The Hollow Words: An Experiment in Legal Historical Method as Applied to the Institution of Slavery

Terrence F. Kiely
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Terrence F. Kiely*

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Legal language is not a descriptive language. It is a directive, influential language serving as an instrument of social control. The "hollow words" are like sign-posts with which people have been taught to associate ideas concerning their own behavior and that of others.

To serve as an instrument of social control legal language is and must be a regularized and repetitive language. The hollow words can function as signposts only if they are in some way authoritatively established as such and used in accordance with some rules . . . .—Olivecrona, Law as Fact (2d ed. 1971).

* * *

This unfortunate species of property is constantly presenting us with cases involving considerations of policy rather than law, and in which little assistance can be derived from authority.—Nott, J., Wingis v. Smith, 3 McCord (S.C.) 400, 401 (1825).

I. INTRODUCTION

It has often been observed that lawyers make bad historians due to their overemphasis of the importance of legal doctrine on

* Professor of Law, DePaul University. B.S., Loyola University of Chicago; J.D., DePaul University; LL.M., New York University.
the dynamics of an historical event. On the other hand, historians without a law background too often overlook the long term importance of the technical aspects of case law or other authoritative legal data buried under layers of esoteric legalese.¹ A legal/historical event should be examined not only from the reference point of the content of cases decided in response to it but also from the methodological perspective—how it was decided within the enveloping context of legal rules and concepts utilized by courts in their position as conflict resolvers. Such an examination is of great importance in achieving a full understanding of the possible ranges of judicial response to the underlying event.

This Article is considered an experiment because it focuses on the technique utilized by courts in the ante-bellum South in resolving selected slave-related tort damage suits and actions in equity for the specific delivery of slaves. It does not analyze directly the economic or social roots of the slave labor system, of which such cases are a reflection. By taking the institution of slavery as a given fact and examining the courts' methodological response to the myriad legal issues raised by the social fact of property in human beings, it is hoped that some light will be shed on issues traditionally addressed by historians.

It too often is overlooked that the common law resolution structure itself has a dramatic effect, often a limiting one, on a court's response to a social issue brought to its attention through litigation. This is especially so in the area of tort liability, with which this Article mainly is concerned. Regardless of the real-life nature of the human conflict situation underlying anticipated litigation, counsel must choose from a very limited number of channeling concepts—negligence, intent, or strict liability—with which preliminarily to label or characterize the conduct of the defendant.

Once an overall channeling concept has been selected, the ensuing court response invariably will center on more limited aspects of the case contained within subconcepts regularly em-

ployed as part of the doctrinal machinery utilized in such cases—duty, proximate cause, etc. Aside from its de-emotionalizing and pidgeon-holing effect on the dynamic of the precipitating human event, the existence of such doctrinal machinery limits the ability of a court to respond fully to the underlying problem. The result is that such concepts or "hollow words," regularly utilized in all cases of any generic type, create what might be deemed a structural lock on decision making.2

The problems posed by this legal phenomenon were especially evident in the decisions rendered by courts in the ante-bellum South in noncriminal slave-related cases. This was because Southern courts, utilizing the conceptual framework and precedent base of English common law, were attempting to construct one legal system to guide decision making in all cases of any one generic type. Cases involving slave property continually interfered with this task. They required a choice between the creation of a specialized parallel system of rules for slave property or the adjustment of the framework of the received common law to the institution of slavery.

There was an obvious and primary need for uniformity in the construction of a common law-private law system in these fledgling states. There was also the pressing responsibility to integrate slave property into any such system. It is the author's hypothesis that the methodological struggle to achieve such integration affected the task of constructing a private law system due to the inherent "channeling concept" nature of the common law resolution structure. This hypothesis, unfortunately, must await further research for verification or refutation. The initial task, and the focal point of this Article, is the description of selected aspects of the slave property integration efforts by courts in the ante-bellum South.

A great deal has been written on the subject of slavery in the United States, but the emphasis has been on the political, economic, social or moral aspects of the question.3 Little has been

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2. The author has examined the inherent limitation set by conceptual language on decision as it applies to modern cases in the area of products liability. See Kiely, The Art of the Neglected Obvious in Products Liability Cases: Some Thoughts on Llewellyn's, The Common Law Tradition, 24 DePaul L. Rev. 914 (1975). That Article, as this one, owes a heavy debt to the work of Professor Karl Llewellyn.

3. Several recent publications merit special attention. R. Fogel & S. Engerman, Time
written on the purely legal side of the issue, more particularly the day to day workings of the courts in slaveholding jurisdictions in the context of the received common law tradition. The purpose of this Article will be to examine selected aspects of the private law side of slave jurisprudence and to analyze the difficulties encountered by the courts in their attempt to mold the contours of the common law around the institution of slavery. The subject is an extensive one and hence a certain selectivity in topical analysis has been necessary. No general attempt has been made to analyze the statutory provisions relating to the criminal responsibility of a slave, the criminal culpability of a master or other white for the willful killing or infliction of serious harm on a bondsman, nor the political implications flowing from such legislation.

The judges made their mark in the interpretation and rapid adaption of the noncriminal side of the common law to the institution of slavery, not in the application of the myriad provisions

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6. The author is in the process of preparing papers on other aspects of the non-criminal side of the law of slavery. The topics discussed infra have been chosen due to their relevance to the basic issue of judicial methodology in this area.

7. Interesting and thoughtful attention is paid to several of these issues by Nash, supra note 4. Each slaveholding state had Black Codes which were statutes for dealing with slaves.
of the so-called Black Codes. The answers to a greater number of questions regarding the role and function of the courts in buttressing the institution of slavery will be found by a study of their creative work in this area. Reference will be made to certain policy measures and criminal decisions, but only insofar as they shed light on the civil difficulties flowing from human chattelhood.

Courts, in private cases, utilized the skeletal conceptual framework of the received common law, fleshed out by an immediate and continual infusion of the "living law" or custom. The greater number of cases involving slaves brought before the courts were civil and, with the exception of Louisiana, the private law was not codified. Therefore, judges had little choice but to attempt to deal with such issues within the confines of the common law legal system that enveloped their and counsels' daily professional lives.

At a first reading, the case law dealing with the institution of slavery, viewed from the retrospect of over a century, tends to shock the sensibilities. After devoting some time to the subject, however, one realizes that here, perhaps more than in any other area of historical-legal studies, one must assiduously avoid infusing into an earlier day current views of morality. As noted by Professor Karl Llewellyn when discussing law and social science methodology:

What is needed is not, of course to throw the world of Ought out of the window and concentrate exclusively upon the description of what is. A descriptive science in the social field is not enough. Yet without a descriptive science which describes, we make no advance; and without keeping description uncontaminated by our desires and ideals we acquire no clean-limbed descriptive science.

It must be recognized that, in general, the men functioning as judges in the ante-bellum South were believers in the system and

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8. It was during these same years that John Austin, the English positivist, reached his conclusion that custom was positive morality as opposed to positive law and therefore not a fit subject for jurisprudential study. J. Austin, Lectures on Jurisprudence (1885).
Eugen Ehrlich's concept of the "living law" as the foundation of the legal order of human society and the well-spring of authority for concrete legal norms offers keen insights when applied to the judicial activity in a law of slavery. E. Ehrlich, Principles of the Sociology of Law (Moll transl. 1936).

all that went along with it. To a court charged with the responsibility of adjudicating slave-related societal conflicts, the concept of slaves as chattels brought to the surface a multitude of methodological difficulties.

The relatively business-like approach of many of the decisions generally reveals the legal technician searching for a methodology, not the Southern firebrands depicted by Northern abolitionists. Some Southern jurists continually used the published reports to preach the Christian necessity of slavery to their Northern detractors. The greater number of them, however, were concerned more with developing doctrinal machinery with which to adjudicate the numerous issues brought to them for resolution because of the social fact of property in human beings.

A necessary starting point in the study of judicial influence in giving economic and societal credibility to the South’s peculiar institution is an examination of the first conceptual hurdle to be cleared by the courts: where to find principles with which to build, in a common law legal environment, a body of slave jurisprudence.

II. THE SEARCH FOR LAW

[L]et it be remembered, that we sit here, not to censure or reprove the errors or crimes of any age or country, but to determine a naked question of law upon legal principles . . . . — Nesbit, J., *Neal v. Farmer*, 9 Ga. 555, 583 (1851).

* * *

[A]t every turn, we find these questions complicated in the framework of society, by peculiar considerations, not referable to the common law, or governed by its analogies . . . .— Watkins, C.J., *McConnell v. Hardemann*, 15 Ark. 151, 156 (1856).

Due to the early abolition of slavery in England, no developed
body of common law dealt with the fine points of ownership in slave property. In the latter part of the eighteenth and early days of the nineteenth century, court and counsel in the slave-holding states searched for a conceptual vehicle with which to settle the growing amount of litigation arising in a social and economic milieu revolving around the institution of slavery. Slave related disputes involving principles of private law accounted for only a small percentage of the cases presented to southern courts. It cannot be forgotten that property in slaves was a business, and hence, the focal point of a steady stream of economically related civil suits. Courts in the ante-bellum South were faced with the dilemma of adjudicating a plethora of unique questions of law within the confines of a legal system that provided no ready answers. To lawyers and judges trained and practicing on a daily basis within the conceptual framework of the common law, the problem was a grave and continuing one.

From the earliest times, the contest for supremacy between the ancient Roman law, with its wealth of principles relating to slave property, and the received or adapted common law tradition is evident. The issue was raised in virtually every case of first impression where the court faced the problem of adjusting a dispute which would have been readily soluble by reference to the common law if the case had involved nonslave property.


13. See K. STAMPP, THE PECULIAR INSTITUTION (1956), [hereinafter cited as STAMPP] for figures delineating the percentage of slaves in terms of total population, based on the 1860 census. The growth of the slave population in the original slave states, plus its expansion to the Southwest, kept a steady pressure on the courts by reason of the increasing amount of litigation involving business disputes. Id. at 203.

14. Cases involving slave property, while numerous, formed only a small percentage of the total number of cases filling daily dockets in the slaveholding jurisdictions. Thus, the greater portion of judicial energy was expended in interpreting and refining the received common law to meet local needs having no relation to the slave labor system.

15. Arguments of counsel based upon the civil law were usually gleaned from the most readily available texts, namely, J. Taylor, ELEMENTS OF THE CIVIL LAWS (1755); T. Cooper, INSTITUTES OF JUSTINIAN (1841); and, on occasion, A. Brown, A COMPENDIUS VIEW OF THE CIVIL LAW (1802). While arguments were continually based, in the alternative, on civil law principles as contained in the above texts or the Code Noir of Louisiana, counsel devoted most of their energies to contesting the issue in terms of the more familiar common law.

16. Even after solutions to the more pressing private law problems were shaped by the
This factor of a known, taught, and otherwise quite satisfactory common law framework for conflict resolution is of prime importance for a proper understanding of the legal difficulties encountered in this area of the private law.

The key element in the methodological struggle under discussion lay in the dual aspects of a slave's legal status.17 Questions courts, arguments based upon the principles of Roman law were still vigorously urged by counsel.

17. In all of the slaveholding jurisdictions, to varying degrees, the slave was considered a person for some purposes and a chattel for others. This unavoidable duality of status gave rise to the incessant search for a method that occupied court and counsel in slave-related cases in the ante-bellum years.

Four contemporary works treated this aspect of the law of slavery in varying degrees of comprehensiveness, two having been written for use by practitioners in the slave jurisdictions and two for the benefit of northern abolitionists. These works merit brief attention here because their publication indicates that the law as traditionally taught and practiced required extensive adjustment when dealing with questions relating to slave property. From the practitioner's standpoint, a text setting out the approaches used in this area was felt to be essential. To Northern detractors, such solutions served as one more example of the moral vacuum existing in the slaveholding states, and provided an interesting outlet for abolitionist rhetoric.

The publications of the latter type, G. STRoud, A SKETCH OF THE LAWS RELATING TO SLAVERY IN SEVERAL STATES OF THE UNITED STATES (1827, reprinted 1968) and W. Goodell, THE AMERICAN SLAVE CODE IN THEORY AND PRACTICE (1853, reprinted 1968), written under the auspices of the American and Foreign Anti-Slavery Society, are pamphlets. In the main, they consist of outraged analyses of selected statutes and court decisions from the slave states, believed to be illustrative of the aid and comfort given the slavers by the Southern bench and bar.

The remaining works, J. WHEELER, A PRACTICAL TREATISE ON THE LAW OF SLAVERY (1837, reprinted 1968), and T. COBB, AN INQUIRY INTO THE LAW OF NEGRO SLAVERY IN THE UNITED STATES OF AMERICA (1858, reprinted 1968) [hereinafter cited as COBB] were prepared as treatises for use by practicing attorneys. As noted by Thomas Cobb, the official Georgia reporter and a practicing lawyer, the only other works of that nature theretofore published were those of Judge Stroud and Jacob Wheeler. Of these he had the following to say in his preface:

I enter upon an untrodden field. Stroud's "Sketch of the Law of Slavery," is and was intended only as an Abolition pamphlet; Wheeler's "Law of Slavery" professes to be only a compend of abridged decisions on prominent questions. An elementary treatise, purporting to define the Law of Slavery as it exists in the United States, has not been brought to my notice.

COBB, at preface ix. The Wheeler text, in effect a digest written by an enterprising New York court reporter in the midst of the development of an American common law of slavery, is somewhat useful as early source material. Unfortunately, it lacks the flavor and content of the Cobb book, written by a man sold on the system and actually engaged in practice in a slaveholding jurisdiction. Cobb gives no attention to the problem of methodology and devotes most of his efforts, after a cursory discussion of a slave's civil and political rights, to the topics of conflict of laws problems applied to the escaped slave issue, slave suits for freedom, and the issue of manumission.
regarding the status of a slave as a person or as a chattel continuously arose. Early decisions utilized several conceptual avenues of approach in the course of attempting to resolve disputes raised by both aspects of the status issue. Prior to the eventual resolution of the problem in the private law area by acceptance of the common law conceptual framework, fleshed out by a constant reference to custom, jurists looked to history in their search for a uniform guide to action.

In addition to the Roman law, it was asserted that the law of slavery should be based on that governing lord and villein in feudal England, that the principles of English law governing the relationship of master and apprentice should control, or even that "the true state of the slave must be ascertained by reference to the disabilities of an alien enemy, in which light the heathen were anciently regarded." The continual oscillation between arguments based on the Roman law or available techniques within the common law historical corpus cannot be grasped fully without drawing fairly fast lines between cases involving the legal

Unfortunately for current scholarship, Cobb's goal of preparing an elementary treatise was not reached. The first 228 pages of the work are devoted to the history of slavery in the known world, plus an analysis of voluminous scientific, philosophical and religious tracts, demonstrating to the author's mind the inevitability and absolute Christian necessity of subjecting the African Negro to a condition of permanent servitude. The remaining 317 pages contain a discussion of the law relating to slaves as persons. In a second volume, Cobb had planned to deal with the variations in property rights and liabilities necessitated by the fact of the slave's status as a chattel. Due to the onset of the Civil War and the ensuing abolition of slavery, it was never completed.

18. Those most litigated involved questions as to a slave's political and social rights, his criminal responsibility and the criminal responsibility of a master, bailee, or other white for the willful infliction of death or serious bodily harm upon a slave.

19. The more numerous problems arose from unique difficulties in the law of tort, contract, agency, and equity.

20. Fields v. State, 1 Tenn. 155 (1829). See also Cobb, supra note 17, at 87.


22. Fable v. Brown, 2 Hill 378, 391-92 (S.C. Ch. 1835). Permeating the entire issue is the fact that most courts and juries were composed of owners of slaves, and that their charge, dutifully executed, was to protect the interests of the slaveholding community. This was a social fact not lost on court and counsel in cases where the spectre of chaos was raised as the probable result of an adverse ruling:

When it is recollected, that our Courts and Juries are composed of men who, for the most part, are masters, I cannot conceive that any injury can accrue to the rights and interests of that class of the community.

issue of a slave's status as a person and those examining his status as property. In cases where the technical legal issue went to the very heart of the master-slave relationship, with its potentially explosive social ramifications, great care and attention was given to alternative non-common law methodologies. Hence, the deepest judicial soul-searching and greatest abandonment of common law technique was reserved for that block of cases revolving around the slave's status as a person.

A. The Slave As A Person

In the cases involving the criminal responsibility of a master or other white for the death or disabling injury of another's slave, the common law, with its troublesome references to the willful infliction of death or serious injury to a "reasonable creature," was almost uniformly rejected. While this general approach

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23. Murder is when a man of sound memory and of the age of discretion, unlawfully killeth within any county of the realm, any reasonable creature "in rerum natura," under the king's peace, with malice aforethought, either express or implied . . . .

3 COKE, INSTITUTES 47 (Thomas' COKE, 1836). See also 4 BLACKSTONE COMMENTARIES 194. The issue of common law liability arose because legislatures failed to draft statutes sufficiently comprehensive to deal with the varied slave property problems which developed.

24. Several early decisions maintained, usually by analogizing slavery to villeinage in England, that the common law in this regard did apply to slaves:

State v. Reed, 2 Hawks. 454, 455-56 (N.C. 1823). See also Kelly & Little v. State, 11 Miss. (3 S. & M.) 518 (1844); Fields v. State, 1 Tenn. 156 (1829); State v. Jones, 1 Miss. (Walker) 83 (1820).

25. As stated by Justice Harris of Mississippi in George v. State, 37 Miss. 316, 320 (1859):

With the exception of this last case [Fields v. State], the cases of Kelly & Little v. State . . . . and The State v. Jones . . . . in our state, and one or two very early cases in North Carolina, founded mainly upon the unmeaning twaddle, in which some humane judges and law writers have indulged, as to the influence of the "natural law," or "civilization" and Christian enlightenment, in amending, proprio vigore, the rigor of the common law, and on a supposed analogy between villanage [sic] in England and slavery here, the cases and text-writers are uniform in declaring that slavery, as it exists in this country, was unknown to the common law of England, and hence its provisions are inapplicable to injuries inflicted on the slave here.
allowed the imposition of criminal penalties by the interpretation of whatever statutory provisions there were regarding slave deaths, it nevertheless amounted to a basic retreat from the common law principles of criminal responsibility as a decisional vehicle in slave-related cases. At the same time, such principles were being used on a daily basis in cases of the killing of one white by another.

Contemporaneously, and of prime importance in the eventual development of property status concepts, other less dramatic aspects of the slave's status as a person were also settled by the courts with equal firmness. A keen awareness of social realities was the fulcrum for decision. Courts, in the absence of legislative guidance, turned to the general principles of the Roman law, since most statutory measures relating to a slave's personal status were based on such principles.

An early decision discussing the noncriminal aspects of a slave's personal status, setting the tone for the future resolution of the property issue, was rendered by the Supreme Court of Alabama in the 1819 case of *Bynum v. Bostwick.* After holding that a slave may not take property by descent or purchase and that hence a legacy to a slave fails due to his incapacity to take it, the court made the following remarks regarding the personal status of a slave in the United States:

The condition of slaves in this country is analogous to that of the slaves of the ancients, the Greeks and Romans, and not that

See also Neal v. Farmer, 9 Ga. 555 (1851); Commonwealth v. Turner, 26 Va. 678 (1827). The former case is an interesting example of the depth of analysis made in the criminal area, consisting of 30 pages devoted in the main, to the history of slavery in the known world.

26. Cobb, supra note 17, at 84-86. However, as noted by Cobb, in regard to defenses under such statutes:

- It would seem that from the very nature of slavery, and the necessarily degraded position of the slave, many acts would extenuate the homicide of a slave, and reduce the offence to a lower grade, which would not constitute a legal provocation if done by a white person.

*Id.* at 92.

See also State v. Cheatwood, 2 Hill 461 (S.C. 1834) (minor assault by slave accepted in mitigation of offense); State v. Tackett, 1 Hawks. 210 (N.C. 1820) (insolence of slave accepted in mitigation of the offense).

27. State v. Tackett, 1 Hawks. 210 (N.C. 1820).

28. 4 Desaus. 266 (S.C. Ch. 1812).
of the villeins of feudal times. They are generally speaking not considered as persons, but as things. They can be sold or transferred as goods or personal estate. Almost all our statute regulations follow the principles of the civil law in relation to slaves, except in a few cases, wherein the manners of modern times, softened by the benign principles of christianity, could not tolerate the severity of the Roman regulations.

One of the Roman regulations that had to give way to modern times and "principles of Christianity" was the matter of the peculium, whereby the Roman slave was allowed to accumulate a certain portion of his earnings, with which he often gathered together substantial amounts of property. Such amounts were also utilized by the Roman slave to trade or buy his freedom. The issue of the peculium arose and was settled, along with most others regarding a slave's personal status, in another Alabama decision, Brandon v. Planters & Merchants Bank, sixteen years later.

The slave of one Brandon, during the latter's absence from the city, found $2,190 in bank notes, a tidy sum in 1828, and showed them to two white men lounging in the town square. The men took the notes from the slave and deposited them in the Huntsville bank in their name, pending an investigation as to the true owner, who was never located. Brandon, upon returning to the city, learned of the find and, after being refused the notes by the bank, filed a successful action of trover for the latter's conversion of his treasure.

The court rejected a lengthy argument by counsel for the bank that the status of slaves was akin to that of villeins, and that, per Lord Coke in Coke on Littleton, property acquired by a villein

29. Id. at 267.
30. Cobb, supra note 17, at 235, 238-39. Cobb maintained that the South had a counterpart to the Roman peculium which itself was voluntary on the master's part, in the discretion vested in the master toward his slaves as to small gifts. The State of Louisiana formally allowed the peculium by statute. Id. at 235 n.3.
31. 1 Stew. 320 (Ala. 1828).
32. Also, if a villain purchase land, and aline the land to another before that the lord enter, then the lord cannot enter; for it shall be adjudged his folly, that he did not enter, when the land was in the hands of the villain. And so it is of goods. If the villain buy goods, and sell or give them to another before the lord seise them, then the lord may not seise the same.

1 Lord Coke's First Institute of the Laws of England §§415, 416.
and disposed of prior to seizure by the lord was beyond his control. They reaffirmed the ruling in the *Bostwick* case and then discussed the subject of the *peculium*:

> [W]ith respect to commerce, our slaves can do nothing in their own right, can hold no property, can neither buy, sell, barter or dispose of any thing without express permission from the master or overseer; so that everything they can possess or do, is in legal contemplation, on the authority of the master.\(^33\)

Hence, the possession by the slave of the notes, even for a moment, was the possession of the master. The owner of the notes never having been found, the bank was guilty of conversion.

To round out the majority opinion, Judge Crenshaw, in a separate opinion, declared that:

> [I]n this country a slave is in absolute bondage; . . . he has no civil rights and can hold no property except at the will and pleasure of his master; . . . his master is his guardian and protector, and all his rights, acquisitions, and services are in the hands of his master.\(^34\)

However, since a slave was not a beast, but a rational human being endowed with volition and understanding like the rest of mankind, whatever he lawfully acquired and gained was the possession of the master.

The *Bostwick* and *Huntsville Bank* cases are representative of decisions delineating aspects of the personal status of a bondsman outside of the graver issues regarding the responsibilities of whites for serious crimes of violence involving slaves. These broader legal issues being settled, nagging questions regarding personal status still remained as to the relationship between master and slave in their day to day functioning in the economy. The answer, in an opinion more florid than the relatively businesslike approach of the *Bostwick* and *Huntsville Bank* decisions, was supplied by Judge Thomas Ruffin of North Carolina in his famous ruling in the 1829 case of *State v. Mann*.\(^35\) The decision is of importance here since it is one of the earliest cases that met the issue of personal status head-on and resolved, finally, any

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\(^{33}\) Brandon *v.* Planters & Merchants' Bank, 1 Stew. 320, 321 (Ala. 1828).

\(^{34}\) *Id.* at 343.

\(^{35}\) 13 N.C. 263 (1829).
remaining questions relative to a slave's status as a person. In effect, a judicial "hands off" policy was adopted as regards the daily contacts between master and slave, a policy of vital importance to the economic feasability of the slave labor system.

Mann had hired a slave from his owner for one year and, during an attempt at chastisement, the slave ran and was shot by him. The owner brought criminal charges of assault and battery against Mann and a conviction was obtained in the lower court. Judge Ruffin began his opinion by expressing the anguish experienced by a judge in such cases due to the conflict between personal feelings and official duties:

A judge cannot but lament, when such cases as the present are brought into judgment. It is impossible that the reason on which they go can be appreciated, but where institutions similar to our own, exist and are thoroughly understood. The struggle, too, in the Judge's own breast between the feelings of the man, and the duty of the magistrate is a severe one, presenting strong temptation to put aside such questions, if it be possible. It is useless however, to complain of things inherent in our political state. And it is criminal in a Court to avoid any responsibility which the laws impose.  

Judge Ruffin then proceeded to analyze the legal relationship between master and slave in an opinion that caused a furor in abolitionist circles and was uniformly damned up to the Civil War as the best evidence of the iniquity of the Southern bench and bar.  

[T]he end [of slavery] is the profit of the master, his security, and the public safety; the subject, one doomed in his person, and his posterity, to live without knowledge, and without the capacity to make anything his own, and to toil that another may reap the fruits.

36. Until very recent times, this same attitude was taken by state courts in cases involving prison conditions in the United States. As stated in an early Virginia case:  

He [the prisoner] has, as a consequence of his crime, not only forfeited his liberty, but all his personal rights except those which the law in its humanity accords to him. He is for the time being the slave of the State.  


37. State v. Mann, 2 Dev. 263, 264 (N.C. 1829).

38. See Stroud, supra note 17, at 10; GoodeLL, supra note 17, at 174.

The intervention of the criminal law into the daily working relationship between master and slave could severely hamper the total economic return sought from slave labor. The truth was, that courts were forbidden to enter upon a general train of reasoning on the subject. They could not allow the right of the master to be brought into discussion in the courts of justice. The slave, to remain a slave, must know that there was no appeal from his master. While slavery existed in its present state it was the imperative duty of judges to recognize the full dominion of the owner over the slave, except where its exercise was forbidden by statute. This must be the case, "on the ground that this dominion was essential to the value of slaves as property, to the security of the master, and the public tranquility, greatly dependent on their subordination." The opinion in *State v. Mann*, along with the statement of Justice Wardlaw of South Carolina that "every endeavor to extend to him [a slave] positive rights is an attempt to reconcile inherent contradictions [for in the very nature of things, he is subject to despotism]," was widely cited as a comprehensive and correct statement of the law.

This discussion of cases dealing with the personal status of slaves, demonstrates the important role of the courts in setting the necessary legal tone for making the institution of slavery a viable economic reality. By keeping the slave in his personal capacity on the outskirts of the law, they created a legal milieu extremely favorable to the continued existence and entrenchment of slavery. The essential conceptual and methodological battles were fought and the proper tone set in the personal status cases. The courts then were free to utilize the known conceptual framework of the common law to adjudicate the great bulk of the cases coming before them; cases arising out of a plethora of slave-related business and property disputes. Consequently, while the interests of the slaveholding community were at stake and the more important decisions in the private law area involved potentially tremendous amounts of money, the issues in such cases did not go to the core of the master-slave relationship itself.

40. *Id.* at 269.
42. *Cohn*, supra note 17, at 90.
43. For an account of the social structure of the slave South, from a Marxist point of
Before proceeding to a discussion of the methodology employed in cases in the private law dealing with the property aspects of a slave’s status and a detailed analysis of several distinct problem areas, it will be of value here to examine a decision rendered by the Supreme Court of Alabama in 1861. Expressing as it does the results of several decades of judicial inquiry into the personal status of slaves, it merits attention as a good summary of the law in this regard. In the short span of 50 years, we see the progression from the harried analysis of the earliest decisions to the assured, confident discussion in Creswell’s Executor v. Walker.\(^4\)

In this case the court held that the bequest of a testator giving his slaves the option of being set free in Liberia or in a free state was void, due to the legal incapacity of the slave to make such a choice. In the course of its opinion, the court, speaking through Justice Walker,\(^45\) made a comprehensive analysis of the general legal status of bondsmen in the slaveholding states. Numerous decisions had established that a promise made to a slave for his own benefit was not enforceable in any legal tribunal. It was settled that a slave could not sue or be sued, except where he was clothed with the statutory right of instituting a suit for freedom. He could not acquire or own property. He had no legal capacity to make a contract, not even that of marriage. All such decisions rested upon the fundamental idea that slaves had no civil or social rights, and were incapable of performing by their own will.\(^46\)

As to the dichotomy in the law between considering slaves as property for some purposes and persons for others, Judge Walker had the following explanation.

It was true that slaves were human beings, endowed with intellect, conscience and will. Indeed, their moral and intellectual

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*view, see E. Genovese, The Political Economy of Slavery (1967).*

It [slavery] extruded a class of slaveholders with a special ideology and psychology and the political and economic power to impose their values on society as a whole. Slavery may have been immoral to the world at large, but to these men, notwithstanding their doubts and inner conflicts, it increasingly came to be seen as the very foundation of a proper social order and therefore as the essence of morality in human relationships.

*Id.* at 8.

44. 37 Ala. 229 (1861).

45. Justice Walker, on occasion, joined Justices Lumpkin and Harris in using the published reports to state the public policy of the slaveholding jurisdictions. This practice expanded in the years just prior to the Civil War.

qualities determined to a considerable extent their value. These qualities were often looked to in ascertaining the rights and liabilities of others in relation to slaves as articles of property. They were rational human beings; they were regarded as persons in reference to acts which were crimes. But, because they were slaves, they were necessarily and "incurably" incapable of performing civil acts. With reference to all such acts they were things, not persons:

Considered in his relation [to crimes], the theory of a complete annihilation of will in the slave is wholly unfounded; while in relation to the former class of acts, it is entirely consistent, and, indeed, is the only theory that can be consistent with the fundamental idea of negro slavery as it exists with us—namely, that in respect of civil rights and legal capacity to perform acts of a civil nature, the slave is not a person, but a thing.  

B. The Slave As Property

A close examination of numerous cases analyzing a slave's status as property reveals no rapidly formulated and consistent body of parallel principles as developed in the area of personal status. There is, however, a consistent use of the language and conceptual framework of traditional common law remedies. The common law as received or adapted to local conditions could not aid in the solution of problems regarding the slave's status as a person. It did provide a wealth of integrative technique for adjudicating disputes revolving around property ownership that was being utilized successfully in non-slave cases.

The pattern of decision making that emerges indicates that the interests of the slaveholders, shown by constant judicial notice of the current custom of the day, was the guiding light to decision.

47. Id. at 236-37.
48. In the act of the legislature . . . extending that system (the common law) to Carolina, then a province of Great Britain, there is a proviso or exception as to all of those parts of it, which were inconsistent with the particular constitutions, customs, and laws of this (then) province, which left an opening for this part of the provincial constitution and custom of tolerating slavery . . . . One part of this custom or law . . . denied to slaves civil rights . . . .

White v. Chambers, 2 Bay 70, 74 (S.C. 1796). See also Atwood's Heir's v. Beck, 21 Ala. 590, 608 (1852):

|It is most unquestionably true, that slaves are now regarded by our law as
The language and conceptual machinery of the common law served as the lantern. A massive, continuous infusion of custom, and the social and economic realities of slavery determined the outcome. Such outcome was, nevertheless, channeled through and expressed in terms of the common law tradition. In light of the traditionally slow development of the common law, the establishment of a relatively complete set of solutions to the unique private law problems involving slaves, within the short span of half a century, serves as an amazing example of the adaptability of the common law and the technical resourcefulness of the judges of the ante-bellum South.

Having analyzed in general terms the efforts of the courts in attempting to deal with the difficulties raised by the dual status of a slave, and having indicated the methodology employed in adjudicating property-related disputes, it remains to give close attention to some of the more pressing noncriminal issues faced by the courts and their response to them. Because they cut across numerous lines and represent the more important areas of adjudication, the discussion to follow will concentrate on cases involving three related areas: respondeat superior; the fellow servant rule and industrial growth; and the power of an equity court to order the specific delivery of slaves.

III. Respondeat Superior

As already intimated, there is perhaps no solution of the great problem of reconciling the interest of labor and capital, so as to protect each from the encroachments and oppressions of the other, so simple and effective as Negro slavery. By making the

chattels, and the owners thereof have an absolute unqualified property in them, and although such right might not have been recognized by the ancient common law, yet such is the genius and expansive nature of the common law, that it adapts itself to the necessities and exigencies of society, and when a new species of property is introduced, and the statute law is silent as to the rules by which it is to be governed, the common law embraces it, and its rules are applied to it, modified, of course, according to the nature of the property thus subjected to its governance.

49. Thomas Cobb in his second volume had planned to analyze this expanding law for the practicing bar in the slaveholding jurisdictions. Cobb, supra note 17.

50. These areas are considered important because they reflect key areas of economic and social interaction where a lack of support by courts would have had disastrous consequences for the slave labor system.

In varied private law disputes the courts of the ante-bellum South were required to utilize the conceptual tools provided by the received common law to render decisions in slave-related economic conflict situations. None were contested more bitterly than those involving the liability of a master for personal injuries, deaths, or property damage caused by his slave. Here, as in most civil cases involving slave property, the received, taught, and otherwise satisfactory common law tradition provided the technique and concepts, but rarely a ready answer.51

Several early decisions rejected as inapplicable to slave property the principles of respondeat superior as set forth in Blackstone's *Commentaries*.52 These principles imposed responsibility only in instances of injuries arising out of activities specifically mandated by the master or in cases where the injury was suffered at the hands of a servant engaged in a public calling, such as blacksmith, for the master's benefit. However, in the face of increasing demands for imposition of blanket liability on masters for any injury in fact caused by a slave, the courts soon resorted to the existing common law. This provided a ready means to protect slave owners' interests where local civil liability statutes did not dispose of the matter.53 Feelings were very strong on both sides of the issue. However, the realities of life in a slave-oriented social and economic structure determined the outcome, as it did in most cases of first impression of any import in the areas of private law.

One of the earliest cases to discuss the issue in any depth was

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51. It is from those two sources, the common law and the civil law, if any where [sic], that we are to derive the principles by which questions of this sort are to be governed. But altho' [sic] we can ascertain that slavery actually existed in both those countries, yet such was the different situations of their slaves at different periods, that it is not easy to trace the reciprocal duties and liabilities of master and servant . . . . Even if the task were less difficult, the condition was so different from that of our slaves that we should profit but little by the research.

52. W. Blackstone, *Commentaries* *32.*

53. See note 72 infra.
Snee v. Trice, decided by the Supreme Court of South Carolina in 1802. Trice's slaves were in the process of clearing a field leased from Snee, preparatory to planting a new crop. It being a cold morning, the slaves lit a fire which, due to a strong wind, ignited some stubble and eventually Snee's corn crib, destroying bushels of corn valued at 300 dollars.

Starke, counsel for defendant, urged the court to accept the common law limitation on a master's liability as the governing law in regard to the master-slave relationship. The innumerable potentially injury-producing physical freedoms customarily allowed slaves in the course of their daily activities must remain free from judicial scrutiny if the institution was to continue. As to the case at bar, it was well known to every planter that from time immemorial slaves had been allowed to build fires in the fields to ward off the morning chill. It would be a cruel master indeed who would attempt to deprive his slaves of this minor comfort. In addition to the factor of long-standing custom of which the instant case was a small example, a deviation from the common law rule would allow slaves to bring financial ruin upon their masters by their "studied misconduct."

This latter argument sufficiently impressed the trial court and also struck a responsive chord with the judges of the supreme court. The slaves volition and physical power to inflict great destruction could never be forgotten:

[Experience had taught us how little they adhered to advise [sic] and direction when left alone. It would indeed, under these circumstances, be a most dangerous thing, to make their masters liable in damages for the unauthorized acts of their slaves, to the extent contended for on behalf of the plaintiff."

The court admitted the application of respondeat superior in all cases wherein the slave was allowed to follow a public calling for the master's benefit or otherwise allowed to attract the public trust, as well as in all cases where the slave's act was done

54. 2 Bay 345 (S.C. 1802).
55. Id. at 347. Counsel, in the alternative argued pure accident, thereby hoping to eliminate dispute over the range of a master's liability for a slave's negligence. Id. at 346.
56. Id. at 350.
57. Id. at 348-49. Large numbers of slaves were skilled workers and allowed to deal directly with the public for the master's benefit, in such capacities as ferrymen, blacksmiths, teamsters, carpenters, and even pharmacists. Id. at 347.
pursuant to specific direction. However, general liability for negligent acts even within the scope of service was firmly rejected.\(^5\) This basic nonliability approach remained the law on the subject until the Civil War and the ensuing abolition of slavery.

While this judicial posture in effect left the injured party in most instances with no recourse, it was still the only socially responsible rule, given the nature of the institution of slavery. As noted, again by the South Carolina Supreme Court, 20 years later in the case of *Wingis v. Smith*:\(^5\)

> Particular cases of hardship may grow out of the law as thus settled: But we cannot foresee the extent of the liability which would spring from a contrary doctrine. The decision [*Snee v. Trice*] appears to be founded upon the policy of the country, and I am disposed to think it correct. It is at least one, on which it would be dangerous to be trying experiments.\(^6\)

Counsel throughout the slaveholding jurisdictions, representing those who had suffered loss at the hands of another's slave, nevertheless refused to accept the principle of *Snee v. Trice*. They vigorously continued to seek decisions imposing blanket responsibility on the owner of the offending slave. It was in a series of cases like *Wright v. Weatherly*,\(^6\) decided by the Supreme Court of Tennessee in 1835, where plaintiff's slave had been murdered by the slave of defendant, that the social facts were most effusively argued on both sides of the issue.

*Weatherly*’s slave, Jerry, died as a result of stab wounds inflicted by Wright’s slave, Andrew. *Weatherly* brought an action on the case against Wright for 550 dollars. The trial court instructed the jury that the master was liable for every trespass committed by his slave, whether or not the act was done outside the scope of the master's service, and regardless of his knowledge.

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58. In addition, it was argued that the very basis of the principle of respondeat superior was inapposite to master-slave cases due to the absence of a meaningful action over against the slave such as was available against free white employees. This point, raised peripherally here, was used to better advantage in subsequent cases.

The court also noted those “salutory checks” of physical chastisement of the slave by the master which were considered a more efficient means of preventing delicts by slaves than an award of money damages.

59. 3 McCord 400 (S.C. 1825).

60. *Id.* at 405.

61. 15 Tenn. 366 (1835).
The jury found for the plaintiff.

Attorney Ready, arguing for the defendant, again stressed the nonliability of a master under English law for the wanton acts of his servant. As to the Roman law wherein the master was liable for all trespasses of his slave, Ready argued the injustice of its application since, due to statutes prohibiting excessive mistreatment of slaves, masters in the United States lacked the corresponding total power over their bondsman. Even if such a principle was applicable to the case, the judgment below was still in error since the Roman law made the master liable only up to the value of his offending slave, and by delivering up the offending slave all further liability was ended.

W. E. Anderson, counsel for Wright, after a brief discussion of the common and Roman law principles applicable to the case, launched into a spirited analysis of the realities of life in a slaveholding jurisdiction and the moral weakness of the argument that liability would ring the death knell of the institution. It could be argued that the adoption of this principle might prove ruinous to owners, since a slave had the physical ability to inflict harm which would, in amount, far exceed his whole value to his master. However, the owning of such property was voluntary on the part of the master; the owner exercised just such care as pleased himself in examining the moral character and qualities of the slave when purchased, and in developing the character of the slave he raised through teaching and discipline. Far better that he should run the risk of ruin than his neighbor who had no say in the matter or any control over the slave.

62. Id. at 368. Counsel, in every case in the area of the private law where statute did not govern, urged the applicability or non-applicability of the received common law, depending upon which side of the issue they were arguing.

63. Id. Each slaveholding jurisdiction, as part of their Black Codes, had statutory measures setting out the limits of master’s use of corporal punishment and setting minimum requirements as to food and clothing. These statutes, if a reading of reported decisions is indicative, appear rarely to have been enforced.

64. Id. at 369. Due to the continual fluctuation in slave prices during the ante-bellum years, such a limitation would often work to the defendant master’s advantage in cases of serious injury.

The “actio noxalis” limitation of the civil law was raised by defense counsel in virtually every case of this nature in an attempt to set some ceiling on his client’s loss in the event of an unfavorable ruling.

65. Id. at 369-75.
Due to the increase in the number of slaves and the continued growth of the nonslaveholding sector of the community, continuing a rule of nonliability would lead to greater social friction than already existed between the two segments of the population. The court was reminded that the great majority of the citizens of the state were nonslaveholders, in the proportion of five to ten nonslaveholders for each slaveholder.66

A. J. Hoover, co-counsel, continuing the attack, also reminded the court of the preferred position of slaveholders before the law and the social ramifications of the slave labor system on the less affluent members of the community. That the owner of slaves should in such cases answer in damages was demanded by every principle of justice, for the laws of the state protected him in that ownership. He had a remedy, both civil and criminal, against any individual who injured his interest by punishing his slaves. He was enriched with the profits of their labor, and he alone possessed the chief power of preventing them from the commission of wrongs. Additionally, there was a portion of the citizenry whose principles would not allow them to own slaves, and another very large portion financially unable to own them. Many would be kept out of employment in consequence of the existence of slavery. If it were determined that there should be no redress for the immediate and direct injuries committed by slaves, the law would become the slave of the slaveholder.67 As to defense arguments that a court in such serious matters should await legislative action, Hoover made the following terse reply:

The objection, that the legislature should first act upon the subject, comes with a bad grace from the owner of slaves. For whenever they have had any rights, growing out of the existence of slavery, the courts have protected them, without any legislative enactments upon the subject.68

66. Id. at 373.
67. Id. at 375-78. While there are a smaller number of slaves in Tennessee than other slaveholding states, the points raised by Hoover were valid for those other jurisdictions as well. As noted by Kenneth Stampp:

In 1860, there were in the South 385,000 owners of slaves distributed among 1,516,000 free families. Nearly three-fourths of all free Southerners had no connection with slavery through either family ties or direct ownership. The "typical" Southerner was not only a small farmer but also a nonslaveholder.

K. STAMPP, supra note 13, at 30.

In the face of these arguments, the court, speaking through Judge Green, reluctantly, but nevertheless decisively, continued the rule of nonliability. The concepts provided by the common law, respondeat superior or the responsibility of the owner of domestic animals, would not support the action. The domestic animal analogy failed for the obvious reason that the subject of scrutiny was a thinking, willing human being. Under the traditional principles of respondeat superior, the master here would clearly not be responsible. While Judge Green felt constrained by the limits of his power as a judge in such a vital area, his personal view was somewhat different:

[It is manifest that some remedy, in a case like the present, is loudly called for, by which to protect the people from injuries which this unfortunate, degraded and vicious class of our population, may inflict. The court, however, cannot afford such remedy. Its business is to expound the law as it exists, and apply established principles to cases as they may arise.]

While the law gave the master the entire property of the slave, it was only just that he should answer, at least to some extent, for the injuries his slave might do to others. Such a provision would not only be fair and equal among the slaveholders themselves, but in relation to the majority of the people of the state who did not own slaves it was "imperiously required."

In states such as Missouri, where a relevant statutory measure based on Roman law was on the books, liability was strictly limited to its terms. In Jennings v. Kavanaugh, decided by the Missouri court in 1837, the facts were basically those in Weatherly: the murder of plaintiff's slave by a slave owned by defendant. A statute provided for recovery from the master in

69. Id. at 380.
70. Id.
71. 5 Mo. 26 (1837).
72. Every person who shall be injured by the commission of any offence against his person, as specified in the second article, or against his property, as specified in the third article of this act, committed by a slave, shall have an action against the master or owner of such slave for the time, to recover any damages by him sustained by the commission of such offence, not exceeding in amount the value of the slave.

Id. at 27.
an amount not exceeding the value of the offending slave\(^7\) in certain cases of offenses by slaves against the person or property of another. The murder of a slave was not one of the designated property injuries, but counsel for Jennings argued that the statute indicated a legislative intent to allow recovery in any instance of property loss, especially one as at bar, where the hardship would be greater than the specified instances. Judge Tompkins rejected such reasoning, indicating the exception made by the statute to the principle of nonliability in such cases as the one at issue. There was no obscurity in the act and courts were limited expressly to giving recovery only for the offenses against property specified in the third article.\(^7^4\)

Even in hard cases such as *Leggett v. Simmons*\(^7^5\) the court refused to budge on the issue of liability for intentional acts. In this 1846 Mississippi case, defendant on several occasions in one evening broke up a vicious altercation between his slave and plaintiff's, and had been threatened by plaintiff's slave with his own weapon. Plaintiff's slave was later slain. Indicating the influence of the old adage that hard cases make bad law, Justice Thatcher stated:

> The defendant was doubtless censurable and blamable, for want of care, prudence, and resolute and sufficient interference between the slaves at the outset of the fatal difficulty, but his conduct seems hardly to warrant the finding of the jury, as such cases are contemplated by the law.\(^7^6\)

As in most cases in which the courts supported the interests of the owners of slaves, the issue refused to die. However, the established principle held fast even in matters much less serious than the murder of another's slave, as when an unauthorized intentional trespass was committed by a slave. In an attempt to halt the continuing debate, Chief Justice Ruffin of North Carolina

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73. Several jurisdictions did have this type of legislation which echoed the "actio noxalis" limitation of the civil law, as was suggested by Judge Green in *Wright v. Weatherly*, 15 Tenn. 366, 371-72 (1835). See generally CoB, supra note 17, for materials dealing with such legislation.


75. 14 Miss. (7 S. & M.) 348 (1846).

76. 30 N.C. 446 (1848).
analyzed the dual aspects of social realities and the nature of the English restriction in the case of *Parham v. Blackwelder*.\(^7^7\)

Blackwelder's slave, without her consent, went upon the land of plaintiff and hauled away wood valued at 50 cents. In this obvious back fence dispute, the trial court instructed the jury that even though defendant would not be liable if the wood were taken by a free white laborer, she must answer for the act of her slave. Justice Ruffin fully realized the importance of the issue, but expressed dismay at the continuing efforts of litigant's counsel:

The question in this case is of much consequence in this country, and, particularly, to the owners of slaves. Though formerly discussed to some extent, we had supposed it to have been long at rest in the minds of the profession, and that in a way, opposite to the opinion given to the jury on this trial.\(^7^8\)

The argument that the rule must be adjusted in cases of innocent injury suffered at the hands of a slave found no support in any decided opinion.\(^7^9\) In fact, noted Ruffin, this lack of support furnished a strong argument against the action. Slavery prevailed extensively in the country, and there could be no doubt that many recoveries would have been sought and awarded if the law were as urged by the plaintiff. Moreover, argued Ruffin, such distinction is not supported by principle, regardless of precedent. The entire argument rests on the assumed necessity of some individual being responsible for the innocently suffered loss in order to act as a deterrent or to provide recompense.

The deterrent argument failed, Ruffin noted, because the slave was responsible criminally if the trespassory act amounted to a public offense. Moreover, he continued, echoing considerations briefly stated in *Snee v. Trice*:\(^8^0\)

[F]or the very reason, that slaves are not liable for damages, our law renders them summarily punishable corporally in many instances, in which free persons are not indictable. In restraint

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77. *Id.* at 446-47.
78. *Id.*
79. The absence of precedent was often raised by court and counsel seeking to avoid the development of parallel concepts for the resolution of slave-related litigation.
80. 2 Bay 345 (S.C. 1802).
of wrongs by slaves, therefore, there is that most powerful consideration of responsibility personally, even to a greater degree than in the instance of free persons, in respect, at least, of minor offences, and in equal degree in respect to all others; and that is, surely the most effectual protection both of the public and individuals from injury.\footnote{81. Parham v. Blackwelder, 30 N.C. 446, 448 (1848).}

Judge Ruffin answered the argument that it was necessary for a financially responsible person to compensate the victims because of the civil irresponsibility of the offending slave. The judge relied upon what was to him the obvious purpose of the English restrictions on liability in cases of like trespasses committed by free servants. The determinant was not the asserted differences between the free servant and slave in their ability to pay for damage, but rather the factor of personal fault:

\[It\] seems very manifest that the difference in that respect . . . ought not to have the effect attributed to it. For, in general, the pecuniary responsibility of menials, though so by contract, is but nominal, and, in cases of aggravated injuries, it is altogether inadequate. The rule at common law could not have been founded on such a responsibility; for it would most commonly be merely illusory.\footnote{82. Id.}

The true reason was that for the willful, wanton acts of a servant, whether or not engaged in his master's business, an equally innocent party, the employer, should not be responsible. That same reasoning applied with equal force to slaves. Hence, the true criterion was whether the master was or was not the cause of the trespass by expressly ordering it or subsequently sanctioning it, not whether the person injured can or cannot have an action against the slave. It was a misfortune if one injured in his person or property by another could not obtain adequate pecuniary satisfaction. The misfortune was no greater when the wrongdoer was a slave than when he was anyone else who had no property. That the injured party was unable in either case to secure redress against the perpetrator of the wrong affords no reason why he should recover from one who was as innocent as himself.\footnote{83. Id. at 450.}
This controversy retained its vitality up to the eve of the Civil War. Counsel continued their persistent efforts to change the law, having in such fashion achieved a turn-about in other important private law areas. In the last case to be considered, *McConnell v. Hardeman,* decided by the Supreme Court of Arkansas in 1854, the court drew upon all of the arguments on either side of the issue. They examined the existing case law, recognized the increasing amount of social friction involving injuries of this nature, but again, albeit reluctantly, held fast.

The plaintiff sued the defendant in trespass for the tortious act of his slave in taking the plaintiff's horse. Chief Justice Watkins indicated that the simple justice of the situation appeared to call for a remedy, but resignedly noted that the decided cases took a different stance:

"[O]n first impression . . . it would seem that the master ought to be liable to make reparation in damages to the person injured by the trespass of his slave. It was so according to the civil law, to which the institution of slavery, as it exists in some of the American states, is very nearly assimilated. And yet, with the exception of Louisiana, such has not been the course of decisions in this country."  

Justice Watkins criticized the "extreme ground" taken by the court in *Snee v. Trice* and other decisions, but concluded that the analysis of Justice Ruffin in *Parham v. Blackwelder* was at least closest to the mark from an analytical standpoint. As to the whole line of cases, continued Watkins, while they were unsatisfactory "it would be unsafe to depart from them."

The basic problem, Justice Watkins realized, was one of methodology. Daily legal life operated, and disputes were adjudi-
cated, within the context of the received, taught common law tradition and that law provided—other than a known technique—little assistance in the policy ridden slave-related cases. Here, in *McConnell*, a Roman law-based statute provided the only opportunity for recovery against the slaveholder:

The common law doctrine relating to master and servant, though . . . inapplicable, *having been adopted*, any extension of the master's liability is the creature of the statute. ⁹⁰ (emphasis added)

It would be for the legislature to consider whether the true interests of slaveholders would be promoted by making them liable for all trespasses committed by their slaves. This would remove many causes of jealousy and ill-feeling against the owners of that species of property, and at the same time protect them by limiting their liability, as in the Roman law, to the value of the offending slaves. ⁹¹

By strictly applying to the master-slave relationship the existing common law restrictions on a master's liability for the injury-producing acts of his servants, the courts avoided the creation of a parallel conceptual structure and effectively protected the interests of slaveowners. This position was deemed necessary, if not just, in cases of neighbor against neighbor. It reflected an awareness of the pattern of social interaction inherent in any slave labor system. The gradual growth of a major business in the leasing of slaves to commercial businesses, however, resulting in scores of disabling injuries and deaths far from home, caused the integration process to fall on hard times.

Judicially forcing neighbors to resign themselves to the existing order of social reality was one thing. Balancing the interests of masters and the rapidly developing industrial and transportation sectors of the economy was quite another. This was especially so in light of the increasing threat to the South from the Northern states, who were in the midst of a rapid economic metamorphosis. The key concept here was a new one, the fellow servant rule.

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⁹⁰ Id.
⁹¹ Id.
So long as climate and disease, and the profitable planting of cotton, rice, tobacco, and cane make the Negro the only laborer inhabiting safely our Southern savannas and prairies, just so long will he remain a slave to the white man. Whenever the white laborer can successfully compete with him in these productions and occupy this soil, the Negro will either be driven slowly through the isthmus, to become amalgamated with the races of South America, or he will fall a victim to disease and neglect, begging bread at the white man's door.—T. Cobb, *Inquiry into the Law of Negro Slavery in the United States of America* ccxxi (1858, reprinted 1968).

Chief Justice Shaw, in 1842, delivered his famous opinion in *Farwell v. Boston & Worcester R.R.*, delineating the fellow-servant doctrine. The rule established a liability buffer for an employer by providing that injuries suffered by an employee due to the fault of a co-worker were only compensable in an action of tort against the fellow servant. Four years later, the important question of whether this exception to the doctrine of respondeat superior applied to slave labor came up for resolution in the court of Justice Joseph H. Lumpkin of Georgia. The issue was a vital one for slave owners. Aside from their use on the owner's farm or plantation, a very considerable business existed in the hiring out of slave labor on long or short term arrangements to railroads, steamship lines, bridge building companies, mines, and factories. Slaves were not only utilized in constructing roadbeds and laying rails, but were actively engaged as railroad firemen, ship's hands, and other nonmenial occupations throughout the South. Justice Lumpkin allayed the fears of slave owners by unqualifiedly declaring that the fellow servant rule had no application to slave labor, thus allowing actions in tort by the lessor-master against the lessee.

The decision, *Scudder v. WoodbirJe*, decided in 1846, re-

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92. 45 Mass. (4 Met.) 49 (1842). The principle actually gained its original support in an earlier South Carolina decision, Murray v. South Carolina R.R., 1 S.C. 386 (1841), but Shaw's ruling in *Farwell v. Boston & Worchester R.R.* was the impetus for the eventual adoption of the rule throughout the country.

93. See, e.g., K. Stampp, *supra* note 13, at 71-73, and cases discussed infra.

94. 1 Ga. 195 (1846).
involved around an action on the case brought by WoodbirJe, the owner of Ned, a slave carpenter, against Scudder, the owner of the river boat Ivanhoe. Ned had been hired out to Scudder for a trip from Savannah to St. Marys and during the course of the trip was killed after becoming entangled in the water wheel. It was established that the death had been caused by the negligence of Scudder's officers on deck, and the jury found for the plaintiff.

Justice Lumpkin noted that the question was new in the state and it deserved "the gravest consideration." He acknowledged the correctness of the opinion of Shaw and others and stated that the fellow servant doctrine would be applied in the state of Georgia. However, he continued, "interest to the owner, and humanity to the slave, forbid its application to any other than free white agents."

The very rationale of the rule could have no application to slave laborers. They dare not interfere with the business of others for they would be instantly chastised for their impertinence. Nor could they testify as to anyone's misconduct. They could not exercise the discretion, left to free white agents, of quitting their employment when matters were mismanaged or portended harm. Whether engaged as carpenters, bricklayers, blacksmiths, ferrymen, wagoners, patroons or private hands, in boats or vessels in the coasting navigations, on railroads, or any other avocation, they had no choice but to serve silently out their appointed time while submitting to whatever risks and dangers were incident to the employment. "Bound to fidelity themselves, they do not, and cannot act as securities, either for the care or competency of others."

After demonstrating that the nature of slavery eliminated the application of the doctrine to slaves since the rule could apply only to one with the freedom to choose his work, Justice Lumpkin turned his attention to an equally compelling reason for the non-applicability of the rule, the economic interest of the master:

95. In light of the eventual holding, it is of interest to note that the fellow servants in this case, the officers, probably were financially responsible.
98. Id. at 199.
What can the master know of the condition of the vessel, road, work or machinery, where his servant is employed, or of the skill or prudence of the persons associated with him? [A] large portion of the employees of the South are either slaves or free persons of color, wholly irresponsible, *civiliiter*, for their neglect or malfeasance. The engineer on the *Ivanhoe* was a colored man. Had the accident been attributed to his mismanagement, to whom should Woodbridge have looked for redress? [W]e think it needless to multiply reasons on a point so palpable.90

Judge Lumpkin’s final point was that humanity to the slave required an exclusion of the doctrine. This point may have been discussed to quiet the outrage of Northern abolitionists, such as Judge Stroud and Reverend Goodell, who eagerly awaited the publication of the Southern reports with which to load their rhetorical canons. That most Southern judges believed in the system of slavery and daily supported it in their decision making cannot, however, hide the fact that humanitarian concerns often entered into their reasoning on the issues brought to them for resolution. In this vein, Judge Lumpkin noted that in almost every occupation requiring combined effort, the employer necessarily entrusted responsibility to a variety of agents. Many of those were “destitute of principle, and bankrupt in fortune.” If it were judicially pronounced that the owner of slaves hired to the numerous navigation, railroad, mining, and manufacturing companies which dotted the countryside could look for compensation only to the co-servant who caused the harm, no hired slave’s life would be safe. As it was, “the guards thrown around this class of the population were sufficiently few and feeble.”100

In *Forsyth and Simpson v. Perry*,101 decided by the Florida Supreme Court in 1853, *White v. Smith*,102 decided by the South Carolina high court in 1860, and *Howes v. The Steamer Red Chief*,103 rendered by the Supreme Court of Louisiana in the same year, the rulings were couched in more traditional language. Nevertheless, the underlying social realities expressed by Judge

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99. *Id.*
100. *Id.* at 199-200.
101. 5 Fla. 337 (1853).
102. 12 S.C. 595 (1860).
Lumpkin were their foundation. As noted by Judge Semmes in the Perry case, the fellow servant rule exception applied to persons competent to contract, responsible for the consequences of their own conduct, and entitled to the same rights and remedies as their co-agents. How could slaves be included within the rule when it was manifest that they had none of those rights or remedies against others and were not liable in a civil suit for their own acts or misconduct?\textsuperscript{104}

In addition, argued Judge Semmes, the interest of both slave and master militated against any contrary doctrine. The judge took judicial notice of the increasing amount of personal injury resulting from the low level of competency among those employed in the river traffic.

The liability of the employer, civiliter, for the misconduct of his subordinates, will naturally add to the personal security and protection of the slave. Public policy emphatically demands, that the owners of boats, railroads, and other public conveyances, should employ careful and capable agents in their respective business.\textsuperscript{105}

This factor of increasing injury, as well as the obvious bitterness felt toward hired slaves by free, white, but impoverished coworkers, was stressed by Judge Duffel in The Steamer Red Chief:

The usual carelessness of steamboatmen, and, unfortunately, the too little value which is often set on human life should not be a means of defense, but rather a forcible reason, in the interest of the community at large, not to enlarge the exception to the general rule which fixed the liability of the master for the acts of his agent.\textsuperscript{106}

In North Carolina, however, in a case almost identical to the fact situation of the leading case of Farwell v. Boston & Worcester R.R.\textsuperscript{107} decided by Shaw, Judge Ruffin rejected the argument of counsel that the fellow servant rule was inapplicable to slave laborers. The 1858 case, Ponton v. Wilmington & Weldon R.R.,\textsuperscript{108}

\begin{itemize}
\item \textsuperscript{104} 5 Fla. 337, 344 (1853).
\item \textsuperscript{105}  Id. at 344-45.
\item \textsuperscript{106} 15 La. Ann. 321, 324 (1960).
\item \textsuperscript{107} 4 Mass. (Met.) 49 (1842).
\item \textsuperscript{108} 51 N.C. (6 Jones Law) 245 (1850).
\end{itemize}
grew out of the death of plaintiff's slave resulting from his being crushed by a train improperly switched onto the wrong track. Ponton was unsuccessful in the trial court and brought an appeal to the supreme court.

Judge Ruffin began his opinion by noting that the rule was of recent origin and that it owed its existence to the great number of servants employed and needed by railroads and steamboat companies. After discussing the English decision of Priestly v. Fowler, which created the fellow servant concept, and reviewing the American decisions dealing with the issue, Judge Ruffin countered the argument of the plaintiff that a basic distinction must be made when slave labor is under consideration. The distinction might be sound if the slave were the person to be benefited by the recovery. But the action was by the owner, for his benefit, and it was obvious that it was in his power also, by stipulations in the contract, to provide for the responsibility of the bailee for exposing the slave to extraordinary risks, or for his liability to the owner for all losses arising from any cause. It was sufficient protection to his property, as owner, to be put on the same footing with the protection of a freeman.

Aside from Judge Ruffins' lone attempt to avoid the creation of parallel concepts for slave property, the courts held fast. Here, the interest of the master necessitated parallel rules. This was not an isolated area, however. As the tempo of an economy desperately trying to free itself from an agrarian base increased, the struggle to integrate slave property into the overall private law system under construction heightened. As a consequence, the integration process suffered.

Two related topics, the liability of carriers for injury to or loss of a slave in cases of authorized or unauthorized transit, must be examined. They further illustrate the difficulties encountered by the courts in attempting to balance the interests of the slaveowners with those of the nascent industrial and transportation sectors of the economy.

110. Indeed, the counsel for the plaintiff admitted that the rule was so thoroughly settled that it could not be shaken unless upon the distinction that the injury complained of in this case was to the person of a slave.
111. Id.
V. Bailments and Carrier Liability

And notwithstanding, a distinguished statesman at the North has predicted that in case of war, the South would become the Flanders of America, the history of the last two wars, and of the last seventy years, commencing with Lord Dunmore's fruitless attempt to stir up a servile insurrection in Virginia, falsifies this opinion. No subordinate class in the world entertains the same strength of attachment toward their superiors. And this feeling is to a great extent reciprocated. The very strength and security of the South consists in the loyalty of our Negro population to their owners. . . .—Lumpkin, C. J., Dudley v. Mallery, 4 Ga. 52, 65-66 (1848).

* * *

By uniform and universal usage [slaves] are constituted the agents of their owners, and are sent on their business without written authority. And in like manner, they are sent to perform those neighborly offices [husking], common in every community. They are not at all times, in the service of their owners, and are allowed, by universal sufferance at night, on Sundays and holidays and other occasions to go abroad, to attend church . . . and to exercise other enjoyments without it ever entering the mind of any good citizen to demand written authority of them. The simple truth is, such indulgences have been so long, and so uniformly tolerated that the public sentiment upon the subject has acquired almost the force of positive law.—McKinny, J., Allen v. Jones, 1 Head (Tenn.) 626, 636-37 (1858).

Railroads and steamships were used by owners and bailees to transport slave labor from one locale to another. In addition, a substantial amount of slave labor was let out to work in these facilities. Therefore, rules had to be formulated to deal with the two greatest threats to a master's interest in slave property: loss of the slave through injury or death and the ever present danger of escape.

The nonapplicability of the fellow servant rule to slave labor, whether viewed as the result of economic necessity or the inherent logic of the rule itself, protected the owners from loss in work-related injuries. However, the problem remained of a carrier's general liability for injury to or loss of a slave during passage in two instances: (1) the authorized transit of a slave, either alone
or in the company of his master or bailee, and (2) the unauthorized transit of an unaccompanied slave.

A. Authorized Transit

In the 1829 case of Boyce v. Anderson, Chief Justice John Marshall settled the law relating to death or injury during authorized transit. He resurrected the ancient common law principles as to the liability of a carrier of goods which required a showing of fault, and applied them to the carriage of slave property. Boyce's agent and a group of his slaves were going downriver on the Mississippi in the steamer Teche when it caught fire and exploded. The agent, slaves and other passengers made it to shore. They were spotted by the steamer Washington which sent out a yawl to bring them aboard without charge and transport them to the nearest port. During the process, the boat's paddle wheel was prematurely started, resulting in the yawl being upset and a slave being drowned. Boyce filed suit against the owners of the Washington, alleging that their liability for the carriage of his slave property was absolute.

Marshall noted that there was no special contract of carriage between the parties. His main concern was the circuit court's charge that the current strict liability doctrine of a carrier's liability for bailed goods had no application to slave property. He posed the question as to whether a sound distinction could be made between a human being, in whose person another had an interest, and nonhuman property. A slave had volition and feelings which could not be overlooked in conveying him from place to place. He could not be stowed away as a common package. This was not only forbidden by principles of humanity, but might endanger his life or health and hence, his value. Consequently, strict liability in such cases would not apply unless stipulated to by special contract. Being left at liberty, the slave might escape. The fact remained that the carrier did not and could not have the same absolute control over the slave that he had over inanimate objects. In nature and character, the slave resembled a passenger, not a package of goods. Thus, the only reasonable principle was

112. 27 U.S. (2 Pet.) 150 (1829).
that the responsibility of the carrier should be measured by the law applicable to passengers, not by the law applicable to bailed goods.\textsuperscript{113}

In the course of Marshall's inevitable search for a methodology, he noted that while there were no slaves in England, there were persons in whose service another had a temporary interest. The law of carriers relating to goods had never been applied to their transit. On the contrary, the applicable standard was negligence. Quoting from Sir William Jones' \textit{Treatise on Bailments},\textsuperscript{114} Marshall argued that the early English law provided that carriers for hire were only liable for neglect. While that rule was altered to one of strict liability as commerce advanced, it was still viable during the ante-bellum period and applicable to slave property.\textsuperscript{115}

The \textit{Anderson} case possibly was a poor fact setting in which to formulate a rule of law governing a carrier's general liability for the transit of slaves, because the undertaking was a gratuitous courtesy on the part of the \textit{Washington}. Nevertheless, the case was cited up to the Civil War as stating the correct principle of law on the subject.\textsuperscript{116} For example, in \textit{Mitchell v. Western & Atlantic R.R.},\textsuperscript{117} decided by the Supreme Court of Georgia in 1860, plaintiff, his wife, children and ten slaves took passage at Atlanta for Kingston. The slaves were paid for as passengers. The train stopped for wood and water and one of the slaves, a boy aged ten, was run over when the train resumed its journey. Judge Lyon, echoing the rationale of Chief Justice Marshall, stated:

\begin{quote}
The slave has volition, the right of locomotion, and the defendant has no right to restrain him in the exercise thereof, by the use of chains or other violent means, unless there has been an express stipulation between the parties to do so.\textsuperscript{118}
\end{quote}

\textsuperscript{113. Id. at 154.}
\textsuperscript{114. This was a very popular and oft-cited treatise in the era under discussion in both slave and non-slave cases.}
\textsuperscript{115. 27 U.S. (2 Pet.) 150, 156 (1829).}
\textsuperscript{116. Considering slaves as property, it is certainly an exception to the general law of liability, in relation to common carriers. But it is an exception produced by reason of necessity, from the nature of the property.}
\textsuperscript{117. Scruggs v. Davis, 40 Tenn. (3 Head) 664, 666 (1859).}
\textsuperscript{118. Id. at 26. While the \textit{Anderson} case maintained its authority, at times great pains were taken to limit it to its fact setting—a gratuitous undertaking with the owner or his agent present. See Richards v. Frachars Adm'r, 28 Mill. 792 (1855), in which the court,}
B. Unauthorized Transit

The reasoning and authority of Chief Justice Marshall, and the necessity of balancing the interests of both the slaveowners and the carriers, overcame any desire on the part of courts to give greater protection to slaveholders in cases of authorized transit. This was not the case, however, where the slave was injured or lost to the master as a result of unauthorized carriage. In such situations, the courts of the ante-bellum South brought the full force of public policy to bear, mirroring once again the realities of life in a social and economic milieu revolving around the institution of slavery.

The law regulating carrier liability in cases of loss or injury to slaves during authorized transit was based on the earliest common law principles of bailment. The law dealing with unauthorized conveyances was based, at least formally in the later years, on the violation of statute. In the absence of statute, and even in cases where legislation was available, the courts utilized current common law principles of conversion to reach the same results. Most of the slave states had enacted statutes providing for monetary fines for any unauthorized passage. Compensation was also provided for all expenses due to financial outlays incurred in recovering fugitive slaves utilizing the defendant's line to escape, including full payment of the value of a slave permanently lost to the owner. The carrier's liability in this area, whether based on statute or case law, revolved around the

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after distinguishing Anderson on the basis that the condition of the boat was not at issue, held strictly liable the owner of a ferry boat which had slipped its mooring as plaintiff's slave and mule began to enter, resulting in the slave's death by drowning:

[Where the loss has been occasioned by the apparent negligence of the party in providing sale and sufficient means to perform what has been undertaken to the public, he comes within the rules applicable to common carriers, whatever may be the kind of property lost by the default.

Id. at 802.

119. The statute utilized in Mangham v. Cox & Waring, 29 Ala. 81 (1856) is typical:

Any railroad company, in whose car or vehicle, and the master or owner of any steamboat or vessel, in which a slave is transported or carried, without the written authority of the owner or person in charge of such slave, forfeits to the owner the sum of fifty dollars; and, if such slave is lost, is liable for his value, and all reasonable expenses attending the prosecution of the suit.

Id. at 87.
presence or absence of a sufficiently detailed pass or permit authorizing the travel.

Justice Nesbit of the Supreme Court of Georgia gave one of the best definitions of the nature and function of the general pass in the case of Macon & Western R.R. v. Holt, decided in 1850. In Holt, plaintiff’s slave, while free on a pass, boarded defendant’s train to avoid an eight mile walk to his destination. During the course of the trip he fell off of the train, resulting in the eventual amputation of his leg. At that time, the state of Georgia had no statute dealing with such cases. The owner averred that at no time did he give his slave permission to board a train to go anywhere.

Prior to an analysis of the carrier’s liability, Justice Nesbit addressed the legal perimeters of the pass and its vital importance to the institution of slavery. The pass established the master’s consent that the slave could leave his home for a specified time. This included the privilege of enjoying that time in such manner as he chose to occupy it. It also established, however, the limitation that the slave should visit only the place or places specified. It proved nothing more and it was the legal duty of the owner not to permit his slave to leave his plantation without a ticket. It was the right of the slave when leaving his master’s protection, with his consent, to have the protection which the permit afforded against punishment. The permit originated in the necessity for a vigilant police, and its primary object was protection against the penalties of the patrol laws. Such, and no more, were the offices of a general pass.

Justice Nesbit held that the slave’s general pass was insufficient evidence of the plaintiff’s permission for the ride. After a lengthy discussion of the law of bailments, he ruled that defendant’s act of taking the slave on board was a conversion and its liability absolute, even though no fault on the railroad’s part was alleged or established by Holt. The justice was careful to note that the Anderson case was not applicable since there the owner, through his agent, had consented to the transit and no fee was

120. 8 Ga. 157 (1850).
121. Id. at 159. See also Cobb, supra note 17, at 109.
charged. He had the following terse comment on the apparent severity of his ruling:

[T]he increased risk, growing out of the reasoning, willing powers, of a living human creature, does not affect the principle. Cognizant of these properties in the chattel, they take the risk. For the purposes, however, of this argument, and, indeed, upon all the legal principles involved, we can consider the slave in no other light than as a bale of goods. I repeat, that the absence of any intention to do a wrong to the owner, does not change the legal character of the act—it is a conversion without that.\(^\text{123}\)

The absence of consent provided the courts with a means of imposing greater liability upon carriers in cases of injury or death. The major concern of the courts and legislatures in imposing such sanctions was the possibility of the escape of slaves. The best judicial analysis of the multiple factors surrounding this issue was made by Chief Justice Rice of the Supreme Court of Alabama in the 1856 case of *Mangham v. Cox & Waring*.\(^\text{124}\)

In the *Cox & Waring* case, the plaintiff's runaway slave had secreted himself on board the defendant's steamboat and was not discovered until the boat was 75 miles upriver from its debarkation point in Mobile. Upon discovering him, the captain put him in chains and eventually deposited him in the Montgomery jail, where he died of pneumonia. Justice Rice recognized the plight of a defendant in such a situation, but nevertheless, reluctantly declared the state policy:

However inconvenient or difficult it may be for the master of a steamboat to prevent any slave from being carried or transported on it, without the written authority of his owner . . . . , yet it is not impossible for him to do it. The legislature has made it his duty to do it and declared the consequences of his failure. The legislature has scrupulously exacted such written authority. The law is plainly one of public policy, which we are bound to enforce and maintain, whatever may be our opinion of its wis-

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122. [W]ere such a case before me, I would unhesitatingly decide in accordance with the rule held by the Supreme Court. It is very apparent, however, that this case is distinguishable.


124. 29 Ala. 81 (1856).
dom or justice, and however severe may be its operation in particular cases.\(^\text{125}\)

The political realities of the day and the innumerable opportunities for escape militated against any compromise. The immense value of slave property; the "peculiar nature" of slaves; the known disposition of the abolitionists of the nonslaveholding states to "delude them [slaves] by art and persuasion" to avail themselves of all facilities for escaping from their owners; the extent of the water boundaries of the state; the number of steamboats and vessels navigating the waters and rivers within its limits; the vehicles running upon railroads in the state; the celerity of the movements of these boats, vessels and vehicles; and the consequent exposure of the owners of slaves, to the "depredations of the fanatical and vicious," collectively considered, necessitated the legislation.\(^\text{126}\)

It was not in escape or injury cases alone that a master was protected by the imposition of blanket responsibility on the errant carrier. In the case of *Western and Atlantic R.R. v. Fulton*,\(^\text{127}\) decided by the Tennessee Supreme Court in 1857, a slave in the service of the Atlantic R.R. Co. had a pass allowing him to make a trip to Chattanooga, Tennessee and back. He gave the pass to his brother, the slave of Fulton. It was accepted by the conductor, and Fulton's slave was transported to Atlanta, Georgia. Upon arrival, he was seized and sold to satisfy a judgment against the person from whom Fulton had bought him, pursuant to a void lien on the slave. Fulton received a judgment against the railroad for 900 dollars in the trial court.

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\(^{125}\) Id. at 89.

\(^{126}\) Id. at 88-89. Judge Lumpkin of Georgia, in language characteristically more flamboyant, but equally to the point, had declared a year earlier:

The South has lost, already, upwards of 60,000 slaves worth between 25 and 30 millions of dollars. Instead . . . of relaxing the means allowed by law for the security and enjoyment of this species of property, the facilities afforded for its escape and the . . . encouragement held out to induce it, constrain us, unwilling or otherwise . . . to tighten the cords which bind the Negro to his condition of servitude—a condition which is to last, if the Apocalypse be inspired, until the end of time; . . . every bondman . . . and every freeman, hid themselves . . . 

(Rev. 6 ch., verses 12 to 17, inclusive).


\(^{127}\) 36 Sneed 589 (Tenn. 1857).
Justice McKinney felt that the social situation, expressed in common law terms, supported the judgment against the carrier. There could be no doubt of the correctness of the judgment in the case upon general principles. The complexion of the case was not varied by the fact that the conductor of the train was innocent of any intentional wrong, and was misled by the false pass in the possession of the slave.

In admitting a slave on the train, the agent of the road acts at his peril and the peril of the company. He is bound to inquire and to know that the owner has given permission and authority to receive and carry the slave on the train; and the very act of receiving and carrying the slave is itself a conversion.\footnote{128. \textit{Id.} at 591. One of the few cases holding a carrier to a less strict standard in escape situations was that of Sill v. South Carolina R.R., 4 Rich. 154 (S.C. 1850), decided by the South Carolina Supreme Court, in the absence of a statute governing carrier liability in such instances. Eaton, a white man born and educated in the North, was a barkeeper in Columbia, South Carolina. He was known as a drunkard and was often seen in the company of slaves. Alick, the slave of Doctor Sills, was a trained apothecary and was hired out by Sills to a drugstore in Columbia. Both Eaton and Alick were known to the ticket agent, who would not have sold a ticket to Eaton for any slave. At that time, however, the road allowed tickets to be purchased on the train, so Eaton, posing as Alick’s owner, took him on the train, purchased a ticket for him and took him to New York City. Justice Withers, in rejecting Sill’s argument that liability for loss through unauthorized transit was absolute, recognized the almost impossible situation of carriers, given the immense traffic of slaves about their masters’ business. If the rule were adopted, it would make transportation of slaves by railroads quite an impractical business. The result would be to require exact investigation of title to such property upon peril to the company. Railroads would be compelled to either decline business that the law commands them to perform, as carriers of passengers, or else to encounter losses that might be oppressive, if not ruinous. It must, therefore, be a case of negligence. \textit{Id.} at 161-62. The court did state that it was a legal duty to demand of the railroad companies the highest degree of caution and diligence when dealing with slaves as passengers. This was due to the facility of escape which their mode of conveyance would offer to absconding slaves, “especially if a sleepless vigilance should give way to any degree of carelessness.” \textit{Id.} at 162.}

It should be noted that the situation of carriers in the South differed appreciably from that of carriers in the North. In the South the carriers, without any reluctance, utilized and depended upon slave labor to operate effectually. The heavier legal burden of strict liability in escape cases and the absence of the fellow servant rule were outweighed in the long run by the benefits of cheap slave labor.\footnote{129. \textit{See} GENOVESE, \textit{supra} note 3.} No doubt the latter consideration entered the minds of the justices in the slaveholding states when they bal-
anced the interests of these two sectors of the economy.

The final section of this Article will analyze one aspect of equity jurisprudence: the power of an equity court to order the return of slaves where the master's physical control over them was lost because of questionable conduct on the part of a neighbor or family member. The loss of slaves through legal process initiated by creditors was a common event in the lives of small holders and was the spark for a wide-ranging set of agreements to avoid that fate. The precise issue of the power of an equity court to order the return of slaves obtained by way of such agreements is conceptually unrelated to the tort-damage topics heretofore discussed. However, the underlying social realities called forth the same protective stance by the courts.

VI. EQUITY: SPECIFIC DELIVERY

[T]here is no standard by which the price of affection can be adjusted, and no scale to graduate the feelings of the heart . . . . — Taylor, C. J., Williams v. Howard, 3 Mur. (N.C.) 74, 80 (1819).

One of the best examples of the difficulties encountered by the courts in their attempts to reconcile the received English jurisprudence with the institution of slavery was in determining the extent of the power of an equity court to decree the specific delivery of slaves. Hard times\(^\text{130}\) and the growth of a mercantile/lending segment in an agricultural economy gave rise to innumerable situations in which the owner of few slaves was faced with the permanent loss of his bondsmen. To avoid attachment by creditors, owners would "sell" one or more of their slaves to a friend or neighbor, usually at a price substantially below the current market value, with an oral agreement that the slave would be "resold" to the owner once his financial situation was more secure. When the friend refused later to honor the agreement, the owner sought a decree of specific performance. Similar agreements were made with friends and neighbors who, by prearranged bidding agreements, would purchase the owner's slaves at a low

\(^{130}\) The depression of the 1840's, which coincided with the increased activity in this area of the law, resulted in many small slaveholders succumbing to the pressures of creditors. Id. at 408.
price at a sheriff's sale initiated by creditors. A creditor often agreed to "resell" a slave sold to him at a low price by a debtor. Such an agreement prevented the slave from being attached by other creditors, and in reality the "sale" merely served as security for the underlying debt. These agreements also gave rise to petitions in equity. On a more personal level, the issue was raised by oral promises to make an eventual gift of a slave cared for or raised by a relative while the owner was in bad financial straits.

To the owner of slaves temporarily deprived of them under such circumstances, economic necessity and related social pressure made a petition for specific delivery the obvious legal recourse. This was especially so in light of the integral part served by slaves in the long process of getting a crop to market or otherwise bringing in needed income. In attempting to deal with these petitions for specific delivery of slaves, the equity courts faced certain obstacles. With the exception of Louisiana and Kentucky, where slaves were classified as realty by statute,\textsuperscript{131} slaves throughout the South were deemed personal chattels. Traditionally, the English equity system prohibited decrees for the specific delivery of chattels, except in limited cases where the requisite \textit{pretium affectionis} could be established.\textsuperscript{132} Consequently, the courts were faced with what in the early years seemed an insurmountable conceptual obstacle.\textsuperscript{133} They experienced the same methodological dilemma that had confronted law courts in tort-damage situations: whether to create a parallel set of equitable principles for slave property, or attempt to integrate such property into the existing equity system.

In addition, the equity courts faced another obstacle. Underlying any methodological difficulty was the pressing problem of the jealousies entertained by the bar and public against any encroachments by the newly established equity courts on the right to trial by jury in civil cases. Given the absence of juries in equity

\textsuperscript{131} In Louisiana, slaves were considered realty for most purposes, while in Kentucky such classification was initially restricted to the law of descents. See G. Stroud, \textit{supra} note 17, at 11.


\textsuperscript{133} "Here there is no extraordinary injury pretended (and, indeed, none can be pretended, in a contract for the sale of a slave) . . ." Caldwell v. Myers, 3 Ky. (Hardin) 560, 563 (1808).
matters and the great time and expense involved in processing such cases\textsuperscript{134} the early decisions deferred the resolution of specific delivery problems to courts of law. The resolution of the issue in the Southern equity courts, in favor of a general rule allowing the issuance of decrees for specific delivery of slaves, was preceded by a unique use of the damage rules relating to conversion to accomplish the same result.

In a growing number of circumstances the owner of slaves, normally a minor holder,\textsuperscript{135} stood to lose control of a valued servant, as well as his entrance into the dominant social class. Through their powers as jurors, owners sought to dispense their own equity in actions at law for conversion. Chancellor Johnson of the South Carolina Court of Equity Appeals in the case of \textit{Young v. Burton},\textsuperscript{136} decided in 1841, described the practice in detail:

> When called to the bar in 1802, I found it the almost universal practice of the law Judges to recommend to the juries, in actions of trover, for slaves, to find for the plaintiff a greater sum than their value, with the alternative, that the plaintiff should release the damages, on the defendant’s delivering up the slaves; and the juries entered into the spirit of it with so much zeal, that it was not unusual to find damages to an amount of double the value, or more, to make it the interest of the defendant to deliver them up.\textsuperscript{137}

\textsuperscript{134} As noted by Chancellor Dunkin in \textit{Young v. Burton}, 1 McMul. 255, 271 (S.C. Eq. 1841):

> Although the court of Equity may, in complex cases, direct an issue, the delay and expenses of such proceedings, render both the court and the parties very reluctant to adopt them.

\textsuperscript{135} As indicated by Stampp, in 1860, 88% of the owners of slaves had less than twenty slaves, 72% held less than ten and almost 50% held less than five. Stampp, \textit{supra} note 13, at 30. Thus, in the recurring hard times due to economic depression, it was the small holder’s slaves who went to the block, not the planter’s.

\textsuperscript{136} \textit{Young v. Burton}, 145 1 McMul. 255 (S.C. Eq. 1841).

\textsuperscript{137} \textit{Id.} at 261. It may be assumed that this or similar practices, resulting in de facto decrees of specific delivery being issued, were fairly common in slaveholding jurisdictions in the early years. This practice of alternative verdicts in trover was seen by courts in the earlier decisions such as \textit{Vauters v. Elders}, decided in 1818, as simple right and justice:

> The law, for many years past, has been seen to look down with complacency, and, perhaps, delight, at every endeavor to promote the principles of justice and right, in a way which shall be least oppressive to its votaries, and, therefore, has seemed to sanction this form of verdict. . . .

\textit{2 Mill.} 184, 186-87 (S.C. 1818).
This alternative verdict could not be abused by the successful party. In *Norris v. Beckley*, the plaintiff attempted to collect labor charges for the time during which the defendant delayed in utilizing his option, which delay eventually required a sheriff's sale. The court reminded the parties and the lower court that the result of a judgment in trover would be passage of legal title to the defendant and warned against abuse of this unique procedure.

Despite this warning, abuses of the practice continued. Finally, they were brought to a halt in the 1818 case of *McDowell v. Murdock*, involving a questionable parol gift. Justice Nott, fearing the growth of parallel legal systems due to the unique problems associated with slave-related disputes, ruled:

> The value of the property, with such damages as must necessarily be supposed to flow from the conversion, is the only true measure . . . if the jury had given only the real value of the property, annexing the alternative, it would have been harmless; for it would have done the defendant no injury, and it would not have been compulsory on either party. But to permit a jury to give an arbitrary verdict, by way of a penalty, to compel the defendant into a measure inconsistent with the nature of the action, is not supportable on any principle of law.

This avenue of approach now was blocked by the law courts. Slaveowners' counsel reluctantly turned to the equity courts for assistance in altering the traditional English rule against decrees for the specific delivery of chattels. By combining arguments based on the nature of the *pretium affectionis* exception and the realities of the slaveholding community, counsel convinced the

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138. 2 Mill. 228 (S.C. 1818).
139. Plaintiff, in an earlier trial, had received judgment against the defendant in the amount of $800.00, to be released upon payment of $30.00 and delivery of the slaves to plaintiff. A judgment for the amount of the hire was granted in the trial court in the instant case.
140. 1 N. & McC. 237 (S.C. 1818).
141. Id.

Allowing this verdict to stand would be making a law for this particular class of cases, which would be applicable to no other. It would be giving to a plaintiff, who had prevailed upon a jury to give him an alternative verdict, a privilege which a plaintiff in no other cases possesses, while it would impose upon the defendant legal disabilities, to which defendants in no other cases are subjected.
courts by 1840142 to do a complete turnabout. They were unable to achieve this change in the respondeat superior cases because of the adverse effect it would have on slaveowners.143 Specific delivery of slave property became the general rule, with exceptions where the interest of the petitioner in the slave was solely the slave's cash value.144

The first major case issuing such a decree and discussing all aspects of the issue145 was Sarter v. Gordon,146 decided by the Equity Court of Appeals of South Carolina in 1835. Ruben Simms became insolvent in 1832 and certain slaves, who had been raised by Mrs. Simms, were a portion of Simms' property subject to a sheriff's sale. Stevens, a neighbor, purchased the slaves and agreed to resell to the Simms family for the price paid plus minor additional compensation, once the family was back on its feet. After Stevens' death, Gordon, the administrator, refused to honor the agreement because of pressing debts of Stevens and the possibility of a higher market potential upon public sale. In the lower court, Chancellor DeSaussure judicially recognized the large number of this type of agreement,147 held it binding on Stevens' estate, and ordered specific performance.

142. The Supreme Court of Tennessee had in the case of Loftin v. Espy, 12 Tenn. 84 (1833) ruled in favor of the general jurisdiction of equity courts to issue decrees for the specific delivery of slaves, but this decision was not followed in the years immediately following its rendition.
143. See text accompanying notes 61-91 supra.
144. See note 161 and accompanying text infra.
145. Early decisions such as Caldwell v. Myers, 3 Ky. (Hardin) 560 (1808), decided by the Kentucky Supreme Court, do not discuss the slave in his personal status or the realities of plantation or farm life. Instead, they based their decision on settled English principles concerning chattels. Id. at 563. Gradually, however, and usually in the course of dictum after deciding the case on alternative grounds, courts began to address themselves to such issues. They leaned favorably towards a moderate revision of the established principle in cases of slave property, at least those alleged to be family of domestic servants. In Williams v. Howard, 7 N.C. 74 (1819), the court, after enforcing via the constructive trust doctrine an oral agreement to resell a domestic servant to the original owner, on the basis of fraud, stated:

[T]hey form an exception, for reasons equally cogent, or more so, than those applicable to land. With respect to other chattel property, justice may be done by damages for non-performance, and therefore equity will not interpose: But for a faithful or family slave, endeared by a long course of service or early association, no damages can compensate . . . .

Id. at 80.
146. 2 Hill 121 (S.C. App. Eq. 1835).
147. Mr. Stevens knew he had obtained a great bargain at the sheriff's sale,
Justice Harper, speaking for the court on appeal, analyzed the case according to American precedent and the nature of the special interests required by English law. He proceeded to view the issue from the standpoint of the realities of the relationship between masters and domestic servants such as those of Mrs. Simms. The tie of master and slave was one of the most intimate relations in society. In every age the distinction had been recognized between a slave brought up in his master's household and one casually acquired. The former was of more value to the master than he would be to a stranger. The owner better understood his qualities and capabilities, and the slave would be more likely to serve with "cheerfulness and fidelity." These factors were greatly enhanced by the consideration of humanity to the slave himself. Were not such feelings worthy of more regard than the taste which would covet an antique altarpiece or a picture of Titian? "We have the principle from the English decisions, but an infinitely stronger case in which to apply it. . . ."148

To avoid squabbles in the future regarding the amount of affection to be pleaded and the mode of proof necessary to warrant the issuance of a decree,149 Justice Harper made the exception the

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148. Id. at 135.
149. Chancellor Harper, in the case of Horry v. Glover, 2 Hill 515 (S.C. App. Eq. 1837) indicated the administrative difficulties inherent in a case by case approach, based upon adherence to the concept of pretium affectionis, thus necessitating a general rule:

[H]ow are these circumstances to be ascertained by evidence? By what rule will you fix the length of time that a slave shall have belonged to his owner, so that he may be supposed to have formed a particular attachment for him? Will you go into evidence of the slave's character and qualities to determine whether they are such as give him a peculiar value to the feelings of his owner, or to have formed a probable inducement to the purchaser in making a contract for him? Suppose him to be one of a family of slaves still in the owner's possession, and who are rendered of less value by his loss [sic], (which is often the case), will you fix the degree of relationship—such as that of a parent or child, husband or wife—which would authorize the court to interfere? Such a construction would tend greatly to litigation and afford room for great looseness of discretion.

Id. at 524.
general rule. Slaves were moral and intellectual beings, having qualities infinitely diversified. In every case where specific slaves were contracted for, it would be assumed that the contract was made with a view to their peculiar qualities.

I am not to shrink from enforcing a well-settled principle of law, because it may lead to unforeseen consequences. I believe these consequences will follow, and I am prepared to lay it down as a general rule that a bill will lie for the specific delivery of slaves, as for the specific performance of a contract for the sale of land; and in saying this, I believe I am giving effect to the law, according to its true meaning.158

Justice Harper, while recognizing the social necessity of a general rule, nevertheless stated an equally compelling exception in cases where the petitioning party was a social parvenu such as the slave trader.151

If it appeared that the purchaser contracted for the slaves as merchandise to sell again . . . this would be merely a matter in the way of trade, and in such case it is certain that complete justice might be done by a compensation in damages. But the general rule must be as I have stated.152

In South Carolina, as elsewhere,153 the creditors' bar refused to accept this new general principle. They continually appealed decrees on the basis of the English rule, or insisted that earlier cases

151. Professional slave traders were held in very low esteem by slaveholders, who saw them as social parvenus at best. However, as noted by Stampp:

The majority of slaveholders agreed that only the most calamitous circumstances could justify dealings with professional traders. In fact, it was hard to find a master who would admit that he sold slaves as a deliberate 'speculation'—a business transaction whose object was a profit—rather than as an unhappy last resort. Perhaps only a few masters wished to regard slaves as marketable commodities, though some certainly did, but most of them had in their lexicons an extremely broad definition of 'necessity'. Somehow their necessities kept the auctioneers busy and enabled the traders to conduct a brisk traffic in human flesh.

Stampp, supra note 13, at 240.
152. Sarter v. Gordon, 2 Hill 121, 137 (S.C. App. Eq. 1835). This exception to the new general rule applied to all petitioners whose sole interest in the slave was its eventual cash value. See, e.g., Bryan & Richardson v. Robert, 1 Strob. 334 (S.C. App. Eq. 1846), [mortgage]; Savery v. Spence, 13 Ala. 561 (1848) [bounty hunter].
153. See, e.g., Murphy v. Clark, 9 Miss. (1 S. & M.) 221 (1843); Summers v. Bean, 54 Va. 404 (1856).
involving slaves actually had been limited to domestic servants.\textsuperscript{154} The decision finally putting the issue to rest in most of the slave-holding jurisdictions was rendered by the Court of Equity Appeals of South Carolina several years later in the case of \textit{Young v. Burton}.

The facts as given by the court are extremely sketchy. They tell us only that Burton was in possession of a slave belonging to Young and that the latter, by a bill in equity, sought the slave's return. The circuit court had dismissed the bill on the ground that such remedy did not lie in the case of slaves.

Chancellor Johnson, speaking for eight of the court's nine members, began by stating his own view that the earlier cases of \textit{Sarter v. Gordon},\textsuperscript{156} and \textit{Horry v. Glover}\textsuperscript{157} had settled the issue with finality. A full consideration was required, however, because the bench as well as the bar continually reviewed the question.\textsuperscript{158} After clearing away bothersome precedents,\textsuperscript{159} the chancellor discussed the history of public opinion on the power of courts to force delivery of slaves by convertors. While the cases had not been preserved, the legal profession knew that courts of chancery had habitually entertained bills for the specific delivery of domestic servants. However, public opinion had not been satisfied with such limited relief, Johnson continued, and noted the unique

\textsuperscript{154} Domestic servants were the factual basis for Chancellor Harper's broad ruling in \textit{Gordon}.
\textsuperscript{155} 1 McMullin 255 (S.C. Eq. 1841).
\textsuperscript{156} 2 Hill 121 (S.C. App. Eq. 1835).
\textsuperscript{157} 2 Hill 515 (S.C. App. Eq. 1837).
\textsuperscript{158} In that case [Sarter v. Gordon] the opinion . . . is distinctly and clearly expressed, with the intent to settle the law; and such I know to have been the intention of the whole Court, then consisting of Mr. Justice O'Neall, Chancellor Harper and myself . . . . It has, however, again been revived, and the importance of the question, and the diversity of opinion, which exists in this Court, renders it proper, that it should be reconsidered.
\textsuperscript{159} Johnson noted earlier decisions in the state wherein the issue was either avoided or simply referred to while the case was decided on other grounds. These cases, he explained, in an amazing bit of judicial confession, were decided immediately after the organization of an equity court of appeal consisting of three judges drawn from the law bench, of which he was a member. They were explained away on the basis that the members of that court had few traces of the fine points of equity jurisprudence in their minds after more than a decade's service on the law side; they were decided without reference to the obvious distinction between slaves and other chattels and those directly addressing the issue were based "on servile adherence to the English rule." \textit{Id.} at 261.
procedure of alternative verdicts in trover cases. Having established public support for a favorable ruling, the chancellor reviewed the English decisions allowing the specific delivery of unique chattels, those where the *pretium affectionis* was established, and those relating to land contracts. He concluded that the principles of those cases applied directly and irresistibly to the cases of slaves generally.

If the law would acknowledge a purchaser's attachment to a barren sandhill, the special value of an honest, able, and diligent slave also should be recognized. To the argument that money damages were an adequate remedy, the following reply was made:

> [T]here are no two human beings, black, white or mixed, which are exactly alike in all their moral, physical, or acquired qualities; and although the peculiar qualities of a slave may be well known and appreciated by the owner, he may be unable to furnish proof of their existence. When one goes into the market [place] to purchase a slave, or a number of them, his selection is determined by the best evidence he can obtain in reference to these qualities. And why should he not have them in specie? Why should he be sent to the courts of law and told with the damages you recover in trover, you may go to the professional dealer and supply their place.¹⁶⁰

Aside from the unpleasant task of replacing a known quantity with an unknown one, the chancellor noted the disastrous economic difficulties that would be faced by a plantation owner if he had to replace one of his skilled slaves such as blacksmith, hostler, driver, or wagoner during midseason.¹⁶¹ In addition, the owner would have to suffer the emotional loss of a "faithful and kind old nurse;" the body servant who has watched over generations of sick beds; the faithful slave who has followed the rise and fall of the family fortunes; and last but not least "the more humble, but equally faithful and devoted field slave, who recommends himself to the regard of his owner by implicit obedience to all his

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¹⁶⁰. *Id.* at 262-63.
¹⁶¹. As it was, planters each year expended large amounts of money for the services of outside skilled workers and tradesmen, thus increasing the importance of whatever skilled slaves were a part of the plantation work force. To a small slaveholder of limited means, the loss could be, and on many occasions was, catastrophic. On this point, see E. Genovese, *The Political Economy of Slavery*, 52-53 (1967).
commands." These considerations were not imaginary wanderings on his part, continued Johnson, but were drawn from real life:

The existence and force of the attachments are not susceptible of higher proof than is found in the well known fact, that when the owner is compelled, by pecuniary embarrassment, to sell his property, the slave is usually the last article that is put under the hammer.\textsuperscript{163}

The court rejected any suggestions that its ruling be limited to instances where the owner could actually establish some special interest in the slave. It held that the mere allegation and proof of ownership was sufficient to warrant the decree. Most frequently the attachment of a master to a slave grew out of a thousand little incidents, of which he was hardly conscious. It was not practical to prove that one had a particular liking for a horn or snuff box, but it was inferred from circumstances. So it must be in regard to slaves:

I have taxed my powers of reflection to their full extent, to conjure up one solitary reason why one who has been deprived of his slave, should not be permitted to determine for himself, whether he should have him again, or his value in money.\textsuperscript{164}

Having rendered the decision, Chancellor Johnson acknowledged the jealousies entertained against the Court of Chancery. He admitted that every assumption of jurisdiction or application of an accepted principle to a new situation would be denounced by the bar as an usurpation and an infringement on the right to trial by jury. In the face of such a barrage, Chancellor Johnson would look to the public for support:

[T]ell the people of this state that a stranger may enter upon you, and carry off your female slave, the mother of a dozen children, otherwise the humblest of your gang; that he may select from them the most valuable, and drive them all off en masse, and that at law your only remedy is damages, estimated at their marketable value, and I know nothing of their feelings

\textsuperscript{162} Young v. Burton, 1 McMull. 251, 264 (S.C. Eq. 1841).
\textsuperscript{163} Id.
\textsuperscript{164} Id. at 265.
and opinions, if they would not arm themselves, and prepare to oppose force to force. 165

Thus, when squarely faced with the realities of a social and economic structure inextricably involved with the slave labor system, the courts of the ante-bellum South declared all slaves to be unique chattels, susceptible to a decree of specific delivery upon proof of ownership alone. The reasoning of Chancellors Harper and Johnson was eventually followed throughout the slaveholding jurisdictions, with the exception of the state of Georgia. 166

VII. CONCLUSION

The process of integrating slave property into a developing, common law oriented system of private law was a continual one, affecting all areas. The judges of the South, like their counterparts in the North, were given the task of adapting the common law to the needs of their changing economic and social milieu. With the passage of each decade, the South’s “peculiar institution” brought forth increasing problems, and the populace looked to the courts for the solutions. Courts in the South, as in the North, were a vital force in the society in which they functioned and were responsive to the needs of such societies. In the thousands of cases decided while the institution of slavery existed in the South, the courts responded by molding the pliable system of the common law to fit the needs of a slave and cotton economy, thus serving as protectors of the interests of the slaveholding community.

165. Id. at 267.
166. In the state of Georgia, no doubt due to the existence of a statute providing for a summary recovery in suits seeking restitution of slaves wrongfully taken by violence or seduction, the courts, in cases involving specific delivery, required that the petitioner establish a special interest in the slave prior to the issuance of a decree. See Dudley v. Mallery, 4 Ga. 52 (1848).