in 1670 - see Chapter 3, p.184 Note 1.

2. See Chapter 3, p.189 and Sirmans, 1962:465.

3. Cooper and McCord, 'Statutes at Large of South Carolina', Act of 1690, Vol.7:343-4.

4. Sirmans, 1962:465.

5. Cooper and McCord, 'Statutes at Large of South Carolina', Act of 1712, Vol.7:352.

The phrase "to all intents and purposes" left the legal definition and treatment of slaves to be determined in practice.

The 1712 and subsequent slave codes established the legal basis upon which the plantation system of producing rice and other crops could fully develop using slave labour. In particular, the 1712 Act introduced a compulsory pass system for slaves: a provision which was repeated in the Acts of 1722 (1) and 1735. (2) Trading without the explicit consent of the owner was prohibited in the 1712 (3) and 1714 (4) Acts; property held by slaves with his owner's consent was made liable to forfeiture by the Act of 1712 (5) and subsequent restrictions were made in the Acts of 1722 (6) and 1735. (7) The 1712 slave code also prohibited masters from granting a slave permission to hire himself out and further restrictions in this area were imposed in the Acts of 1722 (8) and 1735. (9) Moreover, although the 1712

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1. Ibid., Vol.7:371.
2. Ibid., Vol.7:386.
3. Ibid., Act of 1712, Vol.7:353.
4. Ibid., Act of 1714, Vol.7:367.
5. Ibid., Act of 1712, Vol.7:353.
6. Ibid., Act of 1722, Vol.7:394.
7. Ibid., Act of 1735, Vol.7:396.
8. Ibid., Act of 1722, Vol.7:363.
9. Ibid., Act of 1735, Vol.7:380.

code provided that runaway slaves would be subject to criminal proceedings involving extremely brutal punishments (often death), (1) the Acts of 1722 (2) and 1735 (3) did not provide for these harsh punishments in response to growing pressure from the slave-owning class who did not want the value of their property impaired.

In general, the criminal provisions of the early slave codes reflect the tension between the protection of the property interest of the master class and providing assurances that the crimes committed by slaves rendered them liable to punishment. The 1712 slave code attempted to resolve this tension by providing for a special magistrates' court where slaves would be tried for the commission of criminal offences and where "swift justice" could be given so that slave masters would not suffer undue loss of services from their slaves. (4) In the interests of administering this "swift justice" the evidentiary standards of proof required were minimal. In addition, in passing the 1712 Act, the legislature had recognised that slave owners would not always willingly report crimes or subject their slaves to criminal prosecutions because of the potential subsequent loss of value in their slaves (pursuant to punishment). Thus, to remove the

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1. Ibid., Act of 1712, Vol.7:352-3, 359-60, 361-2.
2. Ibid., Act of 1722, Vol.7:380.
3. Ibid., Act of 1735, Vol.7:392.
4. Ibid., Act of 1712, Vol.7:354-5.

economic motive for owners not reporting their slaves' crimes, the legislature provided that the owner should receive the full value of the slave, from the public treasury, as determined by the justices and free-holders who had condemned any slave to death. (1)

Through the 1712 and subsequent slave codes then, the status of slaves as property was defined. Slaves could not own property; they could not engage in trading; they could not hire themselves out; and, in the case of criminal slaves, special legal institutions were created to administer justice and award compensation to owners. The legislative process also prohibited third parties from stealing or damaging the master's property, as, for example, evidenced in the 1722 (2) and 1735 (3) Acts which specified that persons convicted of stealing or attempting to steal a slave were to be sentenced to death. And, under the 1722 slave code the legislature regulated private slave manumissions in the colony by providing that any slave, manumitted by his owner, must leave the colony within twelve months. If such a slave did not leave the colony within this period he:

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1. Ibid., Act of 1712, Vol.7:358. Later Acts, however, because of the cost of this provision to the public treasury, limited the amount of compensation to a maximum of £50 (Act of 1714, Vol.7: 366) and £100 (Act of 1722, Vol.7:383).

2. Cooper and McCord, 'Statutes at Large of South Carolina', Act of 1722, Vol.7:376.

3. Ibid., Act of 1735, Vol.7:389-90.

> Shall lose the benefit of such manumission, and continue to be a slave, to all intents and purposes whatsoever, unless such manumission shall be approved of and confirmed by an order of both Houses of Assembly. (1)

Clearly, from the early 18th century, the South Carolina legislature played a critical role in creating the slave status, and, in so doing, establishing the basis upon which the slave system of production could develop. Legislation was used as the primary mode for regulating the nature and development of the slave system, so much so that, following the Stono Slave Rebellion of 1739, (2) the legislature passed the 1740 Slave Code which stated in its preamble that:

> The extent of ... power over ... slaves ought to be settled and limited by positive laws, so that the slave may be kept in due subjection and obedience, and the owners and other persons having the care and government of slaves may be restrained from exercising too great rigour and cruelty over them, and that the public peace and order of this Province may be preserved ... (3)

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1. Ibid., Act of 1722, Vol.7:384. Under the 1735 Act (Vol.7:396) manumitted slaves had to leave the colony within six months and any freed blacks who returned to the colony within 7 years of the date of their manumissions were to be re-enslaved.

2. The Stono Rebellion of 1739 began with a group of about 20 slaves breaking into a store about 20 miles outside Charleston where they killed the storekeepers and stole guns and gun-powder. As they progressed south, other slaves joined the group and they killed a number of whites en route. The group of slaves, now numbering between 60 and 100, was met by a group of whites, numbering 20-100 and a battle ensued. McCrady, "Slavery in the Province of South Carolina, 1670-1770", 657, estimates that 21 whites and 44 negroes died in the Stono Rebellion. For a full account of the Stono Rebellion, see Wood, 1974:314-23.

3. Cooper and McCord, 'Statutes at Large of South Carolina', Act of 1740, Vol.7:397 - emphasis in original.

In attempting to further define and regulate the slave system through the passage of the 1740 Act, the legislature specified that in the case of blacks the presumption of the law was in favour of slavery. A black claiming to be free could only bring a suit for freedom through a guardian. The 1740 Act clearly stated that slaves lacked legal capacity (1) or personality, thus it was made a criminal offence to teach a slave to write or be educated in any way whatsoever. (2) Moreover, in the preamble to the 1740 Act, where it was stated that slaves were "subjects of property in the hands of particular persons", (3) it was clear that the legislature would no longer, as under the 1712 code, permit the courts to interpret in practice just what kind of property a slave might be, thus the new code provided that slaves were to be treated as chattel property. (4)

This specification that slaves were to be treated as chattel property underlines the degree to which the legislature determined to regulate the slave system since the courts had, under the provisions of the 1712 slave code which permitted the exact property status of slaves to be determined in practice, already

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1. For a discussion of the significance of this, see Higginbotham, 1978:194. This, as shall be discussed later in this chapter, was in direct contrast to Northern colonies where slaves were considered as legal persons in litigation.

2. Cooper and McCord, 'Statutes at Large of South Carolina', Act of 1740, Vol.7:413.

3. Ibid., Vol.7:397.

4. Ibid., Vol.7:397.

defined the slave status as that of chattel property. After reviewing various records Sirmans [1] concludes that, in legal decisions made prior to 1740, legal institutions issued decrees and distributed estates in accordance with a rationale which presupposed slaves to be chattel property. For example, in the case of Benjamin Schenkingh et al v Job Howes and Hugh Grange, 1704, which involved an estate issue, the complaint stated that:

> The said Bernard in his life time was possessed of a very considerable personal Estate, consisting of Negroes, Horses, Sheep, Cattle ... ready money and of Divers other things of value ...; (2)

thus indicating the equating of slaves and other chattels. And, in Order on the Petition of William Ramsay's Executors, 1736, a case involving the distribution of a decedent's personal estate, the Court noted that Ramsay's estate consisted of "(a) ll his Negro slaves and ... other ... personal estate". [3] Thus, in these and other legal practices concerning the distribution of estates, the courts had considered that slaves held an equivalent status to other chattel property long before the explicit declaration in the 1740 Act that slaves "shall be deemed, held, taken, reputed and adjudged in law to be chattels personal": [4] a status which was to continue throughout the

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1. Sirmans, 1962:468.

2. Records of the Court of Chancery:82, as cited by Higginbotham, 1978:212.

3. Records of the Court of Chancery:384, as cited by Higginbotham, 1978:212.

4. Cooper and McCord, 'Statutes at Large of South Carolina', Act of 1740, Vol.7:397.

colonial period. (1)

The legislation passed in South Carolina, from the first major slave code enacted in 1712 throughout the colonial period, was central to the development of the plantation based economy. By defining the status of slave as primarily that of property, the colonists obtained the right to a slave's labour for life without repayment. The master was capable of owning the product of the slave's labour just as he owned the slave, since the state, (2) through its legal institutions and practices, effectively guaranteed the form of property, chattel slavery, just as it guaranteed, through legislation, that slaves were prohibited from owning property, thereby effectively separating the slave from the means of production altogether. In addition, by establishing the legality of slavery, the colony was able to obtain revenue on imported slaves and to regulate how the productive system would develop. Legislation dealing with the imposition of duties on slave importations began in 1703 (3) and in 1706 the legislature exempted from taxation those slaves brought

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1. Having firmly established in legislation that slaves were chattels, subsequent statutes were to further regulate the activities of slaves. By the Act of 1751 (Cooper and McCord, 'Statutes at Large of South Carolina', Vol.7:423), for example, slaves could not be employed in an apothecary in order that they could not learn about poisons. Such restrictions on the activities of slaves reflected the growing public concern about the possibility of slave revolts given the very large slave population.

2. I am here referring to the colony of South Carolina.

3. Cooper and McCord, 'Statutes at Large of South Carolina', Act of 1703, Vol.2:201. Such imposition of duties on slaves were generally part of broad based revenue acts, dealing with a variety of imports, such as the Act of 1716, 'Statutes at Large of South Carolina', Vol.2:651.

into South Carolina by settlers who promised by oath that they would not sell any of their imported slaves within one year. (1) This latter kind of legislative provision was used to encourage the more affluent settlers who would be using slave labour themselves thereby contributing to the development of a particular type of productive system.

Georgia

The fifteen year legislative prohibition of slavery in Georgia ended in 1750 when an act was passed which stated that from that date:

> It shall and may be lawful to import or bring Black Slaves or Negroes into the Province of Georgia ... (2)

This first piece of legislation formally recognising the legality of slavery (3) made various regulatory provisions, such as limiting the number of imported male slaves on any plantation to four times the number of white male servants on the same plantation (4) but it did not bring into effect the wide range of slave regulations which already existed in South Carolina or Virginia. Nevertheless, a "proprietor" possessed virtually

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1. Cooper and McCord, 'Statutes at Large of South Carolina', Act of 1706, Vol.2:280.

2. Candler, ed., 'Colonial Records of Georgia', Vol.1:56-62.

3. Slavery had, of course, as discussed in Chapter 3, been recognised in legal practices.

4. Candler, ed., 'Colonial Records of Georgia', Vol.1:57.

complete authority over his slave under the 1750 statute as long as he did not "endanger the limb" or take the life of his property. (1) Moreover, the 1750 law also specified precisely how slave labour was to fit into the division of labour in the colony. Slaves were prohibited, for example, from being apprenticed to an "Artificer" where they might have been in competition with white labour and all plantation slaves were prohibited from being loaned to any other planter for any employment other than "manuring and cultivating their plantations in the country". (2) And, while technically speaking the provisions of the 1750 statute did not become law since the British Privy Council never officially approved it, the legality of the statute was recognised within the colony. (3)

In 1750, the trustees of the colony at last made it possible for larger land holdings to develop. As was discussed in Chapter 3, the trustees had restricted land tenure under the terms of the original charter for the colony which gave them absolute ownership of land for a period of 21 years. However, from 1750 onwards, the tenure of land in the colony was increased to an absolute inheritance and now Georgians could buy, sell, lease, exchange or will land as in any of the other North American colonies. (4)

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1. For a fuller discussion of this provision, see Higginbotham, 1978:250.

2. Candler, ed., 'Colonial Records of Georgia', Vol.1:58.

3. Saye, 1943:73.

4. Boorstin, 1965:109.

This development occurred only shortly before the Georgia experiment was finally dissolved when, in 1752, the trustees relinquished their control and gave the colony back to the Crown. Georgia subsequently became a "model royal colony" theoretically ruled by the King sitting with his Privy Council though in practice it was governed by the Board of Trade. (1)

Under this new form of government, Georgia passed its first comprehensive law regulating the legal status and nature of slavery in the colony. By the Act of 1755 it was unequivocally stated that all negroes, "Mulatos or Mestizos" and Indians, except those who were already free, and their offspring:

> Are hereby declared to be and remain for ever hereafter absolute Slaves and shall follow the Condition of the Mother and shall be deemed in Law to be Chattels personal in the Hands of their Owners and possessors and their Executors Administrators and Assigns to all intents and purposes whatsoever ... (2)

The 1755 law effectively established the legality of claims to chattel property in slaves and, in terms of its regulatory provisions, was similar to the 1740 Slave Code passed in South Carolina. The 1755 Georgia statute provided that the legal presumption was that all blacks in the colony were slaves; the legal burden of proof was on slaves to demonstrate that they were not slaves; slaves, however, could only prosecute a suit for

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1. For a fuller discussion of this, see Boorstin, 1965:114; and Saye, 1943:109-12.

2. Candler, ed., 'Colonial Records of Georgia', Vol.18:102-3.

freedom through a non-black guardian; and, if any slave unsuccessfully prosecuted such a freedom suit through a guardian they were subjected to corporal punishment. (1) Moreover, under the 1755 law, the number of slaves permitted on plantations was dramatically increased from four to every white male servant under the 1750 Act to twenty five to every white male servant under the 1755 Act.

Like many instances in the other Southern colonies, the contradictory status in law of a slave as chattel property yet also as a person is exemplified by the fact that laws and the courts held slaves to be criminally responsible. The 1755 law, for example, established special crimes for slaves along with special punishments and also special trial procedures for slaves accused of committing crimes. In particular, in order that a master would not lose the labour of his slave, the slave in question had to be brought to trial within three days of his apprehension. (2)

Under the 1755 Act, legal restrictions on the everyday activities of slaves were extensive including the prohibition on the slave ownership of property, the inability of slaves to trade or to learn to read or write. (3) In order to ensure that these provisions were effective, another 1755 statute, "An Act for

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1. Ibid., Vol.18:103-4.

2. Ibid., Vol.18:109-10.

3. Candler, ed., 'Colonial Records of Georgia', Vol.18:132-36, 1755 Slave Code.

Regulating the Militia of this province and for the Security and better Defence of the same", [1] stipulated how the Militia was to be used to patrol the activities of slaves. [2] This act granted commissioned officers complete authority over slaves discovered outside their plantations and, at the same time, required the enlistment of slaves in the army to defend the colony. [3] Moreover, the 1755 militia act required the government to pay slave owners one shilling per day for each day of service given to the army by an inducted slave and full compensation was to be given in the case of injury or death to a slave. [4] By contrast, the masters of white servants received no compensation for their servants inducted army service nor for any injuries caused to servants. [5] Clearly, in this instance, the law was working directly in the interests of the master class dependent on the exclusive use of slave labour for the development of the plantation economy.

Most of the provisions in the 1755 comprehensive slave law were continued in the 1765 [6] and 1770 [7] slave laws, with the addition of more capital offences for slaves and the removal of

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1. Ibid., Vol.18:7-48, 1755 Militia Act.

2. A further two patrol laws which imposed stricter restrictions on the supervision of slaves were passed in 1757.

3. Candler, ed., 'Colonial Records of Georgia', Vol.18:39-41, 1755 Militia Act.

4. Ibid., Vol.18:40-41, 1755 Militia Act.

5. Ibid., Vol.18:18-19, 1755 Militia Act.

6. Ibid., Vol.18:662, 1765 Slave Code.

7. Ibid., Vol.19, Part 1:222, 1770 Slave Code.

some of the modest protections for slaves written into the 1755 statute. From 1755 onwards there were progressively more laws limiting the type of occupations in which slaves could be employed, thus ensuring an even stricter division of labour. For example, a 1758 statute prohibited the hiring out of slaves to be handicraft tradesmen; (1) a 1773 statute prohibited slaves from driving "any Horses or Neat Cattle from their usual place of Feeding"; (2) and a 1774 statute regulated and licensed the hiring of slaves as labourers or porters in Savannah. (3) Thus, by the late colonial period, the system of slavery was as deeply imbedded in Georgia as anywhere else in the South. Legal institutions in Georgia had come to define, just as clearly, the status of slaves as chattel property and, through a series of legislative enactments, had effectively protected the claims of the planter class to this kind of property. Georgia was now in a position to defend the legal right to slave property as staunchly as any of the other Southern colonies.

CONSTRUCTION AND THE SIGNS OF DECONSTRUCTION : THE NORTH

In the preceding section the construction of the slave status as akin to that of chattel property was discussed with particular reference to those Southern colonies where a plantation based economy which became increasingly dependent on slave labour was

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1. Ibid., Vol.18:277-82, 1758 Act.
2. Ibid., Vol.19, Part 1:351-2, 1773 Act.
3. Ibid., Vol.19, Part 2:23-30, 1774 Act.

developing. In the Northern colonies, however, slave labour was of no importance to the developing productive system yet, as was discussed in Chapter 3, from the early colonial period onwards, both Northern and Southern colonies differentiated in law between 'slaves' and other persons held in bondage. However, it was only in the later colonial period, that is from the turn of the 18th century onwards, that Southern Legislatures fully constructed the property definition of slavery and, it might be supposed that, given the different pattern of economic development in the North, there was no necessity for Northern Legislatures to construct this property definition. Northern Legislatures, however, did, directly or indirectly, create their own definitions of the property rights in slaves during this period, and it was only towards the close of the colonial era that a process of deconstructing the slave status occurred in judicial practices and in the beginnings of a counter-legislative trend. The processes of construction and deconstruction in some Northern colonies (1) are now discussed in the context of the particular patterns of economic, social and political development in these colonies.

Massachusetts.

As was noted in Chapter 3, while slave labour was at no time a critical factor in the productive system developing in the New

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1. The colonies discussed are the same as those discussed in Chapter 3, that is Massachusetts, New York and Pennsylvania.

England colonies, the importance of involvement in the international slave trade to the economic development of these colonies should not be underestimated. In particular, New England shipbuilding and shipping interests were centrally concerned with obtaining a substantial part of the slave trade and while, during the 17th century, New Englanders took part in a struggle for an interest in the trade with more powerful European traders, after 1698, when the slave trading monopoly of the English Royal African Company (1) was broken, it became much safer for the New England traders to procure slaves in West Africa. Moreover, when Britain secured the Asiento in 1713, (2) the new responsibility of importing 4,800 slaves into the Spanish South American colonies each year was so great that New England merchants were welcomed into the slave trade as an integral part of the Mother Country's plan to maintain commercial hegemony in Africa and the New World. (3) For their part, the New England colonists regarded the slave trade as vital to the economic life of their colonies. (4)

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1. For the last half of the 17th century the Royal African Company not only dominated British involvement in the international slave trade but also it was the most important single group in the world concerned with the slave trade. Independent British traders had opposed this monopoly for some time and it was finally broken in 1698.

2. For a full discussion of the Asiento and the regulation of the international slave trade, see Chapter 6.

3. Franklin, 1969:101-111, discusses the impact of the securing of the Asiento on New England slave traders.

4. In this context, it is significant that one of the main objections the New England colonists made to the Sugar Act of 1764 (discussed in Chapter 5) was that the new duty of three pence on foreign molasses, a measure designed to prevent smuggling, was damaging to the slave trade and was therefore unacceptable (Franklin, 1969:103).

The first half of the 18th century was the 'golden age' of the New England slave trade and its merchants were centrally involved in the lucrative triangular trade which carried their ships to Africa, then to the West Indies and finally back to the North American colonies. Massachusetts was the leading slave trading colony of New England throughout this period, and, while it was the case that the vast majority of the slaves taken from Africa by Massachusetts traders were left in the West Indies or some Southern mainland colony, some slaves not only stayed in Massachusetts, having been sold locally, but many passed through the colony's ports. In this context, the Massachusetts legislature defined the legal status of imported slaves and regulated the trade within the colony.

By the early 18th century, however, prior to the escalation of Massachusetts' involvement in the international slave trade, the identification of the slave status with that of chattel property had been recognised in legislation, in particular, in the colony's tax assessment statutes. For example, while in 1646 the legislature had passed an Act which taxed black slaves as individuals (though their masters had to pay the charges), Acts passed in 1692, 1696 and 1698, included slaves in the assessment of personal property, and in a 1707 statute, slaves were classified as personal estate. (1) This legislative practice of rating slaves along with horses, cattle and other personal property,

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1. For a discussion of these statutes and a detailed citation, see Greene, 1942:169-70.

continued in all such legislation until the War of Independence. (1)

The first clear definition of the slave as equivalent to chattel property, however, appeared in an Act of 1705 which imposed a duty of £4 per head on imported slaves. If ship captains did not list all imported slaves they were to be fined £8 for failing or refusing to make an entry. A rebate on the £4 duty paid per slave was granted if the slave died within six weeks or was sold out of the colony within one year. This Act therefore permitted the colony to raise some revenue on the importation of slaves and, at the same time, by offering rebates, it imposed some degree of limitation on the numbers of slaves likely to reside in the colony. This legislative practice continued for several decades as a means of raising revenue and regulating the numbers of slaves in the colony despite opposition from the British Government who thought that the imposition of such a duty on slaves might impose limits on the slave trade.

Nevertheless, despite such measures, the tension between the now formal institutionalisation of slavery in Massachusetts and the concern to minimise the numbers of resident non-whites because Massachusetts did not require a slave labour force itself were already evident at the beginning of the 18th century. This tension was particularly apparent in Boston where one third of all blacks (free or slave) lived in the colony. (2) Thus attempts at

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1. See Greene, 1942:169-71; and G.W. Williams, "History of the Negro Race in America from 1619-1880", New York, Arno Press and The New York Times, 1968, Vol.1:188.

2. Greene, 1942:84.

a counter-legislative trend were set in motion as early as 1712 when a Bill was presented prohibiting the importation of slaves because:

> Divers conspiracies, outrages, barbarities, murders ... have been perpetrated and committed by Indians and other slaves within several of her majesty's plantations in America ... (to the) discouragement to the importation of white Christian servants. (1)

This Bill did not, however, become operative and it was not until 1767 that another Bill "to prevent the unwarrantable and unlawful Practice or Custom of inslaving Mankind in this Province and the importation of slaves into the same" was presented in the Massachusetts House of Representatives. Again this proposal was defeated (2) and when the 1771 Bill "to prevent the Importation and purchasing of Slaves into this Province" was passed by the legislature and Council, the Governor refused to sign it (3) thus representing the British Government's opposition to any impediment to the slave trade. (4) After all, if Britain's colonies were central to the development of her economic system in the 18th century, then the slave trade was an important cornerstone. (5)

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1. Charters and General Laws of the Colony and Province of Massachusetts Bay, 749, (Boston, 1814) as cited by Higginbotham, 1978:82-3.

2. George H. Moore, "Notes on the History of Slavery in Massachusetts", reprint edition., New York, Negro Universities Press, 1968:126-8.

3. Moore, 1968 edition:131-2.

4. Greene, 1942:56.

5. Franklin, 1969:53.

Although none of the attempts to begin the process of legislative deconstruction of the slave status were successful in the pre-revolutionary period, the process of deconstruction was set in motion through judicial practices in relation to individual cases. Unlike the Southern colonies, there was no legislative prohibition in Massachusetts against slaves bringing civil suits for their freedom on their own behalf in the courts. For example, in a 1737 case, Re Negro James, (1) in accordance with the provisions of his master's will, on the death of his master's wife, James was declared by the Court "to be absolutely free". In Massachusetts, unlike Virginia for example, (2) the legislature did not limit the right of slave masters to manumit their slaves, thus in the James case the Court upheld the deceased master's wishes.

There was, however, no general trend established in judicial decisions concerning freedom suits of slaves during the 18th century colonial period. It was not until the period immediately preceding the revolutionary war that the judiciary began to develop a consistent approach towards the issue of granting slaves their freedom. For example, by 1772, in the case of Caesar v Taylor, (3) a slave's wife was not required to testify against the slave and the defendant, the slave's master, was not

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1. Re Negro James, 1737, as cited in Higginbotham, 1978:74.

2. The Virginia legislature strictly regulated by statute a master's right to manumit his slaves. See Hening, 'Statutes at Large of Virginia', Vol.3:87 and Vol.4:132.

3. Caesar v Taylor, Essex 1772, as cited in Moore, 'Notes', 1968:118.

permitted to answer a general charge of false imprisonment simply by demonstrating his ownership of the slave in question. And again, in the case of Caleb Dodge v Z, decided in 1774, (1) the Court granted a verdict in favour of the slave Dodge who had brought suit against his master for illegally restraining his liberty. In this case the jury based its verdict on the ground that there was "no law of the Province to hold a man to serve for life". (2)

Notwithstanding this pattern of judicial decisions in the 1770s and a further attempt in 1774 to have a Bill passed which would prohibit the importation of slaves into Massachusetts, (3) it was not until Massachusetts attempted to enact a state constitution after the War of Independence that the issue of slavery could be decided independent of the British Government. As shall be discussed in Chapter 5, the 1780 Massachusetts State Constitution and the Declaration of Rights in Massachusetts were read literally in the case of Quock Walker where, in 1783, the Court ruled that the legality of slavery would no longer be upheld in Massachusetts.

New York

While legislation passed in Massachusetts recognised the chattel property aspect of slavery, in particular through its

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1. Caleb Dodge v Z, Essex 1774, as cited in G. Williams, 'History', 1968:231.

2. For a discussion of other cases decided in the 1770s, see Moore, 'Notes', 1968:118-9; and Williams, 'History', 1968:230-33.

3. Williams, 1968:233-37.

statutes concerning tax assessment and those imposing duties on the importation of slaves, such definitions of property rights in slaves were indirect when compared with the explicit construction of the slave status as akin to chattel property in New York, in legislation beginning with the passage of the 1702 slave code and continuing throughout the later colonial period. The 1702 statute, "An Act for Regulateing of Slaves", (1) explicitly defined slaves as property. Apart from a clear desire to regulate the activities of slaves as expressed in various provisions in this slave code, such as, the prohibition stating that slaves could not assemble in groups of more than three, the section making it a criminal offence for anyone to trade with a slave, and the stipulation that slaves were forbidden to testify "in any matter" except in cases of, for example, a conspiracy amongst slaves to run away, the statute revealed the ambiguous position of a slave in law where law could recognise slaves as property in certain cases and as persons in others:

> And Whereas slaves are the property of Christians, and cannot without great loss or detriment to their Masters or Mistresses, be subjected in all Cases criminal, to the strict Rules of the Laws of England, Bee it Enacted by the Authority aforesaid, That hereafter if any slave by Theft or other Trespass shall damnifie any p'son or p'sons to the value of five pounds, or under, the Master or Mistress of such slave shall be lyable to make satisfaction for such damage to the party injured, to be recovered ... and the slave shall receive Corporal Punishment ... and immediately thereafter be permitted to attend his or her Master or Mistress service, without further punishment. (2)

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1. James B. Lyon, ed., 'Colonial Laws of New York', Albany, N.Y:1894, Act of November 27, 1702, Chapter 123:519-21.

2. Ibid., 519-21.

In this way the 1702 statute attempted to cope with the master's property interest in his slaves: to punish a slave in accordance with the criminal law might deprive a master of the slave's continued labour, whereas it would be a negligible economic loss if, on the other hand, the master simply compensated the victim for damage caused. The master's rights of ownership over slave property were considered of paramount importance within the logic of the law.

This concern with the master's rights of ownership is also evident in later legislation as, for example, the 1705 statute, "An Act to Prevent the running away of Negro Slaves out of the City and County of Albany to the French at Canada" (1) demonstrates. Under this statute, any runaway slaves found 40 miles north of Saratoga were to be charged with a criminal offence and, if found guilty, they would be executed. By the same statute, however, slave owners were protected from incurring any loss in the value of their property. Appraisers, appointed by a justice of the peace, were required to make an appraisal of the value of the slave in question and, if the slave was convicted and executed, the slave owner would receive compensation from the public treasury. In 1708 this practice was extended to cover all instances of the execution of slaves pursuant to a judicial decree so that masters were always compensated for any such loss. (2)

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1. Lyon ed., 'Colonial Laws of New York', Act of August 4, 1705, Chapter 149:582-4.

2. Ibid., Act of October 30, 1708, Chapter 181:631.

Indeed, throughout the first half of the 18th century, various legislative enactments concerning the master/slave relation served to underwrite the chattel aspect of the slave status. In particular, within the criminal justice system, legislation which specifically denied common law procedural safeguards was applied to slaves. The 1708 statute, for example, implied that a slave could be jailed on suspicion of having committed a criminal offence and the right to a judicial determination of guilt or innocence was limited in the case of slaves. (1)

Nevertheless, slaves had to be attributed with some degree of legal personality if criminal acts were to be proceeded against. It was necessary for the law to impute slaves with personality in criminal cases in order that they may be incriminated, thus making it possible for slave owners to receive compensation or bring civil suits for damage to their property against the owner of the slave convicted for an assault on another slave. Indeed, what appears to have happened is that the chattel aspect of slavery was invoked in litigation where slave owners stood to lose. For example, a free man responsible for making a slave woman pregnant was liable to pay damages for any depreciation in the slave's value or for any loss of services. Even when slaves were convicted of criminal offences and sentenced to execution, it appears that the chattel aspect

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1. Ibid., Act of October 30, 1708, Chapter 181:631.

could be invoked at the last minute and slaves were spared execution if the master compensated the injured parties and agreed, for example, to whip the slave publicly. Slaves were regularly bought or hired as personal property and ordinary bills of sale were executed to effect the transfer of title. In addition, slaves could be mortgaged and assigned as collateral for the debts of their masters and they could be taken from their masters on writs of attachment and sold to benefit creditors. Any interference with the property rights of slave-owners was taken to constitute a trespass for which damages could be recovered. (1)

The colonial government of New York further defined the extent to which slavery in that colony was subject to legal regulation when, in 1712, following an insurrection that spring in New York City, it passed a statute restricting a master's right to manumit his slave. This legislative regulation of manumission, while not perhaps as stringent as similar restrictions passed in Virginia, for example, only permitted a master to manumit his slave if the master posted a £200 bond guaranteeing the freed slave's ability to be self-supporting and thereafter annually paying the ex-slave £20 for the duration of the ex-master's life. (2) Masters and slaves did work out individual arrangements in an attempt to overcome such provisions: for example, some

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1. For a full discussion of the instances in which legislation specifically defined the chattel aspect of slavery, see Higginbotham, 1978:119-125.

2. Lyon ed., 'Colonial Laws of New York', Act of December 10, 1712, Chapter 250:764-5.

slaves were promised freedom after a certain number of years of faithful service and others purchased their own freedom by hiring themselves out and paying back their owners by instalments. (1) Nevertheless, the courts tended to strictly construe any manumission agreements by applying technical common law contract doctrines and their related requirements regarding the burden of proof in dealing with litigation involving manumission transactions. (2)

Thus, starting in 1702, the New York colonial assembly, in successive legislative enactments passed up to 1745, (3) constructed the slave status as that of chattel property in a manner similar to the process of construction in the Southern colonies. And, while the 1760s and 70s witnessed a growing opposition to slavery in New York, in part a reflection of the growing opposition to British domination, this opposition to slavery was to prove short lived and limited. Thus, as shall be discussed in Chapter 5, while New York passed a statute prohibiting the importation of slaves after 1785, the legality of domestic slavery was re-affirmed by a 1788 statute.

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1. McManus, 1970:143, discusses such manumission arrangements in some detail.

2. See, for example, Kettletas v Fleet, 1 Antou's Nisi Pruis Repts. 36, New York, 1808, which is illustrative of just how long New York courts persisted in defeating manumission agreements on purely technical grounds.

3. The 1745 statute was a re-enactment of earlier laws similar to the 1705 statute concerning slaves running away to Canada. Various other statutes passed between 1702 and 1745 imposed restrictions on slaves including the Act of 1730 ('Colonial Laws of New York', Chapter 250:684) which prohibited slaves acting as witnesses except in cases where other slaves were accused of capital offences.

Pennsylvania

Prior to 1700 there was no unambiguous articulation within law concerning the status of slaves and slavery in Pennsylvania. Indeed it was only through legislation beginning with a statute passed in 1700, "An Act for the better Regulation of Servants in this Province and Territories", (1) that legal institutions and practices in Pennsylvania indirectly upheld the legality of slavery in that colony. This statute differentiated in the kinds of punishments which could be given to white and black servants, in particular by providing that white servants could be given an addition of time to their servitude whereas black servants could only be subjected to physical punishments, presumably because black servants were already serving for life. By another statute, also passed in 1700, "An Act for the Trial of Negroes", (2) special courts were created for the trial of all blacks - slaves or freemen. However, it was in a statute passed in 1725-6, "An Act for the better regulation of Negroes", (3) that the Pennsylvania legislature made explicit just how legal institutions and practices were to regard both slaves and free blacks in that colony.

Like the legislation passed in some of the other colonies, both Northern and Southern, the 1725-6 Act provided that if any slave was executed, pursuant to a judicial decree, the master would

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1. Pennsylvania Laws, Vol.1:13.
2. Beckman, ed., 'Statutes at Large of Pennsylvania', Vol.2:77-79.
3. Ibid., Vol.4:59-64.

be re-imbursed for the financial loss involved. From that date, when a "negro owned by any of the inhabitants of this province shall hereafter be convicted of any capital crime", the justice and freeholders who sat in the special negro courts as judges were to appraise the value of the slave and pay that sum to the owner from "the duties fees and penalties arising from this and one other act laying a duty on negroes imported into this province". (1)

Thus, from taxes imposed on the importation of slaves, the master's property rights in slaves were to be protected. Just as the legislatures of the Southern colonies, of Virginia, South Carolina and Georgia, had resolved any conflict between the punishment of criminal slaves and the potential loss in value of a slave-owner's property, by the compensation of the owner, so too had Pennsylvania adopted this solution.

Moreover, the 1725-6 Act regulated private manumissions of slaves just as the legislature had done in New York and some of the Southern colonies. In particular the Act imposed restrictions by requiring that "sufficient surities in the sum of thirty pounds" be provided by every master before he could manumit his slave in order to indemnify the government for "any charge or incumbrance [his slave] may bring upon the same in case such negro by sickness or otherwise be rendered incapable to

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1. Beckman, ed., 'Statutes at Large of Pennsylvania', Vol.4: 60.

support him or herself". (1)

In addition to such regulations with regard to slaves, the 1725-6 Act also regulated the activities of freed blacks, evidenced most strikingly by the provision that all children of free blacks or mulattoes were to be bound out until they reached 21 years in the case of women and 24 years in the case of men. (2) Not surprisingly then, if free blacks could be made subject to such restrictions, the restrictions on the geographical movement of slaves and their ability to seek work were extensive under this Act which is regarded as having established the foundations of the Pennsylvania Slave Code. Not only did the legislature authorise the whipping of slaves discovered more than 10 miles from their masters' homes without permission in writing, but also masters were liable to the imposition of a fine of 20 shillings for letting their slaves "ramble under pretence of getting work [or for] giv[ing] liberty to their negroes to seek their own employ". (3)

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1. Ibid., Vol.4:61. While Pennsylvania did not go as far as New York which required a £200 bond and an annual allowance throughout the ex-master's life, nor as far as South Carolina in requiring legislative validation of individual manumissions or Virginia in requiring the exportation of freed slaves from the colony, it did impose a restriction which was never imposed in Georgia at all insofar as Georgia, at no time, prohibited or limited manumission through legislation.

2. Beckman, ed., 'Statutes at Large of Pennsylvania', Vol.4:62.

3. Beckman, ed., 'Statutes at Large of Pennsylvania', Vol.4: 63-4.

While the records of cases tried in the special courts for negroes have all been lost or destroyed (1) some records have survived which make it possible to assess how the Pennsylvania slave code was interpreted in practice. For example, in a criminal case decided in 1707, two black slaves (Toney and Quashy) were sentenced to death in the special courts after being convicted of burglary. Their respective masters petitioned the council (of the special courts) to spare the lives of the slaves so that they could be transported out of the colony after the masters had inflicted corporal punishment. Presumably this request was made so that the masters could sell the slaves out of the colony thereby suffering no financial loss. (2) The Council agreed since:

> [T]he Death of these Slaves would be a greater Loss to The Owners than they could well bear, and ... There is no Provision made for restitution for The Loss by the Publick ... (3)

There is no reason to suppose that this was an atypical decision since in another case decided in 1737 a previous decision to execute a slave was reversed by the court on an application by the freeholders in the colony and the slave was ordered to be transported out of the colony by his master. (4)

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1. Higginbotham, 1978:288, discusses the significance of this loss.

2. Prior to the Act of 1725-6 no provisions existed for compensating owners in the event of the execution of his slave pursuant to judicial decree.

3. Colonial Records of Pennsylvania, Vol.2:421-2, as cited by Higginbotham, 1978:290-91.

4. Colonial Records of Pennsylvania, Vol.4:259, as cited by Higginbotham, 1978:292.

The Pennsylvania judiciary also upheld the legality of claims for the return of runaway slaves to other colonies: thus in a 1738 case involving the theft of two slaves from the governor of Bonavista the Pennsylvania Court required that the slaves be returned to the governor before the defendant was released from prison. (1) Indeed, in a review of the records available concerning the trial of slaves in the Chester County special court for the period 1762-1772 Higginbotham concludes that the overriding concern of the court was to protect the slave-owners' property interest in slaves. (2)

The legislative recognition of the legality of slavery and the institutionalisation of legislative definitions in judicial practices was, however, paralleled by a counter movement. Throughout the 18th century the social and political movement for the abolition of slavery was gaining momentum and, as this momentum grew, acts of manumission multiplied. While the position of the Quakers, a group owning one third to one half of all the slaves in the colony in the early 18th century, (3) was originally ambiguous, by the 1730s the anti-slavery faction in the Quaker movement contributed to a reduction in their importation of slaves and by 1745 the Quakers had virtually ceased to import at all. (4) Quakers also seem to have been

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1. Ibid., Vol.4:289-96, as cited by Higginbotham, 1978:275-6.

2. For a full discussion of these cases, see Higginbotham, 1978:289.

3. Turner, 1911:58.

4. Ibid., 67.

effective in reducing the total numbers of slaves imported into the colony by supporting the passage of numerous pieces of legislation levying increasingly high taxes on imported slaves. In 1700 the Pennsylvania legislature imposed a duty of 20 shillings on every black imported, (1) this figure being doubled in 1702, (2) and dramatically increased in a statute passed in 1712 to £20, (3) though this 1712 statute was not approved by the Crown. (4)

Indeed, it seems that between 1712 and 1727 the Crown and the Pennsylvania legislature were involved in a conflict over whose law would govern in the case of imposing duties on imported slaves. The British Board of Trade in attempting to protect British slave-trading companies disallowed most of the import tax laws drawn up by the Pennsylvania legislature. (5) The Pennsylvania legislature, however, appears to have circumvented, at least to some extent, the Board of Trade's vetoes. The import tax laws were enforced before their technical rescission and new tax laws were continuously being drawn up and instituted before the previous law had been repealed. By 1729, with the decline in the demand for and importation of slaves in

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1. Beckman, ed., 'Statutes at Large of Pennsylvania', Vol.2:107.

2. Ibid., Vol.2:283.

3. Ibid., Vol.2:543-4.

4. M.S. Board of Trade Papers, Proprietor IX, Q, pp.39, 42, as cited in Higginbotham, 1978:295.

5. See, for example, the Pennsylvania laws of 1715, 1717-18, 1720-21, 1722, and 1725-6, in Beckman, ed., 'Statutes at Large of Pennsylvania'.

Pennsylvania, the import duty of £2 was not vetoed by the Crown and this rate remained effective for over thirty years. (1) In 1761 the rate was raised to £10 (2) and this was renewed in 1768. (3) In 1773, the import tax was made "perpetual" at the rate of £20 per slave. (4) By this time, however, the importation of slaves to Pennsylvania was more or less non-existent nor was slave labour desirable in a developing industrially based economy.

The repeated passage of legislation levying heavy taxes on the importation of slaves must therefore be interpreted in this context, that is, in light of the fact that Pennsylvania had no need of slave labour nor was slavery an integral part of its social and economic forms. And, as will be discussed in Chapter 5, when Pennsylvania, in 1780, became the first state to attempt to abolish slavery by legislative enactment, through its passage of the "Gradual Emancipation Statute", (5) slave labour was of no importance to the social and economic forms which were developing there. Nevertheless, the Pennsylvania colonial legislature did construct a definition of slavery, which, while less restrictive than the construction of the slave status in legislation in the

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1. Turner, 1911:5.

2. Beckman, ed., 'Statutes at Large of Pennsylvania', Act of 1761, Vol.6:104-110.

3. Beckman, ed., 'Statutes at Large of Pennsylvania', Act of 1768, Vol.7:156, 159.

4. Ibid., Act of 1773, Vol.8:330-32.

5. Pennsylvania Laws, Act of 1780, Vol.1:838.

Southern colonies, [1] was still a definition which recognised the property aspect in the master/slave relation.

CONCLUSION

In this chapter it has been argued that in the later colonial period in both Southern and Northern American colonies ambiguities and inconsistencies in the status of slaves were subject to a process of resolution. Law, in the form of legislation, was effective in constructing the definition of slave as primarily that of chattel property. This resolution of ambiguity was necessary in legislation if slave labour was to be purchased as a commodity; if slave-owners were to be able to obtain credit to invest in slaves; and if masters were to be protected in their property so that civil actions for damages to that property could be pursued. In a critical sense legislation defined the nature of the agents in the labour process based on slavery; it regulated the basis upon which this labour process could be organised; it provided the means whereby the market in slave labour could be directly controlled; and it fixed the means of production. From the enactment of the first slave code in the South, the 1705 Virginia slave code, through the enactment of the South Carolina and Georgia slave codes, the exact legal status of slaves as equivalent to chattel property was explicitly created in legislation throughout the 18th century. And, while legislation

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1. Arguably, the fact that colonial Pennsylvania never passed the restrictive patrol laws evident in Southern legislation nor a list of special justifications for the killing of slaves, was because slave labour was never a significant factor in the development of the colony nor were slaves a significant proportion of the population.

in the North did not explicitly define slaves as chattels, through its passage of tax laws, its statutes specifying import duties on slaves, and its regulatory provisions concerning the activities of slaves, such legislation implicitly created the chattel definition of slavery. Both Northern and Southern colonies recognised the legal personality in slaves in the process of incriminating them for criminal acts and, at the same time, invoked the chattel status in making it possible for slave-owners to receive compensation for their loss of value in criminal slaves.

The process of construction in legislation then, where the slave came to be defined as chattel property, was effective in creating the basis upon which a slave mode of production could develop. Since the law defined slaves as incapable of owning property they were effectively separated from the means of production and since claims to the legality of slave property could be upheld in both Southern and Northern colonies slave-owners were provided with an effective form of protection for their property in slaves. While slave production was not a significant feature in the developing industrial economy of the Northern colonies, these colonies recognised the legality of claims to slave property to maintain a compatible interdependence with Southern colonies though towards the end of the colonial period some indications of a deconstruction of the slave status in judicial practices and counter legislative trends were evident. The significance of this process of deconstruction in the North is discussed in the next chapter.

CHAPTER 5 : 'FUGITIVES FROM LABOUR' : CONSTITUTIONAL LAW AND SLAVERY

INTRODUCTION

Through an analysis of the process of the construction of the slave status in legislation in both Southern and Northern colonies in the later colonial period, the previous chapter demonstrated how effectively legal institutions and practices created the master/slave relation as a property relation thereby providing the basis upon which a specifically slave mode of production could develop in the South. Towards the end of the colonial period within the Northern colonies, however, it was noted that some indications of a deconstruction of the slave status were apparent in both judicial practices and in counter-legislative trends. While this process of deconstruction which was taking place in Northern colonies throughout the revolutionary period can in part be attributed to the colonists' growing opposition to British domination it was not to be immediately halted by the Declaration of Independence in 1776. Indeed the Northern states, united with the Southern states by the Articles of Confederation, (1) agreed to by Congress in 1777 and ratified and in force in 1781, continued to deconstruct the slave status in judicial practices premised on state constitutions, and in legislative enactments providing for the gradual emancipation of slaves within their own state boundaries.

This process of deconstruction through Northern state legal institutions and practices was antithetical to the process

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1. James D. Richardson (comp.), 'Articles of Confederation', in "A Compilation of the Messages and Papers of the Presidents 1789-1897", Washington, 1897:1, 9-16.

occurring in Southern states where, from the close of the revolutionary war with Britain, the slave system became even more deeply embedded in the social, political and economic structures of the South. This antagonism between North and South was not, however, an antagonism of capitalism versus slavery. On the contrary, by the latter part of the 18th century slavery was an integral part of the developing capitalistic system in North America. The system of production developing in the South was dependent on international capitalism: upon the world demand for the commodities it was producing; sources of investment and so on. It was also dependent on American capitalism in the sense that American capital provided both the apparatus and the means of circulation. Slave production in the South depended on the same forms of commerce, credit and banking as the productive system in the North - both used the same financial and commercial institutions. This intersection of slave production with capitalist relations of circulation provided an advanced commercial and financial apparatus and tied it into the capitalist system. At the same time commercial and financial capital in the North was tied into slave production. No antagonism existed between the capitalist system and slavery - the two were mutually interdependent.

The antagonism between North and South, over the issue of the legality of slavery, was not, as shall be discussed in this chapter, about the existence of slavery or the slave system, but rather it was about which of these regions would govern the new

nation and how to ensure that each region had sufficient political power to pursue its own interests. It was in precisely this context that the new nation state was born through the framing of the US Constitution in 1787: a document embodying, in a legal form, just how the antagonisms between North and South were negotiated. In order to define and regulate the activities of the states and the antagonisms between them, the regulation in question required an agency which could be presented as both external and 'superior' to the states. (1) This agency known as the federal government of the United States of America, was created through the US Constitution, the sovereign public power. The Republican State could thus be given:

> Coherence and limits in the legal form of a constitution; as a doctrine of delegated powers this defines away the problem of the state as a complex organisation of differentiated and interacting agencies of decision. 'Sovereignty' defines the state as a homogeneous space of realisation of the will of the sovereign subject (Monarch, people-in-representation). (2)

Moreover, this notion of 'sovereignty' could resolve the somewhat paradoxical issue that the US Constitution could be regarded as 'superior' to the activities it regulated in the sense that it defined the 'state' and the limits to 'state action' while, at

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1. In developing this line of reasoning I am indebted to Hirst (1980:61-69) when he considers precisely what makes laws effective as laws.

2. Hirst, 1980:69.

the same time, it could be regarded as subject to itself in the sense that constitutional law is the will of the 'sovereign'. As such, law could serve the ideological function of claiming priority for certain agencies within the state which were held to express the 'will' of the sovereign. Federal laws could be effective as laws because they were produced or issued by those institutions presented as a sovereign public power and because their enforcement could be pursued through specific federal legal institutions and practices.

The creation of the North American Republican State, after the Declaration of Independence, was therefore given both coherence and limits in the legal form of the Constitution, through the notion of the sovereignty of the people-in-representation. The notion of the 'rule of law' not of men was central to this creation, yet what was to be regarded as constitutive of this rule of law was explicitly negotiated, full of political compromises, and, an effective guarantee of slave property right. Indeed, the founding fathers who met in Philadelphia in 1787 to create the Constitution were dedicated to the proposition that "government should rest upon the dominion of property". (1) For the representatives from the South this dominion of property meant ensuring the legality of slave property right just as surely as it meant establishing the legality of commercial and industrial forms for the representatives from the North.

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1. Franklin, 1969:144.

In this chapter it will become clear that the series of compromises within the US Constitution, which reflected a negotiation of the antagonisms between North and South, resulted in a more effective legal guarantee to the right to slave property throughout the United States of America than had existed prior to the birth of the nation state. The constitutional guarantees to slave property were necessary in order to ensure that, given the different patterns of development in relation to slavery both within and between North and South, the legality of claims to slave property could be upheld in a consistent and effective way through constitutional recognition. Moreover, given that many of the Northern states were in the process of deconstructing the slave status in law through some statutes banning the importation of slaves and others providing for the gradual emancipation of slaves, a constitutional guarantee which provided for the return of fugitive slaves from Northern to Southern states was necessary. This chapter then, by focusing on how the slave status was articulated in the Revolutionary and post-Revolutionary periods provides an explanation as to why and how the legal title to slave property was effectively guaranteed in the new Republican state by the Constitution framed in 1787. In so doing, this chapter also demonstrates just how legal regulation established a relation between individual states and the public power since the Constitution was to provide the legal basis on which the South's later struggle over who would rule the United States would be primarily fought. (1)

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1. See Chapter 8.

SLAVERY IN THE REVOLUTIONARY PERIOD

> We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable Rights that among these are Life, Liberty and the pursuit of Happiness. That to secure these rights, Governments are instituted among Men, deriving their just powers from the consent of the governed. That, whenever any Form of Government becomes destructive of these ends, it is the Right of the People to alter or to abolish it, and to institute new Government ... (1)

Throughout the Revolutionary period Great Britain was indicted by the American patriots for imposing the system of slavery existing in the colonies through colonial legal institutions. The patriots claimed that any colonial efforts to abolish the slave trade had been effectively blocked consistently by Great Britain's refusal to establish the legality of bills (2) which were drafted to prevent the importation of slaves or to impose high duties on such slaves. When the first Continental Congress met in 1774 an agreement was passed not to import slaves after July 1, 1775; and Georgia, the only colony not present at the 1774 Congress adopted a similar position in 1775. (3) However, as this chapter demonstrates, with British domination effectively

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1. The Declaration of Independence, in Francis N. Thorpe, ed., "The Federal and State Constitutions", Vol.1, p.3ff. The text is taken from the version in the Revised Statutes of the United States 1878 ed., collated with the facsimile of the original, Washington, 1909.

2. Legally, every act passed by a colonial assembly could be thrown out by the British Privy Council.

3. Franklin, 1969:129.

ended and the Republican State established, the legality of slavery was more firmly established on a national basis than at any time under colonial rule and the legal institutions of the new Republican State, ironically enough, ensured that slavery would have a longer life than it was to have in the British empire.

The antagonism which developed between the North American colonies and the British colonial power became increasingly evident at the end of the French and Indian War in 1763 when the threat of the French was removed from the colonies and when Britain began to adopt a new colonial policy which effectively attempted to exert more control over the North American colonies. (1) Aspects of the new colonial policy which proved to be notably provocative included: the Proclamation in relation to the Western Territories issued in 1763; (2) attempts to raise revenue through direct taxation in, for example, the Sugar Act 1764 (3) and the

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1. Richard Hofstadter, William Miller and Daniel Aaron, "The Structure of American History", Englewood Cliffs, Prentice-Hall, 1964:43-53.

2. The restrictive Western policy was especially hard on Southern planters who, in the case of the Virginia tobacco planters in particular, were already wanting to expand inland due to soil depletion.

3. This Act seriously damaged the position of the American colonists in the triangular trade. The Act prohibited the colonies from obtaining molasses from the French islands where it was cheaper and better for the distillation of rum (see, Donald L. Robinson, "Slavery in the Structure of American Politics 1765-1820", New York, Harcourt Brace Jovanovich, 1971:57-58 for a discussion). The triangular trade involved shipping of products (mainly molasses) from the West Indies to New England, New England products (mainly rum) were then shipped to Africa in exchange for slaves and the slaves were shipped to the American colonies. From Britain's point of view the Sugar Act was an attempt to remedy the fact that she was being cut out of the trade.

Stamp Act 1765; attempts to raise revenue through 'external' taxes on trade in the Townshend Acts of 1767; and the Parliamentary granting of a monopoly on tea to the East India Company under the 1773 East India Act. (1)

The American colonists responded to these measures by initially adopting a policy of non-importation of British goods and latterly by openly voicing their opposition through the establishment of the Continental Congress which first met in 1774 to declare the colonists' mutual grievances. (2) When the Continental Congress met again in 1775 it was to adopt the 'Declaration of the Causes and Necessity of Taking Up Arms'. (3) Ironically enough, much of the rhetoric contained in this Declaration, the precursor to the Declaration of Independence, concerned analogising between the position of the colonists to that of a state of slavery. For example, the colonists condemned the legislature of Great Britain for "enslaving these colonies by violence" and they resolved "to die free men rather than live slaves". (4) Despite this, when the colonists finally adopted the Declaration of Independence on July 4, 1776, no

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1. Hofstadter et al., 1964:47-54.

2. For a discussion of this Congress, see, Perry Miller, "The Life of the Mind of America: From the Revolution to the Civil War", New York, 1965:3 et seq.

3. Hofstadter et al., 1964:54-55.

4. 'Declaration of the Causes and Necessity of Taking Up Arms', in Henry Steele Commager ed., "Documents of American History", 8th ed., New York, Appleton-Century-Crofts, 1968:92 et seq. For a discussion of the colonists' perception of their political plight as one of enslavement, see B. Bailyn, "The Ideological Origins of the American Revolution", Cambridge, Mass., The Belknap Press of Harvard University Press, 1971:232-246.

reference was contained in that document to the status of slaves throughout the American colonies.

The original draft of the Declaration of Independence, as prepared by Thomas Jefferson, as approved by the Committee of Five - Franklin, Sherman, Adams, Robert Livingston and Jefferson himself - appointed to prepare such a document, and as presented to the Congress on June 28, 1776, (1) did, however, contain a rhetorical reference to one aspect of slavery for which it held Great Britain solely responsible - the international slave trade. Thus, in Jefferson's original draft the following appears as part of the climax to the colonists' charges against King George III:

> He has waged cruel war against human nature itself, violating its most sacred rights of life and liberty in the persons of a distant people who never offended him, captivating and carrying them into slavery in another hemisphere or to incur miserable deaths in their transportation thither ... Determined to keep open a market where MEN should be bought and sole, he has prostituted his negative for supressing every legislative attempt to prohibit or to restrain this execrable commerce ... he is now exciting these very people to rise in arms among us, (2) and to purchase that liberty of which he has deprived them, by murdering the people on whom he also obtruded them ... (3)

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1. For a discussion of the drafting of the Declaration of Independence, see Carl Becker, "The Declaration of Independence, A Study in the History of Political Ideas", New York, Knopf, 1956, Chapter 4.

2. The reference here is to Lord Dunmore's Emancipation Proclamation for slaves who joined the British Army - November 7, 1775 (Franklin, 1969:133).

3. Facsimile of the original text as cited in Ray Billington, Bert Loewenberg, Samuel Brockunier and David Sparks, eds., "The Making of American Democracy: Readings and Documents", New York, Holt, Rinehart and Winston Inc., 1962, Vol.1:122.

Yet in the version of the Declaration of Independence adopted on July 4, 1776, not even this comment on the international slave trade remained, far less any comment on the system of slavery or the status of slaves as chattel property existing in most of the colonies at that time. The sole reference to the slave trade in the Declaration had been deleted in response to the Southern interest in maintaining an adequate supply of slave labour and in ensuring that slave property right would not be threatened (1) and in response to Northern allies who still had an interest in the lucrative trade. Thus, the Declaration of Independence remains silent on the issue of slavery yet, it was within the space created by this silence that the question of the legality of slavery would be argued throughout the next century as to whether the "self-evident truth" that "all men are created equal" was to include slaves - were they men or were they property?

Despite the silence of the Declaration of Independence on the matter of slavery and the slave trade, the presence of the British Army and the existence of the War did have an unsettling effect on slavery in general. Apart from numbers of slaves running away, many joined the British with the promise of freedom following the Dunmore Emancipation Proclamation of 1775. Many of the new states responded to these measures by permitting the enlistment of slaves in the American Armies and, by the end of the War in 1783, (2)

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1. Louis H. Pollak (ed), "The Constitution and the Supreme Court", Cleveland, World Publishing Co., 1966, Vol.1:9.

2. The War ended officially by the signing of the Treaty of Paris, on September 3, 1783, between the United States of America and Great Britain - ratified in Philidelphia on January 14, 1784, (see, Hofstadter et al., 1964:62).

most states as well as the Continental Congress, were enlisting slaves with the understanding that they were to receive their freedom at the end of their service. (1)

It was not, however, without considerable reluctance, that slaves were permitted to fight in the state or Congressional Armies. For example, the statute passed in New York in 1781 which permitted slaves to serve in the Army, offered freedom on the completion of 3 years service and, at the same time, authorised masters to receive up to 500 acres of unappropriated public land for each slave delivered and enlisted. (2) This compensation to masters was typical in relation to the enlistment of slaves where, for example, in New Hampshire masters were given bounties as payment for the freedom of their slaves. Only two states, Georgia and South Carolina, (3) continued to oppose the enlistment of slaves even with the Congressional plan of 1779 which offered to pay the owners not more than 1,000 dollars for each slave recruited. (4) The extent to which promises of manumission, however, would be upheld and would affect the institution of slavery, only became apparent as the individual states began to adopt their own constitutional forms,

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1. Franklin, 1969:135-38; provides an account of the enlistment of slaves in the Continental Armies.

2. See Laws of New York, Chapter 32, p.42, March 20, 1781.

3. For a full discussion of the issues here, see Benjamin Quarles, "The Negro in the American Revolution", New York, W.W. Norton, 1973.

4. Franklin, 1969:135-6.

legal institutions and practices, freed from the colonial power. The next section of this chapter therefore discusses the issue of the legality of slavery under state constitutions as evidenced in the judicial practices and legislative enactments premised upon them.

STATE CONSTITUTIONS AND THE LEGALITY OF SLAVERY

In the introduction to this chapter it was noted that, throughout the revolutionary period, a process of deconstructing the slave status through Northern legal institutions and practices was paralleled by a contrary process in the South where its legal institutions and practices ensured a more detailed refinement of the slave status as akin to chattel property. Both North and South could no longer argue that British domination was responsible for any articulation of the legality of claims to slave property since, by the mid-1770s, the newly founded states were freed from the constraints of the colonial power and it remained to be seen just how they would regard slavery.

The independent states which eventually formed the United States of America were themselves established following the meeting of the revolutionary central government known as the Second Continental Congress, in 1775. At that time four of the colonies or states were conducting their affairs under makeshift revolutionary administrations, and, it was the advice of the Congress to these states to draw up permanent constitutions. With the adoption of the Declaration of Independence by the Congress in

Jyly 1776, the legal basis on which most of the colonies had been governed - their Royal Charters - was swept away and the remaining states were advised to draw up their own constitutions. Rhode Island and Connecticut, simply by deleting all reference to the King, maintained their original corporate charters and by 1780 all the other states had written new instruments of government.

In most of the states, the legislatures drew up the new state constitution without consulting the voters, and for the most part, (1) the new state constitutions followed the colonial forms. (2) The most important single change was a severe reduction in the power of the Governor: in nine states he had no right to veto and his term was limited to one year (although he could be re-elected). Most of the constitutions also had bills of rights guaranteeing social and political liberties such as the right to jury trial, freedom of speech and worship and so on.

One of the earliest and most influential of the bills of rights of an original state constitution was the Virginia Bill of Rights adopted by the Virginia Constitutional Convention on 12 June 1776. (3) As its first and most basic principle of government, the Virginia Bill of Rights stated:

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1. Massachusetts set an example to be followed by other states, however, when it came to the question of re-writing the basic law. The new constitution was drafted by a special convention elected for that purpose alone (Hofstadter et al., 1964:68).

2. Usually the legislature consisted of two houses (both elective) although Pennsylvania experimented with a single house.

3. For the full text of the Virginia Bill of Rights, see Thorpe (ed) 1909, Vol.7:3813-3814.

> That all men are by nature equally free and independent, and have certain inherent rights, of which, when they enter into a state of society, they cannot by any compact deprive or divest their posterity; namely, the enjoyment of life and liberty, with the means of acquiring and possessing property, and pursuing and obtaining happiness and safety. (1)

The right to possess property by those who "enter into a state of society" included the right to property in slaves. This is clearly demonstrated in the case of Hudgins v Wrights, (2) where the first clause of the Virginia Bill of Rights was explicitly ruled on by the Virginia Court of Appeals. The case reached the appeal court in 1806 from the High Court of Chancery where the Chancellor had ruled that the Wrights were entitled to freedom since they could trace their genealogy, through female ancestors, to an old Indian (3) called Butterwood Nan. While the Virginia Court of Appeals upheld this decision, the Appeal judges made it quite clear that where white persons or native American Indians or their descendants, in the maternal line, were claimed as slaves, the onus probandi (4) lay with the claimant, yet clearly stated that it was otherwise with respect to native Africans and their descendants - the onus probandi in this case lay with them to prove their freedom. Thus, Judge Tucker, in addressing the issue as to the applicability of clause 1 of the Virginia Bill of

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1. Clause 1, Virginia Bill of Rights, in Thorpe (ed) 1909, Vol.7:3813.

2. 11 Va. 1 Hen & M. 133, 134 (1806).

3. The issue of Indian slavery was discussed in Chapter 3.

4. Onus Probandi = Burden of Proof.

Rights, "that all men are by nature equally free and independent", framed the question as follows:

> Suppose these persons, a black or mulatto man or woman with a flat nose and woolly head; a copper coloured person with long jetty black, straight hair; and one with a fair complexion, brown hair, not woolly nor inclining thereto, with a prominent Roman nose, were brought together before a judge upon a writ of Habeas Corpus, on the ground of false imprisonment and detention in slavery: ... How must a Judge act in such a case? ... He must discharge the white person and the Indian out of custody, ... and he must redeliver the black or mulatto person, with the flat nose and woolly hair to the person claiming to hold him or her as his slave, unless the black person or mulatto could procure some person to be bound for him, to produce proof of his descent, in the maternal line, from a free female ancestor - But if no such condition should be required on either side, but the whole case be left with the Judge, he must deliver the former out of custody, and permit the latter to remain in slavery, until he could produce proofs of his right to freedom. This case shews my interpretation how far the onus probandi may be shifted from one party to the other ... (1)

Judge Tucker went on to claim that the first clause in the Virginia Bill of Rights had been framed:

> With a cautious eye to the subject, and was meant to embrace the case of free citizens, or aliens only; and not by a side wind to overturn the rights of property and give freedom to those very people whom we have been compelled from imperious circumstances to retain, generally, in the same state of bondage that they were in at the revolution, in which they had no concern, agency or interest. (2)

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1. 1 Hen & M. 140 - emphasis in original.

2. Ibid., - emphasis in original.

The other appeal court judges concurred with Judge Tucker and with his reasoning regarding clause 1 of the Virginia Bill of Rights. Thus Judge Roane stated that "in the case of a person visibly appearing to be a negro the presumption is, in this country, that he is a slave, and it is incumbent on him to make out his right to freedom". (1) While the Appeal Court, therefore, upheld the decision of the Chancellor in the lower court granting freedom to the Wrights, it denied the Chancellor's reasoning when he ruled that the Virginia Bill of Rights had established a presumption of freedom for all human beings, thereby placing the burden of proof of ownership on the person who wanted to enslave a negro. (2) The Virginia Court of Appeals' ruling in Hudgins v Wrights in 1806 was therefore a definitive holding that Virginia law placed the burden of proof in suits for freedom on negroes. The legality of slave property right was therefore affirmed in Virginia and the pattern was established for other Southern states to follow.

Throughout the revolutionary and post-revolutionary periods, Southern states were unanimous in affirming the legal right to own slave property under their own state constitutions. At this time, over 90% of the slaves in North America lived in the South (3) and, given the immense amount of Southern capital invested in slaves and the major social, political and economic upheavals created in the

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1. Ibid., 141.

2. For a thorough discussion of this case, see R.M. Cover, "Justice Accused: Anti-slavery and the Judicial Process", New Haven, Conn., Yale University Press, 1975:50-55.

3. Jordan, 1968:13.

war and post-war years, the slave-owners of the South can be regarded as having adopted a rational approach in ensuring adequate legal protections for their investments particularly when a new economic significance was already being attached to the institution of slavery. (1) In the period immediately following the Treaty of 1783 (2) the areas where the slaves were concentrated experienced a severe depression: the tobacco plantations were already suffering from problems of soil exhaustion and a glutted market and rice and indigo productions yielded a low profit margin to the planters of these commodities. The price of slaves was also declining but the planters attempted to sustain their losses until a new raw commodity could be produced. Already a system of producing cotton textiles was undergoing revolutionary changes in Britain, and, with the inventions of spinning and weaving machinery, the manufacturing process was so cheapened that the demand for cotton goods was greatly stimulated. The demand for cotton fibre to feed the newly developed machinery came at a time when the Southern planters needed some form of economic and productive reorganisation to inject new life into the plantation system. (3)

As early as 1786 planters on the Georgia-Carolina coast began to experiment with fibres and began to plant larger cotton

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1. Franklin, 1969:141.
2. The Treaty of Paris between the USA and Britain in 1783.
3. Franklin, 1969:147.

crops employing more slaves. With the invention of a cotton gin in 1792 the Southern states were well on the way to making the transition to a new productive system exclusively based on slave labour. Although the cultivation of cotton did not require large capital investment, the most economically affluent planters were able to purchase more land and more slaves, thereby forcing the small-scale farmers to yield to those planters who were able to carry on large-scale cultivation. (1) The invention of the cotton gin, therefore, and the extension of the area of cotton cultivation, ushered in a period of economic change in the Southern states which manifested itself in the increased demand for slave labour. Thus, in the latter part of the 18th century importations of slaves into the United States increased rapidly - in 1803, for example, it was estimated that at least 20,000 slaves were imported into Georgia and South Carolina. (2) The merchants of New England supplied the Southern planters with this human cargo, thus ensuring that Northern capital was also deeply implicated in maintaining the Southern system based on slave production. However, for the North, involvement in the slave trade was not the same as affirming the legality of slave property right under their own state constitutions and the legal practices premised upon them. How then did Northern states regard the issue of the legality of slavery in the context of independence?

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1. Ibid., 148-9.

2. Ibid., 149.

In Massachusetts, the new constitution was drafted by a special convention elected for that purpose alone. (1) The Constitutional Convention first met in 1778 but that version of the state constitution was defeated when submitted to the vote primarily because it contained restricted suffrage requirements and had no Bill of Rights. (2) This was remedied in the new constitution adopted in 1780 by the extension of suffrage to all males and the addition of the Declaration of Rights. Thus article 1 guaranteed that:

> All men are born free and equal, and have certain natural, essential and unalienable rights; among which may be reckoned the right of enjoying and defending their lives and liberties; that of acquiring, possessing, and protecting property; in fine, that of seeking and obtaining their safety and happiness. (3)

But did this guarantee of rights extend to the right to possess and protect slave property? There was no explicit emancipation clause nor any language authorising legislative action effecting emancipation in the new constitution. Yet, in 1769, in the case of James v Lechmere, the Superior Court of Massachusetts argued that the plaintiff, a negro, was entitled to his freedom under the

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1. Massachusetts set the precedent for the convention that later wrote the Federal Constitution and for the special state conventions that later ratified it (Hofstadter et al., 1964:68).

2. Higginbotham, 1978:89-90.

3. Article 1, Massachusetts Declaration of Rights, in Thorpe (ed) 1909, Vol.3:1889.

laws of the province and the terms of the Royal Charter. (1) Exactly how the silence of the new constitution on the issue was to be broken was decided in the case of Commonwealth v Jennison in 1783. (2) This case itself was premised on two earlier cases concerning an alleged slave known as Quock Walker, (3) the legal proceedings involving the issue of the freedom of Quock Walker representing the first application of the Massachusetts Bill of Rights of 1780 (4) to the status of black slaves.

Litigation involving Quock Walker began in 1781 after Walker had escaped from his master, Nathaniel Jennison, and fled to Seth and John Caldwell's farm. The Caldwells were brothers of Walker's former master, whose widow had subsequently married Jennison. Jennison and some friends attempted to force Walker to return, and when he resisted, they severely beat him and took him back to the Jennison farm. Quock Walker then brought an action of trespass against Jennison, suing him for damages for the assault and battery. In the case of Quock Walker v Jennison, (5) Walker

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1. James v Lechmere, 1769, as cited in Moore, 1968:116. This was not, however, a definitive holding since the decision to free the negro, James, was based on an insufficiency in law on Lechmere's part.

2. Proceedings of the Massachusetts Historical Society, 1873-1875:293 (April 1783) - hereafter referred to as Proc. Mass. Hist. Soc.

3. The "case" of Quock Walker has been regarded as an American counterpart of Sommersett - the English case discussed in Chapter 2, "especially in its ambiguity and the resultant misunderstanding about its impact" (Wiecek, 1974:124).

4. The Massachusetts State Constitution of 1780 was ratified and in force in 1781.

5. Proc. Mass. Hist. Soc., 1873-75:296 (September 1781).

was declared a free man and the jury awarded £50 damages to him. Jennison filed an appeal but failed to appear when the case was called for argument and the lower court's decision was affirmed. Jennison then filed suit against the Caldwell brothers in Jennison v Caldwell [1] by bringing an action of trespass against the Caldwells and claiming damages because the Caldwells "seduced Quock Walker from [his] service ... and caused ... to absent himself ... and retained said negro for 6 weeks [for their own benefit]". Jennison was awarded £25 damages.

Clearly, the judgments in these two cases are contradictory. If, as the judgment in the case of Quock Walker v Jennison implies, Quock Walker was not a slave but a free man, then on what grounds could Jennison sue the Caldwells for damages? The Caldwells appealed the verdict in Jennison v Caldwell and the Supreme Judicial Court found them not guilty on appeal and had judgment for costs made against Jennison. [2]

The last in the series of cases involving Quock Walker began in April 1783 before the Supreme Judicial Court. In the case of Commonwealth v Jennison, [3] Jennison was indicted and charged with the assault and battery committed on Quock Walker in 1781. The prosecution argued that Jennison had attacked a free citizen (Walker) not a chattel slave, producing testimony to the effect

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1. Proc. Mass. Hist. Soc., 1873-75:296 (September 1781).
2. Proc. Mass. Hist. Soc., 1873-75:297 (September 1781).
3. Proc. Mass. Hist. Soc., 1873-75:293 (April 1783).

that Walker's former master had promised to manumit him when he reached 25 years old; that his widow had renewed that promise and that Jennison knew this prior to his marriage to the widow. The defence argued that there was a master-slave relation and that Jennison's act was a proper disciplinary measure. However, Chief Justice Cushing in his charge to the jury directed them to find Jennison guilty on the basis of the facts and, in doing this, he argued not on the basis that Walker was a free man because of the manumission promise but because article 1 of the Massachusetts State Constitution made it quite clear that, "the idea of slavery is inconsistent with our own conduct and constitution ...". (1) Jennison was convicted and, although the case did not abolish slavery in Massachusetts, it was one of several freedom suits in the post-revolutionary period where the legality of slavery was undermined.

In the same year (1783) that Cushing found slavery incompatible with the rights granted under the Massachusetts State Constitution, the legislature was considering one of the most straightforward abolitionist bills proposed anywhere. The bill claimed that chattel slavery had never been legal in Massachusetts, it provided compensation for masters whose claims to property were undercut by outlawing slavery, and it enabled help to be given to destitute blacks freed in consequence. (2) And, while this bill did not

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1. Proc. Mass. Hist. Soc., 1873-75:274 (April 1783).

2. Economically, this plan was quite feasible - blacks constituted less than 2% of the total population (Robinson, 1971: 28-29), and domestic slavery was of no consequence to the system of production developing in Massachusetts.

pass through the Senate, the judgment in Commonwealth v Jennison indicated that, whatever the legislature proposed to do, the courts would no longer affirm the legality of claims to slave property in Massachusetts.

Pennsylvania, on the other hand, was the first state (1) to abolish slavery in the 18th century by legislative enactment, when, in 1780, it passed "An act for the Gradual Abolition of Slavery". (2) The provisions of the Act for the gradual emancipation of negro slaves, was to provide a scheme which other states would imitate in their attempts to reconcile the claims of slave property right and bourgeois notions of legality.

The gradual emancipation statute did not free those who were already slaves when the Act was passed - only negro and mulatto children born after the passage of the law were to be freed and those only after serving their mother's master for 28 years. (3) Nevertheless, several aspects of this law are significant. Firstly, section 5 of the Act required all slave owners to register their slaves with the county clerk before November 1, 1780. This registration requirement provided substantial penalties for non-compliance from slave owners. Unregistered slaves were

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1. Technically, a 1652 Act passed in Providence and Warwick, before Rhode Island came under one jurisdiction by a 1663 Charter, banned lifetime servitude in the colony. However, scholars agree that this prohibition was not in force in the 18th century and later 18th century statutory enactments regulating slavery in Rhode Island did give legal sanction to slavery, (see, Catterall, 1968 ed., Vol.4:448; and Higginbotham, 1978:459:3 for more concise detail on this issue.)

2. Act of 1780 Pennsylvania Laws, Vol.1:838.

3. Act of 1780, Section 4, Pennsylvania Laws, Vol.1:839-40.

automatically emancipated because "no negro or mulatto now within this State shall ... be deemed a slave or servant for life ... unless his or her name shall be entered as aforesaid on such record". (1) The registration clause resulted in substantial litigation between master and slave, mostly initiated by Pennsylvania abolition societies (2) and some judges held masters to strict technical compliance with the law in registration cases. (3) The presumption of freedom for unregistered slaves was of profound importance since now, within law, the burden of proof lay with the master to demonstrate that the black in question was his slave. (4)

The 1780 Act also made provisions to ensure that the statute could not be evaded by people 'visiting' the state with their slave. Exempted from the obligation of registration and the related freeing of slaves for non-compliance with section 5 were the "domestic slaves attending on members of Congress ... and persons passing through or sojourning in this State, and not becoming resident therein". (5) Residency was defined as more than a 6 month stay in Pennsylvania, thus a person could not visit Pennsylvania for more than 6 months without the slave or slaves who

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1. Ibid., Section 5, Vol.1:840.

2. Catterall, 1968 ed., Vol.4:245.

3. Ibid., 247.

4. Compare the totally contrary position adopted by the judiciary in the Virginia case of Hudgins v Wrights (1 Hen & M. 134, 1806), discussed earlier in this chapter.

5. Act of 1780, Section 10, Pennsylvania Laws, Vol.1:841.

accompanied him becoming free. Visitors who came to Pennsylvania after November 1, 1780 (the last day of registration under the 1780 Act) could not register their slaves (if they intended to stay more than 6 months). If the legislature had allowed visitors to register slaves after the residents' deadline, there would have been easy options for the evasion of the statute thereby making the process of 'gradual' emancipation more difficult to achieve in Pennsylvania. (1)

Another significant provision in the 1780 Statute granted slaves all the privileges of indentured servants. (2) Thus, although slaves born before March 1, 1780 were denied freedom under the Act, and children to slave mothers after that date had freedom delayed for 28 years, the status of slaves was, for the first time in law, defined in terms of a service obligation rather than a property obligation.

The Act, however, was not passed without considerable opposition particularly from those who argued that its provisions were an affront to the Southern States. (3) Not surprisingly then, many slave owners found ways of subverting the 1780 Statute and in 1788 the legislature passed another act "explaining" the

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1. Higginbotham, 1978:299-300.

2. Act of 1780 Pennsylvania Laws, Vol.1:841. See also Chapter 3 supra. which outlines some of the privileges of indentured servants guaranteed in law.

3. The final vote in 1780 showed 34 assembly men in favour; 21 opposed (Robinson, 1971:31).

1780 Act for the gradual abolition of slavery. (1) The 1788 Act attempted to remedy some of the defects in the 1780 Act. For example, the first section of the 1788 Act clarified the tenth section of the 1780 Act which dealt with the status of visitors' slaves. Thus, section 1 of the 1788 Act provided that:

> All and every slave and slaves who shall be brought into this State by persons inhabiting or residing therein or intending to inhabit or reside therein shall be immediately considered, deemed and taken to be free to all intents and purposes. (2)

There is no mention made here of the 6 month residency requirement in section 10 of the 1780 Act but clarification is given in the case of Commonwealth v Chambre in 1794 (3) where the Court held that a 6 month stay in Pennsylvania would still operate to free a visitor's slave. Moreover, the intention to reside in Pennsylvania was now sufficient proof to free slaves. (4)

Section 2 of the 1788 Act dealt with the efforts of slave owners to subvert the 1780 statute. For example, in order to avoid registering births to slave mothers, slave owners had developed the practice of removing pregnant slaves to another area, where slavery for life was sanctioned, until the child was born. The 1788 Act therefore provided that no pregnant slave could be

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1. Act of 1788, Beckman, ed., 'Statutes at Large of Pennsylvania', Vol.13:52.

2. Ibid., Section 1, Vol.13:52.

3. 4 Dallas 143 (1794), as cited in Higginbotham, 1978:304.

4. Higginbotham, 1978:304.

removed from the State until the delivery of her child. (1) Another ploy was to sell slaves outwith the state, thus the statute prohibited this practice when "such a slave or servant would lose those benefits and privileges" of the gradual emancipation statute. (2)

Section 3 provided that all children born to slaves after March 1, 1780 must be registered before April 1, 1789 or "within 6 months next after the birth of any such child". (3) This registration would guarantee the right to freedom at 28 years and eliminate the possibility that masters could hold such children in slavery for life. The penalty for the non-registration of these children within the time limit was their immediate freedom. (4)

Thus, in passing the 1780 Gradual Emancipation Act, Pennsylvania had set in motion the process of deconstructing the slave status in legislation. The preamble to the 1780 Act indicated that the revolutionary rhetoric contained in the State Constitution could be used by the legislature to begin a process of denying the legality of slave property right. While this process was, as the Act was termed, 'gradual', since slaves were still reported in Pennsylvania in 1840, two generations beyond

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1. Act of 1788, Beckman, ed., 'Statutes at Large of Pennsylvania', Vol.13:52.

2. Ibid., Vol.13:53. The penalty was a fine of £75.

3. Ibid., Vol.13:53.

4. Higginbotham, 1978:305.

the passage of the 1780 Act, [1] and while such emancipation occurred in a state where blacks represented only 2½% of the total population and where the productive system based on a developing free wage labour economy did not require or benefit from slave labour, Pennsylvania had set a precedent in legislation which other Northern States followed. In 1784 Connecticut and Rhode Island both passed laws for the gradual abolition of slavery [2] and the process of deconstructing the slave status in law had effectively begun throughout the Northern States.

This process, however, was by no means unambiguous. At New York State's first Constitutional Convention held in 1777 the Convention was reluctant to include a suggestion of future emancipation in the new constitution. [3] Governor Morris, while proposing that the new constitution include a promise of abolition to be achieved as soon as practicable "consistent with the public safety and the private property of individuals" concluded that "it would at present be productive of great dangers to liberate the slaves within this State". [4] Although

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1. Robinson, 1971:31. These slaves must either have been more than 60 years old or have been born since 1812 to women born before 1780.

2. Franklin, 1969:141.

3. Slavery was a more solidly entrenched economic institution in New York than some of the other Northern States and blacks constituted about 10% of the total population there.

4. Philip S. Foner, "History of Black Americans: From Africa to the Emergence of the Cotton Kingdom", Wesport, Conn., Greenwood Press, 1975:366.

no emancipation provision was passed, the delegates did adopt Morris's anti-slavery resolution that: "every human being who breathed the air of the State shall enjoy the privileges of a free man". (1)

It was not until 1785 that a Bill for gradual emancipation was approved though this plan was not made effective. (2) The legislature did, however, succeed in 1785 in passing a statute prohibiting the importation of slaves. (3) This statute provided that violaters were to be fined £100 and any slaves illegally imported were freed. The statute was ineffective because masters who brought slaves in for their own use were exempted and technically, slaves could be brought in for the present owner's use and thereafter sold with impunity. (4) Others were able to evade the law by hiring out imported slaves under leases that were usually disguised sales cancellable only with the consent of a hirer or his heirs. (5) There is evidence to show that the courts upheld the legality of such 'hirings', as, for example, in the case of Soble v Hitchcock, (6) where an

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1. Ibid.

2. See Franklin, 1969:141; and Higginbotham, 1978:138-140.

3. 1785 Act, Laws of New York, Chapter 15:85.

4. Higginbotham, 1978:140.

5. Compare the practice of the courts upholding this kind of 'leasing' system during Georgia's anti-slavery period when slaves were hired on 99 year leases from South Carolina - see Chapter 3.

6. 2 Johnsons Cases 68 (NY Sup. Ct. 1800) - as cited in McManus, 1970:169.

importer brought in a 'free' man from New Jersey under a 99 year indenture.

In 1788, the legislature, still unable to act on the issue of emancipation, passed a slave code which attempted to eliminate some of the loopholes in the 1785 Anti-Slave Trade Bill, but which, at the same time, affirmed the legality of slave property. (1) For example, the statute made it illegal to sell any slave imported into the state after 1785 declaring that all improperly imported slaves "shall be free"; it precluded sales where both buyer and seller claimed to be permanent residents but where one was actually an agent receiving the slave with the intention of transporting the slave out of the state for sale. At the same time, however, the statute restated settled principles of slavery law: for example, it provided that all who were slaves for life when the statute was passed (February 22, 1788) were to remain in that condition unless properly manumitted; and children "shall follow the state and condition of the mother". (2)

Despite the legislature's confirmation of the legality of slavery in New York, manumissions increased throughout the 1780s and 90s. This period saw the influx, in rapidly increasing numbers, of free white labourers who were providing the labour needs of a developing commercial and industrial economy. Not surprisingly then, in 1799 the New York legislature passed a bill

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1. 1788 Act, Laws of New York, Chapter 40:85 (February 22, 1788).
2. 1788 Act, Laws of New York, Chapter 40:85 (February 22, 1788).

which gradually eliminated the system of slavery.[1] This statute was essentially similar to the gradual abolition statute passed in Pennsylvania in 1780. The New York Act of 1799 provided that all male children born to slave mothers after July 4, 1799 were to be freed at 28 years and all female children at 25 years; these children were to serve their mothers' masters as indentured servants until freed; masters were required to register births and failure to do so resulted in a fine against the master and freedom for the child.

Again, as in Pennsylvania, masters[2] attempted to subvert the statute by measures such as sending pregnant slave mothers out of the state to give birth and so on.[3] Thus in 1801, the legislature enacted that New York residents could not take slaves out of the state unless they also returned with the slaves;[4] and in 1807 an Act was passed which only permitted those persons who had resided in New York for 10 years and who were planning to move permanently out of the state, to take their slaves with them.[5]

From the foregoing discussion of the development of legal institutions and practices in relation to slavery in the revolutionary and post-revolutionary periods, it is clear that

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1. 1799 Act, Laws of New York, Chapter 62:388-89 (March 29, 1799).

2. Masters also assisted in the subterfuge which followed the passage of the 1799 Act when New York became a mecca for slave traders from other states. These traders came to purchase slaves at bargain prices in order to sell slaves out of the state.

3. Higginbotham, 1978:143.

4. 1801 Act, Laws of New York, Chapter 188:615 (April 8, 1801).

5. 1807 Act, Laws of New York, Chapter 77:92-93 (March 31, 1807).

Southern and Northern states, freed from the colonial power, were going in different directions. Throughout this period the slave mode of production was rapidly forming the basis of the Southern economy while, in the North, with its developing commercial and industrial base, any slave labour at all was becoming progressively less desirable. Yet both North and South had adopted virtually identical state constitutional frameworks based on ideological notions of liberty and other civil rights, including the right to acquire and possess property. Both founded their interpretation of the legality of slavery on these constitutional frameworks but they did not reach the same conclusions. For Northern states, their constitutions were used to argue that slavery was inconsistent with the principles behind them and the process of deconstructing the slave status proceeded effectively in legislation and judicial practice. For Southern states, however, their constitutions and the principles behind them did not apply to slaves - slaves were a separate category and not entitled to any state constitutional rights. This separate category was progressively defined as 'different' through the further refinement and regulation of slavery by legal institutions and practices. It was against this background that efforts were made to frame a United States Constitution when the first convention met in Philadelphia in 1787 where, as will be discussed in the subsequent section to this chapter, the issue of slavery featured as the ideological site where various political bargains were struck.

THE US CONSTITUTION AND THE LEGALITY OF SLAVE PROPERTY RIGHT : FUGITIVES FROM LABOUR

After the period of upheaval during the War of Independence the newly independent states moved toward a point of political and economic consolidation culminating in the writing of the United States Constitution in 1787 and its adoption in 1789. The Constitution was, however, as indicated earlier in this chapter, written in the context of a growing antagonism between Northern and Southern states about the legality of slavery within their own state boundaries, an antagonism which reflected political struggles over whose interests would be effectively represented in the government of the new republican state. In the event, as will be argued in the discussion which follows, the US Constitution was drafted in the context of a competition between various interest groups over various issues, though the voting was clearly sectional in character over those sections in the document pertaining to slavery. The document as finally produced and ratified by the states reflects the negotiation of the antagonisms between North and South, and the political compromises made are evident in those clauses concerning commerce, where Southern delegates to the Convention agreed to provisions which were primarily in the interests of the North in exchange for the agreement of Northern delegates to recognise the legality of the slave system in the South and to participate in upholding this legality by apprehending and returning fugitive slaves to their owners, by allowing slaves to be counted for representation purposes in the national government, and by conceding the legality of the slave trade for a specified period.

In fact, the compromises made in producing the US Constitution resulted in a more effective legal guarantee to slave property right throughout the United States of America than had existed prior to the birth of the new nation by providing federal legal institutions which would ensure that, notwithstanding differences in the extent to which individual state legal institutions upheld or recognised the legality of slavery, slave property right could be upheld in a consistent and effective way in constitutional law.

Prior to the framing of the US Constitution, from the period between the Declaration of Independence until 1781, when the Articles of Confederation (1) were eventually in force (having been written in 1777), the delegates to the various sessions of the Second Continental Congress had come into conflict over the need for a central government. (2) In an attempt to compromise between the expressed need for a central administration and the demand for the independence of the various states, the Articles of Confederation had given the new national government considerable powers (3) as well as ensuring mutual respect for state rights and privileges. For example, under Article IV the guarantee was given that:

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1. 'Articles of Confederation', in Richardson (comp) 1897, 1:9-16.

2. Billington et al., 1962:131.

3. Congress might (i) make war or peace and fix state quotas of men and money for the national army; (ii) make treaties and alliances; (iii) decide inter-state disputes, limit state boundaries and admit new states; (iv) borrow money and regulate standards of coinage and weights and measures; and (v) establish post offices. But the rights to levy taxes, raise troops and regulate commerce were denied to Congress - in these areas the states retained sovereignty.

> The free inhabitants of each of these states, paupers, vagabonds and fugitives from Justice excepted, shall be entitled to all privileges and immunities of free citizens in several states;

and that:

> If any Person guilty of or charged with treason, felony, or other high misdemeanour in any state, shall flee from Justice, and be found in any of the United States, he shall upon demand of the Governor or executive power, of the state from which he fled, be delivered up and removed to the state having jurisdiction of his offence. (1)

As well as having certain powers and ensuring state rights, Congress was also given the power to establish how the western territories (ceded from Pennsylvania and Connecticut in 1781) would be governed and settled. (2) Congress used this power for the first time in the Ordinance of 1785 (3) which set up a method for the division and sale of public territories. While this was a non-controversial measure, the same cannot be said of the Northwest Ordinance, adopted by the Continental Congress on July 13, 1787, meeting in New York City. As will become clear in this and subsequent chapters, the Northwest Ordinance was to become central in the struggle for power as to who was to rule the USA. (4)

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1. 'Articles of Confederation', Article IV, in Richardson (comp) 1897, 1:9.

2. Hofstadter et al., 1964, 69-70.

3. 'Ordinance of 1785', in Worthington C. Ford et al (eds), "Journals of the Continental Congress 1774-1789", Washington, 1933, 28:375-378.

4. 'Northwest Ordinance of 1787', in Ford et al (eds), 1933:32: 337-339. For a full discussion of the significance of this measure, see Straughton Lynd, "Class Conflict, Slavery and the United States Constitution", in Political Science Quarterly LXXXI, 1966:225-250.

By the terms of the Ordinance, the Northwest Territory, that is, the lands north of the Ohio and east of the Missippi rivers, were to be initially set up as a single unit with a Governor to be appointed by Congress. When 5,000 free male inhabitants had settled in the territory, those who owned at least 50 acres a piece were to elect a territorial legislature whose acts would be subject only to the Governor's veto. The voters would also send a non-voting delegate to Congress. No less than three and no more than five states were to be carved out of the territory, and the boundaries of three future states were tentatively laid out. When a potential state had 60,000 free inhabitants, it was to be admitted to the Union on an equal footing with the original states.

In addition to these specifications concerning the political administration of these lands, the Northwest Ordinance contained a Bill of Rights which not only provided for certain basic civil rights, including the right to jury trial, but also, in its Sixth article, stated that:

> There shall be neither Slavery nor involuntary Servitude in the said territory otherwise than in the punishment of crimes, whereof the party shall have been duly convicted ... (1)

However, although slavery was prohibited in the territory and the states to be carved from it, through the second clause it was provided that:

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1. 'Northwest Ordinance of 1787: Bill of Rights', in Ford et al (eds), 1933:32:343. This provision is remarkably similar to the 13th Amendment to the US Constitution discussed in Chapter 9.

> Any person escaping into the [territory] from whom labor or service is lawfully claimed in any one of the original States, Such fugitive may be lawfully reclaimed and conveyed to the person claiming his or her labor as aforesaid. (1)

Thus while the Northwest Ordinance had outlawed slavery in the Northwest Territory it had affirmed the legality of slavery in other regions by undertaking to return any fugitives from labour.

Nevertheless, exactly why the Continental Congress of 1787 voted to prohibit slavery in the Northwest has been a puzzle to historians for a number of reasons, the most significant one being that at the time Congress adopted the Ordinance it was controlled by the South. (2) The Clause respecting slavery (in the Ordinance) was agreed to by the Southern members "for the purpose of preventing tobacco and indigo from being made on the N.W. side of the Ohio as well as for sev'l other political reasons" - so wrote William Grayson to James Munroe on August 8, 1787. (3) What were these several other political reasons and why did the Southern majority of the Continental Congress unanimously vote for the Northwest Ordinance despite its anti-slavery clause?

One answer which has been given to this question is that the South expected that the Northwest would be settled mainly by

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1. Ibid., 343.

2. For a fuller discussion see, for example, B.A. Hinsdale, "The Old North West: the Beginnings of our Colonial System", New York, 1899:266; J.M. Merriam, "The Legislative History of the Ordinance of 1787", Proceedings of the American Antiquarian Society, New Series, Worcester, 1889:5:336; and Lynd, 1966:186.

3. See Edmond C. Burnett, ed., "Letters of the Members of the Continental Congress", Washington, DC, 1921-1936:8:632 - cited in Lynd, 1966:190.

Southerners, by an outcropping of the migrants then moving over the mountains into Kentucky and Tennessee, who would vote with the South in any ensuing sectional conflict. (1) Thus, the South could believe that, even without slave-holding, the Northwest would be a support in national politics. Coupled with this was the fact the Ordinance referred only to the Northwest. What then was implied as to the status of slavery south of the line that became the Southwest territory? (2) In, for example, North Carolina's cession of the area (later called Tennessee) it stated:

> Provided always, That no regulations made or to be made by Congress shall tend to emancipate slaves, otherwise than shall be directed by the Assembly or legislature of such State or States. (3)

Thus, in legislating against slavery in the Northwest, the Ordinance only legislated against slavery in that part of the West where it did not exist, while leaving it alone in the Southwest where it already existed and where its legality was already established. (4)

The Northwest Ordinance of 1787 was not only the last but also the most important act passed by Congress under the Confederation which bore on the issue of the legality of slavery. In May of 1787

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1. Both North and South could hope for the allegiance of the 3 states to be formed under the Ordinance, (see Lynd, 1966:190-192).

2. For a fuller discussion of this issue see R. Hilldreth, "The History of the USA", New York, 1849:3:528-29.

3. Walter Clark, ed., "The State Records of North Carolina", Goldsboro, North Carolina, 1905:24:563 - cited by Lynd, 1966: 193, Note 21.

4. Lynd, 1966:192-3.

delegates had already begun to arrive in Philadelphia for the Constitutional Convention which was to establish in law the parameters of the Federal Republican State. In contradistinction to the Northwest Ordinance, the US Constitution did not mention slavery by name, (1) yet several clauses were included to assure the perpetuation of slavery (2) and the maximisation of political power for the Southern slaveholders. (3) These Constitutional clauses, which refer to slaves as 'other persons' (Article I, Section 2(3)) and "persons held to service or labour" (Article IV, Section 2), guaranteed title to slave property right more effectively than any previous action at a national level.

The delegates from the states who attended the Constitutional Convention were almost unanimous on what the sovereign powers of the national government should be (4) and they were mostly agreed on what the states should no longer be permitted to do. (5) Issues nevertheless did arise in the Convention which were subject

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1. Until it was abolished in 1865 by the passage of the Thirteenth Amendment.

2. Article I, Section 2, Clause 3; Article I, Section 9, Clause 1; Article IV, Section 2, Clause 3.

3. Article I, Section 2, Clause 3.

4. Congress should have (i) the power to levy and collect taxes, tariffs and excises; (ii) it should be able to coin and borrow money; (iii) it should be able to pay all debts contracted by the US before the adoption of the Constitution; (iv) it should be able to raise and maintain an army and a navy; (v) it should be able to regulate inter-state and foreign commerce, (see US Constitution, Article I, Section 8; and Hofstadter et al., 1964:74).

5. States should be forbidden to coin money; to make anything but gold and silver legal tender for the payment of debts; to make laws impairing the obligation of contracts; or to levy duties on imports or exports, (Article I, Section 10, US Constitution).

to considerable opposition and which were central to the maintenance of the system of slave production in the Southern states. As has been argued earlier, (1) slave production presupposes the legal institution of slavery, thus the new federal republican state must be made to guarantee the legal title to slave property. Thus, for the legality of claims to slave property to be upheld and effectively guaranteed, the slave-owning class must either be politically dominant or it must make alliances with classes not opposed to compromise over the slavery issue. Since the USA was in the process of establishing itself as a bourgeois democratic republic, the slave-owning class must, to be politically effective, have an effective majority in the representative institutions of the state. This majority, however, did not necessarily have to be a popular majority based on the votes of the citizens. In the USA, the dominance of the Southern slave party interest was made possible by a number of compromises made in the framing of the US Constitution.

One of the central issues to slave-owning interests and over which there was considerable conflict concerned the relative power of large and small states. After considering various plans, principally the Virginia Plan (2) which proposed a two house national legislature with membership allotted among the states in

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1. See Chapter 1 in particular.

2. Max Farrand (ed) "The Records of the Federal Convention of 1787", New Haven, Yale University Press, 1966 rev.ed., (originally published 1911) 1:20-22.

proportion to their population, thus favouring the larger states, and the New Jersey Plan [1] which proposed a single house where all states had one vote each, thus favouring the smaller states, the issue was resolved, after extended debate by the measure known as the 'Great Compromise'. [2] This plan proposed a two house legislature, with membership in the lower house, the House of Representatives, apportioned according to population (satisfying the large states), and with membership of the upper house, the Senate, equal for all states (satisfying the smaller ones). The House of Representatives was regarded as the 'people's branch' of government with members being elected by all eligible voters in each state. The state legislatures, in turn, were themselves to elect the members of the national Senate, to ensure the election of members most satisfactory to property interests. While the South expected to dominate the House of Representatives, the North looked to the Senate for its security, thus making this Great Compromise acceptable. [3]

The existence of the upper chamber, the Senate, based not upon numbers of electors but upon the fixed ratio of two Senators to each state, meant that by keeping the number of slave states at

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1. Ibid., 1:245.

2. Largely devised by Benjamin Franklin.

3. The Northwest Ordinance, in particular its provisions regarding the admission of new states from the Northwest territory, appeared to promote Southern interests in the House while protecting Northern interests in the Senate. Moreover, North as well as South could hope for the political allegiance of at least some of the Northwest states to be carved up (Lynd, 1968:203-210).

least equal to the number of free states, the slave party could maintain its bargaining powers. The South could also hope to dominate the House of Representatives if the Southern states could count slaves for the purposes of representation. Indeed, it was over the issue of the representation of slaves in Congress that another compromise, the 'Three-Fifths Compromise' was made. The issue was whether slaves should be counted in determining the number of representatives to which each state was entitled and in measuring the extent to which Congress could levy taxes on the several states.

The underlying legal issue was whether the slave was a person, and thus entitled to political representation, or chattel property, and as such entitled to be counted solely for the purposes of tax assessment. The representatives from the South wanted slaves to be fully counted in apportioning representation, but counted as less than free men in assessing taxes. The North wanted them to be given less weight only in apportioning congressional representation. Thus, while Georgia and South Carolina delegates demanded that for representation purposes, slaves should be counted equally with free persons, delegates from the North, ironically enough, argued that slaves were property and therefore not entitled to representation. Paterson of New Jersey said he could regard negro slaves "in no light but as property ... and if Negroes are not represented in the States to which they belong, why should they be represented in the Gen'l Govt?" (1) The compromise which was finally accepted, the

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1. Farrand, 1966 ed., 1:560.

'Three-Fifths Compromise' specified that for both taxes and representation, three negro slaves were to be counted as equivalent to five non-slaves. Thus, Article 1, Section 2, Clause 3 of the US Constitution reads:

> Representatives and direct Taxes shall be apportioned among the several States which may be included within this Union, according to their respective Numbers, which shall be determined by adding to the whole number of free persons, including those bound to service for a term of years, and excluding Indians not taxed, three-fifths of all other persons ... (emphasis added). (1)

Through this compromise, the slave states were guaranteed representation in the lower chamber far greater than was warranted by their free population. Indeed, in every election between 1790 and the Civil War, from a quarter to a third more representatives in Congress were given to the South than her free population entitled her to have.

A third major compromise, which assured increased political power for the South (for at least the foreseeable future), concerned the international slave trade and the return of 'fugitives from labour' (fugitive slaves). Opposition to the slave trade was more deep-seated among delegates to the

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1. The coalition of state voting which secured the three-fifths compromise at the Convention was not a combination of 'large states' but was rather an instance of the sectional pattern of Southern and Northern interests. If South Carolina is placed in the 'aye' column, despite its voting against to start with (because it wanted slaves counted as equal to free persons for representation purposes), then Virginia and the Southern states formed a solid block (Lynd, 1968:200).

Constitutional Convention than opposition to slavery itself. This opposition was not sectional in the sense of Southern versus Northern interests, but was based on a complex geographical division of economic interest. Georgia and South Carolina, who strongly opposed any restriction on the slave trade, had witnessed the ravaging of their plantations during the Revolutionary War and required assurance that they could build up their slave labour force for the developing rice economy and the beginnings of the production of cotton. To some extent, they were supported by Massachusetts and Rhode Island, states which were anti-slavery in terms of their own productive systems, though economically centrally involved in the slave trade as financiers, merchants, ship builders, captains and seamen. These interests were noted by General Pinckney, South Carolina, when, in the debate on this issue he contended that:

> The importation of slaves would be for the interest of the whole Union. The more slaves, the more produce to employ the carrying trade; the more consumption also, and the more of this, the more of revenue for the common treasury. (1)

The Constitutional debates on the slave trade centred on two questions: whether the Constitution would recognise the legality of the slave trade; and, if so, whether import duties should be imposed on slaves as with any other merchandise. On the first of these questions, South Carolina, North Carolina and Georgia

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1. James Madison, "Notes of Debates in the Federal Convention", Athens, University of Georgia Press, 1966 ed., 504.

were united in their view that any attempt by the federal government to outlaw the trade would make it impossible for these states to join the Union. Thus Mr Baldwin from Georgia noted that Georgia's physical distance from the seat of national government would:

> Preclude her from equal advantage and that she could not prudently purchase it by yielding national powers. From this it might be understood in what light she would view an attempt to abridge one of her favorite prerogatives [the right to slave labour]. (1)

In making the case for non-interference by the national government with the right to import slaves, these states argued that the slave trade and slavery were not national questions over which the national government had any power, but were strictly of a local nature. This view was upheld by certain Northern states, thus Mr Gerry of Massachusetts noted that the national government "had nothing to do with the conduct of the States to slaves" (2) and Mr Elsworth of Connecticut supported this view when he argued that:

> As slaves also multiply so fast in Virginia and Maryland that it is cheaper to raise than import them, whilst in the sickly rice swamps foreign supplies are necessary, if we go further than is urged, we shall be unjust towards South Carolina and Georgia. Let us not intermeddle. (3)

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1. Ibid., 505.
2. Ibid., 505.
3. Ibid., 504.

The slave trade was opposed by the Middle Atlantic states (New York, New Jersey, Pennsylvania, Delaware) who argued, for example, that:

> The true question was whether the national happiness would be promoted or impeded by the importation, and this question ought to be left to the National Government, not to the States particularly interested; (1)

and by Virginia and Maryland because the latter Southern states had depleted tobacco lands and surpluses of negro slaves and envisaged themselves as 'breeding' grounds for slave labour and thus able to supply slave labour at high prices. (2) Thus, Colonel Mason for Virginia could argue that the slave trade must be stopped and that the national government had the power to do so since, "by an inevitable chain of causes and effects, providence punishes national sins, by national calamities". (3) Pinckney, South Carolina, however, warned that outlawing the slave trade would mean "an exclusion of S. Carola from the Union" and noted that "as for Virginia she will gain by stopping the importations. Her slaves will rise in value and she has more than she wants". (4)

In the context of this kind of opposition, (5) Mr King of

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1. Ibid., Mr Dickenson (Delaware) at 506.

2. Ibid., 503.

3. Ibid., 503.

4. Farrand, 1966 ed., 3:371.

5. The Convention was united however in its opposition to integration of the negro in American society on any basis of citizenship.

Massachusetts suggested that "the subject should be considered in a political light only" and, in doing so, he focused on the second of the questions concerning the slave trade confronting the delegates, namely, whether import duties should be imposed on slaves.

Thus:

> He remarked on the exemption of slaves from duty whilst every other import was subjected to it, as an inequality that could not fail to strike the commercial sagacity of the Northern and middle states. (1)

The delegates from South Carolina, North Carolina and Georgia were, however, apparently prepared to agree to an import duty as long as the slave trade was regarded as legitimate, thus General Pinckney of South Carolina:

> Moved to commit the clause that slaves might be made liable to an equal tax with other imports which he thought right and which would remove one difficulty that had been started. (2)

Having reached this point in the debate on the slave trade Governor Morris, Pennsylvania, suggested that:

> The whole subject ... be committed including the clauses relating to taxes on exports and to a navigation act. These things may form a bargain among the Northern and Southern States. (3)

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1. Madison, 1966 ed., 506.
2. Ibid., 507.
3. Ibid., 507.

Delegates from the commercial North had urged that the federal government be granted full power to regulate interstate and foreign commerce and to make treaties which the states must obey. While the Constitutional Convention agreed on these points, the South, fearful of being out-voted in the new Congress, demanded that commercial regulations and all treaties require the consent of a two-thirds majority in the Senate rather than a simple majority. The Southerners were particularly concerned about taxes on exports, for they were heavily dependent on selling their tobacco and other staples in competitive world markets. The upshot of the debate on these provisions and the issue of the slave trade was reference to a committee of eleven delegates, the members of which represented Northern shipping interests and Southern slave holders. (1)

On the basis of the report of the committee of eleven, the Constitutional Convention negotiated the third major compromise. While the Northerners won their point on a simple congressional majority for acts regulating commerce, the South won the provision requiring a two-thirds vote in the Senate for the ratification of all treaties. The Constitution also prohibited all taxes on exports (2) and, by Article I, Section 9, Clause 1, it guaranteed that for at least 20 years there would be no ban on the importation of slaves:

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1. Madison, 1966 ed., 509.
2. Hofstadter et al., 1964:77.

> The migration or importation of such persons as any of the States now existing shall think proper to admit, shall not be prohibited by the Congress prior to the year 1808, but a tax or duty may be imposed on such importation, not exceeding 10 dollars for each person. (1)

A further aspect of this 'bargain' seems to have been the insertion of the fugitive slave clause, (2) under Article IV, Section 2, Clause 3 which reads:

> No person held to service or labour 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 labour, but shall be delivered up on claim on the party to whom such service or labour may be due.

The obligation to return fugitive slaves had already been established under the terms of the Northwest Ordinance and the clause adopted in the Constitution was virtually identical, (3) which arguably explains why, at the Constitutional Convention, this clause was inserted with very little debate, (4) despite Sherman of Connecticut's view that the Constitution could not be burdened with petty details concerning the return of stolen goods. (5) Ironically enough, as shall be discussed in Chapter 8,

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1. Note that this provision did not necessarily prohibit the slave trade after 1808. This drafting and its consequences are more fully discussed in Chapter 6.

2. Hofstadter et al., 1964:77.

3. See p.306 of this chapter.

4. Madison, 1966 ed., 552; Franklin, 1969:143.

5. Madison, 1966 ed., 510.

this provision regarding 'fugitives from labour', which was hardly discussed at the Convention, was not only the basis for two federal statutes concerning fugitive slaves, (1) but was also at the centre of the conflict prior to the Civil War over the legality of claims to slave property.

The Constitution then, and the federal laws enacted to secure its ends as 'the supreme law of the land', (2) was unambiguous about the issue of slave representation, the legality of the slave trade (at least for 20 years), and on the duty to catch and return a fugitive slave. By regarding slaves, in law, as three-fifths of other persons, Madison was able to comment that the Constitution recognised a dualism rather than a contradiction in law. Thus he argued that slaves were considered by the law:

> In some respects, as persons and in other respects as property. In being compelled to labor, not for himself, but for a master; in being vendible by one master to another master; and in being subject at all times to be restrained in his liberty and chastised in his body, by the capricious will of another - the slave may appear to be degraded from the human rank, and classed with those irrational animals which fall under the legal denomination of property. In being protected, on the other hand, in his life and in his limbs, against the violence of all others, even the master of his labor and his liberty; and in being punishable himself for all violence committed against others - the slave is no less evidently regarded by the law as a member of the society, not as a part of the irrational creation; as a moral person, not as a mere article of property. (3)

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1. The fugitive slave laws of 1793 and 1850, which are discussed in Chapter 8.

2. The Constitution also set up a federal judicial system, under Article VI, Section 2, topped by the US Supreme Court, and while it set up no specific provision for judicial review, Chief Justice Marshall established this (see Chapter 7).

3. Madison in Alexander Hamilton, John Jay and James Madison, "The Federalist Papers", New Rochelle, Modern Library edition, 1965:42:266.

The South then, had secured its political dominance, through Constitutional provisions and through a policy of compromise with Northern interests. Slave property right and bourgeois property right were clearly not, in essence, contradictory. The compromises and bargains struck between North and South showed no antagonism between capitalism and slavery, nor was there any obstacle in the way of the continuance of the Southern productive system based on slave labour. Indeed, as General Pinckney told the South Carolina House of Representatives in January 1788 in his speech urging ratification of the US Constitution:

> By this settlement we have secured an unlimited importation of negroes for 20 years. Nor is it declared that the importation shall be then stopped; it may be continued. We have a security that the general government can never emancipate them, for no such authority is granted; and it is admitted, on all hands, that the general government has no powers but what are expressly granted by the Constitution, and that all rights not expressed were reserved by the several states. (1) We have obtained a right to recover our slaves in whatever part of America they may take refuge, which is a right we had not before. In short, considering all the circumstances, we have made the best terms for the security of this species of property it was in our power to make. We would have made it better if we could; but, on the whole, I do not think them bad. (2)

All delegates to the Constitutional Convention were agreed that the system of government should be based on representing the

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1. The Tenth Amendment, passed in 1789, made this Constitutional Doctrine explicit. The first ten amendments were, in fact, to be regarded as the Federal Constitution's Bill of Rights.

2. Farrand, 1966 ed., 3:254-55.

interests of property and, as such, were able to frame a Constitution which assured the legality of both slave property right and bourgeois property right. And, to ensure that claims to slave property were upheld in the courts, legislation was instituted to implement the constitutional provision for the rendition of fugitive slaves. (1) In 1793 the first fugitive slave law was enacted to implement Article IV, Section 2, Clause 3, of the US Constitution. (2) The 1793 Fugitive Slave Law made clear just how 'fugitives from labour' could be reclaimed, thus Section 3 states:

> And be it so enacted, that when a person held to labor in any of the United States, or in either of the territories on the Northwest or South of the River Ohio, under the laws thereof shall escape into any other of the said states or territory, the person to whom such labor or service may be due his agent or attorney, is hereby empowered to seize or arrest such fugitive from labor, and to take him or her before any judge of the circuit 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 shall be made, and upon 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 person so seized or arrested doth, under the laws of the state or territory from which he or she fled, owe service or labor to the person claiming him or her it shall be the duty of such judge, or magistrate to give a certificate thereof to such claimant, his agent or attorney which shall be sufficient warrant for removing the said fugitive from labor to the state or territory from which he or she fled. (3)

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1. Following the slave insurrection led by Touissaint L'Overture, (see C.L.R. James, "The Black Jacobins", New York, Vintage Books, 1963) in 1791 on the Island of Santo Domingo, many negro slaves from the Caribbean escaped into the United States during the conflict in Haiti. This encouraged more slaves on the US plantations to escape, thus provoking the federal government to take action regarding fugitives in 1793.

2. To ensure that constitutional sovereignty would not be impaired by technicalities, the framers added an 'elastic clause' which enabled Congress, "To make all laws which shall be necessary and proper for carrying into execution the foregoing powers, and all other powers vested by this Constitution in the government of the United States, or in any department or officer thereof" (Article I, Section 8, Clause 18, US Constitution).

3. Act of February 12, 1793, Chapter 7, 1 Stat. 302 - my emphasis.

This law therefore required no trial by jury and required conviction as a 'fugitive from labour' only on an oral testimony of the claimant or on an affidavit certified by a magistrate of the state from which the negro was alleged to have fled. (1) As such, the Act was not only a manifestation in federal law of the constitutional guarantee of slave property right but was also to be used, as shall be discussed in Chapter 8, in critical litigation concerning slavery prior to the outbreak of Civil War.

CONCLUSION

In this chapter it has been argued that throughout the revolutionary and post-revolutionary periods, the process of deconstructing the slave status through Northern legal institutions and practices was paralleled by an antithetical trend in the South where the slave status as akin to chattel property was further refined and entrenched through the practice of law. This antagonism between North and South over the legality of slavery, an antagonism upheld under the new state constitutional frameworks, was not an antagonism of capitalistic versus slave systems but was rather symptomatic of the struggle for power as to which region's interests would predominate in the government of the USA. It was within this context that delegates from the Northern and Southern states met in 1787 to draft a national constitution which would be regarded as definitive of national governmental powers, and the

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1. Franklin, 1969:151.

primary task at the Constitutional Convention was to draft a document which all states could find acceptable. Such a task inevitably involved a prolonged process of negotiation where the commercial interests of the North were explicitly used as bargaining counters with the slave interests of the South.

In the event, through a series of compromises over slave property right subsequently embodied within the text of the US Constitution, notably that for representation purposes, slaves were to be counted as three-fifths of other persons, that the slave trade could not be prohibited for twenty years, and that fugitive slaves could be reclaimed from any part of the USA, a more effective legal guarantee to hold property in slaves was created than had existed prior to the birth of the new republican state. These constitutional provisions constituted a more effective basis within law upon which a slave mode of production in the South could fully develop since they guaranteed that, notwithstanding the different patterns of development occurring in Northern and Southern states, federal legal institutions and practices would ensure that slave property right was not only not under threat but was also, and more importantly, more firmly established throughout the USA. Indeed, as will be discussed in the following chapter, it was precisely this constitutional basis for the legality of claims to slave property which ensured the expanded reproduction of the slave system in the early 19th century.

CHAPTER 6 : LEGALITY AND THE EXPANDED REPRODUCTION OF THE SLAVE SYSTEM

INTRODUCTION

In the previous chapter it was argued that the legality of claims to slave property right was effectively established in constitutional law in the process of negotiating the form and nature of government for the USA. The guarantees to slave property under the US Constitution ensured that the federal republican state would defend the right to this kind of property, as it would any other kind of property, despite any measures individual states took with regard to the legality of slavery within their own boundaries. Thus, within the body of the new 'state' it was possible for a specialist agrarian commodity-producing region based on a slave mode of production to continue to exist, given that the new political and legal orders regarded slaves (labourers) as the legal property of masters (non-labourers). (1)

This developed form of chattel slavery, in which the slave was regarded as a variant of private property and where a system of exchange existed corresponding to this type of property, had developed in the South by the late 18th century and was dependent on the existence of private property as a general institution. From the late 18th century onwards, the Southern states were the major producers of cotton as a commodity to supply the demands of

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1. In their analysis of whether it is possible to construct the concept of a distinctively slave mode of production, Hindess and Hirst (1975:113) have argued that the master's relation to the slave is a proprietal one which is dependent on the existence of laws and a political order which makes the possession of human beings as chattels possible.

capitalist industrial production in both Europe and the Northern states. The South, as a specialist agrarian region, had firmly established its productive system on the basis of slavery and, by the turn of the 19th century, it was clear that the expanded reproduction of the Southern economy meant the expansion of slave production on plantations which produced agricultural commodities for sale on the national and international markets.

Many scholars, however, have argued that it was precisely in attempting to develop economically through a slave rather than a capitalist mode of production that the expanded reproduction of the Southern economy was limited since the slave mode of production resulted in economic backwardness in the South in relation to the capitalistic North and ultimately resulted in the break up of the Union and the Civil War. This reasoning, however, takes for granted what it fails to explain [1] and, given that, as was argued earlier, no necessary antagonism existed between the capitalist system in general and slavery in North America, where slave production appeared under specific conditions as a subordinate form to the capitalist mode of production, the development of the Southern economy could only have been limited by specific factors. These factors - the demand for the commodities produced in the South by the capitalist world market; the political and legal support for the expansion of the slave system;

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1. Thus, Genovese (1964; 1967; 1971) in particular assumes an opposition between capitalism and slavery and then explains the future conflict (the Civil War) in terms of this assumed opposition.

and the supply and price of slave labour power through the internal, domestic trade and the international trade - did not only not impose limits but, as will be argued in this chapter, positively encouraged the expanded reproduction of the Southern economy based on slavery in the early part of the 19th century.

The demand for the commodities produced in the Southern states, in particular the demand for cotton, was more or less insatiable in the world market. Thus, the years immediately following the close of the War of 1812, witnessed an unparalleled movement of the population westward into the Gulf region (1) to cultivate extensive crops of cotton on this rich soil. In Louisiana, (2) for example, cotton and sugar cane rapidly became the profitable crops of the slave holding planters. Numerous planters from the South Eastern states such as Virginia and South Carolina moved into the new lands of the 'Cotton Kingdom' following earlier, unsatisfactory, attempts to grow cotton in Virginia and North Carolina. While at the beginning of the 19th century the South Eastern states had grown most of the cotton, by the 1820s the South Central states were taking over. (3)

This geographical expansion of the plantation system into new lands in order to produce sufficient cotton to meet the demands of the world market can be attributed to a variety of conjunctural

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1. The lands of the Louisiana purchase sold by the French to the USA in 1803. The significance of these lands to the expanded reproduction of the slave system of production will be discussed in a later section of this chapter.

2. Which became a state in 1812.

3. Franklin, 1969:171-72.

factors. There is little doubt that the South suffered from serious soil exhaustion [1] and that the system of production which had developed in the Southern states required to expand itself geographically if it was to minimise the costs of production. To stay in the same lands, without geographical expansion, when these lands had experienced a significant fall in productivity due to soil exhaustion, would have meant additional expenditure in terms of labour time, technique and raw materials, to restore the level of productivity. In the absence of the monopoly possession of land, however, planters could work a particular piece of land until it was exhausted and then move on. The soil exhaustion experienced in the Southern states was therefore not simply a function of the particular labour system involved but was primarily a function of the fact that where land was cheap, planters, wanting to minimise the costs of production, would not engage in the conservation of land by more costly measures, such as crop rotation and fallowing, but would rather buy cheap new land. [2] Slave labour was the primary investment and to make use of this labour most profitably meant geographical expansion.

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1. See, Genovese, 1967:99, where he discusses the extent to which the effects of soil exhaustion are still manifest in the South. For example, in 1930, the South accounted for two-thirds of the tonnage of fertilisers consumed in the USA but represented only one-sixth of the nation's cropland.

2. Hindess and Hirst (1975:168-9) have thoroughly argued the point that soil exhaustion is primarily a function of the planter's relation to the land and the process of production and that such conditions and relations to the land are not specific to slave production but rather occur "wherever there is commodity production for the world market on a large scale in conditions where there is ample surplus land" (169).

The slave system of production, however, could only expand in this way into new territories if slavery could be both politically and legally guaranteed in these new territories. Indeed, it was within the context of the geographical expansion of the slave system in the early 19th century that the basis of the future conflict, which would eventually lead to the break up of the Union and Civil War, was established: a conflict not of capitalism versus slavery [1] but rather of slave holders who wanted to expand into the new territories and free settlers who wanted their own land. Only a presentiment of this conflict, which became critical in the 1850s, [2] was evident in the early 19th century when, with the expanded reproduction of the slave system, the federal republican state guaranteed and defended the legal title to slave property in at least some of the new territories. As will be discussed more fully in the next section of this chapter, throughout the first part of the 19th century the legality of expansion was firmly established despite some opposition and the planter class secured numerous concessions of territory to the slave system. Such territories included the lands of the Louisiana Purchase (1803), the Acquisition of Florida (1819) and, under the terms of the Missouri Compromise of 1820, the lands up to the

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1. The plantation economy of the South was closely allied with important sections of northern banking, commercial and industrial capital. For example, most of the marketing and carrying of the staple crops produced in the South was performed by New York and New England commission merchants, or 'factors', who also served, for an additional fee, as the planters' purchasing agents, (Hofstadter et al., 1964:155-156).

2. See Chapter 8.

parallel 36° 30′ North.

The expansion of the slave system, however, required not only land but also slaves. Expanded reproduction, then, required an adequate supply of slave labour, that is, it required a viable market in slaves as a commodity. And, for a viable market in slaves as a commodity to exist meant that there could be "no effective legal prohibition of the alienation of or the trade in slaves", (1) so that the slave had a value as a commodity hence in circulation. (2) Slave labour had to be capable of being bought and sold in the commodity market and, for an adequate supply of slave labour to be maintained in the Southern states this meant that there must be no effective legal prohibition on either the international or the internal, domestic slave trade. To supply the Southern plantations, in the early 19th century, with enough slave labour, breeding was either insufficient or impracticable (3) therefore the renewal of the labour force through the international slave trade was necessary in addition to the slaves bred in Virginia and Maryland.

In this chapter, it will be argued that in spite of the legal prohibition of the international slave trade from 1808

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1. Hindess and Hirst, 1975:141.

2. Hindess and Hirst (1975:128-138; 141-2) have argued that the slave must have a value in circulation if the central contradiction constitutive of the forces of production in the slave mode of production, that is, between the slave as a labourer and as a form of property, is to exist.

3. Breeding raises the price of slaves due to the cost of maintenance during the unproductive period and where the consumption of a slave's labour power is exhausted in less than a generation, breeding is not possible as a major source of supply.

onwards, [1] this legislation, and subsequent refinements were by no means effective. While by 1835 "the international slave trade had been legislated to death", [2] the effectiveness of the legislation depended on both the circumstances and motives surrounding the abolition of the international slave trade and the effectiveness of the system of law enforcement in relation to national and international law. As will be discussed later in this chapter, the 'legal technicalities' inherent in the federal legislation of the United States, the inadequate resources for policing the prohibitions, and the complexity at international law, were some of the critical factors which rendered any legislation in this area almost totally ineffective. Thus no real limitation to the expanded reproduction of the slave system, because of an inadequate labour supply, was imposed by the legislative prohibition of the international slave trade.

Moreover, the internal domestic trade in slaves was not prohibited and soon became an extremely profitable and well-organised trading activity in and of itself. In the economic reorganisation forced upon Maryland, Virginia and the Carolinas, at the turn of the 19th century with the movement into the Cotton

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1. Federal restrictions against the international slave trade were expressly forbidden (re the importation of slaves) by the US Constitution until the year 1808. Many abolitionists and anti-slavery reformers argued that by outlawing the international trade, slavery itself would gradually be abolished. This, of course, did not happen.

2. Warren S. Howard, "American Slavers and the Federal Law", New York, International Publishing Co., 1963:4.

Kingdom, slave trading took its place along with diversified farming as solutions to the problem of economic readjustment. Even before 1800 the domestic slave trade in Maryland and Virginia was well developed. States like South Carolina which had prohibited importations from Africa for a time, encouraged their citizens to purchase slaves from other states, thereby stimulating the domestic traffic considerably. The inter-state traffic thus became a profitable economic activity, and the consequent rising value of slave property had the effect of quietening any anti-slavery sentiment in Maryland and Virginia at the turn of the century. (1) With the official closing of the international trade in 1808, the domestic trade became even more profitable. By about 1815, around the time of the great movement of the population into the Cotton Kingdom, it had become a major economic activity in the country and the machinery for handling the domestic traffic in slaves developed rapidly. (2)

The significance of these developments in relation to the international and domestic trade in slaves is discussed more fully later in this chapter, but, despite the complexities involved, there is no doubt that an adequate supply of slave

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1. As was mentioned in Chapter 5, both Virginia and Maryland had suffered from an excess of slaves in the late 18th century, but the inter-state trade became highly profitable for them.

2. Franklin, 1969:175. Slave breeding was also practised on some scale in the states of the upper South such as Virginia and Maryland. In fact, slave breeding was one of the most approved methods of increasing agricultural capital. Breeding was fairly profitable and slave girls became mothers at about 13 years old. Bounties and prizes were offered for great proflicacy, and, in some instances, freedom was granted to mothers who had enriched their masters to the extent of bearing 10 or 15 children (Franklin, 1969:178).

labour was maintained and that a viable market in slaves as a commodity continued to exist. When Congress officially closed the international trade in 1808 there were approximately one million slaves owned in the country. And, while it is not possible from the records available to estimate what proportion were subsequently smuggled into the country and how many slaves were bred from slave populations already established from Virginia to Georgia, the fact that on the eve of Civil War there were approximately four million slaves owned in the South, demonstrates that the market in slaves as a commodity was maintained. Thus, the distribution of slaves to the units of production through the commodity market ensured that the status of the slave as a form of property and as a labourer was maintained.

As will be discussed in more detail in subsequent sections of this chapter, from the turn of the 19th century, the expanded reproduction of the slave system was made possible by the extremely rapid growth in the demand for commodities, in particular cotton, produced on Southern plantations, by the capitalist world market; by the South's maintenance of political dominance in the representative institutions of the federal republican state, thereby securing numerous cessions of territory to the slave power; and by the federal state's recognition of the legality of the internal domestic trade in slaves and its failure to make legislative prohibition of the international trade effective, thereby ensuring that the sources of slave labour were adequate to meet the demands of the slave system.

LEGALITY AND EXPANSION

As was argued in the introduction to this chapter, the expansion of slave production to new territories as opposed to forms of production based on free labour meant that slavery must be legally/politically guaranteed in the new territory. The purchase of Louisiana by the United States from France in 1803 almost doubled American territory, (1) and, at the same time, facilitated the expansion of cotton and sugar cultivation by the planters of the Southern States and the deepening entrenchment of the slave system in the region. (2) Prior to the Louisiana purchase, that area, whether in the hands of the French or the Spanish, (3) was already a centre of sugar cane cultivation. Slaves had been introduced by the Creole planters and by the late 18th century some were being brought into Louisiana from the Caribbean. The acquisition of Louisiana by France in 1800 (4) had greatly disturbed the United States, since in 1795 (5) the new republic had negotiated a satisfactory arrangement with Spain for the navigation of the Mississippi River. More than one third of the produce of the United States was transported via New Orleans. Thus, to ensure continued navigation of the river for

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1. Hofstadter et al., 1964:98.

2. Franklin, 1969:152.

3. France acquired the area from Spain in 1800 (Hofstadter et al., 1964:97).

4. Spain had held Louisiana from 1762-1800 (Hofstadter et al., 1964:97).

5. See Franklin, 1969:152.

western farmers, the United States purchased the territory from France. (1) This purchase also ensured a vast area for the expansion of the slave mode of production.

In the early 19th century the United States could thus appraise its unsettled western lands as one of its most valuable assets, particularly after the purchase of Louisiana. And, although many of the settlers in the 'frontier lands' were imbued with the revolutionary principles of liberty, this ideology was to be rendered ineffective by the power of the slave-holding class intent on securing new lands for the Cotton Kingdom. Moreover, the greater portion of the people who moved from the Atlantic Coastal states to the attractive lands of the Southern Gulf states were committed to slavery, (2) the migration of slaves with Virginian and Carolinian planters to the Kentucky and Tennessee regions in the 1790s (3) setting the pattern of the expanded reproduction of the slave mode of production in the 19th century.

The acquisition of Florida by the United States from Spain in 1819 led to a further expansion of the slave system. Shortly before the beginning of the War of 1812, the doctrine which came to be known as 'Manifest Destiny', summarised by Adams' statement

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1. There were several reasons for Napoleon's decision to sell Louisiana (see Hofstadter et al., 1964:97-98; Franklin, 1969: 152), but there can be little doubt that Napoleon's failure to crush the slave revolt led by Toussaint L'Ouverture in Haiti, was a significant factor (see James, 1963).

2. Franklin, 1969:166-67.

3. Although neither Kentucky nor Tennessee were actually states in 1790, migration was so rapid, that they soon qualified for statehood (Franklin, 1969:146).

that the absorption of all North America by the United States was "as much a law of nature ... as that the Mississippi should flow to the sea" (1) became increasingly expressed by slaveholders and Northern industrialists alike. The declared motivation behind expansionism was to extend the area of freedom - 'the Empire of Liberty'. Southern slaveholders who expounded this doctrine were able to contain the contradiction of slave owning at the same time as expounding the doctrine of Manifest Destiny by constructing an ideology which viewed the enslavement of blacks as essential to the white man's freedom. (2) With the acquisition of Florida, which now safeguarded slave owners against the possibility of losing slaves through their escape to Spanish soil, and the lands of the Louisiana purchase, the planter class had already secured a monopoly control of a vast amount of new territory acquired by the United States but effectively ceded to the slave system.

This rapid expansion of the slave system into new territory was temporarily interrupted by the controversy over the admission of Missouri. While it had been straightforward enough to guarantee the legality of claims to slave property in the new lands of Louisiana and Florida, the controversy over whether Missouri could be admitted as a slave state opened up the question of just how far the slave system could be allowed to extend. This "momentous

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1. As cited by Hofstadter et al., 1964:107.

2. A parallel argument was also made at a later stage in relation to the genocide of North American Indians - another manifestation of the notion of 'Manifest Destiny'.

question", wrote Jefferson in 1820, "like a firebell in the night, awakened me and filled me with terror". (1)

Under the terms of the Northwest Ordinance, (2) slavery had been legally prohibited in the Northwest Territory from 1787 onwards. The conflict over the extension of slavery occurred just beyond the Northwest Territory in the so-called Upper Louisiana Territory, whose settlers first applied for admission to the Union under the name of Missouri in 1818. In the House of Representatives, James Tallmadge of New York offered an amendment to the Missouri 'Enabling Act' which would prohibit the introduction of additional slaves into the new state, and further, that all children born of slaves in that region would be freed when they reached the age of 25 years. Although the Tallmadge Amendment narrowly passed the House of Representatives it was defeated in the Senate by 22 votes to 16, even though the number of free states outnumbered slave states 11 to 10 at the time the Amendment was proposed in 1819.

This deadlock over Missouri's admission carried over to the next session of Congress which opened in December 1819. Now, along with Missouri's petition for admission as a slave state, came Alabama's application also. There was no issue about the admission of Alabama as a slave state under the terms of the Northwest Ordinance, thus on December 14, 1819, Alabama entered

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1. Letter to John Holmes, April 22, 1820, cited by Billington et al., 1962:1:249-50.

2. Discussed in Chapter 5.

as a slave state and re-established the balance of power between slave and free states at 11 each. Missouri would have made a twelfth slave state, thereby giving Southern senators a virtual veto of all legislation enacted by a preponderantly Northern House of Representatives.

The Northern majority in the House therefore insisted on keeping Missouri closed to slavery. When the North Eastern part of Massachusetts applied for admission to the Union as the independent state of Maine, however, many members of Congress, led by Henry Clay, attempted to break the deadlock. In a series of measures, known as the 'Missouri Compromise', (1) they arranged for the temporary preservation of the balance of power in the Senate by admitting Missouri as a slave state and Maine as a free one. The most significant provision of the compromise permitted slavery in Missouri but prohibited it "forever ... in all territory ceded by France to the United States ... which lies north of 36° 30′ ... not included within the limits of [that] state". (2) The legality of slavery in Missouri was thus ensured by the terms of the Compromise of 1820.

Clearly then, in the first part of the 19th century, there

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1. As cited by Hofstadter et al., 1964:111.

2. President Munroe hesitated to sign the compromise measures on the grounds that the Constitution nowhere sanctioned the power to exclude slavery from a territory (Hofstadter et al., 1964:111). Ex-President Jefferson concurred in this view in his letter of April 22, 1820 to Senator John Holmes of Massachusetts, by noting that the issue of slavery was the "exclusive right of every state, which nothing in the Constitution has taken from them and given to the General Government", as cited by Billington et al., 1962:1:250.

were no political limits to the expansion of the slave system and the numerous concessions of territory to the slave power along with the federal republican state's guarantee to defend the legal title to slave property ensured the development of the Southern economy. Only in the controversy over the admission of Missouri as a slave or free state were there any signs of the sectional conflict which was to become explosive. This conflict was not a conflict between different economic systems but rather a conflict within the development of the new territory. With the development of new economic and productive interests in the early 19th century, in particular large scale manufacturing and inter-state transportation, new markets and the speedy exchange of commodities were created. Many yeomen were transformed into intensively commercial farmers producing wheat and corn in the Middle West, while the Southern planters produced cotton and the North Eastern farmers, dairy products. (1)

The struggle over the expansion of slavery into the hitherto unoccupied Western lands, such as Missouri, was not an opposition of slavery to capitalism but was rather a struggle over the right to occupy these lands which were the property of the federal republican state. Would the USA be governed by representatives of the planter class or not? At the centre of this struggle was a determination of the political representatives of the planter class to obtain a land monopoly thereby excluding

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1. Hofstadter et al., 1964:108-114.

the free farmers who wanted to settle in the same regions. This was not however evidence of any essential contradiction between slave property right and bourgeois property right. After all, the property of the free farmers of the North Eastern states was not threatened by the existence of slave property right - the two were interdependent and co-existent. What it was evidence of was a struggle which would continue up to the outbreak of Civil War, that is, whose interests were to be paramount in the government of the USA.

Paradoxically enough, in the struggle over who would rule the USA, the political representatives of the planter class made several notable attempts from the 1820s into the 30s to gain the support of the West. From the 1820s on the West had campaigned for cheap public lands and for the protection of the 'squatter' who claimed government land before it had been officially opened to settlement. The squatter who had improved his land during his 'illegal' tenure, demanded the right to buy it at the minimum rate when it was finally placed on the open market. But even the minimum rate of $1.25 seemed excessive to many and Senator Benton of Missouri proposed, in 1824, that unsold government land be reduced gradually to 75 cents an acre and then to 50 cents. If no takers appeared, he argued, the lands should be given away free. This proposal, known as 'graduation' was resisted by Easterners who regarded it as likely to reduce the supply of wage labourers thereby forcing wage costs up, (1) but political

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1. Easterners suggested that the West should be closed altogether for a time and that any future sales should be limited to lands already on the market.

representatives of the slave holding South supported Benton in the hope that they could achieve the support of the West in attempting to destroy the protective tariffs which favoured Eastern manufacturers and industrialists. (1)

By a Tariff Act in 1824, Congress had raised the duties on a number of key manufactures and these duties were further raised by an Act of 1828. The political representatives of the South (2) had argued that the 1828 tariff reduced the South to a state of serfdom to Northern industrialists since they were forced to pay exhorbitantly for Northern manufactures or manufactured imports from Europe. Europe had reacted against the American tariffs by raising their own against Southern rice and cotton. The Southern attitude was summed up by Vice-President Calhoun himself when he argued that no free government would permit the transfer of "power and property from one class or section to another", (3) and suggested that this tyranny of the majority could be neutralised by the constitutional right of each state to nullify an unconstitutional Act of Congress. This doctrine of nullification expounded in the South was held to be against the principles of sovereignty upon which the federal republican state had been created. No single state had the right to determine whether or not an Act of Congress was constitutional.

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1. Hofstadter et al., 1964:121-122.

2. Vice-President Calhoun published anonymously an anti-tariff essay in 1828 (Hofstadter et al., 1964:122).

3. As cited by Billington et al., 1962:1:265.

A struggle between the South, and South Carolina in particular, and the Congress ensued but the West did not support nullification theory and in 1833 when a new Tariff Act was passed, which reduced duties gradually, South Carolina withdrew her nullification ordinance. (1)

This failure of the South to gain the support of the West over the issue of the nullification of federal action however only served to intensify the South's aggressive policy over the expansion of slavery into the Western lands. Arguably the South perceived it as necessary to use its effective political dominance in the institutions and apparatuses of the federal republican state to ensure that sufficient lands could be secured for the expanded reproduction of the Southern economy. In managing to achieve this in the early part of the 19th century, notwithstanding the conflict over the admission of Missouri, the South also managed to maintain its effective political dominance in the USA by keeping the number of slave states at least equal to the number of free states.

LEGALITY AND THE TRADE IN SLAVES

If the expanded reproduction of the slave system required that the federal republican state guaranteed and defended the

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1. This ordinance was passed in South Carolina a few months earlier - November 1832. It ordered the legislature to prohibit the collection of duties in state ports and asserted that the use of federal forces to collect duties would be followed by secession. See, Cooper and McCord (eds) 'Statutes at Large of South Carolina', Nullification Ordinance, 1832, Vol.1:329-331.

legal title to slave property in new territories it also required, as was argued earlier, that a viable market in slaves as a commodity was maintained. For such a market to have existed there must have been no effective legal prohibition of the trade in slaves as commodities, thus ensuring that an adequate supply of slave labour was maintained.

Many of the anti-slavery reformers and abolitionists in both Britain and North America, in campaigning for the abolition of the international slave trade, had hoped that abolition would lead to the death of slavery itself. (1) Slavery itself, however, could not be seriously damaged (if at all) unless the legal prohibitions on the international trade were effective and the internal domestic trade in slaves could be stopped. However, both the circumstances and motives surrounding the abolition of the international slave trade and the effectiveness of the system of law enforcement in relation to national and international prohibition created the situation in which there was effectively no obstacle to the expanded reproduction of slave labour in terms of the international trade nor was there any legal prohibition of the domestic trade.

Federal restrictions against slave importation were, as was discussed in Chapter 5, expressly forbidden by the US

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1. See, for example, Patrick Medd, "Romilly: A Life of Sir Samuel Romilly: Lawyer and Reformer", London, Collins, 1968; and Samuel Romilly, "The Life of Sir Samuel Romilly", eds. His Two Sons, London, John Murray, 3rd ed., 1842, for a discussion of the British view; and Loren Miller, "The Petitioners", New York, Pantheon Books, 1966; for a discussion of this view in the USA.

Constitution until the year 1808 (1) (Article I, Section 9, Clause 1). While this constitutional prohibition was regarded as a major concession to Southern interests, some Southern states voluntarily prohibited slave importation by state statute before and after the ratification of the US Constitution. (2) In 1783 Maryland prohibited the importation of negro slaves as did South Carolina in 1787. The South Carolina law was renewed from time to time until 1803 when it was repealed on the grounds that it was unenforceable. (3)

The fact that there were prohibitory state laws in the South reflects the somewhat curious dilemma in which the slave interests found themselves. On the one hand, Southern planters required an adequate supply of slave labour to cultivate cotton as the slave system expanded into new territories, yet on the other, the South feared the wholesale importation of slaves for a number of reasons. DuBois, for example, places considerable emphasis on the fear in the South of slave insurrections. In commenting on the role of Toussaint L'Ouverture's uprising (which began in Haiti in 1791) DuBois comments, "... A waive of horror and fear swept over the South, which even the powerful slave traders of Georgia did not dare withstand ...". (4) And

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1. See, in particular, pp.312-316 supra.

2. Many Northern states had done this earlier of course - see Chapters 4 and 5.

3. Franklin, 1969:140.

4. W.E.B. DuBois, "The Suppression of the African Slave - Trade to the United States of America, 1638-1870", New York, 1896:70-71.

Phillips argues that "the distinctively Southern considerations against the trade were that its continuance would lower the prices of slaves already on hand, ... that it would so increase the staple exports as to spoil the world's market for them; ... (1)

No doubt there were a number of complex reasons for the prohibitory state laws but there is also no doubt that these laws were totally ineffective. In defiance of local laws, New England traders carried on a large traffic while Southern planters were willing to receive slaves from whatever source possible. Thus, despite prohibitory state laws, in both Northern and Southern states, the international slave trade to the US continued.

The first federal statute which attempted to regulate the slave trading activities of the United States was passed on March 22, 1794. (2) In substance this statute made the fitting out, building or preparation of an international slave ship in the US a criminal offence subject to fine and forfeiture of the slave vessel. Theoretically, the impact of this statute would be to curtail New England shipbuilding activities in support of the international trade, but since the statute did not seek to prohibit other American involvement in slave trading the legislation was

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1. Phillips, 1966:133-34.

2. Act of March 22, 1794, Chapter 11. This legislation was "the first action against the trade by any nation", (Howard, 1963:3).

arguably a political move to placate abolitionist elements [1] and the general public concern over any further rise in the slave population (and the fear of insurrections).

The Act of 1800 prohibited American citizens from carrying negroes for sale from one foreign country to another and gave commissioned United States vessels the right to seize vessels operating illegally. [2] In spite of a good deal of debate over slavery, this measure to strengthen the 1794 regulation of American participation in the international trade was passed by a vote of 67 to 5 in the Congress. [3]

A further federal statute passed in 1803 placed policing activities in the hands of customs officers and collectors. Although this legislation provided a federal penalty for violations of state laws on importations and Section 1 of the Act provided informer bounties, it appears that public knowledge of such bounties was at best limited. The following extract from a report made by a customs collector on May 22, 1817 indicates that the practice of giving out informer bounties was so uncommon that even those responsible for policing the trade were ignorant

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1. See Jordan, 1968:327; regarding the impact of petitions from Abolition Societies to the Congress prior to the Act of 1794.

2. This legislative action against the slave trade by Congress in 1800 followed the introduction of a petition by representative Robert Waln, a wealthy Philadelphia Quaker. The petition asked for a restriction of the slave trade, modification of the fugitive slave law passed by Congress in 1793, and also expressed hope for eventual, general emancipation (Jordan, 1968:325-330).

3. Jordan, 1968:380.

of the bounty provision in the 1803 Act:

> Collector Bullock. He reported, May 22, 1817: I have just received information from a source on which I can implicitly rely, that it has already become the practice to introduce into the state of Georgia, across the St Mary's River, from Amelia Island, East Florida, Africans, who have been carried into the Port of Fernandina, subsequent to the capture of it by the Patriot army now in possession of it ...; were the legislature to pass an act giving compensation in some manner to informers, it would have a tendency in a great degree to prevent the practice; as the thing now is, no citizen will take the trouble of searching for and detecting the slaves. I further understand, that the evil will not be confined altogether to Africans, but will be extended to the worst class of West India slaves. (1)

For a customs collector to suggest that legislative provision for giving bounties to informers should be made 14 years after such provision exists in statute, suggests that such bounties were rarely given out. (2)

When South Carolina reopened her ports to the legal importation of slaves in 1803 (by an Act repealing previous legislation which prohibited slave importations) the anti-slavery forces began to press for action. Resolutions were introduced in the following Congress condemning the slave trade but no conclusive steps were taken. In December 1805, Senator Bradley of Vermont introduced a Bill to prohibit the slave trade after January 1, 1808, but, after a second reading, consideration of

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1. Historical Records, Doc. No.42, 10-11, 16 Cong. 1 Sess. 111 (1818) - my emphasis.

2. This interpretation is supported by material cited in DuBois, 1896:108-109; and Howard, 1963:320.

the measure was postponed. In February 1806 Representative Bidwell of Massachusetts introduced a similar measure but again nothing was done. In his message to the Congress, December 2, 1806, President Jefferson called the attention of the Congress to the approaching date on which the slave trade could be prohibited. He suggested that measures be taken to "prevent expeditions to Africa that could not be completed before January 1, 1808". (1)

On March 2, 1807, the law prohibiting American involvement in the African slave trade was passed, after heated debate on every provision in the Bill between representatives of the slave holding and non-slave holding states and interests, and most of the voting on the specific provisions was sectional in character. (2) Persons convicted of violating the Act were to be fined and imprisoned. The fines ranged from 800 dollars for knowingly buying illegal negroes to 20,000 dollars for equipping a slaver. The disposition of the illegally imported negroes was left to individual state legislatures. Finally, the Act gave the President authority to order US naval cruisers along the US coast to intercept illegal slavers.

From the beginning the law went unenforced and while some Southern states passed the supplementary acts concerning the disposal of illegally imported negroes, others did not even

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1. As cited by Franklin, 1969:153.

2. Franklin, 1969:154.

construct this appearance of attempting to follow the federal law - they enacted no supplementary legislation at all. Where supplementary laws were enacted, providing for the sale of illegally imported negroes, the proceeds were to be paid into the public treasury and to the informer.

The constantly shifting responsibility for the enforcement of the law prohibiting American involvement in the international slave trade and the importation of slaves also made it unlikely that the legislation would be effective. As DuBois observes:

> It is noticeable, in the first place, that there was no especial set of machinery provided for the enforcement of this act. The work fell first to the Secretary of the Treasury, as head of the customs collection. Then, through the activity of the cruisers, the Secretary of the Navy gradually came to have oversight, and eventually the whole matter was lodged with him, although the Departments of State and War were more or less active on different occasions. Later, ... the Department of the Interior was charged with the enforcement of the slave trade laws. It would indeed be surprising if, amid so much uncertainty and shifting of responsibility, the law were not poorly enforced. (1)

The legislative drafting of the 1807 statute also contributed to the ineffectiveness of enforcement. From the wording, it was assumed that most of the policing activities would take place in the various US ports or along the coast where vessels would attempt to unload directly into US jurisdiction. Such an assumption about how to enforce the prohibition can only be

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1. DuBois, 1896:108-9.

regarded as a deliberate evasion given the methods used to smuggle slaves into US territory. Consider the following account of smuggling activities:

> ... I was offered a chance to accompany one of the consignees on a land trip during which our negroes were to be sold. The kaffle in charge of negro drivers, was to strike up the Escambia river and thence across the boundary line into Georgia, where some of our wild Africans were mixed with various squads of native blacks and driven inland until sold off, singly or by couples, on the road. At that time the United States had enacted laws declaring the African slave trade illegal, but the Spanish possessions were thriving on the inland exchange of negroes and mulattoes. (1)

Moreover, the scarcity of records on enforcement operations in US ports suggests that the legislation was of marginal effect. (2)

A further Act passed in 1818 again relied on informers in order to prosecute offenders. A factor which made the informer prosecution mechanism of enforcement particularly ineffective was the fact that the informer was not anonymous. In order to collect his bounty he was forced to publicly expose himself, and, as reported to Congress in July of 1818, informing could be a very dangerous occupation. (3) And, while Section 4 of the Act of 1819 sought to correct this 'technical defect' in the legislative drafting, by protecting the informant's identity from public disclosure, the problem remained of there being no immunity from prosecution for the informant should he be involved in the illegal

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1. Dow, 1927:238.

2. Howard, 1963:318.

3. Historical Records, Doc. No.100, 9, 15 Cong. 2 Sess VI (1818).

activity. Finally, although the Act of 1820, which was the most severe slave trade Act of any nation, made any US citizen who was a crew member of a ship involved in the slave trade liable to be adjudged a pirate, with piracy being punishable by death, there was again a singular lack of enforcement.

Given the ineffectiveness of this legislation and the fact that, after the official closing of the international slave trade from 1808, the domestic internal trade became more developed, it is hardly surprising that the Southern slave system experienced no difficulty in procuring an adequate supply of slave labour for its expanded reproduction. In Maryland, Virginia and the Carolinas, the domestic trade took its place along with diversified farming. Many business firms that dealt in farm supplies and animals frequently carried a 'line' of slaves and auctioneers who disposed of real estate and personal property sold slaves along with the other commodities. Slave breeding was also common in the upper South and the slaves in these centres were often shipped to the Cotton Kingdom via the Atlantic Ocean. The prices of slaves in the domestic trade reflected all the forces operating to create supply and demand. In the early 19th century the prices were modest and, as the demand increased in the lower South with the expansion of the slave system, the prices on both the Northern and Southern markets tended to rise. Slave trading and hiring were integral and essential parts of the economic and social fabric of the South and New England shipbuilders and masters, Middle Atlantic merchants, and Southern planters all consistently

ignored federal and state legislation. (1)

Any US legislation against the international slave trade was also largely ineffective owing to the complexities involved in enforcing the law at an international level. The multi-national character of the African slave trade made the enforcement of domestic statutes outside of coastal jurisdictional limits extremely complex. For example, a slaving vessel could be built in the US, sold in Cuba, manned by a multi-national crew and be of Spanish registry. Ownership and registry of slave vessels could be altered as often as necessary to suit the requirements of any situation.

The British, following the Act to Abolish the Slave Trade of March 25, 1807, (2) were the first to send out naval patrols into international waters and along the coast of Africa to intercept slavers. This Act provided for the forfeiture of vessels owned by British residents or citizens engaged in the trade. To

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1. Franklin, 1969:152-54; 175-82.

2. 46 Geo. 3. c. 36. Britain, "the world's foremost slave trader for generations" (Howard, 1963:3), finally outlawed the trade in 1807 and became a leading advocate of international suppression. Despite the fact that this Act was passed after a dedicated abolitionist campaign (see, for example, Romilly, 1842, Vol.2), it should not be forgotten that in relation to domestic issues the abolitionists were certainly not radicals (see, for example, Williams, 1966:178-196), and moreover that the evolution of moral opposition to the slave trade was by no means the sole or even the most significant factor in explaining abolition of the slave trade. By 1807 the West Indian British colonies had acquired a sufficient population of slaves. Limitation of British participation in the trade would protect the West Indian colonies against an excessive concentration of slaves and, at the same time, deny to Brazilian and Cuban planters one source of slaves. British merchants and industrialists also wanted to rationalise the conditions of trade with Africa (Howard, 1963:3-5).

enforce the Act, two British naval vessels, one frigate and one sloop, were ordered to patrol some 3,000 miles of African coast. By 1847 this number had expanded to 1 six rate man'o war, 22 sloops and brigs and 7 steam vessels - some 30 vessels in total. (1)

In order to establish an effective policing effort which could overcome legal obstacles to enforcement, Britain made treaty arrangements with various nations involved in the trade. For example, in 1814 in the Treaty of Ghent (which ended the War of 1812) the United States agreed with Great Britain to "use their best endeavours" for the abolition of the trade. (2) Similar arrangements were made with Russia, Prussia, Austria and France in 1815, and in 1817 Britain and Portugal made a treaty allowing each country the mutual right to search merchantmen. A similar treaty was made between Britain and Spain in 1820. Under these treaties, prize courts of mixed commissioners were established at convenient ports (3) in order to adjudicate the legal issues. (4)

For this policing effort to be effective required not only a more or less constant vigilance by the navies involved in patrolling the African coast but also an agreement to permit mutual rights to search amongst the nations involved. The United

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1. See, C. Lloyd, "The Navy and the Slave Trade", London, Collins, 1949, Appendix.

2. American State Papers, Foreign, III, No.271:735-48.

3. Sierra Leone, St Helena, Barbados, Loando, Rio de Janiero, Surinam and Havana (Howard, 1963:18).

4. It should be emphasised, however, that neither Spain nor Portugal had outlawed slavery in their colonies.

States, however, refused to permit British cruisers to board and search American vessels. The US argued that this position was necessary because of the British naval practice of impressment, that is, the policy adopted by the British Navy of impressing into service, during times of war, crew members of American merchantmen who were of British origin. (1) Thus, while the treaty arrangements with other nations provided for a mutual right of search, the fact that the US was not a signatory to this kind of agreement meant that international efforts to suppress the African slave trade through naval operations were likely to be particularly ineffective. Slavers could avoid being searched by simply hoisting an American flag thus making them legally immune from search by any foreign navy and at no risk of search from the American Navy since the US had no navy patrolling the vicinity. (2) Even when the US finally sent its own patrol of 5 ships into the area, this made little difference. Since the US had not agreed to the treaties, the US Navy could not search foreign vessels. As a consequence of this, the slavers would carry flags of several nations thus, if an American naval vessel approached, the slaver would hoist a Spanish or other foreign flag, and if a British vessel approached, the slaver would hoist the American flag. The issue of registry of the

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1. The negotiation of Jay's Treaty in 1794 was an unsuccessful effort to abolish this practice which was also an issue in the War of 1812 (Hofstadter et al., 1964).

2. See M. Mannix and D. Crowley, "Black Cargoes", London, Macmillan, 1962:200-1.

vessel was irrelevant in this situation since the navy in question could not board in the first place in order to demand a showing of registry. (1)

In addition to this kind of difficulty created by the international character of the trade, there were many practical difficulties involved in detecting slaving vessels. For example, most of the seizures were likely to be made when the vessel was en route to the African coast (2) or following the coast in search of slaves since the ship made all possible speed to leave the patrolled area once its holds were filled. Nevertheless, an empty slaver could be detected as such, once boarded, as there were distinctive signs of slave trade involvement. For example, slavers generally carried disproportionate amounts of food, water and medicine; there was a slave deck or at least planking that could be used to construct one; and slavers also tended to have larger crews to guard the slaves as well as shackles and other immobilising devices. (3)

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1. For examples of these practices and detailed accounts, see Mannix and Crowley, 1962:201; Howard, 1963:74.

2. From the evidence available it appears that most seizures were in fact made when the slavers were empty (see Mannix and Crowley, 1962; Howard, 1963).

3. See United States v The Isla de Cuba, 26 F. Cas 554 (No.15, 449) (DC Mass. 1860). In this case the Court found that these 'signs' were sufficient evidence in determining whether a vessel was intended for the slave trade - it found the explanation of the amounts of supplies, planking and iron rods, unconvincing and said that they provided conclusive evidence. For a discussion of the extent of these practices, see Mannix and Crowley, 1962:205.

Sometimes, however, auxiliary vessels were used to carry the necessary equipment and cargo to use in slaving operations. This practice, in and of itself, was not illegal thus the slaver was only subject to risk when loading and carrying back its contraband. (1)

If the purpose of the United States federal legislation was to prohibit American involvement in the slave trade and to prohibit importation then much depended on the effectiveness of enforcement at international level. The effectiveness of enforcement depended on the status of the slave trade under international law and the appropriate powers and rights of nations to control the involvement of their citizens and citizens of other nations in the international slave trade. In the case of The Antelope (2) the US Supreme Court demonstrated the lack of coherence and consistency surrounding the issue of the status of the slave trade at international law. The Antelope case came, on appeal, to the US Supreme Court from the Circuit Court of Georgia and the principles at issue were based on allegations filed by the Vice-Consuls of Spain and Portugal claiming certain Africans as the property of subjects of their nations.

Briefly, the factual background to the Antelope case began when a privateer, called the Columbia, sailing under a

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1. Howard, 1963:22. On the use of whaling vessels, see United States v The Augusta, 25 F. Cas 892 (No.14) 477.

2. 23 US 66 (1825):112-132.

Venezuelan Commission obtained a crew of mostly American citizens from Baltimore in 1819, and proceeded to sea under the Artegan Flag, renaming itself the Arraganta. Off the coast of Africa the Arraganta captured an American vessel from which she took 25 Africans; and she captured several Portuguese vessels from which she also took Africans; and she captured a Spanish vessel, the Antelope, from which she took a further considerable number of Africans. The Arraganta and the Antelope sailed in company to off the coast of Brazil where the Arraganta was wrecked and Metcalf, the Master, and many of his crew in the Arraganta were made prisoners and transferred, with armaments, to the Antelope. The Antelope, thus armed and under the command of John Smith, a US citizen, was renamed General Ramirez and, on board this vessel were all the Africans captured by the Arraganta in the course of her voyage. The General Ramirez (Antelope) was found off the US coast by the revenue cutter Dallas under the command of Captain Jackson and was brought into the port of Savannah, Georgia, for adjudication. At the time of her capture there were "upwards of two hundred and eighty" (1) Africans on board.

On their arrival, the vessel and the Africans were libelled and claimed by the Portuguese and Spanish Vice-Consuls reciprocally. They were also claimed by Smith as captured jure belli. They were claimed by the US as having been transported from foreign parts by American citizens, in contravention to the

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1. 23 US 66 at 112.

laws of the US, and as entitled to their freedom by those laws and by the law of nations. Captain Jackson, Master of the revenue cutter, filed an alternative claim for the bounty given by law if the Africans should be adjudged to the US; or to salvage, if the whole subject should be adjudged to the Portuguese and Spanish Consuls. The Circuit Court [1] of Georgia dismissed the libel and claim of John Smith; they dismissed the claim of the US except as to that portion of the Africans which had been taken from the American vessel; and the residue were divided between the Spanish and Portuguese claimants. Since some of the Africans had died and no evidence was adduced to show which had been taken from which vessels, the Court declared a proportionate share-out thus designating 16 "by lot" of the original 25 to the US.

In the appeal before the US Supreme Court the US asserted no property in the Africans but insisted on their right to freedom, whereas the Consuls of Spain and Portugal demanded the Africans as slaves obtained through "legitimate commerce" and acquired "as property" by subjects of their respective sovereigns. Thus, Chief Justice Marshall characterised the basic conflict presented by The Antelope as the conflict between "the sacred rights of property". [2]

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1. A federal court. For a discussion of the federal court structure, see Chapter 7.

2. 23 US 66, 114. Note that throughout the report on The Antelope case there are numerous references to the "Africans which" - when the issue is re property - and "Africans who" - when the issue is re liberty.

In considering what the legal limits to the international slave trade were, the US Supreme Court cited judicial precedents [1] which held that the legality of the capture of a vessel engaged in slave trade depends on the law of the country to which the vessel belongs. Thus, The Amedie, [2] which was an American vessel involved in the slave trade captured by a British cruiser, was held to be unlawfully involved in the trade because "the laws of the claimant's country allow of no right of property such as he claims"(slaves). The same principle was affirmed in The Fortuna. [3] However, in The Diana, [4] a case involving a Swedish vessel, captured with a cargo of slaves by a British cruiser, the ship and cargo were restored on the principle that the trade was allowed by the laws of Sweden. In The Louis [5] a British cruiser had captured this French vessel on a slaving voyage before she had purchased any slaves. On appeal to the Court of Admiralty in England, the principle was laid down that the right of search was confined to a state of war except against pirates but slave trading was not piracy nor was the slave trade contrary to the law of nations. Thus, the right of visitation and search could not be exercised on the vessels of a foreign power, unless permitted by treaties.

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1. The precedents relied on were all British cases.
2. 1 Acton's Rep. 240.
3. 1 Dodson's Rep. 81.
4. 1 Dodson's Rep. 95.
5. 2 Dodson's Rep. 238.

The reasoning in this case went on to suggest that, in British Courts of Admiralty, the vessel of even a nation which had forbidden the slave trade, but had not conceded the right of search, must, if wrongfully brought into a prize court for adjudication, be restored to the original owner. The Louis was returned to the French owners.

It was against this particular background that the central issue confronted in The Antelope case, that is, the question of the precise status of the slave trade at international law, was before the US Supreme Court for the first time. Chief Justice Marshall answered this question by arguing that the legal solution was to be found:

> In those principles of action which are sanctioned by the usages, the national acts, and the general assent of that portion of the world of which [the jurist] considers himself as a part, and to whose law the appeal is made. If we resort to this standard as the test of international law, the question ... is decided in favour of the legality of the slave trade. (1)

Marshall argued that every nation sanctioned this "commerce" and that the right to participate in it remained lawful to those nations who had not relinquished it. Recognising the perfect equality of nations at international law and relying on the British precedents to argue that the slave trade was not piracy, Marshall concluded that:

> It follows, that a foreign vessel engaged in the African slave trade, captured on the high seas in time of peace, by an American cruiser, and brought in for adjudication, would be restored. (2)

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1. 23 US 66, 121.

2. Ibid., 123.

Other Supreme Court Justices, however, dissented from this view and the Court, being equally divided, did not offer any binding principles to resolve the status of slavery at international law. For this reason, that is, because the practice of the Supreme Court is to affirm the decree of a lower court when the Justices are equally divided in their view of the appeal, the order of the lower court directing restitution to the Spanish (1) claimants of the Africans found on board The Antelope was affirmed.

The Court, however, still faced the problem of determining the particular Africans subject to restitution under the decree of the lower court. The Court, in adjudicating between "the sacred rights of liberty and property" were only concerned that the Spanish receive a proportionate number of Africans in restitution for those on board The Antelope prior to its capture by the Arraganta. The question of liberty versus slavery for individual Africans was deemed irrelevant. The Spanish were awarded a proportionate share and "all the remaining Africans are to be delivered to the United States to be disposed of according to law", (2) that is, to be transported back to Africa pursuant to the Act of 1819, (or to be sold and the funds paid into the public

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1. No Portuguese subject appeared to assert title to his property in any of the Africans - the appeal being 5 years after the original plunder, led the Court to hold to the view that the real owner belonged to another nation.

2. 23 US 66, 132.

treasury). Thus, even with the official outlawing of the slave trade in 1807, the US Supreme Court could, in 1825, still regard African slaves as items of property capable of being restored to Spain or held by the US in proportion to the original quantity of the 'slave cargo'.

In another case decided on appeal to the US Supreme Court in 1825, The Plattsburgh [1] the issue of the legality of the slave trade at international law was simply evaded by citing The Antelope as precedent in the arguments of counsel, and by the fact that a lower court, the Circuit Court for the Southern District of New York, had determined the present case exclusively upon the facts respecting the alleged sale of the Plattsburgh and change of voyage. The libel was founded on several Acts of Congress for the prohibition of the slave trade, in particular, the Slave Trade Acts of 1794 (Chapter 2) and 1800 (Chapter 205). In delivering the opinion of the US Supreme Court, Mr Justice Story argued that the whole case turned upon the question of fact, that is, whether the voyage to Africa [2] was originally undertaken from the United States or whether it was undertaken by the claimant, a Spanish subject (Mr Marino), from Cuba, after having made a bona fide purchase of the ship altogether unconnected with the original enterprise. The Court held that the Plattsburgh was equipped in the US for the slave trade and that even if the facts did not support

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1. 23 US 66 (1825):133-146.

2. The Plattsburgh was seized by a US vessel prior to obtaining any slave cargo.

this, it was acting in concert with the auxiliary, the Eros, which carried the necessary supplies etc. Moreover, the asserted purchase by Marino could not be proven and even if it could, under the Act of 1794, if a vessel was prepared in the US for participation in the slave trade, then it was forfeited no matter who the current owner was. Thus, the US Supreme Court held that "the reality of the asserted sale to Marino is not established by the proofs, and our conclusion is, that the unlawful enterprise had its origin in Baltimore". (1) The Plattsburgh was forfeited and Marino's claim dismissed.

The case of The Amistad, (2) however, did confront most of the central issues of legality involved in the international slave trade. (3) The litigation in this case began in the lower courts of Connecticut and the current case before the US Supreme Court was an appeal from the decree of the Circuit Court of the district of Connecticut (sitting in Admiralty).

On 27 June 1839, the Schooner L'Amistad, (4) "being the property of Spanish subjects", left the Port of Havana, Cuba,

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1. 23 US 66, 146.

2. United States, Appellants v The Libellants claimants of the Schooner Amistad, her tackle, apparel and furniture, together with her cargo, and the Africans mentioned and described in the several libels and claims, Appellees, 40 US (15 Pet) 518 (1841).

3. This case is also the most famous/infamous reported on concerning the international slave trade. Contemporary with the decision, it received international reporting and within the US it became "a trial of one president by another" with John Quincey Adams for the alleged slaves (the Mendis), President Martin Van Buren siding with the slave interests (see, William A. Owens, "Black Mutiny", New York, International Publishing Co., 1971: foreword by Wesley A. Hotchkiss, vii-xi).

4. L'Amistad means The Friendship - a singular irony.

for Puerto Principe, Cuba. On board were the master, Ramon Ferrer, Jose Ruiz and Pedro Montez, all Spanish subjects. Ferrer had a negro boy with him, "claimed to be his slave". Ruiz had forty-nine negroes with him, "claimed by him as his slaves, and stated to be his property, in a certain pass or document, signed by the Governor-General of Cuba". Montez had four other negroes with him, claimed as his property as slaves in a similar pass or document. (1)

On the voyage, and before the arrival of the vessel at her port of destination, the negroes rose, killed the master and took possession of L'Amistad. On 26 August, 1839, the vessel was discovered by Lieutenant Gedney of the US brig Washington at anchor on the high seas about half a mile from Long Island shore. The vessel, with the negroes (2) and the other persons on board, was brought into the district of Connecticut by Lieutenant Gedney, and was libelled for salvage in the District Court of the US. On 18 September 1839 Ruiz and Montez filed claims and libels in which they asserted their ownership of the negroes as their slaves (and of certain parts of the cargo). (3) On 19 September 1839 the attorney of the US for the district of Connecticut filed an information or libel explaining that the

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1. 40 US (15 Pet) 518.

2. Lieutenant Gedney had found some negroes on shore - he seized them and took them back on the vessel.

3. Various other claims and libels were filed re salvage and cargo but these will not be discussed since they are not of central importance to the legal issues involved in the case re slave trading.

Spanish minister had officially presented, to the proper department of the Government of the US, a claim for the restoration of the vessel, cargo and slaves, as the property of Spanish subjects, pursuant to the Treaty of Spain with the United States of 1795 - if the claim was legally well-founded. (If, however, it appeared that the negroes were transported from Africa in violation of the laws of the US and brought within US jurisdictional limits contrary to the same laws, then the Spanish minister asked that the court make an order to remove the negroes to the coast of Africa under US law. This second part of the first US libel was removed in the second libel filed by the attorney of the US on 19 November).

Vega, the Vice-Consul of Spain for the state of Connecticut, filed his libel on 19 November 1839 claiming that Antonio was a slave, the property of the representatives of Ferrer (the master of L'Amistad who had been killed). This libel asked that Antonio be delivered to the Vice-Consul so that he might be returned to his lawful owner in Cuba.

On January 7, 1840, the negroes, namely Cinque and others (with the exception of Antonio), filed an answer denying that they were slaves or the property of Ruiz and Montez, or that the latter:

> Could under the constitution of the laws of the US, or under any Treaty, exercise any jurisdiction over their persons, by reason of the premises offered and praying (1) that they might be dismissed. (2)

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1. "Praying" means asking - terminology used in the libels.

2. 40 US (15 Pet) 521-2.

In this answer the negroes insisted that they were native born Africans, born free and not slaves; that they were unlawfully kidnapped in April 1839 and forcibly taken on board a certain vessel on the African coast unlawfully engaged in the slave trade; that they were unlawfully transported in the same vessel to Cuba where they were unlawfully sold as slaves; that Ruiz and Montez made a pretended purchase of them and that "without law or right" they were placed on board L'Amistad to be transported somewhere and there to be enslaved for life. They took possession of L'Amistad with the intention of returning to Africa or to "seek asylum in some free state". (1)

The District Court gave its judgment on 23 January, 1840. This included various decrees on salvage and cargo but the important decrees in relation to the legal issues involved in the slave trade were:

(i) it dismissed the libels and claims of Ruiz and Montez, with costs, as being included under the claim of the Spanish minister;

(ii) it allowed the claim of the Spanish Vice-Consul, for Antonio, on behalf of Ferrer's representatives;

(iii) it rejected the claims of Ruiz and Montez for the delivery of the negroes (but admitted them for cargo);

(iv) and it rejected the claim made by the attorney of the

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1. 40 US (15 Pet), 522.

> US on behalf of the Spanish minister for the restoration of the negroes under the 1795 Treaty but it decreed that the negroes should be delivered to the President of the US to be transported to Africa, pursuant to the Act of 3 March, 1819. (1)

From this decree, the district attorney on behalf of the US appealed to the Circuit Court of Connecticut except so far as related to the restoration of the slave Antonio. No appeal was made by Ruiz or Montez, nor on behalf of the representatives of owners of L'Amistad. The Circuit Court, by a pro forma decree, affirmed the decree of the District Court, and from that decree, the present appeal was brought to the US Supreme Court.

The only parties before the US Supreme Court then were, on the one side, the United States, intervening for the sole purpose of procuring restitution of the property, as Spanish property, pursuant to the Treaty of 1795, and, on the other side, as appellees, the negroes (2) (Cinque and others) asserting themselves, in their answer, not to be slaves but to be free native Africans kidnapped in their own country and illegally transported by force from that country, and now entitled to maintain freedom.

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1. Ibid., 523.

2. Lieutenant Gedney was also an appellee on his libel for salvage - this is not discussed here as it is not central to the issues.

The central issue before the Court was whether the negroes were the property of Ruiz and Montez and ought to be delivered up to the Spanish minister. It had been argued by the US, that the Court were bound to deliver the negroes up, according to the Treaty of 1795 with Spain which had been continued in full force by the Treaty of 1819. The Treaty with Spain provided:

> That all ships and merchandize ... which shall be rescued out of the hands of any pirates or robbers, ... shall be brought into some port of either state ... in order to be taken care of and restored, entire, to the true proprietor, as soon as due and sufficient proof shall be made concerning the property thereof. (1)

On this ninth article the US placed reliance for the restitution of the negroes and for the case to be brought within this article required the establishment of the following facts:

(i) that the negroes fell within the description of merchandise in the sense of the Treaty;

(ii) that the negroes had been rescued on the high seas out of the hands of pirates and robbers, which, could only be established by showing that the negroes themselves were pirates and robbers; and

(iii) that Ruiz and Montez, the asserted proprietors, could establish their title by competent proof.

In relation to (i), the Court argued that if the negroes were lawfully held as slaves under the laws of Spain, and recognised

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1. 40 US (15 Pet), 527.

"as property", then, within the terms of the Treaty, they must "be included under the denomination of merchandize". However, on point (iii) the Court argued that from the facts it was clear that the negroes never were the lawful slaves of Ruiz, Montez or any other Spanish subject, but that they were kidnapped from Africa in violation of the laws and treaties of Spain against the slave trade. Thus Ruiz and Montez had no competent proof of ownership, and the negroes, not being slaves, could not be regarded as merchandise. Moreover, if they were not slaves but were kidnapped Africans, then there could be no pretence that on point (ii) they could be regarded as kidnappers or robbers. (1)

Thus, on the facts, the Court argued that the negroes were not the property of Ruiz and Montez and could not be delivered to the Spanish minister. However, the US had also argued that:

> The ship and cargo, and negroes, were duly documented as belonging to Spanish subjects, and this court /[had]/ no right to look behind these documents; that full faith and credit is to be given to them; and that they are to be held conclusive evidence ... even although it should be established ... that they have been obtained by the grossest frauds ... upon the constituted authorities of Spain. (2)

The Court, however, argued that while public documents of a Government, accompanying property found on board of the private ships of a foreign nation, was deemed <u>prima facie</u> evidence of the

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1. 40 US (15 Pet), 528-30.

2. Ibid., 530.

facts they purported to state, they "are always open to be impugned for fraud" and if fraud was established then it destroyed such documents as proof. At international law a ship's papers were "but prima facie evidence" and, if shown to be fraudulent, they were not proof of any valid title. The documents which Ruiz and Montez used to assert their proprietory interest in the negroes were fraudulent thus "these negroes ought to be deemed free" and the Court ordered for provision to be made to return them to Africa. (1)

Thus, although in 1841, thirty four years after the official closing of the international slave trade, some native born Africans who had been kidnapped in the trade were declared legally free in The Amistad case, it is clear from the arguments and consideration of the legal issues involved that these Africans gained their freedom because no proof could be offered that they were the legal property of any Spanish subject, and, not being slaves, they could not be legally considered 'merchandize'. (2) If proof could have been offered that they were legally purchased as slaves, then the conclusion follows that they would have been regarded as merchandise which could be bought, sold or transported anywhere at

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1. Ibid., 534. These negroes, accompanied by a few white missionaries, on board 'The Gentleman' (a ship procured by the Amistad Committee) did, in fact, return to Africa. On landing back in their native territory, Cinque and the other Mendis (negroes) found their tribe decimated by inter-tribal warfare, and, by yet another twist of fate, Cinque turned procurer for the slave trade (see Wesley A. Hotchkiss, foreword, xi, in Owens, 1971).

2. Under the terms of the 1795 Treaty as discussed earlier.

the owner's will. Moreover, the fact that this particular case excited so much national and international attention in 1841 [1] only underlines the earlier argument in this chapter that the legislation aimed at outlawing the international slave trade was, to any significant extent, ineffective.

With the demand for slaves increasing in the 19th century and the prices going up, merchants and traders continued to engage in the slave trade, despite its closure by federal legislation in 1807. The long unprotected coast, the certain markets and the prospect of immense profits, [2] coupled with all the loopholes in the legislative and enforcement efforts, ensured that the trade would continue. It was generally known and admitted that American capital, American ships and American sailors were carrying on an extensive slave trade between Africa and the New World. Almost every year witnessed an appeal of the President or some public leader for a more rigid enforcement, but nothing was done, nor could flagrant violation be used to create opinion to bring action against those profiting from the trade. In this instance, there was no evidence of any sectional conflict: New York merchants as well as those of New Orleans were

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1. For a detailed and interesting account of L'Amistad and the circumstances, nationally and internationally, surrounding it, see Owens, 1971.

2. The balance sheet of the ship, La Fortuna, which was fitted out in 1827, indicates the profitability of slave trading. Total expenses reached 39,980.46 dollars; total returns equalled 81,419.00 dollars (77,490.00 dollars from the proceeds of 217 slaves). Net profit equals 41,438.54 dollars. It is interesting to note, that under expenses, the following appears: "Government officers at 8 dollars a head ... 1,736.00 dollars" (see Howard, 1963:236).

benefiting from the trade. (1)

CONCLUSION

Throughout the first part of the 19th century then the slave power was able to engage in a self-conscious movement for the expanded reproduction of the slave system. Despite legislative attempts to outlaw the international slave trade, these attempts were almost wholly ineffective and, even in those rare instances, such as L'Amistad, where Africans were freed, (2) there was no threat to the trade in slaves as long as it could be proven that the negroes in question were, in fact, the legal property of someone. Moreover, as was also noted earlier, the internal domestic trade in slaves was quite legal and flourished in the first part of the 19th century. Taken together, it is clear that the domestic trade and the ineffectiveness of attempts to outlaw the international trade, ensured that a viable market in slaves as a commodity was maintained and that an adequate supply of slave labour for the expanded reproduction of the slave system was ensured. This supply of labour, coupled with the assurance of the legality of claims to slave property in the new

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1. Franklin, 1969:182-83.

2. In the L'Amistad case, when arguing before the US Supreme Court on behalf of the Africans, John Quincy Adams (former US President) said: "The moment you come, to the Declaration of Independence, that every man has a right to life and liberty, an inalienable right, this case is decided. I ask nothing more on behalf of these unfortunate men, than this Declaration", Argument of John Quincy Adams, Before the Supreme Court of the US, Appellants v Cinque and Others, Africans, Captured in the Schooner L'Amistad, by Lieutenant Gedney, reprint edition, New York, Negro Universities Press, 1969:89.

territories ceded to the slave power under the terms of the Missouri Compromise, the Acquisition of Florida, and the lands of the Louisiana Purchase, and the national and international demand for the commodities, in particular cotton, produced on the Southern plantations, promoted the full-scale development and expansion of the Southern economy based on slavery in the first part of the 19th century.

The consequences of this expanded reproduction for the legal regulation of the slave system in the 19th century South are discussed in the next chapter. Indeed, it was within the context of this fully developed slave economy that legal institutions and practices exerted their own unique effects in containing the apparent contradictions inherent in the legal recognition of both property and personality in the chattel slave. This containment of contradiction was accomplished within law through the development of a special form of Southern pleading in terms of the master/slave relation when, for example, the criminal responsibility of slaves was at issue: a form of pleading which was compatible with the property aspect of slavery.

CHAPTER 7 : PROPERTY OR PERSON : THE CHATTEL SLAVE IN LAW

INTRODUCTION

> The prisoner [a slave] is a human being, degraded indeed by slavery, but yet having 'organs, dimensions, senses, affections, passions', like our own.
>
> Gaston, J. in State v Will. (1)

> It will be the imperative duty of the Judges to recognise the full dominion of the owner over the slave ... All this we do upon the ground, that this dominion is essential to the value of slaves as property.
>
> Ruffin, J. in State v Mann. (2)

In the previous chapter it was argued that, despite the official closure of the international slave trade from 1808 onwards, there were no effective limits to the expanded reproduction of the slave system during the first part of the 19th century. The legality of the internal domestic trade and the ineffectiveness of legislative attempts to control the international trade in slaves guaranteed an adequate supply of slave labour. This supply of slave labour, coupled with the assurance of the legality of claims to slave property in the new territories ceded to the slave power (3) and the national and international demand for the commodities produced on the Southern plantations positively encouraged the rapid development and expansion of the Southern

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1. 18 NC 121 (1834).

2. 18 NC 268 (1828).

3. The lands of the Louisiana Purchase; the Acquisition of Florida and the territory granted under the terms of the Missouri Compromise.

economy based on slavery in the first part of the 19th century.

Indeed from the turn of the 19th century the slave system of production expanded as rapidly as the wider acceleration of international capitalism. (1) The first agricultural staple produced in the South was tobacco and the first slave labour plantations were devoted to growing the leaf in tidewater Virginia and Maryland. After 1800, the tobacco culture spread westward across the upper South, and by mid-century this newer area was raising more tobacco than the old. Other Southern staples which could be profitably grown on plantations were rice and sugar, though these were grown only in limited regions where soil and climate permitted. However, by 1820, the South's cotton crop had become more valuable than all its other crops combined. By 1835 the cotton culture had spread from the seaboard into the new lands of the Gulf states, and by 1850 the Gulf area had become the greatest cotton growing region in the world. (2)

Paralleling this expansion was a dramatic expansion in the slave population. In 1790, for example, there were less than 700,000 slaves, whereas by 1830 there were well over 2 million. (3)

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1. R.W. Fogel and S.L. Engerman, "Time on the Cross: The Economics of American Negro Slavery", New York, Wildwood House, 1974, demonstrate conclusively that the slave system was economically viable and efficient as a productive investment, comparing favourably with other forms of agriculture.

2. Hofstadter et al., 1964:154.

3. By 1860 this figure had increased to over 4 million (Franklin, 1969:186).

Given the immense productivity of the large plantations [1] and the fact that only about a quarter of the whites in the South were slave-holders at all, and of these, approximately 90% fell into the category of being small slave-holders (owning 20 slaves or less), it is hardly surprising that the social and political influence of large owners was enormous. [2]

This accelerated development of the Southern slave system demonstrates that the impact of legislation directed towards controlling the international slave trade was of no material consequence in relation to the ownership of slave property. Nevertheless, as will be discussed in this chapter, the turn of the 19th century and the official closure of the international trade do mark the beginnings of a new 'mature' phase of the Southern slave system. The implications of the closing of the international slave trade (however ineffective the legislation in this area was to be) and of the domestic expansion of the slave system coupled with the tensions occasioned by the practice of slavery in a nation, at least ideologically committed to liberty, [3]

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1. Missippi, Alabama, Louisiana and Georgia, the states at the top of the list in the number of large slave-holders, produced the majority of the cotton crop.

2. Franklin, 1969:185-187; and Hofstadter et al., 1964:151-2.

3. Southerners such as Thomas Jefferson and James Madison had assisted in forging an American liberal philosophy in the late 18th century which posited not only the inalienable rights of life, liberty and the pursuit of happiness but also the legitimacy of insurrection if men were deprived of these rights.

tended to curb the level of exploitation of slaves [1] and led to some attempts to conserve their labour power.

Thus, while the federal state, in its constitutional form, had undertaken to guarantee the security and legal title to slave property, [2] the nature of this guarantee was by no means consistent in either legal definitions or practices. Where the slave system of production was developing, as in the lower South in the late 18th and early 19th centuries, regulatory laws were being enacted which were in force in the ordinary courts or through specially constituted slave tribunals where the guilt or innocence of slaves was adjudicated. At the same time, these same courts asserted that a slave could not be party to a suit of law; he could not testify; [3] his irresponsibility meant that his oath was not binding thus he could make no contracts; and his ownership of property was generally forbidden. [4]

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1. At the same time, slaves became increasingly subject to control over every facet of their lives. All over the South, a body of laws, known as the Black Codes, began to emerge in the late 18th into the early 19th century. This body of laws, aimed explicitly at protecting the ownership of slave property, and covered every aspect of the life of the slaves. For a discussion of the Black Codes, see Franklin, 1969:187-189.

2. This was discussed in Chapter 5.

3. Except against another slave or a free negro.

4. See, for example, Franklin, 1969:188.

In law, the chattel slave [1] is clearly a contradictory being - as a chattel, the slave is denied legal personality, yet in being held responsible for his actions by the criminal law, the slave is accorded the attributes of a legal subject. [2] Moreover, the value of the slave, as property, as a chattel, depends on the fact that, while being denied the status of a legal subject (such as the chattel definition involved), the slave, of necessity, must have many of the attributes of a human subject, such as the capacity to act under supervision and so on.

This necessary recognition of the human aspect [3] of the chattel slave posed the specific problem of how law could

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1. For an excellent discussion of the conception of the chattel slave in Roman private law, in its differentiation between things (res) and persons, and the issue of legal personality, see Hindess and Hirst, 1975:110-112. See also, W.W. Buckland, "The Roman Law of Slavery", Cambridge University Press, 1970:3-6. It must be emphasised however that the legal form of slavery in North America, did not grow out of Roman Law but rather out of Anglo-Saxon traditions (see Chapter 2). For a discussion of the colonial forms of slavery in Latin America which grew out of Roman Law traditions, see S. Elkins, "Slavery: A Problem in American Institutional and Intellectual Life", Chicago, University of Chicago Press, 1968 ed.; F. Tannenbaum, "Slave and Citizen", New York, Random House, 1947; and Degler, 1971.

2. See Davis, 1975, for his discussion of the chattel slave as a "man-thing", a concept which he uses to describe the contradiction between man as subject and as chattel.

3. The contradiction between subject and thing inherent in the legal status of chattel slave is also evidenced by the fact that laws were, from time to time, created in order to mitigate some of the excessively harsh treatment of slaves (see Chapter 4). While, as Stampp, 1956, has argued, many of these laws were ineffective because of technical drafting where, for example, a slave might 'accidentally' die after being 'rightly' punished by his master, or because of lack of enforcement the fact that such laws were passed at all is a recognition of the slave as more complex than a simple chattel.

attribute both property and personality to the same legal status. As will become evident in the subsequent discussion in this chapter, Southern legal institutions and practices developed their own unique form of legal reasoning to accommodate these apparent contradictions, a form of reasoning absent in Northern states and from which the latter's legal institutions and practices would diverge, ultimately leading to a conflict in law requiring resolution through the legal institutions and practices of the federal republican state. (1)

This form of legal reasoning which was able to uphold the slave system and regard the legal rights of property in slaves as paramount, was most clearly articulated in relation to the criminal law (2) where issues of criminal responsibility were central to the protection of slave property in that owners had to be protected from criminal damage to their slaves and from their slaves disturbing the 'public peace' and so on. When dealing with the issues of the alleged criminality of slaves or the commission of criminal acts against slaves, Southern courts evaded the issue of personality by arguing from the institutional arrangements of slavery. In other words, issues of guilt, innocence, provocation and the like, were decided on in terms of the legal nature of the master/slave relation, not in terms of the alleged acts or omissions

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1. See Chapter 8 for a discussion of this conflict in law.

2. This contradiction was referred to in Chapters 3 and 4 concerning the colonial period. Indeed, the creation of the special negro courts to deal with the criminal offences of slaves clearly demonstrates some recognition of legal personality.

of the individuals concerned. Slaves and other persons could be viewed as criminally liable through reference to the institutional conditions of slavery and through analogising with other relations such as those of lord/villein; master/apprentice; and parent/child.

In this way, Southern legal institutions and practices were able to create a form of legal reasoning which could contain any apparent contradictions inherent in the legal status of chattel slave and which could, at the same time, regulate the kinds of protections to be given to slaves which would ensure their value as property without giving them legal rights which might threaten the slave system. Thus, in the cases discussed in this chapter it is clear that common law protection was attributed to the slave status when deciding on property rights, but when the 'human' rights of slaves were at issue, common law protection was denied by arguing that slavery, being unknown at common law, (1) had been created by positive law and that any rights accruing to slaves as persons were therefore wholly predicated upon statutory law. One status in the relation, the master, was protected by the common law as well as any statutory enactments, whereas the other was dependent on statute alone for any legal rights.

Nevertheless, whatever the contradictions in both definition and practice in the process of negotiating this cultural artefact,

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1. The English precedent of Sommersett, 20 How. St. Tr. 1, discussed in Chapter 2, was extensively relied on for this argument.

this chapter illustrates that both the legal institutions and practices of the Southern states in the first part of the 19th century and those of the federal republican state regarded the slave, in the last instance, as property not subject. Despite the fact that the issue of the expansion of the slave system was a contestable question between Northern and Southern states, throughout the first period of the 'rule of law', 1800-1835, established under the auspices of the US Supreme Court, (1) the property interest in slaves was consistently upheld and freedom suits consistently denied.

During this early part of the 19th century, the US Supreme Court was presented with a number of instances in which a ruling could have been made which would limit the expansion of the slave system. The Court was presented with various opportunities where the freedom of an individual 'slave' could have been declared but it consistently exercised its discretion in favour of upholding the system of slavery. This pattern, however, was established in the same period that the US Supreme Court played a particularly active role in expanding its power to decide on constitutional issues in other areas. In a number of cases before

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1. See this chapter, p.415, Note 1, for the constitutional establishment of the US Supreme Court under Article III of the US Constitution.

the US Supreme Court, Chief Justice Marshall [1] demonstrated that the Court was not concerned about whether or not its opinions offended some powerful interests in the country, while reserving for the federal judiciary broad powers in adjudicating rights of citizens, states and the federal government. [2]

Yet despite this expansion of its power, the US Supreme Court made no fundamental rulings in any of the slavery cases before it but simply reiterated and emphasised that the legal title to slave property was guaranteed in constitutional as well as state law, thus maintaining and containing the tension between the ideology of liberty upon which the new states had been founded and the continuing practice of slavery. The system of slave production was not only more firmly entrenched and expanded in the Southern states throughout the first part of the 19th century, but was also given an effective guarantee in constitutional law by a

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1. Practically every historian of the US Supreme Court has called Marshall one of the ten great judges to preside there. See, for example, A. Beveridge, "The Life of John Marshall", Houghton Mills Co., 1916; Charles Warren, "The Supreme Court in United States History", Vol.1, 1789-1821, Boston, Little, Brown and Co., 1923; and Pollak, 1966.

2. For example, in Marbury v Madison, 1 Cranch 137 (1803), a case which "represented the determination of Marshall and his associates to interfere with the authority of the executive" (Warren, 1923, Vol.1:4), Chief Justice Marshall announced the Court's power to declare Acts of Congress (federal statutes) unconstitutional, a doctrine which became perhaps the most fundamental decision in the American system of federal constitutional law. In deciding a number of other cases - Fletcher v Peck (6 Cranch 87, 1821); McCulloch v Maryland (4 Wheaton 316, 1819); Sturges v Crowninshield (17 US 122, 1819); Dartmouth College v Woodward (17 US 518, 1819); Cohen v Virginia (6 Wheaton 264); Gibbons v Ogden (9 Wheaton 1, 1824); and Ogden v US Bank (22 US 738) - Chief Justice Marshall further expanded the authority of the Court while limiting the scope of the states by setting aside state laws as contrary to the US Constitution.

consistent exercise of discretion in favour of affirming the legality of claims to slaves as items of private property, thereby ensuring that the basis of the Southern economy was consistent with the process of capitalist development throughout North America.

CONFLICT WITHIN THE LEGAL STATUS : COMMON LAW v STATUTE

As was mentioned earlier, the contradictory nature of the chattel slave in law is perhaps most clearly evident in relation to the criminal law. In the 19th century South, when legal institutions confronted the issue of the commission of criminal acts against slaves, conflict arose over whether or not to afford legal protection to slaves because they were human beings or because of the property interest of the owner. In making these decisions, courts were faced with the issue of whether or not the common law could be applied to slaves. If it could, then this could provide a doctrinal foundation for the recognition of other aspects of the legal personality of the slave under the common law, in particular, the right to basic procedural fairness in criminal proceedings, unless common law protection was very carefully limited to the particular case and to specific aspects of slavery.

The question of whether or not there could be an application of the common law to the slave was not only a question of doctrinal right but was also a question of which institutions would be effective in shaping the status and conditions of the slave. If it was asserted that there could be no application of

common law to the status of slavery, then the issues surrounding the development and nature of slavery would be determined by slave owners and legislatures (when the latter chose to intervene). In this case the role of the courts would be restricted to the interpretation of legislative enactments and cut off from the tradition of judge made common law. On the other hand, if the courts did establish that there could be an application of common law to the condition of slavery, then the courts could assert their own specific institutional effectivity in relation to the development of slavery.

Nash has argued that an appreciable volume of litigation concerning the "personal rights of slaves" did not reach the appellate courts [1] of the Southern states until the end of the 18th century and it was, therefore, not until the early years of the 19th century that these courts had occasion to consider, "the first and most fundamental question of black criminal jurisprudence: Did the slave fall under the protection of the

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1. The courts of the individual states and of the Federal Government are divided into two principal branches - trial and appellate courts. With very few exceptions, all lawsuits, both civil and criminal, begin in the trial courts by the filing of a complaint in civil actions or by indictment or information in criminal actions. Following final judgment in the trial court, a party may seek review in an appellate court of the rulings of law which he challenges as incorrect. Unless, however, he alleges that the evidence relied on in the trial court was legally insufficient, a party may not appeal the accuracy of the findings on fact. In some states there are two levels of appellate court - intermediate and ultimate. The courts of record in the Federal system are the US District Court (the trial court), the Court of Appeals, and the United States Supreme Court (see p.415, Note 1 for detail on the federal system).

common law ...". [1] While the answer of the South Carolina Supreme Court, for example, was unequivocal:

> There can be ... no offense against the State for a mere beating of a slave ... The peace of the State is not thereby broken; for a slave is not generally regarded as legally capable as being within the peace of the State; [2]

other Southern states witnessed the development of an application of common law protection, albeit inconsistently applied. In the discussion of the cases which follow, it will become clear that apparent inconsistencies in the application of common law to the status of slaves can be attributed in part to the degree to which courts attempted to reconcile the formal contradictions between the ideological basis of the North American republican state and the legal recognition of slavery and its effective guarantee by that state, coupled with their ability to develop a special form of legal reasoning which, arguing from the institutional arrangements governing the master/slave relation, limited the application of common law to the property aspect of the slave status.

For example, in the case of State v Boon, [3] which was decided before the North Carolina Supreme Court in 1801, the issue of whether or not statutory or common law should be applied in the

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1. A.E. Keir Nash, "Fairness and Formalism in the Trials of Blacks in the State Supreme Courts of the Old South", in 56 University of Virginia Law Review, 1970:67.

2. State v Maner, 22 SCL, 453-5 (1834).

3. 1 N.C. Taylor, 246 (1801).

case of the killing of a slave by a third party [1] (not the owner) was confronted. The lower court had found Boon guilty of murdering a slave under an Act of 1791 which stated that:

> If any person shall be hereafter guilty of wilfully and maliciously killing a slave, such offender shall upon the first conviction thereof be adjudged guilty of murder, and shall suffer the same punishment as if he had killed a free man, any law, usage or custom to the contrary notwithstanding. (2)

The judge in the lower court had directed the case to the Supreme Court to obtain the latter's opinion on whether any, or what, punishment could be inflicted on Boon. Adopting a strictly constructionist view of the enacting clause, Judge Hall for the Supreme Court argued that, because the phrase "as if he had killed a free man" was subject to differing interpretations depending on the circumstances of the killing, he was unable to inflict any punishment on Boon, "without using a discretion and indulging a latitude, which in criminal cases, ought never to be allowed a Judge". [3]

The State [4] had also argued, however, that independent of any legislative Act the offence with which Boon was charged was a felony at common law. Judge Hall denied the applicability of the common law to the case of slavery because, he argued, no such

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1. When I refer to a "third party" I am referring to a person who does not stand in any particular relationship to the slave. The significance of this will become apparent as my argument develops.

2. 1 N.C. Taylor, 246.

3. Ibid., 248.

4. When I use "State" with a capital "S" I am referring to the party in a litigation.

status of slave existed in England, nor was there any resemblance in law between villenage and slavery since villeins had legal rights whereas slaves did not. Moreover, the fact that various Acts had been passed, in particular those of 1741, [1] 1774 and 1791, in relation to the killing of slaves suggested that the offence was not a felony at common law. [2] If it had been, Hall argued, there would have been no need to pass legislation. For these reasons Judge Hall had "little doubt" that Boon must be discharged.

While Judge Macay, relying solely on the statute, argued that Boon must be discharged, and Judges Johnston and Taylor agreed with the verdict on the grounds that the language of the 1791 Act was open to interpretation, these latter two judges also argued that the killing of a slave was murder at common law. There was, however, no need in State v Boon to rule on the issue of the applicability of common law to the status of slaves since all judges agreed about the lack of clarity in the 1791 statute and chose to premise their verdict on that basis.

However, the question about the protection of a slave under the common law was not to be evaded in another case before the

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1. This statute, dealing with the circumstances in which slaves might be killed (runaways, for correction etc.), stated that civil damages could be claimed by the owners. To sustain this action, said Hall, slaves must be considered as chattels.

2. On the relationship of the English Common Law to post-revolutionary development of law in the United States, see Perry Miller, "The Life of the Mind in America: From the Revolution to the Civil War", New York, 1965. See also Chapter 2 for a discussion of villenage and its relevance to the common law debates re slavery.

North Carolina Supreme Court. In the 1823 case of State v Reed, (1) the appeal was against the sentence passed on a third party on conviction for the murder of a slave at common law. Judge Hall, as in State v Boon, argued that slavery was unknown to the common law (2) while Chief Justice Taylor, as in his opinion in State v Boon, argued that the murder of a slave was an offence at common law. Judge Henderson, who held the decisive vote on the three man bench, concluded that a slave's life was protected at common law. In defining murder as "the killing of any reasonable creature, within the protection of the Law, with malice prepense", and asserting that, "a slave is a reasonable, or more properly a human being" and by claiming that English common law had been incorporated into the jurisprudence of North Carolina, Henderson argued that a slave, being a reasonable creature, within the protection of the law, could in fact be murdered. (3)

Henderson denied the argument that:

> [a slave] being property ... is not within the protection of the law, and therefore the law regards not the manner of his death; that the owner alone is interested, and the State no more concerned independently of the acts of the Legislature on that subject, than in the death of a horse. (4)

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1. 9 NC, 2 Hawks, 454 (1823).

2. Reed's defence counsel cited State v Boon as precedent and Sommersett v Stuart (20 How. St. Tr), in England which argued that slavery was not known to the common law (see Chapter 2, p.125 et seq.)

3. 9 NC, 2 Hawks, 455.

4. Ibid., 455.

What the law did do, in establishing slavery, was to vest in the master:

> The absolute and uncontrolled right to the services of the slave, and the means of enforcing those services follow as necessary consequences ...; but the life of a slave being no ways necessary to be placed in the power of the owner for the full enjoyment of his services, the law takes care of that... (1)

In conclusion, Henderson suggested that the death penalty should be pronounced against Reed.

Henderson's reasoning in State v Reed is indicative of the desire to establish a precedent for a common law basis for the protection of the slave status. There is no reason, for example, why the Court could not have arrested judgment, allowing the prosecutor to bring a new indictment under a clearly applicable statute, rather than attempting a more uncertain common law argument. Henderson's statement, "I disclaim all rules or laws in investigating this question, but the Common Law of England, as brought to this country by our forefathers ...", (2) can only be read as a determined attempt to establish some common law basis in relation to the status of slavery. Moreover, with

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1. 9 NC, 2 Hawks, 456. The distinction made here between the legal right to the services of the slave as opposed to the person of a slave can be compared with the English slavery cases discussed in Chapter 2 where the correct form of common law pleading for the services of the slave had to be adopted.

2. 9 NC, 2 Hawks, 455.

this decision in State v Reed in favour of protecting the life of the slave under the common law, it would become necessary in subsequent cases to define the scope of this common law protection. The occasion for the further definition of the slave's protection under the common law was the case of State v Hale, (1) an appeal from a conviction for the assault and battery on a slave which reached the North Carolina Supreme Court in 1823.

Chief Justice Taylor stated that the issue before the Court in State v Hale was, "whether a battery, committed on a slave, no justification, or circumstances attending it, being shown, is an indictable offence", (2) and he went on to deliver his opinion by immediately stating the premises on which his argument was based:

> As there is no positive law, decisive of the question, a solution of it must be deduced from general principles, from reasonings founded on the common law, adapted to the existing condition and circumstances of our society, and indicating that result, which is best adapted to general expedience. (3)

Although State v Reed was not specifically referred to as precedent, the influence of that decision is clear. In the present case the applicability of the common law to protect the slave was no longer a principle in dispute. What was at issue in State v Hale was

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1. 9 NC, 2 Hawks, 582 (1823).
2. 9 NC, 2 Hawks, 582
3. Ibid., 582 - my emphasis.

the extent of the application of the common law to the protection of a slave and, in this case, the Court stated its intention to play an active role in the resolution of this issue. Thus, Judge Taylor stated:

> It would be a subject of regret to every thinking person if Courts of Justice were restrained, by any austere rule of judicature, from keeping pace with the march of benignant policy, and provident humanity, which for many years, has characterised every Legislative act, relative to the protection of the slaves, and which christianity, by the mild diffusion of its light and influence, has contributed to promote; and even domestic safety and interest equally enjoin. (1)

In commenting upon the development of legislation in relation to slavery Taylor noted that it had secured:

> To this class of persons, milder treatment and more attention to their safety; for the very circumstance of their being brought within the pale of legal protection, ... has rendered them of more value to their masters, and supressed many outrages ... (2)

It was therefore the law, Taylor claimed, which had been able to contain the contradiction between subject and thing by offering some form of protection for the subject, while, at the same time, this very protection ensured the value of the slave's status as thing (or chattel).

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1. Ibid., 583.
2. Ibid., 583.

Counsel for Hale, however, had argued that no offence had been committed because the person assaulted was a slave:

> Who is not protected by the general criminal law of the State; but that, as the property of an individual, the owner may be redressed by a civil action. (1)

Judge Taylor, however, rejected this argument and, basing his opinion on the common law, he concluded that while the private injury caused by an assault and battery could be redressed by a civil action, the act was still a crime by its breach of "that social order which it is the primary object of the law to maintain". (2)

However, the public peace was apparently only broken by the assault on a slave by a stranger (third party) not by an owner. Thus:

> The instinct of a slave may be, and generally is, tamed into subservience of his master's will, and from him he receives chastisement, whether it be merited or not, with perfect submission; for he knows the extent of the dominion assumed over him, and that the law ratifies the claim. But when the same authority is wantonly usurped by a stranger, nature is disposed to assert her right, and to prompt the slave to a resistance ... (3)

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1. 9 NC, 2 Hawks, 583. In Chapter 4 the fact that suits for civil damages by owners were permissible in the case of damage to their property (slaves) was discussed. And, in many states, the state itself paid compensation to owners whose slaves were killed in the revolutionary war.

2. 9 NC, 2 Hawks, 584.

3. Ibid., 584.

The reason that a stranger's assault on a slave was considered a crime at common law was because as well as rendering the public peace insecure:

> The value of slave property must be much impaired, for the offenders can seldom make any reparation in damages ...[since] ... these offences are usually committed by men of dissolute habits, hanging loose upon society, who, being repelled from association with well disposed citizens, take refuge in the company of colored persons and slaves. (1)

Thus, Taylor could arrive at the conclusion that while the law secured to the master a complete authority over the slave "to render him useful as property", this right of property could be more effectively guaranteed, "when the slave is protected from wanton abuse from those who have no power over him ...". (2) However, even this judgment against a stranger's assault on a slave was limited by the qualification that:

> Many circumstances which would not constitute a legal provocation for a battery committed by one white man on another, would justify it, if committed on a slave, provided the battery were not excessive. (3)

Therefore, while Taylor in this case, because Hale did not show that there had been provocation, decided that the indictment for

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1. Ibid., 585.
2. Ibid., 596.
3. Ibid., 586.

the assault and battery of a slave was maintainable, he left the issues of provocation by a stranger and what constitutes excessive battery open to case by case resolution. Both Judges Hall and Henderson concurred that "much depends on the circumstances of the case". (1) In other words, sometimes an assault and battery on a slave could be maintained as an indictable offence and sometimes it could not.

The issue as to when an assault and battery on a slave could be maintained as an indictable offence was again confronted in State v Mann (2) decided before the North Carolina Supreme Court in 1829. The defendant, Mann, had been indicted for an assault and battery upon Lydia, the slave of Elizabeth Jones. Mann had hired the slave for one year and during that time, the slave "committed some small offence" and Mann chastised her. In the act of chastising her the slave ran off and when she refused to stop, Mann shot and wounded her. Mann was found guilty in a lower court because "he had only a special property in the slave" as a hirer. On appeal to the Supreme Court, Judge Ruffin noted that the central question before the Court was, "whether a cruel and unreasonable battery on a slave, by the hirer, is indictable". (3)

Ruffin rejected the precedent of State v Hall (4) since that case only referred to an assault and battery on a slave by a

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1. Ibid., 587.

2. 13 NC, 263 (1829)

3. Ibid., 264.

4. This is the same case as State v Hale discussed immediately before the present case.

stranger. The defendant, Mann, was the hirer and, as such, was entitled not to a special property relationship but to the same property relationship which existed between master and slave:

> Our laws uniformly treat the master or other person having the possession and command of the slave, as entitled to the same extent of authority ... In a criminal proceedings ... the hirer and possessor of a slave, in relation to both rights and duties, is, for the time being, the owner. (1)

Thus, in order to decide whether the hirer (as owner) could be indicted for an assault and battery on 'his' slave, Judge Ruffin argued that, "the Court is compelled to express an opinion upon the extent of the dominion of the master over the slave in North Carolina". (2)

The prosecuting Attorney General had, in the lower court, argued, by analogising between the master/slave relationship and other relations of authority (parent/child; master/apprentice etc.), that the assault and battery of a slave was an indictable offence and that the present case was no different in principle to State v Hall. The implication here could have been that an owner could be indicted for an unreasonable and brutal assault and battery. Ruffin, however, denied that there was any likeness between say the relation of parent/child and that of master/slave.

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1. 13 NC, 265.

2. Ibid., 264.

Indeed:

> With slavery it is far otherwise. The end is the profit of the master, his security and the public safety; the subject, one doomed in his own person, and his posterity, to live without knowledge, and without the capacity to make any thing his own, and to toil that another may reap the fruits. (1)

To achieve this end required obedience and:

> Such obedience is the consequence only of uncontrolled authority over the body. There is nothing else which can operate to produce the effect. The power of the master must be absolute, to render the submission of the slave perfect. (2)

This discipline, argued Ruffin, "is inherent in the relation of master and slave". (3)

The only place where the law could legitimately intervene to limit the uncontrolled authority was, according to Ruffin, (4) through legislation. He therefore rejected the common law argument and denied that the courts had any active role in relation to the definition of slavery:

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1. 13 NC, 266.

2. Ibid., 266.

3. Ibid., 267.

4. Note that Ruffin himself owned over 100 slaves at the time of the Civil War "nearly all of whom were born his and raised by him", (see 'Publications of the North Carolina Historical Commission', Vol.8, Part 4, "The Papers of Thomas Ruffin", IV).

> We [judges] are forbidden to enter upon a train of general reasoning on the subject. We cannot allow the right of the master to be brought into discussion in the Courts of Justice ... The Court therefore disclaims the power of changing the relation, in which these parts of our people stand to each other ... [and] ... I would gladly have avoided this ungrateful question. But being brought to it, the Court is compelled to declare, that while slavery exists amongst us in its present state, or until it shall seem fit to the Legislature to interpose express enactments to the contrary, it will be the imperative duty of the Judges to recognise the full dominion of the owner over the slave, except where the exercise of it is forbidden by statute. All this we do upon the ground, that this dominion is essential to the value of slaves as property. (1)

Thus, in the absence of any statute protecting a slave from an unreasonable and cruel assault and battery from his owner (or quasi-owner such as Mann) and by the Court's refusal to argue from the general principles of common law, the decision of the lower court was reversed and the legality of the absolute authority of the owner over his slaves was affirmed. The law would not interfere in the case of a master shooting his slave.

Common law protection had, in State v Hale (or Hall) expanded to the point where an assault and battery on a slave by a stranger was held to be an indictable offence but in State v Mann it was clearly articulated that a master (or one in his position) could not be held criminally liable - the master/slave relation was, after all, first and foremost a property relation. Even in the case of strangers, it will be recalled, however, that

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1. 13 NC, 267-8.

the ruling was for every case to be judged on its merits and one interpretation of State v Hale is that Hale was held criminally liable because of an offence against property when, in his case, presumably because he had no means, civil restitution to the owner was not possible. In these circumstances, common law protection was afforded to the slave but this was no guarantee that another slave, being brutally assaulted by another stranger, would be afforded such protection. This would appear to depend not only on the circumstances of the case but also on the circumstances of the stranger. Common law protection then, was apparently granted when the property interests in slavery would benefit but it was denied when attempts were made to apply it to the personal rights of slaves.

One of the clearest statements of the position that there could be no application of the common law to the question of any personal rights of slaves was that of Judge Nesbitt of the Supreme Court of Georgia in Neal v Farmer (1) decided in 1851. While many of the Southern appellate courts had, between the 1820s and 1850s, permitted the application of common law to the slave status (2) in protecting the rights of property and the

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1. 9 Ga, 555 (1851).

2. The Supreme Courts of Alabama and Tennessee, for example, could argue that even where statutes existed, they simply specified particular penalties for the commission of a pre-existing common law offence. For a fuller discussion of such cases, see Nash, 1970:66-77.

'public peace', the most conservative of the ante-bellum appellate courts, South Carolina and Georgia, had consistently rejected any application of common law. (1) This consistent rejection of the applicability of the common law to the slave status can be attributed to the fact that these states, where the slave mode of production was most deeply entrenched, had, through legislative enactment, developed an extensive degree of control over the slave system, a degree of control premised on the power wielded by the slave owners to secure such legislation in order to limit the power of the courts in relation to slavery. Nowhere is this inability of the courts to exert their own specific influences on the slave status, through an appeal to common law, more articulately stated than in Judge Nesbitt's reasoning in Neal v Farmer.

In Neal v Farmer, the precise issue (2) before the Court was: "is it a felony at Common Law to kill a slave?" (3) This issue had to be resolved before any civil damages could be awarded in connection with the killing of the slave in question, because if it was a felony at common law then the present civil case had to be suspended until the offender was convicted or acquitted. In

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1. For a fuller discussion of these cases, see Nash, 1970:76-77.

2. This case involved fairly complex litigation due to an attempt to gain civil damages for the killing of a slave with one party arguing that it was not a felony at common law to kill a slave and the other arguing that it was.

3. 9 Ga, 560.

delivering the opinion of the Court, Judge Nesbitt, citing Hargrave's argument in Sommersett v Stuart (1) as precedent, argued that the "Common Law recognises but one species of slavery as having existed in England under its sanction at any time, and that is villenage." (2) And in reviewing the English cases on villenage, Nesbitt concluded that since the last recorded case of villenage was in 1617 and Georgia was not settled until 1732, villenage was:

> No part of the Common Law in 1732 ... [thus] ... all the reasoning of the counsel, drawn from the fact that slavery was recognised by the Common Law, in the form of villenage necessarily falls to the ground. (3)

Moreover, even if villenage was still in force, said Nesbitt, the legal relations between master and slave and lord and villein were so dissimilar that an argument by analogy could not be sustained. A villein, argued Nesbitt, was not unconditionally a slave. A villein, although the subject of property, had civil and political rights: he could bring suits in the court; and, as a subject under the protection of the Crown, his lord could not kill him or maim him. (4)

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1. For a discussion of the significance of this case, see Chapter 2.

2. 9 Ga, 562. For a discussion of villenage and its importance to the legal status of the slave, see Chapter 2.

3. 9 Ga, 566.

4. Ibid., 567. Arguably Nesbitt could have approached the issue of the applicability of common law to the slave status. To assert that villeins were not slaves because villeins were entitled to common law protection begs the question of whether the status of slavery was incorporated in the common law so as to protect the slave against murder.

In reviewing the decisions of the English Courts, Nesbitt concluded that the question of the status of a slave in England was settled in Sommersett v Stuart when the issue of "the right of the master to control a person of the slave" in England was confronted. (1) Although Lord Mansfield recognised the master/slave relation and admitted that a "contract for the price of a negro slave, was good in England", (2) he denied the right of the master to control the person of the slave in England. A slave could not exist in England - the "moment he set foot on the soil of England, he was free". (3)

This doctrine had been upheld in subsequent English and North American cases, (4) thus:

> We hold it, therefore, settled upon authority that African slavery does not, and never did exist in England. What then, is the inevitable conclusion? It is that such a thing as killing a negro slave in England, is a legal impossibility, and could not be a felony under the Common Law. In other words, the Common Law has no application to the condition of slavery in England, or in Georgia. (5)

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1. 9 Ga, 577 - my emphasis.

2. Ibid., 577.

3. Ibid., 577.

4. Nesbitt relied on the following precedents: in England - Forbes v Cochrane, 2 Band and Cres, 448; 1 Act on R, 240; The Slave Grace, 2 Hagg. Adm. R, 94; and in the USA (Massachusetts) - Saul v His Creditors, 17 Martin's R, 598; Butler v Hooper, 1 Wash. CR, 499; Ex parte Simmons, 4 Idem., 390; Butler v Delphanie, 7 Serg and Rawle, 378; Commonwealth v Aves, 18 Pick, 193.

5. 9 Ga, 578. Nesbitt points out that if a white man killed an African in England he would be guilty of a felony because the deceased would not be a slave but a free man.

Indeed, in spelling out the consequences for the slave system of permitting common law protection, Nesbitt noted:

> If it protects the life of the slave, why not his liberty? and if it protects his liberty, then it breaks down, at once, the status of the slave ... [The colonies received the common law] ... as slaveholding communities and as applicable to them as slaveholders. It is absurd to talk about the Common Law being applicable to an institution which it would destroy. (1)

In concluding his rejection of the applicability of common law to the slave status, thereby affirming the judgment of the lower court that it was not a felony at common law to kill a slave, Nesbitt argued that statute alone could define any personal rights that a slave might have because where:

> Two races of men [are] living together, one in the character of master and the other in the character of slave, [they] cannot be governed by the same laws ... [and any personal rights for slaves] ... must be defined by positive enactments, which, whilst they protect the slave, guard the right of the master. (2)

Common law then, was apparently only regarded as being applicable to the slave status when, as in the North Carolina cases discussed earlier, the protection of the property rights

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1. 9 Ga, 579-80 - emphasis in original. Nesbitt emphasised that property rights in slaves had existed in Georgia since 1751. This right to property had been confirmed by statute; recognised by the state constitution; and by the compromises of the US Constitution.

2. 9 Ga, 579. Compare Ruffin's identical position in State v Mann.

inherent in the master/slave relation was regarded as paramount. Where the issue of the human rights of slaves was at stake, as in Neal v Farmer, the common law was regarded as inapplicable and the only appeal was to statutory law. Courts apparently decided on which rights were at issue on the basis of the extent to which civil restitution could be expected for damage to slave property. As the North Carolina cases demonstrate, common law protection was afforded to slaves when they were assaulted or killed by a certain class of persons (poor "strangers"), but this was not so when owners or quasi-owners committed the same acts. On the other hand, in Neal v Farmer the Court was aware just how well developed the legal regulation of slavery was in Georgia and that civil restitution was possible in that instance through statutory law regardless of whether or not the killing of a slave was held to be a felony at common law. However, even Nesbitt when he stated that, "the laws of Georgia, at this moment, recognise the negro as a man, whilst they hold him property", (1) could not totally deny the human aspect of the chattel slave.

Thus, even in those cases, such as State v Mann and Neal v Farmer, where there was an explicit denial of common law protection to the slave status, this denial was coupled with the assertion that statutory law did recognise the person in the status as well as the chattel. The issue of the extent to which the legal personality of slaves would be recognised, and, if so, how it

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1. 9 Ga, 582 - my emphasis.

would be recognised, by statute or at common law, was, as the subsequent discussion demonstrates, even more problematic when the law attempted to deal with criminal slaves as opposed to those committing alleged criminal acts against slaves.

PROPERTY v PERSONALITY : THE SLAVE STATUS

As was argued earlier, if common law protection could be applied to the status of slaves when criminal acts were committed against them, then this could provide a basis within legal discourse from which it could be argued that other aspects of the legal personality of slaves should be recognised under the common law. Southern courts of law, however, managed to evade the issue of defining the extent to which the legal personality of slaves was recognised in such instances either by strictly limiting the nature of common law protection to the property rights inherent in the master/slave relation, in those cases where common law applied, or by categorically rejecting the applicability of the common law to any aspect of slavery, in those cases which argued that statute alone defined the nature of the slave status. However, while this kind of legal reasoning obfuscating the issue of legal personality could be adopted when the alleged offender was not a slave, to try a slave for an alleged commission of a criminal act required that the law regard him as criminally responsible, a status which required a recognition of the person rather than the chattel aspect of the slave. Exactly how the law coped with the contradictory nature of the slave, a 'man-thing',

is discussed in relation to the following criminal cases where the defendant was a slave.

In State v Negro Will [1] the defendant, Will, a slave, had been indicted for the murder of Baxter, his overseer. The judge in the lower court, on a special verdict, [2] decided that Will was guilty of murder and pronounced the death sentence. Will then appealed to the North Carolina Supreme Court on the basis of the following facts: Will, a slave, "was under subjection to the deceased", his overseer. In response to a complaint of "some act of petulance and impropriety" of Will's, the deceased, Baxter, "formed a resolution of punishment or violence" and, if necessary, "to shoot the prisoner". [3] Baxter told Will of his intention and Will ran off whereupon the deceased shot him and "lodged the whole load in the prisoner's back, and inflicted a wound likely to occasion death". [4] Will fled and was involved in a struggle with Baxter (and other negro slaves sent to catch him). Will struggled to cut himself free and "in the struggle inflicted two wounds" on Baxter, one of which proved fatal. [5]

Judge Gaston, in delivering the opinion of the Supreme Court, noted that, "the crime charged is that of murder at common law",

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1. 18 NC, 121 (1834).

2. The special verdict was rendered because the jury were "altogether ignorant" of whether Will was guilty of the murder with which he was charged.

3. 18 NC, 121, 135.

4. Ibid., 136.

5. Ibid., 136.

and that, on the facts, if this incident had occurred between two free men, whatever their "relative condition [say master/apprentice] the homicide could not have been more than manslaughter". (1) However:

> It must be admitted ... that the relation which exists between the owner or temporary master, and his slave, is in many respects strikingly dissimilar from that which the law recognises between a master and his apprentice ... Unconditional submission is the general duty of the slave; unlimited power, is the general, the legal right of the master. Unquestionably there are exceptions to this rule. It is certain that the master has not the right to slay his slave, and I hold it to be equally certain that the slave has a right to defend himself against the unlawful attempt of his master to deprive him of life. (2)

Gaston argued that, "there is no legal limitation to the master's power of punishment, except that it shall not reach the life of his offending slave", (3) and that only the legislature could limit this power any further - this was not the province of the court.

In considering the facts of the case, Gaston therefore argued that the overseer was acting within the limits of his rightful authority when he told Will that he would punish him - Will's act was a breach of duty. Nevertheless, the overseer's "barbarous" acts could not be justified and the Court had to

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1. Ibid., 135.
2. Ibid., 136 - emphasis in original.
3. Ibid., 137 - emphasis in original.

consider the issue of legal provocation in relation to the subsequent struggle which took place between Will and the overseer. Gaston rejected the State's argument that State v Mann was a precedent on the issue of provocation, thus the question remained:

> If the passions of the slave be excited into unlawful violence, by the inhumanity of his master or temporary owner, or one clothed with the master's authority, is it a conclusion of law, that such passions must spring from diabolical malice? (1)

Gaston reminded the Court that the appeal was to the common law which declared:

> Passion not transcending all reasonable limits, to be distinct from malice. The prisoner is a human being, degraded indeed by slavery, but yet having 'organs, dimensions, senses, affections, passions', like our own; (2)

and, on the basis of this direction, the jury were unable to find express malice therefore Will was found guilty of manslaughter instead of murder. (3)

The issue of what constituted provocation in determining whether the crime committed was murder or manslaughter when the party killing was a slave was elaborated further in the appeal case of State v Caesar, A Slave. (4) Judge Pearson, in delivering

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1. 18 NC, 121, 141 - emphasis in original. Diabolical malice was necessary to prove murder in this case.

2. Ibid., 141.

3. Ibid., 141.

4. 9 Iredell Rep. NC, 391.

his opinion noted that the question was:

> Whether the rules of law, by which manslaughter is distinguished from murder, as between white men, are applicable, when the party killing is a slave. If not, then to what extent a difference is to be made? (1)

Pearson stated that this issue was before the Court for the first time since in State v Negro Will the person killed was the overseer, (2) whereas the slave Caesar had been convicted of murder in killing a white man who was not his master or anyone standing in the master/slave relation to him - the deceased was a stranger.

Briefly the facts of the case were as follows: two slaves were talking together when approached by two white strangers (one of whom was the deceased). The white men started beating the slaves when a third slave approached. The white men ordered him to get a whip so they could whip the slaves. When the slave refused the two white men started beating him severely whereupon one of the other slaves (Caesar) intervened and knocked the two white men down with a fence rail and the three slaves ran away. The blow to one of the white men proved to be fatal.

Judge Pearson noted that if this incident had occurred between white men then it would have been a case of manslaughter.

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1. Ibid., 391.

2. He also ruled out Jarrott's case as relevant precedent. In that case the general question was discussed, but the decision did not turn upon it. See State v Jarrott, 1 Iredell Rep. NC, 86.

However, "the same rules are not applicable" (1) in this case because of "the nature of the institution of slavery". (2) Indeed:

> Insolent words from a slave are as apt to provoke passion, as those from a white man. The same reasoning, by which it is held, that the ordinary rules are not applicable to the case of a white man, who kills a slave, leads to the conclusion, that they are not applicable to the case of a slave, who kills a white man. (3)

This, he stated was "merely a new application of a well settled principle of the common law", a principle settled in connection with other relations such as parent/child; master/tutor; and master/apprentice. Legal provocation, in the case of a slave, could only be constituted by "bodily pain or unusual circumstances of oppression", since, "one or both is sufficient to account for passion". (4) On this understanding of provocation Judge Pearson suggested that a slave could be guilty of manslaughter instead of murder. However, in the present case it was not the slave receiving the blows who killed the white man but another slave. Nevertheless, in this case Pearson extended the principle on the precedent of State v Hale, where common law

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1. He cited State v Tacket, 1 Hawks, 217, and primary principles, as precedent.

2. 9 Iredell Rep. NC, 392.

3. Ibid., 392.

4. Ibid., 394. In relation to this issue Pearson discussed the cases of State v Will; State v Mann and State v Hale; which were held to support his view here.

protection was given to the status of a slave when the slave was assaulted by a stranger, and concluded that the judge in the lower court was wrong in convicting for murder warning, "great caution is required to protect slave property from wanton outrages, while, at the same time, due subordination is preserved". (1)

While Judge Nash agreed with Pearson in asking for a new trial and based his argument on common law, Chief Justice Ruffin dissented, stressing the total "dissimilarity in the condition of slaves from anything known at the common law". (2) The consequences of an application of common law in extenuating the present offence to manslaughter worried Ruffin:

> It seems to me to be dangerous to the last degree to hold the doctrine, that negro slaves may assume to themselves the judgment as to the right or propriety of resistance, by one of his own race, to the authority taken over them by the whites, and, upon the notion of a generous sympathy with their oppressed fellow servants, may step forward to secure them from the hands of a white man, and much less to avenge their wrongs. First denying their general subordination to the whites, it may be apprehended that they will end in denouncing the injustice of slavery itself, and, upon that pretext, band together to throw off their common bondage entirely. (3)

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1. 9 Iredell Rep. NC, 396. Note that in this case the doctrine was reasserted that "the law allows of the infliction of blows. A master is not indictable for a battery upon his slave; ... whereas the law does not allow a white man to inflict blows upon a slave, who is not his property" (9 Iredell Rep. NC, 393 - emphasis in original).

2. 9 Iredell Rep. NC, 402.

3. Ibid., 410.

Notwithstanding such divergences in the opinions of judges, however, it is clear that all recognised at least some degree of legal personality in slaves in holding them criminally responsible. Moreover, in both State v Negro Will and State v Caesar the criminal charge of murder against the slave in question was brought at common law. None of the judges objected to common law charges being brought in the case of allegedly criminal slaves, whereas, in the cases [1] discussed earlier where non-slaves were accused of committing criminal acts against slaves, the issue was whether or not the charge itself could be maintained at common law. In those cases it was only when a 'stranger' offended against the slave that the common law charge was upheld. When a slave-owner or quasi-owner offended against 'his' slave the applicability of common law was denied and statutory law was relied on exclusively. Common law was clearly only regarded as applicable when it could be used to protect slave property.

Thus, even in those cases where slaves were tried for criminal offences and where the common law charge was not in dispute, courts were clearly primarily concerned with the protection of slave property while recognising the legal personality of the slave accused. In establishing the degree of legal provocation, for example, courts reasoned in terms of the institutional arrangements governing the master/slave relation. Not only did courts hold that what was constitutive of legal provocation differed as between slaves and free whites but also that this differed when

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1. State v Boon; State v Reed; State v Hale; State v Mann and Neal v Farmer.

the victim was an owner or quasi-owner (as in State v Negro Will) as opposed to a stranger (as in State v Caesar).

When confronting the issue of the commission of criminal acts against or by slaves, it is evident that law recognised both property and personality in chattel slaves, albeit in a strictly limited way. Courts were extremely cautious in deciding how far common law protection would extend to the slave status, limiting each judgment to the specific case and relationship in question. Some courts and judges were, as has been noted, so cautious that any common law protection was denied (1) because of the perceived dangers of permitting arguments relating to slavery to be drawn from general principles. The denial of common law applicability meant a reliance on statutory law as the sole guide to the definition of the slave status regarding personal rights. And, even where the common law was accepted, judges constantly emphasised that only the legislature could alter the law. However, where a legislative act had not been passed judges, on the whole, developed a line of common law reasoning by arguing that if one says that a slave is not entitled to the rule of the common law then, at the same time, one establishes another rule (the opposite to what is denied) and that to do this is the province of the legislature not the courts. (2) And, while there can be little

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1. See Nash, 1970, for a discussion of the development of common law in the trial of slaves (and free negroes). His work details the extent to which slaves, as criminal defendants, were recognised as having rights and emphasises that procedural fairness and formality was the norm. Such procedural formality, of course, could only serve to underline the presumed 'legality' of the slave system.

2. See, in particular, Judge Nash's opinion in State v Caesar, A Slave (9 Iredell Rep. NC, 391).

doubt that the development of common law reasoning did recognise aspects of the person in the slave, it is also clear that this reasoning was used as a more effective means of protecting slave property than relying on statutory omission.

This overriding concern to protect slave property was not, however, solely evident in the legal practices of the Southern states. Within the legal practices of the federal republican state itself, during the first part of the 19th century, the property interest in slaves was consistently upheld, as the following discussion demonstrates, and this constitutional guarantee of the primacy of slave property right over liberty provided a sound legal basis for the expanded reproduction of the Southern economy based on slavery despite the fact that Northern states were beginning to contest the issue of the expansion of the slave system. (1)

THE PROPERTY INTEREST UPHELD IN THE US SUPREME COURT

As was noted earlier, throughout the first part of the 19th century, slave property right was effectively strengthened through

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1. Chapter 8 discusses how this contestable question developed into a totally divisive issue.

the practices of the US Supreme Court. (1) In an era which became famous for the activist role adopted by the Court in relation to other constitutional issues, (2) so much so that by the end of Chief Justice Marshall's term of office, the authority of the Supreme Court and the powers of the federal government had considerably expanded thereby limiting the scope of the states, on the issue of slavery, the Court did not confront any of the fundamental constitutional questions. The Court simply reiterated and emphasised that the legal title to slave property was guaranteed in constitutional as well as in state law.

The first case, involving a slave, to come before the US Supreme Court, was that of Scott v Negro London. (3) London had brought an action of assault and battery against Scott, his purported owner. Assault and battery actions were the pleading

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1. The United States Supreme Court was established by Article III of the US Constitution. The US Supreme Court has ultimate authority for determining the applicability of the federal constitution and the federal constitutional law. The Courts of Record in the federal system are the United States District Court (the trial court), the Court of Appeal and the US Supreme Court. In most instances, the United States Supreme Court has the right to decline appeals from either the District Courts or the US Court of Appeal. However, in cases raising questions of unusual importance under the US Constitution or federal law, an appeal may be filed from the highest state court or from the federal Court of Appeal to the US Supreme Court. (For an analysis of the procedural, historical and jurisdictional aspects of the federal judicial system, see Charles Allen Wright, "Law of Federal Courts", 2nd ed., West, 1970).

2. See, Beveridge, 1916; and Warren, 1923, Vol.1.

3. 7 US (3 Cranch) 324 (1806).

mechanisms which blacks most often used to challenge the validity of their enslavement. In substance, the master's restriction or punishment of the negro became an assault and battery if the latter was not the former's slave.

London's claim was grounded on a 1792 Virginia statute, (1) under Section 2 which provided that slaves brought into Virginia after that date for a year "or so long at different times as shall amount to one year, shall be free", (2) provided under Section 4 that:

> Nothing in this Act contained, shall be construed to extend to those who may incline to remove from any of the United States, and become citizens of this, if, within 60 days after such removal he or she shall take the following oath ... 'I, A.B., do swear, that my removal into the state of Virginia was with no intent of evading the laws for preventing the further importation of slaves ...' (3)

This oath had to be made within 60 days of arriving in Virginia otherwise domestic slaves who came with their master could be freed after residing in Virginia for one year.

Briefly the facts of the London case were as follows: in July 1802, London had been brought from Maryland to Virginia by Scott's father and hired out until the father died at the end of 1802. In March 1803, Scott got "possession" of London and

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1. Act of Assembly of Virginia, 17 December 1792, 186.

2. See Chapter 4 regarding Southern statutes passed restricting importation of slaves.

3. Act of 1792, 186.

moved to Virginia in June 1803. On 5 July 1803, Scott took the oath described above. The trial court held that the owner's oath ought to have been taken within 60 days after London's July 1802 removal into Virginia, thus London was freed.

The US Supreme Court, however, were unanimous in reversing the lower court's decree of freedom by reading the statute differently, setting aside the failure of Scott's father (his agent) to take the oath as oversight and in not holding Scott responsible for this negligence. The Court did not apply the agency doctrine, that owners are bound and liable when through negligence or failure their agent does not comply with statutory legal requirements, where its application would result in freeing a slave.

In the case of Scott v Negro Ben, (1) Ben claimed his freedom on the basis of a Maryland statute of 1783 which prohibited the importation of slaves into the state, with certain exemptions for owners. The exemption at issue in the case was that prior to a slave coming into Maryland proof had to be given to a naval officer or collector of tax, that the slave had been residing in the United States for at least three years immediately preceding his importation to Maryland.

In the view of the lower court there was an ambiguity about whether the statutorily required proof of residence had been given to a naval officer or collector of the tax prior to Ben's

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1. 10 US (6 Cranch) 3 (1810).

importation. The US Supreme Court, however, reversed the lower court's holding in favour of freedom and Chief Justice Marshall noted:

> The majority of the court is of the opinion, that the property of the master is not lost by omitting to make the proof which was directed, before the naval officer, or the collector of the tax ...; (1)

and considerably diluted the effect of the Maryland statute by advancing the view that proof of residence could still be considered legitimate if offered at the time the slave claimed his freedom, even though the statute had required "antecedent" proof.

In Mima Queen and Children, Petitioners for Freedom v Hepburn (2) the petitioners were attempting to establish their freedom on the ground that their mother was free. This case, involving the issue of how one establishes his pedigree on ancestry, turned on the question of the admissibility of hearsay evidence to prove the freedom of the ancestor from whom the petitioners claimed their freedom. The lower court in Maryland had admitted hearsay evidence but Chief Justice Marshall, delivering the opinion of the US Supreme Court, argued that the exceptions (3) to the prohibitions on hearsay evidence, such as cases of pedigree or boundary, could not be permitted in the case where the plaintiffs were, in substance, attempting to prove their

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1. Ibid.

2. 11 US (7 Cranch) 289 (1813).

3. At the time of this decision there was ample authority for the admission of those declarations sought by the plaintiff within the pedigree exceptions (see, for example, Wigmore on Evidence (3rd ed.) Section 1501 and 1502 in particular).

freedom through pedigree. The basis for Chief Justice Marshall's conclusion was that:

> If the circumstances that the eyewitness of any fact be dead should justify the introduction of testimony to establish the fact from hearsay, no man could feel safe in any property, a claim to which might be supported by proofs so easily obtained. (1)

Only Justice Duvall dissented, noting that:

> The reason for admitting hearsay evidence upon a question of freedom is much stronger than ... in controversies relative to the boundaries of land ... the right to freedom is more important than the right to property. (2)

The US Supreme Court, however, ruled that the right to property was paramount.

Another freedom suit, Negress Sally Henry, by William Henry, her father and next friend v Ball (3) in 1816 was denied. Sally claimed her freedom because her importation was purportedly in violation of a 1796 Maryland statute. Sally was Ball's slave when he granted her to a Mrs Rankin for a year. Mrs Rankin took Sally to Washington (where the 1796 Maryland statute was in force) for a few months, then Ball took Sally back to Virginia and subsequently to Washington. Sally's counsel argued that if Ball knew of Mrs Rankin's intended importation of Sally and did not

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1. 11 US (7 Cranch) 289 (1813).
2. Ibid.
3. 14 US (1 Wheat) 1 (1816).

object then Sally would be entitled to freedom under the 1796 statute. Chief Justice Marshall for the Supreme Court concluded that under Section 4 of the 1796 Act, Sally [1] was merely in a temporary status, sojourning in Washington, thus her freedom must be denied.

While in Negress Sally v Ball the US Supreme Court arguably simply adopted a strictly constructionist interpretation of the 1796 Maryland statute, their denial of freedom in the case of Negro John Davis et al v Wood [2] was made by a systematic rejection of each ground on which it could have exercised its discretion in favour of freedom. John Davis, and apparently other children, were attempting to prove that they were not slaves but were free by establishing the lineal parentage of Davis' grandmother (Mary Davis) and his mother (Susan Davis). [3] He offered to prove that competent witnesses had heard old persons now dead declare that Mary Davis, also now dead, "was a white woman, born in England" and that Susan Davis, his mother, was descended in the female line from Mary Davis. Susan Davis, in an earlier suit, had gained her freedom. Davis wanted his mother's prior case record to be admitted in evidence so that he could prove his freedom from being descended, in the female line, from a free

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1. See, Miller, 1966, for a discussion of the significance of the London, Ben and Sally cases.

2. 14 US (1 Wheat) 4 (1816).

3. It will be recalled from Chapters 3 and 4 that the status 'slave' was passed through the maternal line. If the mother was free then so were her children.

woman. He also wanted evidence admitted to prove that his purported owner (Wood) had sold his mother to her previous owner so that he could demonstrate a privy relationship between the two purported owners thereby allowing the verdict against Susan Davis' owner to be admissible in evidence.

The US Supreme Court, however, sustained the lower court's exclusion of Davis' mother's 'records'. Chief Justice Marshall, delivering the opinion of the Court, commented:

> The record was not between the same parties. The rule is, that verdicts are evidence between parties and privies. The court does not feel inclined to enlarge the exceptions to this general rule, and, therefore, the judgment of the court below is affirmed. (1)

By not feeling 'inclined' to admit any of the evidence, the Court had clearly exercised its discretion in favour of upholding the property interest to the exclusion of liberty.

These early cases before the US Supreme Court, and the cases reviewed earlier in this chapter concerning the commission of criminal acts against or by slaves illustrate the ongoing tension in law between the extent to which slave were regarded as chattel property and the extent to which they were recognised as human beings. The determination of the legal status of a black child depicts just how far the legal status was analogous to that of chattel property rather than human beings. This status was derived from the concept of partus sequitur ventrem:

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1. 14 US (1 Wheat) 4 (1816).

> The offspring follows the mother; the brood of an animal belongs to the owner of the dam; the offspring of a slave belongs to the owner of the mother, or follows the condition of the mother. A maxim of the civil law, which has been adopted in the law of England in regard to animals, though never allowed in the case of human beings. (1)

While the common law doctrine that the status of a child follows that of the father was not adopted in the slave owning states with regard to blacks, it is arguable that the common law oriented US Supreme Court could have challenged this position. However, in Williamson v Daniel, (2) a complex dispute about which groups of heirs had inherited certain slaves in the distribution of an estate, Chief Justice Marshall said that with regard to the children of the slaves named in the will, it was:

> Well settled ...[and] ... universally considered [that those children follow] the mother unless they be separated from each other by the terms of the instrument which disposes of the mother. (3)

As was noted, this civil law doctrine was by no means universal, and, in the United States a white child's status, under common law, followed the father. Though the US Supreme Court regarded 'as settled' the civil law principle that in relation to slavery

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1. 2 Blackstone's Commentaries, 1768 ed.:390.
2. 25 US (12 Wheat) 568 (1827).
3. Ibid.

the child's status followed that of the mother, the North American courts had rejected those other civil laws (from Continental Europe) which purportedly granted slaves many rights not allowed to slaves in the US. If the North American courts, however, had followed the common law doctrine regarding the children of slaves then those children born of white fathers and slave mothers would have been free. The consequences of this for the slave system would have been highly significant given the number of mulatto slaves in the US.[1] It would appear then, in relation to slavery, that the North American legal system adopted a common law view or a civil law view in accordance with what doctrinal base could most effectively guarantee slave property right.[2]

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1. By the Census of 1850 there were 246,565 persons classed as mulatto slaves.

2. While it goes beyond the purpose of this work to discuss the debate between historians, sociologists and anthropologists about the differences between the European civil law system as applied to slaves in Latin America and the legal system of slavery in the US, Tannenbaum's seminal work (1947) notes that in Latin America slaves had considerably more civil and legal rights. Tannenbaum's interpretation has received considerable support, most notably from Stanley Elkins, "Slavery: A Problem in American Institutional and Intellectual Life", Chicago, Chicago University Press, 2nd ed., 1968. The critics have included Arnold Sio, "Interpretations of Slavery: The Slaves Status in the Americas", in Comparative Studies in Society and History, VII, April 1965: 289-308; David Brion Davis, "The Problem of Slavery in Western Culture", Ithica, New York, Cornell University Press, 1966; and Degler, 1971. The literature on Brazil is abundant though perhaps the three most important works are: Gilberto Freyre, "The Masters and the Slaves: A Study in the Development of Brazilian Civilisation", New York, 1946; Donald Pierson, "Negroes in Brazil, A Study of Race Contact at Bahia", Chicago, 1942; and Arthur Ramos, "The Negro in Brazil", Washington, 1939.

Clearly then, for the US Supreme Court to have rejected partus sequitur ventrem in Williamson v Daniel could hardly be expected given the interests of the slave system. However, in McCutchen v Marshall (1) the Court was presented with an opportunity to establish a doctrinal base in support of manumission without interfering with partus sequitur ventrem. McCutchen, in his will, had bequeathed his slaves to his wife during her natural life and provided that, upon her death, they should "be forever and entirely set free: except those ... [who had not reached] twenty one years at the death of his wife". The latter were to be subject to McCutchen's brother and brother-in-law until they reached 21 years. Two of the female slaves, however, had children after McCutchen's death but before his wife's death. The heirs to the McCutchen estate argued that these children could not be set free because they were born before their mothers had been freed, and the Court upheld this claim by noting that these children must be considered absolute slaves according to the laws of Tennessee. (2) The Court could have argued that had the children been born before McCutchen died, he would have made the manumission clause apply to them also.

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1. 33 US (8 Pet) 220 (1834).

2. The case was based on these laws.

CONCLUSION

In this chapter it has been argued that the turn of the 19th century marked a new 'mature' phase of the Southern slave system in the sense that the legal regulation of slavery had to confront the implications of a rapidly developing economy based on slave labour. To effectively regulate the massive expansion in the slave mode of production, legal institutions and practices in the Southern states had to develop a way of recognising the contradictory nature of the chattel slave - as a person and as an item of private property. The property rights of slave owners in slaves could only be guaranteed effectively if law could protect this property from violation by strangers committing 'criminal' acts against slaves and, at the same time, regulate the behaviour of slaves themselves.

In responding to these social demands Southern legal institutions and practices developed their own unique form of legal reasoning, a form of reasoning which evaded the contradictory nature of the chattel slave status by arguing in terms of the institutional arrangements governing the master/slave relation. Issues of guilt, innocence, culpability and legal provocation were determined in terms of the precise relationship between the slave and the other party involved. Thus, when the property rights of slave owners could be best protected at common law, courts articulated the view that common law could be applied to the slave status. On the other hand, where the issue at stake was the extent of a slave's protection against abuse from

his owner or quasi-owner, courts maintained that since slavery was unknown at common law, a slave could only appeal to statutory law for any personal rights.

It was not, however, only Southern legal institutions and practices which regarded the claims to property rather than personality in slaves as paramount. The cases decided by the US Supreme Court in the first part of the 19th century demonstrate those instances in which a ruling could have been made which would, to some extent, limit the expansion of the slave system, if only in declaring the freedom of individual slaves yet the Court consistently chose to exercise its discretion in favour of upholding the property rights of slave owners against the liberty of individuals. The Court chose to re-emphasise the constitutional guarantee to slave property right thereby ensuring that not only was the system of slave production more firmly entrenched and expanded in the Southern states throughout the first part of the 19th century, but also that slave owners could depend on a constitutional guarantee that was effective.

At the same time, however, as the legal institutions and practices of the Southern states and the federal republican state were producing a more effective legal guarantee to slave property, Northern legal institutions and practices were developing what would become an antagonistic form of legal reasoning which was articulated in relation to sojourners' slaves, fugitive slaves and slaves in transit from one state to another. This contrary

form of reasoning which argued that any slave's entry into a free state accomplished liberation, would, as will be discussed in the next chapter, eventually come into direct conflict with the legal reasoning adopted in Southern states and by the US Supreme Court over the extent of the expansion of the slave system - a conflict which would itself lead to the abolition of the slave system in the aftermath of Civil War.

CHAPTER 8 : SLAVERY : THE CONFLICT IN LAW AND IDEOLOGY

INTRODUCTION

In the previous chapter it was argued that, despite an apparent conflict created by the recognition of humanity in slave property, this contradiction was contained within law by the development of a distinctive form of Southern legal reasoning where issues of criminal liability were decided on within the context of the institutional arrangements governing the master/slave relation. Litigation concerning criminal acts committed by or against slaves did not centre on the broad legal rights accruing to a 'person' at common law but rather focused on arguments from the 'institution of slavery'. In so doing, courts could evade the relevance of the issue of personality and argue that the rights of slaves, if any, were defined by statute. This form of legal reasoning, evident within Southern legal institutions and practices, a form which iterated that the slave was a piece of private property, thereby making the slave system consistent with capitalist development, was also upheld in constitutional law by the US Supreme Court's consistent exercise of discretion in favour of upholding the property rights of slave owners against the liberty of individuals. The right to slave property then was not only guaranteed by the legal institutions of the slave-owning states of the South but also by the legal institutions of the federal republican state itself.

Indeed, in this chapter, the centrality of the role of the US Supreme Court in making the legal status of slavery nationally enforceable will become clear. In the years preceding the Civil

War, the US Supreme Court, when faced with the question of the legality of slavery under the US Constitution, either made very conservative decisions regarding the Constitution or avoided the constitutional issues altogether by relying on legal technicalities. At a national level, the legal status slave was not only recognised but strengthened by these decisions.

However, the US Supreme Court's attempts to ensure that the legality of slavery was recognised at a national level were by no means unproblematic. Northern and Western interests began to question whether the principle of 'judicial review', enshrined in the US Constitution, was being used politically, by a Supreme Court dominated by Southern Justices, to foster the interests of the slave-owning minority in the USA. The USA had been created as a democratic republic where the view of the majority was to be the basis of government, but this fundamental principle was being subverted by the slave power.

The conflict which developed between North and South then was not a conflict over the existence of slavery per se, nor was it a conflict, as was argued in earlier chapters, between capitalism and slavery. (1) Indeed, whilst Northern states were not slave-owning

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1. As has been argued in earlier chapters, the plantation economy of the South was centrally involved with Northern commercial and industrial institutions. Northern manufacturing centres were heavily dependent for their livelihood on Southern commerce and the export of manufactures to the South, and, right up to the outbreak of Civil War, Southern planters remained active customers of North Eastern and Western farmers (Hofstadter et al. 1964:158-161). Indeed the slave mode of production was quite consistent, as a specialist agrarian region, with capitalist development and was central to the specific pattern of development in the USA.

they did not deny the legal status 'slave'. What was of central concern to Northern interests, however, was whether or not the slave-owning class would dominate the political institutions of the federal republic state and whether or not the slave mode of production would become the dominant economic form. As was argued in Chapter 6, by the early part of the 19th century, there were no effective legal or political limits to the expanded reproduction of the slave system to new territories since the Southern interest had been able to maintain an effective dominance in the representative institutions of the federal state. However, by the 1830s the migration of free settlers to the hitherto unoccupied Western lands, which were federal state property, reached an unprecedented level, (1) and those free settlers came into conflict with a slave-owning class intent on obtaining a land monopoly for the expanded reproduction of the slave system. The future conflict, which eventually led to both Civil War and the abolition of the slave system by the 13th Amendment to the US Constitution, (2) was not a conflict over the existence of slavery in certain parts of the USA but was a conflict over the extent of its expansion.

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1. Franklin, 1969:166-185.

2. The 13th Amendment was passed by Congress on February 1, 1865, and ratified on December 18, 1865. It states:

> "Section 1. Neither slavery nor involuntary servitude except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction.
> Section 2. Congress shall have power to enforce this Article by appropriate legislation".

Although an active abolitionist movement did develop in the North which made certain political gains in relation to the slavery issue from the 1820s onwards, (1) these gains were not premised on a principled opposition to the fact of slavery but rather on the issue of expansion. Institutionally, slavery had been confined to one particular race - negroes. Ideological support for slavery was not only evident in a specifically Southern defence of the slave system, (2) which had begun to

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1. In 1821 Lundy began his newspaper, 'The Genius of Universal Emancipation'; in 1828 Garrison wrote his first anti-slavery editorial; in 1829, Walker, a militant free negro, published his 'Appeal' urging slaves to revolt against their masters; and on 1 January 1831 Garrison founded his anti-slavery newspaper 'The Liberator'.

The beginnings of abolition are discussed in Alice D. Adams, "The Neglected Period of Anti-slavery in America, 1808-1831", Boston, 1908. One of the best discussions of the abolition movement is Gilbert H. Barnes, "The Anti-slavery Impulse, 1830-1844", New York, 1933. A good compilation of papers can be found in Martin L. Duberman, ed., "The Anti-slavery Vanguard", Princeton, 1965. Herbert Aptheker's article "Militant Abolitionism", in Journal of Negro History, XXVI, October 1941, is excellent; and the history of black abolitionists is well covered by Herbert Aptheker, "The Negro in the Abolitionist Movement", New York, 1941. For the best account of resistance to slavery, see Herbert Aptheker, "American Negro Slave Revolts", New York, 1969.

2. This defence took the form of claiming a paternalistic concern for the slave by his master in contradistinction to the 'free wage' type of 'slave' allegedly existing in the industrial North. According to this view, the free wage labourer was exploited to the full value of his labour and then discarded, whereas in the South, the slave population was cared for until death. This defence, however, did not develop until the 1830s, following the Missouri Compromise and a series of slave uprisings, culminating in the Nat Turner rebellion in Virginia in 1831. In the early 19th century public discussion and debate on slavery was simply repressed. For a full discussion of the development of the Southern defence of slavery, see George M. Frederickson, "The Black Image in the White Mind", New York, Harper and Row, 1971.

develop during the confrontation over the admission of Missouri as a slave state, culminating in the Missouri Compromise, (1) but was also evident in the development of racism (2) in the North and West. Abolition in the North (3) was not coupled with any appreciable change in the social and political status of the negro, (4) so much so that, as will be discussed later in this chapter, Northern legal institutions and practices, developed a form of legal reasoning which maintained that the rights of free blacks were only granted by statute since blacks were not citizens, a line of reasoning remarkably similar to that developed by Southern legal institutions and practices in the case of slaves. Moreover, even within the abolutionist movement, there was a conflation of anti-slavery and racist thought. This denial of civil and political rights to free Northern negroes, coupled with the development of racism, was taken by Southerners as a confirmation of the 'correctness' of the slave system. It was, therefore, only within the context of the struggle over the extent of the expansion of the slave system that pro- and anti-slavery ideologies could be effectively used to make political gains.

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1. See Chapter 6.

2. Racism is here defined as a rationalised ideology grounded in what were and are thought to be the facts of nature - biological, psychological, moral or whatever. For a discussion of racist rhetoric, see Frederickson, 1971.

3. See Chapters 4 and 5.

4. The problem of the free negro in the North is dealt with by Leon Litwack, "North of Slavery , The Negro in the Free States, 1790-1860", Chicago, University of Chicago Press, 1961.

Central to the struggle over the extent of the expansion of the slave system was the issue of whether the federal republican state would guarantee the importation of the legal title to slave property into the Western lands, where free settlers and slave-owners were competing to occupy the same regions. Since these regions were federal property and the decision regarding the legality of slavery in these regions would be taken within the representative institutions of the federal state, the Southern interest could be assured of expansion if it could maintain a dominant political power within these institutions. This it effectively managed to achieve well into the nineteenth century and it thereby secured a monopoly of land reserves against free settlement. As was discussed in Chapter 6, there were numerous concessions of federal state territory to the slave system including the lands of the Louisiana Purchase, the Florida peninsula, and the territory up to the parallel 36° 30′ North under the terms of the Missouri Compromise. These land reserves ceded to the slave power were further expanded by the Annexation of Texas from Mexico in 1845 (1) - slavery being explicitly permitted by the terms of the Missouri Compromise.

The balance of power had been effectively maintained by a constant negotiation process, which kept the number of free and slave states equal, up to 1850 when California was admitted as a

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1. For a discussion of the Annexation of Texas, see Hofstadter et al. 1964:137-139; as also Franklin 1969:172.

free state. The 'Compromise of 1850' which admitted California as a free state represented the outcome of a complex political struggle between the 'free soil' movement and the planter class. In return for ceding California to the free labour system, the slave power won a critical legal victory in having the 1850 Fugitive Slave Law passed, a law which extended the legal rights of the slave owner into the free states.

This 'Compromise', however, was extremely tenuous, (1) with Northerners arguing for majority rule and the ability of Congress to ban slavery from the territories and Southerners insisting on constitutional limitations to majority rule in the case of slavery. Only four years later, open hostility took the place of compromise with the passage of the Kansas-Nebraska Act of 1854. This Act, introduced by a Northern Democrat, Senator Stephen Douglas of Illinois, provided that the people of the West, in particular Kansas and Nebraska, should determine whether or not they wanted slavery, independent of national control, and explicitly repealed the Missouri Compromise of 1820 as "inconsistent with the principle of non-intervention by Congress with slavery in the States and Territories" as recognised by the 1850 Compromise. (2)

As will be discussed later in this chapter, the Kansas-Nebraska Act precipitated a desperate struggle between the free settlers, backed by Northern interests, and the planters, backed by

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1. Georgia, Mississippi, Alabama and South Carolina had seriously considered secession and many Southerners agreed to staying in the Union only if there was strict adherence to the enforcement of the Fugitive Slave Act (Franklin, 1969:266).

2. Kansas-Nebraska Act, May 30, 1854, US Statutes at Large, X, 277, 282-284.

Southern interests, for the control of Kansas. If free settlers predominated and obtained a political dominance in the territorial legislature, then the legality and existence of slavery might be threatened by the passing of laws which favoured free small scale cultivation rather than slave production. Moreover, to be cost effective, slave production relied on an effective monopoly of land in order to minimise the costs of production and to increase profits. Thus, the slave owning class, in attempting to achieve and maintain the political/legal conditions necessary for the effective existence of slave production in Kansas, came into direct conflict with the free settlers. (1) And, it was in the midst of this conflict that the Republican Party, opposed to the extension of slavery, was born. (2)

The re-alignment of political power within the United States was further accelerated by the decision of the US Supreme Court in the case of Dred Scott v Sandford, 1857. (3) In effect that decision, which is discussed in detail later in this chapter, made the whole of the USA a slave holding domain since not only could slave owners legitimately pursue and retrieve slaves who ran away, under the Fugitive Slave Act of 1850, but also a slave owner could reside in free territory with his slave held in bondage. And, while the instrumental victory for the slave power was very short-lived, given that civil war was imminent, this victory, at a

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1. The nature and significance of this conflict are more fully discussed at p. 478-483 of this chapter.

2. See, Franklin, 1969:267; and Hofstadter et al, 1964:173.

3. 60 US, 393 (1857).

symbolic level threatened the free states with having to enforce slavery under the US Constitution and with the influence of planter class.

Thus, the conflict which resulted in the Civil War and the abolition of slavery was not based on an opposition to the existence of slavery on the part of the North, but rather on the complex political struggle surrounding whether or not limits could be placed on the expansion of the slave system. It was within this context that the legal institutions and practices of the federal republican state played a critical role since law, which could have imposed limits, in fact did the contrary, in both US Supreme Court decisions and federal legislation, by recognising the legality of expansion. The South was therefore able to pursue its aggressively expansionist policy, a policy which eventually led to its own downfall when Northerners and Westerners came to perceive that the South was so intent on maintaining a dominant political power in the USA that the interests of the other sections might be sacrificed. The following sections of this chapter articulate just how the conflict in law and ideology was created and how this contributed to the development of the complex political struggle reaching crisis level after the 1860 Presidential elections, (1) resulting in secession and Civil War, and, at the same time accomplishing the only thing which could destroy the slave owning class - the abolition of slavery itself.

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1. This election resulted in a victory for Abraham Lincoln, the first Republican President (see, p.503 of this chapter).

LEGALITY AND THE CONFLICT IN IDEOLOGY

> The prejudice of race appears to be stronger in the states that have abolished slavery than in those where it still exists; and nowhere is it so intolerant as in those states where servitude has never been known. (1)

As was discussed in Chapter 5, by the turn of the 19th century, "almost every Northern state had either abolished slavery outright or had provided for its gradual extinction". (2) The slave mode of production had never developed to any significant extent in the Northern states, and with the acceleration of the development of the capitalist mode of production in these states, ideological support for the abolition and/or gradual extinction of slavery had not presented any particular problems. (3) In abolishing slavery in the North, it became possible for these Americans to argue that slavery was a moral wrong, an ideological inconsistency in their own Revolution, in the foundation of their own Republic. (4) Nevertheless, their concept of society's relationship to the former slave, now free, did not necessarily extend beyond formally abolishing the legal status of slavery. Removing the legal status 'slave' in no way implied that Northerners did not recognise the

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1. Alexis de Toqueville, "Democracy in America", trans. G. Lawrence, ed., J.P. Mayer, New York, Doubleday and Co., 1969:373.

2. Litwack, 1961:3.

3. Indeed, throughout the latter part of the 18th century, there had been increasing hostility from white workers to competition with negro slaves (see Litwack, 1961:1-5).

4. See Chapter 5.

legal status of slavery as it existed in other regions nor did it imply any commitment to social and political equality for free blacks in the North. (1)

On the contrary, in creating a new status for former slaves, Northern legal institutions and practices developed a form of legal reasoning which denied citizenship, with all its privileges, to free blacks, on the grounds that blacks, being slaves at the time the US Constitution was framed, could not be regarded as citizens within the meaning of that term in the Constitution. The only civil rights to which blacks were entitled were those specifically created by statutory law, just as Southern legal institutions and practices argued that the personal rights of slaves were defined by statute. In this way Northern courts and legislatures were able to effect a re-definition of the former slave status so that law could exert its own specific power over the extent to which blacks would be integrated into Northern society.

One area in which this legal re-definition of the slave status was particularly effective was that of educational opportunity for free blacks. (2) In Connecticut, for example, two attempts were made in the 1830s to establish independent educational institutions for blacks: the first was an abolitionist proposal to establish a negro college in New Haven; the second was an attempt to establish a school for negro girls in Canterbury.

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1. Litwack, 1961:15-16.

2. A fundamental demand in the struggle of free blacks for survival and improvement in 19th century Northern society.

The attempt to establish a negro college in New Haven coincided with the advent of Garrisonian abolitionism. (1) In June 1831, three abolitionist leaders - Simeon S. Jocelyn, Arthur Tappan and William Lloyd Garrison (2) - proposed, to the first national negro convention, that such a college should be established to "cultivate habits of industry and obtain a useful mechanical or agricultural profession". (3) However, while the Convention endorsed the proposal, the town of New Haven firmly rejected it arguing that the founding of colleges would thwart the policy of 'colonization', (4)

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1. For a general background to the history of abolitionism, see references cited in Note 1, page 432. In addition, see Louis Filler, "The Crusade Against Slavery, 1830-1860", New York, 1960; and Dwight L. Dumond, "Anti-slavery: The Crusade for Freedom in America", Ann Arbor, 1961.

2. A Yale graduate and white minister in a New Haven church, a New York merchant and philanthropist, and the editor of 'The Liberator' (an anti-slavery newspaper), respectively.

3. See, 'Minutes and Proceedings of the First Annual Convention of the People of Colour', Philadelphia, 1831:5-7, as cited in Litwack, 1961:123-4.

4. The term 'colonization' refers to the idea, which originated as early as 1714, of sending negroes back to Africa. In 1777, the Virginia Legislative Committee, headed by Thomas Jefferson, set forth a plan for the gradual emancipation and exportation of slaves. The idea of colonization was central to the objectives of many emancipation societies and following Paul Cuffe's voyage to Africa with 33 negroes in 1815, the American colonization society was organised in 1817. Plans were made to establish a negro colony in Africa and by 1830 the Society had settled 1,420 negroes in Liberia. While some advocates of colonization wanted an end to slavery and the return of all negroes to Africa, slave holders hoped to drain off the free negro population thereby giving greater security to the institution of slavery. The great majority of negroes who did return to Africa, approximately 12,000 through the Society, were in fact, from the slave holding states. After 1831, however, the abolitionists led by Garrison (originally a friend of colonization) turned on the scheme and it fell into complete desuetude in the decade prior to the Civil War. For a full discussion of colonization, see Phillip J. Straudenraus, "The African Colonization Movement, 1816-1865", New York, 1961.

that such a college was destructive to the interests of the city and that no such college could be imposed on a community without that community's consent. (1) For the time being, Connecticut had denied educational opportunities to free blacks.

The second attempt, to establish a negro school for girls in Canterbury, began in 1832 when Miss Crandall, a Quaker schoolmistress, agreed to admit a negro to her popular girl's boarding school. After most parents withdrew their children, Crandall consulted Garrison and other abolitionists about opening her school exclusively to negro girls. (2) On March 2, 1833, 'The Liberator' announced the establishment of "a High School for Young Colored Ladies and Misses" and published a list of 'sponsors' which included virtually every prominent negro and white abolitionist leader in the North. Canterbury responded to the news of the proposed school with meetings, delegations of protest and warnings about the consequences. Despite tremendous pressure, Crandall and her abolitionist backers refused to abandon the project and in April 1833 the school opened and attracted students from various Northern states. The town responded with harassment and finally appealed to the state legislature for appropriate measures. (3)

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1. See, Litwack, 1961:126.

2. Ibid., 127.

3. See Samuel J. May, "Some Recollections of our Anti-Slavery Conflict", Boston, 1869:40-42, 50-51, as cited in Litwack, 1961: 127-8. The terrible consequences which were argued as being likely to follow included that there would be a depreciation in property values, that local negroes would claim equality with new arrivals which, in turn, would lead to claims of equality with whites and so on.

The legislature responded by passing an Act on May 24 which prohibited the establishment of "any school, academy or literary institution, for the instruction or education of coloured persons, who are not inhabitants of this state", and further forbade anyone to instruct, harbour or board such persons without the approval of local authorities. (1) The preamble to the Act notes that a school, in attracting pupils, would "tend to the great increase of the coloured population of the state, and thereby to the injury of the people". Clearly, the coloured population were not regarded as part of "the people". Crandall, however, refused to close the school and was duly arrested on charges of violating the new law. The controversy was now transferred to the courts.

At her first trial, on August 23, 1833, before the Windham County Court, the jury failed to agree on a verdict despite the judge's instruction to the jury that the 1833 statute was "constitutional and obligatory on the people of the State". (2) The jury was duly discharged and a second trial was held two months later. At the second trial, Crandall v Connecticut, (3) Chief Justice Daggett's charge to the jury upheld that of the judge in the

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1. Section 1, Act of 1833, in Hurd, 1858:2:45-46.

2. See, "Report of the Trial of Miss Prudence Crandall before the County Court for Windham County, August term 1833, On An Information Charging Her with Teaching Colored Persons not Inhabitants of this State", Brooklyn, Connecticut, 1833, as cited by Litwack, 1961:130.

3. 10, Conn. Rep., 339-372 (1833).

first trial. (1) Daggett did not find the 1833 statute in violation of any US constitutional provision. In particular, contrary to Crandall's defence counsel's argument, Daggett said that the 1833 Connecticut statute did not violate the 'privileges and immunities' clause (Article IV, Sec. 2, cl.1), (2) of the US Constitution since this constitutional provision applied to citizens and free blacks were not citizens within the meaning of that term in the US Constitution.

In arriving at this conclusion Daggett began with posing the question "are slaves citizens?" (3) He argued that they were not, because at the time of the framing of the US Constitution, certain clauses recognised slavery in fact if not in name; (4) other clauses recognised a distinction between free men and 'all other persons'; (5) and all states were slave states in the sense that at least some "persons" within the states were slaves. Daggett argued that "a citizen means a free man" therefore slaves could not be citizens. (6)

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1. Chief Justice Daggett's charge to the jury anticipated much of the logic of the US Supreme Court's decision in Dred Scott v Sandford more than two decades later, see pages 485-500 of this chapter.

2. Article IV, Sec.2, cl.1, states: "The citizens of each State shall be entitled to all privileges and immunities of citizens in the several States".

3. 10, Conn. Rep., 344 - emphasis in original.

4. Article IV, Sec.2, cl.3 - Fugitives from labour.

5. Article I, Sec.2, cl.3 - Representatives and direct taxes to be apportioned according to the number of free persons plus three-fifths of all other persons.

6. Daggett also held that Indians were not citizens within the meaning of the term.

On the basis of this logic Daggett arrived at the question "are free blacks citizens?" (1) In considering this question he dismissed the defence arguments for citizenship (2) and instead relied solely on the authority of Chancellor Kent's Commentaries that:

> In most of the United States, there is a distinction in respect to political privileges, between free white persons and free coloured persons of African blood ... The African race are essentially a degraded caste, of inferior rank and condition in society. (3)

Thus Chief Justice Daggett concluded that free blacks were not citizens within the meaning of the US Constitution.

In concluding his summing up to the jury, Daggett instructed them that the only issue before them was whether the 1833 statute was unconstitutional. While his opinion on the law was quite clear, he argued that, even if free blacks were citizens, this still did not make the 1833 statute unconstitutional. Education, he said, was a fundamental privilege, but the 1833 statute did not prohibit schools, it simply placed them under civil authorities. This, he said, was within the state legislature's power to do and did not offend the US Constitution. The jury returned a verdict against

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1. 10, Conn. Rep., 345 - emphasis in original.

2. He dismissed, for example, as irrelevant, federal statutes which provided that a free black navigating a vessel was under protection if he raised the American flag, and the defence contention that because coloured persons could be held responsible for treason then they must be citizens (Vol.10, Conn. Rep., 341).

3. Kent's Commentaries, at 258, cited by Daggett in Vol.10, Conn. Rep., 346 - emphasis in original.

Crandall and she subsequently appealed.

On appeal, the Supreme Court of Errors heard Crandall's argument that free blacks were citizens within the meaning of the US Constitution (1) and that the lower court's logic, arguing from the status 'slave' was wrong:

> Pupils are not slaves. The reason why slaves are not citizens is, because they are held to be property, and not men, and hence have not freedom of choice or action. The reason does not reach these pupils. (2)

The state however argued that the intention of the framers of the US Constitution was to make a distinction between whites, who were citizens, and "all other persons" who, at that time, were slaves. If the whole instrument was regarded in toto (3) then it was impossible to use the term citizen in relation to the coloured race. (4) In delivering the opinion of the court, however, Judge Williams felt "no disposition to volunteer opinion on that subject [the issue of citizenship]" (5) but instead reversed Miss Crandall's conviction on a technical defect in the information. (6)

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1. And were therefore entitled to the protection of Article IV, Sec.2, cl.1. This being the argument, the judge should have directed the jury in the lower court to rule that the 1833 statute was unconstitutional and void.

2. 10, Conn. Rep., 352 - emphasis in original.

3. It was argued that in construing certain sections of the US Constitution, the document must be considered as a whole.

4. 10, Conn. Rep., 354-65.

5. Ibid., 367.

6. The information had omitted to note that the school was not licensed. Judge Williams argued that this was a 'fatal defect' as the onus was on the State to set forth every fact to bring the case within the statute (10, Conn. Rep., 369). Chief Justice Daggett dissented from the other judges by arguing that Crandall had not noted this defect as a cause of error (Vol.10, Conn. Rep., 372).

While the Canterbury school finally closed on September 10, 1834, due to constant harassment and attempts to burn it down, (1) in May 1838, the state Senate repealed the 1833 statute under which Miss Crandall had been tried, as unconstitutional (2) and schools for black pupils were now legal in Connecticut.

Nevertheless, the schools which were established were based on segregation and it was to this issue that abolitionists now turned. By 1845, Massachusetts' negroes could send their children to public schools in various towns and only Boston (3) maintained a policy of segregation. Black and white abolitionists began to attack the policy of the Boston Primary School Committee (since it assumed responsibility for the classification and distribution of students) who responded by issuing reports in 1846 and 1849 condoning their policy of segregation on the grounds that racial mixing was degrading, that integration in other Massachusetts communities had failed, and that separate schools had demonstrated their superiority in Philadelphia, New York and Providence. Even assuming the correctness of integration in principle, the Committee felt that any attempt to implement it would be disastrous "under the present state of public feeling and sentiment". The Committee concluded that

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1. Litwack, 1961:131.

2. Hurd, 1858:2:46.

3. It must be emphasised however that the vast majority of negroes lived in Boston (see Litwack, 1961:143).

legislation could neither regulate social customs nor compel association. (1)

In 1849, Benjamin Roberts, a Boston negro, decided to test the legality of the Primary School Committee's power to enforce segregation. In the case of Roberts v The City of Boston, (2) which was an appeal from the Court of Common Pleas, Benjamin Roberts had brought suit in the name of his 5 year old daughter, Sarah, who had been excluded from five white primary schools on her way to her legal school, under an 1845 statute which provided that, "any child, unlawfully excluded from public school instruction in this commonwealth, shall recover damages therefor against the city or town by which such public instruction is supported". (3) The issue before the Court was whether the Primary School Committee's power to enforce segregation constituted an unlawful exclusion of Sarah Roberts from public school instruction under the 1845 statute.

Charles Sumner, (4) counsel for the 5 year old plaintiff, argued that the Massachusetts' State Constitution (5) and the "Spirit of American Institutions" recognised that "all men,

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1. City of Boston, Report of the Primary School Committee, 1846; and Report of a Special Committee of the Grammar School Board, 1849; as cited in Litwack, 1961:144-46.

2. 5 Cush., (59 Mass.) 198-210, (1849).

3. 1845 Statute, c.214, cited in Roberts v The City of Boston, 5 Cush., 198.

4. Subsequently an anti-slavery leader in the US.

5. See Chapter 5 for a discussion of the Massachusetts State Constitution.

without distinction of color or race are equal before the law". (1) In arguing that Sarah Roberts was asking for her personal rights, he went on to demonstrate just how segregated schools violated the principle of equality before the law. Although the Committee could rightly classify scholars, it could not assume:

> Without individual examination, that an entire race possess certain moral or intellectual qualities, which render it proper to place them all in a class by themselves. (2) (3)

Such an assumption, argued Sumner, was a violation of the principle of equality before the law, therefore the bye-law of the Committee providing 'separate but equal' schools must be held to be unconstitutional - a school devoted exclusively to negroes could in no way be regarded as equal. Moreover, since slavery had been abolished in Massachusetts through the Bill of Rights in the Massachusetts State Constitution, (4) "the same words, which are potent to destroy slavery, must be equally potent against any

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1. 5 Cush., 201.

2. Many later cases, extending well into the twentieth century, would use "scientific" evidence to support the contention that negroes were, in fact, intellectually inferior. For a selection of these cases see, T. Emerson, D. Haber and N. Dorsen, "Political and Civil Rights in the United States", Boston, Little, Brown and Co., 1967: Vol.2:1230-1300.

3. 5 Cush., 203.

4. See Chapter 5 for a discussion of the relevance of the Bill of Rights to the abolition of slavery in judicial practices.

institution founded on caste". (1)

In delivering the unanimous opinion of the Court, Chief Justice Shaw, however, upheld the Committee's power to enforce segregation. (2) In arriving at this decision, Shaw considered Sumner's argument that segregation violated the principle of equality before the law. This principle, said Shaw, was sound "as a broad general principle" but it did not mean the same in all circumstances. For Shaw, what the principle of equality before the law meant was that:

> The rights of all, as they are settled and regulated by law, are equally entitled to the paternal consideration and protection of the law, for their maintenance and security. What those rights are, to which individuals ... are entitled, must depend on laws adapted to their respective relations and conditions. (3)

In interpreting the principle of equality before the law in this manner, Chief Justice Shaw argued that the question before the Court was whether the regulation which provided separate schools for coloured children was a violation of their legal rights. These legal rights, said Shaw, depended upon the "provisions of law" not "broad principles", thus the rights of individuals, in regard to

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1. 5 Cush., 204. Sumner concluded his argument by appealing to the court on behalf of Sarah Roberts. On the other side, P.W. Chandler, on behalf of the City of Boston, confined his argument largely to a legal defence of the powers of the Primary School Committee, declining to discuss any of the substantive issues involved in segregation.

2. The plaintiff, Sarah Roberts, was therefore nonsuited (i.e. suit denied).

3. 5 Cush., 206.

schools, had to be ascertained in relation to statutory law. (1) By adopting this line of reasoning Shaw had accomplished what Southern legal practices had managed in relation to the question of the personal rights of slaves. He had denied the applicability of "broad principles" and argued that the personal rights of free blacks were exclusively dependant on statute, just as Southern judges had argued that the personal rights of slaves depended wholly on statutory law. (2) And, from a consideration of the statutory law on the subject, Shaw concluded that the Primary School Committee did have the power to decide on whether or not separate schools were in "the best interests of both classes of children placed under their superintendence" (3) and since Boston provided for the instruction of negro children, it had discharged its duty.

The importance of the decision in Roberts v The City of Boston transcended the local struggle for integration. Chief Justice Shaw's legal argument in favour of segregated schools on the basis of the 'separate but equal' doctrine established a controversial precedent in American law which would be argued in courts throughout the United States, in cases relating not only to

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1. 5 Cush., 206-207.

2. This line of reasoning, as developed within Southern legal practices, is fully discussed in Chapter 7.

3. 5 Cush., 209.

education, for well over a century. (1)

After the Roberts decision, Boston negroes turned to legislative appeals through the Equal School Rights Committee and on April 28, 1855, a Bill was approved to prohibit racial or religious distinction in admitting students to any public school. This achievement inspired activists throughout the North in their campaigns for integration in schools but by 1860 there were only a

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1. Roberts v City of Boston, 5 Cush., 198, in which the Supreme Judicial Court of Massachusetts held that the primary school committee of Boston had power to make provision for the instruction of coloured children in separate schools established exclusively for them, and to prohibit their attendance upon the other schools, was one of the earliest cases stating the legality of 'separate but equal' facilities. The argument regarding equality before the law pre-dated the passage of the 14th Amendment to the Constitution, passed by Congress on June 16, 1866, and ratified on July 28, 1868, which states that: "Section 1. All persons born or naturalised in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall bridge the privileges and immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the law". Later cases contesting the 'separate but equal' doctrine were largely premised on the 14th Amendment, equal protection and due process clauses. See for example, Plessy v Ferguson, 163 U.S. 537, 16S. Ct. 1138, 41 L.Ed. 256 (1896); Buchanan v Warley, 245 U.S. 60, 38S. Ct. 16, 62 L.Ed. 149 (1917); Gong Lum v Rice, 275 U.S. 78, 48S. Ct. 91, 72 L.Ed. 172 (1927). For other early US Supreme Court Cases, not squarely ruling on the separate but equal doctrine, yet deciding the issues within this framework see, Cumming v Board of Education, 175 U.S. 528, 20S. Ct. 197, 44 L.Ed. 262 (1899); Berea College v Kentucky, 211 U.S. 45, 29S. Ct. 33, 53 L.Ed. 81 (1908). See also, Missouri ex rel Gaines v Canada, 305 U.S. 337, 59S. Ct. 232, 83 L.Ed. 208 (1938); Sweatt v Painter, 339 U.S. 629, 70S. Ct. 848, 94 L.Ed. 1114 (1950); McLaurin v Oklahoma State Regents, 339 U.S. 637, 70S. Ct. 851, 94 L.Ed. 1149 (1950); Brown v Board of Education, 347 U.S. 483, 74S. Ct. 686, 98 L.Ed. 873 (1954); and Bolling v Sharpe, 347 U.S. 497, 74S. Ct. 693, 98 L.Ed. 884 (1954). For a fuller discussion of the separate but equal doctrine, see Chapter 9.

few small and scattered communities (1) which agreed to integration while the larger cities, including New York, Philadelphia, Providence, New Haven and Cincinnati, persisted with the policy of 'separate but equal'. (2)

Nevertheless, despite the fact that free blacks in the North were clearly regarded as a separate species to whites, (3) from the 1830s onwards blacks (slave or free) were migrating North and West from the South. And, while some of the Northern abolitionists made concerted efforts to assist Southern slaves to escape, particularly by means of the underground railroad, (4) certain Northern states, such as Indiana and Ohio, which bordered on slave holding states, enacted legislation which prohibited the further emigration of free negroes. In the Indiana case of Barkshire v State, (5) for example, decided in 1856, Barkshire, a negro, had

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1. It should be noted that free negroes (46% in the North; 44% in the South; the remainder in the South Central and Western States in 1860, Franklin, 1969:217) were concentrated in urban areas.

2. Litwack, 1961:149-151.

3. Evidenced by the fact that laws against inter-marriage existed; that free negroes were not able to testify against whites in a criminal action; and other such restrictions.

4. The origin of the Underground Railroad goes back to the 18th century where people assisted runaway slaves, and by the end of the War of Independence, organised resistance was taking shape with slaves being 'purchased' and brought North etc. Stations, conductors and means of conveyance had been organised by the 1830s (though originally most of the fugitives travelled by foot), and with the emergence of Garrison and other militant abolitionists, the Underground Railroad operated in flagrant violation of federal fugitive slave laws (Franklin, 1969:253-260).

5. 7 Indiana, 389-41 (1856).

appealed against being convicted for bringing a negro woman (as his wife) into Indiana in June 1854, and harbouring her there, in contravention of the Constitution and laws of Indiana.

In delivering the opinion of the Court, Judge Stuart argued that, on the basis of the 13th Article to the Indiana State Constitution of 1851, which provided that, "no Negro or Mulatto shall come into or settle in the State; that all contracts made with those coming in, contrary to such prohibition, shall be void", and the subsequent Act of 1852 passed to enforce this Article, (1) Barkshire's conviction must be upheld and the marriage (2) declared void. He noted that "the policy of the State is ... to exclude any further ingress of Negroes and to remove those already among us as speedily as possible". (3) Stuart also noted that in inaugurating this policy, the people had voted overwhelmingly in favour under the title "Exclusion and Colonization (4) of Negroes". Free negroes, of course, were no part of the popular voice.

This denial of civil and political rights to free blacks in the Northeast coupled with the policy of Northwestern states to

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1. Which provided a fine of from 10 to 500 dollars as a penalty for violation of the Act (7 Indiana:389).

2. Marriage was, said Stuart, a civil ceremony, thus a contract, therefore no exception could be taken to the statute (7 Indiana: 389).

3. 7 Indiana:390.

4. Another Act of 1852 had been passed which set aside 5,000 dollars for a plan to colonize negroes out of the State.

exclude blacks altogether was held to be consistent with abolitionism. Indeed, the dynamics of national territorial expansion and frontier settlement demonstrated that the support of abolitionism under the banner of free soil could be combined, not simply with ambivalence and paternalism towards the negro, but with virulent racism. (1) At the same time, the status attributed to free blacks in the North and West undercut the force of any Northern criticism of the Southern slave system and was viewed by Southerners as confirming the correctness of the racial caste system of the South.

By the 1830s a specifically Southern defence of the slave system had developed and the ideological battle against Northern anti-slavery rhetoric had begun. (2) The pro-slavery defence argued that slaves in the South were better off than the 'free-wage-slaves' in the North. Moreover, not only was it argued that slave labour was absolutely essential to the economic prosperity and development of the South but also that social upheavals in the free states were to be attributed directly to unregulated capitalism and Northerners were called on to accept slavery as a means of

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1. For a discussion of the racist elements in the denial of civil and political rights and in abolitionism, see C. Vann Woodward, "The Strange Career of Jim Crow", 3rd rev.ed., New York, Oxford University Press, 1974.

2. For a fuller discussion of this point, see Franklin, 1969: 260; and Hofstadter et al, 1964:156.

repressing upheaval. (1) The virtues of slave labour versus free labour were constantly expounded by Southerners, who noted, in particular, that, "where slavery exists labor and capital never come in conflict, because they are in the same hands, and operate in harmony". (2) In sum, it was argued that slavery permitted the development of a higher culture in the South than in the North.

One of the most powerful ideological weapons, however, was the fact that, as Southern ideologues constantly argued, the US Constitution itself guaranteed the legal right to slave property, and, while the international slave trade had been legally prohibited in 1808, (3) the inter-state commerce in slaves was quite legal and continued to flourish. No federal statute nor US Supreme Court decision had interfered with this source of slave labour and, as will be discussed in the next section, the US Supreme Court had no desire to either question the legality of the inter-state slave trade or to place its regulation firmly in the hands of the federal government.

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1. For a statement of an extreme view of this kind, see George Fitzhugh, "Sociology for the South or the Failure of Free Slavery", Richmond, Va, 1854.

2. Judge Ruffin's address before the State Agricultural Society of North Carolina, October 18, 1855, in 'Publications of the North Carolina Historical Commission', Vol.8, Part 4, "The Papers of Thomas Ruffin", IV, 333-4. Judge Ruffin decided the case of State v Mann, referred to in Chapter 7.

3. See Chapter 6 for a discussion of the ineffectiveness of this legislation and subsequent legislative efforts to prohibit the international trade in slaves.

INTER-STATE COMMERCE IN SLAVES : STATE v CONSTITUTIONAL LAW

When the early slavery cases (1) were argued before the US Supreme Court, between 1810 and 1816, the Court was not dealing with the issues in a climate of political opinion divided over the question of the extent of the expansion of the slave system. However, by the 1840s, there had been a considerable escalation in the ideological struggle between pro- and anti-slavery forces, (2) so that any US Supreme Court decision relating to slavery would have considerable political and legal significance for these struggles. Thus, the Supreme Court Justices, in the 1841 case of Groves v Slaughter, (3) recognised that they had been brought into 'contact with a dangerous political issue" (4) but, rather than confront the major constitutional issues involved in "the subject of the respective powers of the State and the Federal Government over the introduction of slaves within State borders", (5) the Court chose to evade these issues by reaching its decision on technical grounds.

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1. Negro London, Negro Ben, Mima Queen and Negress Sally -- discussed in Chapter 7.

2. In addition to the problems of intersectional strife between North and South, many contemporary figures thought the black/white conflict unsolvable. Alexis de Tocqueville reports that John Latrobe of Maryland, a leading Colonizationist, had said: "The black and white population are in a state of war. Never will they mingle. One of them will have to yield place to the other", as quoted in Frederickson, 1971:21 .

3. 40 US (15 Pet.) 449 (1841).

4. Warren, 1923:2:67.

5. Ibid., 67.

The litigation issues in the case of Groves v Slaughter date from 1835 when a Louisiana slave trader, Robert Slaughter, entered into a contract with John W. Brown of Mississippi for the sale of slaves who were to be transported from the state of Louisiana to Mississippi. Slaughter delivered the slaves to Mississippi and, in exchange, accepted two promissory notes from Brown which were due and payable at a future time. When the notes matured, Slaughter demanded payment, and Brown defaulted. Slaughter then demanded payment from Moses Groves, (1) who had endorsed the promissory notes, thus accepting legal responsibility for payment to Slaughter in the event of Brown's default.

Groves, however, refused to honour his endorsement and Slaughter brought suit against Groves in the Circuit Court of the US for the Eastern District of Louisiana (2) for a breach of contract. Groves defended the suit on the grounds that the contract upon which the note was based was illegal and therefore unenforceable. The contract was illegal, argued Groves' lawyer, because its subject matter was illegal under the Mississippi State Constitution. By an amendment to the Mississippi State Constitution, passed at a convention on September 2, 1832, the introduction of slaves as merchandise, or for sale, into that

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1. Who subsequently became the plaintiff in error before the US Supreme Court.

2. For an explanation of the federal court system, see Note 1, p.415, Chapter 7.

state, on or after 1 May 1833 was prohibited. (1) Since the contract was entered into in the state of Mississippi, after 1 May

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1. The constitutional amendment read as follows: "The introduction of slaves into the State, as merchandize, or for sale, shall be prohibited, from and after the 1st day of May 1833: provided, that the actual settler or settlers shall not be prohibited from purchasing slaves in any state of this Union, and bringing them into this state for their own individual use, until the year 1845", Miss. Cons. Art. Section 2 (1832) . The general concern about the commercial traffic in slaves in Mississippi dated back to 1808, when, still a territory, Mississippi regulated the traffic to protect itself against "dangerous or convict slaves". It will be recalled from Chapter 6 that many Southern states, around this time, adopted similar measures for a variety of conjunctural reasons including the fear of escaped slaves following Toussaint L'Ouverture's revolt in Haiti and to prevent glutting the market in slaves. Mississippi had not enacted legislation under its first State Constitution which granted the General Assembly power to prohibit the introduction of slaves, as merchandise, from outwith the state, thus the new constitutional provision was adopted in 1833. Why the state adopted this provision in 1833 is again attributable to a complex of conjunctural factors including the fear of slave rebellion, given that in the 1830 Census whites outnumbered slaves by as little as 5000 and the introduction of new slaves was rapidly increasing (with some counties reporting an outnumbering of slaves to whites at 3:1), and the fact of the Nat Turner slave insurrection in Virginia in 1831. Perhaps more importantly, however, this constitutional provision was an economic measure adopted by Mississippians to avoid paying some 2 million dollars in debts owed to Northern financial interests as a result of loans and debt accruing from purchasing slaves. "Owing to the great financial difficulties into which that State had been plunged, its Governor had recommended such prohibition in order to check the drain of capital away from the State, through withdrawal to other States of the purchase price of slaves so introduced", Warren, 1923:2:68, footnote 1 .

1833, the laws of that state were controlling, (1) argued Groves. The Circuit Court, however, gave judgement for Slaughter, (2) upholding the validity of the notes in question, and Groves subsequently appealed to the US Supreme Court on the ground of states rights thereby raising the issue of the extent to which the US Congress had control over the inter-state commerce in slaves.

The case of Groves v Slaughter was argued before the US Supreme Court for 7 days, received enormous public attention, and was heard by leading politicians including Clay who emphasised that more than 2 or 3 million dollars would be affected by the Court's judgement. The contemporary view was that:

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1. If the Court had upheld this argument the promissory notes would have been declared void because the contract was illegal under the Mississippi Constitutional Amendment of 1832. Had that been the case, then all such contracts would have been void and, according to a Natchez newspaper this would "have an important bearing on Northern negro debts to the amount of at least 2 million dollars" as cited in Warren, 1923:II:68, footnote 1 . Contracts made regarding the purchasing of slaves were typically made on a 'pay later' basis - the consequences of a decision which upheld the controlling authority of state law, thereby making such contracts void in Mississippi, for Northern and Southern capital, would have been enormous.

2. In the amount of 7,000 dollars plus interest and costs.

> The case appeared to present questions of a most explosive nature, and to require the Court to decide whether, if negro slaves were articles of commerce, the State Constitution was repugnant to the Commerce Clause (1) of the Federal Constitution; or, if slaves were persons, whether they were citizens of the United States whose constitutional rights had been infringed by the State Constitution. A decision on the latter question would have caused the Court to confront, in 1841, the same mighty problem which was to come before it, 15 years later, in the Dred Scot Case. (2)

In the event, however, the Court chose neither to address the issue of whether or not the Mississippi State Constitution was "repugnant" to the commerce clause of the US Constitution, if slaves were articles of commerce, nor to address the issue of whether

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1. Article I, Section 8, Clause 3 of the US Constitution, gives Congress the power: "to regulate commerce with foreign nations, and among the several States, and with the Indian tribes". The issues raised by Groves went to the core issues involved in the birth of the national Constitution. The drafters of that document were particularly concerned about states excluding or penalising the commerce from other states. Several legal historians have concluded that the Constitutional Convention was called specifically to give the national government the power to regulate commerce. See, for example, Beveridge, 1916. There is little doubt that the commerce clause of the Constitution, as finally drafted, was designed to eliminate the state-created legal impediments to the free flow of commerce among the States, particularly where the motiviation for such state legislation was the protection of a state's own domestic economic interest. Alexander Hamilton, John Jay and James Madison, in their essays in support of the US Constitution emphasised the need for national regulation of inter-state commerce otherwise, "each State, or separate confederacy, would pursue a system of commercial policy peculiar to itself" (The Federalist Papers, 37, Modern Library Edition, 1965).

2. Warren, 1923, 2:70 - emphasis in original.

slaves, if persons, were citizens of the US whose constitutional rights had been infringed by the State Constitution. Instead, the Court confined its argument to a precise understanding of the Mississippi State Constitution and found that, since no additional statutory legislation had been enacted subsequent to the 1832 constitutional amendment prohibiting the introduction of slaves as merchandise, or for sale, into that state, on or after 1 May 1833, the constitutional amendment was ineffective and therefore ruled that the decision of the Circuit Court in favour of the validity of the notes in question was correct and must be upheld. Judge Thomson, in delivering the majority's opinion, pointed out that the court's holding made:

> ... it unnecessary to enquire whether this article in the constitution of Mississippi is repugnant to the constitution of the United States; and indeed, such enquiry is not properly in the case, as the decision has been placed entirely upon the construction of the constitution of Mississippi. (1)

By reaching a decision on technical grounds regarding the construction of the Mississippi State Constitution, the Court had evaded the central US Constitutional issues.

Nevertheless, many of the Justices did express their views on the underlying federal constitutional issues almost, as if, they wanted their interpretations 'on the record'. For example, Justice McLean, an anti-slavery proponent said:

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1. 40 US (15 Pet.), 503.

> As one view of this case involves the construction of the Constitution of the United States in a most important part, and in regard to its bearing upon a momentous subject, ... under existing circumstances, I deem it fit and proper to express my opinion upon it ... Each State has a right to protect itself against the avarice and intrusion of the slave dealer; to guard its citizens against the inconveniences and dangers of a slave population. The right to exercise this power by a State is higher and deeper than the Constitution. (1)

While McLean's comments represented the strongest statement yet made by a Supreme Court Justice on the slavery issue, both pro- and anti-slavery factions regarded his comments as supporting their respective positions. The slave states took his words as supporting their position that the states had exclusive power to regulate all questions affecting slavery within their borders and those against the expansion of slavery argued that McLean's view precluded such expansion. (2)

Not surprisingly then, other pro-slavery Supreme Court Justices concurred with the view that the individual states, not Congress, had the power to regulate the traffic in slaves. Thus, Chief Justice Taney argued:

> In my judgement, the power over this subject is exclusively with the several states; and each of them has a right to decide for itself, whether it will, or will not, allow persons of this description to be brought within its limits, from another state, either for sale, or for any other purpose ... (3)

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1. As cited in Warren, 1923:2:71-72.
2. Warren, 1923:2:72.
3. 40 US (15 Pet.), 508.

Only Justice Baldwin dissented from this view because he felt "bound to consider slaves as property".(1) The US Constitution guaranteed the right to such property and gave it protection from violation - it was for the states to declare "what is property capable of ownership" (2) and, having declared that slaves constituted such property, Congress alone had the power to regulate inter-state trading in that property. (3)

Thus, in Groves v Slaughter, although a decision was reached which evaded ruling on the federal constitutional issues, the Supreme Court Justices had revealed how they would have voted on these issues. This chance came, as will be discussed in the next section, in the 1842 case of Prigg v Pennsylvania, (4) concerning fugitive slaves, when the US Supreme Court were not able to refrain from ruling on the Constitutional issues by merely deciding on a technicality.

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1. Ibid., 512.

2. Ibid., 515.

3. It is difficult to understand how the inter-state traffic in slaves could be regarded as anything other than a commercial activity within the meaning of the commerce clause of the US Constitution. For example, "One Hundred and Twenty Negroes for Sale - The Subscriber has just arrived from Petersburg Virginia, with one hundred and twenty likely young Negroes of both sexes and every description, which he offers on the most reasonable terms ... Planters and traders are earnestly requested to give the subscriber a call previously to making purchases elsewhere ..." Benjamin Davis, Hamburg S.C. September 28, 1838. Adverts of this kind were a typical feature of Southern society, as the inter-state trade flourished, (as cited in William Goodell, "The American Slave Code in Theory and Practice", 1853; rep.ed., New York, New American Library, 1969:54-55).

4. 41 US (16 Pet.) 539 (1842).

FUGITIVES FROM LABOUR : THE CONSTITUTIONAL GUARANTEE TO THE OWNERSHIP OF SLAVE PROPERTY AFFIRMED

If the US Supreme Court, in Groves v Slaughter, had held that Mississippi could restrict the traffic of slaves, as merchandise, into its state, Northern states would have been provided with a general principle which could have been applied in prohibiting Southerners from bringing slaves into Northern states when slave owners were visiting these states. (1) Moreover, if the Court had held with Groves' constitutional argument, such a holding might also have shed light on the Northern states' power to set up standards which would deter the capture of fugitive slaves. The issue of fugitive slaves was very much alive in the 1840s with slave owners becoming increasingly frustrated by the lack of enforcement of the 1793 federal statute (2) enacted to render the US Constitutional provision for the recapture of fugitives (Article IV, Section 2, Clause 3) effective. This lack of enforcement was primarily due to the fact that the subsequent state statutes passed in the 'free' states, which specified definite procedures for the reclaiming of fugitives, were either not enforced or, for some technical reason, state courts refused to grant reclamation. Not surprisingly then, when the case of Prigg v Commonwealth of Pennsylvania, (3) the first case to come before the US Supreme Court

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1. See, for example, Commonwealth v Aves, 35 Mass. (18 Pick) 193 (1836); Jackson v Bulloch, 12 Conn. 39 (1837); and, for a discussion of the issues, see Wiecek, 1974:131-3.

2. Act of February 12, 1793, Ch.7, 1 Stat.302. This Act, which established procedures through which slave owners or their agents could get certificates permitting removal of alleged fugitive slaves, was discussed in Chapter 5.

3. 41 US (16 Pet.) 539 (1842).

involving fugitive slaves, was being heard in 1842, both pro- and anti-slavery factions were anticipating a decision of profound political and legal significance.

Edward Prigg had pled not guilty to his indictment under an 1826 Pennsylvania statute (1) for the forceful abduction of a negro with the intention of delivering her up to her Maryland owner, Margaret Ashmore. The 1826 Pennsylvania statute had established a specific procedure (2) for the claim and delivery of 'fugitives from labour' and Prigg was alleged to have violated Sections 6 and 7 of the Act which required that a state magistrate issue a certificate for the removal of the fugitive from Pennsylvania. The state magistrate had not, in fact, issued a certificate for the removal of Margaret Morgan, the Maryland runaway slave, from Pennsylvania, thus the lower court in Pennsylvania found Prigg guilty of the offence. (3) This judgement was later upheld by the

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1. Act of March 25, 1826, 'Pennsylvania Laws', titled, 'An Act to give effect to the provisions of the constitution of the United States relative to fugitives from labor for the protection of free people of color and prevent kidnapping'.

2. This procedure required the claimant to obtain a warrant from a state magistrate, and then to bring the fugitive before the magistrate pursuant to the warrant (3). Upon proof to the magistrate of the legitimacy of the claim (4-5) a certificate would be issued permitting the removal of the fugitive from the state (6-7) and the magistrate was required to keep a record of all such certificates (10). Section 1 specified criminal penalties for violation of any of these provisions.

3. Morgan was a slave, according to the laws of Maryland, to Margaret Ashmore; the slave escaped and fled to Pennsylvania in 1832; Prigg, the legally constituted agent for Ashmore, took the negro woman, in 1837, as a fugitive from labour, before a state magistrate after obtaining the correct warrant but the magistrate refused to grant the certificate required by the 1826 Pennsylvania statute.

Supreme Court of Pennsylvania and the case before the US Supreme Court was based on a writ of error from that judgement.

In Prigg v Pennsylvania the central argument presented to the US Supreme Court Justices by counsel was as to the constitutionality of the 1826 Pennsylvania statute. In discussing the constitutional provisions at issue in the case, Prigg's counsel argued that the precise issue before the court was the interpretation of Article IV, Section 2, Clause 3:

> No person held to service or labour 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 labour but shall be delivered up on claim of the party to whom such service or labour may be due.

The constitutional purpose behind this clause was argued counsel,

> To secure to the citizens of the slave-holding states the complete right and title of ownership in their slaves, as property, in every state in the Union into which they might escape ... [since the] ... full recognition of this right and title was indispensable to the security of this species of property in all the slave-holding states. (1)

Because the state of slavery was a municipal regulation, founded upon territorial laws, (2) it was necessary to insert a specific

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1. 41 US (16 Pet.) 543.

2. Counsel cited Sommersett v Stuart, (20 Howell's State Trials), as precedent for this position, arguing that since Sommersett was decided prior to the Revolution, this view of the status of slavery was the position when the Constitution was drafted. For a discussion of the Sommersett Case, see Chapter 2.

clause in the US constitution, otherwise "every non-slave holding state in the Union would have been at liberty ... to have declared free all runaway slaves coming within its limits". (1)

In developing this line of argument, Prigg's counsel arrived at the conclusion that Article IV, Section 2, Clause 3 granted an unqualified "right on the part of the owner of the slave, which no state law or regulation can in any way qualify, regulate, control or restrain". (2) This being the case, an owner had a right to repossess this property which local state laws conferred upon him. However, for this constitutional right to be effective required legislation, and this was provided by the 1793 federal statute which provided for the repossession of a fugitive slave, (3) and "the legislation of congress, if constitutional, must supersede all state legislation upon the same subject; and by necessary implication prohibit it". (4)

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1. 41 US (16 Pet.) 544.

2. Ibid., 545.

3. Act of February 12, 1793, Ch.7, 1 Stat. 302: "Sec.3. And be it so enacted, that when a person held to labour in any of the United States, or in either of the territories on the Northwest or South of the river Ohio, under the laws thereof shall escape into any other of the said states or territory, the person to whom such labour or service may be due his agent or attorney, is hereby empowered to seize or arrest such figutive 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 ... and upon proof ... either by oral testimony or affidavit ... that the person so seized and arrested doth, under the laws of the state or territory from which he or she fled, owe service or labour to the person claiming him or her, it shall be the duty of such judge, or magistrate to give a certificate thereof to such claimant, his agent or attorney, which shall be sufficient warrant for removing the said fugitive from labour, to the state or territory from which he or she fled".

4. 41 US (16 Pet.) 556.

The State of Pennsylvania argued, on the other hand, that the 1793 federal statute was unconstitutional because it did not fall within the scope of any of the enumerated powers of legislation conferred upon Congress by the US Constitution, and, that being the case, the Act of Congress was null and void and the Pennsylvania statute was therefore legally binding.

Justice Story, however, in delivering the majority opinion of the US Supreme Court, noted that the State of Pennsylvania's argument, in effect, was that unless the power to enforce constitutional rights could be found among explicit powers of legislation enumerated in the Constitution then these rights could not be enforced. But, said Story, "such a limited construction of the constitution has never yet been adopted as correct, either in theory or practice". (1) Not only did the fact that Congress pass the 1793 statute demonstrate that they had held a different interpretation of the Constitution, but also the fact that various state courts (2) had upheld the validity of the 1793 statute, demonstrated that the Act was within the scope of the constitutional authority conferred on the national legislature. But even if the Act had just recently been passed, Justice Story made it clear that "we hold the act to be clearly constitutional". (3)

The only remaining point at issue, said Story, was "whether the power of legislation upon this subject [of fugitive slaves] is

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1. 41 US (16 Pet.) 618.

2. Virtually all of the decisions were rendered in Southern state courts.

3. 41 US (16 Pet.) 622.

exclusive in the national government, or concurrent in the states". (1) In the opinion of the US Supreme Court "it is exclusive" (2) and, in giving his reasons for this opinion, Justice Story noted, firstly that:

> The right to seize and retake fugitive slaves and the duty to deliver them up, in whatever state of the Union they may be found, and, of course, the corresponding power in congress to use the appropriate means to enforce the right and duty, derive their whole validity and obligation exclusively from the Constitution of the United States ... Before the adoption of the constitution, no state had any power whatsoever over the subject, except within its own territorial limits; (3)

and secondly that, in order to provide an effective guarantee for this "absolute right", the control of fugitive slaves had to be undertaken by:

> One and the same will, and act uniformly by the same system of regulations throughout the Union ... [since] The legislation of one state may not only be different from, but utterly repugnant to and incompatible with, that of another. (4)

Because some non-slave-holding states may not have chosen to return fugitives, if there had been a concurrent power in the states to act on the question of fugitive slaves, and because this power would have amounted to the "power to destroy the rights of the owner",

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1. Ibid.

2. Story cited the opinion of Chief Justice Marshall in Sturges v Crowninshield as binding precedent for this view -17 US (4 Wheat. Rep.)122 (1819) . For a discussion of the decisions of the US Supreme Court in the Marshall era, see Chapter 7.

3. 41 US (16 Pet.) 623.

4. Ibid.

Story concluded that "such a state of things could never have been intended" and that the right of legislation on the subject must be construed as exclusive in Congress to provide the owner with security for his property. (1) For these reasons, the US Supreme Court held that the 1826 Pennsylvania statute was unconstitutional and void since, "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". (2)

This holding, however, was qualified, by what Justice Story regarded as a major concession to the anti-slavery interest, insofar as he argued that state officials were not obliged to assist in the enforcement of the federal law. Thus, Congress had no power to require the state magistrate in Prigg v Pennsylvania to issue a certificate for the removal of Margaret Morgan (the slave) from the state of Pennsylvania. While state magistrates could issue a certificate for removal under the 1793 federal statute, if they did not do so federal courts existed in all the states where such a certificate could be obtained.

The judgement of the Supreme Court of Pennsylvania was, however, reversed on the grounds of the unconstitutionality of the 1826 Pennsylvania statute; Prigg was therefore found not guilty of the offence since, legally, no offence had been committed; and the case

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1. 41 US (16 Pet.) 624-5.

2. Ibid., 626.

was remanded from the US Supreme Court back to the state court for the judgement to be carried into effect. Prigg could then seek a certificate from a federal judge and remove the slave back to Maryland.

While the majority of the US Supreme Court concurred with the main holdings, and Justice Wayne concurred with the entire opinion on the grounds that at the time when the US Constitution was framed, the protection of all property (including slave property) was of paramount importance in protecting the "institutions of the states", (1) Chief Justice Taney (2) wanted to go further than the majority of the Court in protecting the master's rights of ownership by requiring state officials to assist in the rendition of fugitive slaves. (3) Only Justice McLean dissented from the majority in arguing for the validity of the 1826 Pennsylvania statute, noting that the critical issue in Prigg v Pennsylvania was: "whether the claimant of a fugitive from labor may seize and remove him by force, out of the state in which he may be found, in defiance of its laws". (4) In this context he was not referring to the laws of a state which were in conflict with the US Constitution or the 1793 federal statute.

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1. 41 US (16 Pet.) 645.

2. See Dred Scott v Sandford, discussed in the next section of this chapter, for Taney's views on the legality of slavery. Note also that two other justices agreed with Taney on the point of his dissent.

3. 41 US (16 Pet.) 633.

4. Ibid., 666. McLean's argumentation on this point is entirely consistent with the views he expressed earlier in the case of Groves v Slaughter, discussed at p.462 of this chapter. McLean was one of the two Northern justices of the Court.

He agreed that such state laws were void. What he was referring to were "those laws which regulate the police of the state ... and [which] preserve its territory and jurisdiction from acts of violence". (1) By looking into the circumstances which led to the passage of the 1793 federal statute, (2) McLean argued that there was nothing in that statute which could defend the US Supreme Court's opinion that a right existed to take the fugitive, as in the present case, by force and remove him out of the state. Not only did such a right not exist but to remove a slave forcibly from a state was an expressed violation of the 1793 federal statute.

McLean went on to note that while:

> The rights of the master, so far as regards the service of the slave, are not impaired by [the slave's flight to another state] ... the mode of asserting them is essentially modified. In the state where the service is due, the master needs no other law than the law of force, to control the action of the slave. But can this law be applied by the master, in a state which makes the act [of slavery] unlawful? Can the master seize his slave and remove him out of the state, in disregard of its laws, as he might take his horse which is running at large? (3)

He therefore argued that the majority of the US Supreme Court had, in fact, held to the view that there was no difference in principle between a runaway slave and a runaway horse. He, however,

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1. Ibid., 666.

2. The 1793 federal statute had been passed in the context of a conflict between Pennsylvania and Virginia over the forcible removal of persons claimed as fugitive slaves (see Chapter 5, p.321).

3. 41 US (16 Pet.) 668.

maintained that there was a difference:

> The slave as a sensible human being, is subject to the local authority into whatsoever jurisdiction he may go; he is answerable under the laws for his acts, and he may claim their protection; the state may protect him against all the world except the claim of his master ... and should the slave commit murder, he may be detained and punished for it by the state, in disregard of the claim of the master. Being within the jurisdiction of a state, a slave bears a very different relation to it from that of mere property. (1)

On this basis, Justice McLean argued that there was no conflict between the 1826 Pennsylvania Statute and 1793 federal statute - both were in accord. In a slave state, every coloured person was assumed to be a slave, whereas in a non-slave holding state, like Pennsylvania, every coloured person was assumed free. It was on this principle that all states, slave or free, legislated. Thus, Pennsylvania could clearly prohibit and punish the forcible removal of a coloured person out of the state. This was compatible with the 1793 federal statute which "authorises a forcible seizure of the slave by the master, not to take him out of the state, but to take him before some judicial officer within it". (2)

In addition, however, the majority of the US Supreme Court had argued that the 1826 Pennsylvania statute was in conflict with the US Constitution because it interfered with the constitutional guarantee afforded to the master as to the protection of his slave property, if fugitive slaves could not be forcibly removed from other

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1. 41 US (16 Pet.) 669.

2. Ibid., 670.

states. But, said McLean, this guarantee only applied to slaves and in Pennsylvania, since all coloured persons were assumed free, the master could not forcibly remove a claimed slave, he must prove that the said slave was, in fact, a slave:

> The presumption, in a non-slave holding state, is against the right of the master, and in favor of the freedom of the person he claims. This presumption may be rebutted, but until it is rebutted by the proof required in the act of 1793, and also, in my judgement, by the constitution, must not the law of the state [rather than the master] be respected and obeyed? (1)

For McLean the answer was unequivocal; the laws of a state must prevail over the 'rights' of the master. (2) Thus, while in his view, the state magistrate was obliged, (3) though he could not be coerced, to issue a certificate for the removal of the fugitive slave upon proof, the fact that the magistrate refused did not justify Prigg's action in forcibly removing the fugitive from Pennsylvania. Prigg could have taken the claimed fugitive slave before a federal judge.

Nevertheless, while Justice McLean's opinion, in favour of the 1826 Pennsylvania statute, was only one voice of dissent from an

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1. Ibid., 672.

2. Ibid.

3. Justice McLean had dissented from Story's majority opinion that state officials were not obliged to assist in the enforcement of the federal law. McLean argued "where the constitution imposes a positive duty on a state or its officers to surrender fugitives, Congress may prescribe the mode of proof and the duty of the state officers" (41 US (16 Pet.) 666).

otherwise unanimous US Supreme Court, the question of the lack of enforcement of the 1793 fugitive slave provisions, coupled with the slave power's aggressively expansionist policy, became increasingly divisive to the Union throughout the 1840s, reaching a critical juncture after the admission of Texas as a slave state in 1845. This vast expanse of land, explicitly ceded to the slave system under the terms of the Missouri Compromise, (1) was annexed from Mexico, primarily in response to a generation-long struggle by Southerners for the acquisition of this territory for their cotton kingdom. (2)

In this context, the issue of whether or not Congress had the authority to determine if slavery would exist in a territory obtained by the United States became critical. The slave interest argued that since the Constitution recognised and protected property in slaves, owners of such property could not lawfully be discriminated against by being prohibited from carrying such property wherever they went. The anti-slavery interest argued that, ever since 1789, when Congress confirmed the clause in the Northwest Ordinance of 1787 which excluded slavery from the Northwest Territory, (3) Congress had exercised its prerogatives over property and territory as the Constitution (4) said it could. Another interest

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1. The territory lay South of 36° 30', the critical latitude, (Hofstadter et al, 1964:138-9).

2. Franklin, 1969:172-3.

3. For a discussion of the Northwest Ordinance, see Chapter 5.

4. See, Article IV, Section 3, Clause 2, US Constitution.

arising out of this conflict, put forward the doctrine of 'squatter' or 'popular' sovereignty. The spokesmen for this view, Cass of Michigan and Douglas of Illinois, argued that there was a long established precedent in the US for communities to act as the best judges of their own interests. Let the new territories be set up with the question of slavery open and then let the people decide for themselves. Exactly how this was to be done was vague, and, as shall be discussed later in this chapter, when tried out in Kansas, the results were disastrous.

By 1848, the issue of the extension of slavery to new territories had become so inflammatory that both major parties (1) evaded it in preparing for the presidential election, thus creating the space for the birth of a new party, the Free Soil Party, drawn largely from defectors from both major parties, committed to "Free Soil, Free Speech, Free Labor, and Free Men" and to addressing the slavery issue head-on. (2) In 1850, all of these questions were debated by Congress in a series of debates over the admission of California as a state, whether free, slave or open, resulting in what is known as 'The Compromise of 1850'. Despite heated debate from free soilers on the one hand and secessionists (3)

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1. Democrats and Whigs. Both of these parties were committed to a policy of negotiation and compromise over the expansion of slavery.

2. See Hofstadter et al, 1964:146-7.

3. Georgia, Mississippi, Alabama and South Carolina all considered secession at this time (Franklin, 1969:266).

on the other, a somewhat tenuous agreement was reached and the Compromise of 1850 contained five separate measures. Under the provisions of the Compromise, California entered the Union as a free state; two new territories, New Mexico and Utah, were created with explicit 'squatter sovereignty' rights on the issue of slavery; Texas was to cede certain lands to New Mexico and be compensated; the slave trade, but not slavery, was prohibited in the District of Columbia; and lastly, an extremely severe and more stringent fugitive slave law was passed. (1)

For the time being then, sectional animosities had been deflated and in the 1852 presidential elections, Franklin Pierce, the Democratic candidate, easily defeated his Whig opponent with the Free Soil party making a very poor showing (much poorer than in 1848). Nevertheless, following the death of Unionists such as Webster and Clay in the same year, the Whig party itself began to break up with some Southern Whigs joining the Democrats. The rest of the Whigs would soon form the backbone of a new Northern party, committed to prohibiting any further expansion of slavery in the territories. Ironically enough, as will be discussed in the next section, the slave power, by its adoption of an aggressively expansionist policy,

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1. The 1850 Fugitive Slave Act was passed with many Northern congress men abstaining from the voting (Hofstadter et al, 1964: 148-9). The Act placed enforcement in the hands of US Marshals and Deputy Marshals, who could call on any private person's assistance, and provided severe penalties for their failure to carry out their duties properly ($1,000 fine) as well as even severer penalties for any obstruction of the provisions ($1,000 plus 6 months imprisonment). For details see, Fugitive Slave Act 1850, US, Statutes at Large, IX, 462 ff.

created the basis upon which a political force explicitly opposed to the expansion of slavery could emerge. That force was the Republican party. (1)

CONFLICT WITHIN THE RULE OF LAW

The sectional truce brought about by the Compromise of 1850 was short-lived and by 1852 there were signs of increased Northern resistance to complying with the 1850 Fugitive Slave Act, in particular with those provisions which made private persons liable for assistance in recapturing fugitives, even in the free states. (2) Mob attacks on federal officers trying to reclaim fugitive slaves became increasingly common while Southerners considered such incidents as evidencing Northern hostility to Southern institutions and as representing clear violations of their constitutional property rights. (3) The South's drive to secure more slave territory, however, was undeterred by such resistance and in 1854, with the passage of the Kansas-Nebraska Act which re-opened the question of the expansion of slavery in the Western territories, the truce was effectively destroyed and the Northern determination to

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1. Hofstadter et al, 1964:148-9.

2. Resistance was intensified by the publication of "Uncle Tom's Cabin" by Harriet Beecher Stowe, 1852. The book sold 300,000 copies in its first year and was dramatised in theatres throughout the North (Franklin, 1969:266).

3. Hofstadter et al, 1964:168-9.

stem the spread of slavery throughout the Union intensified.

Many issues, open and concealed, lay behind the Kansas-Nebraska Act. Railroad extension, private political ambitions, sectional bargaining, the expansion of the slave system and the aspirations of the 'free soil' western settlers were all involved. The central figure in the drama, Senator Stephen A. Douglas of Illinois, who introduced the Kansas-Nebraska Bill into the Senate, no doubt had his own reasons for doing so, (1) but whatever the motives of Douglas may have been, the passage of the act on May 30, 1854, was to precipitate a desperate and violent struggle over the control of Kansas, and at the same time, lead to the development of the Republican Party as an effective political force. As passed, the Act provided that two territories, Kansas and Nebraska, would be organised out of a section of Western territory; that the residents of the two territories, and not Congress, should determine, by 'popular sovereignty', whether or not they would permit slavery when they became states; and that:

> Being inconsistent with the principle of non-intervention by Congress with slavery in the States and Territories, as recognised by the legislation of eighteen hundred and fifty, commonly called the Compromise Measures, (2)

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1. Douglas, an ardent supporter of land grant aid to western railroads and a leading spokesman for the planned transcontinental railroad, needed the Nebraska Territory to be settled before the railroad could be built. To organise this territory, Douglas had to make deals with Southern interests, and the Northern democratic allies of the Southern interest (Hofstadter et al, 1964:170.)

2. Section 14, Kansas-Nebraska Act, May 30, 1854, US Statutes at Large, X, 277, 282-284.

the Missouri Compromise was "hereby declared inoperative and void". Both territories, in fact, lay North of the latitude 36°30' where slavery had been explicitly prohibited under the Missouri Compromise, "forever".

The Kansas-Nebraska Bill, while it passed the Senate by 37 to 14 votes, had a much harder time in the House of Representatives, which was up for election in 1854, and finally squeezed through by 113 to 100 votes. Everyone of the 45 Northern Whigs in the House voted against the Bill and this group received the support of almost half the Northern Democrats plus a few Whig and Democratic border-state votes. A solid bloc of Southern Democrats and half the Northern Democrats, on the other hand, together with the majority of the Southern Whigs, had put the measure through. The 'anti-Nebraska' men (1) began to form a new political organisation committed to preventing the expansion of slavery, through adhering to the principle that Congress had the right to keep slavery out of the territories and thus the Republican Party was born.

As noted earlier in this chapter, the central reason for the Republican Party's opposition to the expansion of slavery was not founded on a matter of principle but was rather to be explained in terms of the political struggle over the right to occupy territories which were federal state property - it was a struggle about who would rule the USA. The central tenet of the Republican ideology

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1. This group also included the Free Soiler 'Conscience Whigs' and abolitionists. For a general survey of the groups, see, R.A. Billington, "Westward Expansion", New York, Holt, Rinehart and Winston Inc., 1960.

was not freedom for slaves but freedom for free men to farm the land. (1) At issue was the question of whether slave-holders would rule the free men of the rest of the nation or not - not whether slavery should or should not be abolished. (2)

Events subsequent to the passage of the Kansas-Nebraska Act added to the political power which the Republican Party had already achieved through the split in the Democratic Party over the terms of the Act. Since Nebraska Territory lay wholly separated from the slaveocracy, Southerners ignored it, but not so with Kansas. Kansas (3) lay adjacent to the slave state of Missouri and became a battle ground where the issue of 'popular sovereignty' was resolved in a class war between planters and free settlers. The free settlers were backed by the Republicans and some of the more

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1. See generally, Eric Foner, "On Free Soil, Free Labour, Free Men: the Ideology of the Republican Party before the Civil War", New York, Oxford University Press, 1970.

2. Indeed: "inherent in the anti-slavery outlook of many Republicans was a strong overtone of racism. For the whole free labor argument against the extension of slavery contained a crucial ambiguity. Was it the institution of slavery, or the presence of the Negro which degraded the white laborer? Sometimes the Republicans clearly stated that the institution itself, not the race of the slave was to blame ... Often, however, Republicans indicated that they made little distinction between free negroes and slaves, and felt that association with any black degraded the white race. 'I want nothing to do with either the free Negro or the slave Negro ...', said Lyman Trumbull. 'We wish to settle the Territories with free white men'. Simon Cameron of Pennsylvania stated that he wished to keep Negroes out of the Territories because the white laborer 'must be depressed wherever the Negro is his competitor in the field or workshop'" (Foner, 1970:266-267).

3. The climate of Kansas was not particularly conducive to cotton production (Hofstadter et al, 1964:171).

radical Northerners attempted to block Southern designs on Kansas by sending free state men there, through 'emigrant aid societies', [1] in such numbers that popular sovereignty would win the area for freedom. The slave power, however, was able to act as a more effective organised conspiracy since they could use poor whites from bordering Missouri to pour into Kansas on the day votes were cast for the election of the first territorial legislature. Thus, on election day, March 30, 1855, although only 2,000 Kansans were registered to vote, 6,000 ballots were cast and the slave power gained a majority on the territorial legislature. The new legislature immediately passed a series of repressive laws which prescribed the death penalty for anyone aiding a fugitive slave and simply to question the legality of slavery in Kansas carried a sentence of two years of hard labour. [2]

The free settlers [3] responded by drawing up their own constitution which banned slavery from Kansas, and adopted it in an election in January 1856, in which planters refused to participate. Partisans from both sections fought for their respective administrations and by the 1856 presidential election over 200 people had been killed in the guerilla war in "bleeding Kansas". The events occurring in this battleground dramatically politicised

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1. Billington et al, 1962:362.

2. Hofstadter et al, 1964:171-2.

3. They received no assistance from the federal government which had refused to disqualify the results of the first rigged election.

the issue of the expansion of slavery at a national level, giving the Republican Party tremendous support [1] at the 1856 elections and demonstrating that voting was becoming truly sectional in character. [2]

As the sectional controversy intensified, Northern state courts increasingly denied that they had any legal responsibility to uphold the slave status when master's brought their slaves into a free state - the slave status only applied where the municipal law upheld it. [3] For example, in Anderson v Poindexter, [4] 1857, the Ohio Supreme Court held that a slave coming into a free jurisdiction for a temporary stay was automatically freed because slavery was "repugnant to reason and the principles of natural law", citing Sommersett v Stuart as binding precedent. Moreover, notwithstanding the 1850 Fugitive Slave Act, in another 1857 case, Rodney v Illinois Central Railroad, [5] which involved a suit by a Missouri slaveowner against the railroad for letting a fugitive slave ride on its train to freedom, the Illinois Supreme Court denied a remedy on the ground that Missouri's toleration of slaveholding was repugnant to Illinois policy.

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1. Not yet enough, but the party was only two years old.

2. Although a Democratic President, Buchanan, was elected, the lines were being drawn.

3. Sommersett v Stuart, discussed in Chapter 2, was held to be precedent for this view, in particular, Lord Mansfield's comments on the municipal character of the slave status.

4. 6 Ohio St. 623 (1857).

5. 19 Ill. 42 (1857).

Southern state courts, on the other hand, increasingly developed a line of reasoning which totally repudiated Sommersett v Stuart as precedent on the issue of slavery. Thus Chief Justice Lumpkin, of the Supreme Court of Georgia, in the 1855 case of Cleland v Waters stated:

> I utterly repudiate the whole current of decision ... from Sommersett's case down ... which hold that the bare removal to a free country ... will give freedom. This fungus has been engrafted upon [free state] Codes by the foul and fell spirit of modern fanaticism. (1)

More alarming, however, for those against the further expansion of slavery and for Northern states attempting to preserve their freedom, were the decisions made by a US Supreme Court dominated by Southern Justices. Chief Justice Taney held for the majority in Strader v Graham 1850, that every state had power to determine the status of persons within its jurisdiction:

> Except in so far as the powers of the states in this respect are restrained, or duties and obligations imposed on them, by the Constitution of the United States. (2)

This qualification implied the same clause or construction of the US Constitution might be held, in a later decision, to limit or prohibit the ability of free states to prevent the intrusion of

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1. 19 Ga. 35, 41-42 (1855).

2. 51 US (10 How.) 82, 93 (1850).

slavery into their jurisdictions, by declaring that no state could interfere with a master's legal right of property in his slave.

The significance of these trends had hardly become apparent when the US Supreme Court, in 1857, handed down a critical decision in the case of Dred Scott v Sandford. (1) Briefly, the facts of the case were as follows: from 1834 to 1836, Dred Scott, a slave, who had been taken by his master, Dr Emerson, from the slave state Missouri to the free state Illinois, was in the service of Dr Emerson in Illinois. He was then taken from Illinois to Wisconsin Territory, North of the latitude 36° 30' where he lived with Emerson from 1836 to 1838. Slavery and the taking of slaves to this part of the Louisiana Purchase (then known as the Wisconsin Territory) had been prohibited by the Act of Congress in 1820 known as the Missouri Compromise. (2) In 1838 Scott and his family moved with Dr Emerson back to Missouri and Scott and his family were subsequently sold to Sandford. It was through Sandford's attempts to exercise what he thought were his rights of ownership over Scott and his family that Scott brought an action for trespass against Sandford in the US Circuit Court for the district of Missouri, asserting his right to freedom under state and federal law.

The anti-slavery group who backed Scott's suit for freedom hoped to prove that Scott's sojourn in free Illinois and in a territory

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1. 60 US (19 How.) 393 (1857).

2. Act of March 6, 1820, US Statutes at Large, III, 544, discussed in Chapter 6.

where slavery was made illegal by the Missouri Compromise had made him a free man. By a complicated route (1) the Scott case finally reached the US Supreme Court in May 1856 and was decided March 6, 1857. As will become clear in the discussion which follows, the Supreme Court Justices could have simply dismissed the Dred Scott case on the grounds that Scott, a negro, was neither a citizen of Missouri nor of the United States and hence was not entitled to sue in the federal courts. However, while this was part of the decision they handed down, the Justices chose to go much further and rule on whether Congress had a right, under the US Constitution, to exclude slavery from the territories. (2)

Thus, the two major constitutional issues which the US Supreme Court considered in the Dred Scott case were: firstly, whether a negro, whose ancestors were brought to the United States and were treated as slaves, was conceived of as a citizen under the Constitution of the United States, (3) and secondly, whether Congress had the Constitutional authority to prohibit taking slaves into territories administered by the United States.

In delivering the majority opinion (4) of the Supreme Court, Chief Justice Taney noted that the first question was "very serious"

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1. This route involved various suits and counter-suits in the lower courts.

2. President Buchanan had taken the exceptional step of indicating to two Supreme Court Justices that he expected them now to settle the question of slavery in the territories - this is precisely what the Justices did.

3. If not a US citizen then Dred Scott would not be entitled to sue in a federal court.

4. The Court voted 6 to 2 against Scott in this opinion.

and that the status of negroes, descended from slaves, could not be ascertained in comparison to Indians, who, like any other foreign people, could be naturalised and entitled to claim citizenship on that basis. In considering whether negroes were US citizens, (1) Chief Justice Taney maintained that the words "people of the United States" and "citizens" were synonymous terms, therefore, the question before him was whether negroes were a part of that people which formed the basis of sovereignty:

> We think they are not, and that they are not included, and were not intended to be included, under the word "citizens" in the Constitution, and can therefore claim none of the rights and privileges which that instrument provides for and secures to citizens of the United States. On the contrary ... [negroes were considered] ... a subordinate and inferior class of being ... [who] had no rights or privileges but such as those who held the power and the Government might chose to grant them. (2)

In arriving at this conclusion, Chief Justice Taney argued that:

> It is not the province of the court to decide upon the justice or injustice, the policy or impolicy, of these laws. The decision of that question belonged to the political or law-making power; to those who formed the sovereignty and framed the Constitution. The duty of the court is, to interpret the instrument they have framed ... and to administer it as we find it, according to its true intent and meaning when it was adopted. (3)

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1. The specific constitutional provision at issue is Article IV, Section 2, Clause 1: "The Citizens of each State shall be entitled to all the privileges and immunities of citizens in the federal states".

2. 60 US, 395.

3. Ibid.

Thus, in interpreting sovereignty, "we the people of the United States", as the definition of "citizenship", Chief Justice Taney dismissed the question of individual state citizenship as irrelevant. While states might confer citizenship as they pleased, the right to establish a uniform rule of naturalisation had been exclusively granted to Congress by the US Constitution.

This being the case, argued Taney, the question then arose: did the US Constitution confer on a negro, freed by the laws of a particular state and made a citizen of that state, all the privileges of a citizen in every other state (as a US citizen) including the right to bring suit in the federal courts? Taney thought not, therefore Dred Scott, "could not be a citizen of the State of Missouri, within the meaning of the Constitution of the United States, and, consequently, was not entitled to sue in its courts". (1)

At the time when the Constitution was adopted citizenship was conferred on those who were citizens of each state but there was nothing to support the view that negroes were considered as citizens:

> In the opinion of the court, the legislation and histories of the times, and the language used in the Declaration of Independence show, that neither the class of persons who had been imported as slaves, nor their descendents, whether they had become free or not, were then acknowledged as part of the people, nor intended to be included in the general words used in that memorable document. (2)

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1. Ibid., 396.

2. Ibid., 397.

Indeed, said Taney:

> They had for more than a century before been regarded as beings of an inferior order ... so far inferior, that they had no rights which the white man was bound to respect; and that the negro might justly and lawfully be reduced to slavery for his benefit. He was bought and sold, and treated as an ordinary article of merchandise and traffic, whenever a profit could be made by it. (1)

In referring, in particular, to the legislation of the colonies (2) Taney noted that all the colonies had regarded slaves "as property". Moreover, both the clause in the US Constitution guaranteeing the right to import slaves until 1808, and the clause relating to fugitives from labour supported his interpretation that negroes were not considered part of the people or citizens of the government then formed. (3)

Further support to his contention that negroes could not be citizens within the meaning of that term in the US Constitution, was drawn from the fact that all negroes, free or slave, were regarded as a separate class of persons; (4) from the opinion of Chief Justice Daggett for the Connecticut Supreme Court in the case of Crandall v Connecticut (5) who had held that negroes were not

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1. Ibid.

2. For a discussion of the legislative construction of the slave status as akin to that of chattel property in the later colonial period, see Chapter 4.

3. 60 US, 398-443.

4. He cited the existence of state statutes prohibiting inter-racial marriage, requiring negroes to have passes and so on.

5. 10 Conn. Rep., 339, 340 (1833), discussed at pages 441-446 of this chapter.

citizens within the meaning of the word in the US Constitution and were not therefore entitled to the privileges and immunities associated with US citizenship; and from the Articles of Confederation, which predated the Constitution, (1) where the provision defining citizenship used a different language:

> That the free inhabitants of each of the States, paupers, vagabonds, and fugitives from justice, excepted, should be entitled to all the privileges and immunities of free citizens in the several States. (2)

By free inhabitants, however, was meant white inhabitants, (3) since, at that time, some negro slaves would have been freed, and:

> It is impossible ... to believe that the great men of the slaveholding States, who took so large a share in framing the Constitution of the United States, and exercised so much influence in procuring its adoption, could have been so forgetful or regardless of their own safety. (4)

To "all this mass of proof", Taney added that the repeated legislation of Congress (5) supported his construction of the meaning of citizenship under the US Constitution and his view that:

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1. For a discussion of the Articles of Confederation, see Chapter 5.

2. 60 US, 448 - emphasis in original.

3. See Article 9, Section 5 of the Articles of Confederation.

4. 60 US, 447.

5. Ibid., 449. In particular, he cited the naturalisation law of March 26, 1790 which confined the right of becoming citizens "to aliens being free white persons"; the militia law of 1792 which used the term "white male citizen" to exclude negroes; and the 1813 law on employment on board vessels which drew a distinction between citizens and persons of colour who were not citizens.

> This class of person [negroes] were governed by special legislation directed expressly to them, and always connected with provision for the government of slaves, and not with those for the government of free white citizens. (1)

Thus, Chief Justice Taney, with the majority of the US Supreme Court held that:

> Dred Scott was not a citizen of Missouri within the meaning of the Constitution of the United States, and not entitled as such to sue in its courts; and, consequently, that the Circuit Court had no jurisdiction of the case. (2)

At this point, the US Supreme Court could have simply dismissed the Dred Scott case on grounds of lack of jurisdiction. The Court, however, chose to extend its judgment into other areas of law, thus Taney noted that not only did the Circuit Court make an error in jurisdiction in hearing the case but also, given that it had heard it, the US Supreme Court, as an appellate court, must correct any further errors in the argument Scott made claiming his freedom. (3) The Court must therefore inquire whether the facts relied upon by Scott entitled him to his freedom. In doing this, two questions arose: firstly, whether Scott and his family were free in Missouri because of their previous removal to Wisconsin

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1. 60 US, 450.

2. Ibid., 453.

3. This discussion at this point centred on the technicalities of pleading and while they could have chosen to stop here, the Justices wanted to get the record clear on the Missouri Compromise.

Territory (North of 36° 30'); and secondly, if they were not, whether Scott himself was free because of his removal to Rock Island, in the free state of Illinois. (1)

In examining the first of these questions, Chief Justice Taney noted that what was at issue was whether the Missouri Compromise of 1820 was constitutional:

> Whether Congress was authorized to pass this law under any of the powers granted to it by the Constitution; for if the authority is not given by that instrument, it is the duty of this court to declare it void and inoperative, and incapable of conferring freedom upon any one who is held as a slave under the laws of any one of the States. (2)

Scott's counsel had argued that the Missouri Compromise was constitutional because Article IV, Section 3, Clause 2 of the US Constitution conferred on Congress the "power to dispose of and make all needful rules and regulations respecting the territory or other property belonging to the United States".

Chief Justice Taney, however, in delivering the opinion of the US Supreme Court, argued that, on the basis of precedent and the intention behind the clause, this constitutional provision was irrelevant since it was confined to territory which was part of the United States at that time. The Missouri Compromise was over the lands later acquired from France under the Louisiana Purchase. (3)

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1. Note that Scott was in Illinois first - 1834-36 - then Wisconsin Territory - 1836-38. The twist in chronology had consequences for the issue of the freedom of Scott's family.

2. 60 US, 455.

3. See Chapter 6.

The constitutional provision which must be relied on by the Court in reaching its decision on the issue of the constitutionality of the Missouri Compromise was not Article IV, Section 2, Clause 3, but rather the "due process" clause of the Fifth Amendment to the US Constitution (1) which provides that no person shall be deprived of life, liberty or property without due process of law. Slave property, argued Taney, was no different from other property. Indeed the US Constitution recognised the right of property of the master in a slave:

> And makes no distinction between that description of property and other property owned by a citizen, [thus] no tribunal, acting upon the authority of the United States, whether it be legislative, executive, or judicial, has a right to draw such a distinction, or deny to it the benefit of the provisions and guarantees which have been provided for the protection of private property against the encroachments of the Government. (2)

For that reason, said Taney, the US Supreme Court was of the opinion that the Missouri Compromise was, and always had been, unconstitutional and void.

In sum, not only had the US Supreme Court held that negroes were not citizens of the US and therefore that Dred Scott's suit must be dismissed for lack of jurisdiction, but also they had declared the Missouri Compromise unconstitutional thereby affirming the legality of the Kansas-Nebraska Act of 1854 and making it

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1. Passed by Congress on September 25, 1789 and ratified December 16, 1791.

2. 60 US, 466. Note the change in terminology from "person" in the Fifth Amendment to "citizen" in Taney's argument. He has, of course, already said that negroes are not citizens.

possible for masters to take their slaves anywhere in the territories and retain title in them.

Only two of the Supreme Court Justices (1) dissented from that opinion. Their dissent, and in particular the argument of Justice McLean, (2) merits attention not only because it demonstrates that within law an entirely different holding was possible, (3) but also because it demonstrates that the Justices were all aware of the central political significance of the Dred Scott case.

Justice McLean began his dissenting opinion by noting that strict technicalities had been used in the majority opinion of the Court, in dismissing the case due to lack of jurisdiction. However, said McLean, if the Court wanted to argue on technicalities it was the majority who were wrong - the rules of pleading themselves forbade the Court to reach the conclusion it did. The majority had to assume that Dred Scott was a slave yet Sandford's plea:

> That the plaintiff [Dred Scott] is a negro of African descent, his ancestors being of pure African blood, and were brought into this country, and sold as Negro slaves (4)

did not show Dred Scott to be a slave, and "it does not follow that a man is not free whose ancestors were slaves", said McLean. (5)

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1. Justice McLean and Justice Curtis, both Northern Justices.

2. Justice McLean had also dissented in two other Supreme Court decisions discussed in this chapter: Groves v Slaughter and Prigg v Pennsylvania.

3. And arguably more 'correct' within the rules of procedure etc.

4. 60 US, 581.

5. Ibid., 582.

What was at issue was Dred Scott's freedom - to deny jurisdiction because it was assumed that he was a slave when no proof of this was asserted in Sandford's plea was an injustice.

Moreover, remarked McLean, for the Court to argue that even if Dred Scott were free and a citizen of a state, he could not sue in a federal court because negroes, free or otherwise, were not citizens of the US, was not warranted. There were, he said, several fundamental principles involved in the Dred Scott case which should have been considered by the Court in reaching a decision.

The first of these related to the locality of slavery as settled by the US Supreme Court itself and the state courts. In arguing that "slavery is limited to the range of laws under which it is sanctioned" (1) and was therefore a municipal regulation, bounded and limited to the range of territorial laws, McLean cited the precedent of Prigg v Pennsylvania (2) as "the great and leading case" on this issue. Moreover, the conclusion in Prigg was supported by Sommersett v Stuart (3) "considered by this Court as the highest authority" and upheld in subsequent English decisions. The civil law of Continental Europe had established that "slavery can exist only within the territory where it is established". (4) Even the slave states of the USA had consistently recognised that slavery

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1. Ibid., 586.

2. 41 US (16 Pet.) 539 (1842), discussed at pages 464-475 of this chapter.

3. 20 How. St. Tr.79 (1771-72) discussed in Chapter 2.

4. 60 US, 584.

was governed by municipal regulations; thus Judge Mills, for example, speaking for the Court of Appeals of Kentucky in the 1820 case of Rankin v Lydia had argued that slavery was a right existing only by positive law, "without foundation in the law of nature, or the unwritten and common law". (1)

Having established that slavery was a municipal status, McLean went on to discuss the second principle at issue in Dred Scott: the relation between the federal government and slavery in the states. Slavery, he said, "is emphatically a State institution". This position had been recently upheld by the US Supreme Court's decision in the case of Groves v Slaughter which found that "Congress had no power to interfere with slavery as it exists in the States, or to regulate what is called the slave trade among them". (2) The only connection which the federal government had with slavery in a state related to the constitutional provision requiring the rendition of 'fugitives from labour'.

This being the case, McLean considered the third principle: the power of Congress to establish territorial governments which prohibit the introduction of slavery to that territory. Relying on earlier decisions by the US Supreme Court (3) McLean argued that

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1. 9 Ky. (2 A.K. Marshall) 467 (1820).

2. 40 US (15 Pet.) 449 (1841), discussed at pages 456-463 of this chapter.

3. In particular, Chief Justice Marshall's holding for the majority in McCulloch v Maryland, 4 Wheat. 316 (1819).

Congress had the power to exclude slavery from a US territory. Moreover, this power could be justified on the grounds of "sound national policy". The argument that this would be unfair to Southern slave-holders could not be sustained since:

> It is only necessary to say that, with one-fourth of the Federal population of the Union, they have in the slave States a larger extent of fertile territory than is included in the free States. (1)

McLean's argument proceeded to what he regarded as the fourth principle at issue: the effect of taking slaves into a state or territory, and holding them there, where slavery was prohibited. Citing the precedent of Prigg, Sommersett, Slave Grace (2) and the authority of the US Constitution, for his position that slavery was limited to territorial laws, he asked "by virtue of what law is it that a master may take his slave into a free territory, and exact from him the duties of a slave?" (3) He answered that neither the laws of Wisconsin Territory nor the US Constitution or any federal statute sanctioned it. To argue that the slave was property and that the master had a right to do what he wished with that property, just the same as any other property he owned was wrong; "coloured persons are made property by the law of the State and no such power has been given to Congress". Thus by taking a slave into a territory where slavery was prohibited, the slave

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1. 60 US, 591.

2. Rex v Allan, 2 Hagg.94, 116 Eng. Rep. 179 (Adm.1827). This English case, slave Grace, was discussed in Chapter 2.

3. 60 US, 592.

became free in that territory. (1)

From this conclusion, Justice McLean considered the fifth principle: whether the return of a slave under the control of his master, after being entitled to his freedom, reduced him to his former condition. The decisions of the Supreme Courts of the Southern states, said McLean, had consistently upheld the constitutionality of the Missouri Compromise and had declared that coloured persons must be adjudged as entitled to their freedom when their masters held them in slavery in territories or states in which slavery was prohibited. (2) The Supreme Court of Missouri had itself upheld the constitutionality of the Missouri Compromise. Moreover, it "was the settled law" that "on return of the slave to Missouri, his former condition of slavery did not attach". (3) This consistent precedent, however, had been overturned for the first time in Missouri in the 1852 case of Scott v Emerson, an earlier suit concerning Dred Scott which involved the identical questions currently before the US Supreme Court, Emerson having, since that decision was made upholding his ownership of Scott, on the grounds that "times are not as they were when the former decisions on this subject were made," (4) sold Scott to Sandford.

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1. Ibid., 593-4.

2. e.g. Mississippi, Virginia, Louisiana, Maryland and Kentucky as well as some others. For example, in Betty v Horton (5 Leigh. Rep. 615) and Commonwealth v Pleasants (10 Leigh. Rep. 697), both decided in South Carolina, the principle was upheld that a slave, being taken to a free state, became free. See McLean's argument at 60 US, 596-602.

3. 60 US, 598.

4. 15 Mo. 576 (1852).

This overturning of precedent led McLean to a consideration of the final principle at issue in Dred Scott: whether the decisions of the Supreme Court of Missouri were binding on this court. The decisions of state courts were only followed by the US Supreme Court "where they give a construction to the state statutes". (1) This was not the issue in the present case therefore there was no obligation on the part of the US Supreme Court to follow the Supreme Court of Missouri's decision in Scott v Emerson, particularly since that decision "refused to notice" the legality of the Missouri Compromise and the Illinois Constitution under which Dred Scott and his family claimed their freedom. To uphold this line of reasoning, argued McLean, was a fundamental erosion of the rule of law (2) and "if a State court may do this, on a question involving the liberty of a human being, what protection do the laws afford?" (3)

Despite Justice McLean's eloquent argument in favour of a consistent application of the rule of law, Chief Justice Taney had a different interpretation of the rule of law, and his interpretation, which allowed him to hold for the majority that the Missouri Compromise was unconstitutional, that negroes (free or slave) were not US citizens and that masters could take their slaves anywhere in the territories and retain legal title in them,

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1. 60 US, 602.

2. If not completely illegal under the 25th section of the Judiciary Act (60 US, 603).

3. 60 US, 603.

was regarded as a clear-cut victory for the slave power. (1) And, even though this victory was short-lived in an instrumental sense, it was a critical symbolic victory for the slave power. If the opinion in Dred Scott v Sandford were to hold, then a fundamental objective for which the Republican party itself had been organised was unconstitutional. Even a significant section of the Northern Democrats, (2) traditional allies of the slave power, were troubled by the decision. If Congress did not have the constitutional power to exclude slavery from the territories, then neither did any of the territorial legislatures which existed by Congressional authorisation.

CONCLUSION

If the decision in Dred Scott v Sandford represented a symbolic victory for the slave power, any satisfaction was very short-lived. At the state constitutional convention at Lecompton, Kansas, in 1857, pro-slavery delegates named in a rigged election not only wrote a constitution explicitly guaranteeing slavery but also refused to permit the electorate as a whole to vote on it. This "Lecompton Constitution", (3) when presented to Congress as a document on which Kansas sought admission as a state, produced a stalemate between the Senate (which accepted it) and the House of Representatives where the 'Douglas Democrats' voted with the

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1. Franklin, 1969:268.

2. Hofstadter et al, 1964:174.

3. The "Lecompton Constitution" was adopted on September 4, 1857. For its content, see Thorpe (ed) 1909, II:1210-1218.

Republicans to defeat it. This stalemate was broken in May 1858 when Congress passed the English Bill which would grant Kansas immediate statehood together with a federal land grant if her voters accepted the Lecompton Constitution, or which would continue territorial status if they decided to reject it. In the event, Kansans voted down the Lecompton Constitution, 11,812 to 1,926 and remained as a territory (1) and in a state of conflict between slave-owners and free settlers.

Sectional hostilities were further intensified in the following year in the aftermath of John Brown's raid on the federal arsenal at Harpers Ferry, Virginia, October 16, 1859, which was regarded by Southerners as a Northern backed abolitionist conspiracy to foment slave revolt. (2) This event dramatically highlighted the divisions over the question of slavery and, coming just prior to the 1860 presidential elections, it helped to sway many voters to the Republican party (3) and, at the same time, deepened the secession sentiment already taking hold in the South.

In April 1860, the Democratic national convention assembled at Charleston, South Carolina, at the centre of secession territory. Some Southern Democrats wanted to have a platform which unequivocally

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1. Kansas remained a territory until 1861 when it entered the Union as a free state (Hofstadter et al, 1964:175-6).

2. Brown was not, in fact, backed by Northern abolitionists. However, when he was hanged on December 2, 1859, he was ensured of martyrdom in the anti-slavery movement (Franklin, 1969:268-9).

3. Franklin, 1969:269.

declared that neither Congress nor a territorial government could abolish slavery or impair the legal title to the ownership of slave property. When it became clear that their desire to argue for federal protection of the legality of slavery in the territories would not be adopted by many of the Northern Democrats, and, in particular, those who supported Douglas on his 'popular sovereignty' platform, most of the Southern Democrats withdrew, thus making it impossible for Douglas to get the two-thirds of the ballot necessary to win the nomination. On June 18, when the Democrats reconvened at Baltimore, and the same thing happened, this convention went ahead to nominate Douglas on a 'popular sovereignty' platform. Independently, the Southern Democrats nominated John C. Breckenridge of Kentucky to represent the Southern position on slavery in the territories.

This formal split in the Democratic Party represented the break in the last unionist political bond between North and South, and, on May 18, when Abraham Lincoln won the Republican nomination, on a platform which denied "the authority of Congress, of a territorial legislature, or of any individuals to give legal existence to Slavery in any Territory of the United States" (1) as well as making a commitment to a protective tariff, free homesteads and a Pacific railroad, all measures which would undermine the power of the slaveocracy, it was evident that the results of the 1860 elections would reveal a divided nation.

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1. As quoted in Hofstadter et al, 1964:178.

Just how divided the nation was is evidenced by the fact that two separate contests were fought for the presidency. In the South, the fight was between the Southern Democrat, Breckenridge, and Bell, the candidate for the Constitutional Union Party, (1) and in ten Southern states Lincoln's name was not even placed on the ballot. In the North the contest was between Lincoln the Republican and Douglas the Northern Democrat. Although Lincoln had the majority required for president in the electoral college, he carried less than 40% of the nationwide popular vote, and a sectional candidate had become US President. (2)

Southern political leaders had repeatedly threatened that a Republican victory would result in secession. Secession was attractive for a number of reasons: it would mean that the South would no longer have to pay the federal taxes and tariffs which largely benefited the North and perhaps the international slave trade could be re-opened and the South could have its own federal state based exclusively on the interests of the planter class. Thus, as a result of the South's aggressively expansionist policy, on December 20, 1860, South Carolina withdrew from the Union and by February 1, 1861, Mississippi, Florida, Alabama, Georgia, Louisiana and Texas had followed. On February 4 these states formed a new

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1. His platform was "to recognise no political principle other than the Constitution of the country, the Union of the States, and the enforcement of the laws" (quoted in Hofstadter et al, 1964, 178).

2. Hofstadter et al, 1964:179.

government, (1) the Confederate States of America, and despite various attempts at compromise by border states, (2) open war began when, after Confederate forces had reduced Fort Sumter in Charleston harbour in April 1861, Lincoln issued a proclamation for the militia to put down the 'insurrection'. Virginia seceded in May and was followed by North Carolina, Tennessee and Arkansas. (3)

The outbreak of Civil War, following the Republican victory, did not however result in the emancipation of slaves throughout the Union. Only those slaves who lived in the Confederacy were to be considered as free after January 1, 1863, under the terms of Lincoln's Emancipation Proclamation, (4) and it was not until the close of the Civil War, on February 1, 1865 (ratified December 18, 1865) that the US Congress denied the legality of slavery by the

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1. This government also drew up a Constitution which forbade the enactment of any law "impairing the right of property in negro slaves" and included a manifest threat to the slave states which had not yet seceded: "Congress shall also have power to prohibit the introduction of slaves from any State not a member of ... this Confederacy". This was an effort to coerce Virginia especially, where the selling of excess negroes had been very profitable (Hofstadter et al, 1964:189).

2. Most notably the Crittenden Plan put forward by Senator John J. Crittenden of Kentucky, and another version of this from Virginia.

3. Critical border states, slave and free, were however held by Lincoln.

4. See, Richardson (comp.) 1897:VI:96-97. Lincoln's role in emancipation was essentially conservative. Only 3 months after issuing this proclamation he suggested slaves should be freed over a period of 37 years, during which time efforts would be made to colonize the freedmen outside the US (see Richardson (comp.) 1897: VI:126-142).

Thirteenth Amendment to the US Constitution. (1)

However, as will become evident in the next and final chapter, despite the illegality of slavery now, a two hundred year old legacy which consistently affirmed the legality of claims to slave property, was to provide a category which could be used within law as the basis for analogising to the legality of other statuses which formally contradicted the central ideological foundations of the rule of law itself.

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1. For the text of the 13th Amendment, see Note 2, page 431 of this chapter.

CHAPTER 9 : CONCLUSIONS : THE LEGACY OF A LEGAL CATEGORY

INTRODUCTION

In Chapter 8 it was argued that the US Supreme Court played a central part not only in recognising but also in strengthening the legal status of slavery at a national level, in both slave holding and non-slave holding states. From Groves v Slaughter (1) through Prigg v Commonwealth of Pennsylvania (2) culminating in Dred Scott v Sandford, (3) the US Supreme Court articulated an interpretation of the US Constitution which permitted slave owners to take their slaves anywhere in US territory and retain legal title in them, and, moreover, which denied US citizenship, irrespective of state citizenship, to all blacks, slave or free. (4) And, while chattel slavery as a legal category was to disappear officially from law with the ratification of the Thirteenth Amendment (5) to the US Constitution in 1865, two hundred years of colonial, state and federal court decisions and legislative enactments which affirmed the legality of claims to property in human beings was to provide the legacy of a category within law which could be used as the basis for analogising to the legality of other statuses which denied the central ideological foundations of

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1. 40 US (15 Pet) 449 (1841).

2. 41 US (16 Pet) 539 (1842).

3. 60 US, 393 (1857).

4. In denying US citizenship to blacks the Court denied protection normally granted to US citizens under the privileges and immunities clause of Article IV, Section 2, Clause 1 of the US Constitution.

5. Passed by Congress, February 1, 1865; ratified by the states December 18, 1865.

'the rule of law' itself: liberty, formal equality before the law and the proportionality of labour and rewards. Indeed, the Thirteenth Amendment itself, in outlawing one form of slavery, explicitly legalised another. Thus:

> Section 1. Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction. (My emphasis)

This explicit authorisation of 'slavery' or 'involuntary servitude' as punishment for crime permitted the most obvious translation of the distinguishing features of chattel slavery into another context. Within the legal category, slaves had been regarded as articles of property, which, like other property, could be bought, sold, transferred, traded and inherited. Their labour was central to the definition of their status as 'slaves'. This labour had been controlled primarily through the domestic discipline imposed on slaves by the master class, afforded legality by special courts and punishments for criminal slaves (1) or special forms of pleading applicable solely to the master/slave relation. (2) After the ratification of the Thirteenth Amendment, however, ex-slaves were no longer subject to this form of legal control and the penal laws of the Southern states became applicable to all offenders regardless of race. Ex-slaves, however, owned nothing and could still only be

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1. See Chapter 4.

2. See Chapter 7.

punished in their bodies. (1) It is therefore not surprising to find that in the post-Civil War era the master class relied on a system of penal servitude which made public slaves of black and poor white convicts: "in some states they in fact became the temporary or lifelong slaves of private employers or corporations to whom the government delegated the right to exploit them for private profit". (2) In both creating and justifying this kind of punishment, the status of the punished was analogised in law with the status of slave. This analogy had, of course, been given an explicit legal foundation by the language of the Thirteenth Amendment which, while denying the legality of racial slavery, affirmed the legality of penal slavery. (3)

Penal slavery and forced labour as punishment have, of course, an exceedingly long history and Rusche and Kirchheimer have argued that such penal methods are primarily related to economic considerations, especially the use of convict labour in situations where the economy is predominantly labour intensive or could make use

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1. Commenting on slavery in the Ancient World, Demosthenes noted that slaves were punished in their bodies, citizens in their property (as quoted in Sellin, 1976:177). Those without property are still punished differently from those with it.

2. Sellin, 1976:145.

3. While this is the case, I am not arguing that criminal punishment derives or follows from the precedent of slavery. I am not, therefore, in agreement with Sellin's (1976) argument that the physical punishments which characterised the treatment of slaves in different epochs and which were gradually extended to cover free men, only leads one to the conclusion that contemporary penal systems retain the essential marks of these formerly slave punishments. What I am arguing is simply that within legal discourse analogies were drawn between slavery and punishment just as within legal discourse analogies were drawn between other unfree statuses, such as villenage, and slavery.

of large numbers of workers at marginal cost. In particular, they argue that the use of convict labour, from the mid-seventeenth century until the industrial revolution was well under way in Europe, was intimately and profitably connected with mercantilist economics. (1) Great Britain was particularly successful in making use of convict labour in its colonial expansion (2) through transportation: (3) its success in the convict trade not being surprising given that it was the foremost slave trader in the world. (4)

Indeed, when Great Britain found it necessary to abolish transportation (5) as its central mode of penal policy, it was primarily through arguments analogising between the legal status of the transported convict and the slave that the ideological basis for abandonment was accomplished. However, like their North

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1. Rusche and Kirchheimer, 1968 (ed.)

2. For a discussion of British colonial theories, see Knorr, 1944; R.L. Schuyler, "The Fall of the Old Colonial System", London, Oxford University Press, 1945; George Nadel and Perry Curtis, "Imperialism and Colonialism", New York, Macmillan, 1964; E.J. Hobsbawm, "Industry and Empire", Harmondsworth, Penguin, 196; Semmel, 1970 and Dobb, 1975.

3. See Chapter 3 for a brief discussion of the importance of transported convicts' labour to colonisation.

4. See Chapter 6 on the international slave trade.

5. Primarily in response to the stage of development reached in Australia and the pressure from free settlers in that Continent against accepting more convict labour (see O'Brien, 1950). This was remarkably similar to the pressure from the free settlers of the Western territories in the USA against the expansion of slavery.

American ex-colonists in abolishing slavery, when the British abandoned transportation, they retained the idea that the convict may be forced to labour and that the fruits of this labour belong exclusively to the state. Thus, in 1853 'penal servitude' became the substitute punishment for transportation serving to strengthen the notion that unfree labour could be legally authorised, given convict status. This legacy is still evident in contemporary penal systems in both Great Britain and the USA in that prison labour is compulsory, refusal of it being a disciplinary offence, and even in new developments in penology, such as community service by offenders, where offenders are sentenced to a number of hours of 'community service work'.

Penal slavery, however, involves a temporary denial or suspension of rights and would be applied to only a minority of the North American ex-slaves. But the Thirteenth Amendment had said nothing about the status of all ex-slaves and in 1857, in Dred Scott v Sandford, Chief Justice Taney had said that all blacks, free or slave, were not citizens of the US and that the framers of the US Constitution considered them as "a subordinate and inferior class of beings". Indeed, the Southern states had already adopted the "black codes" to ensure the role of blacks as a labouring force in the South by the time the Thirteenth Amendment was ratified in December 1865. These codes, based partly on pre-war laws governing free negroes in the South, and partly on vagrancy laws in the North, attempted to define the legal position of the freed

men, [1] as they were called. In most Southern states, these codes prohibited negroes from working as artisans or in other capacities where they may be in competition with white labour, and, except under stated conditions, they could not leave their jobs. Nowhere could negroes vote, hold office or serve on juries, thus "the control of the Negro permitted to white employers was about as great as that which slaveholders had exercised". [2]

This Reconstruction policy being followed by President Johnson [3] met with severe opposition in Congress, where Northern and Western interests fought the possibility that the slave power, in a different guise, would be able to achieve a situation of white Southern minority rule comparable to the pre-Civil War era. Congress itself determined to take charge of Reconstruction [4] passing the Fourteenth Amendment on June 16, 1866 though it was not ratified until July 28, 1868. [5]

There is no doubt that the Fourteenth Amendment was passed

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1. The name 'freedmen' came from the establishment of the Freedmen's Bureau established by Congress in March 1865 as part of the War Department and authorised to issue, "provisions, clothing and fuel ... for ... the destitute and suffering" (as cited in Hofstadter et al, 1964:211; and Franklin, 1969:302-306-10).

2. Franklin, 1969:304.

3. Lincoln's Vice-President who took over after the former's assassination in April 1865. Johnson was a Southerner, from Kentucky.

4. For a fuller discussion of this policy, see Franklin, 1969: 304; and Hofstadter et al, 1964:216-220.

5. The Fourteenth Amendment had a stormy history before ratification (as discussed in Hofstadter et al, 1964:217).

primarily to grant citizenship to all blacks, thus overruling the US Supreme Court's holding in Dred Scott, and to effect the restoration of the Union. Thus:

> Section 1. All persons born or naturalised in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; (1) nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.
>
> Section 2. Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons (2) in each State, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for President and Vice President of the United States, Representatives in Congress, the Executive and Judicial officers of a State, or the members of the Legislature thereof, is denied to any of the male inhabitants of such State, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced (3) in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such State.

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1. This clause gave effect to Article IV, Section 2, Clause 1 of the US Constitution in the case of blacks since they were now citizens. In Crandall v Connecticut, discussed in Chapter 8, blacks had been denied the protection of the "privileges and immunities" clause of the US Constitution because the Court ruled that they were not citizens.

2. This clause amended Article I, Section 2, Clause 3 of the US Constitution where representation had been based partly on the counting of slaves as "three-fifths of all other persons". For a discussion of the 'Constitutional Compromises' which resulted in slaves (though never specifically mentioned by name) being counted as three-fifths of a person, see Chapter 5.

3. This clause was inserted to attempt to ensure that the Southern states, where the vast majority of blacks lives, would only get representation in the US Government on the basis of those blacks who were not denied the right to vote.

> Section 5. (1) The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

Despite the Fourteenth Amendment, however, certain states, such as Louisiana and Georgia, prevented blacks from voting in the presidential election of 1868, thus Congress strengthened the protection of the black vote through the passage of the Fifteenth Amendment in 1869, ratified in 1870, which guaranteed both a wider exercise of the franchise along with the explicit removal of race as a disability. Thus:

> Section 1. The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color or previous condition of servitude.
>
> Section 2. The Congress shall have power to enforce this article by appropriate legislation.

While the meaning and purpose of these Civil War Amendments have

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1. Section 3 denied certain government offices to insurrectionists - Confederate leaders - but left Congress with the option to remove this disability, and Section 4 concerned debt accrued during the Civil War and did not recognise the legality of Confederate debts.

been the subject of much controversy [1] it is certainly the case that the possibility was created, within law, for a comprehensive federal programme guaranteeing fundamental civil rights protected by federal machinery against both state and private encroachment. The seven federal statutes supporting the 13th, 14th and 15th Amendments were passed more or less in conjunction with the Amendments and, despite the fact that there were members of Congress who voted against the constitutionality of these statutes, [2] known as the Civil Rights Acts, [3]

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1. The literature on the Civil War Amendments is voluminous. With respect to the 13th Amendment, see Emerson et al, 1967:1004-1008. On the 14th Amendment, see F. Graham, "The 'Conspiracy Theory' of the Fourteenth Amendment", in 47 Yale L.J. 371:1938; A. Fairman, "Does the Fourteenth Amendment incorporate the Bill of Rights?", in 2 Stanford Law Review, 5:1949; D. Frank and G. Munro, "The Original Understanding of 'Equal Protection of the Laws'", in 50 Columbia Law Review, 131:1950; L. Frantz, "Congressional Power to Enforce the Fourteenth Amendment Against Private Acts", in 73 Yale Law Journal, 1353:1964; and J. Henkin, "'Selective Incorporation' in the Fourteenth Amendment", in 73 Yale L.J. 74: 1963. For a specifically Southern view attacking the validity of the ratification process of the 14th Amendment, see I. Suthon, "The Dubious Origin of the Fourteenth Amendment", in 28 Tulane L.R. 22: 1953. On the 15th Amendment, see Note 74 Yale Law Journal, 1148: 1965. For a discussion of the economic, political and social background to the Civil War Amendments, see, for example, Stampp, 1956.

2. Just as there were those who voted against the Amendments themselves (see, R. Carr, "Federal Protection of Civil Rights: Quest for a Sword", Boston, Little, Brown and Co. 1947).

3. With reference to the enactment of the Civil Rights Acts, see United States Commission on Civil Rights, Washington D.C., USGPO, 1963. Carr, 1947, discusses the statutes in some detail and provides the text of the legislation. Miller, 1966, notes the significance of these statutes and the Amendments in guaranteeing fundamental civil rights.

fundamental civil rights had not only been given a constitutional guarantee but had also been constructed in legislation: "by constitutional fiat and statutory direction, the national writ would run to guarantee privileges and immunities, due process, and equal protection of the law for every man, white and black". (1)

Five of the seven statutes enacted to implement the Civil War Amendments were general civil rights acts. The first of these, the Act of April 9, 1866, "An Act to protect all Persons in the United States in their Civil Rights, and furnish the Means of their Vindication", known as the Civil Rights or Enforcement Act, was passed at a time when only the Thirteenth Amendment had gone into effect. The Act was aimed at outlawing the 'black codes' enacted by the Southern states immediately after the close of the Civil War, which restricted the movement and occupation of negroes. Thus it provided that all persons born in the United States were citizens and endeavoured to ensure equality before the law for all races by guaranteeing rights:

> To make and enforce contracts, to sue, be parties, and given evidence, to inherit, purchase, lease, sell, hold and convey real and personal property, and to full and equal benefit of all laws and proceedings for the security of persons and property. (2)

The federal courts were given exclusive jurisdiction over cases arising under the Act, penalties were prescribed for its violation, and the President was empowered to use the land and naval forces to procure its enforcement.

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1. Miller, 1966:101.

2. US, 14 Stat. 27.

The second Civil Rights or Enforcement Act, "An Act to enforce the Rights of Citizens of the United States to vote in the several States of this Union, and for other purposes", (1) passed by Congress on May 31, 1870, and its amended version in the third Civil Rights Act of February 28, 1871, (2) attempted to make the Fourteenth and Fifteenth Amendments effective. More specifically these two statutes were designed to protect the right to vote by providing federal machinery to supervise elections in the states. In the 1870 and 1871 Civil Rights Acts, Congress provided penalties for actions done "under color of law" and it was made a felony to conspire "under color of law".

The Act of April 20, 1871, known as the Ku Klux Klan Act, or the Antilynching Act, entitled "An Act to enforce the Provisions of the Fourteenth Amendment to the Constitution of the United States", (3) penalised action, "under color of law", which deprived persons of their rights under the laws or Constitution of the United States. The President was authorised to use the military forces to suppress unlawful action when the states were unable or unwilling to prevent interference with citizens' rights or the obstruction of the federal government processes.

Finally, there was the Civil Rights Act of March 1, 1875, (4)

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1. US, 16 Stat. 140.
2. US, 16 Stat. 433.
3. US, 17 Stat. 13.
4. US, 18 Stat. 335.

"An Act to protect all Citizens in their civil and legal rights", designed to guarantee to negroes equal accommodation with white citizens in all inns, public conveyances, theatres and other places of amusement. Refusal by private persons to provide such accommodation was declared to be a misdemeanor, and injured parties were given the right to sue for damages.

The other two of the seven statutes were more limited in purpose and application. These were the Slave Kidnapping Act of May 21, 1866, (1) "An Act to prevent and punish Kidnapping", which made it a federal crime to kidnap and carry away a person with the intention of placing him in slavery or involuntary servitude; and the Peonage Abolition Act of March 2, 1867, (2) "An Act to abolish and forever prohibit the System of Peonage in the Territory of New Mexico and other parts of the United States", which, while specifically aimed at practices prevailing in New Mexico, (3) was also designed to define "involuntary servitude" and to provide specific criminal penalties for violation of the Thirteenth Amendment. (4)

From the language of these seven Acts, it is clear that, within legal ideology, the rights of individuals could arguably be protected against interference either by public officers or private individuals. While they were aimed specifically at safeguarding

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1. US, 14 Stat. 50.

2. US, 14 Stat. 546.

3. In this context the term 'peonage' referred to the enslaved debtors of New Mexico.

4. Carr, 1947:36-39.

the newly freed negro's rights, without exception, no mention is made in any of these statutes of the negro as such. Instead the wording is sufficiently broad to cover the rights of all citizens if not all inhabitants or persons. Indeed, as will be discussed later on in this chapter, the wording of these civil rights statutes and the 13th, 14th and 15th Amendments, have made it possible, within law, to extend considerably the applicability of these categories, in litigation right up to the present day. Thus, many years after its passage, the use of the word 'person' in the first section of the 14th Amendment was interpreted by the federal courts as applying to such 'legal persons' as business corporations, thus supplying the legal grounds for courts to declare as unconstitutional the state regulation of railroads, trusts and the like. (1)

In abolishing the legality of slavery then, the political, economic and social conditions surrounding abolition were translated into a quite specific language. The Constitutional Amendments and subsequent legislation and legal practices which represent this translation have, in turn, had their own distinctive effects on the political aims originally sought through them. Thus while the eradication of discrimination against blacks due to lack of US citizenship was the stated aim of, for example, the Fourteenth Amendment, it will become clear in the following discussion that, within legal discourse, it was nevertheless

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1. Hofstadter et al, 1964:217.

possible for a negative discrimination to operate by denying "full" citizenship on the grounds that the Fourteenth Amendment only referred to legal discrimination which was based on "state action" as opposed to individual action. Yet premised on the same constitutional guarantee it was also possible to appeal to individual rights and, within legal discourse, positive discrimination could be upheld on the basis of such rights in relation to education and voting in particular.

It will therefore become clear in this chapter that, just as with slavery, the notion of individual rights is by no means definitive of law in other areas: while within legal discourse the basis of right is consistently referred to, it is evident that the question of whose rights, whether it be master or slave, state or individual, will be legally upheld, can be settled in any given situation through an appeal to supporting or non-supporting precedent, through reference to other clauses in the US Constitution, through differing interpretations of statutory law, and so on. The same body of law can therefore provide the basis for positive or negative discrimination, just as it was able to provide for the recognition of property and personality in the slave.

In studying the development of chattel slavery in North America as a legal category it is clear not only that law can operate quite effectively without premising its conclusions on notions of individual rights, but also that law cannot simply be analysed as a mere concomitant of something else, such as the mode of production,

nor can it be regarded as having some essential or original general form. On the contrary, as has been discussed throughout this thesis and as will be discussed in the subsequent sections of this chapter, legal categories, practices and institutions can exert their own distinctive effects on other social, economic and political forms, effects which can have reproductive and transformative qualities even after the official disappearance of a category from law. Thus, through analogising with the slave status, legal institutions and practices were able to define, for example, the nature of the convict status, the scope of grass-roots political power and the limits to educational opportunity in ways which have had profound effects on the development of other social institutions. The discussion which follows, therefore, gives some indication of the longer-term effects of the development of chattel slavery as a legal category and, in so doing, indicates just how my analysis of the operation of law in relation to chattel slavery is consistent with the more general concerns addressed in Chapter 1 of this thesis about the nature of law in society.

ANALOGIES IN LAW : CONVICT STATUS

As was discussed in the introduction to this chapter, with the defeat of the Confederacy and the passage and ratification of the Thirteenth Amendment to the US Constitution in 1865, chattel slavery officially disappeared from law "except as a punishment for crime". The explicit attribution of legality to penal slavery or servitude

given by the Thirteenth Amendment permitted a translation of some of the distinctive features of the system of chattel slavery, in particular the use of forced labour, into a new context.

The Southern states in the Reconstruction era, burdened with heavy taxes to meet the expenses of rebuilding a shattered economy, subjected to confiscatory federal taxes, attempting to revive trade [1] and committed to the traditional penological view that convicts should, by their labour, reimburse the government for their maintenance and create revenue, introduced a system of penal servitude where black and poor white convicts were "public slaves". [2] In some states these convicts became "the temporary or lifelong slaves of private employers or corporations to whom the government delegated the right to exploit them for private profit". [3] This revived convict lease system, as it was known, not only translated the basis of chattel slavery into a penal context at that time, but also uniquely affected the manner in which the penal system of the South was to develop up to the present time.

The convict lease system which developed in the Southern states was in part attributable to the legacy of two centuries of chattel slavery. While the slave owners of the South had been stripped of their human property following the passage of the Thirteenth Amendment, the view of the status of blacks, in a society dominated

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1. Hofstadter et al, 1964:212-3.
2. Sellin, 1976:145.
3. Sellin, 1976:145.

by a white ex-slave-owning minority, as "a subordinate and inferior class of beings" was to survive the abolition of slavery. Thus, an Alabama prison physician could assert, in an address to the National Prison Congress of 1889:

> That there is a vast difference between all the races no one doubts. That there is still a greater difference between the Caucasian and the Negro, occupying, as they do, the two extremes of the human family, I think is true. That, as a race, the Negro is physically and mentally inferior I assert as a fact beyond dispute. Whether this is a result of previous conditions or the discriminating handiwork of the Creator makes no difference. (1)

Another prison physician from Tennessee, in his address to the National Prison Congress of 1890 echoed this view:

> We have difficulties at the South, which you at the North have not ... We have a large alien population, an inferior race. Just what we are to do with them as prisoners is a great question as yet unsettled. The Negro's moral sense is lower than that of the white man ... The Negro regards it as no disgrace to be sent to the penitentiary. He never cares to conceal the fact that he has been there. How we are going to reform that race we do not know. (2)

Initially the way that the "great question" was settled was to create a Southern penal system based on forced labour where, in leasing convicts, the government sold the labour of the convicts to

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1. R.M. Cunningham, "The Convict Lease System of Alabama in its Relation to Health and Disease", in Proceedings of the National Prison Association (1889), p.138 - cited by Sellin, 1976:146.

2. P.D. Simms, Proceedings of the National Prison Association (1890), pp.120-121 - cited by Sellin, 1976:146.

the lessees. Where 85 - 95% of the convict population was black, (1) racism provided an easy ideological justification. When leasing ended early on in the twentieth century, largely because of the lack of profitability to the state as opposed to the private lessees, many Southern states replaced the convict lease system by the establishment of prison plantations and farms to exploit the labour of those convicts not employed on the chain gangs working on the roads. Many of these institutions, in particular those in Alabama, Arkansas, Florida, Louisiana, Mississippi and Texas, proved to be highly profitable financially. For example, in Louisiana, when a particular firm lost its monopoly on leased convict labour in 1901, the state bought the firm's Angola plantation along with its prisons and continued to raise cotton, and later sugar cane, along plantation system lines. Additional land was acquired by the state and by 1929 Angola had 18,000 acres and a smaller plantation of 3,500 acres at Monticello. (2) These convicts were, "treated very much like black slaves had been treated on any large 'well-run' antebellum plantation", (3) obedience being enforced by corporal punishments such as flogging.

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1. Sellin, 1976:146. These figures indicate a disproportionate representation of blacks in the convict population. In the free population blacks accounted for 30 - 40% of the total population in the Southern states (see Franklin, 1969:185-187).

2. Sellin, 1976:170.

3. M.T. Carleton, "Politics and Punishment: The History of the Louisiana State Penal System", Baton Rouge, Louisiana State University Press, 1971:168.

That forced labour continues to be regarded as legally guaranteed in the context of convicts is not only evident in prison administrative law where prison labour is regarded as compulsory and refusal of it a disciplinary offence, but is also evident in a series of decisions[1] establishing a consistent precedent up to Rhodes v Meyer,[2] that hard labour incidental to a properly imposed prison sentence does not violate the Thirteenth Amendment to the US Constitution. Thus, even today, in the bourgeois democratic republic par excellence, the central characteristics of chattel slavery, the performance of compulsory labour and deprivation of liberty, have been analogised to and legally guaranteed in a penal context.[3] Indeed, as Morris comments:

> The long struggle to establish prisoners' rights - to litigate, to demand natural justice as a part of prison discipline - as distinct from their right not to be beaten or starved to death, may be compared to the task of outlawing slavery itself, as distinct from enacting laws that will protect domestic animals from undue cruelty. (4)

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1. Lindsey v Leavy, 149 F 2d. 899 (9th Cir.), 1945; United States v Dowd, 271 F 2d. 292 (7th Cir.), 1959; Draper v Rhay, 315 F 2d. 193 (9th Cir.), 1963.

2. Rhodes v Meyer, 334 F 2d. 709, 719 (8th Cir.), 1964, Cert. den., 379 US 915, 1964.

3. Morris notes that the system of convict leasing, chain gangs and prison farms, subject to investigation in the 1930s and again in the 1960s, persist in states like Arkansas in the USA and are mirrored most obviously in the treatment of black and coloured convicts in South Africa (1978:294).

4. Morris, 1978:295.

This analogy between the status of the convict and that of the slave is certainly evident in ideological debates surrounding penological developments, perhaps most notably in the case of the abandonment of transportation, which, as the central feature of 18th century penology persisting through the first half of the 19th century, had been explicitly used as a means of supplying labour for British colonial expansion.

In both parliamentary reports and debates concerning transportation in the 19th century analogies were continually drawn between the status of the transported convict and that of the slave in arguments against the perpetuation of transportation as a criminal sentence. Thus, the Parliamentary Select Committee on Transportation of 1837-8, the Molesworth Committee, reported that:

> It appears ... to have been the practice at an early period (1) to subject transported offenders to penal labour, and to employ them as slaves on the estates of the planters, and the [statute] 4 Geo. 1, c.11, gave to the person who contracted to transport them, to his heirs, successors, and assigns, a property and interest in the services of such offenders for the period of their sentences. The great want of servants in the colonies was one of the reasons assigned for this mode of punishment, and offenders were put up to auction, and sold by the persons who undertook to transport them, as bond slaves ... Transportation ... is slavery ... and the condition of the convict slave is frequently a very miserable one ... it is the restraint on freedom of action, the degradation of slavery ... which chiefly constitutes the pains of transportation. (2)

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1. This reference is to the early transportation, from the early 17th century until the American War of Independence, of convicts, to North America. As early as 1615, the Privy Council had ordered that, unless convicted of wilful murder, rape, witchcraft or burglary a convict could be sent to the North American plantations. See Chapter 3 for a discussion of the use of convict labour in early colonial expansion.

2. Select Committee on Transportation, 1837-38 (The Molesworth Committee), Parliamentary Papers, Vol (669) xxii, iii-iv.

This view of transportation as analogous to the system of negro slavery was held by many contemporary commentators. Thus, in 1847, one writer could argue that the transportation system was "one of downright slavery" and that since "we have done well in abolishing Negro slavery: (1) we shall do still better by abolishing slavery in our penal colonies". (2) In the General Report on Convict Prisons of 1860-61 to Parliament, Sir Joshua Jebb again drew attention to analogies between transported convicts and slaves in noting that the convicts had "embarked in small vessels, similar to slavers of the present day, (3) and the dungeons in which they were confined during the passage are described by [Macaulay] as 'being all darkness, stench, lamentations, disease and death ... those who reached their house of bondage were mere skeletons, requiring to be fattened before they were sold'". (4) And at a meeting of the National Association for the Promotion of Social Science in 1863 it was argued that the transported convict "was converted into a sort of white slave. That slavery was as irksome to him as slavery is to the negroes in the Southern States of America"; and that if transportation was revived a price would have

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1. This reference is to the British Abolition of the slave trade in 1807.

2. Anon., "Benevolence in Punishment or Transportation Made Reformatory", London, Selley, Burnside and Seeley, 1845:35, 36-7.

3. An illuminating reference to an illegal practice at that time.

4. Sir Joshua Jebb, 'General Report on the Convict Prisons 1860-61', London, for HMSO by George Eyre and William Spottiswoode, 1862:4.

to be paid for it at some time in the future, just as was currently happening in the Civil War in the USA:

> I do not suppose that two years ago any one of us imagined that the guilt of our ancestors in establishing negro slavery in America would have recoiled upon us at the present day. Yet at this moment we see in the arrestment of our principal manufacture, in the suffering of millions of our population, that sin of our fathers, after the lapse of two centuries, visited on the children. (1)

This view of the system of transportation as being analagous with the North American system of slavery continued throughout the 19th century and into the 20th in debates concerning penal policy. Indeed, writing about experiments in punishment, Du Cane could argue that transportation had been established, "as a kind of slave trade, and offenders were put up to auction and sold for the period of their sentences"; (2) and Wines could argue that transported convicts, "were slaves, for a term of years, and the traffic in convicts was a form of competition with the African slave-trade". (3) Thus, long after transportation had officially disappeared as a legitimate criminal sentence it could be referred to as an instance of slavery and comparisons could be drawn between the convict trade and the slave trade; the buying and selling of convicts and slaves; conditions on the convict and slave ships;

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1. J.R. Fowler and Martin Ware, Jun., (eds), "The Transportation of Criminals", London, Emily Faithfull, 1863:18,15.

2. E.F. Du Cane, "Experiments in Punishment", in The Nineteenth Century, November 1879, Vol.6., 871.

3. Frederick H. Wines, "Punishment and Reformation", New York, Thomas Y. Crowell and Co., 1910 ed:163.

the profit of both systems; the rules governing the conduct of transported convicts and slaves; and the fact that in complaining about their treatment, transported convicts and slaves faced benches of magistrates or justices drawn from the ranks of the master class. (1)

Nevertheless, despite the abandonment of transportation in the mid-19th century, (2) the central characteristics of that criminal sentence, which made it possible to analogise with the system of slavery, were in fact retained. Thus the same 1837-38 Committee, (3) which had categorically argued against transportation, could also argue that any new punishment must entail both compulsory labour and the loss of personal liberty:

> As capital and severe corporal punishments have gradually been relinquished, the loss of personal liberty and the performance of compulsory labour have necessarily become the chief elements of every penal system that has been devised ... (4)

Exactly why this was necessarily the case was not discussed by this Committee. They simply stated that:

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1. See, for example, Du Cane, 1879; Wines, 1910; and O'Brien, 1950.

2. Although the 2nd Penal Servitude Act of 1857 saw the disappearance of the word 'transportation' from the statutes, transportation in fact lasted, under the name of probation, until 1867, when the last convict ship sailed (as cited by Wines, 1910: 171.)

3. The Molesworth Committee, as discussed on page 526 of this chapter.

4. Parliamentary Papers, Vol (669) xxii, xli - my emphasis.

> Such being the case, the question under discussion will be greatly simplified by considering, in the first instance, in what manner and by what arrangements confinement and forced labour can best be inflicted. (1)

The solution to finding an alternative to transportation was ultimately found in the system of penal servitude which developed from 1853 onwards. (2) Forced labour, "remunerative in its character but unremunerated" (3) and the deprivation of liberty were the hallmarks of the system of penal servitude. And, as with transportation, in later arguments against penal servitude, analogies were drawn between the convict sentenced to penal servitude and the negro slave. Thus, in correspondence with the Home Secretary in 1907, Sir Richard Hartington could note that "penal servitude is ... a condition far worse than that of negro slavery". (4)

Nevertheless, despite the fact that analogies have been numerously drawn between the distinctive characteristics of the system of chattel slavery and different modes of punishing convicts, each new punishment devised has retained these characteristics.

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1. Parliamentary Papers, Vol (669) xxii, xli.

2. In the Act of 16 and 17, Vic. c. 99, 1853, penal servitude could replace some of the sentences of transportation but in the Act of 20 and 21, Vic. c. 3, 1857, penal servitude wholly replaced transportation as a punishment.

3. Fowler and Ware, 1863:10.

4. Sir Richard Hartington, Bart, "The Punishment of Crime", paper printed by J.S. Cook, Worcester, 1895:16, in H.O. 45/14099/14574/2.

As Morris argues, "the slave, being property-less, provides an ante-type for the property-less members of the nation state that emerged in the 16th century" in the sense that, being property-less, such people are not simply regarded as having no substantial rights in society but are "treated as if they were themselves property". (1)

Thus, in relation to the convict:

> Those who rule the state, certainly since the emergence of property of a distinctive indicator of status, have frequently been at pains to identify those who offend against property as being outside the society, or at least deserving of banishment from it for varying periods. But whether the banishment is to a far country or merely to the confines of a penitentiary, the punishment is, in strict legal terminology, 'corporal'. In that sense, the convict may be employed as a factor of production wholly at the disposal of the state, lacking in rights other than those which might be equally applied to domestic animals. In that prison labour is compulsory, and refusal of it a disciplinary offence, it reflects that continued servile status ... (2)

This continued "servile status", however, has not only been maintained within the convict status but also, as will be discussed in the next section, is reflected in various civil and political statuses right up to the present day. The analogies within law between penal treatments and slavery are only the most obvious ones, given the explicit legitimation of penal slavery in the Thirteenth Amendment to the US Constitution. Penal slavery, however, has, at any given time, only been applied to a limited

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1. Morris, 1978:294 - emphasis in original.

2. Ibid., 295.

proportion of the population in any state, and, as was noted in the introduction to this chapter, in the USA in the post Civil War era, would be applied only to a minority of the ex-slaves or freedmen liberated from the system of chattel slavery by the passage and ratification of the Thirteenth Amendment. Nevertheless, the passage of the 13th, 14th and 15th Amendments to the US Constitution and the civil rights statutes (1) enacted to ensure that these constitutional provisions were effective in legal practices, provided a much broader basis, within law, for redefining the status of ex-slaves and other persons in terms of basic civil and political rights. In the discussion which follows some indication of just how broad this redefinition of status would become is given.

THE LEGACY OF THE LEGAL CATEGORY

The initial construction of civil rights in legislation, premised on the 13th, 14th and 15th Amendments to the US Constitution, was aimed specifically at defining the legal rights of freedmen in the post Civil War era. This legislative definition of rights was accomplished in conjunction with the legal abolition of chattel slavery, and, as such, was a direct consequence of the fact that chattel slavery as a legal category, had existed and developed over a period of two hundred years. The official disappearance of chattel slavery from law, however, did not remove

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1. See pages 512-519 of this chapter.

the unique effects of the legal category. On the contrary, the legal category of chattel slavery has left behind a particularly potent legacy in legislation and legal practices, the effects of which are still evident in contemporary civil rights litigation in the USA.

As was mentioned earlier in this chapter, while the Civil Rights Acts of the 1860s and 1870s and the Constitutional Amendments were directed at ex-slaves, neither the legislation nor the Amendments make explicit reference to negroes. Indeed the wording used has made it possible, within law, to extend the applicability of the abolition of the legal category of chattel slavery in litigation in diverse substantive areas right up to the present. In abolishing the legality of slavery then, by means of the law itself, the political, economic and social conditions leading to the abolition in law, were translated into a different realm of discourse with its own specific language and form and its own specific effects.

Thus, under Section 2 of the 13th Amendment, Congress has been able to enact both civil and criminal statutes, in addition to the Civil Rights Acts of the 1860s and 1870s, to implement the abolition of slavery, not only in its traditional form, but also in other contexts. For example, while the history and origin of the relevant provisions of the contemporary US Criminal Code are somewhat complex, (1) 18 U.S.C. § 1581 (1958), dealing with peonage, which

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1. For a discussion of this complexity, see Emerson et al, 1967: 1005.

took its original form from the Anti-Peonage Act of 1867, (1) is aimed at preventing the holding, arresting, or returning of anyone to a condition of peonage, and was primarily designed to eliminate debt bondage, a condition which was commonplace in the territory acquired from Mexico in the mid-19th century, as well as in other parts of the USA. (2) This particular provision was discussed as recently as 1944, where, in the case of Pollok v Williams, (3) the US Supreme Court held that an Alabama statute, which enabled employers to force employees, in debt on account of advances in wages, to continue to work for them under threat of criminal punishment, was a violation of the 13th Amendment to the US Constitution. This particular practice had been one of the more

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1. US, 14 Stat. 546, "An Act to abolish and forever Prohibit the System of Peonage in the Territory of New Mexico and other parts of the United States", discussed at page 518 of this chapter.

2. For a discussion of the relevant cases under the anti-peonage statute and provisions, see Emerson et al, 1967:1005. See also Carr, 1947, where he discusses the peonage provisions under the 13th Amendment in the general context of civil rights.

3. 322 US 4, 64 S.Ct. 792, 88 L.Ed. 1095 (1944).

subtle devices used for securing forced labour. (1)

The criminal code provision, 18 U.S.C. § 1584, dealing with involuntary servitude, which, unlike peonage, has no requirement of debt, is the result of a 1948 provision which merged the anti-slave trade, pre-Civil War Act of April 20, 1818, (2) with the Act of June, 1874, (3) "An Act to Protect Persons of Foreign Birth Against Involuntary Servitude". While this latter statute was originally enacted to prevent abuses to Italian children who were being recruited to perform as street musicians, it has been regarded as applicable to all persons. (4) The provision (18 U.S.C. § 1584) itself prohibits the holding of a person in or selling of a person into a condition of involuntary servitude, or bringing into the United States any person held in involuntary servitude. (5) However, in United States v Shackney, (6) decided

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1. Other practices have included, in some areas, sheriffs freeing prisoners into the custody of local entrepreneurs who pay fines or post bonds. The prisoners then work for the "benefactors" under threat of being returned to prison. Frequently the original charge against the prisoner has been trumped up for the purpose of securing labour by this means. In other cases, persons have simply been held in bondage by sheer force or by threat of prosecution for debt. The Civil Rights Division of the US Department of Justice, established in 1939, received a total of 104 complaints of peonage and involuntary servitude for the period from 1961 to 1963. Of these, only 2 resulted in prosecution; 92 being closed on the face of the complaint or after investigation (as cited by A. Shapiro, "Involuntary Servitude: The Need for a more Flexible Approach", in 19 Rutgers Law Review, 65-85, 1964).

2. US, 3 Stat. 452.

3. US, 18 Stat. 251.

4. For a discussion of the relevant cases, see Emerson et al, 1967: 1005-1006.

5. See the full discussion of this in the case of United States v Shackney, 333 F. 2d. 475, 481-483 (2d Cir. 1964).

6. Ibid.

in 1964 before the US Court of Appeals, the issue before the Court was what constituted an involuntary servitude within the meaning of the statute. In the event, the Court held that the lower court's conviction of a Connecticut farmer, who had imported a Mexican family to work on his farm, and had used psychological and economic intimidation to keep them working there, could not be upheld under the statute - the threat to have the employee sent back to Mexico could not be interpreted as involuntary servitude under 18 U.S.C. § 1584.

Claims that compulsory civilian labour as an alternative to military service violates the 13th Amendment have been rejected by the courts (1) and military service itself has been held not to violate the 13th Amendment. (2) Likewise, courts have rejected the contention that legislation which imposes limits on the right to strike, or which requires a striker to return to work, conflicts with the 13th Amendment. (3) A question, however, which has not yet been ruled on fully under the 13th Amendment is whether a recipient of welfare funds may be required by a state to work, under the threat of a penal sanction. In People v La Fountain, (4) decided in 1964, a conviction under such a statute was reversed,

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1. See, for example, Badger v United States, 322 F. 2d. 902, 908 (9th Cir. 1963).

2. See, for example, Koch v Zineback, 316 F. 2d. 1 (9th Cir. 1961).

3. See, for example, N.L.R.B. v National Maritime Union, 175 F. 2d. 686 (2d. Cir. 1949), cert.den. 338 US 954 (1950).

4. 21 App. Div. 2d. 719, 249 N.Y.S. 2d. 744 (1964).

and the indictment dismissed. This decision, however, was based on the grounds that the refusal to work was not wilful, as required by the applicable statute and in other cases the courts have consistently held that a cut-off of welfare funds for refusal to work does not violate the 13th Amendment. (1)

On the other hand, a much broader interpretation of the 13th Amendment was adopted in Jones v Alfred H. Mayer Co., (2) in 1968. On appeal, the Court held that 42 U.S.C. § 1982, originally enacted as the Civil Rights Act of 1866, (3) "bars all racial discrimination, private as well as public, in the sale or rental of property, and that the statute, thus construed, is a valid exercise of the power of Congress to enforce the Thirteenth Amendment", (4) thus the plaintiffs were entitled to recover damages and injunctive relief because of the refusal of the defendants to sell their home in a private sub-division to the plaintiffs solely because of race. Such a refusal, on the grounds of race, was taken to represent one of the "badges and incidents of slavery" which the 13th Amendment had been designed specifically to abolish.

Nevertheless, while some cases have considerably broadened the definition of what is to be considered as slavery, involuntary

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1. For a discussion of these cases, see Emerson et al, 1967: 1007. On the 13th Amendment generally, see John Hope Franklin, "Civil Rights in the US : A Chapter in the Emancipation of the Negro, 1863-1962", New York, Random House, 1962.

2. 392 US, 409 (1968).

3. See pages 516-517 of this chapter.

4. 392 US, 413.

servitude or peonage, under the 13th Amendment, in a number of other cases, decided in the decades after the adoption of the Civil War Amendments, (1) the US Supreme Court invalidated various provisions of the Civil Rights Acts. In United States v Cruikshank (2) in 1875, the defendants were among more than 100 persons jointly indicted in a federal court in Louisiana who were variously charged with offences in violation of the Civil Rights or Enforcement Act of May 31, 1870 (Section 6), (3) which made it a felony to conspire to deprive any citizen of his constitutional rights and privileges. The Louisiana federal court had found the defendants guilty and the US Supreme Court was considering the constitutional issues. The US Supreme Court held that the 14th Amendment applied only to state not private action and that no other part of the US Constitution afforded authority for the 1870 civil rights statute - it was therefore considered unconstitutional.

In United States v Reese (4) in 1876, two election inspectors in a Kentucky municipal election were indicted, for refusing to receive and count the vote of a negro, under various provisions of the Civil Rights Acts which prohibited interference with the right to vote. The US Supreme Court, considering the issues exclusively under the 15th Amendment, held the provisions of the Civil Rights

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1. That is, the 13th, 14th and 15th Amendments.
2. 92 US, 542, 23 L.Ed. 588 (1875).
3. See Page 517 of this chapter.
4. 92 US, 214, 23 L.Ed. 563 (1876).

Acts unconstitutional as going beyond the 15th Amendment, in that the statutory provisions under which the defendants had been indicted were not limited to interference on account of race, colour or previous condition of servitude - a strictly constructionist view of the US Constitutional Amendments reminiscent of the pre-Civil War cases on the constitutional issues surrounding slavery. (1)

Similarly, the Civil Rights Cases, (2) argued before the US Supreme Court in 1883, involved a series of indictments under the Civil Rights Act of March 1, 1875, (3) charging the defendants with refusal to grant accommodation to negroes in various theatres, a hotel and a railroad car. In holding that the 14th Amendment was applicable solely to an abridgement of privileges and immunities through "state action" as opposed to private action, Sections 1 and 2 of the 1875 Civil Rights Act, under which the defendants had been charged, were held to be unconstitutional and void. Moreover, in arguing that the 13th Amendment, abolishing slavery and involuntary servitude, did not afford constitutional authority to 1875 Civil Rights Act § 1 and § 2 , Justice Bradley argued that there was no similarity between the kind of "badges" of slavery and servitude abolished by the 13th Amendment and the actions to which the 1875 Act was addressed:

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1. See Chapter 7 for a discussion of the early US Supreme Court cases regarding slaves' suits for freedom and Chapter 8 for a discussion of the later cases dealing with the inter-state commerce in slaves, fugitive slaves and the citizenship of negroes (free or slave).

2. 109 US, 3, 3 Sup.Ct. 18, 27 L.Ed. 835 (1883).

3. See pages 517, 518 of this chapter.

> Is there any similarity between such servitudes and a denial by the owner of an inn, a public conveyance, or a theater, of its accommodations and privileges, to an individual, even though the denial be founded on the race or color of that individual? Where does any slavery or servitude, or badge of either, arise from such an act of denial? ... What has it to do with the question of slavery? (1)

Moreover, said Bradley:

> It would be running the slavery argument into the ground to make it apply to every act of discrimination ... When a man has emerged from slavery ... there must be some stage in the progress of his elevation when he takes the rank of a mere citizen, and ceases to be the special favorite of the laws ... (2)

Given this interpretation of the Civil War Amendments and the alleged unconstitutionality of the central provisions of the Civil Rights Acts, it is not surprising to find the US Supreme Court upholding this view in United States v Harris, (3) an 1883 case involving the indictment of twenty persons under the provisions of the Civil Rights Acts of 1870 and 1871, (4) prohibiting a conspiracy by two or more persons to deprive another of equal protection of the laws, equal privileges or immunities under the laws, or from hindering state authorities from affording such

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1. 109 US, 29.
2. Ibid., 31 - my emphasis.
3. 106 US, 629, 1 S. Ct. 601, 27 L.Ed. 290 (1883).
4. See page 517 of this chapter.

protection. Twenty members of a Tennessee lynch mob captured four prisoners held by a state deputy sheriff and beat them severely, killing one. The US Supreme Court held that these twenty persons had been wrongly indicted since the 14th Amendment applied only to "state action", not private action, and that no other part of the US Constitution could afford legality to the statutory provisions at issue. (1)

The only provisions of the Civil Rights Acts which the US Supreme Court did uphold were those which they considered the US Constitution guaranteed (through Article 1, Section 4) (2) or the "state action" interpretation of the 14th Amendment. Thus in Ex parte Virginia (3) 1880, the US Supreme Court upheld the

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1. Given this kind of construction of the Civil War Amendments by the US Supreme Court, it is not surprising that, "The civil rights laws did not succeed in obtaining actual as well as legal equality for freed-men. For a brief period vigorous enforcement was attempted in the hope that the Ku Klux Klan and its allies could be defeated in their uncompromising effort to nullify the new amendments ... 7,372 criminal prosecutions were brought under the civil rights laws between 1870 and 1897, of which 5,172 were in the South. About twenty per cent of the prosecutions resulted in convictions. In the end, however, the Klan forces won. The very extent of the litigation under the Enforcement Acts soon over-taxed the capacity of the twenty-four district courts in the South ... other factors were [also] at work to deprive the civil rights laws of the public support ... The disputed presidential election of 1876 ... was settled by a deal ... The compromise was not only the withdrawal of federal troops from the southern states ... but [also] the end of the Reconstruction effort itself. It was plain that the North had abandoned the fight ...", (J. Maslow and S. Robinson, "Civil Rights Legislation and the Fight for Equality", in 20 University of Chicago Review, 1953, 363, 370-371).

2. This provision concerns the election of Senators and Representatives.

3. 100 US, 89, 25 L.Ed. 676 (1880).

indictment of a Virginia judge charged with excluding negroes from state juries in violation of a specific prohibition of the Civil Rights Acts. The Court ruled that the action of the judge constituted "state action" under the 14th Amendment. And, in Ex Parte Siebold, (1) 1880, Maryland election officials were indicted for stuffing ballot boxes in a Congressional election. The provisions of the Civil Rights Acts making this a criminal offence were sustained under the federal power to control Congressional elections, conferred by Article 1, Section 4, Clause 1 of the US Constitution. (2)

Nevertheless, despite this kind of case, where some provisions of the Civil Rights Acts were held to be constitutional by the US Supreme Court, the view that the federal government had no jurisdiction over social discrimination by private persons or organisations, against persons of a different race or colour, under the 14th Amendment, was to have far-reaching consequences and is still upheld in contemporary cases involving this constitutional issue. (3) Indeed, these early cases ruling on the scope of the Civil War Amendments opened the way to poll taxes and literacy tests designed to disqualify negroes from marking a ballot

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1. 100 US, 371, 25 L.Ed. 717 (1880).

2. "Article 1, Section 4.1. The times, places, and manner of holding elections for Senators and Representatives, shall be prescribed in each State by the legislature thereof; but the Congress may at any time by law make or alter such regulations, except as to the places of chosing Senators".

3. See, for example, Moose Lodge No. 107 v Irvis US 92, S.Ct. 1965 (1972) where the issue was whether the Lodge which excluded negroes bore the attribute of "state action". The Court held that there had been no violation of the 14th Amendment since the Lodge did not bear the attribute of "state action".

and to laws segregating negroes from whites in public places. (1)

Although the Civil War Amendments and the Civil Rights Acts were directed at protecting the ex-slave's right to vote, (2) resistance, initially taking the form of violence and intimidation, and latterly on a legal basis, led to the effective disenfranchisement of blacks before the turn of the 20th century: "beginning about 1890 the southern states undertook to establish the disenfranchisement of the Negro on a legal basis". (3) Various measures, all aimed at circumventing the 15th Amendment, were adopted, including various literacy, property, residence and character qualifications as well as the "grandfather clause", (4) the "poll tax" (5) and, with the ultimate establishment of the Democratic Party as the sole Southern party, (6) the "white primary". (7)

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1. Hofstadter et al, 1964:226; and Franklin, 1969:331-2.

2. It should be remembered, of course, that at this time women were still nowhere near being granted the right to vote.

3. Emerson et al, 1967:1106.

4. For example, the "grandfather clause" was written into Louisiana's State Constitution in 1898. This called for the addition to the permanent registration list of the names of those male persons whose fathers and grandfathers were qualified to vote on January 1, 1867. At that time, of course, no negroes in Louisiana were qualified to vote. This pattern was repeated throughout the Southern states. For a discussion of this, see Franklin, 1969:335-341.

5. In Mississippi, for example, an 1890 suffrage amendment was written which imposed a poll tax of 2 dollars. Again, other Southern states adopted similar measures (Franklin, 1969:34,39).

6. See, Franklin, 1969:332-339; and Emerson et al, 1967:1106.

7. Negroes were excluded from the Democratic Primary in the South by the rules of the Party (Franklin, 1969:342).

Whether these laws were pushed through by conservative politicians anxious to disenfranchise poor whites as well as blacks or by Populist forces fearful of losing the negro vote to their conservative opponents, as in Georgia and South Carolina particularly, there is no doubt that they were effective in disenfranchising the negro in the South - a pattern which still continues. Thus, while in 1867, 66.9% of the negro voting age population in Mississippi were registered to vote, by 1892 only 5.7% were so registered and in 1955 only 4.3% were registered. (1)

It was not until Smith v Allwright (2) in 1944 that the US Supreme Court held that the exclusion of negroes from the Democratic Party primaries was a clear violation of the 15th Amendment. In an attempt to circumvent this decision, some states, most notably South Carolina, changed the rules governing the Democratic Party organisation and the conduct of primary elections. The Party organised into clubs, open to members on a racially segregated basis, though all members were allowed to vote in the primaries including qualified negro electors but only if they took an oath stating: "I further solemnly swear that I believe in and will support ... social and educational separation of the races". (3) When in 1948

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1. See, United States Commission on Civil Rights, Voting in Mississippi, 8, Washington D.C., U.S.G.P.O., 1965.

2. 321 US 649, 64 S.Ct. 757, 88 L.Ed. 987 (1944).

3. As cited by Emerson et al, 1967:1119, Note 2.

the need for negroes to take this oath was held to be a "clear and flagrant evasion of the law", (1) the Southern states responded by bringing in literacy, character and other qualifications for voting. (2)

The poll tax was one of the most common measures adopted by Southern states in the post-Civil War era to disenfranchise negroes and it continued, in various guises, into the 1960s. In Breedlove v Suttles, (3) 1937, the US Supreme Court held that the poll tax was not unconstitutional and could not be said to violate the "equal protection" and "privileges and immunities" clauses of the 14th Amendment. And, while various legislative and judicial efforts were made to eliminate the poll tax, none succeeded until the passage of the 24th Amendment to the US Constitution, passed by Congress on January 23, 1964. (4) Notwithstanding this Amendment, however, Mississippi passed a law in 1964 which provided that, in order to vote, those previously exempted from poll tax by state law need only obtain permanent exemption certificates while those who previously had been subject to the tax had to obtain an annual poll

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1. For a discussion of the relevant cases which dealt with the issue of the white primary, see Emerson et al, 1967:1107-1120.

2. See Emerson et al, 1967:1120, Note 4.

3. 302 US, 277, 58 S.Ct. 205, 82 L.Ed. 252 (1937).

4. "Section 1. The right of citizens of the United States to vote in any primary or other elections for President or Vice President, for electors for President or Vice President, or for Senators or Representatives in Congress, shall not be denied or abridged by the United States or any State by reason of failure to pay any poll tax or other tax.
Section 2. The Congress shall have power to enforce this article by appropriate legislation".

tax receipt. This law was subsequently invalidated on the grounds that it was inconsistent with the 24th Amendment. (1) And, in Harper v Virginia State Board of Elections, (2) 1966, the US Supreme Court overturned its precedent of Breedlove v Suttles (3) by declaring the Virginia poll tax to be unconstitutional. (4)

In another area - the area of racial segregation versus integration - the early constitutional holdings on the Civil Rights Acts were to uniquely affect the development of North American society right up to the present day. In 1896, in Plessy v Ferguson, (5) the US Supreme Court held that an 1890 Louisiana statute, which provided for separate facilities for negro and white passengers on trains within the state and provided criminal penalties for violations by railway officials, was not a violation of the "equal protection clause" of the 14th Amendment and was quite consistent with the US Constitution. The "separate but equal" doctrine as set forth in Plessy v Ferguson relied on the precedent of Roberts v City of Boston, (6) in which the Supreme Court of Massachusetts had held that the Primary School Committee of Boston had power to make provisions for the instruction of coloured children

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1. Emerson et al, 1967:1125, Note.

2. 383 US 663, 86 S.Ct. 1079, 16 L.Ed. 2d. 169 (1966).

3. Discussed on the previous page of this chapter.

4. For a full discussion of the development of poll tax cases post the 24th Amendment, see Emerson et al, 1967:1125-1134.

5. 163 US 537, 16 S.Ct. 1138, 41 L.Ed. 256 (1896).

6. 5 Cush. (59 Mass) 198-210 (1849). This case was fully discussed in Chapter 8.

in separate schools established exclusively for them, and to prohibit their attendance upon the other schools. (1)

Mr Justice Brown, in delivering the opinion of the US Supreme Court in Plessy, however, failed to regard it as significant or of any consequence, that in relying on Roberts as precedent, (2) the Court was relying on a case decided prior to the abolition of slavery hence prior to the passage of the Civil War Amendments and any subsequent civil rights legislation. Instead, Mr Justice Brown denied Plessy's contention that "in any mixed community, the reputation of belonging to the dominant race, in this instance the white race, is property" (3) and argued that it was an "underlying fallacy" for Plessy to maintain that the "enforced separation of the two races stamped the colored race with a badge of inferiority". (4) Moreover, said Brown, "if one race be inferior to another socially, the Constitution of the United States cannot put them upon the same plane". (5)

Segregated public education was, of course, common at the time of the Plessy decision and the term "separate but equal" was frequently used in relation to education prior to Plessy. (6)

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1. For a full discussion of the significance of Roberts v The City of Boston, see Chapter 8.

2. The Court also relied on state laws prohibiting inter-racial marriage as support for the "separate but equal" doctrine.

3. 163 US, 544 - emphasis in original.

4. Ibid., 545.

5. Ibid., 546.

6. Franklin, 1969:342.

Congress itself had established segregated schools in the District of Columbia by that time. (1) In fact, the "separate but equal" doctrine, particularly in relation to eduction, was upheld in law into the second half of this century. In Missouri ex rel. Gaines v Canada, (2) 1938, the negro plaintiff had been denied admission to the Missouri State University Law School on the basis of race, in accordance with a state statute providing for segregation in public schools. There was, however, no separate negro law school at the time and the US Supreme Court held that because no separate facility existed, the discrimination was a denial of the "equal protection clause" of the 14th Amendment.

Following this decision the number of negro plaintiffs increased and courts began to define more extensively just what 'substantial equality' in separate facilities was about. (3) In Sweatt v Painter, (4) 1950, for example, a negro had sought admission to an all white University of Texas law school even though there was a separate negro law school in the area. The negro law school had, in fact, been established in response to an earlier suit by Sweatt. However, once established, Sweatt refused to register there, renewing his application to the white law school on the basis

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1. Emerson et al, 1967:1234.
2. 305 US 337, 59 S.Ct. 232, 83 L.Ed. 208 (1938).
3. See, Emerson et al, 1967:1235; and Franklin, 1969:553-4.
4. 339 US 629, 70 S.Ct. 848, 94 L.Ed. 1114 (1950).

that the negro law school was unequal to it under the Plessy doctrine. The US Supreme Court upheld Sweatt's argument on the ground that the negro school was unequal in facilities, curriculum, reputation and professional contact.

The US Supreme Court went further than this in McLaurin v Oklahoma State Regents. (1) McLaurin had been admitted to a previously segregated white graduate school for education because the separate negro school had been found unequal to the white one at an earlier stage in the litigation. McLaurin, however, was only admitted on a specially segregated basis, including a separate seat for classroom attendance and in the cafeteria. The Court held that such state approved restrictions on the basis of race alone produced an inequality in educational opportunity which violated the "separate but equal" constitutional test.

Finally, after more than a century of upholding the constitutionality of the "separate but equal" doctrine, in Brown v Board of Education (1st decision) (2) in 1954, the US Supreme Court Justices held that the "separate but equal" doctrine itself was a violation of the "equal protection clause" of the 14th Amendment. However, the decision in Brown v Board of Education (2nd decision) (3) in 1955, where the US Supreme Court left the implementation of desegregation to the District Courts, has itself contributed significantly to the slow pace of desegretation - a process still

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1. 339 US 67, 70 S.Ct. 851, 94 L.Ed. 1149 (1950).
2. 347 US 483, 74 S.Ct. 686, 98 L.Ed. 873 (1954).
3. 349 US 294, 75 S.Ct. 753, 99 L.Ed. 1083 (1955).

only underway to a minimal extent. (1)

The extent to which desegregation/integration is currently underway is, of course, integrally connected with the legality of other forms of discrimination, for example, in housing, which lead to a de facto if not de jure segregation in other areas such as education. Moreover, the manner in which the public school system is itself financed can be and has been regarded as discriminatory. Thus, as recently as 1971, in Serrano v Priest, (2) the Supreme Court of California held that the public school financing system which relies on local property taxes, causing disparities between individual school districts in the amount of revenue available per pupil, "discriminates against the poor and violates the equal protection clause of the Fourteenth Amendment". (3)

Thus, through the Civil War Amendments, the Civil Rights Acts and subsequent implementing legislation as well as in judicial decisions, the legal category of chattel slavery has been extended to include under the "badges and incidents of slavery" various kinds of discrimination based on race, wealth, sex and so on, and, in the areas drawn particular attention to, that is voting and education, both considered as legally guaranteed within bourgeois notions of right, some indication of the unique effects which a legal category can produce as a legacy in the course of outgrowing its initial

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1. For a fuller discussion of the origin, development, refinement and abolition of the "separate but equal" doctrine in case law, see Emerson et al, 1967:1230-1402.

2. 487 P.2d. 1241 (1971).

3. Ibid., 1241.

discursive and categoric forms has been presented.

CONCLUSION

In producing those unique effects from within the development and abolition of slavery as a legal category, the law, in the form of legislation and legal practices, has both produced and reproduced certain forms of political, economic and social relations and these relations have themselves played a part in the production and reproduction of the law. As was argued in Chapter 1, society itself is only possible and maintains itself insofar as the sets of activities, interactions, relations and institutions which are constitutive of it are reproduced.

In this thesis, law has not simply been conceived of as some institutional form or set of rules but rather has been considered as a social practice itself. As such, law reproduces itself not only in the creation or enforcement of rules of law but also on the level of the reproduction of social relations which form the core of its subject matter and upon which it acts. Law is produced and reproduced, and, in the sense that every act of production is, in an important sense, a novel enterprise, which may be transformative by altering a structure at the same time as it reproduces it, this work has addressed itself to the question of what part law has to play in the process of the reproduction and transformation of given societies. More specifically, it has focused on the law in relation to chattel slavery from the point at which that particular legal category was developed within a particular society to the point at which the

category officially disappeared as law.

The substantive part of this thesis then has attempted to address itself to an understanding of the precise nature of the effectivity of legal regulation in a specific instance. And, in arguing in Chapter 1 that any attempt to analyse or understand the conception of the legal form in general necessarily leads to either essentialist notions of the law-as-origin or reductionist conceptions of the legal form, such as those which regard law as an exigency of the mode of production of which it is an effect, I posed the problem of law as a problem of understanding legislation, legal institutions and legal practices. The general question I addressed was the question of how it comes about that law, in the form of legislation, legal institutions and practices, can define social relationships which are not based on assumptions of equivalence, exchange or equality.

In answering that question in relation to the development of chattel slavery in North America as a legal category, I have argued that law in fact does not come about in response to the recognition of prior realities and as a means of regulating an already given realm of relations between agents. (1) Instead, I have argued that law, in fact, can and does define agents as agents, that it can and does, through its regulatory aspect, impose requirements of action upon agents, and that the 'subjects' recognised in law and the

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1. Pashukanis, 1951, is arguing in this way in attempting to develop his general theory of law.

activities regulated by it can be and are constructed in legislation.

The central concern of this thesis has therefore been with the question of the nature and effectivity of legislative/legal systems as specific forms, a question which necessarily involves an explanation of the origin and operation of specific laws and legal practices within a specific set of apparatuses. As Hirst comments, to view law in this way, as a social practice, is to recognise that there is a definite effectivity to legislation and legal practice, thus "law can outrun and re-define its discursive and categoric forms". (1) And, while recognising that law is, by definition, created by the conditions of its existence, social, political and economic, its specific sphere of effectivity is not simply an expression of these conditions, but is rather a translation of the conditions into another and quite distinctive language. Legislation, legal apparatuses and practices represent this translation, and, as such, constitute their own particular sphere of effectivity - a sphere with its own unique effects which can be transformative as well as reproductive of the conditions of its existence.

The specific instance, the development of the law of chattel slavery in North America, was chosen for the focus of my analysis because this form of slavery developed wholly within the context of legality and it was through the forms of law that the slave status was legitimated or otherwise. In defining chattel slavery as a form of

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1. Hirst, 1979:112.

legal subordination in which the owner had the rights of property over another human being, his slave, this particular form of legal subordination was not only consistent with capitalist development in North America but also represented the necessary legal form of slavery in the slave mode of production which developed in the Southern colonies and states. Within the development of the legal category of chattel slavery, the slave was a variant of private property, premised on the existence of the general form of private property. As property, the slave was bought, sold and inherited, and was regarded as a legal non-subject.

At the same time, the slave's value, as property, was wholly dependent on his having the apparently contradictory attributes of a human subject, in particular, the ability to labour. The ability of legal systems to support inconsistencies in definitions and practices is clearly instanced in relation to chattel slavery, where, from within the same body of rules of law, legal institutions and practices could uphold the legality of claims to slave property, while recognising the personality in slaves. This containment of apparent contradiction was primarily achieved through the development of legal arguments which reasoned on the basis of the institutional arrangements governing the master/slave relation rather than on the basis of the regulation of disputes between 'individuals' or 'subjects', and on the development of special forms of pleading and procedure in relation to chattel slavery including the establishment of special courts to deal with slaves. And, while there were inconsistencies in definition and practice, as the substantive chapters in this thesis

have demonstrated, the legal category 'chattel slave' was constructed, refined and articulated from the lowest to the highest courts, in civil and criminal actions, in legislation and in constitutional law, in a way which clearly regarded the slave as primarily a form of property.

In this thesis the detailed examination of the law and its practices in relation to chattel slavery has indicated how chattel slavery developed as a legal form, the part which that particular legal category played in the production and reproduction of social and political relations, and the manner in which social and political structures shaped the nature of the slave system through the forms of law. Indeed, my argument has been that while capitalist development created the possibility for a particular form of chattel slavery to exist, the operation of law and legal institutions was, in this case, part of the process of the uneven development of capitalism and, as such, was inextricably linked with that development exerting its own influence upon it.

Thus, contrary to the assumption made by other scholars that capitalist and slave systems are necessarily antagonistic, I have argued that slave production appeared under specific conditions as a subordinate form to capitalist production. The only antagonism between these two modes could have been at the ideological level, insofar as the ideological basis of bourgeois right, that is, liberty, equality before the law, equity, the proportionality of labour and rewards, is, in formal terms, apparently contradicted by the existence of slave property. However, given the institutional

confinement of chattel slavery to blacks, and the ideological support for this afforded by racism, and, more importantly, given the 'mastership' of the 'rule of law' itself as the central legitimating ideology of 18th and 19th century bourgeois social orders, there was, in fact, no substantive contradiction between the existence of slave property within the North American bourgeois democratic republic.

Indeed, in its practices and discourse, the law in relation to chattel slavery performed its own unique task, producing its own unique effects, in defining and legitimating the status of master (owner)versus slave (owned) - a social relationship which denied any semblance of equality, exchange, equivalence, liberty or any other ideological notion of bourgeois right. The case of chattel slavery, far from being incompatible with bourgeois notions of legality and right, only serves to highlight the 'dark side' of these same notions of legality. The fact that chattel slavery was constructed within bourgeois law itself clearly demonstrates that such law is not defined by notions of individual rights - this conception of bourgeois law is itself ideological and colludes with a central 'legal fiction' within bourgeois social formations.

If, as this work has demonstrated, law can clearly and consistently deny individual rights, as in the case of chattel slavery, or temporarily suspend them, as in the case of the convict (penal slavery) then the category of 'rights' cannot be definitive of law; and again, if that law can deny the status of 'subject' as in the case of chattel slaves, or temporarily suspend it, as in the

case of convicts (penal slaves), then neither can the category of 'subject' be definitive of law. To understand law, analyses must be based on an approach which regards law as a practice, thus requiring an explanation of the emergence and development of specific laws in the form of legislation, legal institutions and practices. Only by adopting such an approach to the study of law in society can we begin to understand the precise effects of law in particular social formations and thereby build up a body of knowledge which can contribute to more general theorising about the specific nature and effectivity of legal as opposed to other forms of defining and regulating social relationships. The case of the development of chattel slavery in North America provides an analysis of both why and how, within this particular category, the law has functioned as an instance of construction, recognition, regulation and transformation and, in so doing, demonstrates the specific effectivity of this particular legal category, in the form of legislation, legal institutions and practices.

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