Masters of Law: English Legal Culture and the Law of Slavery in Colonial South Carolina and the British Atlantic World, 1669-1783

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A Note on Text

Throughout this dissertation, I refer to modern-day Charleston, South Carolina, as Charlestown, the common spelling of the port city until it was incorporated as Charleston in 1783. All monetary values are in pounds sterling. Between 1725 and 1775, £100 sterling was approximately £700 in South Carolina currency. Where applicable, I have adjusted dates to reflect the beginning of the calendar year on January 1 rather than March 25.

Abbreviations

APC	*Acts of the Privy Council of England, Colonial Series*, W.L. Grant and James Munro, eds., 6 vols. (London, 1908-12)
BL	The British Library, London, United Kingdom
BOD	The Bodleian Library, Oxford University, Oxford, United Kingdom
BPRO	Records in the British Public Record Office Relating to South Carolina, 1663-1782, ed. W. Noel Sainsbury, 36 vols., Emory University, Woodruff Library, Atlanta, G.A.
CSP	Calendar of State Papers, Colonial Series
ECCO	Eighteenth-Century Collections Online, Gale Group, galenet.galegroup.com
EEBO	Early English Books Online, Chadwyck-Healey, eebo.chadwyck.com
HLP	*The Papers of Henry Laurens*, ed. Philip M. Hamer et al., 16 vols. (Columbia: University of South Carolina Press, 1968-2003)
LOC	Library of Congress, Manuscripts Division, Washington, D.C.
NARA	National Archives and Records Administration, Atlanta, G.A.
RSCG	*Royal South Carolina Gazette*
RG	*Royal Gazette*
SAL	*The Statutes at Large of South Carolina*, ed. Thomas Cooper and David J. McCord, 10 vols. (Columbia: A.S. Johnston, 1836-41)
SCDAH	South Carolina Department of Archives and History, Columbia, S.C.
SCG	*South-Carolina Gazette*
SCHM	*South Carolina Historical Magazine*
SCHS	South Carolina Historical Society, Charleston, S.C.
SHC	Southern Historical Collection, University of North Carolina, Wilson Library, Chapel Hill, N.C.
SNA	Scottish National Archives, Edinburgh, Scotland, United Kingdom

SP	*The Shaftesbury Papers*, ed. L. Cheves (Charleston: Home Press, 2010)
TNA	The National Archives, Kew, United Kingdom
WMQ	*The William and Mary Quarterly*, 3rd ser.

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Introduction

In the summer of 1750, South Carolina colonist Peter Manigault traveled to England to acquire a legal education.[1] At first Peter, the son of wealthy merchant Gabriel Manigault, saw "nothing" in England that he preferred to his "Native Country." However, he quickly changed his mind, throwing himself into the hustle and bustle of eighteenth-century metropolitan life and peppering his father with requests for funds, including money to purchase a gold watch, "a very Necessary Article" in his "present Situation."[2] When he was not sampling the delights of London's social season, he dedicated himself to his legal studies, moving from Bow Street, which was "situated in the very Center of all the bad Houses in Covent Garden," to the Inner Temple. From this convenient location he frequented the Temple Library and snagged "Bargains" on used law books at sales "about Temple Bar."[3] He also rode the Oxford circuit, an "expensive" enterprise that involved not only hazardous travel conditions, but also the tedium of "attending the Courts all day & writing out any Notes in the Evening."[4] Indeed, after making "Notes of all Causes of Consequence that ha[d] been argued" since he arrived in England, after filling his "Law Books" with countless "Remarks and References," and after listening to "very tedious

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[1] "Six Letters of Peter Manigault," *The South Carolina Historical and Genealogical Magazine* 15 (1914): 113-23. Peter Manigault was one of many South Carolinians who travelled to England to acquire a legal education in the second half of the eighteenth century. South Carolina colonists, in fact, sent more sons to be educated in England than any mainland colony in the late colonial period. Some of these students were less dedicated to their studies than Manigault, including Jack Garden, who concluded that "a person can not be a good Lawyer & an honest Man at the same time," and instead became a "Hackney Writer," or Billy Drayton, the son of a famous planting family, who became embroiled in a scandal over dueling. Peter Manigault to Ann Manigault, 8 December 1753, Manigault Papers, 11/275/11, South Carolina Historical Society, Charleston, South Carolina.

[2] Peter Manigault to Gabriel Manigault, 1 August 1750, Manigault Papers, SCHS.

[3] Peter Manigault to Ann Manigault, 20 July 1752, Manigault Papers, 11/275/8, SCHS; Peter Manigault to Ann Manigault, 25 September 1752, Manigault Papers, 11/275/8, SCHS; Peter Manigault to Gabriel Manigault, 18 October 1752, Manigault Papers, 11/275/8, SCHS.

[4] Peter Manigault to Gabriel Manigault, 18 October 1752, Manigault Papers, 11/275/8, SCHS; Peter Manigault to Ann Manigault, 30 November 1752, Manigault Papers, 11/275/8, SCHS.

affidavits" at Westminster, Manigault came to the conclusion that "Mirth and Law are incompatible." Thus resigned to the dullness of his chosen profession, he was called to the Bar in 1754 and returned to South Carolina, where he became part of that "Respectable Body of Men, who (provided they are well paid for it) make it their sole Business in this Life, to take care of the Lives & Estates of their Fellow Creatures."[5]

Manigault never lost his distaste for law. Although he did practice in South Carolina for a decade, he ultimately abandoned the profession, selling his books "at 10 per Cent lower than they were bought" because his "Inclination" to quit was "so strong."[6] Nonetheless, Manigault's English legal education continued to provide him with the wherewithal to make a living. Applying his legal expertise to the running of his own plantations and those of absentee South Carolina planters, he leveraged his knowledge of English law to ensure his clients the greatest return on their investments in land and, most importantly, slaves. Indeed, as Manigault and other South Carolina colonists were well aware, knowledge of English law was the *sine qua non* of mastery over slaves. Because slaves were colonists' most significant form of productive property, the ownership of enslaved people made it necessary to acquire at least a rudimentary English legal education. Although local statutes provided a legal superstructure that allowed colonists to own, police, and punish slaves, most daily legal practices surrounding slave ownership were rooted in English precedents and procedures: colonists categorized slaves as property using English legal terms, they bought and sold slaves with printed English legal forms, and they followed English legal procedures as they litigated over enslaved people in court. They

[5] Peter Manigault to Gabriel Manigault, 27 September 1753, Manigault Papers, 11/275/11, SCHS; Peter Manigault to Ann Manigault, 27 September 1753, Manigault Papers, 11/275/11, SCHS; Peter Manigault to Gabriel Manigault, 18 August 1753, Manigault Papers, 11/275/11, SCHS; Peter Manigault to Ann Manigault, 19 February 1753, 11/275/9, SCHS.

[6] Peter Manigault to unknown, [October] 1768, Manigault Papers, 11/278/7, 80, Peter Manigault Letterbook, SCHS.

did so not merely out of a desire to emulate metropolitan culture.[7] Rather, English law provided colonists with a discourse and with plural modes of proceeding that aligned with the commercial imperative to treat people as property in a variety of transactions. Slave law was an organic part of, not separate from, English law in colonial South Carolina and throughout the British Atlantic World.

In this dissertation, I follow South Carolina colonists of all sorts, from wealthy merchant-planters to illiterate sailors, as they used English law to manage slaves. I also place their activities in a larger Atlantic context, attending in particular to legal practice in Jamaica and other Caribbean colonies. Emphasizing practice rather than proscription, I examine manuscript litigation records, diaries, correspondence, bills of sale, trusts, indentures, mortgages, and other transactional documents in order to present an account of slave law that is entirely new. Most historians of early America are reluctant to consider the law of slavery in plantation America as a part of English law. Working on the assumption that "there was no slave law in England," they conclude that slaveholders made significant compromises as they sought to conform English legal norms to their plantation societies.[8] From these assumptions springs a portrait of legal deviance, of colonists who warped English law to police their slaves, and of self-conscious slaveholders who became increasingly conflicted about the extent of their legal divergence over the course of the eighteenth century. By the early nineteenth century, according to historians, their strident defense of slavery masked an acute anxiety over treating people as things, and hid a fractured system that was increasingly vulnerable to outside critiques and enslaved people's

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[7] Robert Olwell, *Masters, Slaves, and Subjects: The Culture of Power in the South Carolina Low Country, 1740-1790* (Ithaca: Cornell University Press, 1998), 60-61; Christopher Tomlins, *Freedom Bound: Law, Labor, and Civic Identity in Colonizing English America, 1580-1865* (Cambridge: Cambridge University Press, 2010), 450-51.

[8] Alan Watson, *Slave Law in the Americas* (Athens: University of Georgia Press, 1989), 62.

resistance.[9] Attending to daily legal practice produces a different narrative, however, one in which English law imbued Atlantic World slavery with its tensile strength and insulated slave owners from the need to contemplate the moral implications of owning human beings. Indeed, rather than finding a system destined to collapse under the weight of moralist critiques in the Age of Revolutions, we encounter a legal culture of astonishing flexibility that emerged unscathed at the dawn of the new republic.

Slavery's Many Laws

The methodological premise of this study is that a focus upon the slave codes promulgated by colonial legislatures has left historians with an incomplete view of the law of slavery in plantation America, one that emphasizes criminal law at the expense of so-called "private" law, and proscription over daily practice, with significant repercussions.[10] Because slave codes consisted primarily of policing and criminal law provisions, most historians have conflated slave law with criminal law, neglecting the quotidian legal transactions and practices that made slavery work. In *Many Thousands Gone*, for example, Ira Berlin focuses entirely on the ways in which "planters mobilized the apparatus of coercion in the service" of their new labor regime, while David Barry Gaspar emphasizes the harsh physical punishments meted out to

[9] An older literature that suggested slavery became less economically viable over the course of the colonial period has been thoroughly debunked. See Kenneth Morgan, *Slavery, Atlantic Trade, and the British Economy, 1660-1800* (Cambridge: Cambridge University Press, 2001); Trevor Burnard, "'Prodigious Riches': The Wealth of Jamaica Before the American Revolution," *The Economic History Review*, new ser. 54 (2001): 506-24.

[10] Scholars who emphasize statute over practice include David Barry Gaspar, "Rigid and Inclement': Origins of the Jamaica Slave Laws of the Seventeenth Century," in *The Many Legalities of Early America*, edited by Christopher L. Tomlins and Bruce H. Mann, 78-96 (Chapel Hill: University of North Carolina Press, 2000); William M. Wiecek, "The Statutory Law of Slavery and Race in the Thirteen Mainland Colonies of British America," *WMQ* 34 (1977): 266.

slaves in colonial Jamaica.[11] Likewise, studies of the culture of power in plantation America privilege the criminal dimension of slave law, suggesting that slave courts and the apparatus of terror surrounding the execution of slaves allowed whites to project their authority over enslaved people and even each other.[12] Whether they have assumed that the primary function of slave law was to prevent insurrection or to maintain social hierarchies among white planters, historians have emphasized the coercive element of the law of slavery in part because it allows them to recover how slaves resisted their captivity. Because slave codes recognized and punished rebellion, marronage, and running away, they stand as an enduring testament to humanity and personality of individual enslaved people.[13]

When we broaden our source base to include evidence of daily practice, however, an entirely different picture emerges. Rather than finding a narrow system devoted to policing enslaved people and preventing insurrection, we encounter a pervasive set of rules and practices; rather than finding one monolithic "slave law," we find many laws. Slavery and the legal practices that undergirded it not only set master against slave in a coercive relationship sanctioned by the state, it organized white and black South Carolinians' lives. Everything about slavery in colonial South Carolina had a determinative legal dimension, and everything legal was influenced by chattel slavery. Slave mortgages bound white colonists to one another, while the

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[11] Ira Berlin, *Many Thousands Gone*: *The First Two Centuries of Slavery in North America*. (Cambridge: Harvard University Press, 1998), 115; Gaspar, "Rigid and Inclement," 78-96. See also Edmund S. Morgan, *American Slavery, American Freedom* (New York: Norton, 1975); Philip J. Schwarz, *Slave Laws in Virginia* (Athens: University of Georgia Press, 1996); Tomlins, *Freedom Bound*.

[12] Olwell, *Masters, Slaves, and Subjects*, 100; Vincent Brown, *The Reaper's Garden: Death and Power in the World of Atlantic Slavery* (Cambridge: Harvard University Press, 2008), 131-44.

[13] In his study of slave laws in Virginia, for example, Schwarz seeks to uncover slaves' agency in shaping slave codes, cautioning that "any discussion of laws that leaves out those people whom laws are meant to benefit, control, or regulate is incomplete." Indeed, for Schwarz, "paying close attention to slaves is one of the hallmarks of the late twentieth-century upsurge of histories that deal with slavery." His goal – which includes enfolding slaves' West African legal traditions into a narrative about the development of law – leads Schwarz to focus almost entirely on criminal and policing provisions, including, most prominently, provisions relating to capital offenses. Schwarz, *Slave Laws in Virginia*, 1.

availability of slaves as collateral shaped their economic choices when insolvency loomed. Shipwrecks triggered litigation over the ownership of mariners of African descent, pitting white sailors against their captains and the Crown against colonists as litigants claimed property rights in people. And a father's death set in motion acrimonious bickering over the ownership of hired out slaves, fracturing customary working arrangements on plantations.

That the law of slavery in plantation America was a many-headed hydra has important implications for our understanding of plantation societies, and particularly the dynamics of slave resistance. In a vibrant, commercial, and highly mobile plantation colony, slaves were bought, sold, bequeathed, mortgaged, stolen, and hired out on a daily basis. Colonists also routinely litigated over slaves in the context of debt disputes, salvage claims, and conflicts over probate. Transactional law, not just criminal law, "private" law as well as "public" law, shaped interactions among blacks and whites. Certainly state-sanctioned violence and the threat of physical brutality were key components of a legal culture that was built from the bottom up to control African and African American slaves, but this legal culture also worked quietly and invidiously to commodify enslaved people on a daily basis. In quotidian acts of economic exchange and in litigation that assumed people were things, white colonists – both male and female – adhered to the "chattel principle," the notion that monetary value inhered in the bodies of people of African descent.[14]

The assumption that slaves were valuable things at law limited slave resistance. Indeed, enslaved people who struggled against their bondage not only found themselves checked by the

[14] Walter Johnson, *Soul By Soul*: *Life Inside the Antebellum Slave Market* (Cambridge: Harvard University Press, 1999), 2; Daina Ramey Berry, "'We'm Fus' Rate Bargain': Value, Labor and Price in a Georgia Slave Community," in *The Chattel Principle: Internal Slave Trades in the Americas*, edited by Walter Johnson, 55-71 (New Haven: Yale University Press, 2004); Phillip Troutman, "Grapevine in the Slave Market: African American Geopolitical Literacy and the 1841 *Creole* Revolt," in *The Chattel Principle: Internal Slave Trades in the Americas*, edited by Walter Johnson, 203-33 (New Haven: Yale University Press, 2004).

coercive apparatus of the state, but also by more subtle legal practices that assumed they were property, and by colonists who had learned by repeating these practices to treat them (and think of them) as mere things. When an African mariner named Ned slipped away from his masters and hopped a ship bound for Great Britain in 1718, for example, he found himself condemned and sold in a Vice Admiralty Court, not hauled into a slave court.[15] When Henry Laurens's "likely" slave Sampson ran away in 1764, he faced not the lash, but the prospect of sale as his punishment.[16] Transactions as well as physical brutality answered resistance in plantation America, and in handling slaves as property under the watchful eye of the law, masters set limits for enslaved people's actions in pervasive and effective ways.

In fact, historians have grossly underestimated the extent to which the routine and the mundane -- litigation over property and debt, buying and selling, mortgaging and conveyancing -- contracted rather than expanded space for slave agency. Forms as well as force policed freedom's boundaries. No matter how legally savvy slaves were, no matter how daring, the ubiquity of law in plantation life meant that it was nearly impossible for slaves to anticipate and counteract legal threats. Although nineteenth-century historians have shown that enslaved people could perhaps shape the outcome of a slave sale, the sheer variety of invisible legal obstacles that confronted slaves ultimately made it difficult for them to devise effective strategies for resistance. It was hard for an enslaved field hand to know whether she had been mortgaged, or when a creditor might foreclose on that mortgage.[17] A black mariner could not anticipate when his ship might be hauled into a Vice Admiralty Court, and might not know which colonial

[15] *Masters et al. v. Sloop Revenge*, 19 November 1718, South Carolina Vice-Admiralty Court Records, A-B vols., 276-300, Library of Congress, Manuscripts Division, Washington, D.C.

[16] Henry Laurens to John & Thomas Tipping, 4 December 1764, *The Papers of Henry Laurens*, edited by Philip M. Hamer et al., 16 vols. (Columbia: University of South Carolina Press, 1968-2003), 4:513-14.

[17] Bonnie Martin, "Slavery's Invisible Engine: Mortgaging Human Property," *The Journal of Southern History* 76 (2010): 820.

Vice Admiralty jurisdiction would determine his fate. Likewise, a master's sudden death might result in a house slave's emancipation, or it might reveal the extent of a colonist's indebtedness, shattering that slave's family through a court-ordered sale. This is not to say that slaves did not resist or that enslaved people were not legally savvy. Although this dissertation takes as its subject the activities of white colonists, we also shall see evidence that slaves struggled against their bondage by running away, stopping work, and taking advantage of war-time disruptions to claim freedom for themselves and their families.[18] Nonetheless, in a place where slavery's laws were everywhere, enslaved people learned that freedom was only "unbound" where law could not follow.[19]

Slavery and English Law

The laws of slavery that organized even the most mundane aspects of life in colonial plantation societies were part and parcel of England's laws, despite the commonplace assumption that English law did not recognize slavery, and that colonists were forced to mine other legal systems for precedents when constructing slave regimes in the New World. Alan Watson, for example, has insisted that the law of slavery in the Americas "came into being bit by

[18] A voluminous literature on slave resistance in South Carolina includes Peter Wood, *Black Majority: Negroes in Colonial South Carolina From 1670 Through the Stono Rebellion* (New York: Random House, 1974); Jim Piecuch, *Three Peoples, One King: Loyalists, Indians, and Slaves in the American Revolutionary South, 1775-1782* (Columbia: University of South Carolina Press, 2013); Silvia R. Frey, *Water From the Rock: Black Resistance in a Revolutionary Age* (Princeton: Princeton University Press, 1991); Robert Olwell, "'Domestick Enemies': Slavery and Political Independence in South Carolina, May 1775-March 1776," *The Journal of Southern History* 55 (1989): 21-48; and Olwell, *Masters, Slaves, and Subjects*.

[19] Indeed, as Christopher Tomlins has shown, it was only when a long and bloody civil war temporarily displaced law that colonial plantation America's slave regimes ceased to function. Tomlins, *Freedom Bound,* 569. See also G. Edward White, who argues that "law in America could not serve as a mechanism for transcending, or resolving, disputes about slavery because it had been enlisted on one side of those disputes. If law could not resolve the dispute, the only remaining options were force or the Union's dissolution." G. Edward White, *Law in American History: Volume 1 From the Colonial Years Through the Civil War* (Oxford: Oxford University Press, 2012), 381.

bit," often influenced by custom, but more importantly as judges in the late colonial period borrowed from Roman law.[20] Elsa V. Goveia points to Spanish influence in the developing slavery regimes of the West Indies, although she also emphasizes the role that slave owning planters played in adapting the Spanish system of slavery to meet their local needs.[21] And Christopher Tomlins, while allowing that English common law adaptations were important in a developing law of slavery, suggests that the rationale for slavery as well as some of its most important legal doctrines emerged from the *ius naturale* and *gentium* (the law of nature and the law of nations) which legitimized the enslavement of captives and "brutes."[22]

Moving beyond prescription to probe legal practice instead reveals that English law supplied the forms, procedures, and vocabulary that made slavery possible. England may have lacked a statutory law of slavery, but at the level of practice English law offered colonists workable precedents and templates that allowed them to manage slaves on a daily basis. At the heart of these very English legal practices was the classification of slaves -- at first by custom but later by statute -- as chattel property. Although historians often read antebellum chattel slavery back into the colonial past, South Carolinians were precocious in considering slaves as moveable

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[20] Watson, *Slave Law in the Americas*, 64. In 1965, Arnold A. Sio offered a similar comparative analysis of Roman and American slavery. Arnold A. Sio, "Interpretations of Slavery: The Slave Status in the Americas," *Comparative Studies in Society and History* 7 (1965): 289-308.

[21] Elsa V. Goveia, "The West Indian Slave Laws of the Eighteenth Century," in *Caribbean Slavery in the Atlantic World: A Student Reader*, edited by Verene A. Shepherd and Hilary McD. Beckles (Kingston, Jamaica: Ian Randle, 2000), 580.

[22] Tomlins, *Freedom Bound,* 418. While a majority of scholars argue for the Continental jurisprudential origins of slave law, several historians aver that colonists looked to their English legal heritage when they cobbled together slave codes. These historians, however, primarily link slave law with English policing statutes or criminal law. Bradley Nicholson, for example, suggests that England's "often brutal police law," developed in the sixteenth century as a response to the problem of "masterless men," provided a template for laws meant to control and police a lower stratum of people. Bradley J. Nicholson, "Legal Borrowing and the Origins of Slave Law in the British colonies, *The American Journal of Legal History* 38 (1994): 41. Olwell likewise finds that "while inimitable in fact, the example of English criminal justice was nonetheless a very real presence in the mental worlds of South Carolina jurists" as they crafted and interpreted slave legislation. Olwell, *Masters, Slaves, and Subjects*, 61. Thomas D. Morris has proven the boldest advocate of the English origins of the "Southern" law of slavery, rooting slave law in English property law. Morris, however, focuses almost entirely upon nineteenth-century slave law. Thomas D. Morris, *Southern Slavery and the Law, 1619-1860* (Chapel Hill: University of North Carolina Press, 1996), 42.

chattel property rather than fixed, real property.[23] Doing so gave them instant access to a fully-formed (though continuously modulating) English legal system that had evolved over the early modern period to maximize the power of chattel property owners to buy, sell, and bequeath their possessions without restraint. English property law's categories created an inexorable logic, in fact, that made it possible and perhaps even necessary for colonists to commodify human beings in order to realize the value of their most critical productive property. Properly categorized as chattel, slaves could be slotted into pre-printed bills of sale, mortgages, trusts, and conditional bonds. They also could be substituted for other moveable property in common law causes of action or in Vice Admiralty litigation, where they could be treated just like cargo. Indeed, English law's formulaic nature, rather than acting as a rigid barrier to adaptation, made it infinitely modifiable for slaveholders who sought to manage their human property. By allowing them to analogize slaves to ships, cows, or horses, the language of chattel slavery unlocked a host of ways of proceeding that suited South Carolina colonists' need to treat their slaves as a species of property.[24]

This procedural flexibility, which benefitted slaveholders, combined with jurisdictional diversity to create multiple modes of proceeding when colonists litigated over enslaved people. As English legal historians have shown, jurisdictional variety was the norm rather than the exception in early modern England, and English colonists brought legal experiences and traditions to the New World that appear surprisingly varied against the backdrop of scholars' assumptions of a monolithic Anglo-American common law heritage.[25] This was particularly true

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[23] Philip D. Morgan, *Slave Counterpoint: Black Culture in the Eighteenth-Century Chesapeake and Lowcountry*, (Chapel Hill, University of North Carolina Press, 1998), 261; Winthrop D. Jordan, *White Over Black: American Attitudes Toward the Negro, 1550-1812* (Baltimore: Penguin, 1968), 98.

[24] Watson, *Slave Law in the Americas*, 64.

[25] Amy Louise Erickson, *Women and Property in Early Modern England* (London: Routledge, 1993), 5; Tomlins,

in South Carolina, where colonists replicated England's jurisdictional map more precisely than any other colony. In contrast to Virginia, for example, where county courts blended features of common law and equity courts, South Carolina possessed institutionally distinct common law (Court of Common Pleas and Court of General Sessions of the Peace), equity (Court of Chancery), ecclesiastical (Court of Ordinary), and vice admiralty (Vice Admiralty Court) jurisdictions from an early date.[26] These courts applied different substantive and procedural laws. South Carolina colonists created a legal system that gave them real options when it came to litigating their disputes over slaves and did not, as some have suggested, replicate an English court system in a way that flattened its jurisdictional diversity. This landscape changed little over time, despite sporadic failed attempts to introduce county courts in the colony.[27] In fact, legal practice in South Carolina defies the traditional "anglicization" narrative, which posits that colonists increasingly conformed their laws and institutions to those of England over the course of the eighteenth century.[28] Certainly the education of attorneys in South Carolina improved over time – more students from South Carolina studied at the Inns of Court in England in the late colonial period than from any other mainland colony – and pleading, particularly in the common law Court of Common Pleas, became more elaborate.[29] But throughout the colonial period, South Carolina colonists conformed their institutions and practice as closely to that of England as

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Freedom Bound, 188.

[26] John Edker Douglass, "The Creation of South Carolina's Legal System, 1670-1731" (Ph.D. diss., University of Missouri-Columbia, 1984), v. By 1731, the colony had four courts of record, located in Charlestown, as well as magistrate and slave courts which functioned at the parish level. The Court of Common Pleas was a civil jurisdiction that sat four times a year. The Court of General Sessions of the Peace heard criminal cases twice per year. Both common law courts were presided over by the Chief Justice. Douglass, "The Creation of South Carolina's Legal System," 153, 285.

[27] Ibid., 84.

[28] John M. Murrin, "Anglicizing an American Colony: The Transformation of Provincial Massachusetts" (Ph.D. diss, Yale University, 1966), *passim*.

[29] Robert M. Weir, *Colonial South Carolina: A History* (Columbia: University of South Carolina Press, 1997), 251; William E. Nelson, *The Common Law in Colonial America, Volume II: The Middle Colonies and the Carolinas, 1660-1730* (New York: Oxford University Press, 2013), 70.

possible, and this meant that those who sought a judicial resolution to disputes over slaves could take advantage of multiple jurisdictions and a variety of ways of proceeding at law.

Slavery and Procedure

Taken together, the extensive replication of English institutions, forms, and procedures in colonial South Carolina directly contributed to the dehumanization of enslaved people in the British Atlantic World. Historians have long puzzled over the capacity of colonists in plantation America to treat human beings as property. Indeed, English colonists persisted in treating slaves as things at law despite the fact that many colonists, particularly by the mid-eighteenth century, recognized that African slaves were human beings, albeit ones they believed to be of an inferior sort. Henry Laurens, for example, lamented the fate of "three wretched human creatures call'd Negroes" who had been consigned to him in 1764, only to boast in the same letter that their sale was "the greatest Sale" he had ever made.[30] He also condemned the "inhumanity of seperating & tareing assunder" slave families, which he claimed he would "never do or cause to be done" except, of course, "in case of irresistable necessity."[31] Colonist Catherine Percy likewise thanked her male relation for his "care & attention" in attending to "the sale" of her "Negroes," expressing her "concern" for the slaves in 1778. But she also celebrated the fact that her human property had "more then doubled the interest" and "sold most extravagantly high."[32]

Laurens and Percy, like colonists throughout British plantation America, oscillated between understanding the slaves they owned as human beings and as objects as it suited their

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[30] Henry Laurens to John & Thomas Tipping, Barbados, 4 December 1764, *HLP*, 4:513-14.

[31] Henry Laurens to Elias Ball, 1 April 1765, *HLP*, 4:595-97.

[32] Catherine Percy to Barnard Elliot, 5 October 1778, Baker Family Papers, 11/537/10, SCHS.

economic interests. They did so without any apparent discomfort or concern, despite our expectation that they should have perceived treating people as property as a troubling contradiction. In fact, some historians have suggested that it *was* troubling, that as the eighteenth century progressed slave owners grew increasingly conflicted over their ownership of human property, and that paternalism and its accompanying rhetoric helped to ease their psychological discomfort.[33] But when we watch what slave owners did, not what they said, we see that they suffered no cognitive dissonance when they claimed property rights in people.

We are left to wonder why. Certainly the fact that slavery was ubiquitous in the early modern world partially explains why colonists suffered no qualms about treating people as property. As D. B. Davis has famously observed, it is antislavery rather than slavery that requires an explanation, so pervasive was the practice of slaveholding in the ancient, medieval, and early modern periods.[34] But the very nature of English law also made it easier for colonists to dehumanize slaves. Indeed, the early modern English law that colonists brought with them to North America was a law of procedures and forms, categories and jargon. It provided a vocabulary and a meta-language that seems at first glance to be inflexible, but in practice was highly adaptable. As long as colonists could fit slaves into this pre-existing linguistic framework, they could access a legal system that had evolved over time to suit the needs of a rapidly commercializing society. In fact, the logic of English law made it *necessary* for colonists to insert slaves into English legal categories and to deploy older procedural formulae if they hoped to maximize the value of their human property. In this sense, legal procedure functioned instrumentally in colonial South Carolina and in the British Atlantic World, giving colonists

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[33] Eugene D. Genovese, *Roll, Jordan, Roll: The World the Slaves Made* (New York: First Vintage Books, 1976), 5; Morgan, *Slave Counterpoint*, 295-96.

[34] David Brion Davis, *The Problem of Slavery in the Age of Revolution, 1770-1823* (Oxford: Oxford University Press, 1999), 41.

access to particular ways of proceeding at law that suited their financial interests.

However, the language of English law in colonial South Carolina was more than a mere tool. It also performed an important psychological function, insulating colonists from the need to contemplate the moral consequences of their legal choices. Procedure in British plantation America served to reduce friction, in much the same way that Hannah Arendt found that "officialese," clichés, and stock phrases allowed twentieth-century Nazi functionaries to participate in the mass-murder of Jewish people without reflecting upon the their actions. For Arendt, the repetition of empty phrases was "connected with an inability to think," and these phrases were the "most reliable of all safeguards" against "reality." Evil for Arendt was banal, and it appeared in the guise of categories, jargon, and bureaucracy.[35] In much the same way, when British colonists analogized slaves to things and when they classified enslaved people as property, they shielded themselves from the need to see slaves as simultaneously human beings and as objects as law, and from registering this as a contradiction. For British colonists, categories were placeholders, devoid of any intrinsic moral value. They deployed them instrumentally in order to fit slaves into a familiar English property law rubric. But when they did so, they also made it possible for themselves to participate uncritically in a brutal economic system.

Legal categories and legal language did not merely function instrumentally in colonial South Carolina and the British Atlantic World, nor did they simply act as a psychological balm. The language of law also created new legal and social realities. As anthropologists, linguists, and legal theorists have recognized, law is the "locus of a powerful act of linguistic appropriation,

[35] Hannah Arendt, *Eichmann in Jerusalem: A Report on the Banality of Evil* (New York: Penguin, 2006), 46-47.

where the translation of everyday categories into legal language effects powerful changes."[36] In other words, the language of law is more than "transparent;" indeed, it possesses "dynamics of its own that contribute to social results."[37] Legal language "creates new meanings through its use in social context," and when we "only focus on the content (semantics) rather than the form (pragmatics) of speech, we miss a great deal about the creative function of language."[38] When South Carolina colonists categorized slaves as chattel property, they not only smoothed over the tensions between holding universal ideas of humanity and treating people as things, they also created "a social reality that did not exist prior to the act of speaking."[39] Indeed, by calling slaves chattel, by treating African people as things at law, colonists in South Carolina and throughout the British Atlantic constructed a legal world in which slaves were not just *like* things, they *were* things. Through the act of categorization, they rendered factual what had been a mere supposition: the idea that Africans were less than human. Repeated over centuries, slotting slaves into English legal categories in turn foreclosed the possibility that enslaved people might be considered anything other than chattel, just as the classification of slaves as subjects in other imperial contexts opened up space for negotiation and resistance.[40] Far from an item of antiquarian interest, then, English law's forms and procedures, not just its substance, matters tremendously in accounting for the dehumanization of Africans throughout the British Atlantic World.

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[36] Elizabeth Mertz, "Legal Language: Pragmatics, Poetics, and Social Power," *Annual Review of Anthropology* 23 (1994): 435-55

[37] Ibid., 437.

[38] Elizabeth Mertz, "Language, Law, and Social Meanings: Linguistic/Anthropological Contributions to the Study of Law," *Law & Society Review* 26 (1992): 421-22.

[39] Ibid., 422.

[40] Malick W. Ghachem, *The Old Regime and the Haitan Revolution* (Cambridge: Cambridge University Press, 2012), 58.

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In each chapter of my dissertation, I examine a different facet of slavery's multiple laws, and I move from analyzing quotidian legal practice to studying litigation patterns. Chapter One emphasizes the relationship between English property law and slavery. I follow South Carolina colonists as they sought to classify slaves as property, and as they deployed their knowledge of English property law on a daily basis to manage slaves. From an early date, South Carolina colonists considered slaves to be personal property that could be bought, sold, and bequeathed without restraint. Whereas most plantation colonies settled upon some mixture of chattel and real property when they determined how to classify their slaves, South Carolina colonists adopted pure chattel slavery in order to facilitate commercial transactions involving enslaved people, and to expand their credit with British merchants. Through close readings of legal forms, including marriage settlements, trusts, and wills, in this chapter I also watch small acts of legal transformation, moments in which colonists analogized slaves to things. In these acts of legal analogy, South Carolina colonists compared enslaved people to livestock and other valuable moveable objects, not because they believed them to be the same as those objects, but because they believed them to be the same at law. Nonetheless, these small acts of transformation had much larger consequences, giving motion and meaning to statutory schemes that allowed colonists to treat slaves as things.

Chapter Two, an examination of creditor-debtor relations, extends this analysis. In this chapter I watch colonists as they bought and sold slaves, and as they leveraged the value inherent in African bodies to expand their plantation and mercantile enterprises. Indeed, the law of credit

and debt played an important role in determining how colonists managed their slaves, as slaves were a significant form of collateral in plantation colonies like South Carolina. Colonists structured slave sales using English legal forms, and particularly conditional bonds, which allowed them to buy slaves on credit without needing to consult a lawyer. When insolvency loomed, they also maneuvered in the shadow of the law, dodging writs, arbitrating disputes, and absconding across colony lines with mortgaged human property. Building on the work of scholars of the nineteenth-century internal slave trade, in this chapter I show how colonists considered slaves first and foremost to be economic assets. They drew upon a degree of legal knowledge that is surprising from a modern perspective in order to treat slaves not only as a source of labor but also as a critical source of human capital.

I supplement these analyses of daily legal practice by attending to litigation in understudied colonial courts, including Vice Admiralty and Chancery jurisdictions. In Chapter 3, for example, I examine slave litigation in the Vice Admiralty Courts of colonial South Carolina and Jamaica. Following litigants of all sorts -- including planters, merchants, and sailors -- I argue that these litigants facilitated the dehumanization of Africans throughout the Atlantic World when they asked Vice Admiralty Courts to recognize property rights in people. Indeed, Vice Admiralty law and procedure allowed colonists and sailors to compare slaves (and free Africans) to cargo and even ships, and to demand that courts condemn and sell slaves for the benefit of the winning party. Far from serving the interests of elite merchants and planters, these courts also catered to sailors and those in the maritime trades, suggesting that even the most humble litigants became skilled in the nuances of classifying and claiming slaves as property.

In Chapter Four, I turn to a study of South Carolina's Chancery Court, which applied the law of equity and followed bill procedure utilized by the Chancery Court in England. Drawing upon

unstudied manuscript Chancery Court records, I argue that colonial equity jurisdictions routinely adjudicated claims to slaves, and that litigants seamlessly modified English equity law to satisfy their legal need to commodify human beings. South Carolina's equity jurisdiction provided colonists with an opportunity to fully explain their customary arrangements involving slaves, including slave hiring agreements and plantation rental contracts, rather than forcing them to adhere to more restrictive common law forms of action. As a result, in colonial South Carolina, a court that originated as a court of the King's conscience became a slave court, and the language of equity was deployed to justify the most inequitable of practices.

British newcomers to South Carolina saw no irreconcilable tension between English law and the ownership of slaves, and in my final chapter I explore how administrative law in occupied Charlestown evolved to manage an increasingly mobile slave population. Rather than reforming colonial slave law, British administrators and military officers heavily relied upon colonial precedents as they balanced their need to maintain South Carolina's plantation economy against their desire to employ the labor of slaves in British army departments. Individual British administrators also learned to buy, sell, and argue over slaves, adopting slavery's legal language as they sought to supplement their incomes and build wealth. As they established their own plantations and confiscated the human property of people they called rebels, they, too, treated slaves as things on a daily basis, replicating local legal practices that did not appear from their perspective to be maladaptive. Taken together, this chapter and those preceding it upend traditional narratives that link English law's extension overseas with the flowering of liberty. Focusing on practice, not prescription, I show how English law ultimately served colonists' desire to command slave labor, with tragic human consequences that reverberated throughout the Atlantic World.

Chapter 1
Slavery and Property

In the last decade of the eighteenth century, South Carolina lawyer John Phillips painstakingly transcribed into his legal precedent book the proper form of pleadings for a case involving "[t]rover for a Negro."[1] This newest addition to his handwritten collection of legal forms and court decisions represented one of many entries touching on litigation over slaves, including a sample writ of "[t]respass vi et ar[mis] for beating a slave," a writ of "trespass for killing a negro," and a form of declarations "to recover for an unsound Negro sold for a sound price." According to the formula Phillips followed, the plaintiff in a slave trover case -- a lawsuit over the improper conversion of slave property -- should first declare that he "was possessed of a certain Negro woman Slave" who was valued at "the price of ___ as of his own proper goods & chattels." He also should allege that the slave subsequently came "into the hands" of the defendant, who "craftily & subtilly" converted the slave "to his own proper use" even though he knew that the slave was the plaintiff's property.[2] Having established that he owned the slave, that the defendant knowingly failed to return the slave, and that this willful act had resulted in damages, the plaintiff in such a case might request relief.

That Phillips created a precedent book like this is not surprising. Nor does his interest in slave litigation shock, especially given the fact that he practiced in South Carolina, a black majority colony by the second decade of the eighteenth century. What makes this particular entry in Phillips's precedent book noteworthy is the fact that the original source for this trover

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[1] In this common law cause of action based on English legal precedents, the plaintiff complained in a plea of trespass on the case that the defendant had found his property and wrongfully converted it to his own use. J.H. Baker, *An Introduction to English Legal History*, 4th ed. (London: Butterworths Lexis Nexis, 2002), 399.

[2] John Phillips, Book of Precedents, 1788-1839, 34-400, 37, South Carolina Historical Society, Charleston, South Carolina.

form did not, in fact, describe a case of trover for a slave, but for a horse. Indeed, it seems that Phillips first made an exact copy of pleadings from litigation over an "iron gray horse" and only later edited his transcription, striking out "iron gray horse" and replacing it with "Negro woman Slave." When and why Phillips edited this entry is unclear, but his small act of dehumanization -- substituting a person for an animal in a handwritten legal precedent book -- encapsulates a larger process by which English property law, wielded by legally savvy colonists, transformed people into things throughout the British Atlantic World. In fact, when Phillips made this substitution, when he replaced one chattel with another that was to his mind legally identical, he repeated an act of analogy that had been performed countless times before by South Carolinians of all sorts as they managed their slaves on a daily basis. At the birth of a new nation and at the turn of a new century, Phillips drew upon a long history in which colonists cloaked the human tragedy of slavery in a distinctively English idiom of property law and inheritance. Using their knowledge of English property law to buy, sell, and devise slaves, these colonists exhibited the same dexterity in commanding enslaved people using the language of English property law as they did in manipulating the environment to suit the needs of rice agriculture.[3]

Historians have long understood that transforming people into property was Atlantic World slavery's defining characteristic, and for most scholars the dehumanization of slaves both in law and in daily life "was absolutely central to the slave experience." David Brion Davis, for example, has argued that "[f]rom antiquity, chattel slavery was modeled on the property rights traditionally claimed for domestic animals."[4] Eugene Genovese likewise has observed that slavery "rested on the principle of property in man," the idea that a slave was an "*instrumentum*

[3] S. Max Edelson, *Plantation Enterprise in Colonial South Carolina* (Cambridge: Harvard University Press, 2006), 5.

[4] David Brion Davis, *The Problem of Slavery in the Age of Emancipation* (New York: Alfred A. Knopf, 2014), 11.

vocale -- a chattel, a possession, a thing, a mere extension of his master's will."[5] Similarly, for Philip D. Morgan, "masters thought of and acted toward" slaves "using the language of property."[6] These historians largely have assumed that the property component of slavery triggered cognitive dissonance on the part of slave owners, that treating people as property posed a "fundamental contradiction" that slave owners sought to overcome in various ways, and in particular by developing a paternalist ethos that emphasized mutual obligations binding masters and slaves.[7]

In this chapter I challenge this assessment that making people into property embedded a core contradiction at the heart of slave societies that destabilized American slavery. By describing the process by which slaves were transformed into property, I show how a legal language of categorization and description functioned to establish a segregated area of meaning that was, to a great degree, cut off from the daily encounters that gave the lie to the notion that enslaved human beings were things. Rather than analyzing slave owners psychologically to understand how they justified treating people as property, I trace how, as a practical matter, English law made the dehumanization of slaves possible and even, in the terms of its own internal logic, necessary. In statutes and daily legal transactions, colonists compared slaves to moveable goods and livestock in order to fit their human property into a familiar English legal rubric that divided possessions into chattels (moveable, personal property) and real estate (land). They did so in order to accomplish particular economic objectives. Whether seeking to shield

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[5] Eugene D. Genovese, *Roll, Jordan, Roll: The World the Slaves Made* (New York: First Vintage Books, 1976), 3-4.

[6] Philip D. Morgan, *Slave Counterpoint: Black Culture in the Eighteenth-Century Chesapeake and Lowcountry*, (Chapel Hill, University of North Carolina Press, 1998), 259.

[7] Genovese, *Roll, Jordan, Roll*, 5; Morgan, *Slave Counterpoint*, 257. Jennifer Morgan also has argued that "the claim on the part of slaveowners that the mean and women they enslaved were not fully human was "[t]he contradiction at the heart of slavery." Jennifer L. Morgan, *Laboring Women: Reproduction and Gender in New World Slavery* (Philadelphia: University of Pennsylvania Press, 2004), 167.

slaves from creditors or to remove restraints on alienability (sale), colonists first and foremost perceived their slaves to be economic assets, to be property that could be bought, sold, and bequeathed for their benefit. When they compared slaves to livestock and when they drafted laws that classified slaves as property, colonists drew upon a familiar legal vocabulary to maximize the value of their slaves. Their language of description and categorization had little or no ideological content, nor did colonists betray any concern with reconciling the humanity of slaves with their legal classification as property. In comparing slaves to cattle, for example, colonists did not signal their belief that slaves were like livestock in reality. Rather, moments of analogy confined the comparison to whether colonists thought slaves were like livestock at law. By grounding this argument in legal practice, I challenge characterizations by scholars such as Jennifer Morgan, who suggests that the conflation of people and animals posed an ideological conundrum that opened up space for enslaved people to assert their humanity and undermine their categorization as property. Instead, I see the law of slavery operating in colonial South Carolina to reinforce the salience of the slave-as-thing.[8]

In this chapter I examine South Carolina colonists' treatment of slaves as property, placing their legal activities in the context of wider trends in plantation America. Moving from a comparative analysis of property law provisions in Atlantic World slave statutes to daily legal practice in colonial South Carolina, I argue that South Carolina colonists were precocious in their treatment of slaves as chattel property. Whereas the process of elaborating a slave property regime was attenuated in other plantation colonies, from an early date South Carolina colonists considered slaves to be chattels, relying upon customary mercantile practice rather than statutory law to define slaves as property. When South Carolina finally codified chattel slavery in 1740, members of the local legislature, the Commons House of Assembly, made a conscious choice not

[8] Morgan, *Laboring Women*, 173.

to follow precedents in other plantation colonies, where slaves were treated as real estate for some purposes and chattel for others. In South Carolina, colonists recognized the commercial benefits of removing all restraints on masters' rights to transfer enslaved people, and they wrote into law a type of "pure" chattel slavery that foreshadowed legal developments in the nineteenth-century South. Taken together, statutory law and daily legal practice in the colony reveal how an entire legal culture was built upon the assumption that slaves could be made to fit easily into an English property law rubric. English law provided the vocabulary, forms, and procedures that allowed colonists to treat slaves as things and to analogize people to livestock and other personal property. Rather than viewing the processes by which South Carolina colonists adapted English law to suit their slave society as fraught with contradictions, I show the ease with which they applied English property law to slaves.

By reconstructing a world in which English property law facilitated the dehumanization of slaves, I reinforce and extend recent scholarship that places English property law at the heart of British colonization enterprises -- from claiming, distributing, and improving land, to dispossessing first peoples.[9] With the exception of legal historian Claire Priest, who analyzes the impact of Parliamentary statutes on colonial slave classification schemes, scholars of English property law's migration across the globe have ignored slaves, the most valuable property in the

[9] These also include studies of how colonists and imperial authorities claimed, chartered, and mapped land; disputes over aboriginal title; and the development of jurisdiction as a geographical construct. See Stuart Banner, *Possessing the Pacific: Land, Settlers, and Indigenous People from Australia to Alaska* (Cambridge: Harvard University Press, 2007); John McLaren, A.R. Buck, and Nancy E. Wright, eds. *Despotic Dominion, Property Rights in British Settler Societies* (Vancouver: UBC Press, 2005); John C. Weaver, *The Great Land Rush and the Making of the Modern World, 1650-1900* (Montreal: McGill-Queen's University Press, 2003); Lauren Benton, *A Search for Sovereignty: Law and Geography in European Empires, 1400-1900* (Cambridge: Cambridge University Press, 2010); Lisa Ford, *Settler Sovereignty: Jurisdiction and Indigenous People in America and Australia, 1788-1836* (Cambridge: Harvard University Press, 2010); Christopher Tomlins, *Freedom Bound: Law, Labor, and Civic Identity in Colonizing English America, 1580-1865* (Cambridge: Cambridge University Press, 2010); Ken MacMillan, *Sovereignty and Possession in the English New World: The Legal Foundations of Empire, 1576-1640* (2006); Shaunnagh Dorsett, "Mapping Territories," 137-58 in *Jurisprudence of Jurisdiction*, edited by Shaun McVeigh (New York: Routledge, 2007); idem., "'Since Time Immemorial': A Story of Common Law Jurisdiction, Native Title, and the Case of Tanistry," *Melbourne University Law Review* 26 (2002): 32-59; Andrew Fitzmaurice, "The Genealogy of Terra Nullius," *Australian Historical Studies* 129 (2007): 1-15.

British Empire.[10] South Carolina colonists, however, understood that property and the law that governed it were of singular importance in arranging their economic affairs, including how they managed enslaved people. Their activities in turn prove that the neat categories of public and private law which legal historians deploy were meaningless in the context of plantation America.[11] In slave societies like South Carolina, *all* law, including property law, was slave law. Indeed, slave law could be found in "public" statutes, but we also encounter it in bills of sale, wills, and marriage settlements. Understanding this reality upends traditional narratives that link English law's extension overseas with the flowering of liberty. Just as historians have begun to uncover how English law facilitated the dispossession of first peoples, from America to Australia, I show its central role in the expansion of a brutal slave regime.

At the same time, interrogating moments of analogy for their legal rather than their ideological content complicates an older historiography that casts the history of slavery as a sequence of power struggles and negotiations between masters and slaves set against the backdrop of more or less static plantations.[12] In fact, colonists' interactions with slaves were shaped not only by plantation power dynamics but also by broader economic forces that required slave owners to respond to changing commercial environments. English property law provided a ready framework that allowed colonists to do so. Placing the language of dehumanization in its broader economic context in turn invites us to see slave owners as less psychologically or morally conflicted than we might expect. Reacting not only to ongoing slave resistance but also

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[10] Claire Priest, "Creating an American Property Law: Alienability and Its Limits in American History," *Harvard Law Review* 120 (2006): 414.

[11] Most recently, G. Edward White has suggested that colonial law consisted of "a regime of public written law," which "governed the process of securing title to land," and a second category of private law that "governed the status of marital property, personal and well as real." G. Edward White, *Law in American History: Volume 1 From the Colonial Years Through the Civil War* (Oxford: Oxford University Press, 2012), 80.

[12] See Genovese, *Roll, Jordan, Roll*, 6-7, 10.

to wider commercial demands, colonists could modulate between understanding the slave as human and the slave as property without pause. English property law, in fact, encouraged a type of thinking that allowed and even required colonists to obscure the humanity of enslaved people if they wished to maximize their economic value. Crucially, however, if colonists' legal choices lacked ideological content, documenting how they compared people to things also reveals that moments of legal analogy had distinctly ideological *consequences*. In the aggregate, South Carolina colonists internalized these analogies, and they were layered atop pre-existing beliefs about African racial inferiority. English law, then, encouraged a type of mechanical thinking that codified the dehumanization of Africans throughout the Atlantic World, with invidious and lasting consequences.

In part one of this chapter, I briefly describe the law of property in England, and examine how colonists adapted English property law to suit their needs as slaveholders. Because the process by which colonists used English law to transform people into things is immediately visible in the slave codes passed by colonial assemblies, in part two I examine how colonists in Barbados, Jamaica, and Virginia classified enslaved people as property. Despite scholars' assumption that slaves always were considered chattel property, assembly members carefully weighed different classificatory schemes, modulating between treating slaves as real estate and slaves as chattels in order to balance the commercial needs of colonial debtors and British merchants. Classifying slaves as real estate, for example, protected slaves from creditors, but at the cost of contracting credit that was based on the slaves' underlying value; treating slaves as chattel subjected them to creditors' claims while making it easier for colonists to buy, sell, borrow against, and devise enslaved people.

In part three, I examine statutory slave law in South Carolina, placing the colony's slave

codes against a backdrop of property law administration in the colony. In South Carolina, colonists selectively drew upon English law to create one of the most "liberal" property law regimes in the American colonies. This regime facilitated not only the development of vibrant markets in land but also in enslaved people by removing restraints on alienability and devisability. Moving from a customary legal regime in which slaves were treated as chattels *de facto* to a statutory law of slavery that codified customary practice, South Carolina colonists constructed a legal system that differed from others in plantation America, departing from West Indian precedents to classify slaves as chattel for all purposes. That they did so demonstrates their familiarity with legal practice in the slave trade, where slaves were considered merchandise, as well as their decidedly commercial orientation. From an early date colonists recognized that chattel slavery provided slave owners with a bundle of rights that facilitated the easy exchange of slaves and expand their credit with merchants.

The classification of slaves as chattel property both in practice and at law in South Carolina had decidedly negative consequences for slaves. In this chapter's final section I describe discrete moments in which colonists transformed people into things, showing the long-lasting and negative consequences of a regime in which colonists routinely analogized slaves to other types of personal property. Most South Carolina colonists did not vocalize their mental calculations or even signal them, as Phillips did, by physically substituting the word "slave" for the word "horse." Nonetheless, in transactional documents and correspondence that supply our only evidence for daily legal practice, we can see that colonists frequently grouped slaves with livestock. As D.B. Davis has argued, the sleight of hand by which human beings were compared to animals, performed countless times over the course of a century and a half, fueled the growth

of scientific racism in the late eighteenth and early nineteenth centuries.[13]

Adapting English Property Law

English property law, which provided the foundation for property law in the American colonies, divided property into real property and chattel property. Chattel property, also called personal or moveable property, included money, household furniture, clothing, debts, and livestock, while real estate typically denoted land.[14] Because land in England was central to economic, social, and political life, the law of property developed to provide significant protections for real property that did not apply to chattels. Specifically, unsecured creditors -- creditors who had not been offered land as security for debts -- could not attach a debtor's land upon his death, and real property descended to a debtor's heirs "free of all legal claims" of unsecured creditors. Likewise, even when land was offered as security, the cost and procedural difficulties of obtaining a judgment against the debtor in court made seizing land used as security impracticable. In contrast, debtors could seize and sell personal property to satisfy debts even if that property had not been offered as security.[15] Land, unlike personal property, also could be entailed, which prevented heirs from dividing or alienating (selling) an estate, and ensured that land would pass intact from generation to generation.[16]

[13] Davis, *The Problem of Slavery in the Age of Emancipation*, 32.

[14] Amy Louise Erickson, *Women and Property in Early Modern England* (London: Routledge, 1993), 23-24. Leases of land were considered "chattels real," "halfway between real and personal property." Although land in England could be held as freehold, copyhold, or leasehold property, only freehold property was considered to be real property. *Ibid*., 24.

[15] Priest, "Creating an American Property Law," 388.

[16] Ibid., 419.

In England, "four separate but overlapping legal systems" administered legal disputes over real and personal property: common law, equity, ecclesiastical, and local courts (including manorial and borough courts).[17] These jurisdictions applied different rules in determining legal questions about the transmission of property, although over the course of the seventeenth century jurisdictional competition and Parliamentary statutes had the overall effect of standardizing property law administration. Roughly, the rules of property law that these courts followed created two distinct but overlapping regimes, one that addressed questions about marital property and another that governed the inheritance of real and personal property upon an individual's death.[18] Rules pertaining to marital property primarily concerned the ownership and transmission of married women's property (although courts also adjudicated questions about widowers' rights to land and chattels). At common law, a married woman was considered *feme covert*, subject to the doctrine of coverture, which stipulated that during marriage her legal identity was "covered" by that of her husband. As a result, a married woman could not make contracts in her own name; she could not make a will; she could not sue or be sued without her husband; and she forfeited control over her dowry and all personal property.[19] However, upon her husband's death she became entitled to a dower portion, which consisted of one-third of her husband's real property for life and one-third of his personalty outright.[20]

Although these legal rules deprived women of meaningful property rights in theory, individuals sought to mitigate coverture's deleterious effects in practice, in part because property holders valued their daughters and cared for their maintenance and comfort, but also because

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[17] Erickson, *Women and Property in Early Modern England*, 23.

[18] *Ibid.*, 24.

[19] *Ibid.* Widows and single women, however, could and did make wills.

[20] Carole Shammas, Marylynn Salmon, and Michael Dahlin, *Inheritance in America From Colonial Times to the Present* (New Brunswick: Rutgers University Press, 1987), 25.

they sought to protect familial wealth. Of primary concern was protecting an heiress's property from an irresponsible or avaricious husband (particularly a husband who was a chronic debtor), and to prevent husbands from controlling valuable property after a wife's death. In response to these dynastic concerns, over the course of the seventeenth and eighteenth centuries propertied families in England began to shield familial assets through marriage settlements, which conveyed property to trustees for the benefit of a woman in anticipation of her marriage. These settlements ensured that a husband could not access or dispose of his wife's property. Instead, a wife maintained control over her property (usually through trustees) during her marriage, thereby safeguarding familial wealth from her husband and his creditors and ensuring its transmission intact to the next generation. Married women could not dispose of their property via testamentary bequest at common law, a restriction that marriage settlements superseded by including stipulations authorizing a married woman to make a will despite her coverture. Although they were unenforceable at common law, marriage settlements were honored and litigated in equity courts, a jurisdiction that will be discussed more fully in Chapter 4.[21] As settlers established colonies overseas, these evolving English mechanisms for safeguarding female property proved useful for managing widows' and daughters' inheritance, which commonly included of valuable slaves.

In addition to addressing questions about female property, English property law evolved to govern the transmission of property upon an individual's death. The question of overarching significance to family members and courts was whether a decedent died with or without a will (intestate). In contrast to Continental legal systems, where testamentary freedom was limited, by the end of the seventeenth century English men (as well as unmarried women and widows) could

[21] Erickson, *Women and Property in Early Modern England*, 26.

dispose of both personal and real property via will with few restraints.[22] The act of writing a will gave testators the power to "disinherit whomever they pleased," only subject to a widow's dower claim.[23] Writing a will also allowed a testator to chose an executor (or executrix), the person responsible for inventorying, managing, and distributing a decedent's estate to heirs, a process known as probate and overseen by ecclesiastical courts.[24]

For those who did not choose to make a will, the common law rules of inheritance governed the descent of real property. Under the "canons of descent," which had been followed since at least the thirteenth century, land descended by primogeniture (to the first-born son), but in the absence of male heirs daughters inherited jointly.[25] Over the early modern period, questions about the inheritance of intestates' personal property increasingly came to be governed by Parliamentary statute. In the century immediately preceding the founding of the Carolina colony (1670), a period of significant legal change, legislation rather than litigation or custom (with a few exceptions) controlled questions of inheritance. This trend culminated in a 1670 statute that gave intestates' widows one-third of a decedent's personalty (if the couple had issue) and provided for equal inheritance of personal property by children.[26] Like testates' estates, intestates' estates were administered by ecclesiastical courts, which appointed an administrator (or administratrix) to manage, account for, and distribute the decedent's property to heirs at law. Parliament's resolution of what had previously been an anarchic system of intestate property

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[22] John E. Crowley, "Family Relations and Inheritance in Early South Carolina," *Histoire Social – Social History* 17 (1984): 35. However, as Carole Shammas has argued, it appears that merely one in four decedents in early modern England left a will, and wealth and testation were correlated: the propertied were more likely to make wills. Carole Shammas, "English Inheritance Law and Its Transfer to the Colonies," *The American Journal of Legal History* 31 (1987): 151.

[23] Shammas, Salmon, and Dahlin, *Inheritance in America*, 27.

[24] Erickson, *Women and Property in Early Modern England,* 27.

[25] *Ibid.*, 26.

[26] Shammas, Salmon, and Dahlin, *Inheritance in America*, 26.

distribution set an important precedent for colonists in South Carolina and in other colonies that would primarily rely upon local legislation in delineating intestacy rules and that would likewise use statutes to classify slaves as property for inheritance purposes.

The administration of English property law occupied significant institutional and mental space in early modern English legal culture. Indeed, property law comprised the heart of English common law, which developed to provide litigants with a royal forum for adjudicating disputes over land.[27] Consequently, as English colonists began to settle in North America and the West Indies, adapting an English property law regime to suit colonial societies was of primary concern.[28] As Carole Shammas has shown, colonies "followed one of two patterns," either delaying the passage of "any very detailed bill on inheritance" or "continually fiddl[ing] with specific provisions." In general, colonies with large dissenting populations (primarily Puritans and Quakers) deviated most dramatically from English precedents and changed their inheritance schemes frequently.[29] In contrast, colonies in the Chesapeake and the Carolina Lowcountry, as Marylynn Salmon has argued, adhered to English legal precedents as closely as possible, largely for cultural reasons. According to Salmon, settlers in these colonies came to America "unwillingly" in the hopes of amassing large fortunes and succeeded "at the price" of "their dignity," and, in response, they mimicked English forms "as closely as possible" to compensate for their feelings of cultural inferiority.[30]

As we shall see, however, colonists' decisions to adhere to English legal forms and

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[27] Baker, *An Introduction to English Legal History*, 15.

[28] As John McLaren, A.R. Buck, and Nancy E. Wright have argued, "[t]he use and regulation of property are central to an understanding of the history and culture of the settler colonies of the British Empire." John McLaren, A.R. Buck, and Nancy E. Wright, "Property Rights in the Colonial Imagination and Experience," in *Despotic Dominion*, 1.

[29] Shammas, Salmon, and Dahlin, *Inheritance in America*, 30

[30] Marylynn Salmon, *Women and the Law of Property in Early America* (Chapel Hill: University of North Carolina Press, 1986), 10.

procedures also represented a practical acknowledgement that English property law provided a workable framework for thinking about and adjudicating disputes over land and, more importantly, slaves. Indeed, in plantation colonies that relied upon slave labor, assembly members classified slaves as real estate or as chattel property to suit the needs of the planter class they represented, working with rather than discarding English property law forms and concepts in order to maximize the commercial and productive value of their human property. Despite scholars' assumptions that slaves were a novel form of property and that adapting colonial laws to suit slave societies was a fraught process, provincial statutes instead reveal how easily colonists fit slaves into an English property law rubric. These statutes became sites of legal innovation in that they explicitly authorized the ownership of human beings, but they also were the natural continuation of a dynamic English legal culture in which legislation increasingly defined the contours of property law regimes.

Real versus Chattel Property in Plantation America

In plantation America, where slaves comprised colonists' most valuable property, fitting slavery into the rubric of English property law with its bifurcation of property into chattels personal and real estate required colonial assemblies to make determinations that impacted slave owners' rights to sell, devise, and shield slaves from creditors. Each property category endowed slave owners with a different bundle of rights. Classifying slaves as either real estate or chattels had distinctive legal and economic ramifications. Whereas treating slaves as chattel property facilitated their transfer via sale or bequest, slaves defined as real estate could be annexed to land and entailed. Colonial elites throughout plantation America understood the economic stakes in

classifying their slave property, and they hotly debated whether slaves should be deemed chattels or real property, often settling upon some mixture of the two.

Despite the fact that colonists were deeply concerned with determining how their human property would be classified, most historians have ignored this aspect of slave law for a variety of reasons. First, even those who are acutely conscious of slavery's chronological and regional variations tend to collapse time by assuming that slaves have always been classified as chattel property. Indeed, the phrase "chattel slavery" has become an uninterrogated phrase used to describe the legal status of human beings as property in British America and the nineteenth-century American South and to emphasize the ideological brutality and racial oppression involved in reducing people to the status of animals to make them property. Philip D. Morgan, for example, assumes that slaves in colonial South Carolina and Virginia always were chattel property, arguing that the "slaves' status as chattel was at the root of the callousness and dehumanization they faced, setting them apart from other compulsory laborers."[31] In *White Over Black*, Winthrop D. Jordan is similarly inattentive to change over time with regard to slave property, noting that "[b]y the end of the seventeenth century in all the colonies of the English empire there was chattel racial slavery."[32] Assuming that property provisions in the law of slavery have remained static, most historians have not thought to probe shifts in the definition of slaves from real estate to chattel. "Chattel" has become an historical shorthand for the legal dehumanization of enslaved people, but it conceals the many ways in which colonial legislators defined slaves as real property as distinct from personalty.

An important exception to this generalization is the work of Thomas D. Morris, who has

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[31] Morgan, *Slave Counterpoint*, 261.

[32] Winthrop D. Jordan, *White Over Black: American Attitudes Toward the Negro, 1550-1812* (Baltimore: Penguin, 1968), 98.

suggested that "for one reason or another rules of real property were applied in some instances in over one-third of the jurisdictions that made up the slave south."[33] Morris's study, which encompasses the nineteenth century as well as the colonial period, disproves the assumption that legislators or judges understood slaves to be exclusively chattel property. Colonial assembly members, in fact, vacillated between classifying slaves as real and chattel property, weighing slaveowners' desire to protect estates against their desire to secure credit. Because they sought to maximize their legal rights to alienate but also to shield their slave property from creditors' claims, assembly members often wrote into law an odd (from an English perspective) distribution of property rights. Whereas legislators treated slaves as real property in some circumstances (which technically allowed masters to entail slaves and ensured that eldest sons would inherit both land and slaves in cases of intestacy), in others they deemed slaves chattel in order to facilitate their alienability and to expand credit (made possible by securing debts with slaves that creditors could seize in cases of nonpayment). Although the overarching trend, at least in statutory law, was from real estate to chattel, this move was halting and contingent, as colonists responded to local economic conditions as well as the realities of lawmaking in an imperial context.

In Barbados, where the laws of slavery provided the "seed crystal" for "the slavery regimes of the Restoration colonies," a 1668 statute clarified intestacy rules by holding that slaves would be "Estates Real, and not Chattels," and would "descend unto the Heir and Widow of any person dying intestate according to the manner and custom of Lands of Inheritance held in

[33] Thomas D. Morris, *Southern Slavery and the Law, 1619-1860* (Chapel Hill: University of North Carolina Press, 1996), 64.

Fee-simple."[34] This statute modified earlier legislation that implied that slaves were chattels by likening them to "men's other goods."[35] Significantly, the 1668 law exempted merchants, factors and agents: the slaves they imported to Barbados would be considered chattels until sold.[36] Despite this attempt to classify slaves as real property for the benefit of the planters who purchased them, as Richard S. Dunn has observed, Barbadians continued to value slaves in estate inventories, which traditionally included only personal property. Because creditors could reach inventoried property, the inclusion of slaves in inventories suggests that Barbadians may have allowed creditors to attach slaves despite their classification as real property.[37] Perhaps to settle the legality of this practice, in 1672 the Barbados Assembly declared slaves to be "Chattels for the payment of Debts," although they would remain real estate "to all other intents and purposes."[38]

In Jamaica, too, Assembly members classified slaves as real property for some purposes but chattels for others. A 1696 Jamaica statute considered slaves real property for the purposes of determining their descent upon an owner's death. In other words, English intestacy law would apply to slaves in the same way it applied to landed estates. However, slaves could be seized as chattels to satisfy creditors' claims until all of a decedent's debts had been paid. Only the slaves that remained after the payment of an owner's debts would descend as did land. As in Barbados, however, it appears that legal practice in Jamaica may not have followed statutory prescription

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[34] Tomlins, *Freedom Bound*, 428. "An Act declaring the Negro-slaves of this Island, to be Real Estates" (1668), *Acts Passed in the Island of Barbados, From 1643 to 1762, inclusive* (London, 1764) (hereafter cited as *Barbados Acts*), 64.

[35] Richard S. Dunn, *Sugar and Slaves: The Rise of the Planter Class in the English West Indies, 1624-1713* (Chapel Hill: University of North Carolina Press, 1972), 239.

[36] "An Act declaring the Negro-slaves of this Island, to be Real Estates," *Barbados Acts*, 65.

[37] Dunn, *Sugar and Slaves*, 242.

[38] "A Declarative Act upon the Act making Negroes Real Estate" (1672), *Barbados Acts*, 94. Priest, "Creating an American Property Law," 414.

entirely. Indeed, Claire Priest has argued that Jamaican courts often refused to attach slaves to satisfy creditors' claims, a fact that worried English merchants interested in protecting their right to seize planters' most valuable and liquid assets.[39]

Assembly members in Virginia also classified slaves as real property at various times during the colonial period. Following the Barbadian example, in 1705 Virginia burgesses enacted a statute declaring slaves real estate for the purposes of inheritance, but also inserted language allowing merchants, factors, and agents to treat slaves as chattels.[40] Significantly, this statute followed West Indian trends by allowing creditors to seize slaves for payment of debts "as other chattels or personal estate may be."[41] The statute apparently created confusion about whether slaves could be entailed, however, which was resolved in a 1727 law that expressly authorized slave owners to entail their human property. Under this statute, executors and administrators could still seize slaves to pay the debts of the deceased, as was the case in earlier statutes, but only when the decedent's other personal estate was inadequate to pay those debts. Likewise, the statue provided some protection for wives' dower rights by maintaining that slaves "entailed and possessed by a husband in right of his wife could not be seized to satisfy his debts."[42] In 1748, Virginia made slaves chattels personal; however, the Privy Council

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[39] "An Act for the better Order and Government of Slaves" (1696), *Acts of Assembly, Passed in the Island of Jamaica; From 1681, to 1737, inclusive* (London: John Baskett, 1738); Priest, "Creating an American Property Law," 421. Evidence from Antigua suggests that as late as the 1780s, some Antiguans treated their slaves as annexed to land. Frank Wesley Pitman argued that because Antiguan slaves were deemed annexed to land, they might be likened to serfs. Frank Wesley Pitman, "The Treatment of the British West Indian Slaves in Law and Custom," *The Journal of Negro History* 11 (1926): 616.

[40] "An Act Declaring the Negro, Mulatto, and Indian Slaves Within this Dominion, to be Real Estate," (1705) William Waller Henning, Hening's *Statutes at Large: Being a Collection of all the Laws of Virginia, from the First Session of the Legislature in the year 1619*, 13 vols. (1819-1823), 3:333, available at http://www.vagenweb.org/hening/.

[41] *Ibid.*, 334.

[42] Morris, *Southern Slavery and the Law*, 67. "An Act to explain and amend the Act, For declaring the Negro, Mulatto, and Indian Slaves, within this Dominion, to be Real Estate...," Hening, *Statutes at Large*, 4:225-26.

disallowed this act in 1751.[43] In explaining the disallowance, the Privy Council cited the fact that the Act did not contain a suspending clause. Likewise, they insisted that the 1705 and 1727 acts, which the 1748 act would repeal, had been successful from an imperial policy perspective because they allowed planters "to annex Negroes to Land to keep Estates in Families to increase the Trade of Great Britain to raise the credit of Your Majestys said Colony and to strengthen it in point of Defence."[44] That imperial officials made connections between the law of slavery and imperial trade and defense suggests that they, like American colonists, were aware of the high stakes in classifying slave property. By encouraging freehold slavery in order to ensure that the land was peopled and defended, these administrators sought to reap tangible material benefits for Britain's American empire in classifying slaves as real estate.

This positive understanding of freehold slavery and its broader implications for imperial policy in turn suggests that the choice to classify slaves as real property cannot be mapped neatly onto a larger economic narrative that takes the removal of feudal restraints as its end point, as some historians have suggested. Morris has conflated freehold slavery with feudal tenures, arguing that Virginia adopted chattel slavery after the American Revolution because it had finally become a "trading" colony. In the early eighteenth century, according to Morris, planters "were willing to place more restraints around the alienation of slaves" in order to "assure a labor force for the commercial plantations of the South and the power of some patriarchal families." By the end of the eighteenth century, he argues, colonies like Virginia had had moved away from feudalisms like entail. Seeking total freedom to alienate their property in order to participate in a booming market economy, planters completely removed restraints on slave alienability by

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[43] Hening, *Statutes at Large*, 5:432.

[44] *Acts of the Privy Council of England, Colonial Series*, edited by W.L. Grant and James Munro, 6 vols. (London, 1908-12), 5:138.

classifying their slaves decisively as chattels.[45] Deciding how to classify slaves, however, was a more complicated and contested process than this modernization narrative describes, and freehold slavery was perceived as advantageous not only by the Privy Council and the Board of Trade, but also by colonists themselves. There was nothing progressive about this transition from classifying slaves as real estate to classifying slaves as chattel. Throughout the colonial period, legislators understood that slaves were at the heart of a highly commercialized economy and sought to strike a balance between their constituents' interests in shielding slaves from creditors and exposing them to creditors so that they could better weather the Atlantic economy's fluctuations.

Indeed, colonists throughout plantation America understood that decisions about the classification of their slave property would impact economic and social life, and they debated these issues with a keen sense of their significance for building family fortunes and profiting from slave ownership. Writing to the Board of Trade in 1728, for example, Lieutenant Governor Gooch of Virginia summarized a recent polarizing dispute over changes in the law of slavery, and specifically the way in which slaves were classified as property. As Gooch explained, some Virginia colonists took "great exception" to an "act to explain and amend the act for declaring the negroe mulatto and Indian slaves within this Dominion to be real estate" on the grounds that the act did not sufficiently protect widows' dower rights to slaves. An opposing faction aligned with British mercantile interests, however, insisted that failure to pass the act would prompt a

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[45] Morris, *Southern Slavery and the Law*, 66, 71. The movement from ancient restraints to total alienability is a well-worn trope taken up most recently by Banner, for whom entail and other eighteenth century property devices for maintaining familial estates must be shed on the way to a truly American system of property law. According to Banner, "no one lamented the loss of English land tenure, which was widely understood as a feudal relic unsuitable for the modern world." While some, including Thomas Jefferson, might not have shed a tear over the abolishment of entail and primogeniture, the assertion that such mechanisms were "unsuitable for the modern world" is open to question. Stuart Banner, *American Property: A History of How, Why, and What We Own* (Cambridge: Harvard University Press, 2011), 6.

contraction of much-needed credit. Specifically, without the act, "many creditors would be defrauded, and especially the British merchants, who can't be inform'd or always made acquainted with such [marriage] settlements, but generally give credit according to the number of slaves they know a man is possess'd of."[46] Uncertainty about their ability to seize slaves as personal property in case of default might contract the credit they were willing to offer. Virginians likewise "fiercely" resisted the Debt Recovery Act (1732), passed by Parliament at the request of British merchants who were concerned that colonial planters would seek to reclassify their slaves as real estate in order to shield them from creditors.[47] The Act "abolished the legal distinctions between real property, chattel property, and slaves in relation to the claims of creditors," making it possible for creditors to seize slaves and even land in payment of debts.[48] "Such are the difficultys of making a perishable thing governable by the . . . rules of succession as lands of inheritance," an exasperated Gooch informed the Board of Trade.[49] Such were the difficulties, too, of achieving consensus within colonial assemblies about classifying slave property.

As Richard Dunn and Claire Priest have shown, colonists' decisions to classify slaves as real or chattel property were influenced by concerns about creditor-debtor relations. Statutes

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[46] Gooch to Board of Trade, [8 June] 1728, *Calendar of State Papers, Colonial Series*, 36:241, available at http://www.british-history.ac.uk/catalogue.aspx?gid=123.

[47] Priest, "Creating an American Property Law," 425. Barbadians also opposed the Debt Recovery Act, asking the Board of Trade to declare that the Act did not apply in Barbados, where "creditors have all reasonable security for the payment of their debts…and even better security for them than creditors in England have for their debts there." Barbadians believed that the Act would "compleat the ruin of the inhabitants." They noted that, "there being but a very small currency of cash in this island," only creditors would be able to afford to purchase the "best sugar-work plantation[s]" if they were sold by outcry to satisfy creditors. Representation of the President, Council and Assembly of Barbados to Board of Trade, 18 January 1733, *CSP*, 40:21.

[48] Priest, "Creating an American Property Law," 389. As Richard Sheridan explains, the Debt Recovery Act prompted criticisms in England because it seemed to promote slave auctions. In 1797, William Knox "pushed through a bill in Parliament…to repeal as much of the Credit Act as made Negroes chattels for the payment of debts." Richard B. Sheridan, *Sugar and Slavery: An Economic History of the British West Indies, 1632-1775* (Baltimore: Johns Hopkins University Press, 1973), 289.

[49] Gooch to Board of Trade, [8 June] 1728, *CSP*, 36:241.

defining slaves as real property reflect colonists' interest in ensuring that heirs who received land also received slaves to make the land productive, but also reveal their interest in shielding slaves from creditors. By defining slaves as real estate, which under English law could not be attached by unsecured creditors (that is, creditors who did not have a bond that listed the property that secured the debt), planters could protect their slave property and ensure that in the case of intestacy whole plantations, including an annexed labor force, would pass intact to the eldest sons. Indeed, because some creditors "attached and sold all the slaves on an estate, leaving the heirs with 'bare land without Negroes to manure the same,'" Assembly members classified slaves as real estate in order to keep their "plantations as viable working units."[50] At the same time, colonial assemblies engaged in a balancing act, weighing the importance of protecting colonial debtors against the need to secure credit from English merchants. These merchants typically were reluctant to extend credit when valuable assets, including slaves, were unavailable for attachment. In general, the desire to make credit available to buy goods, slaves, and land won out over the fear that bad seasons, poor management, and low commodity prices might leave plantation estates bereft of their productive human property. Although colonists classified their slaves as real property for the purposes of inheritance, they also allowed creditors to attach slaves in payment of debts before those slaves would descend according to the laws of inheritance.

As they drafted slave legislation, colonists throughout plantation America assumed that English property law provided a useful way of sorting people into different kinds of property. English colonists did not, as was the case in Spanish and French colonies, move beyond a property law framework to treat an enslaved person as an "inferior kind of subject." Rather,

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[50] Dunn, *Sugar and Slaves*, 241.

slaves in English colonies always were considered "a special kind of property."[51] Whether classified as chattel property or real estate (or some mixture of the two), slaves were fitted into a centuries-old English property law rubric that was evolving to meet the rising demands of commercial exchange. This had important implications for slaves in that it precluded the possibility that they could claim the protection an early modern sovereign owed his subjects. Although historians have debated the extent to which the classification of slaves as real property or chattels mattered from the slaves' perspective, this distinction between subject and property made a real difference, as historians of Spanish and French slavery have shown.[52] Although slaves were treated as property throughout the Americas, enslaved people in Spanish and French colonies sometimes invoked the reciprocal bonds of allegiance and protection owed to them as subjects, particularly during the Age of Revolutions. Unlike slaves in the British West Indies, whose freedom was finally achieved via a compensatory scheme that continued to assume they were property, French and Spanish slaves asserted claims to freedom and justice rooted in their status as persons and, more importantly, as subjects of European monarchs entitled to protection

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[51] Elsa V. Goveia, "The West Indian Slave Laws of the Eighteenth Century," in *Caribbean Slavery in the Atlantic World: A Student Reader*, edited by Verene A. Shepherd and Hilary McD. Beckles (Kingston, Jamaica: Ian Randle, 2000), 584.

[52] Freehold slavery, according to Eugene Sirmans, attached the slave to land, "like a serf," whereas chattel slavery "attached him to a master," making him more vulnerable to sale and re-sale. Moreover, a slave classified as freehold property "enjoyed a higher legal status than he did as chattel, because freehold was a higher form of property than chattel." Eugene Sirmans, "The Legal Status of the Slave in South Carolina, 1670-1740," *The Journal of Southern History* 28 (1962), 465. Richard Dunn has disputed Sirmans' contention that freehold slaves enjoyed better conditions than chattel slaves. For Barbados, he argues, the classification of slaves as real property gave the slave "no new freedom. If anything, the slave laws of the seventeenth century further restricted his opportunities." Dunn, *Sugar and Slaves*, 241. William M. Wiecek, on the other hand, argues that masters naturally sought to protect their economic investment in the slave as chattel. William M. Wiecek, "The Statutory Law of Slavery and Race in the Thirteen Mainland Colonies of British America," *The William and Mary Quarterly,* 3rd ser. 34 (1977): 266. It seems unlikely that, in practice, the classification of slaves as either real or chattel property affected their treatment. Most colonial laws that classified slaves as real property nonetheless provided for the sale of slaves in satisfaction of debts. This implies that a real property classification scheme did not afford additional protection to slave families. Likewise, it does not stand to reason that the classification of slaves as chattel property would make masters more inclined to protect slaves. Freehold slaves were also economic assets, particularly when they were made available to creditors via statute. Owners of chattel slaves, therefore, had no greater economic incentive than owners of slaves classified as real property to treat their slaves well.

under the law.[53] Throughout British Plantation America, by contrast, masters asked themselves what kind of property it was in their best interests for enslaved people to be.

South Carolina as an Exception

Unlike colonists in Barbados, Jamaica, and Virginia, South Carolinians only briefly experimented with treating slaves as real estate and, indeed, did not seek to classify slaves via statute between 1691 and 1740. Instead, they relied upon the mercantile practice of considering slaves to be chattel, a customary arrangement that was not enshrined in statute until 1740, when the colony significantly revised its slave code. The failure to classify slaves as property until 1740 and the codification of chattel slavery thereafter made South Carolina's slave law unique among colonial slave regimes. South Carolina's early reliance upon custom rather than statute to allocate the property rights of slave owners is remarkable when viewed in light of careful statutory management in other plantation colonies. Likewise, the colony's decision to codify those customary arrangements marked it as different from other plantation colonies, where slaves were classified as both real estate and chattel property. The evolution of slave law in South Carolina confirms and extends characterizations of the colony as distinctively commercial,

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[53] Goveia, "The West Indian Slave Laws of the Eighteenth Century," 584; As Malick W. Ghachem shows, slaves in San Domingue creatively and strategically invoked provisions of the Code Noir in asserting claims to freedom. The authors of the Code, which governed the behavior of both masters and slaves throughout the colonial period, "aimed to strike a balance between the view of the slave as outside the bounds of sovereign authority and an alternative view of the slave as a subject (however disfavored and mistreated) of absolute monarchy." Malick W. Ghachem, *The Old Regime and the Haitan Revolution* (Cambridge: Cambridge University Press, 2012), 58. This is not to say that slaves in British colonies were more submissive or less prone to rebellion than other slaves in Spanish America. Rather, the statutory law of slavery in British colonies provided slaves with fewer protections that could be used to hold masters accountable to royal oversight. Indeed, when imperial authorities did offer slaves the Crown's protection, particularly during the American Revolution, they eagerly seized upon these assurances. For a discussion of the impact of Lord Dunmore's proclamation in South Carolina, see Jim Piecuch, *Three Peoples, One King: Loyalists, Indians, and Slaves in the American Revolutionary South, 1775-1782* (Columbia: University of South Carolina Press, 2013), 68.

revealing that colonists' dynamic engagement with the Atlantic economy not only had cultural consequences, but also had significant legal ramifications. Proximity to merchants and slave factors bred familiarity with legal norms in the trade, which colonists absorbed and deployed when they treated slaves as chattel property rather than real estate.

South Carolina's Commons House of Assembly passed its first slave code in 1691, and in keeping with West Indian legislative trends, Assembly members stipulated that slaves should be freehold property (real property), except with regard to the payment of debts, in which case they should be "deemed and taken as all other goods and chattels."[54] However, the Lords Proprietors, who held title to the colony by royal charter from 1666 to 1729, disallowed this law along with all other legislation passed during the gubernatorial regime of Seth Sothell, one of the infamous "Goose Creek" men who took control of the colony's government and later was recalled in disgrace by the Lords Proprietors.[55] For the next fifty years, statutory law in South Carolina remained surprisingly vague with regard to classifying slave property.[56] Indeed, colonists did not formally declare slaves to be chattels until 1740.[57]

In the absence of legislative guidance, South Carolinians treated their slaves as chattel property from an early date. In early marriage settlement documents slaves were named with other personal property, and especially money, cattle, and household goods.[58] For example, in

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[54] The law read: "as to the payment of debts [negroes] shall be deemed and taken as all other goods and chattels…and all negroes shall be accounted as freehold in all other cases whatsoever, and descend accordingly." An Act for the better ordering of Slaves (1691), *The Statutes at Large of South Carolina*, edited by Thomas Cooper and David J. McCord, 10 vols. (Columbia: A.S. Johnston, 1836-41), 7: 343-44. This law is incorrectly dated to 1690 in *SAL*. See L.H. Roper, "The 1701 'Act for the Better Ordering of Slaves'," *WMQ* 64 (2007): 397n.

[55] Sirmans, "The Legal Status of the Slave in South Carolina," 465.

[56] Although colonists continued to generate new slave legislation during this period, these codes primarily addressed concerns about policing the colony's expanding slave population.

[57] "An Act for the Better Ordering and Governing Negroes and Other Slaves in This Province" (1740), *SAL*, 7: 397.

[58] Marylynn Salmon, "Women and Property in South Carolina: The Evidence from Marriage Settlements, 1730 to 1830," *WMQ* 39 (1982): 12.

anticipation of Elizabeth Ashby's marriage to John Vinaridge in 1730, her family drew up a marriage settlement giving Elizabeth "separate use" of "all and Singular the Issue profits and increase of the negroes and other Slaves & all other the personal Estate whatsoever" without her husband's "hinderance." The assumption that slaves were personal estate was reinforced later in the agreement, which also grouped Elizabeth's slaves with the rest of her "goods Chattles moneys or other personal Estate."[59] Slaves, African as well as Native American, were also routinely included in estate inventories, which only listed personal property. An early inventory dating to 1688, for example, included "one Indian woman named Francis," who was valued at £15 sterling.[60] And in slave sale advertisements, South Carolina colonists called slaves "chattels," revealing that the term and its legal meaning were well understood from an early date. In 1735, for example, the *South-Carolina Gazette* ran an advertisement for an estate sale of "all the Goods and Chattels" of the deceased, "consisting of Negroes, Household Goods and other Effects."[61] The phrase "Goods and Chattels" was a common one, a piece of legal jargon with which colonists were familiar and which appeared in a variety of places in conjunction with the word "negro" or "negroes." Elizabeth Ashby's marriage settlement included this grouping, but it also appeared in early colonial wills. In 1736, Jonathan Welden of Christ Church parish in Berkeley County left his "whole estate," including "both Negroes Horses and Cattle and all other my

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[59] Articles of Agreement, 9 February 1730, Ball Family Papers, 33-83-1 (6) (oversized), SCHS. The agreement also empowered Elizabeth to devise her estate "both real and personal" by will.

[60] Roby Inventory, 1688, The National Archives, Kew, United Kingdom, PROB 4/19619. See also Sirmans, "The Legal Status of the Slave in South Carolina," 466-68.

[61] *South Carolina Gazette,* 25 October 1735. Customary practice also dictated who would be deemed a slave. Enslaved people, according to Assembly members in 1712, included "all negroes, mulatoes, mustizoes or Indians, which at any time heretofore have been sold, or now are held or taken to be, or hereafter shall be bought and sold for slaves." Moreover, "their children" also were "hereby made and declared slaves." "An Act for the Better Ordering and Governing of Negroes and Slaves" (1712), *SAL*, 7:352. This language closely tracked that of earlier statutes (1691 and 1701). See Roper, "The 1701 'Act for the Better Ordering of Slaves'," for an extensive discussion of the 1701 act, which is located in manuscript at the British Library.

Goods and Chattels" to be shared equally among his wife and children.[62] Moses Wilson of Goose Creek also bequeathed his "well beloved" wife and her sons the residue of his estate, including his "Negroes Stock Goods Chattels & Estates."[63] This grouping of human property with other personal property, and in particular livestock, was common throughout the colonial period.

In the wake of the 1739 Stono River slave uprising, South Carolina significantly revised its slave code. The 1740 "Negro Act" amplified an already harsh slave-policing regime to include provisions that "stripped slaves of many of the individual protections customarily granted by the common law."[64] By creating an imposing legal edifice that was meant to prevent another rebellion, Assembly members sought to eliminate slaves' ability to congregate, to move freely throughout the province, to access weapons, and to engage in marketing activities without permission. The Negro Act also reinforced an already draconian criminal code for slaves while imposing penalties on masters who mistreated their slaves or failed to provide them with sufficient food and clothing. The latter provisions stemmed less from humanitarian regard for slaves' well being and more from the belief that improving the living conditions of slaves would help to prevent insurrection and other forms of resistance.

Most recently, historians have analyzed the 1740 Negro Act to understand how South Carolina colonists perceived themselves as members of a broader British Empire, particularly given the fact that they owned human property. For Robert Olwell, the 1740 statute was a "cultural edifice," a law that "was both 'imagined' and constructed to reflect a metropolitan

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[62] Will of Jonathan Welden, 26 July 1736, ST 0505A, Secretary of State Recorded Instruments, Will books Vol. LL 1737-1747 S 213027, 12-14, South Carolina Department of Archives and History, Columbia, South Carolina.

[63] Will of Moses Wilson, 25 February 1737/8, ST 0505A, Secretary of State Recorded Instruments, Will books Vol. LL 1737-1747 S 213027, 267-73, SCDAH.

[64] Robert Olwell, *Masters, Slaves, and Subjects: The Culture of Power in the South Carolina Low Country, 1740-1790* (Ithaca: Cornell University Press, 1998), 62, 66.

ideal."[65] Aware that the institution of slavery "engendered conflicts and incongruencies between the ideals and practices of English justice and its provincial counterpart," colonists drew upon English legal traditions in the Negro Act in order to recast their society as familiar.[66] Christopher Tomlins, too, has argued that in the Negro Act colonists signaled their "respect for English law" as part of a broader cultural performance in which they used a "discourse of legality" to serve their own self-interests.[67]

The 1740 act was more than a "cultural edifice" meant to signal South Carolina colonists' conformity with broader English legal principles and traditions. The Negro Act also codified chattel slavery in the colony, thereby distinguishing the statute from all other slave laws that preceded it, and marking South Carolina's slave regime as different from others in plantation America. Indeed, although Assembly members in the wake of the Stono Rebellion largely were concerned with reinforcing policing and criminal provisions, they also clarified for the first time since 1691 how slaves would be treated as property.[68] Following customary practice, Assembly members specified that slaves would be "deemed, held, taken, reputed and adjudged in law, to be chattels personal, in the hands of their owners and possessors, and their executors, administrators and assigns."[69] Rather than stipulating that slaves would be considered chattel property in some cases and real estate for others, however, South Carolina legislators instead chose to make slaves

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[65] *Ibid.*, 60.

[66] *Ibid.*, 61.

[67] Tomlins, *Freedom Bound*, 450-51.

[68] First, Assembly members reiterated that "all negroes and Indians . . . mulattoes or mustizoes who now are, or shall hereafter be . . . absolute slaves." Colonists also for the first time formally adopted the principle of *partus sequitur ventrem*, a civil law doctrine providing for the matrilineal heritability of slavery. Indeed, the 1740 act specified that the children of slaves would "follow the condition of the mother." "An Act for the Better Ordering and Governing Negroes and Other Slaves in This Province" (1740) (hereinafter "Negro Act"), *SAL*, 7: 397. Virginia already had adopted partus sequitur ventrem in 1662.

[69] Negro Act, *SAL,* 7:397.

personal property "to all intents, constructions and purposes."[70] As we have seen, statutes in the West Indies and in Virginia carefully apportioned masters' property rights in slaves, stipulating that slaves would be chattel property for the purposes of debt collection, but real property in cases of inheritance. This decision to classify slaves as chattel property for all purposes marked the colony's statutory law of slavery as an outlier.

The uniqueness of the Negro Act's property law provisions did not escape the attention of metropolitan legal authorities, including the Board of Trade's legal counsel, Matthew Lamb. Opining on the 1740 statue's legality, Lamb noted that the Negro Act was "Different from all the Laws of the other Colonyes and Plantations" because it made "Negroes Chattells Personall," and he expressed concerns that the statute infringed upon the Debt Recovery Act, which had made real estate (including slaves classified as real estate) subject to the claims of British creditors. Although Lamb did not provide an elaborate explanation for his qualms about the Negro Act, it seems that he believed the Debt Recovery Act only authorized freehold slavery, not chattel slavery. His advice may also have reflected broader concerns about how chattel slavery would impact imperial trade and defense. As we have seen, in rejecting Virginia's bid to introduce chattel slavery the Privy Council offered similar objections, which suggests that different branches of the British administrative state determined prior to the mid-eighteenth century that freehold slavery (as modified by the Debt Recovery Act) was preferable from a policy perspective. In 1766 the Privy Council also disallowed Georgia's "Act for the better ordering and governing Negroes and other Slaves in this Province, and to prevent the inveigling or carrying away Slaves from their Masters or Employers" because the statute classified slaves as chattels and not real estate. This was "of publick ill consequence" from an imperial perspective

[70] *Ibid.*

because it would hinder "the Cultivation and Improvement of Farms and plantations."[71] Classifying slaves as chattel would deprive plantations, which were inherited by the eldest son in colonies like Virginia in which entail was common, of their labor force, which would descend to younger sons according to the law of intestate succession. Despite Lamb's concerns, however, the 1740 statute was never disallowed, largely due to the lobbying efforts of South Carolina merchants. With a few minor alterations the Negro Act remained in force through the rest of the colonial period.[72]

It is unclear why South Carolinians chose in 1740 to clarify what had been a long-standing practice of treating slaves as chattels. Indeed, between 1691 and 1740, Assembly members revised and reissued slave statutes numerous times without ever seeking to define enslaved people as property.[73] Nonetheless, this decision to codify chattel slavery in 1740 in the face of different practices in other colonies suggests that South Carolinians made a conscious choice to deviate from established statutory precedents. Scholars of slave law in the Atlantic World have long observed that colonists in plantation provinces were aware of other slave statutes, and in fact borrowed heavily from neighboring codes in elaborating their own slave laws. As Edward B. Rugemer has shown, South Carolinians were influenced not only by Barbadian statutes but also by Jamaica's slave laws when they formulated their statutory law of slavery in the seventeenth and eighteenth centuries. Intimately familiar with West Indian slave codes, South Carolina colonists would have known that slaves were classified differently in the

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[71] *APC*, 5:40-41.

[72] Matthew Lamb to Board of Trade, 2 November 1748, Records in the British Public Record Office Relating to South Carolina, 1663-1782, edited by W. Noel Sainsbury, 36 vols., 23:261. The Board ultimately declined to take action, however, "due to the intercession of Charles Town merchants, who often owned slaves and who enjoyed considerable influence with the Board of Trade." Sirmans, "The Legal Status of the Slave in South Carolina," 472.

[73] Between 1691 and 1740, colonists passed slave statutes (including minor revisions to older statutes) in 1693, 1695, 1696, 1701, 1712, 1714, 1717, 1722, and 1735.

Caribbean. That they rejected West Indian classification schemes is especially noteworthy given the fact that chose to follow West Indian examples in drafting criminal and policing provisions.[74] In 1740, South Carolina masters staked their claim to British America's most intensively commercialized slave society by classifying slaves as chattel property for all purposes.

Slaves as Merchandise

Why did colonists deviate from West Indian examples when it came to classifying their slaves as property? Colonists themselves did not explain their choices, but their decision to consider slaves chattel property becomes clear when placed in the context of the colony's economic, social, and cultural climate in the first half of the eighteenth century. Specifically, the fact that Assembly members were innovators in treating slaves as chattel property supports and extends a view of South Carolina as a particularly commercial province. Dominated by an overlapping merchant and planter elite that did not shy away from discussing business affairs, South Carolina colonists were especially engaged with the broader Atlantic marketplace.[75] The marketplace, for South Carolinians, was physically manifested in Charlestown, a vibrant port city and the most important commercial entrepôt in the southern mainland colonies. There, planters converged to sell rice and other commodities as their "economic lives shifted between production and exchange."[76] Most important for our purposes, South Carolina colonists travelled to Charlestown to purchase slaves directly from town-based slave factors, in contrast to Virginia

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[74] Tomlins, *Freedom Bound*, 419; Edward B. Rugemer, "The Development of Mastery and Race in the Comprehensive Slave Codes of the Greater Caribbean During the Seventeenth Century," *WMQ* 70 (2013): 429-58.

[75] Edelson, *Plantation Enterprise*, 174.

[76] *Ibid.*, 177. Unlike Virginia and the West Indies, where commodity producers "tended to consign their staples for shipment to Europe," in South Carolina planters "sold almost all their rice and most of their indigo in town for an immediate return." *Ibid.*, 176.

planters, who purchased slaves in a variety of locations along Potomac, Rappahannock, York, and James Rivers.[77] As the most important slave-trading center north of the Caribbean, Charlestown was a point of contact for slave factors and planters, a place where not only goods and commodities but also ideas were exchanged.[78] Economic necessity as well as physical proximity to merchants in Charlestown meant that South Carolina planters were connected to Atlantic mercantile life in a less attenuated way than planters in the West Indies or Virginia, where the "tidewater gentry seemed disengaged from the details of Atlantic commerce."[79] This difference had significant cultural ramifications. Unlike other colonists in British America, South Carolinians "admitted the mundane world of production and exchange into polite society." They prided themselves on their commercial acumen and on their "commitment to business," which "became a normative standard around which elites oriented their values in the colonial era."[80] But South Carolina colonists' commercial orientation also was significant in that it bred familiarity with mercantile practice, and particularly legal norms that governed daily practice in the slave trade.

Although many scholars assume that English law did not recognize slavery because England lacked a statutory framework authorizing or regulating the possession of slaves, slave trading and slave owning were in fact legally sanctioned, and English slave traders and factors developed ways of proceeding in trade that were recognized as binding custom.[81] Perhaps the

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[77] Kenneth Morgan, "Slave Sales in Colonial Charleston," *The English Historical Review* 113 (1998): 908.

[78] In addition, many South Carolina planters also purchased town homes in Charlestown and lived in town for at least part of the year, ensuring that they kept in "close touch with merchants, commodities, and slaves." Ibid., 910.

[79] Edelson, *Plantation Enterprise*, 176.

[80] *Ibid.*, 174.

[81] Goveia puts the case for revising the common belief that English law did not recognize slavery, noting that under both West Indian law and English law, "trading in slaves was a recognized and legal activity. Under both, there were provisions for regulating the mortgage of slaves and obliging their sale as chattels in cases of debt. This point

most important custom among English merchants was to regard slaves as chattel property or "merchandise" until they were sold.[82] Indeed, most colonial slave statutes that adopted freehold slavery nonetheless granted exceptions for traders and merchants, allowing them to treat slaves as merchandise in acknowledgment of this custom. The Royal African Company, which exercised a British monopoly on the transport and sale of slaves from Africa to the Americas between 1672 and the close of the eighteenth century routinely considered slaves to be merchandise.[83] In legal agreements between the Company and ship captains, for example, slaves were grouped with other goods and commodities that could be bought and sold on the African coast. John Sperriford "of London Marriner and master of the Good Ship or Vessel called the *Fortune*" agreed with the Royal African Company in 1695 to "transport and bring Negroes Elephants Teeth and any other Goods Com[m]odities and merchandizes" from Africa "unto any of the English plantat[i]ons in America."[84] In the same year, Sam Kelly, master of the galley *Mary & Margaret*, also entered into a charterparty (a shipping agreement) undertaking to deliver slaves and other commodities and merchandise from the Angola region to the American colonies.[85] The wording of these agreements was nearly identical, suggesting that the Company and its Court of Assistants used standard language in contracting with ship captains for the purchase and delivery of slaves bound for the Americas. Even at this early date, then, treating slaves as moveable property was becoming routine legal practice among English slave merchants.

The grouping of slaves with other moveable property in legal documents reflected the

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is worth stressing. The idea of slaves as property was as firmly accepted in the law of England as it was in that of the colonies." Goveia, "The West Indian Slave Laws of the Eighteenth Century," 584.

[82] Baker, *An Introduction to English Legal History*, 475.

[83] Stephanie E. Smallwood, *Saltwater Slavery: A Middle Passage from Africa to American Diaspora* (Cambridge: Harvard University Press, 2008), 3.

[84] Articles of Agreement between the Royal African Company and John Sperriford, 5 July 1695, C111/184, TNA.

[85] Articles of Agreement between the Royal African Company and Sam Kelly, 22 October 1695, C111/184, TNA.

imperatives of a commercial slave trading system designed to commodify slaves. Stephanie Smallwood has described this system as one in which Africans were transformed into "human commodities" whose most important attribute was their "exchangeability."[86] Indeed, the Royal African Company paid slave trade captains by the head, not by the ultimate sale price of slaves at their final destinations. This payment structure encouraged slave traders to perceive Africans not as human beings with individual qualities and characteristics, but as items that could be packed into the hold of ships and added to an accounting ledger. Associating slaves with merchandise in transactional documents was a natural outgrowth of a system of exchange in which human beings were purposefully reduced to units of moveable property. When slave traders conflated Africans with other types of fungible commodities like "Elephants Teeth," they made analogies that were readable in the context of a business that privileged calculation and valued enumeration in planning and conducting long-distance trade, one in which traders filled their holds as quickly as possible with slaves who seemed most likely to survive a transatlantic crossing.[87]

Although South Carolina colonists did not state that they followed mercantile norms in treating slaves as chattels, they nonetheless replicated these norms when they described slaves as merchandise. A 1719 statute, for example, imposed import duties on "Negroes, Liquors, and other Goods and Merchandizes," as colonists grouped slaves with other commodities in taxation schemes.[88] In Vice Admiralty Court proceedings, discussed in more detail in Chapter 3, judges and litigants also conflated slaves with merchandise transported as cargo. This is not surprising given the fact that litigants and judges followed mercantile legal customs in the Vice Admiralty

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[86] Smallwood, *Saltwater Slavery*, 35.

[87] The Royal African Company traded to South Carolina into at least the 1720s. On 30 August 1720, Governor Francis Nicholson was instructed to "give all due Encouragement and Invitation" to the Royal African Company so the colony would have a "constant and sufficient Supply of Merchantable Negroes at Moderate Rates in Mony or Commodities." BPRO, 8:133.

[88] "An Act for laying an Imposition on Negroes, Liquors, and Other Goods and Merchandizes . . ." (1719) *SAL*, 3:56.

Court, a jurisdiction that developed to provide justice for merchants and mariners. In 1717, for example, South Carolina colonists Joseph Rivers, Richard Rivers, Joseph Danford, and Alexander Spencer were accused of taking and carrying away "all and Singular the Negros Goods and Merchandizes" from the sloop *Diamond*, which had run aground near James Island.[89] During litigation associated with the capture and prosecution of the notorious pirate Stede Bonnet, his captors also claimed they were entitled to "all & Singular the Negroes Goods Wares and Merchandizes" that were "found on board" Bonnett's ship, the *Revenge*.[90] While it is difficult to determine the extent to which these mercantile customs filtered through the institution of the Vice Admiralty Court into South Carolina's early legal culture, the Court's institutional importance for local merchants and planters (who served on Vice Admiralty Court juries and as appraisers) suggests that it may have played an important role in educating litigants and juries about mercantile legal norms, including how slaves should be classified as property.

A "Liberal" Property Law Regime

The mercantile custom of treating slaves as chattel property, which South Carolina colonists adopted from an early date, explains the colony's chattel slavery regime and Assembly members' decision to deviate from West Indian legal customs. But Assembly members also chose to codify chattel slavery because treating slaves as moveable property suited colonists' commercial needs. Specifically, South Carolina colonists classified slaves as chattel property in

[89] John Stevens Master and Owner of Sloop *Diamond* versus Joseph River, Richard Rivers James Denford & Alexander Spencer of Berkeley County Planters, 18 December 1717, South Carolina Vice-Admiralty Court Records, 1716-1732, A-B vols., 192-227, Library of Congress, Manuscripts Division, Washington, D.C.

[90] In re the Ship *Revenge*, 19 November 1718, South Carolina Vice-Admiralty Court Records, 1716-1732, A-B vols., 276-300, LOC.

order to maximize the alienability of slaves and expand their credit with British merchants. Long before other colonies made the decision to classify slaves as chattel property for all purposes, South Carolina colonists had already settled upon a classificatory scheme that allowed them to buy, sell, and devise slaves without restraint. This decision was in keeping with the more general tenor of property law administration in the province, which was the most "liberal" in the American colonies.[91] This liberal regime served the interests of slaveholders, who took advantage of the colony's particularly flexible legal system to manage their slaves as property.

From an early date, South Carolina colonists chafed at proprietary restrictions on their ability to buy and sell property at will. Inspired by the political economy of James Harrington, the Lords Proprietors of Carolina believed that establishing a well-ordered system of land ownership and descent was essential for maintaining a functioning polity in the province.[92] They sought to assert dominion over their colonial possessions from the center, wielding the language of property law to bridge the physical and mental distance between themselves and Carolina.[93] Particularly concerned to prevent the formation of an active land market, which they believed

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[91] John E. Crowley, "Family Relations and Inheritance in Early South Carolina," 39.

[92] Anthony Ashley Cooper and John Locke, who collaborated in drafting the text of the Fundamental Constitutions, believed that wisely-crafted agrarian policies were the key to creating and maintaining a balanced government, which would in turn ensure the long-term stability of the Carolina polity and the happiness of its citizens. There is evidence that Ashley and Locke were familiar with Harrington and his ideas, and particularly those contained in *Oceana*, which outlines in detail a plan to establish and preserve the "the balance of dominion, by such a distribution that no one man or a number of men within the compass of the few or aristocracy can come to overpower the whole people by their possessions in lands." James Harrington, *The Commonwealth of Oceana*, in *The Political Works of James Harrington*, edited by J.G.A. Pocock (Cambridge: Cambridge University Press, 1977), 181. Both Locke and Ashley owned copies of *Oceana*, and Locke discussed Harrington's works (as well as Thomas More's *Utopia*) in a 1659 letter to William Goldolphin. John Harrison, and Peter Laslett, *The Library of John Locke* (Oxford: Oxford University Press, 19665), 151. John Locke to William Godolphin, c. August 1659 in Mark Goldie, ed., *John Locke: Selected Correspondence* (Oxford: Oxford University Press, 2002), 10. K.H.D. Haley, *The First Earl of Shaftesbury* (Oxford: Clarendon Press, 1968), 219. Although it is unclear whether Ashley and Harrington were personally acquainted, the two both entered Lincoln's Inn within a few days of each other in 1638. *Ibid*., 24.

[93] To this extent, the text exemplifies Christopher Tomlins's characterization of law's role in colonization as both discourse and "modality of rule." The text became a tangible link between Proprietors and colonists, providing a common language through which political and constitutional disputes would be framed, as it simultaneously outlined an institutional and legal structure for colony government. Tomlins, *Freedom Bound*, 5-6.

had developed in Virginia with disastrous consequences on the Anglo-Indian frontier, the Proprietors placed restrictions on the division and sale of land in the new colony. In the Fundamental Constitutions of Carolina, in which they advanced a constitutional model for the colony, they stipulated that estates belonging to landgraves and cassiques, the colony's newly minted hereditary aristocracy, should descend to the heir male, but failing that were to escheat, or return, to the Lords Proprietors.[94] This provision was a dramatic departure from common law intestacy rules. Whereas English common law allowed for the division of real property among daughters in the absence of a son, the Fundamental Constitutions cut off descents after the failure of the male line.[95] The Proprietors also restricted colonists' ability to divide and sell land. Effectively, this limited colonists' opportunity to freely dispose of their property, which prospective emigrants found alarming. Migrating from Barbados, many of the colony's first settlers complained that restraints on the inheritability and alienability of property imposed by the Proprietors were unacceptable. They were "absolutely dissatisfied and discouraged" from

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[94] By the time that the first Carolina colonists embarked for the New World in 1669, it was already clear to the Proprietors that the *Constitutions* could not be fully implemented. As the Proprietors themselves acknowledged, the small number of colonists who had subscribed to the venture would be insufficient to fill all of the political and administrative offices described in the document.

Escheat denotes a process by which the land of a tenant seized in fee was returned to the lord from whom he held it under two conditions that interrupted the normal course of descent: when a tenant seized in fee died without heirs (*aut per defectum sanguinis*) or if he committed a felony (*aut per delictum tenetis*). Sir Edward Coke, *The First Part of the Institutes of the Laws of England* (New York: Garland Publishing Company, 1979): 13a. Along with wardship, relief, and aid, escheats were considered incidents of tenure – that is, payments or obligations that a tenant owed the lord from whom he held real property. William Stubbs, *The Constitutional History of England in its Origin and Development*, 6th ed., 3 vols. (Oxford: Clarendon Press, 1903-1906), 1:47. Undergirding escheat was the theory that lands are always held of a superior lord pursuant to an original grant, and that the tenant does not own land, but only an estate in land. Thus, when the estate terminated (because a tenant died without heirs or committed a felony), it reverted to the lord from whom it was held, who could re-grant it at his pleasure. Frederic W. Hardman, "The Law of Escheat," *The Law Quarterly Review* 15 (1888): 322. Although theoretically the immediate lord of whom land was held benefitted from escheats, when the lord could not be found, the Crown was entitled to escheats. In the wake of *Quia Emptores*, which abolished subinfeudation, escheat increasingly operated in the Crown's favor, and the right of escheat came to be considered a Crown prerogative. "Origins and Development of Modern Escheat," *Columbia Law Review* 61 (1961): 1320.

[95] This provision helped to ensure that daughters would not inherit vulnerable borderlands. It also lessened the chance that collateral or remote heirs would claim large tracts of land in Carolina, thereby preventing unknown or unwelcome persons from inserting themselves into the colony's aristocratic hierarchy.

settling in Carolina, a potential migrant from Barbados claimed, because the Fundamental Constitutions stipulated that the "lands appertaining to all Landgraves Cassiques with the Dignityes shall go to the Heire male, and for want of such issue escheate to the Proprietors." Why should these colonists "hazard soe greate an Estate upon such an uncertaine Lymitation?" he asked.[96]

Resistance to this clause soon blossomed into blatant disregard for any Proprietary directives that disrupted planters' expectations about how Carolina should develop, and particularly how its lands should be managed. Indeed, the confrontation over the clause foreshadowed numerous future clashes between planters and Proprietors over Carolina's developmental trajectory, many of which centered on land use, property law, and the buying and selling of Native American slaves. As Carolina colonists became "agricultural omnivores," they pushed against Proprietary strictures and set out to "incorporate the largest portions of arable land within their grants," and they sought to capture and sell Native Americans without proprietary interference. In doing so, they "set a course for lowcountry settlement that eroded the Proprietors' vision during Carolina's very first year."[97] This vision would permanently collapse in 1719, when the Carolina colonists overthrew the Proprietary government in favor of royal control.[98]

From an early date, then, South Carolina's colonists evidenced a concern to maintain control over the inheritability and alienability of property, a concern that would later be

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[96] Sir John Yeamans to Lords Proprietors, 15 November 1670, *The Shaftesbury Papers*, edited by L. Cheves (Charleston: Home Press, 2010), 218-20. Responding to these complaints, the Proprietors did, in fact, revise this provision to allow property to descend "all entirely and undivided to the next heir general" where a male heir could not be located.

[97] Edelson, *Plantation Enterprise*, 15, 45.

[98] M. Eugene Sirmans, *Colonial South Carolina: A Political History, 1663-1763* (Chapel Hill: University of North Carolina Press, 1966), 125-28.

manifested in their precocious treatment of enslaved people as exclusively chattel property, and which in turn reflected the "commercial rather than the patrimonial character of wealth" in the colony.[99] Just as South Carolina colonists sought to buy and sell land without legal restraint, they also classified slaves as chattel in order to facilitate the easy purchasing of slaves on credit. Indeed, their decision to treat slaves *de facto* as chattels and, later, to codify this classification worked in tandem with an English property law regime that had been tailored over time to suit the needs of this slave society. Through the interplay of Parliamentary and local statutes, colonists ensured that enslaved people could be bought, sold, and devised without limitation. At the same time, they ensured that slaves would always be available to creditors, even when widows claimed them as dower property. This, in turn, encouraged British merchants to advance South Carolina slave owners credit to purchase more land and more slaves, safe in the knowledge that their most valuable assets always could be reached.

South Carolina's colonial property law regime on the whole favored the alienability and devisability of property. In fact, South Carolina was the "only royal colony to preclude entails."[100] At common law, entail (also called fee tail) is an estate of real property that cannot be alienated by or devised by will. It is an estate less than freehold, one that offers a severely curtailed bundle of rights to the landholder (called the tenant in tail). Developed in the medieval period in order to prevent heirs from selling or devising land out of the family, this type of conditional estate persisted into the eighteenth century in England, despite the emergence of methods that enabled holders of entailed lands to "bar" the entail.[101] Entail was legally

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[99] Crowley, "Family Relations and Inheritance," 37.

[100] Ibid., 36.

[101] Carole Shammas, "English Law and Its Transfer to the Colonies," *The American Journal of Legal History* 31 (1987): 152. For a discussion of the development of ways to bar an entail, see A.W.B. Simpson, *An Introduction to the History of the Land Law* (Oxford: Oxford University Press, 1961), 195-224. Coke, in his "Commentary on

permissible in some American colonies, and particularly in Virginia, where Holly Brewer has claimed that the entail of both land and slaves was commonly practiced. Arguing that entail was a feudal remnant purposefully adopted by Virginia's great families, Brewer also has suggested that Virginians finally precluded entail at the end of the eighteenth century as part of a seemingly inexorable post-Revolutionary march to adopt more liberal property regimes.[102]

South Carolina's early preclusion of entail suggests a conscious rejection of the Virginia property law model. Neither slaves nor land were entailed in South Carolina, although testators could limit the descent of property to certain conditions, usually the birth of an heir.[103] For the most part, however, South Carolina slave owners favored the free alienation of property, a preference in keeping with the needs of their rapidly expanding commercial society. By preventing entails, colonists ensured that land and slaves could be separated when it was economically sensible for slave owners to do so, not kept together generation after generation by dynastically-minded testators. Indeed, South Carolina colonists may actually have been deterred from adopting entail by practice in Virginia. There, some planters complained that laws allowing the entail of slaves prevented slave owners from moving their human property from older plantations to newly acquired tracts. These older plantations would become "overstocked" with slaves, while the tenant in tail acquired "fee simple land, much fitter for cultivation than his

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Littleton," devotes an entire chapter to discussing the fee tail, explaining in depth its "incidents" as well as how such an estate is formed. Coke, *The First Part of the Institutes of the Laws of England*, Lib. 1, Cap. 2. Generally, the creation of an entail was accomplished in the context of the conveyance document (such as a will or deed), in which the landowner would transfer real property using the formula "to A and the heirs of his body." Indeed, as Coke observed, "[t]enant in taile generall is, where lands or tenements are given to a man, and to his heires of his bodie begotten." *Ibid.*, Sects. 14, 15. This formula of conveyance distinguished the fee tail from the fee simple estate, which was transferred using the formula "to A and his heirs," and was freely alienable and devisable.

[102] Holly Brewer, "Entailing Aristocracy in Colonial Virginia: 'Ancient Feudal Restraints' and Revolutionary Reform," *WMQ* 54 (1997): 338-39. Brewer seeks to rebut C. Ray Keim, "Primogeniture and Entail in Colonial Virginia," *WMQ* 25 (1968): 545-86. Analyzing wills from York County, Virginia between 1715 and 1769, Morris has argued that most Virginians did not entail their slaves, and that heirs who inherited slaves in fee tail could "dock" the entail easily. Morris, *Southern Slavery and the Law*, 71.

[103] Crowley, "Family Relations and Inheritance," 49.

intailed lands" where, but for the laws of slave property, "he could work his slaves to a much greater advantage." During a period of rapid economic and geographic expansion, South Carolina colonists realized the practical value of a divisible and mobile labor force that could be put in the service of frontier expansion.[104] They used property law, enacted through local statutes, to ensure that slave owners were provided with the maximum of flexibility when it came to managing their human property.

South Carolina's preference for alienability and devisability did not mean that colonists rejected English property law wholesale. In fact, South Carolina colonists, more than most colonists in British America, sought to replicate an English legal system by erecting judicial institutions and introducing substantive laws that emulated those in England. An important part of this process of mimesis was importing English intestacy law. In 1712, the Commons House of Assembly "received" 167 Parliamentary statutes, declaring these statutes to be in force in the colony and adopting "all and every part of the Common Law of England" that had not been modified by Parliamentary statutes, local laws, or local customs. The 1712 reception statute was the first of its kind in the American colonies.[105] As Harold Simmons Tate, Jr. has noted, "some care was taken" in the choice of statutes to be adopted as colonists sought to clarify the role that English law would play in the province.[106] Although Assembly members adopted statutes that addressed a number of broader legal categories, including criminal law, legal procedure, religious toleration, and civil liberties, among the most significant were those relating to property law. These included, most importantly, the 1670 "Act for the better settling of Intestates'

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[104] Hening, *Statutes at Large*, 5:432, n. *.

[105] Harold Simmons Tate, Jr., "South Carolina's Reception of English Law" (Ph.D. diss., University of South Carolina, 2008), 1. According to Tate, a 1694 reception statute preceded the 1712 statute, but the text of the earlier law is missing. *SAL*, 2:413-14. Tate thinks it likely that Chief Justice Nicholas Trott, South Carolina's first trained judge and attorney, drafted the reception statute. Tate, "South Carolina's Reception of English Law," 143-44.

[106] Ibid., 157.

Estates," which regulated intestacy procedures. The Act stipulated that widows should receive one-third of the residue of a decedent's personal property after debts had been paid, and that children should inherit personality equally.[107]

The reception of the 1670 statue, working in tandem with chattel slavery, had important implications for South Carolina slave owners. First, by giving a widow access to one-third of her deceased husband's personal property (which in South Carolina included slaves) Assembly members provided widows with increasingly valuable human property for their support. Indeed, by 1712 African slaves comprised roughly one-half of South Carolina's population, as white colonists imported slaves in ever-increasing numbers to move more acres of land into rice production.[108] Most propertied colonists "had more wealth in slaves than land" in the eighteenth century, and as John Crowley has argued, colonial South Carolina's property law represented an attempt to "take into account the legal status of slaves as personalty in the division of estates."[109] Whereas in England a "widow's interest in the landed estate was sufficiently compensated by maintenance for life from one-third of its income," for many South Carolina widows, returns from land could not provide adequate support. Although Assembly members did not explain why they chose to adopt the 1670 statute, codifying a widow's interest in slaves in order to provide her with sufficient maintenance may have played a role in their decision.[110]

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[107] 22 & 23 C. 2, c. 10, adopted in *SAL*, 2:523 *ff*.

[108] Morgan, *Slave Counterpoint*, 95.

[109] Crowley, "Family Relations and Inheritance," 52.

[110] The potential downside to South Carolina's intestacy scheme, however, was that a widow who remarried would take her deceased husband's slaves with her, which under the doctrine of coverture would become the property of her new husband and would no longer pass to her children upon her death. Slave owners could alter these "dangerous effects of intestacy" by writing a will that limited a wife's access to the estate. Salmon, *Women and the Law of Property*, 157. Wills were proved by the governor and council sitting as a Court of Ordinary. This court also had authority over the administration of intestates' estates. According to John Crowley, testation rates in colonial South Carolina were high, and testates usually comprised "between 40 and 50 percent of such listings as probated decedents, militiamen, and jurymen." As in England, wealthy decedents were more likely to leave a will. "Half of the testators with identifiable occupations were planters, one quarter were merchants, and another quarter

By adopting the 1670 Act, South Carolinians also ensured that the children of intestates would inherit the residue of personal property, including slaves, equally. Unlike Virginia, where slaves were real estate and would descend according to the canons of descent to the eldest son (primogeniture), in South Carolina, daughters and sons alike would share in a decedent's enslaved property.[111] This provision was particularly important in a high-mortality province like South Carolina, where colonists could not be sure of producing a surviving male heir. Indeed, the interaction of disease, human actors, and the natural environment in the colony created a demographic profile that made it appear less like other mainland colonies and more like the British West Indies. Even by early modern standards, "which were nothing if not appalling," life in colonial South Carolina was "peculiarly fragile."[112] In the colony's "funereal lowlands," the white population "had difficulty sustaining itself naturally until the 1770s." Nearly one-third of the residents of who survived to the age of twenty died before they were forty, while the crude death rate in Charles Town among whites was "terrifically high: between 52 and 60 per thousand" between 1722 and 1732."[113] Colonists were aware they were likely to die young and without male heirs. This realization, after all, is what prompted colonists to complain about the escheats clause in the Fundamental Constitutions, which prohibited daughters from inheriting land. Although South Carolina colonists may have been less dynastically-minded than their counterparts in Virginia, they nonetheless sought to ensure the transmission of wealth, which increasingly took the form of slaves, through at least one generation. The 1670 intestacy statute,

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were artisans and tradesmen. The proportion of widows varied between 8 and 19 percent." John E. Crowley, "The Importance of Kinship: Testamentary Evidence from South Carolina," *Journal of Interdisciplinary History* 16 (1986): 565-66.

[111] Morris, *Southern Slavery and the Law*, 83.

[112] Peter A. Coclanis, *The Shadow of a Dream: Economic Life and Death in the South Carolina Low Country 1670-1920* (New York: Oxford University Press, 1989), 38.

[113] *Ibid.*, 42.

when combined with chattel slavery, made this possible even when colonists failed to produce a surviving male heir.

Chattel slavery, working in tandem with the 1670 intestacy statute, also ensured that in South Carolina creditors could attach slaves claimed by widows. Unlike land, which descended directly to the heir-at-law in cases of intestacy, under English law personal property was subject to creditors' claims and funeral expenses before the residue could be apportioned as a widow's thirds. As colonists throughout the British Atlantic World were well aware, creditors were reluctant to extend credit when assets could not be attached. This, after all, had been the point of the Debt Recovery Act, which sought to prevent colonial legislatures from re-classifying slaves as real estate in order to shield them from creditors. For precisely this reason, assembly members in provinces where slaves were treated as real estate for some purposes passed laws that were creditor friendly, particularly when it came to widows' claims to slaves. Virginia burgesses, for example, worked hard to ensure that even though slaves were considered real property for the purposes of inheritance, creditors could still reach dower slaves.

South Carolina colonists arrived much earlier at a simpler solution. By adopting chattel slavery, they ensured that creditors always and without question could attach slaves in the colony, even when those slaves were claimed by widows. Familiar with the needs of merchants and factors through their interactions with them in Charlestown and also by virtue of the fact that many South Carolina planters themselves were engaged in mercantile activities, slave owners crafted a legal regime that allowed them to maximize the availability of credit. As we shall see in Chapter 2, doing so was vital for colonists who increasingly relied upon credit to expand their plantation and mercantile enterprises. Leveraging the value inherent in their human property, they sought access to credit in order to purchase more slaves and more land for them to work.

Indeed, the cycle of credit and debt in South Carolina relied upon the ready availability of this literal kind of human capital, which was used to fuel the colony's geographic and financial expansion and helped to make South Carolina's colonists the richest group on a per capita basis in North America on the eve of the American Revolution.

Repercussions: Analogies to Livestock

Legislative determinations about how slaves should be classified as property dehumanized slaves, but colonists also transformed people into things on a daily basis when they compared slaves to livestock and moveable property in transactional documents. Historians have long understood that colonists analogized slaves to livestock, and that comparing slaves to animals played an important role in the dehumanization of enslaved people. Rooted in antiquity and fertilized by a Judeo-Christian world-view that posited an "almost unbridgeable gap between humans and animals," the animalization of "increasing numbers of outsiders" during the age of expansion removed the "inner human qualities that helped to protect an adult man or woman from being treated as a mere object -- as opposed to a moral "center of consciousness."[114] For Davis, the process of dehumanization "made slavery possible" by severing "ties of human identity and empathy." It allowed slave owners to overcome, albeit incompletely, the "problem of slavery," which was the "impossibility, seen throughout history, of converting humans into totally compliant, submissive chattel property."[115] Dehumanization, in fact, has primarily been seen as a psychological process, one in which conflating slaves with animals functioned to

[114] Davis, *The Problem of Slavery in the Age of Emancipation*, 22, 26, 13.

[115] *Ibid.*, *passim.*

overcome the cognitive dissonance generated by treating people as property.[116] But dehumanization in British plantation colonies was first and foremost a legal process, an attempt to fit slaves within a familiar property law rubric in order accomplish particular economic tasks. As such, animal analogies demanded only a formal association of slaves and livestock within the well-worn pattern dictated by the law, not an explicit or ideological consideration of the comparison from first principles. These analogies also reflected colonists' perception that slaves and livestock were similar in terms of their economic value and the labor they provided on plantations. Rather than reading colonists' dehumanizing language as reflecting a conflicted mental state, the grouping of slaves and livestock more often than not was a practical decision driven by twinned legal and economic imperatives.

South Carolina colonists, like colonists throughout British plantation America, routinely described slaves using dehumanizing language. When Henry Laurens, who acted as a factor for British slave trading merchants, intervened on behalf of a slave purchaser to request an abatement in price, he described the purchased slave in distinctly animal terms as a "Creature" and an "Idiot" who as "very Mauger & full of sores." Arguing on behalf of the "poor Industerous shoemaker" who now owned the defective slave, he suggested that even if the slave were "sound he would not be worth a Groat" given the fact that he was such "a Loathsome Carcass." According to Laurens the buyer was "much to be pittied." Not only had he purchased a slave that "no one will take off of his hands at any rate," he also was forced to gaze upon "such an object in View that is shocking to human Nature."[117] Laurens's choice of vocabulary in referring to this particular slave was not unusual. South Carolinians routinely referred to

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[116] "Slaveowners linked the reproductive lives of men and women to those of agricultural commodities in gestures that read as efforts to either establish distance from or to distinguish between their own struggles with 'increase.'" Morgan, *Laboring Women*, 83.

[117] Austin & Laurens to Robert & John Thompson & Co., 20 April 1757, *HLP,* 2:523-24.

enslaved people in ways that suggested they were less than human, ranging from describing slaves as "stock" (that is, as a form of productive capital) to summarily appraising female slaves along with their "issue and increase."[118] For example, describing his own slave, Nanny, Laurens characterized her as "a breeding Woman." Indeed, he expected that "in ten Years time" she would "double her worth in her own Children."[119] When colonists like Laurens deployed this type of language in connection with slaves, they engaged in a cultural practice that had become commonplace in the British Atlantic World by the eighteenth century. As Davis and others have shown, slave owners in South Carolina and elsewhere hearkened back to a much older discursive tradition when they analogized Africans to beasts, signaling their belief in the inherent inferiority of Africans by describing them as less than human.[120]

When English colonists grouped slaves with livestock, however, their linguistic choices also reflected their belief that slaves and livestock were similar from an economic perspective. Slaves and livestock were both valued for their labor, and in transactional documents colonists deployed symmetrical language that suggests they linked slaves with livestock because they performed similar productive work functions. For example, when Reverend John Hockley arrived in the parish of St. Johns, members of the church vestry undertook a subscription "for the purchasing Parish Negros -- also one other Subscription put about for the purchase of a Horse.[121] This parallel language also appeared in a 1706 act establishing religion in the province and providing for the "Maintenance of Ministers." The statute stipulated that the rector or minister would "enjoy" "all such Negroes and their Increase as hath been already purchased, given and

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[118] According to Jennifer Morgan, one-third of South Carolina slave owners who "transferred enslaved women in their wills" between 1711 and 1729 used the term "increase." Morgan, *Laboring Women*, 138.

[119] Henry Laurens to Richard Oswald, London, 16 October 1767, *HLP,* 5:370.

[120] Davis, *The Problem of Slavery in the Age of Emancipation*, *passim*. For a discussion of the dehumanization of African women, see Morgan, *Laboring Women*, 82-91.

[121] Vestry Minutes, 14 Nov. 1765, Thomas P. Ravenel Collection, 12/314/1, SCHS.

allotted, or that shall be herafter purchased, given and allotted, to any of the several Parishes." Assembly members then reproduced the same language, providing that the divine would also "enjoy all such Cattle and their Increase, as hath been already purchased, given and allotted, or shall be hereafter purchased, given and allotted to any of the several Parishes."[122] In this case, both slaves and cattle would be required to work glebe lands in order to provide the minister with an income; the grouping of slaves and livestock here speaks to the vestry's desire to provide the new cleric with labor that was necessary to maintain his living. Indeed, both slaves and cattle were considered to be "stock," that is, valuable property that colonists expected to generate a return, in part through reproduction. Both were also the kind of productive property required on any plantation land in order to improve it and generate revenue.

Most important, however, colonists grouped slaves with livestock because they were both chattel property. As a legal matter, slaves and livestock were identical, and when colonists grouped them together, their decision to do so was driven in part because they recognized this fact. Indeed, classifying slaves as chattel had practical legal ramifications that compelled colonists to associate slaves with livestock in transactional documents. For example, because slaves were not real estate, buyers could not assume that plantations would be conveyed along with the slaves who worked them. Colonists seeking to sell plantations, then, were required to stipulate whether slaves were included in a sale. As a result, sellers often grouped slaves with livestock and plantation equipment in conveyancing documents. For example, when William and Bridget Sereven sold Rene Ravenel a plantation in Berkley County in 1708, the sellers also included in the sale "one negro man named Jack one negro Woman named Bronka and one negro

[122] "An Act for the Establishment of Religious Worship in this Province, according to the church of England; and for the Erecting of Churches for the publick Worship of God; and also for the Maintenance of Ministers, and the Building convenient Houses for them" (1706), Nicholas Trott, *The Laws of the Province of South Carolina*, 2 vols. (Charlestown, 1736), 1:133-34.

boy named Quashee and ye cart that belongs to ye said Plantation with all the working oxen their yokes and chains."[123] Peter Manigault, writing to David Deas in 1771, gave his correspondent "notice" that William Blake had purchased not only "Jasper's Barony" but also "all the Negroes Cattel Horses & all Stock whatsoever with the Plantation Tools & Provisions of every kind/merchantable Rice only excepted."[124] Detailing precisely what personal property would be included in a real estate sale helped to ensure that a conveyance embodied the intent of both the buyers and the sellers, and that the sale price accurately reflected the value of the property conveyed.

Because slaves were among a colonists' most valuable chattel property, testators also routinely listed them together with livestock in wills. As Lawrence Rowland has shown, slaves and livestock were the two most valuable types of personal property listed in colonial inventories from the Sea Islands of South Carolina.[125] In the period immediately prior to the colony's rice boom, livestock also "provided a source of income" and "represented the major form of wealth" in the colony.[126] Devising both livestock and slaves, then, was among a testator's most important final acts. In fact, South Carolina colonists associated testation with the possession of both slaves and cattle. Eliza Lucas Pinckney, who is best known for introducing commercial indigo planting in South Carolina in the 1740s, explicitly linked will-making with the ownership of livestock and slaves. Pinckney spent one particularly slow social season learning "the rudiments of the law" from Thomas Wood's two-volume *Institute of the Laws of England*, and

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[123] 15 October 1708, William Cain Family Papers, 281.01.01.01(P) 01-14, SCHS.

[124] Peter Manigault to David Deas, 1 May 1771, Manigault Papers, Box 11/278/7, Peter Manigault Letterbook, 1763-1773, 149, SCHS.

[125] Lawrence Sanders Rowland, "Eighteenth Century Beaufort: A Study of South Carolina's Southern Parishes to 1800" (Ph.D. diss., University of South Carolina, 1978), 161.

[126] John Otto, "Livestock-Raising in Early South Carolina, 1670-1700: Prelude to the Rice Plantation Economy," *Agricultural History* 66 (1987): 21.

she explained to a correspondent that she used her newfound knowledge to provide legal services to her "poor Neighbors." These unfortunate individuals had "few slaves and Cattle to give their children," and consequently never thought of making a will until "they come upon a sick bed and find it too expensive to send to town for a Lawyer."[127] Pinckney's impression that colonists with slaves and cattle more typically wrote wills was correct. As John Crowley has shown, the testation in colonial South Carolina was "frequent," and "its likelihood increased with decedents' wealth."[128]

In their wills, South Carolina colonists typically devised their livestock and slaves in tandem. For example, in 1727 Dunkan MacGregror named his wife Mary his executrix, and gave her one-third of all of his "Negroes Cattle and household goods."[129] Duncan McQueen of Pon Pon also left his "natural Son" John McQueen "one Negroe boy now at Savannah Town . . . together with half of Hogg's Horses and Mares about Savannah Town."[130] Likewise, Peter Gurry gave his "Beloved Wife" Marget one-third of the remainder of his estate, "that is to say Negro's horses Cattle and all what I posses except Lands."[131] Testation was not primarily a means by which planters "enacted a moral grammar through which they attained fluency in the practice of

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[127] Eliza Lucas Pinckney to [Miss Bartlett] [c. June 1742] *The Letterbook of Eliza Lucas Pinckney, 1739-1762*, edited by Elise Pinckney (Columbia: University of South Carolina Press, 1972), 41. Far from doubting her own legal abilities, Pinckney believed that she had "done no harm" to these supplicants. Indeed, she had learned her "lesson very perfect," and knew "how to convey by will Estates real and personal." She "never forget in its proper place, him and his heirs for Ever, nor that 'tis to be signed by 3 Witnesses in presence of one another." Taking comfort in Doctor Wood's assurance that "the Law makes greater allowance for last Wills and Testaments presumeing the Testator could not have council learned in the law," she congratulated herself on a job well done. Nonetheless, Pinckney was willing to admit that her legal knowledge had its limits. As she confided to her friend, although a wealthy widow "teazed me intolerable to draw her a marriage settlement," Pinckney conceded that it was "out of my depth," although she did agree to act as one of the widow's trustees. *Ibid.*

[128] Crowley, "The Importance of Kinship," 565.

[129] Will of Dunkan MacGregor, 15 February 1726/7, Secretary of State Recorded Instruments; Will books Vol. LL 1737-1747 S 213027, 15, SCDAH.

[130] Will of Duncan McQueen, 12 February 1736, Secretary of State Recorded Instruments, Will books Vol. LL 1737-1747 S 213027, 22-24, SCDAH.

[131] Will of Peter Gurry, 1 March 1736/7, Secretary of State Recorded Instruments, Will books Vol. LL 1737-1747 S 213027, 43-45, SCDAH.

slaveownership," but, rather, it was a practical process that followed long-established forms and did not demand the application of any special ethical consideration. Colonists arranged their affairs in an economically logical way, listing their most valuable chattel property together when they made specific or general bequests of their residual estate.[132]

That the decision to group slaves with livestock was dictated by a perception of their comparable economic value is reinforced by the wills of tradesmen. These testators typically grouped slaves not with cattle, as was the case for planter testators, but with their most valuable possessions: their tools. For example, William Linthwaite devised his wife "the use of" his "Negro Man named Lister and of all my shop Tools and other Instruments of my Trade" until his son came of age, at which point he would inherit "the said Negro Man Shop Tools & Instruments of Trade."[133] Hannah Gale, likely a blacksmith's widow, left her husband's tools to her daughters. They were to be "Equally Divided . . . Share and Share alike with the Negroes not herein mentioned."[134] The grouping of tools with slaves in these wills suggests that practicality more than ideology determined the ordering of personal property. Colonists associated slaves with livestock not in the service of a broader psychological process that allowed them to ignore the humanity of slaves, but in order to rank their chattel property according to value and transfer it to the next generation.

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[132] Morgan, *Laboring Women*, 69.

[133] Will of William Linthwaite, 8 April 1739, Secretary of State Recorded Instruments, Will books Vol. LL 1737-1747 S 213027, 264-67, SCDAH.

[134] Will of Hannah Gale, 25 November 1735, Secretary of State Recorded Instruments, Will books Vol. LL 1737-1747 S 213027, 357-63, SCDAH.

Conclusion

Although the dehumanization of slaves occurred throughout the Americas, the economic and legal imperatives of chattel slavery facilitated this process by making it advantageous and even necessary for colonists to group slaves with livestock. Whether they sought to identify property that would be conveyed in a plantation sale or to specify who would receive valuable chattel property upon their deaths, colonists associated slaves with livestock because they were legally identical and perceived to be of similar value. Certainly English colonists were not the only residents of the Americas who likened slaves to livestock. But English law gave them a particular incentive to do so. With its bifurcation of property into real estate and chattels, English property law provided no meaningful alternatives for colonists who sought to participate fully in a legal system that had already developed forms, procedures, and substantive law around this classificatory scheme. Categorizing slaves as chattels or real estate alone gave colonists access to this pre-made system, and colonists carefully weighed classificatory schemes with a full understanding that each conveyed different bundles of rights to slave owners.

In South Carolina, colonists ultimately codified chattel slavery in order to buy, sell, and devise slaves without restraint. Classifying slaves as chattel property, when set to work in connection with other property law statutes in the province, provided colonists with substantial flexibility in managing their slaves. This suited their needs as particularly active participants in a dynamic Atlantic economy, while also allowing them to accumulate and bring into production new and sometimes far-flung plantation acreage. Free from the restraints of entail, primogeniture, and dower claims to slaves, South Carolina colonists could move slaves to outlying plantations, sell them without encumbrances, and devise them to whomsoever they

chose. While providing this flexibility, chattel slavery also created legal and economic incentives for colonists to group slaves with livestock. When John Phillips crossed out "iron gray mare" and substituted it with "negro woman slave," he did so in the context of a plantation society that had consciously deviated from precedents in choosing to codify chattel slavery. In a province where an enslaved person was legally identical to a horse or a cow, it is not surprising that colonists grouped slaves together with livestock in transactional documents, or that a lawyer like Phillips would adapt English legal forms and procedures previously used to litigate over animals to litigate over slaves.

The decision to group slaves with livestock was in many ways a practical one, driven by the utility of doing so in the eyes of the law more than to address any qualms about the morality of holding property in human beings or to shore up legal distinctions between white and black colonists. From the colony's beginning, these distinctions were readily evident; the degraded status of enslaved people in South Carolina did not require further explication. Rather, animal analogies were a natural outgrowth of a type of reasoning by analogy that was endemic of English common law thinking, one that required litigants, lawyers, and judges to constantly make comparisons between like and like.[135] If slaves were like livestock as a legal matter, then it followed that they should be grouped together in legal documents, and indeed that the same documents used to litigate over animals could be used to litigate over human property. Viewed as a form of legal instrumentalism, a means by which slave owners categorized enslaved people

[135] Patrick Nerhot, "Introduction," in *Legal Knowledge and Analogy: Fragments of Legal Epistemology, Hermeneutics, and Linguistics*, edited by Patrick Nerhot (Netherlands: Kluwer Academic Publishers, 1991), 1; Katja Langenbucher, "Argument by Analogy in European Law," *Cambridge Law Journal* 57 (1998): 481-521.

as property in order to maximize their value, likening slaves to animals was a morally neutral act from the perspective of slave owners.[136]

If analogizing slaves to livestock was a morally neutral act from a slave owner's perspective, however, it had distinctly negative and long-lasting consequences for enslaved people. In the aggregate, livestock analogies generated in the colonial period reinforced and replicated stereotypes that inscribed animalistic qualities upon African bodies. As Davis has argued, these stereotypes eventually were given the imprimatur of science, fueling the development of scientific racism in the late eighteenth- and early nineteenth-centuries and creating a "systematic way of institutionalizing" the dehumanization of slaves.[137] Ultimately, the institutionalized dehumanization of Africans became a justification not only for enslavement per se, but also for day-to-day slave trading practices that destroyed countless black families. Through the workings of the internal slave trade and in the "epitome of bestialization," the slave auction, white slave owners drew upon a discourse of dehumanization as they expanded westward and as they defended slavery from ever-louder critiques.[138]

As a practical matter, the codification of "pure" chattel slavery in South Carolina also had invidious repercussions that extended far beyond the colony's borders. South Carolina's colonial slave regime, in fact, set a precedent for slave law in the Deep South as territories in the new United States engaged in their own project of legal borrowing. Just as mainland American colonies drew upon West Indian legal models in formulating a statutory law of slavery, so too did new Deep South slave societies look to South Carolina's slave law as an exemplar. Moving "from the eastern seaboard to the territories of Alabama, Mississippi, Arkansas, and Louisiana,"

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[136] For a discussion of the moral neutrality of instrumentalism, see Malick W. Ghachem, *The Old Regime and the Haitan Revolution* (Cambridge: Cambridge University Press, 2012), 8-9.

[137] Davis, *The Problem of Slavery in the Age of Emancipation*, 32.

[138] *Ibid.*, 11.

planters "rapidly adopted" South Carolina's slave code "either in whole or in part." Indeed, South Carolina's slave law eventually became "the slave law of virtually all the newly formed territories."[139] This mass exportation included not only the colony's severe criminal and policing provisions, but also chattel slavery. And as chattel slavery migrated into the Deep South after the American Revolution, so too did the dehumanizing metaphors that chattel slavery encouraged, with disastrous results for enslaved people.

[139] Sally E. Hadden, "The Fragmented Laws of Slavery in the Colonial and Revolutionary Eras," in *The Cambridge History of Law in America*, edited by Michael Grossberg and Christopher Tomlins, 3 vols. (Cambridge: Cambridge University Press, 2008), 1: 281. An exception to this trend was Kentucky, which adopted portions of its slave law from Virginia and North Carolina. *Ibid*., 282. For a recent general treatment of the western expansion of slavery, see Adam Rothman, *Slave Country: American Expansion and the Origins of the Deep South* (Cambridge: Harvard University Press, 2005).

Chapter 2
Slavery and Debt

In March 1743, South Carolina colonist Arthur Matthews had reached his limit. Outraged that an officer of the court had attempted to seize "some Negros" that had been mortgaged to him, Matthews prevented the officer from removing the slaves. "I think I have Acted in all Cases as the Law Directs in Relations to Negros under Mortgage," Matthews later explained in a letter to the provost marshal, and he further claimed that his attorney would be willing to "Supporte me in what I have Done." Satisfied (according to his own assessment of what the law was) that his actions had been entirely proper, Matthews ended his missive on a defiant note: the "Gentlemen that has Directed you to Sease right or wrong may Com on Me for the Slaves," he dared, but "I Shall Defend them Till I am Sattisfied."[1]

We do not know whether Matthews successfully prevented the officer from taking the mortgaged slaves, but his hastily scrawled complaint draws our attention to the reality of creditor-debtor relations in societies where enslaved people were valued both as financial assets and as productive laborers. Indeed, in plantation colonies throughout the British Atlantic World, colonists took full advantage of the dual nature of human property as they sought to build wealth over the eighteenth century. Using a variety of legal instruments to assemble the capital to buy slaves, they viewed slaves as sound economic investments, purchasing slaves on credit and securing their debts by pledging enslaved people as collateral. African bodies, in fact, became South Carolina colonists' most significant form of wealth, and combined with land ownership, slaveholding was the key to the colony's pre-Revolutionary economic success. These colonists maximized the value of their slaves as coerced laborers, achieving a level of prosperity that was

[1] Arthur Matthews to Samuel Hurst, Esq., 1 March 1743, S205002, South Carolina Department of Archives and History, Columbia, South Carolina.

"staggering" by putting slaves to work producing valuable export commodities and leveraging their worth to secure credit.[2]

In this chapter, I examine creditor-debtor relations in colonial South Carolina, showing how slavery shaped everyday legal practice and how legal practice, in turn, shaped slavery. I watch colonists as they bought enslaved people, usually on credit, and I examine how they used legal instruments like conditional bonds to invest in slaves. Building on the work of economic historians who have shown the importance of slave mortgaging to South Carolina's eighteenth-century growth, I also examine how colonists secured their debts with slave mortgages, often in order to purchase more slaves. Buying slaves on credit, in fact, deepened South Carolina's commitment to slavery, as financing more slave purchases seemed the only way for over-extended colonists to extricate themselves from debts. For these debtors, adding slaves to plantations would allow them to clear and plant more acreage, which in turn would enable them to satisfy their creditors. They hazarded their fortunes on a successful next crop, continuing to leverage human capital to purchase the productive labor they needed to expand their plantation and mercantile enterprises.

Many of these colonists were successful, but some were not. Failure, indeed, is at this chapter's heart. Although I examine connections between slave purchasing, debt, and plantation building, noting how these worked together to create widespread white prosperity, I am largely concerned with colonists who could not, in the end, make ends meet, and with the creditors who scrambled to squeeze what they could from insolvent debtors. Understanding how the law of credit and debt worked in South Carolina requires us to follow colonists when insolvency loomed, when crops failed, and when businesses went bust. At these moments of acute financial

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[2] Kenneth Morgan, "Slave Sales in Colonial Charleston," *The English Historical Review* 113 (1998): 907.

hardship, whether they came about through bad luck or poor management or a combination of the two, both creditors and debtors bargained in the shadow of the law, generally seeking to avoid the expense of high-priced lawyers and the hassle of slow-paced litigation. In their preference for the amicable adjustment of their affairs without recourse to formal law these colonists were not unlike other colonists throughout the British Atlantic World. South Carolina creditors, like creditors elsewhere, threatened litigation, bargained with debtors, and acted in concert to share an insolvent debtor's property. And South Carolina debtors, like other colonial debtors, dodged writs, offered to assign their debts, and "held close" in their homes to avoid legal process. Unlike many northern colonists, however, creditors and debtors in South Carolina were bound together by debt made flesh in the bodies of slaves, and they maneuvered within a presumption, often without comment, that people were property. At a procedural level, colonists easily slotted slaves into an English legal framework that was meant to facilitate land purchasing. Combining timeworn legal jargon with the newest printing technology, they executed pre-printed conditional bonds to buy slaves, and they routinely mortgaged human property to secure their debts. English law, in fact, readily accommodated colonists' need to generate capital to buy enslaved people, despite the commonplace assumption that adapting English law to slave societies was a fraught process.[3]

Beyond shaping how colonists used traditional credit instruments, the presence of slaves

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[3] An older historiography assumed *arguendo* that there was no English law of slavery, largely because England lacked a statutory framework that either authorized slavery or provided for the policing of slaves. Alan Watson, for example, begins his study with the premise that "[t]here was no slavery in England, hence there was no slave law in England." Indeed, "a law of slavery had to be made from scratch." Alan Watson, *Slave Law in the Americas* (Athens: University of Georgia Press, 1989), 62. More recently, historians have begun to complicate this orthodoxy. See, e.g., "Forum: Somerset's Case Revisited," *Law and History Review* 24 (2006): 601-71; J.H. Baker, *An Introduction to English Legal History*, 4th ed. (London: Butterworths Lexis Nexis, 2002), 475-77; and Elsa V. Goveia, "The West Indian Slave Laws of the Eighteenth Century," in *Caribbean Slavery in the Atlantic World: A Student Reader*, edited by Verene A. Shepherd and Hilary McD. Beckles (Kingston, Jamaica: Ian Randle, 2000), 584.

in colonial South Carolina as commodities and laborers also influenced everyday legal decisions, particularly when insolvency loomed. For creditors, the knowledge that a debtor had secured other debts with slaves encouraged dunning. Unsecured creditors, in fact, were aware that the attachment of mortgaged slaves would deprive colonists of the labor they needed to pay other delinquent debts, and it therefore was in their best interest to allow colonists to keep land and slaves together to generate the income that could pay off what they owed. Indeed, in plantation colonies, creditors had an even greater incentive to avoid litigation. These creditors sacrificed the opportunity to seize and sell enslaved property for a quick gain, taking a longer view that slaves should continue to labor to service the debts of their masters. At the same time, debtors bargained with creditors to maintain possession of their slaves, going to great lengths keep plantations running. In moments of financial hardship, the dance of debt and credit in colonial South Carolina resembled in many respects that in northern colonies, but where it differed, it owed its peculiar steps to the presence of human property.

The legal culture of credit and debt in slave societies like South Carolina remains unexamined by scholars. Although historians Russell Menard, Bonnie Martin, and David Hancock have noted the importance of slave mortgaging to South Carolina's eighteenth-century economic growth, historians have yet to describe how the law of credit and debt functioned on a daily basis in plantation societies.[4] In his recent study of bankruptcy in colonial and early republic America, for example, Bruce Mann examines creditor-debtor relations in Massachusetts

[4] Bonnie Martin, "Slavery's Invisible Engine: Mortgaging Human Property," *The Journal of Southern History* 76 (2010): 817-66; Russell R. Menard, "Financing the Lowcountry Export Boom: Capital and Growth in Early Carolina," *The William and Mary Quarterly*, 3rd ser. 51 (1994): 659-76; David Hancock, "'Capital and Credit with Approved Security': Financial Markets in Montserrat and South Carolina, 1748-1775," *Business and Economic History* 23 (1994): 61-84.

and other New England colonies, largely ignoring developments in plantation America.[5] Economic historians of the transition to capitalism have displayed a similar regional bias, emphasizing changing debt-holding patterns in northern colonies.[6] Where scholars do attend to southern developments, they typically emphasize debt as a rhetorical construct. Mann, for example, analyzes the relationship between debt, slavery, and dependence as a rhetorical trifecta in Revolutionary Virginia, suggesting that planters' indebtedness to British merchants gave them "an unwonted, and doubtless frightening, kinship with the slaves."[7] Herbert Sloan and Woody Holton adopt a similar analysis of debt as a cultural and intellectual concept in their studies of colonial Virginia.[8] Slavery scholars, too, have ignored this topic. Conflating statutory law with slave law, these historians primarily emphasize the criminal and policing statutes promulgated by colonial legislatures, ignoring the law of credit and debt.[9]

Attending to creditor-debtor relations in colonial South Carolina presents an entirely different picture of what slave law was and how it worked. This was a law of seemingly insignificant, everyday transactions. It was a law built in the aggregate as colonists bought, sold,

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[5] Bruce Mann, *Republic of Debtors: Bankruptcy in the Age of American Independence* (Harvard: Harvard University Press, 2003).

[6] Richard Bushman, "Markets and Composite Farms in Early America," *WMQ* 55 (1998): 351-74; Christopher Clark, "Rural America and the Transition to Capitalism," *Journal of the Early Republic* 16 (1996): 223-236; Naomi Lamoreaux, "Rethinking the Transition to Capitalism in the Early American Northeast," *Journal of American History* 90 (2003): 437-61; Charles E. Brooks, *Frontier Settlement and Market Revolution: The Holland Land Purchase* (Ithaca: Cornell University Press, 2012); Christopher Clark, *The Roots of Rural Capitalism: Western Massachusetts, 1780-1860* (Ithaca: Cornell University Press, 1992); Winifred Rothenberg, *From Market- Places to a Market Economy: The Transformation of Rural Massachusetts, 1750-1850* (Chicago: University of Chicago Press, 1992).

[7] Mann, *Republic of Debtors*, 137.

[8] Herbert E. Sloan, *Principle and Interest: Thomas Jefferson and the Problem of Debt* (Charlottesville: University of Virginia Press, 2001); Woody Holton, *Forced Founders: Indians, Debtors, Slaves and the Making of the American Revolution in Virginia* (Chapel Hill: University of North Carolina Press, 1999).

[9] See, e.g., David Barry Gaspar, "Rigid and Inclement': Origins of the Jamaica Slave Laws of the Seventeenth Century," in *The Many Legalities of Early America*, edited by Christopher L. Tomlins and Bruce H. Mann, 78-96 (Chapel Hill: University of North Carolina Press, 2000) and William M. Wiecek, "The Statutory Law of Slavery and Race in the Thirteen Mainland Colonies of British America," *WMQ* 34 (1977): 258-80.

and mortgaged slaves, and as they used centuries-old legal language to do so. On a daily basis, in fact, it was the quotidian stuff of credit and debt and buying and selling that made slavery work. South Carolina colonists understood this. They knew that slave law not only organized relationships among masters and slaves, but also among buyers and sellers, planters and British merchants. Debt, realized in the bodies of enslaved people, connected colonists in slave societies throughout the Atlantic World to each other even as it shaped their daily legal choices.

Perhaps more important, the fact that so many slaves were owned conditionally worked in the long run to commodify and dehumanize African people. Because few colonists paid cash for slaves, it was impossible for slave owners to avoid calculating the value of individual slaves in terms of their value at sale, and to compare this figure to the amount of income a slave's labor generated. This economic calculus was particularly important in times of financial difficulty, when slave owners made hard choices about the profitability of their slaves relative to their expectations about crop yields. Far from perceiving their slaves primarily as family members who should be sold only reluctantly, colonists viewed their slaves first and foremost as economic assets that could (and should) be sold to offset losses or mortgaged to generate capital. Certainly colonists understood slaves, and particularly favored slaves, to be human beings with their own personalities, desires, and emotions. Nonetheless, moving beyond criminal law to watch everyday legal behavior reveals that an awareness of slaves' humanity did not deter colonists from treating enslaved people as things. Rather, they took full advantage of the dual nature of human property, oscillating between treating slaves as conscious, human agents and treating slaves as commodities when it suited their economic interests.

This view of colonists' legal and economic behavior suggests that it differed little from scholars' revised view of nineteenth-century slave owners, whom they have characterized as

market actors who zealously pursued profit maximization at the expense of enslaved families. On the whole, these scholars have illustrated that slave owners followed the "chattel principle," ascribing economic value to the bodies of their slaves and perceiving them as human capital that could be leveraged to suit their commercial needs. As this chapter shows, colonists fully understood the chattel principle long before the expansion of the internal slave trade, suggesting less difference between pre-Revolutionary and post-Revolutionary slavery than many scholars have believed. Although the closing of the international slave trade created a new, internal slave economy that differed from its predecessor in many respects, when it came to viewing slaves as economic investments and using their legal knowledge to act on that perception, colonial slaveholders did not differ greatly from subsequent generations.

In this chapter's first section, I examine the importance of slaves to South Carolina's economy and to colonists' strategies for wealth building. I show how purchasing slaves on credit allowed colonists to expand their plantation enterprises, following two Scots planters, William and John Murray, as they invested in slaves and built a successful indigo plantation in the 1750s. I pause then to consider how, as a practical matter, colonists like the Murray brothers executed their purchases, noting how they used pre-printed conditional bonds to secure their slave purchases. These forms replicated familiar English legal jargon, allowing colonists to purchase enslaved people without a lawyer's aid. In section two, I contrast the Murrays' experience with that of Robert Baillie, another Scots planter who through poor luck and even worse judgment became entrapped in a cycle of slave purchasing on credit as he sought to build a plantation in the Georgia Lowcountry. The legal instrument that held out the hope of salvation for Baillie -- but ultimately brought him to the brink of ruin -- was the mortgage, and in this section I also examine the day-to-day implications of slave mortgaging as a legal practice. Although the

mortgaging of slaves was never specifically authorized in South Carolina, colonists nonetheless assumed from an early date that slaves could be mortgaged to secure their debts. They adapted the mortgage, which in England and New England colonies typically secured debts with land, to reflect the fact that slaves were their most valuable assets, not only in terms of their currency value, but also in the ways in which this value could be exchanged.

When colonists like Baillie failed financially, when they could no longer satisfy their creditors, they faced insolvency. In sections three and four I explore the implications of insolvency for creditors and for slave owning debtors, noting how the presence of slaves as collateral shaped debtor-creditor relations. When a debtor owned slaves, creditors' options multiplied. Indeed, creditors could choose to treat slaves as assets that could be attached and sold, or they could allow debtors to retain enslaved laborers in the hopes that they would work to service a master's debts. More often than not, creditors chose the second option, avoiding costly litigation and short-term gains in favor of a long-term debt collection strategy. At the same time, as I show in this chapter's final section, debtors fought to maintain possession of slaves, sometimes going to extreme lengths to avoid losing their productive human property. Keeping up with the law of credit and debt in the Lowcountry thus constrained what slaves meant to planters as they managed their value as investments.

The Cycle of Credit and Debt

In contrast to other mainland plantation colonies like Virginia, where the legal status of slaves was elaborated over decades, slavery was established at South Carolina's founding

moment.[10] Indeed, from the beginning, the colony's projectors expected that colonists would use slave labor to produce the commodities that would make their New World venture profitable. While the Fundamental Constitutions of Carolina (1669), the Lords Proprietors' proposed constitution for the colony, explicitly endowed settlers with "absolute power and authority over [their] negro slaves," early settlers from Barbados likewise helped to ensure that the province's legal system would grow around a consensus that slaves should be treated as property both *de jure* and *de facto*.[11] These colonists brought their slaves with them to Carolina, relying upon West Indian statutory frameworks to draft the colony's early slave codes, as we have seen in Chapter 1.[12] After a period of experimentation with a variety of commodities for export, the commercial production of rice accelerated at the turn of the eighteenth century and prompted colonists to import larger numbers of enslaved Africans.[13] By 1740, South Carolina was the "largest continental slave importer in the eighteenth century" and the port city of Charlestown

[10] See Edmund S. Morgan, *American Slavery, American Freedom* (New York: Norton, 1975).

[11] John Locke, First Draft of Fundamental Constitutions of Carolina, 21 July 1669, The National Archives, Kew, United Kingdom, PRO/24/47/3. This put to rest concerns which lingered into the eighteenth century in other places throughout the British Empire, including Jamaica, that evangelizing slaves created a moral obligation on the part of planters to free their co-religionists. See Vincent Brown, *The Reaper's Garden: Death and Power in the World of Atlantic Slavery* (Cambridge: Harvard University Press, 2010), 208.

[12] For a discussion of early immigration to South Carolina from Barbados, see Richard Dunn, "The English Sugar Island and the Founding of South Carolina," *South Carolina Historical Magazine* 72 (1971): 81-93. For a discussion of Barbadian slave codes as a "seed crystal" for slave codes in South Carolina and throughout the Atlantic World, see Christopher Tomlins, *Freedom Bound: Law, Labor, and Civic Identity in Colonizing English America, 1580-1865* (Cambridge: Cambridge University Press, 2010), 428-31. It should be noted that, particularly during the proprietary period, South Carolina colonists also enslaved the colony's native peoples. See Alan Gallay, *The Indian Slave Trade: The Rise of the English Empire in the American South, 1670-1717* (New Haven: Yale University Press, 2002). Indian slaves, in fact, continued to appear in colonists' wills well into the eighteenth century. In 1736, for example, Paul Ravenel bequeathed "One Mustee Girl by name Molley" to his niece. Will of Paul Ravenel, 20 January 1736, Secretary of State Recorded Instruments, Will books Vol. LL 1737-1747 S 213027, SCDAH.

[13] Slave imports in South Carolina "rose markedly" in the 1720s and 1730s, with importation rates nearly doubling in the 1730s. Philip D. Morgan, *Slave Counterpoint: Black Culture in the Eighteenth-Century Chesapeake & Lowcountry* (Chapel Hill: University of North Carolina Press, 1998), 60.

the region's most important slave entrepôt.[14]

Slaves comprised an increasingly significant portion of colonists' wealth throughout the eighteenth century. Whereas in England "land was the critical family resource," in South Carolina, wealth commonly took the form of enslaved people.[15] Slaves, in fact, accounted for 40 to 50 percent of South Carolinians' movable property between 1720 and 1770, and this figure reached 68 percent in 1774.[16] This difference reflected the realities of economic life in plantation colonies, which were oriented towards the production of agricultural commodities for an Atlantic market. In South Carolina, the commercial production of rice and indigo had created an economy organized around increasingly diversified and far-flung plantation enterprises, enterprises that relied heavily upon slave labor.[17] Indeed, in order to produce crops large enough to justify investing in a rice plantation, planters required at least thirty workers.[18] Although less labor-intensive than rice cultivation, indigo production also required significant capital investment in the form of slaves. By the 1770s, these enslaved laborers could cost £40 a head, with planters purchasing as many as 20 or 30 slaves at a time, a prodigious expense for even the wealthiest planter.[19] Major merchants, too, were "large slaveholders," while Charlestown-based

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[14] Daniel C. Littlefield, "The Slave Trade to Colonial South Carolina: A Profile," *SCHM* 101 (2000): 110-11; Morgan, "Slave Sales in Colonial Charleston," 908.

[15] John E. Crowley, "Family Relations and Inheritance in Early South Carolina," 51. For a discussion of testamentary practices in Jamaica, see Trevor Burnard, "Inheritance and Independence: Women's Status in Early Colonial Jamaica," *WMQ* 48 (1991): 93-115.

[16] Morgan, "Slave Sales in Colonial Charleston," 907.

[17] S. Max Edelson, *Plantation Enterprise in Colonial South Carolina* (Cambridge: Harvard University Press, 2006), 76; 111-12.

[18] Morgan, *Slave Counterpoint*, 36.

[19] *Ibid.*, 37; Morgan, "Slave Sales in Colonial Charleston," 922. Over the colonial period the number of large slaveholdings in the colony increased. Whereas in the 1720s only 12% of plantation units employed fifty or more slaves, by the 1770s 52% of units did so. Morgan, *Slave Counterpoint*, 37, 40. Kenneth Morgan notes that by the 1750s, planters were purchasing slaves in lots of "twenty, thirty, and forty, though this had been previously uncommon in the province." Morgan, "Slave Sales in Colonial Charleston," 913.

artisans routinely employed skilled slaves who could be purchased outright or hired.[20]

Investing in slave labor could produce an astonishing rate of return, particularly for South Carolina planters. Although profitability "varied from plantation to plantation," a ten to fifteen percent return on investment was considered "a successful year," and by the end of the colonial period an "optimum" rate of return was fifteen to twenty percent.[21] This was in contrast to the Virginia tobacco planter, who could expect a mere five to ten percent return on his investment.[22] Colonists in South Carolina appreciated that slaves, when set to work productively on plantations, could be a lucrative investment. From Henry Laurens, a merchant who "parlayed a fortune trading rice and slaves into a private plantation empire," to immigrant newcomers, colonists widely believed that slaves would quickly pay for themselves. Early eighteenth-century planters, in fact, expected field slaves to work off their purchase price in four years, with this number decreasing to less than two years by the end of the colonial period.[23] Their faith in the profitability of investing in slaves was largely well founded. As S. Max Edelson has shown, Henry Laurens's staggering £14,286 outlay in land and slaves allowed him to build a "plantation

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[20] Morgan, "Slave Sales in Colonial Charleston," 907. See, e.g., Will of William Linthwaite, 8 April 1739, 264-67, Secretary of State Recorded Instruments; Will books Vol. LL 1737-1747 S 213027, SCDAH. Linthwaite, a shop keeper, gave the use of his "Negro Man named Lister and of all my shop Tools and other Instruments of my Trade to my said Wife until my said son Thomas shall arrive at the age of Twenty One Years and after his arriving at such age I give and bequeath the said Negro Man Shop Tools & Instruments of Trade to my said Son his Executors Administrators & Assigns." Slaves were omnipresent in Charlestown, in fact, and were a particularly strong presence along its docks and waterways, where they worked as pilots, sailors, and in the maritime trades. Morgan, *Slave Counterpoint*, 236-43; Michael J. Jarvis, "Maritime Masters and Seafaring Slaves in Bermuda, 1680-1783," *WMQ* 59 (2002): 585-622; W. Jeffrey Bolster, *Black Jacks: African American Seamen in the Age of Sail* (Cambridge: Harvard University Press, 1998); Marcus Rediker, *Between the Devil and the Deep Blue Sea, Merchant Seamen, Pirates, and the Anglo-American Maritime World 1700-1750* (Cambridge: Cambridge University Press, 1989). For the life of Charlestown pilot Thomas Jeremiah, see William R. Ryan, *The World of Thomas Jeremiah: Charles Town on the Eve of the American Revolution* (Oxford: Oxford University Press, 2010) and J. William Harris, *The Hanging of Thomas Jeremiah: A Free Black Man's Encounter With Liberty* (New Haven: Yale University Press, 2009).

[21] Edelson, *Plantation Enterprise*, 241. Philip Morgan suggests that the rate of return was "in excess of 20 percent." Morgan, *Slave Counterpoint*, 38.

[22] *Ibid.*

[23] *Ibid.*

empire" that was successful by "any standard."[24] Laurens's investment was outsized. Indeed, in 1710 Thomas Nairne estimated the cost of starting a rice plantation at £1,000, while in 1772 William de Brahm placed that figure at £2,476.[25] Nonetheless, the purchase of land and slaves on a much smaller scale also could be a sound financial decision, as William and John Murray, two Scots planters, discovered.[26]

William Murray travelled from Scotland to Charlestown in the middle of the eighteenth century, initially hoping to make his fortune as a doctor. Like many other newcomers to South Carolina, however, he soon learned that "the only way of making an Estate quickly" was by purchasing land and slaves. Swayed by this commonplace knowledge, in 1755 he declared his intention to "quit Physick & turn Planter," obtaining a grant for land that was situated seventy miles from Charlestown and was "as good as any in the Province for Indico and Rice." Murray planned to settle his new plantation as soon as possible, that is, as soon as he could "raise as much Money as will purchase me Ten Negroes." Consequently, he and his brother John, who traveled to Carolina to join him in this planting venture, set out to acquire slaves at the best price possible.[27]

Like other South Carolina colonists, the Murray brothers were bargain shoppers when it came to slave purchasing, timing the market and making plans to buy based upon expected crop yields.[28] At first, they planned to purchase West Indian slaves in Antigua, where they had "heard

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[24] Edelson, *Plantation Enterprise*, 201.

[25] Thomas Nairne, *A Letter From South Carolina* . . ., 2nd ed. (London, 1718), 48, Eighteenth-Century Collections Online, Gale Group, galenet.galegroup.com; Morgan, *Slave Counterpoint*, 35.

[26] Edelson, *Plantation Enterprise*, 201.

[27] William Murray to John Murray of Murraythwait, 27 May 1755, GD219/288/9, Scottish National Archives, Edinburgh, Scotland, United Kingdom.

[28] Morgan, "Slave Sales in Colonial Charleston," 914. The centralization of the slave trade in Charlestown helped to make this possible by giving merchants and planters a quicker and "more accurate" picture of slave prices. Many of

that negroes are very cheap," and, although this scheme never prospered, by 1757 John Murray nonetheless could report that they possessed "a very fine plantation" with thirty "very good Slaves." Indeed, he had had the "good luck" to purchase these "Choice" slaves at the "greatest bargain," congratulating himself on saving £29 on their price.[29] Putting these new slaves to work growing indigo, John and William expected to turn a quick profit, reassuring their mother that planters in the area had cleared "a thousand pound sterling last year by their Crop." They anticipated, with hard work and good management, that their plantation's return on investment would be even more impressive.[30]

The Murray brothers, like most South Carolina colonists, bought their slaves on credit, betting that a successful planting season would allow them to satisfy their creditors, including slave merchants. The high start-up costs associated with rice and indigo production, most of which were labor costs, meant that only the richest colonists could afford to buy land, slaves, and equipment without borrowing capital.[31] The financial structure of transatlantic slaves sales was complicated and varied from colony to colony, although by the middle of the eighteenth century lending practices had become more standardized. South Carolina colonists typically purchased slaves on credit from Charlestown-based slave factors, who accepted consignments of slaves from Britain-based slave trading firms on commission. Credit, in fact, was extended in nearly every step of the slave trade, from the coast of Africa to the Charlestown harbor, and creditors

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these planters lived in Charlestown for at least part of the year. Ibid., 909. See also Edelson, *Plantation Enterprise*, 128.

[29] John Murray of Murraythwaite to Adam Smart, 3 January 1756, GD219/290, 1, John Murray of Murraythwaite Letterbook, SNA. In this gambit they differed from most South Carolina colonists, who avoided West Indian slaves because they were subject to higher import duties and, perhaps more importantly, were considered prone to rebellion. John Murray to Mother, 6 March 1757, GD 219/287/12, SNA. Murray had learned that slaves from Antigua were not a bargain and in fact "fetch[ed] a higher price there than in this province," according to his West Indian correspondent. John Murray of Murraythwaite to unknown recipient, 22 July 1756, John Murray of Murraythwaite Letterbook, 22, SNA.

[30] John Murray to Mother, 6 March 1757, GD 219/287/12, SNA.

[31] Edelson, *Plantation Enterprise*, 241.

therefore faced the practical problem of collecting debts from far-flung colonial debtors like the Murray brothers. In order to better secure these debts, over the course of the eighteenth century factors increasingly asked buyers to execute conditional bonds.[32]

Conditional bonds were deeds that were signed and sealed by the buyer (also called the obligor), and they "predicated payment on the obligor's failure to perform a specified condition before the date set for payment." The bond indicated a sum that the buyer was obliged to pay (called a penalty) to the seller (the obligee), but also stipulated that if the buyer paid half of this price (the true sale price plus interest) by a date certain, the obligation to pay the penalty was void.[33] Dating to the fourteenth century, conditional bonds became widely used in medieval and early modern England because they gave parties to a contract "a more secure remedy in debt" by stipulating a fixed sum of money that could be obtained for non-performance.[34] Parties to the bond typically brought an action of debt to enforce the penalty "and not the underlying agreement," and because of this, the circumstances of the underlying agreement "were hidden on the back of the bond."[35] Conditional bonds, in fact, tended to obscure the type of transaction that resulted in the bond's creation. This may have had the effect of recommending them to slave merchants and colonists who sought a legal instrument that could easily accommodate transactions involving human property. Vague as to the nature of the bargain, conditional bonds required no adaptation at all, giving those involved in the slave trade a way to enforce slave sales that conformed to existing English law and practice.

Conditional bonds became the standard instrument for securing debts in the slave trade in

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[32] Kenneth Morgan, "Remittance Procedures in the Eighteenth-Century British Slave Trade," *The Business History Review* 79 (2005): 719; Morgan, "Slave Sales in Colonial Charleston," 924.

[33] Mann, *Republic of Debtors*, 10. J.H. Baker also refers to this type of bond as a "common money bond." J.H. Baker, *An Introduction to English Legal History*, 4th ed. (London: Butterworths Lexis Nexis, 2002), 324.

[34] *Ibid.*, 321.

[35] *Ibid.*, 324. Baker argues that this hindered the development of the law of contract.

the eighteenth century in part because the Debt Recovery Act of 1732, discussed in Chapter 1, required bonds to be used to secure all open book accounts. It reflected the concerns of merchants, who operated in a credit-based transatlantic economy, that colonists had used (or might use) local statutes to limit their ability to seize valuable land and slaves as collateral or to otherwise defraud them. Although colonial planters found the Act "deeply offensive," it had the effect of expanding the slave trade because it gave colonial factors effective legal remedies against delinquent debtors.[36] Whereas these factors previously had been unable to seize real estate (including slaves categorized as real estate) after the passage of the Act they now could seize most types of colonial property. Debts, including those incurred for buying slaves, also would be secured by bonds, which could be sued upon in colonial courts. These remedies, in the aggregate, expanded colonial credit with British merchants.[37]

In South Carolina, the passage of the Debt Recovery Act ultimately standardized credit practices. Because slave factors could be assured a legal remedy against colonial debtors, British slave trading firms began to require factors to enter into contracts obligating them to remit two-thirds of a sale's proceeds within one year, and the remainder within two years. In turn, Charlestown-based factors sought more guarantees from purchasers. Planters typically secured a purchase with a bond due at eighteenth months, which allowed them time to profit from the next year's crop. If the planter could not pay, he then was required to take out an additional bond due in another year, with a 10 percent penalty.[38] Purchasers rarely used specie when they ultimately

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[36] Jacob M. Price, "Credit in the Slave Trade and Plantation Economies," in *Slavery and the Rise of the Atlantic System*, edited by Barbara Solow (Cambridge: Cambridge University Press, 1991), 309.

[37] Morgan, "Remittance Procedures," 720.

[38] Price, "Credit in the Slave Trade," 311. By the 1750s, British slave traders had begun to demand even more assurances from their factors, requiring them to remit "bills in the bottom." That is, when a trading vessel returned to England, the factor was expected to remit whatever commodities he had received to date in payment for slaves, as

paid for slaves, largely because it was scarce or, when available, might be clipped or counterfeited.[39] Instead, when they finalized their purchases, most planters did so either entirely or partially with commodities or with bills of exchange. A bill of exchange, put simply, was an order written by one person (the drawer) that instructed a second person (the drawee) to pay a third person (the payee) within a specified time period. In a sense, the drawee acted as a bank and agreed to pay the bill when he or she accepted it. The drawer then "became liable to the drawee for the amount of the draft." These bills were negotiable – that is, they could be discounted or circulated as a medium of exchange.[40]

Just as conditional bonds in England did not typically describe an underlying transaction, in colonial South Carolina conditional bonds used to purchase slaves are difficult to distinguish from those used to purchase land or other property. Indeed, it is easy to miss the fact that many surviving bonds underwrote slave sales. Passing references to slave purchases by bond or fortuitous marginalia are a historian's only way of knowing the type of transaction that generated this type of instrument. A 1783 bond obliging Thomas Shepoe and William Henry Mills to Richard Bohun Baker is an example of the latter. On its face, the bond makes no references to slaves or a slave sale. Nonetheless, this bond financed the purchase of 50 slaves, a fact that is

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well as bills of exchange drawn on his own surety for the balance. The "bills in the bottom" system was developed in the West Indies and then migrated to Charlestown, according to Jacob Price. Ibid., 311, 313.

[39] Morgan, "Slave Sales in Colonial Charleston," 923. Financed sales also benefitted slave factors, who could obtain higher prices when they offered credit. Factors discouraged specie purchases because the five percent discount traditionally offered for these transactions could operate to depreciate slave prices in the market as a whole. Sellers, then, incentivized slave sales on credit by offering terms that suited a buyer's needs, usually allowing purchasers up to twelve months to pay (with interest). Although these longer terms increased the chances that a buyer might default, the risk to the seller generally was outweighed by the opportunity to obtain a higher price and thus, to remit more money to British slave merchants. An exception to the cashless payment system was the sale of slaves to Spanish and Portuguese colonies. Morgan, "Remittance Procedures," 721.

[40] Mann, *Republic of Debtors*, 12; Price, "Credit in the Slave Trade," 315. Technically, the bill of exchange was not a credit instrument – generally drawers drew on a credit balance, rather than relying purely on the "good will of the merchant." Ibid., 294.

only apparent due to a handwritten note on the back of the bond.[41]

The wider availability of printed bond forms beginning in the 1730s makes it all the more difficult for historians to identify the type of agreement that resulted in the execution of a conditional bond. Indeed, these forms enabled colonists to conduct all sorts of transactions using pre-printed forms that were virtually identical. Like handwritten conditional bonds, printed bonds did not specify the nature of the underlying transaction. The printer, instead, supplied the necessary legal language, leaving blank spaces that colonists used to specify an agreed-to penalty and repayment amount. This jargon closely mimicked that of medieval and early modern English conditional bonds, beginning with the opening recitation: "Know all Men by these Presents," and including the standard language of performance: "The Condition of the above Obligation is such . . ."[42] These forms reduced transaction costs by eliminating colonists' need to consult a lawyer or notary to acquire a form for a slave sale. Their increased availability in eighteenth-century South Carolina tracks the colony's growing reliance on slave labor during this period and suggests a relationship between the expansion of print culture and a booming slave economy. In fact, pre-printed conditional bonds as well as pre-printed bills of sale -- which commonly were used to memorialize slave sales -- challenge characterizations about the consequences of print's expansion in the eighteenth century. Whereas the proliferation of print traditionally has been viewed as a positive force for the development of a broader public sphere, wider access to printed legal forms also facilitated the sale of slaves, serving the practical needs

[41] Baker acknowledged on the back of the bond "that Nineteen of the fifty Negroes were sold which this Bond was given for were the Property of my wife Elizabeth Baker and are to be accounted for as hers on her Marriage Settlement." Bond, 13 January 1783, Baker Family Papers, 11/535/33, South Carolina Historical Society, Charleston, South Carolina.

[42] See, *e.g.* blank bond form, GD237/10/1/34, SNA.

of slaveholders or aspiring slaveholders like the Murray brothers.[43]

When they executed pre-printed conditional bonds (or handwritten bonds, which also continued to be circulated) in order to purchase slaves, colonists both expected and hoped that a successful crop would allow them to meet their obligations, and particularly to pay money owed to slave merchants.[44] As John Murray explained, "neat Crops" could "make every thing clear," and slave purchasers like the Murrays prioritized their debts to Charlestown-based slave factors, settling their balances with slave sellers before paying bills for dry goods.[45] For William and John, the careful management of their plantation ultimately made their initial investment in slaves worthwhile; he and his brother were able, with "great oeconomy," to turn a profit and to keep creditors at bay.[46] Others, however, were less fortunate. Indeed, the economic logic of purchasing slaves on credit played out in a very different way for Robert Baillie, another Scottish immigrant who arrived in the Lowcountry in the same decade as the Murray brothers. Baillie struggled for years to build a profitable dry goods business and, later, a Georgia plantation. He

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[43] See, e.g. David Hall, *Worlds of Wonder, Days of Judgment: Popular Religious Belief in Early New England* (Cambridge: Harvard University Press, 1990) and Stephen Innes, *Creating the Commonwealth: The Economic Culture of Puritan New England* (New York: Norton, 1995). For the function of print during the imperial crisis and in the development of American nationalism see David Waldstreicher, "Rites of Rebellion, Rituals of Assent: Celebration, Print Culture, and the Origins of American Nationalism," *Journal of American History* 82 (1995): 37-61. For a positive view of print culture in early modern England, see Tim Harris, *London Crowds in the Reign of Charles II: Propaganda and Politics from the Restoration until the Exclusion Crisis* (Cambridge: Cambridge University Press, 1987); Keith Thomas, *Religion and the Decline of Magic* (New York: Scribner, 1971); Christopher Hill, *The World Turned Upside Down: Radical Ideas during the English Revolution* (London: Temple Smith, 1972); Kevin Sharpe, *Remapping Early Modern England: The Culture of Seventeenth-Century Politics* (Cambridge: Cambridge University Press, 2000); Mark Knights, *Representation and Misrepresentation in Later Stuart Britain: Partisanship and Political Culture* (Oxford: Oxford University Press, 2005); and Linda Colley, *Britons: Forging the Nation: 1707-1837* (Yale: Yale University Press, 1992). But see Kevin Sharpe, *Reading Revolution: The Politics of Reading in Early Modern England* (Yale: Yale University Press, 2000).

[44] For an example of a handwritten bond, see GD237/10/1/14, SNA.

[45] John Murray to Mother, 6 March 1757, GD 219/287/12, SNA; Morgan, "Slave Sales in Colonial Charleston," 924.

[46] John Murray to Mother, 6 March 1757, GD 219/287/12, SNA. Although the Murray family papers do not reveal the plantation's rate of return, it likely equaled or exceeded 8 percent, South Carolina's statutorily mandated interest rate. Interest rates in the colony fell over the course of the eighteenth century from 10 percent to 8 percent (1748) to 7 percent. According to Peter Coclanis, reduced rates reflected the colony's increased economic stability and the greater availability of investment capital. These rates were still higher, however, than those in Europe, which encouraged outside investment in South Carolina. Peter A. Coclanis, *The Shadow of a Dream: Economic Life and Death in the South Carolina Low Country 1670-1920* (New York: Oxford University Press, 1989), 105-6.

contracted debts to purchase slaves that he ultimately could not pay. Like many other colonists, he saw slaves as the key to wealth and as a means to eliminate debt, and he continued to purchase enslaved people on credit and mortgaging those slaves he already owned, all in the hopes of producing a bumper crop that would finally satisfy the mounting demands of his many creditors. His financial misfortunes illustrate the allure of slave mortgaging as a practice as well as its risks for slave owners and the enslaved people who changed hands to meet the legal demands of bonded debt.

People as Collateral

Robert Baillie began his career in the British West Indies, travelling from Scotland to Jamaica in the 1750s to become a dry goods merchant. Although he initially reported to his family that he liked the island "very well," Baillie quickly soured on his new home. In part, this was because Jamaica's climate made him ill, and he constantly complained to relatives in Scotland about his poor health and mounting doctors' bills. But Baillie came to loathe Jamaica primarily because he could not earn a living there, and in fact contracted substantial debts to his Scottish merchant suppliers. "[T]here is no Prospect of making Money" in dry goods, he lamented.[47] Rather, the most profitable ventures were in "negroes Sugar & Rum," which, had he been able to purchase them, would have made him "a Considerable sum of money." Lacking the financial means to do so, however, he waxed bitter that he was "obliged to take dry goods" on credit, and thereby incurred debts that would trail him for decades.[48]

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[47] Robert Baillie to George Baillie, 29 July 1750, GD1/1155/65/1, SNA; Robert Baillie to unknown recipient, 28 November 1751, GD1/1155/65, SNA; Robert Baillie to James Baillie, 4 October 1755, GD1/1155/68/1, SNA.

[48] Robert Baillie to James Baillie, 4 October 1755, GD1/1155/68/1, SNA.

Baillie's failure as a Kingstown merchant colored his view of Jamaican society. He wrote home that being a "Trader in Jamaica [was] a punishment" that he "would not wish" on his "greatest enemy."[49] Indeed, the island was "a place where there is nothing but one man trying to cheat his Neighbour another Dying by w[hi]ch ten or twelve people w[i]th small Cargoes is broke a third standing the Martial, able to Pay his Debts but will not do it by w[hi]ch as many poor Merchants is broke."[50] Although he could "see no Prospect of ever getting out of this cursed Place" and expected to "Live & Die" in Jamaica "as Poor as a hat," he nevertheless began to contemplate making a fresh start in another colony.[51] Baillie, as an eighteenth-century Briton, had his pick of any number of destinations, from Virginia, to the "Bay of Honduras," to the "Musqueto Shore." He even toyed with the idea of joining the East India Company as a clerk. Ultimately, however, he dismissed these "Schemes" as "Rash" and settled on a closer destination, leaving Jamaica behind to start a new life on the American mainland.[52]

Moving to the Georgia Lowcountry in 1753, Baillie originally intended to set himself up as a dry goods merchant, but upon his arrival he, like William Murray, learned that "Patent[ing] Ground & turn[ing] Planter" was a "much more Advantagious way than the Mercantile Be."[53] After making a poor showing as a Savannah merchant, he sold his remaining stock and patented 500 acres on the Newport River, where the country was "the finest" he "ever was in."[54] Baillie decided to turn planter because he thought it was "by far the surest and most profitable way of Life." Indeed, a plantation in Georgia was a safe financial bet, according to Baillie, because "the

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[49] Robert Baillie to Mother, 18 February 1752, GD1/1155/65/9, SNA.

[50] Robert Baillie to George Baillie, 29 November 1751, GD1/1155/65/7, SNA.

[51] Robert Baillie to Mother, 30 November 1751, GD1/1155/65, SNA.

[52] Robert Baillie to George Baillie of Hardington, 24 December 1752, GD1/1155/65/11, SNA. Robert Baillie Kingston to George Baillie of Hardington, 27 May 1753, GD1/1155/66/1, SNA.

[53] Robert Baillie to George Baillie of Hardington, 18 July 1753, GD1/1155/66/2, SNA.

[54] Robert Baillie to James Baillie, 18 November 1753, GD1/1155/66/4, SNA.

Land itself [was] Daily growing in Value, As Also the Negroes." There was only one rub: he lacked start-up capital to purchase slaves. As he advised his father in Scotland, a plantation "requires a Stock to begin with," and he only needed "a few Negroes" to render him "entirely Happy." Over the course of decades as he struggled to establish a profitable plantation, Baillie would continue to view slaves as both appreciating assets and as a labor source that would allow him to repay his Jamaican creditors. Without slaves, he "must remain poor without being able to pay my debts;" with slaves, he would be able to "Clear my Negroes" and "reimburse" his father and his creditor "friends."[55]

In this sentiment he was not alone, and far from a foolhardy act, keeping slaves at work to pay debts was generally considered sound good sense in the Lowcountry. Henry Laurens, for example, praised Georgia planter Lachlan McIntosh for his "resolution" to keep his slaves together rather then sell them off in the face of financial hardship. "[S]triving a little longer to extricate them by their own labour from the incumbrances which at present lays upon them," according to Laurens, was a much better plan than writing his enterprise off at a loss.[56] Indeed, for colonists like Baillie and McIntosh, the bodies of slaves were both a source of equity and a source of labor. Persistence and even doubling down on losses by purchasing more slaves (usually by mortgaging existing slaves) seemed likely to pay off in the long run. For McIntosh, this investment strategy eventually yielded positive results, but for Baillie, a never-ending cycle of slave purchasing on credit brought him to the brink of ruin.

When Baillie first wrote to his father seeking money to purchase slaves, he had already acquired two slaves on credit, planning to call in a "good Deal of Money due in this Province" to

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[55] Robert Baillie to George Baillie, 10 February 1754, GD1/1155/66/5, SNA.

[56] Henry Laurens to Lachlan McIntosh, 7 March 1763, *The Papers of Henry Laurens*, edited Philip M. Hamer et al., 16 vols. (Columbia: University of South Carolina Press, 1968-2003), 3:361-62.

pay for his purchases.[57] Baillie's trust in his debtors, however, was misplaced, and several months later he again asked his father to "support his Credit" in Scotland, which he "found impossible to preserve." It seems that Baillie had foolishly promised to pay for one of his slaves "on Demand" because he daily "expected to receive" the money he was owed. His debtor was "very Backward in payment," however, and Baillie was hard pressed to pay for the slave.[58] He ultimately was forced to draw on his father in "part payment of the Negro," begging him not to protest his bill of exchange in fear that this would force him to sell his "land & negroes" at "a great Disadvantage."[59] As Baillie was well aware, if his father protested the bill (refused to accept it), this would have had serious financial repercussions. Not only would he have been responsible for the principal plus interest, costs, and damages, the protest would have cast his creditworthiness in doubt. This, in turn, might have prompted nervous creditors to call in debts immediately.[60]

When Baillie expressed concerns that his father might protest his bill of exchange, he displayed a familiarity with a larger Atlantic culture of credit and debt, a culture that was supported by a constantly modulating stream of knowledge about the creditworthiness of particular debtors. As we shall see, creditors sought the latest information about a debtor's financial and even physical health, using this information to make determinations about whether to press a debtor for a remittance or, as a last resort, to sue an insolvent debtor or his estate.

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[57] Robert Baillie to George Baillie, 10 February 1754, GD1/115/66/5, SNA.

[58] Even shrewd financial managers could find themselves in this predicament, particularly during periods of economic contraction. In 1766, for example, Henry Laurens complained "I have receiv'd Mr. Dubourdeu's Note & if I knew where I would call for the Money for I was never so distress'd in my Life. It seems as if every body had concluded that I had no use for Money. It is certain that they have combin'd (by accident I suppose) not to pay me any this Year, say the past Winter." Henry Laurens to Joseph Brown, 25 April 1766, *HLP,* 5:120-21.

[59] Robert Baillie to George Baillie, 25 May 1754, GD1/1155/66/7, SNA.

[60] A bill was protested when a payee returned the bill to the drawer and demanded payment. This made the drawer "liable to the payee for the principal sum of the bill, interest from the date of protest, the costs of protest, and, for foreign bills, a surcharge of up to 20 percent of the principal as damages." Mann, *Republic of Debtors*, 12.

Baillie's family in Scotland was aware of the importance of maintaining good credit, and they cautioned him to meet his obligations in a timely manner. His father, in fact, was concerned that Baillie's failure to pay his Jamaican debts would "diminish his stock," not only with colonial creditors but with his Scottish backers.[61] He also cautioned Robert against "entirely working upon Creadit," aware that starting a plantation drove new planters into debt. Indeed, if Baillie "turn[ed] planter," according to his father, it would "be teathering" him to the American colonies "for life" as he sought to pay off his creditors.[62]

Baillie chose to ignore his father's sound advice, however, and he continued to ask friends and relatives for loans that would allow him to purchase more slaves. Although by 1755 he was "beginning to be in a very good way," he soon thereafter became involved in a failed slave-trading venture to the West Indies. He also agreed to stand as personal security for a man from St. Kitts who enticed him with plans for a joint planting venture, a decision that made him liable to the man's creditors in case of default. The planting scheme ultimately proved fraudulent, and Baillie feared that his land and slaves, which he had mortgaged, would be sold at vendue (public auction) to satisfy his debts and those for which he stood as surety.[63] Far from deterred by this brush with financial disaster, however, Baillie continued to maintain his faith in the cycle of debt and slave purchasing that brought him so close to the edge of bankruptcy. He even blithely encouraged his brother to become a planter, suggesting that if he could acquire "two or three hundred pound to purchase Negroes" he might "soon Make an Estate here by the

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[61] George Baillie to Robert Baillie, GD1/1155/66/9, SNA.

[62] George Baillie to Robert Baillie, 18 January 1754, GD1/1155/66/16, SNA.

[63] Robert Baillie to James Baillie, 4 October 1755, GD1/1155/68/1, SNA. Offering personal security for a loan was a risky proposition. As Henry Laurens noted, "I have done so many things that seem'd to be handsome & some that prove to be very foolish, by advancing Money & becoming surety for folks that in the present uncommon dearth of Cash I can barely keep dunns from my door." Henry Laurens to James Grant, 1 May 1767, *HLP,* 5:245.

Culture of indigo."[64] Forced to take up a lieutenancy during the Seven Years' War in order to make ends meet, he hoped to return to planting at the conflict's end when he was in a "Capacity to purchase Slaves."[65] In the mean time, he continued to dun his relatives in Scotland for loans "to purchase Negroes," which he maintained would put it in his "power to make a cr[o]p next year." Despite all of his financial mishaps, which he acknowledged he had "brott" upon himself, Baillie never doubted his choice to turn planter. Rather, he steadfastly maintained that he would "much rather chuse to be a Planter in Georgia than either to go to the Army or the East Indies."[66]

Baillie's story illustrates the risks inherent in the cycle of slave purchasing and debt that characterized economic life for many lowcountry planters. For Baillie, achieving financial success as a planter required him to buy slaves on credit. These slaves would work to pay for themselves, and their labor would be the means by which he extricated himself from debt. Ultimately, however, slave purchasing left Baillie on the brink of insolvency. Much of his debt was secured by mortgage, a type of security interest that guarantees a debt will be repaid. Mortgages in England and in New England colonies typically leveraged land, but in plantation societies, colonists like Robert Baillie often mortgaged their slaves, offering their human property to creditors as collateral.[67] Indeed, as Russell Menard and Bonnie Martin have shown, slave mortgaging was a common practice in colonial South Carolina and in other plantation colonies, including Virginia, and colonists routinely risked slaves in order to fund purchases of

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[64] Robert Baillie to James Baillie, 4 October 1755, GD1/1155/68/1, SNA.

[65] Robert Baillie to James Baillie, 13 August 1756, GD1/1155/68/6, SNA.

[66] Robert Baillie to James Baillie, 9 July 1757, GD1/1155/68/4, SNA. Baillie's persistence eventually yielded returns. He recovered financially, and went on to serve in the Georgia Assembly. During the Stamp Act crisis he signalled his loyalty to the Crown by concealing the colonial stamp distributor in his home. He was imprisoned and his property was confiscated by the colonial revolutionary government. After fleeing to East Florida, he died "borne down with Misfortunes" in 1782 as a colonel of the local militia. Petition of John Baillie to the Loyalist Claims Commission, [undated], GD1/1155/77/4, SNA.

[67] Robert Baillie to James Baillie, 4 October 1755, GD1/1155/68/1, SNA.

additional land and slaves. In fact, leveraging the value of slaves was one of the most important legal means by which colonists raised the substantial capital required to expand their plantation and mercantile enterprises.

In South Carolina, slave mortgaging began at an early date. A 1698 statute, in fact, chastised colonists for failing to disclose mortgages of plantations, "negroes, and other goods and chattels." These undisclosed mortgages created uncertainty about titles and led to protracted litigation as "buyers of plantations, and lenders of money upon second or after-mortgages" squabbled over ownership and priority when colonists defaulted on loans.[68] Despite passing references to slave mortgaging in statutes, however, the practice was never specifically authorized. Instead, it seems that South Carolinians *assumed* that slaves might be mortgaged, apparently without concern that this might deviate from English practice. Because slaves were deemed chattel property in South Carolina, colonists effortlessly extended this Old World method of securing debt to their New World slave society in order to mobilize the equity in their most valuable property.

South Carolina's economic growth over the course of the eighteenth century made this legal adaptation a practical necessity. As Menard has shown, slave mortgaging grew in tandem with the colony's increasingly prominent role as a commodity producer. During periods of prosperity, planters mortgaged slaves to finance the purchase of more slaves, which they hoped would allow them to participate more fully in South Carolina's bustling export economy. Slave mortgaging did not benefit great planters alone: many who engaged in this practice were "men of modest means" like Robert Baillie who used slave mortgages to help them build farms and

[68] "An Act to prevent deceits by double Mortgages and Conveyances on Lands, negroes, and Chattels, &c.," (1698) in *The Statutes at Large of South Carolina*, edited by Thomas Cooper and David J. McCord, 10 vols. (Columbia: A.S. Johnston, 1836-41), 2:137.

accumulate wealth.[69] Indeed, Menard has found that slave mortgaging was the primary method by which "numerous small farmers expanded their operations." Slave mortgages linked town-based capital to hinterland farmers while facilitating the geographic and economic expansion of the South Carolina Lowcountry.[70] Although Jacob Price has suggested that "credit was unlikely to benefit equally all would-be slave owners, least of all the poorest," and that the "readier availability of credit to the creditworthy" on the whole favored "the growth of larger productive units and of social systems dominated by larger planters," this was not true for South Carolina.[71] In contrast to Barbados or the Chesapeake, where the engrossment of productive land created plantation societies that were closed to newcomers, in South Carolina liberal credit secured with slaves deepened the commitment of less wealthy colonists to slavery, creating a white man's country that had extended deep into the backcountry by the end of the colonial period.[72]

Slave mortgages in South Carolina and in other plantation colonies generally were of three types. In the first, a purchase-money mortgage, the buyer made an initial down payment, obliging him to pay the remaining principal plus interest. This type of mortgage benefitted colonists who did not own slaves or did not care to risk them. Indeed, in a purchase-money mortgage, the purchased slave served as collateral for the debt, and the seller retained legal title

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[69] Indeed a review of probate inventories from the early eighteenth century reveals that "a substantial number of South Carolina's farms and plantations were small operations, worked by their owners alone or with one or two slaves." Menard, "Financing the Lowcountry Export Boom," 665.

[70] Menard found that the average loan size in the 1710s was a "relatively modest" £140, with 60 percent of loans "worth less than £100." He argues that this pattern remained "similar through the following three decades but with a trend toward smaller loans." Ibid., 661, 667.

[71] Price, "Credit in the Slave Trade," 294.

[72] Ibid., 295. By the middle of the eighteenth century, South Carolina's white population had "crossed the fall line into the piedmont." Joyce E. Chaplin, *An Anxious Pursuit: Agricultural Innovation & Modernity in the Lower South, 1730-1815* (Chapel Hill: University of North Carolina Press, 1993), 4. South Carolina's white population nearly doubled between 1750 and 1770. Natural increase accounted for some of this growth, but it was also fueled by immigration from the middle colonies into the backcountry. By 1760, 50% of the colony's white population lived in the backcountry; this figured reached nearly 75% in 1770. Robert M. Weir, *Colonial South Carolina: A History* (Columbia: University of South Carolina Press, 1997), 205-6, 209.

until the debt was paid.[73] Mortgages also could operate in a way that was similar to an equity loan today. If a purchaser already owned slaves, he could risk those slaves as collateral to secure a loan that he promised to repay with interest. This second type of mortgage was advantageous in that it allowed the mortgagor (the borrower) to access the equity in his slaves without having to sell them. Mortgaged slaves, in fact, typically could continue to labor for the mortgagor, generating income that in turn could be used to repay the loan.[74] This is the type of mortgage arrangement that South Carolina colonist Nathaniel Green proposed to Henry Laurens in 1764 when he asked him to "[l]end him £700 upon his own Bond & a Mortgage of 9 Negroes," which he assured Laurens were "his own & free from all incumbrance."[75]

The third type of mortgage was executed to secure a pre-existing debt. Creditors in South Carolina and throughout the British Atlantic World were attuned to the financial well being of their debtors, constantly assessing their creditworthiness.[76] When it appeared that a debtor might be insolvent, asking for a mortgage was a prudent option because, as a legal matter, mortgages gave creditors priority over unsecured creditors if the debtor proved insolvent. Put simply, a creditor with a mortgage of land and slaves had a better chance of being paid when debtors like Robert Baillie defaulted.[77] When a bond due to Henry Laurens went unpaid, for example, a nervous Laurens asked the debtor to secure the debt "by Mortgage or personal security" in order to give him priority over other creditors. In this case, Laurens specified that he preferred a

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[73] Martin, "Slavery's Invisible Engine," 822.

[74] Ibid., 823. There were some exceptions to this. Indeed, Menard has found that in some cases "property was transferred from mortgagor to mortgagee for the use of the lender during the term of the loan. That property was usually one of several slaves listed as security in the mortgage." Menard, "Financing the Lowcountry Export Boom," 669.

[75] Henry Laurens to John Savage, 14 June 1764, *HLP,* 4:313.

[76] Peter Manigault to Sarah Nickleson, 12 August 1766, Manigault Papers, 11/278/7, 43, Peter Manigault Letterbook, 1763-1773, SCHS.

[77] Mann, *Republic of Debtors*, 15.

mortgage of slaves rather than land, directing his agent to accept delivery of "as many Negroes" as the agent thought were "worth the Amount of said principal Ballance."[78] Likewise, in his neverending search for capital to buy slaves, Robert Baillie promised to secure his brother with a mortgage, likely of slaves he already owned, to secure a loan to buy more slaves.[79] In 1747 colonist Jonathan Atcheson, who owed his creditors nearly £4,000, also agreed to mortgage all of his slaves in order to better secure his creditors.[80] And James Waddell mortgaged slaves to Amerintha Elliott "for the better securing the payments" due on a lease.[81]

A mortgage, however, was not "perfect security." Creditors, in fact, might discover that they had misjudged the value of mortgaged property, leaving themselves short if a debtor defaulted. This was true no matter the nature of the collateral. But creditors assumed even more risks when mortgaged property was human. Unlike land, slaves were subject to illness and death, posing problems for creditors whose interests had been secured with sick (and therefore less valuable) or dead (and therefore valueless) slaves. This was a real concern given the harsh work regimen on Lowcountry plantations as well as a disease environment that led to relatively high slave mortality rates.[82] Although it was possible to substitute healthy slaves for ill or dead slaves in a mortgage agreement, not all colonists were scrupulous in advising creditors that mortgaged slaves were sick or deceased. For example, when Peter Manigault set out to collect a debt for

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[78] Henry Laurens to Roger Moore, 14 December 1747, *HLP*, 1:89-90. When Laurens gave his uncle the option to secure the debt by "personal security," he meant that his uncle could recruit a surety to guarantee the debt "by promising to pay the creditor if the debtor did not. Sureties made their promises in writing, either by co-signing the debtor's bill or bond or by executing a separate surety bond." Mann, *Republic of Debtors*, 15. Laurens also obtained a mortgage of a Mr. Dunlap's slaves in 1762. Henry Laurens to William Smith, 30 October 1762, *HLP,* 3:144.

[79] Robert Baillie to James Baillie, 9 July 1757, GD1/1155/68/4, SNA.

[80] James Mickie to Sir Alexander Nisbet, 29 March 1747, GD237/1/154/3, SNA.

[81] 23 March 1798, Baker Family Papers, 11/536/10, SCHS.

[82] Morgan, *Slave Counterpoint*, 91. Morgan suggests that the death rate among Lowcountry slave children from birth to age four was 342 per 1,000, while in the Chesapeake this rate was 327 per 1,000. Morgan, however, believes that these figures underestimate the difference between mortality rates in South Carolina and Virginia.

Ben Stead, he discovered that only two of the slaves mortgaged to Stead were alive, and the remainder had been sold. Stead was legally entitled to the proceeds from the sale, but Manigault warned his client that the sale proceeds were "all" he would "get from that Quarter."[83]

Perhaps more importantly, slave mortgages were uniquely risky to creditors because human property could be concealed or carried off by unscrupulous debtors. Whereas land was geographically fixed and impossible to hide, slaves could be transported out of the reach of creditors, a practice that will be described more fully below. Colonists who were unfamiliar with a debtor and his property also might be tricked into accepting a mortgage of slaves who already had been used as collateral in other transactions. Although by statute mortgages of land and slaves were to be recorded in the Secretary's Office, in practice it could be difficult to discover whether slaves had previously been used to secure debts, a fact that had important consequences for creditors. Indeed, when a debtor proved insolvent, first mortgages took priority over later mortgages of the same property. This helps to explain why Henry Laurens was wary of loaning money to Nathaniel Green despite his promise to mortgage his slaves. Although Laurens thought the security offered was "enough for the Sum to be Lent," he prudently waited to learn whether the slaves already had been mortgaged before he agreed to the loan.[84] James Mickie was less cautious than Laurens and was tricked by an unscrupulous debtor into accepting a "Mortgage of negroes and Cattle" that already had been used as security. This "Villain . . . had the Knavery" to supply Mickie with the "Names of Negroes that were Mortgaged 7 years before," and it was only after Mickie cross-referenced this list of names in the Secretary's office that he learned of

[83] Peter Manigault to Ben Stead, 18 June 1771, Manigault Letterbook, 155.

[84] Henry Laurens to John Savage, 14 June 1764, *HLP,* 4:313.

the perfidy. By that time, however, the debtor had already "retired a Little way to the Northward," beyond Mickie's reach.[85]

Nonetheless, this very mobility made slaves appealing to creditors as security. Slaves, first and foremost, were valuable, and despite price fluctuations over the eighteenth century, tended to appreciate.[86] When Henry Laurens approached a debtor and asked for the debt to be secured with a slave mortgage, he did so with the understanding that in the case of default, he would receive an asset that he could sell to offset his loss. In fact, Laurens and other creditors could command a good price for slaves sold in payment of debts (in contrast to slaves sold because they had committed crimes).[87] But even when the value of slaves could not be made liquid through sale, slaves might be put to work on the creditor's own plantation. After taking security from a debtor that included a plantation "with 20 Negroes independent of Children," for example, the firm of Fabre & Price contemplated their creditor client's alternatives. Either they could sell the slaves "for Cash & the Plantation at 1 2 & 3 Years Credit taking a mortgage on the Property," or the plantation could be operated in the creditor's interest. The latter option was a good one, and they recommended it to their client: by "adding 40 Hands to the 20" seized slaves, "2 to 300 Barrells of Rice could be made before any part of the uncleared Swamp is put in order," and "when 200 acres more are cleared the same number of hands may make from 5 to 600

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[85] James Mickie to [Sir Alexander Nisbet], 7 March 1745, GD237/1/154/2, SNA.

[86] Between 1722 and 1775, "the (constant dollar) price of slaves increased at an estimated 1.45 percent per year, which is significantly different from the annual 0.82 percent increase in the Caribbean." Eltis, Lewis, and Richardson also found that the "real" slave price – a price deflated to account for export prices – "began to increase in the early 1740s" and more than doubled by the time of the American Revolution. David Eltis, Frank D. Lewis, and David Richardson, "Slave Prices, the African Slave Trade, and Productivity in Eighteenth-Century South Carolina: A Reassessment," *The Journal of Economic History* 66 (2006): 1057, 1060.

[87] Laurens himself believed that debt slaves were a good bargain, and he specifically instructed his confederates in Jamaica to purchase them if they saw "a good opportunity." Henry Laurens to Richard Todd, 23 September 1767, *HLP*, 5:310.

Barrells."[88] Indeed, for creditors, the fact that slaves were both commodities and laborers multiplied alternatives when they sought to make good on a loss.

The practice of using people as collateral, which had distinct advantages for white colonists, had potentially devastating consequences for enslaved people. Slave mortgaging put parents and children at risk for seizure and sale, as the foreclosure of mortgages led to the separation of slave families who were sold to satisfy creditors. Indeed, in South Carolina's slave mortgage economy the relationship between debtor and creditor rather than master and slave was of primary importance. Subordinating the desires of slaves to their own economic needs, slave owners refused to acknowledge any claims of enslaved people. Instead, debtors' and creditors' obligations to one another took precedence, as they negotiated the terms by which slave property would be pledged, valued, and exchanged. At the same time, slave mortgaging made it more difficult for slaves to protect their families and to develop effective resistance strategies. The dense web of creditor-debtor relationships that mortgaging created was difficult for even the most savvy white colonists to navigate, much less African and African American slaves who were denied access to important legal information. Although slaves "knew that anyone in their family might be mortgaged," they "rarely" could identify which family member had become collateral and "to which creditor."[89] Foreclosure could come at any moment and without warning, triggered by the sudden death of an indebted owner, the demands of a cash-strapped creditor, or a planter's failed crop. Enslaved people may have been able to shape the conditions of sale or to persuade owners not to sell families apart, but mortgages and the conditions under

[88] Fabre & Price to Charles Goodwin and William Thomas, 4 January 1791, Add MS 85477, British Library, London, United Kingdom.

[89] Martin, "Slavery's Invisible Engine," 820.

which they were foreclosed were subject to broader economic and legal forces.[90] Indeed, as a practice, mortgaging posed a threat that was difficult for slaves to anticipate and, therefore, counteract.

The Business of Debt

Many colonists used slave mortgages to expand their plantations and businesses, leveraging human capital to increase their income and repay their creditors.[91] But some, like Robert Baillie, collapsed under the burden of buying slaves on credit. When colonists continued to purchase slaves without making punctual remittances to creditors, they faced insolvency. Insolvency could occur for any number of reasons that were beyond a planter's control. In 1756, for example, drought caused most South Carolina indigo planters to lose "the major part of what they planted," which hindered their ability to service debts.[92] Hurricanes and floods also "swallowed up dreams of bountiful rice harvests," while war depressed commodity prices and interrupted trade.[93] King George's War (1744-48) was particularly disastrous for Carolina planters and merchants, as Spanish privateers disrupted trade and harassed British merchants, sending "insurance and freight rates soaring" and severely reducing the profitability of rice

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[90] Daina Ramey Berry, "'We'm Fus' Rate Bargain': Value, Labor and Price in a Georgia Slave Community," in *The Chattel Principle: Internal Slave Trades in the Americas*, edited by Walter Johnson (New Haven: Yale University Press, 2004), 55.

[91] John Rose, for example, gloated in 1759 that he was worth "better than three thousand pound Sterling in lands and slaves," which he would use to pay his debts. John Rose to [James Rose], 15 May 1759, Kislak MSS, Library of Congress, Manuscripts Division, Washington, D.C.

[92] Austin & Laurens [Henry Laurens] to Augustus & John Boyd & Co., *HLP,* 2:183.

[93] Edelson, *Plantation Enterprise,* 102.

exports.[94] The financial downturn caused by the war ruined a number of prominent Carolinians, leading James Mickie to marvel at the "List of Bankrupts" published in the paper, and to speculate that the colony was "now almost in the 5th Act" and might "without some Intervention of Providence, soon come to the Epilogue."[95]

Hounded by creditors for payment, insolvent debtors found all their obligations called in at once and faced near-constant dunning from creditors and middlemen debt collectors. Bruce Mann has traced the emergence of professional debt collectors to the early republic, contrasting debt collection that "was more clearly becoming a business" with the "personalized, polite duns of pre-Revolutionary" debt collectors.[96] By at least the 1760s, however, prominent South Carolina merchants and lawyers advertised their services as debt collectors for hire. Henry Laurens, for example, supplemented his income by collecting the Carolina debts of British merchants, charging his clients a 5 percent commission to pressure debtors to send remittances to Britain.[97] Peter Manigault, the scion of a wealthy South Carolina family, also became a paid debt collector for foreign creditors. Educated at the Inns of Court, Manigault eventually abandoned his law practice in South Carolina, building a side business managing the estates of South Carolinians living abroad and collecting debts owed to British merchants. Manigault advertised that he was willing to "recover Money" due from South Carolinians "to People in Gt.

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[94] Stuart O. Stumpf, "Implications of King George's War for the Charleston Mercantile Community," *SCHM* 77 (1976): 169.

[95] James Mickie to Sir Alexander Nisbet, 29 March 1747, GD237/1/154/3, SNA.

[96] Mann, *Republic of Debtors*, 32.

[97] Henry Laurens to John Rutherford, 4 April 1763, *HLP,* 3:403. Far from a polite debt collector, Laurens could become quite aggressive in squeezing debtors for the sums due to his clients. Writing to Foster Cunliffe & Sons, he congratulated himself on his heavy-handed tactics, describing how he had not only threatened to attach the property of an indebted German immigrant family, but also to send them all to prison. Were they a People of any Spirit," he thought these heavy-handed tactics might have succeeded, but as it was his threats alarmed them "but very little." Austin & Laurens [Henry Laurens] to Foster Cunliffe & Sons, 24 February 1756, *HLP*, 2:106.

Brittain," and to do so "upon the best Terms."[98] As he wrote to a correspondent, If "any Body in Engld . . . wants Money recovered in the Law Way here, I would be glad you would recommend them to me."[99] Using his legal education to great advantage, Manigault kept track of debtors' financial health, springing into action when insolvency loomed. His collection practices along with those of Laurens reflect the ubiquitous use of slaves as collateral. More importantly, they reveal that creditors in slave societies had a particularly strong incentive to avoid litigation when debtors were slaveholders.

Both Laurens and Manigault provided their clients with financial information about South Carolina debtors that helped creditors to determine whether to extend more credit, to begin pressuring debtors for payment, or to take formal legal action. Creditors, through agents like Laurens and Manigault, constantly watched their debtors for signs of insolvency. Because unsecured creditors were given priority based upon the order in which they served the debtor with process, information about a debtor's current and future financial prospects was extremely important, especially to foreign creditors. If one creditor sued, "all creditors had to sue to claim a place in line," and in the rush to the courthouse foreign creditors were likely to suffer.[100] Laurens and Manigault helped to even the playing field for their clients, most of whom lived in Great Britain, offering up-to-date news not only about crop failures, but also about the work ethic of various debtors. For these creditors, assessing risk was a complicated process that required an on-the-spot assessment of not only a debtor's finances, but also of his character. Henry Laurens, advising debtor Edward Graham on courtroom demeanor, emphasized the combination of industry and honesty that creditors sought in their debtors when he urged him to

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[98] Peter Manigault to Robert Udney, Manigault Papers, Manigault Letterbook, 38.

[99] Peter Manigault to T. Gadsden, 14 May 1766, Manigault Letterbook, 39.

[100] Mann, *Republic of Debtors*, 48.

"be honest, be upright, give a just & unreserved Account of all that can be called Yours." From clothing to speech, Graham should "be modest & decently submissive," and should declare that he was determined "to go to work immediately in some honest way" to repay his debts. Only by doing so would he be able to "heal a broken character" and restore his creditworthiness.[101]

In addition to relating information about a debtor's character and finances, agents like Laurens and Manigault also offered insight into a debtor's physical well being. Indeed, the discovery of a debtor's illness or death could prompt frenzied inquiries into his estate's financial footing. Upon discovering that one of his client's debtors had died, for example, Henry Laurens scrambled to learn "in what circumstances the Gentlemen died & in whose hands his affairs are fallen" so he could "satisfy the inquiries of a Friend in England."[102] Manigault's collection business also could be little more than an extended deathwatch. In 1768, for example, he advised Isaac King that debtor Samuel Peronneau "dyed three Days ago" much to the "Surprize of every Body." Unfortunately, Peronneau had died "without enough to Satisfy his Judgment Creditors," which meant that ordinary contract creditors like his client likely would not see a shilling.[103] Expressing his determination to do the best he could under the circumstances, however, Manigault assured King that he would discover the identity of Peronneau's "Executors as soon as they are qualified." They "shall be pressed," he promised King, "to remit" what he was owed.[104]

When debtors were insolvent, creditors' practical legal remedies were limited. This was true not only in South Carolina, but throughout the British Atlantic World. As in most colonies,

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[101] Henry Laurens to Edward Graham, 30 August 1766, *HLP,* 5:178.

[102] Henry Laurens to James Read, 18 October 1762, *Ibid.,* 3:141.

[103] Peter Manigault to Isaac King, 20 December 1768, Manigault Letterbook, 87.

[104] Peter Manigault to Isaac King, 21 October 1768, Ibid., 80-81.

in South Carolina a creditor could sue out a writ of attachment, which forced a debtor to provide security for the debt either with his property or, if he did not possess sufficient property, his body. As a practical matter, however, imprisonment for debt was unlikely to lead to repayment (and might, in fact, delay it), and a creditor's successful prosecution of a suit did not necessarily mean that repayment was forthcoming. Writs of execution, which issued after a creditor won a lawsuit, were not self-enforcing and "often yielded little or nothing."[105] Indeed, creditors often stood to benefit more from reaching an agreement with debtors who were willing to assign their possessions (including their outstanding debts) in exchange for a discharge. When Thomas Walter could no longer satisfy his creditors, for example, he "assigned all his Estate & Effects for the Benefit" of any creditors that would give him "a Discharge within Twelve Months."[106] This practice of reaching an informal resolution was followed in even the largest and most complex cases, and creditors collaborated to ensure that assets were divided fairly. For example, the slave trading firm of Middleton, Liston, & Hope failed catastrophically in the 1760s (they owed £60,490 to their creditors), and when Henry Laurens reviewed the firm's books, he found that planters who had purchased slaves on credit owed the firm £3,571, while the firm itself had secured some of its obligations with "a Mortgage of 49 Negroes, Sundry Household furniture, Cattle."[107] Laurens negotiated with representatives of other creditors, including Peter Manigault, to divide the firm's assets and debts in an equitable way. As Manigault explained to one of his clients, these types of private agreements among creditors and debtors were "now become the

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[105] Mann, *Republic of Debtors*, 18.

[106] Peter Manigault to Isaac King, 6 September 1771, Manigault Letterbook, 162-63.

[107] Henry Laurens to William Reeve, 30 September 1767, *HLP,* 5:323. In this incredibly complicated agreement, the debtors promised Henry Laurens and his creditor client that they would "surrender themselves & go to Jail, if those Creditors who have sued them & to whom Mr. H. Middleton stands as special Bail shall not drop their Actions & come in upon a footing with other Creditors & that in such case they must & will exclude them wholly. And such Creditors have all (one excepted) promised to discontinue their several actions." *Ibid.,* 325. For a discussion of this bankruptcy, see also Morgan, "Remittance Procedures," 726.

Mode in this Country."[108]

Manigault and Laurens, aware that accommodations with debtors were more likely to result in remittances, generally avoided litigation, which they considered expensive and counterproductive to their clients' interests. Laurens, in fact, preferred to collect his clients' debts (as well as his own) without "the trouble & expence of going to a Lawyer." It was his stated policy to "never ask" for professional legal help where he could "possibly avoid it," and he chose to settle affairs himself or with the help of his friends and neighbors.[109] Manigault, although trained as a lawyer -- or perhaps because of it -- also avoided lawyers and litigation, considering law "the Ratio ultima of Scoundrels." Instead, he sought to negotiate with debtors rather than sue them.[110] In a collection case involving a Georgia debtor, for example, Manigault lamented the fact that his client ultimately was "obliged to have Recourse to the Law, which ought to be avoided if possible."[111] Viewing litigation as a last resort, both Manigault and Laurens sought alternative resolutions for themselves and for their clients.

Both men, however, routinely used the threat of litigation to bring debtors to account. As Manigault explained to client Robert Udney, the threat of legal action could be quite effective in bringing a recalcitrant debtor to heel. Although Udney's debtor at first "appeared very unwilling to come to any Settlement," upon Manigault's "urging the necessity of a Suit by which he must unavoidably be [exposed], he at last complied."[112] Laurens, in hot pursuit of an "imprudent" debtor, hired a lawyer not to put the case in suit, but to intimidate the debtor and force him to

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[108] Peter Manigault to Isaac King, 6 September 1771, Manigault Letterbook, 162-63. South Carolina did not have a bankruptcy statute, but the colony did pass an insolvency statute in 1759. The goal of this statute was to relieve imprisoned debtors by allowing them to disclose all assets and assign them to an assignee in trust for his creditors. "An Act for the More Effectual Relief of Insolvent Debtors . . ." (1759) in *SAL*, 4:86-94.

[109] Henry Laurens to James Donnam, 4 July 1763, *HLP,* 3:487.

[110] Peter Manigault to Ralph Izard, [1765], Manigault Letterbook, 22-25.

[111] Peter Manigault to Isaac King, 27 October 1770, Ibid., 131-32.

[112] Peter Manigault to Rober. Udney, 1 October 1766, *Ibid.,* 45-46.

come to a settlement "for the Benefit of his Creditors."[113] Writing to William Bruce, another debtor, he was direct in his threat to sue if Bruce would not settle: he warned him to "pay off your whole debt or give me good security for it," or he would put Bruce "to trouble."[114] Laurens also did not "Care to affront" debtor Henry Ravenel "by a Writ," but threatened that if his latest dun did not result in a remittance, legal action would shortly follow.[115] Intimidation, it seems, was practiced on debtors great as well as small, and Laurens warned James Grant, the Governor of East Florida, that if he refused to pay his debts he would "receive the Grace of God from R. Williams, Esquire," Laurens's lawyer.[116]

Even when creditors ultimately decided to proceed with a lawsuit, legal action could be merely another step in a broader strategy that took as its goal a non-litigated settlement. Indeed, filing a lawsuit could result in a quick agreement on the courthouse steps. For example, when Peter Manigault retained lawyers to prosecute a suit on behalf of planter Ralph Izard, his actions prompted a speedy and "reasonable" settlement, and he was sure in another case that a writ issued would "bring" the debtor "to reason."[117] In 1765, Laurens initiated proceedings against debtor John Hume, going so far as to obtain a favorable verdict in the hopes of forcing a settlement. Only when Hume refused to settle despite the verdict did Laurens re-open the lawsuit.[118] Arrest, too, could be a negotiation tactic, as was the case with one Mr. McCall, who "came to his Senses" after his arrest and offered Manigault "everything he had in the World in

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[113] Austin & Laurens [Henry Laurens] to Henry & Bartholomew Pomeroy, 10 April 1756, *HLP,* 2:161.

[114] Henry Laurens to William Bruce, 30 August 1764, *Ibid.,* 4:388.

[115] Henry Laurens to Henry Ravenel, 3 September 1766, *Ibid.,* 5:185.

[116] Henry Laurens to James Grant, 30 January, 1767, *Ibid.,* 5:225.

[117] Peter Manigault to Isaac King, 28 April 1770, Manigault Letterbook, 120.

[118] Henry Laurens to John Hume, 16 April 1765, *HLP,* 4:608-9.

exclusion of all his other Creditors."[119]

In their desire to avoid lawyers and litigation costs, Laurens and Manigault were not unlike creditors elsewhere in mainland America, who realized that the cost of debt litigation outweighed its potential benefits. As Bruce Mann has noted, creditors in northern colonies also preferred "nonlitigated resolutions," understanding that lawsuits could set in motion a train of events that were not necessarily to their advantage." Lawyers were expensive, and the pace of justice was slow.[120] Nonetheless, litigation, which brought with it the threat of attachment or imprisonment, was a particularly risky proposition for creditors when a debtor's assets included slaves. Just as planters like Robert Baillie understood that slaves were the primary means by which they could satisfy their creditors, creditors knew that attaching slaves could be financially counterproductive, inhibiting rather than hastening the collection of debts. As a result, they often chose to leave the debtor in possession of his land and slaves, hoping that a planter could produce crops that at least would allow him to service interest if not repay the principal. When Thomas Walter assigned "a small plantation of 15 Negroes" to his creditors, for example, Manigault urged his client to allow Walter to keep his slaves. Although his client technically had a legal right to attach and sell the slaves, Manigault nonetheless advised that it would be "best to let him keep them . . . in his Possession until the Crop of Indigo is made." If the crop was a good one, Walter's creditors stood to gain more from this arrangement than by selling the slaves immediately.[121] Likewise, when the mercantile house of Dacosta & Farr failed Manigault took an assignment of the firm's debts on behalf of his clients, but hesitated to seize the remainder of the firm's assets, including "Household Goods & Slaves." The debtor had rightly

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[119] Peter Manigault to Isaac King, 30 October 1769, Manigault Letterbook, 106-7.

[120] Mann, *Republic of Debtors*, 20.

[121] Peter Manigault to Isaac King, 6 September 1771, Manigault Letterbook, 162-63.

pointed out to Manigault that if his creditors allowed him to keep his property, he would "one Day or other be able to pay" them, but if they "distress[ed] him now," they would lose their "Money irrecoverably."[122]

Henry Laurens was similarly dubious of the wisdom of attaching slaves. Rather than seizing the slaves of William Butler, who "had about 60 Negroes with some Land but all under Mortgage," Laurens and Butler's other creditors ultimately decided to keep "the Estate together allowing him a small maintenance for the management of it." They hoped that this would allow Butler, whom the creditors knew "to be a good Planter," to produce a crop that could satisfy at least some of their demands.[123] Laurens likewise urged the creditors of Andrew Fesch, who had "near Sixty Slaves of the Companys in his possession," to "wait untill the Crop is made" before acting against him.[124] Creditors and their colonial agents, like Manigault and Laurens, were legally savvy. They understood that their clients could obtain a judgment against their debtors if they took their cases to court, and that attaching and selling slaves could offset losses. Nonetheless, when a debtor's assets included slaves, they urged caution and accommodation rather than litigation. Privileging slaves as laborers over slaves as commodities, they ultimately chose long-term productivity over short-term liquidity.

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[122] Peter Manigault to Sarah Nickleson & Co., Ibid., 16-17.

[123] Austin & Laurens [Henry Laurens] to Gidney Clarke, 30 June 1756, *HLP,* 2:235-37.

[124] Henry Laurens [Austin, Laurens, & Appleby] to Henry Bouquet, 7 September 1761, *Ibid.,* 3:80-82. Although both Manigault and Laurens preferred to allow debtors to keep their land and slaves in the hopes of winning some remittances for their clients, when affairs seemed beyond repair Laurens in particular urged debtors to sell their possessions in order to satisfy their creditors. Providing unsolicited advice to Bellamy Crawford, who wrote to Laurens seeking a loan, he urged the insolvent Bellamy to "Sell off your whole Estate . . . & pay off all your debts," because his "produce will not cancel the growing Interest upon your debts," and more importantly his "Negroes in all probability will not sell so much by 10 per Cent or more next fall when you say you are resolved to sell them as they will at this time." Whereas paying off his debts would be "an act graceful, Honourable, commendable & will get you some friends, more confidence, & the applause of every thinking Man," deferring payment "until you may by some intervening misfortune be incapable of giving each Creditor his full demand will be it self, an act presumptuous, unwarrantable, & not quite honest, will put it out of the power of any friend you have to say a Word in excuse for you, will make every thinking Man withdraw his confidence, & will render you a subject for Laughter & redicule." Henry Laurens to Bellamy Crawford, 2 May 1764, *Ibid.,* 4:258-59.

Avoiding Law With Richard and Archibald Stobo

Just as creditors and their agents in South Carolina bargained in the shadow of the law, seeking to keep land and slaves together for as long as possible, South Carolina debtors were also legally savvy, anticipating creditors' actions when they failed to make payments. The beleaguered Robert Baillie, for example, knew precisely what would happen if his father protested the bill of exchange he had used to pay for a slave. The "dishonoring" of a bill, especially by a member of one's own family, would have set off a chain reaction among his creditors, with each rushing to secure priority. Their actions, Baillie knew, would be shaped by the fact that Baillie had mortgaged his slaves. Indeed, his unsecured creditors, understanding that an "Advantage" would "accrue to the person that has got the mortgage," would have an incentive "to distress" him immediately for payment. These creditors could not hope to recoup their losses if the mortgage was foreclosed and the slaves were "sold at Vendu according to the Custom of America." Likely, they would begin to dun him mercilessly while he still had a way to generate income. Baillie's hopes, therefore, rode on a calculus -- shaped by an awareness of the law of debt and credit -- that his creditors would allow him to keep his slaves because it was in their own best interests to do so.[125] Debtors like Baillie, when confronted with financial failure, sifted through their options, paying off creditors when necessary, but also seeking to avoid their duns where possible. Peter Manigault's pursuit of a particularly wily debtor, Richard Stobo, reveals the extent to which debtors understood their legal options and maneuvered within the law to produce a favorable result. Stobo's case also shows how the presence of slaves, and

[125] Robert Baillie to James Baillie, 4 October 1755, GD1/1155/68/1, SNA.

particularly mortgaged slaves, shaped creditors' and debtors' actions when insolvency loomed. Whereas creditors weighed the relative benefits of immediate liquidity against future returns on a slave's labor, debtors sought to shield their most valuable property, viewing slaves as the only means by which they could clear their debts.

Richard and Archibald Stobo were brothers who owed money to London merchants Isaac King and Sarah Nickleson, two of Peter Manigault's largest clients. The nature and amount of their debt is unclear, but for nearly five years, the Stobo family led Manigault a merry chase as they avoided both informal duns and more formal attempts at debt collection. The Stobo brothers first appear in Manigault's letterbook in 1765, by which point they already had been "amusing" Manigault "for some Time" in their attempts to avoid their creditors. Their refusal to pay Manigault's clients or to come to an agreement ultimately prompted him to "take Writs against them" and put their debts in suit. Rather than allowing their property (or themselves) to be taken, however, the Stobos began keeping to their house in order to dodge the people Manigault had employed "with the Offers of a great Reward to take them." Manigault and his hired men could not apprehend the Stobos, it seems, because they had become experts in "keeping close." This was a strategy debtors used to avoid being served with a writ of attachment or a writ of execution.[126] Because the "law everywhere prohibited sheriffs and constables from forcibly entering a person's dwelling to serve a writ on the occupant," debtors could dodge legal process by hiding out in their homes, often for years at a time.[127] This, it appears, is precisely what the Stobos did with great aplomb, only making appearances "when the Courts of Justice were shut up" or on Sundays when writs could not be served. Afterwards, they

[126] Peter Manigault to Sarah Nickleson & Co., 25 March 1765, Manigault Letterbook, 16-17.

[127] Creditors and their agents could not force their way inside a home, although they could "enter through an open or unlocked door, climb through an unsecured window, or trick their way inside." Mann, *Republic of Debtors*, 26-27.

dutifully retired to their "Lurking Place" where Manigault and his spies could not reach them.[128]

For the Stobos, keeping close was a desperate act, but it also was part of a larger strategy to force creditors to come to a better accommodation. Although Richard Stobo (Archibald died while they were still keeping close) would not allow Manigault to serve him, he nonetheless was in frequent communication with his frustrated pursuer, suggesting terms for an accord. In August 1766 he offered Manigault "£2000 Sterling for a Discharge or to assign his Books," an offer that Manigault refused because he could not "depend upon anything he says."[129] But Stobo continued to hold out, using the occasion of his brother's death to secure a "Protection for a few Months" from the Chancery Court. As Manigault complained, under the Court's protection Stobo was allowed to walk "publicly about Town," and he dared "not arrest him."[130] Stobo's tactics ultimately worked: worn down chasing the wily debtor, Manigault accepted his "Offer to pay two thousand pounds Sterling in four Years, & give good Security." Even though Manigault knew that Stobo was "not worth a half penny" and that he likely would "fly off as before," he nonetheless "closed with the Offer provided the Security is good."[131]

The fact that Richard and Archibald Stobo were slaveholders inspired these herculean efforts at both debt collection and avoidance. Indeed, it seems that Richard Stobo originally decided to "keep close" in order to avoid being served with a writ of attachment "upon which his Negroes were all [to be] taken." Manigault, too, acted aggressively to preserve his clients' interests when he realized that there were judgment creditors who would also take the "Negroes

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[128] Peter Manigault to Sarah Nickleson & Co., 14 May 1766, Manigault Letterbook, 35.

[129] Peter Manigault to Sarah Nickleson & Co., 12 August 1766, Ibid., 41-43.

[130] Peter Manigault to Isaac King, 21 October 1768, Ibid., 80-81.

[131] Peter Manigault to Isaac King, 28 April 1770, Ibid., 120.

& must be first satisfied."[132] For Stobo, keeping close until his creditors agreed to accept a bond and security (which likely would take the form of a slave mortgage) would allow him to retain his slaves, whose labor was his only way of repaying his creditors. For Manigault, the knowledge that Stobo's slaves would be taken to satisfy other creditors prompted him to conclude an agreement with Stobo despite his initial reservations. Although the accommodation they ultimately reached was less favorable than Manigault hoped, it at least gave his clients a secured interest in Stobo's property before his slaves were taken.

Archibald and Richard Stobo kept close to avoid creditors, but other colonists resorted to more desperate measures, absconding with their slaves across colony lines. Jonathan Atcheson, for example, mortgaged all of his slaves to secure his considerable debts, but subsequently tried to "carry off every one of them" in the middle of the night to the horror of his creditors.[133] Andrew DeLavillette, a merchant in the port of Georgetown on South Carolina's northern coast, owed "a large Sum" of money to the firm of Austin & Laurens. He escaped with thirty slaves to the West Indies. Acting "a very ungenerous part," DeLavillette slipped out of the province and sailed to Antigua, where the law and Henry Laurens could no longer reach him.[134] Like DeLavillette, colonists fleeing from debtors with their most valuable human property often hopped a ship for the West Indies or crossed into North Carolina or Georgia, which remained a haven for debtors and escaped criminals well into the nineteenth century, as Lisa Ford has noted.[135] Florida and the backcountry also were popular destinations for debtors who fled with slaves. The firm of Fabre & Price, for example, was concerned that dunning one planter might

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[132] Peter Manigault to Sarah Nickleson, 18 May 1765, *Ibid.*, 18-19.

[133] James Mickie to Sir Alexander Nisbet, 29 March 1747, GD237/1/154/3, SNA.

[134] Austin & Laurens [Henry Laurens] to Robert Stuart, 28 April 1756, *HLP,* 2:174-75.

[135] Lisa Ford, *Settler Sovereignty: Jurisdiction and Indigenous People in America and Australia, 1788-1836* (Cambridge: Harvard University Press, 2010), 56.

prompt him to "fly" with his slaves and other moveable property "over to the Spaniards or Perhaps over the blue Mountains." The backcountry, they complained, had "become a fashionable resort" for some indebted planters, who retreated west to avoid their debts. When these planters "have or expect executi[on] against them," they would "decamp with all their movables 4 to 500 Miles back." There, new land could be "procured for a Trifling consideration" and they could "live at ease & Freedom so far as to keep their Creditors at defiance."[136]

Fabre & Price characterized flight as an effective way to avoid paying creditors. Indeed, if a debtor absconded with slaves, creditors could bid "farewell to any Recovery of Debts."[137] This was partly true. Although South Carolina allowed creditors to attach any "moneys, goods" or "chattels" that remained in the colony after debtors fled, these sorts of remedies would have been of limited utility when colonists took their most valuable moveable property with them.[138] When debtors fled with slaves, it is likely that creditors suffered a loss. But there is also evidence to suggest that fleeing the province may have been a less permanent decision, and in fact was merely one of many strategies that colonists used to force creditors to offer them a better deal. For example, when that "Villain" Mr. Milliken "retired a Little way to the Northward," probably to North Carolina with his twice-mortgaged slaves, he kept in contact with his creditors, continuing to negotiate for a more favorable settlement. James Mickie, in fact, reported that he had received assurances from Milliken and his correspondents that their money was "Safe," and more importantly that Milliken ultimately hoped "to return" to South Carolina. Milliken, it seems, had fled the province not to avoid his debts entirely, but in order to extract additional concessions from Mickie. Aware of how the law of credit and debt worked in practice,

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[136] Fabre & Price to Charles Goodwin and William Thomas, 4 January 1791, Add MS 85477, BL.

[137] Ibid.

[138] "An Act for the Better Securing the Payment and More Easy Recovery of Debts due from Any Person or Persons Inhabiting, residing or Being Beyond the Seas . . ." (1744) in *SAL*, 3:617.

he knew that depriving Mickie of the opportunity to attach his slaves would force his creditor to write off his debt as a total loss. He hoped in this case that Mickie would realize that he stood to gain substantially more if he came to an agreement. Milliken's gambit, it seems, was successful, and Mickie promised "not to oppose his return," presumably reaching some accord with Milliken that would allow him to re-enter the province without fear of attachment.[139]

Conclusion

When colonists like Milliken and the Stobo brothers took extreme measures to elude their creditors (or to force them to reach an accommodation), their actions marked them as part of a broader British Atlantic legal culture. Like colonists in other provinces, South Carolina colonists kept close, avoided legal process, and sought out-of-court resolutions, displaying a degree of legal literacy that can be surprising from a modern-day perspective.[140] Their everyday legal decisions were shaped by an awareness of how the law of credit and debt operated in practice as well as prescription. Indeed, debtors in South Carolina and throughout the Atlantic World accurately gauged how creditors would react to delinquency. At the same time, creditors sought to stay one step ahead of insolvent colonists, threatening them with litigation but generally preferring to come to a non-litigation resolution. Both groups skillfully played a game of cat and mouse with a full understanding its written and unwritten rules.

Colonists in plantation America, however, maneuvered in the shadow of law that treated people as things, and this shaped their decisions in profound ways. Debtors like Richard Stobo

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[139] James Mickie to [Sir Alexander Nisbet], 7 March 1745, Scottish National Archives, GD237/1/154/2, SNA.

[140] Mary Sarah Bilder, "The Lost Lawyers: Early American Legal Literates and Transatlantic Legal Culture," *Yale Journal of Law and the Humanities* 11 (1999): 47-117.

and Robert Baillie, for example, operated with an eye toward shielding their human property from creditors, knowing that slaves were both their most valuable assets and the only means they had of extricating themselves from debt. For creditors like Arthur Matthews, who declared that he would defend slaves mortgaged to him against all other creditors, the knowledge that a debtor owned slaves likewise influenced legal behavior in times of financial hardship. These creditors were forced to decide whether to recoup losses immediately by attaching and selling slaves, or, alternatively, to allow debtors to retain their slaves in the hopes that this would result in larger remittances.[141]

English law made these types of choices possible. Older legal forms, including conditional bonds, required no modification before they could be deployed to secure the sale of human beings, and colonists assumed without debate or discussion that slaves, because they were property, could be mortgaged. In fact, examining debtor-creditor relations in colonial South Carolina reveals just how little – not how much – adaptation was required to create a complex moral economy in which what mattered most was "satisfying" other white colonists. In this economy, all other priorities were layered atop the lives and aspirations of enslaved people. Indeed, the entire system of credit and debt in South Carolina prioritized the claims of other participants in credit markets over those of slaves, who, though they bought and sold goods, did not participate as meaningful agents in a higher-order economy of credit. In a place where people were things, the desires of individual slaves and the integrity of their families would always run up against the needs of slave owners as well as the broader economic forces that shaped those needs.

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[141] Arthur Matthews to Samuel Hurst, Esq., 1 March 1743, SCDAH.

Chapter 3
Slave Law at the Water's Edge

In 1718, South Carolina colonists Richard and Catherine Tuckerman laid claim to a "Negro Man named Ned" who had been captured on a ship belonging to the infamous pirate Stede Bonnet. At the Vice Admiralty Court in Charlestown, the Tuckermans detailed the twisting path by which Ned, who had been hired out to a ship's captain, was taken -- not once, but twice -- by buccaneers as he sought to escape from servitude on a Britain-bound snow. Buried in a titillating story of violence on the high seas, the Tuckermans' claim to their human property not only included a "prayer" that the judge would declare them Ned's owners; they also asked the Court to sell the "notorious Renegade" at public auction. Using the imperial state's legal apparatus to great effect, the Tuckermans ultimately obtained their desired result: the Court ordered Ned to be appraised and sold.[1]

This Vice Admiralty case suggests that many of our assumptions about the development of American slave law are incorrect. Indeed, when outlining slavery's legal dimensions, most historians have emphasized the statutory law of slavery, considering slave law synonymous with the increasingly complicated slave codes promulgated by colonial legislatures.[2] Taking as a starting point Lord Mansfield's claim that slavery was "so odious, that nothing can be suffered to support it, but positive law," historians have left us with a picture of a world in which elite colonists, wielding power through local assemblies, erected a formidable legislative apparatus

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[1] *Masters et al. v. Sloop Revenge*, 19 November 1718, South Carolina Vice-Admiralty Court Records, A-B vols., 276-300, Library of Congress, Manuscripts Division, Washington, D.C. Unless otherwise noted, I have dated cases based upon the first record entry in the Vice Admiralty Court's Minute Books.

[2] See David Barry Gaspar, "Rigid and Inclement': Origins of the Jamaica Slave Laws of the Seventeenth Century," in *The Many Legalities of Early America*, edited by Christopher L. Tomlins and Bruce H. Mann, 78-96 (Chapel Hill: University of North Carolina Press, 2000) and William M. Wiecek, "The Statutory Law of Slavery and Race in the Thirteen Mainland Colonies of British America," *The William and Mary Quarterly*, 3rd ser. 34 (1977): 258-80.

that kept slaves in check via criminal and policing statutes.[3] Positive law, according to these studies, made slavery possible in Britain's colonial possessions just as the lack of slave codes in the metropole meant "there was no slave law in England."[4] But while legislation regulated slavery's establishment and expansion, a focus on statutes has led us to overlook the extent to which colonists and judges, in the context of litigation, imbued the letter of the law with meaning in disputes over slaves.

In this chapter, I follow colonists like the Tuckermans, along with planters, merchants, and sailors as they litigated over slaves in South Carolina's Vice Admiralty Court. I also watch them maneuver in other admiralty jurisdictions throughout the British Atlantic World, including the Vice Admiralty Court of Jamaica.[5] These colonial Vice Admiralty Courts, sitting without juries and following procedures that derived from European civil law, were spread across England's empire, from Bermuda to Bombay. They applied a body of substantive law that had emerged over centuries to meet merchants' need for speedy dispute resolution and sailors' demands for fair pay and protection. Vitally important to maritime communities, in the eighteenth century an astonishingly diverse group of litigants made use of them, from South Carolina planters to Dutch sailors to free African subjects of the King of Spain. They acquired a jurisdiction broader than admiralty courts in England, and their judges decided a wide variety of suits touching on maritime life, including mariners' wage claims, prize cases, breaches of shipping contracts, salvage, torts, petty crime committed on the high seas, and violations of the Navigation Acts. They differed in fundamental ways from colonial courts of common law, but

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[3] *Somerset v. Stewart* (1772) 98 Eng. Rep. 499, 510.

[4] Alan Watson, *Slave Law in the Americas* (Athens: University of Georgia Press, 1989), 64.

[5] There is no study of the Jamaican Vice Admiralty Court, whose records are scanty and scattered. For a description of extant seventeenth-century Jamaican records relating to maritime causes, see Helen Crump, *Colonial Admiralty Jurisdiction in the Seventeenth Century* (London, 1931), 104. The manuscripts Crump describes can be found at The National Archives, Kew, United Kingdom, HCA 49/59.

most of all because litigants in these courts could sue things, usually ships and their cargoes. Indeed, it was the Vice Admiralty Courts' *in rem* (against the thing) jurisdiction that made them especially attractive to litigants, many of whom lived in transient maritime communities in which individuals were difficult to locate and hold to legal account. In bustling port towns like Charlestown, after all, ships were readily visible, while people ebbed and flowed with the tides.

I place these courts, their unique procedures, and the people that moved within them at the center of an analysis of the lived law of slavery in the British Atlantic World. In a maritime empire that relied upon slave labor on land and at sea, colonial Vice Admiralty Courts and the judges who staffed them facilitated commercial transactions involving slaves and recognized property interests in enslaved (and sometimes even free) people.[6] Bridging local legal needs and global economic realities, they routinely adjudicated wage disputes on slave ships, salvage claims to slaves found adrift on the high seas, and questions about the allocation of slave sale commissions.

Historians have overlooked this important facet of Vice Admiralty practice. Recent scholarship, in fact, depicts early nineteenth-century admiralty law as a benign change agent if not a revolutionary force for good. Jenny Martinez, for example, has linked admiralty Courts of Mixed Commission to the rise of human rights jurisprudence, while Tara Helfman has argued that colonial Vice Admiralty judges on the coast of Africa "embarked on an unprecedented experiment in international humanitarian intervention" in order to end the slave trade.[7] To a certain extent, their work continues the rehabilitative efforts of an older generation of historians. Concerned to recover the Vice Admiralty Courts' institutional reputation from the criticism of

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[6] David Armitage, *The Ideological Origins of the British Empire* (Cambridge: Cambridge University Press, 2000), 8.

[7] Jenny S. Martinez, *The Slave Trade and the Origins of International Human Rights Law* (Oxford: Oxford University Press, 2011); Tara Helfman, "The Court of Vice Admiralty at Sierra Leone and the Abolition of the West African Slave Trade," *Yale Law Journal* 115 (2006): 1122.

American revolutionaries, scholars of eighteenth-century Vice Admiralty, including Charles Andrews and Carl Ubbelohde, likewise ignored the slaves that these jurisdictions appraised and sold. Instead, they focused upon the important administrative and legal services that the Courts provided to local maritime communities. "The part which the vice-admiralty court played in the history of the colonies," according to Andrews, "has been overstressed on the coercive and oppressive sides," and scholars therefore had forgotten the Courts' "great usefulness as the guardian of the rights of the seamen."[8]

My research confirms Andrews's broad conclusions. Colonial Vice Admiralty Courts were institutions of undoubted local importance, providing much-needed resources and remedies for seaboard communities and sailors. But it was precisely because these jurisdictions were responsive to litigants' needs that we find them resolving disputes involving slaves. Indeed, in plantation colonies like South Carolina and Jamaica, slaves made up the largest part of colonists' wealth and constituted their most critical productive property.[9] As these cases show, not all of these slaves were engaged in agricultural labor. As scholars have shown, in black-majority colonies and in maritime communities throughout the Atlantic World, slaves and free Africans worked as pilots, mariners, and in the shipping trades. Whether guiding sloops over the treacherous Charlestown bar, working as hired laborers on transatlantic merchant vessels, or fishing off the coast of Jamaica, slaves were omnipresent along early America's waterways and

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[8] Charles M. Andrews, *The Colonial Period of American History*, 4 vols. (New Haven: Yale University Press, 1938), 4:251; Carl Ubbelohde, *The Vice-Admiralty Courts and the American Revolution* (Chapel Hill: University of North Carolina Press, 1960).

[9] See Kenneth Morgan, "Slave Sales in Colonial Charleston," *The English Historical Review* 113 (1998): 907; Trevor Burnard, "'Prodigious Riches': The Wealth of Jamaica Before the American Revolution," *The Economic History Review*, new ser. 54 (2001): 506-24.

coasts.[10] It should not surprise us, then, that these individuals appear in a variety of different capacities in colonial Vice Admiralty records.

One of the benefits of reconstructing the business of these courts, then, is that it lays bare the visceral realities of life in slave societies, where enslaved and free African mariners lived in peril on the sea in more than the traditional sense. Although Africans who spent their working lives on water moved more freely through plantation societies than agricultural laborers, their voyages often brought them into contact with Vice Admiralty Courts, where litigants relentlessly claimed them as laborers and as property. In places where human beings were considered things at law, the Vice Admiralty Court -- a jurisdiction that specialized in seizing, appraising, and condemning things -- demarcated the boundaries of slave agency as it opened up other strategies for resistance. Indeed, the *in rem* process that distinguished admiralty jurisdictions from common law courts renders the property component of slavery highly visible to historians, even as it reminds us just how easily English law in all its varied forms accommodated slavery throughout empire.

Vice Admiralty Courts had provincial utility, and their judgments adapted to meet the commercial needs of maritime populations, including the need to command slave labor. Yet their business also challenges easy distinctions between center and periphery, and between the local and the global. In addition to providing a speedy and efficient forum for local dispute resolution, the colonial Vice Admiralty Courts were dynamic instruments of empire that emerged

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[10] Philip D. Morgan, *Slave Counterpoint*: Black Culture in the Eighteenth-Century Chesapeake & Lowcountry (Chapel Hill: University of North Carolina Press, 1998), 236-43; Michael J. Jarvis, "Maritime Masters and Seafaring Slaves in Bermuda, 1680-1783," *WMQ* 59 (2002): 585-622; W. Jeffrey Bolster, *Black Jacks: African American Seamen in the Age of Sail* (Cambridge: Harvard University Press, 1998); Marcus Rediker, *Between the Devil and the Deep Blue Sea, Merchant Seamen, Pirates, and the Anglo-American Maritime World 1700-1750* (Cambridge: Cambridge University Press, 1989); William R. Ryan, *The World of Thomas Jeremiah: Charles Town on the Eve of the American Revolution* (Oxford: Oxford University Press, 2010) and J. William Harris, *The Hanging of Thomas Jeremiah: A Free Black Man's Encounter With Liberty* (New Haven: Yale University Press, 2009).

to satisfy the financial and military imperatives of British expansion throughout the globe. Although the authority to hear maritime causes existed in the American colonies prior to 1696, properly constituted Vice Admiralty courts (staffed by judges with commissions from the High Court of Admiralty in England) were first established in 1697 to enforce the Navigation Acts and to centralize colonial administration. These courts helped to ensure that customs laws were not evaded, but they also facilitated British military expansion during the first half of the eighteenth century, a period of near-constant warfare. From condemning prize ships so they could be re-fitted as privateers to depriving enemies of slaves on land and at sea, the colonial Vice Admiralty Courts provided connective tissues in the sinews of power that allowed the British state to flex its fiscal and military muscles in the eighteenth century.[11]

Although Vice Admiralty Courts represented an extension of centralized, royal power into the Western Hemisphere, colonists and sailors routinely litigated in these jurisdictions and benefited from the courts' unique procedures in a number of ways. The lack of juries in Vice Admiralty Courts, for example, was a distinct advantage to mariners and merchants who were interested in speedy and fair process. The latter also participated in the Court's day-to-day administration by acting as court-appointed appraisers, valuing everything from sailcloth to slaves. By litigating in Vice Admiralty Courts and by participating in their daily operations, these colonists and mariners invited empire in, extending the British imperial state's reach as they asked the Court to acknowledge their property rights in human beings. Their need for legal services that facilitated their commercial aspirations merged harmoniously with the administrative demands of empire building. And when Vice Admiralty Courts fulfilled litigants'

[11] See John Brewer, *Sinews of Power: War, Money, and the English State, 1688-1783* (Cambridge: Harvard University Press, 1990).

needs by condemning, appraising, and selling slaves, the British state acknowledged and sanctioned local legal practices that dehumanized enslaved people.[12]

In part one of this chapter, I briefly describe the evolution of the colonial Vice Admiralty Court system after 1696, placing the establishment of colonial Vice Admiralty Courts in a broader context of imperial state building. I then turn to a discussion of admiralty jurisdiction and procedure, distinguishing colonial Vice Admiralty Courts from the common law courts that scholars more typically emphasize. In part two, I examine in depth the business of South Carolina's Vice Admiralty Court, drawing upon an analysis of 139 cases heard by the Court between 1716 and 1763 and recorded in surviving minute books. These records reveal a vibrant jurisdiction, patronized by a wide variety of litigants and closely connected to Charlestown's merchant community.[13] Next, I turn to a discussion of slave litigation in the South Carolina Court, emphasizing cases in which colonists claimed slaves as property. Situating these cases in an Atlantic context, I argue that in both South Carolina and Jamaica, litigants took advantage of admiralty procedures to assert their property rights in human beings. Indeed, although Eugene Genovese has suggested that courts repeatedly "tripped over the slave's humanity," litigants and judges in colonial Vice Admiralty Courts did not pause to consider the humanity of slaves, nor did they betray any cognitive dissonance in treating slaves as property in the context of litigation. Rather, they seamlessly analogized human beings to other types of marine property that might be

[12] For a similar view of the role of litigants in early modern English state formation, see Steve Hindle, *The State and Social Change in Early Modern England, 1550-1640* (New York: Palgrave Macmillan, 2002).

[13] Although the Court's records are surprisingly complete they have not yet been systematically analyzed, likely because they remain unpublished. It seems that Charles Andrews reviewed these records, but aside from occasional citations to decisions, he never produced a detailed analysis of the Court's business.

claimed using centuries-old admiralty procedures. Their activities helped make it possible, in ideological as well as practical terms, to treat enslaved people as property.[14]

African mariners, both enslaved and free, were the frequent objects of litigants' claims, and in part four I also seek to reconstruct their lives, highlighting opportunities for mobility and agency, but also elucidating the real risks that a life at sea entailed for sailors of African descent. Finally, in part five I conclude with an analysis of admiralty disputes touching on the transatlantic and regional slave trades, revealing the colonial Vice Admiralty Courts' important role in regulating life on slave ships during times of peace and in policing illicit slave trading during times of war. Whether depriving the French of much-needed slave labor in the sugar islands or redistributing slaves from captured vessels to navy and privateering crews, the Courts helped to secure British military supremacy over the course of the eighteenth century.

The Vice Admiralty Court System, 1697-1763

Before 1763, when the financial burdens of the Seven Years' War prompted a systematic reorganization of the colonial Vice Admiralty system, nine colonial courts of Vice Admiralty adjudicated cases at the water's edge in the American colonies.[15] With a broad jurisdiction derived from the Crown through the High Court of Admiralty, the judges that staffed these royal courts provided remedies for people who made their living on the sea. They also functioned as a legal resource for the royal Navy and English privateers by acting as a clearing house for prizes (enemy vessels and cargoes captured during a time of war), making them an important

[14] Eugene D. Genovese, *Roll, Jordan, Roll: The World the Slaves Made* (New York: First Vintage Books, 1976), 29.

[15] David R. Owen and Michael C. Tolley, *Courts of Admiralty in Colonial America: The Maryland Experience, 1634-1776* (Durham: Carolina Academic Press, 1995), 35.

administrative arm of the British fiscal-military state in the eighteenth century. And they exercised a jurisdiction, unknown to English admiralty courts, to enforce the Navigation Acts, a series of statutes passed in the seventeenth century to control trade within the British Empire.

Despite their importance to early modern people, however, most American legal historians have overlooked the colonial Vice Admiralty Courts' business in favor of analyses of common law jurisdictions. Aside from several specialist studies of the eighteenth-century colonial Vice Admiralty Courts and a few edited records collections, these jurisdictions fit awkwardly or not at all into narratives about the development of American law.[16] This is largely because the colonial Vice Admiralty Courts disappeared as distinct institutions in the legal system of the new United States, surrendering their jurisdiction to the federal courts under Article III of the Constitution and Section 9 of the Judiciary Act of 1789.[17] Because the work of the Vice Admiralty Courts has been obscured, then, in this part I examine their history, jurisdiction, and most importantly, the procedures that distinguished them from the better-understood colonial common law courts. I particularly focus upon the Courts as they operated

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[16] The best most recent study of a colonial Vice Admiralty Court is Owen and Tolley, *Courts of Admiralty in Colonial America: The Maryland Experience, 1634-1776*. Studies of Vice Admiralty Courts in other jurisdictions include Carl Ubbelohde, "The Vice Admiralty Court of Royal North Carolina, *North Carolina Historical Review* 31 (1954): 517-28; Dorothy S. Towle, ed. *Records of the Vice-Admiralty Court of Rhode Island 1716-1752* (Washington, D.C.: The American Historical Association, 1936); Arthur J. Stone, "The Admiralty Court in Colonial Nova Scotia," *Dalhousie Law Journal* 17 (1994): 363-429; Charles M. Hough, ed. *Reports of Cases in the Vice Admiralty of the Province of New York and in the Court of Admiralty of the State of New York, 1715-1788* (New Haven: Yale University Press, 1925); George H. Reese, ed., *Proceedings in the Court of Vice-Admiralty of Virginia 1698-1775* (Richmond: Virginia State Library, 1983); L. Kinvin Wroth, "The Massachusetts Vice Admiralty Court and the Federal Admiralty Jurisdiction," *American Journal of Legal History* 6 (1962): 347-67; Edgar Aldrich, "Admiralty Jurisdiction, and the Admiralty Courts of New Hampshire During the Colonial and Revolutionary Period, And the Period Since the Adoption of the Constitution of 1783-1784" in *Proceedings of the New Hampshire Bar Association* (1909-10), 31-62.

[17] Owen and Tolley, *Courts of Admiralty*, 201.

between 1697 and 1763, after the establishment of a centrally controlled Vice Admiralty system, and before the Courts were reorganized in the wake of the Seven Years' War.[18]

Prior to 1697, admiralty jurisdiction was extended to the American colonies on an ad-hoc basis. Many colonial governors were empowered through their royal or proprietarial commissions to act as vice admirals and to hear maritime causes, a practical acknowledgement of the fact that merchants and sailors trading to America needed access to judges who could adjudicate cases touching on maritime life.[19] It also was not unusual for West Indian governors to receive special commissions during times of war to hear prize cases.[20] Nonetheless, with the exception of Jamaica (1662), Maryland (1694), and New York (1696), most colonies erected Vice Admiralty jurisdictions (courts with commissions issued directly from the High Court of Admiralty) after 1697.[21]

The creation of colonial Vice Admiralty Courts after 1697 was part of a wider campaign to centralize imperial administration and more vigorously enforce the Navigation Acts, and particularly the new Act of 1696. Because colonial common law juries habitually refused to convict local violators, imperial administrators sought a legal alternative to the adjudication of

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[18] For an extensive discussion of these post-1763 reforms, see Ubbelohde, *The Vice-Admiralty Courts and the American Revolution*, *passim*. For colonists' complaints about Vice Admiralty Courts in the 1760s and 1770s, see David S. Lovejoy, "Rights Imply Equality: The Case Against Admiralty Jurisdiction in America, 1764-1776," *WMQ* 16 (1959): 459-84.

[19] In colonial South Carolina, for example, the Governor and Council, sitting as an admiralty court, presided over at least nine maritime cases between 1671 and 1692. In some cases, the Council clearly distinguished its admiralty business from its other judicial business, noting specifically on the record that "The Councill meet as a Court of admiralty." *In re Carolina Merchant*, 22 August 1692 in Alexander S. Salley, Jr., ed. *Journal of the Grand Council of South Carolina*, 2 vols. (Columbia: Historical Commission of South Carolina, 1907), 2:56.

[20] Andrews, *Colonial Period*, 4:224; Andrews, "Introduction," in Dorothy S. Towle, ed. *Records of the Vice-Admiralty Court of Rhode Island 1716-1752* (Washington, D.C.: The American Historical Association, 1936), 8. There also had been periodic but failed earlier attempts to erect separate admiralty jurisdictions in places like Newfoundland, where disputes in the fisheries were common. Owen and Tolley, *Courts of Admiralty*, 26; Crump, *Colonial Admiralty Jurisdiction*, 33, 36.

[21] Owen and Tolley, *Courts of Admiralty*, 26, 20. The Jamaican Vice Admiralty Court, as Helen Crump has noted, was somewhat of a novelty in that it's primary institutional purpose was to adjudicate cases involving prizes. Crump, *Colonial Admiralty Jurisdiction*, 97.

Navigation Acts cases by common law courts, and in 1696 the *Act for Preventing Frauds and Regulating Abuses in the Plantation Trade* authorized colonial admiralty courts to enforce violations of the Acts of Trade.[22] The 1696 act, however, wrongly assumed the existence of Vice Admiralty Courts in all of the colonies.[23] To remedy this oversight, in 1697 the Privy Council authorized the High Court of Admiralty to draft commissions that would empower colonial governors to create vice admiralty courts modeled after the High Court of Admiralty in England.[24] Decidedly royal courts, these new colonial Vice Admiralty jurisdictions "derived their authority from the king, conducted their proceedings in the king's name, and were presided over by a judge whose commission under warrant from the crown was issued directly from the High Court of Admiralty."[25]

The Vice Admiralty Courts' procedures more than anything else set them apart from other colonial jurisdictions. As institutions derived from European civil law rather than English common law, admiralty courts in the British Isles and the American colonies tried cases without juries, which made them vulnerable to criticism in England during the seventeenth century and in the mainland American colonies immediately prior to the American Revolution.[26] Unlike common law tribunals, in which witnesses testified in open court, witnesses in Vice Admiralty Courts generally did not provide *viva voce* evidence. Rather, in a typical admiralty trial an individual judge or deputy judge issued a final decree based upon written testimony alone. This

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[22] Owen and Tolley, *Courts of Admiralty*, 32, 5; Crump, *Colonial Admiralty Jurisdiction*, 2.

[23] *Ibid.*, 2.

[24] Andrews, *Colonial Period*, 4:226.

[25] Andrews, "Introduction," 17.

[26] Admiralty jurisdictions in England also proved unpopular because admiralty courts deprived other courts of potentially lucrative business. This included not only courts of common law, but also manor and borough courts. The fourteenth-century Ricardian statutes that limited admiralty jurisdiction to the body of the counties specifically referenced the encroachment of admiralty jurisdiction on "diverse franchises." 13 R. 2 c.5, 1389.

testimony took the form of answers to interrogatories (questions propounded to witnesses) or depositions (sworn written statements).[27]

Perhaps more importantly, these Courts also could proceed *in rem* (against the thing) whereas common law courts typically proceeded *in personam* (against the person).[28] As in English admiralty jurisdictions, libellants (plaintiffs) in colonial Vice Admiralty Courts could libel (sue) things, generally ships and their cargoes.[29] A suit commenced when the libellant, represented by a proctor (attorney) (or in the case of the Crown the Advocate General) filed a libel (a complaint) setting out the facts of the case and asking for relief.[30] The Court then issued a warrant to the Vice Admiralty Court marshal to arrest the libelled ship and/or cargo. Crucially, the owner of an arrested ship (the respondent) could then file a stipulation that substituted security in place of the vessel. This meant that the ship could immediately return to sea without having to await the outcome of a trial. If the libellant prevailed, the Court either ordered the ship sold or the security forfeited.[31] Courts also provided an opportunity for those financially interested in a ship or its cargo, including sailors, to claim their respective share of a ship or the goods it transported. In the case of prize ships, claimants often were original owners of vessels

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[27] Owen and Tolley, *Courts of Admiralty*, 17. In disputes over captured prize ships, interrogatories often adhered to a formula that was meant to elicit testimony about the nature of the ship's cargo, the crew members' places of origin, and the ship's owner, making the records in these cases particularly interesting sources for social history.

[28] It was possible, however, to proceed *in personam* in colonial Vice Admiralty Courts, particularly in criminal cases. These usually were initiated with a warrant to arrest the body of the defendant. See, e.g. *Joseph Powell v. William Lyford*, 3 January 1763, South Carolina Vice Admiralty Minute Books, E-F vols., 494-500, National Archives and Records Administration, Atlanta, G.A.

[29] A libellant might also choose to libel the cargo alone. See, e.g. *Parcel of Brandy*, 25 September 1717, South Carolina Vice Admiralty Minute Books, A-B vols., 126-137, LOC.

[30] In South Carolina, the Advocate General received his Commission from the Crown. See, e.g. Commission of James Abercrombie, 10 October 1730, South Carolina Vice Admiralty Court Minute Books, A-B vols., 757-58, LOC.

[31] Owen and Tolley, *Courts of Admiralty*, 15. In the case of a contumacious respondent, Vice Admiralty judges also had the power to attach and condemn any of the respondent's maritime property within the jurisdiction. Maritime attachment, although once available to the High Court of Admiralty, "fell into disuse" in England. More like an action *in personam*, it had been attacked by common law judges over the course of the seventeenth century. *Ibid.*, 17.

that had been taken as prizes by an enemy and then re-captured by the royal Navy or by privateers. But as we shall see it also was not unusual for colonists or mariners to claim slaves found aboard libelled ships.[32]

Vice Admiralty Court procedure provided a number of advantages to litigants, many of whom were peripatetic mariners or busy merchants. Indeed, Vice Admiralty procedures were tailor-made to suit an Atlantic World that was highly mobile and in which people maneuvered outside of traditional communities that provided judicial oversight and mechanisms for conflict resolution. More streamlined than common law suits, there were no requirements to adhere to formula or forms of action in Vice Admiralty pleadings. This lessened opportunities for delay, which was important for merchants and ship owners anxious to return their vessels to the course of commerce, and made it possible to litigate without specialized legal expertise. The Courts moreover did not sit only in term time, like common law courts, but assembled on an as-needed basis, another boon to litigants interested in the speedy adjudication of claims. Remedies, too, made the Vice Admiralty Court friendly to merchant as well as mariner litigants. For example, the requirement that respondents provide security prior to trying a libel helped to ensure that proven claims would be satisfied even if a ship sailed off to a foreign port or a respondent refused to participate in the proceedings.[33] Finally, deposition and interrogatory evidence was uniquely well suited for peripatetic mariner or merchant witnesses. Rather than requiring these individuals to appear in court, Vice Admiralty judges issued commissions to take depositions or

[32] In these cases, the South Carolina Vice Admiralty Court often returned the vessel to the original owner, with the proviso that the owner pay the captors salvage, usually reckoned at 1/8 the value of the ship and cargo. See e.g. *John Tyrach & Others v. Ship Catherine*, 7 January 1763, South Carolina Vice Admiralty Minute Books, E-F vols., NARA.

[33] Owen and Tolley, *Courts of Admiralty*, 16.

interrogatories, even to witnesses in other colonies.[34] This written evidence, as a practical matter, also was easier to translate than in-court testimony. Indeed, colonial Vice Admiralty Court records reveal the linguistic diversity of early modern maritime communities, as witnesses and litigants were nearly as likely to be Spanish, Dutch, or French speakers as native Englishmen.[35]

Although their procedures mimicked practice in English admiralty jurisdictions, the colonial Vice Admiralty Courts enjoyed a substantially broader jurisdiction than these older courts.[36] In part, this was because the 1696 Act endowed the Courts with the authority to try Navigation Acts cases, a jurisdiction unknown to admiralty courts in England.[37] The Navigation

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[34] In a 1747 South Carolina case, for example, the Court issued commissions to two New York merchants and one "Counsellor at Law" to interview "material Witnesses" residing in New York. *William Walton v William Yeomans*, 28 September 1747, South Carolina Vice Admiralty Minute Books, C-D vols., NARA.

[35] The Vice Admiralty Court in South Carolina employed foreign merchants living in Charlestown to translate written depositions or answers to interrogatories. These individuals also might be called upon by the Court to translate ship's papers, including customs documents, instructions, letters of marque, captains' logs, and bills of lading. In the case of the *Ju Vrouw Anna*, a Jamaican prize case, the Court used a jeweler from Kingston, Jamaica, to translate Dutch documents. *Ju Vrouw Anna*, 4 October 1747, Records of the High Court of Admiralty and Colonial Vice-Admiralty Courts, TNA, HCA 49/60.

[36] Owen and Tolley, *Courts of Admiralty*, xiv; According to Crump, "The victory of the common lawyers came with the civil wars, but under the Restoration admiralty courts gained ground in the colonies, though the High Court of Admiralty at London lost almost all business save prize." Crump, *Colonial Admiralty Jurisdiction*, 141. See also Andrews, *Colonial Period*, 4:228. The High Court of Admiralty had original jurisdiction in maritime causes and prize cases. It also could appoint commissioners to sit as courts of *oyer* and *terminer* to try (with a jury) felonies on the high seas. England's local vice admiralty courts "looked chiefly after marine business," but not trade violations. *Ibid.*, 4:223.

[37] Owen and Tolley, *Courts of Admiralty*, 4-5. In England, violations of trade laws were tried in the Court of Exchequer or by barons of the exchequer in the counties. Andrews, *Colonial Period*, 4:223. Although after a period of confusion the Board of Trade ultimately decided that the Vice Admiralty Courts in the colonies exercised a concurrent jurisdiction to enforce the Navigation Acts with common law courts, in many colonies Navigation Acts cases comprised a significant portion of the Court's docket. Owen and Tolley, *Courts of Admiralty*, 7. Actions to enforce parliamentary statutes forbidding colonists from cutting marked white pine trees (which were used by the royal navy) were an exception to this rule. Ubbelohde, *The Vice-Admiralty Courts and the American Revolution*, 16.

The colonial Vice Admiralty Courts also were largely unrestricted by parliamentary statutes, and particularly the two statutes of Richard II that limited the High Court of Admiralty's jurisdiction to things "done upon the sea" but not "within the bodies of the counties." Indeed commissions from the High Court of Admiralty endowed some colonial Vice Admiralty judges with the authority to try torts that occurred in waters *infra corpus comitatus* (within the body of the county). Owen and Tolley, *Courts of Admiralty*, 138-39. South Carolina is an important exception to this as the colony specifically incorporated Parliamentary statutes limiting admiralty jurisdiction to the body of the counties, including 13 R.2 c.5, 1389, "What things the Admiralty and his Deputy shall meddle," and 15 R.2 c.3, 1391, "In what Places the Admiral's Jurisdiction doth lie," in "An Act to Put in Force . . ." (1712), in *The Statutes at*

Acts, also called the Acts of Trade, aimed to "promote shipping, increase customs revenues, and monopolize trade with the colonies." In general, they stipulated that ships engaged in colonial trade must be owned by English (and, after the Act of Union in 1707, British) subjects and built in England or the colonies. Shipmasters and at least three-quarters of the crew had to be English subjects, and enumerated commodities were to be unloaded and reloaded in England (with a duty paid) prior to being shipped to other countries.[38] Governors took an oath to uphold the Navigation Acts, but they also received financial incentives for successful Navigation Act prosecutions: the Crown, the governor, and the informer each took one-third of the value of condemned ships and cargoes.[39]

Large of South Carolina, edited by Thomas Cooper and David J. McCord, 10 vols. (Columbia: A.S. Johnston, 1836-41), 2:401 *ff.*

Colonial Vice Admiralty courts also largely avoided the jurisdictional competition that resulted in the limitation of admiralty jurisdiction in England. Although the High Court of Admiralty enjoyed a resurgence under the Tudors, during the seventeenth century common law judges and lawyers eroded the Court's jurisdiction. Using writs of prohibition, Sir Edward Coke in particular "demanded that admiralty jurisdiction be confined to the open sea only and that the courts be prohibited from dealing with cases arising within the waters of the realm, that is, within rivers as far as the first bridge that impeded navigation." Andrews, *Colonial Period*, 4:224; Owen and Tolley, *Courts of Admiralty*, 3. Andrews has found evidence of writs of prohibition issuing to Vice Admiralty Court judges in some of the American colonies. "The writ was made use of probably in all the colonies at one time or another, but we have no certain evidence of its exercise in Maryland, Virginia, and Antigua. Of the other colonies illustrations are few from Bermuda and Barbados. But in Massachusetts, Rhode Island, New York, Pennsylvania, and the two Carolinas, prohibitions were frequently employed." Andrews, *Colonial Period*, 4:263.

[38] An excellent description of the Navigation Acts and the colonial trade system can be found in Nuala Zahedieh, *The Capital and the Colonies: London and the Atlantic Economy, 1660-1700* (Cambridge: Cambridge University Press, 2010), 35-55. See also Owen and Tolley, *Courts of Admiralty*, 102-03. As Michael Jarvis has shown, enslaved Bermudian mariners owned by British subjects constituted British subjects for the purposes of the Navigation Acts. Jarvis, "Maritime Masters and Seafaring Slaves," 598.

[39] Owen and Tolley, *Courts of Admiralty*, 107, 104. There is reason for thinking that these financial incentives worked. In South Carolina, for example, governor James Glen worked tirelessly behind the scenes to have the Ship *Vrouw Dorothea* condemned for Navigation Acts violations. Writing as the case wound its way through a particularly lengthy and complicated appeals process, Glen observed that "there can be no doubt but that I was very desirous that the Vessel and Cargo should be Condemned." Indeed, he "was fully convinced that there had been a flagrant breach of the Laws of Trade." He was even more certain that the Governor of Jamaica, who first captured the vessel, was not entitled to compensation. After all, according to Glen, "vigilantibus non dormientibus &ca." James Glen Letterbook, GD45/2/1, [1751-1752], 141, Scottish National Archives, Edinburgh, Scotland, United Kingdom.

In a 1729 case, the master of the ship St. Antonio, libelled for violating the Navigation Acts, challenged the Court's authority to apply the Navigation Acts to non-British subjects. In his answer, the respondent argued that "if he hath Comitted any Offence against the Laws of Great Britain that is not Malum in Se or contrary to Jus Gentium." The

Apart from enforcing the Navigation Acts, the jurisdiction of the colonial Vice Admiralty Courts extended to two other types of cases: instance and prize. Instance jurisdiction was litigation brought on the "instance" of the plaintiff against a vessel and/or its cargo. In instance cases, the colonial Vice Admiralty Courts applied maritime law, sometimes called the law merchant, which differed significantly from law applied in the common law courts.[40] An amalgam of Roman law and "procedures developed by merchants in European ports of the Mediterranean, Atlantic Coast, North Sea, and Baltic," maritime law facilitated international commerce by ensuring that ships could be returned to sea quickly.[41] It evolved to spread risks among merchants, to reward those who hazarded life and limb to save marine property, and to limit the liability of ship owners.[42]

Instance suits in colonial Vice Admiralty Courts varied in type. They included mariners' claims for unpaid wages, claims for salvage (retrieving a ship or cargo that had been captured, beached, or wrecked), and bottomry bond suits in which captains borrowed against the value of their vessels in foreign ports.[43] The courts' instance jurisdiction likewise extended to maritime contracts for ship supply and repair, marine insurance, and charter party cases. In a type of instance case novel to colonial Vice Admiralty Courts, judges also heard claims brought by sailors that a ship was unfit for sea. They had the authority to arrest the ship, order it surveyed, and either certify the vessel as fit or have it condemned and sold.[44]

Court was unpersuaded however, and the ship was condemned. *Thomas Gadsden Collector of Customs v. St. Antonio*, 30 June 1729, South Carolina Vice Admiralty Court Minute Books, A-B vols., 563, LOC.

[40] J.H. Baker has argued that procedure more than substance distinguished the law merchant from the common law. J.H. Baker, "The Law Merchant and the Common Law Before 1700," *Cambridge Law Journal* 38 (1979): 295-322.

[41] Owen and Tolley, *Courts of Admiralty*, 6-7.

[42] *Ibid.*, 12-14.

[43] *Ibid.*, 12.

[44] *Ibid.*, 2-4. This is precisely what happened in the 1716 case of the Snow Rochdale, which South Carolina's Vice Admiralty judge condemned after her mariners protested "against the Wind and Seas" for damaging the vessel

Adjudicating mariners' wage cases was a particularly important part of the colonial Vice Admiralty Courts' instance business (and that of English admiralty jurisdictions as well). Admiralty law, in fact, privileged mariners, viewing them as incapable of making rational decisions and therefore in need of heightened legal protection. As Sir William Scott, a High Court of Admiralty judge, noted, the "common mariner is easy and careless, illiterate and unthinking, he has no such resources, in his own intelligence and experience in habits of business."[45] Consequently, mariners almost always won their wages suits. Moreover, Courts allowed mariners to join together to libel a ship, which limited individual litigation costs and made adjudicating cases faster and easier.[46] Admiralty procedure also permitted judges to arrest vessels to secure mariners' claims and to condemn them in order to pay back wages. Finally, upon the sale of a ship condemned in a Vice Admiralty Court, judges preferred the claims of seamen ahead of all other creditors when proceeds were distributed.[47]

As a part of their instance jurisdiction, colonial Vice Admiralty Courts also heard cases involving torts and petty crimes committed on the high seas. These cases typically involved sailors who complained about excessive physical punishment on a voyage.[48] Admiralty jurisdiction did not, however, extend to felonies, as was also the case in England. These were

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beyond repair. In re the *Snow Rochdale*, 13 November 1716, South Carolina Vice Admiralty Court Minute Books, A-B vols., 1-19, LOC. Unfit ships typically were sold for the benefit of the owners.

[45] H. Bourguignon, *Sir William Scott, Lord Stowell, Judge of the High Court of Admiralty* (Cambridge: Cambridge University Press, 1987), 5-7.

[46] Generally, sailors would execute, en masse, a power of attorney authorizing a local merchant or their ship's captain to prosecute a case on their behalf. The attorney would then appoint a proctor to bring the libel. This type of collective advocacy also was used by mariners to collect prize money due to them upon the condemnation of a ship.

[47] Owen and Tolley, *Courts of Admiralty*, 2-3. Owen and Tolley have found that in Maryland, wage cases brought by seamen were won "without exception." *Ibid.*, 11.

[48] See, e.g. *John Clancy, Cooper of the Pook Pink v. Bennet*, a South Carolina case in which the libellant claimed hearing loss as the result of an assault. 10 August 1737, South Carolina Vice Admiralty Court Minute Books, C-D vols., 164-65, LOC. See also *Joseph Powell v. William Lyford*, in which the libellant requested a warrant to arrest the body of Lyford for trespass and assault "with Force and Arms," 3 January 1763, South Carolina Vice Admiralty Court Minute Books, E-F vols., 495, NARA.

crimes where penalties implicated life and limb, and thus required a common law jury.[49] Neither did the Vice Admiralty Courts technically exercise jurisdiction over piracy, although the records of piracy trials were kept in the minute books of some Courts, including those of South Carolina.[50] Rather, pirates were tried under special commissions of *oyer* and *terminer* (to hear and determine) issued to a colony's Vice Admiralty judge and several other high-ranking local officials. In South Carolina, for example, a 1701 piracy commission authorized Joseph Morton, the Vice Admiralty judge, along with the "Honorable James Moore Esq. Ch[ie]f Justice, And to the Honorable Edmund Bellinger Esq. Deputy Judge of [the] Admiralty and [the] Honoble Rob Danield & Rob Gibbs Esq" to "enquire by [the] Oath of Good & lawfull men . . . of all and all manner of Pyracies Robberies & Murther's homicides and Misdemeanours done & perpetrated upon [the] Seas."[51] In periods when piracy particularly concerned imperial officials, the High Court of Admiralty issued batches of these commissions to colonial Vice Admiralty judges. Indeed, these documents were mass-produced and transmitted throughout empire in times of perceived need. For example, a draft commission for trying pirates in South Carolina and

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[49] Owen and Tolley, *Courts of Admiralty*, 6. However, as Owen and Tolley also concede, Jamaican Vice Admiralty courts did occasionally hear maritime felony cases, and I have found evidence of at least one maritime felony tried in South Carolina's Vice Admiralty Court. *Ibid.*, 34. The South Carolina case is a 1758 case in which a captain on a slave ship was alleged to have murdered mariners. *King v. Joseph Harrison*, 22 June 1758, South Carolina Vice Admiralty Court Minute Books, E-F vols., 45-52, NARA.

[50] In South Carolina, the Court's records include some piracy trials, although not all. Indeed, The National Archives contains unbound records from at least one piracy trial in South Carolina that do not appear in the Court's minute books. TNA, HCA 1/99/14.

[51] Commission to Joseph Morton et al., 5 January 1701, Alexander S. Salley, ed., *Commissions and Instructions From the Lords Proprietors of Carolina to Public Officials of South Carolina, 1685-1715* (Columbia: Historical Commission of South Carolina, 1916), 120-21. Interestingly, this commission provides for a trial by jury, which technically had been disallowed under The Piracy Act of 1700. This act provided that pirates were to be tried according to the civil law, not under the procedures outlined in a 1536 statute requiring jury trials for suspected pirates. Although the 1536 statute placed piracy under the HCA's jurisdiction, it stipulated that after Admiralty lawyers "decided that a case existed, the Lord High Admiral issued a commission to a special common law court of oyer and terminer, which had common law procedures and common law juries." Robert C. Ritchie, *Captain Kidd and the War Against the Pirates* (Cambridge: Harvard University Press, 1986), 141. A 1717 Piracy Act brought the colonies in line with English procedures, including jury trials for pirates. Owen and Tolley, *Courts of Admiralty*, 34. South Carolina's 1712 incorporation statute specifically received the Henrician piracy statutes "For Pirates and Robbers on the Sea," 27 H.8 c. 4, 1535 and "For Pirates," 28 H.8 c. 15, 1536, in "An Act to Put in Force . . ." (1712), *SAL*, 2:401 *ff*.

Georgia was simply an edited version of a Virginia commission that changed place names and substituted "George III" for "George II."[52]

In addition to their instance jurisdiction, the colonial Vice Admiralty Courts exercised jurisdiction over prize ships and cargos captured during times of war, and navy vessels or privateers could haul prizes to any of the colonial Vice Admiralty Courts for condemnation.[53] The Courts' authority to try prize cases was reinforced after each declaration of war, when the High Court of Admiralty issued new prize warrants to Vice Admiralty Court judges. These warrants authorized them "to take Cognizance of, and Judicially to proceed upon & all manner of Captures Seizures Prizes and reprizals of all Ships and goods" and "to hear and determine the same."[54] Both military necessity and commercial demands for speedy condemnation of vessels made it particularly important for colonial Vice Admiralty Courts to act in cases of prize. Indeed, prize ships could not be legally sold prior to condemnation, a process that produced a certificate that could be used as a title deed to the ship. Especially in the West Indies, where ships were needed during times of war, it was impractical to require captors to sail their ships to England for condemnation prior to re-registering them and returning them to the Caribbean theater.[55]

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[52] TNA, HCA 1/64.

[53] After a brief period of confusion about whether colonial Vice Admiralty Courts had the authority to hear prize cases or whether prizes must be tried at the High Court of Admiralty in England, the colonial Vice Admiralty Courts received a specific grant of exclusive prize jurisdiction in 1707. Owen and Tolley, *Courts of Admiralty*, 35; 6 Anne c. 37. There is reason to believe that ships' captains engaged in forum shopping when choosing where to have vessels condemned, although a variety of other factors influenced their choice of Vice Admiralty Court. In the case of the prize ship *Le Esperance*, for example, the captain had intended to make for Bermuda, but sailed the ship into Charlestown after meeting with bad weather. *Kelly & others v. Prize Snow Le Esperance and her Cargoe*, 1 November 1757, South Carolina Vice Admiralty Court Minute Books, E-F vols., 297-344, NARA.

[54] Prize warrant, 5 June 1756, South Carolina Vice Admiralty Court Minute Books, E-F vols., 115, NARA.

[55] This need for a jurisdiction that could quickly condemn prizes accounts for the early establishment of a Vice Admiralty Court in Jamaica. Crump, *Colonial Admiralty Jurisdiction*, 97. Not surprisingly given their geographic location, the adjudication of prize claims formed an important portion of the business of West Indian Vice Admiralty Courts, and particularly the Jamaican Vice Admiralty Court. In fact, Ubbelohde thought that "[p]rize cases comprised more than one-third of the litigation before the American vice-admiralty courts in the years 1702 to 1763," although the empirical basis for this conclusion is unclear. Ubbelohde, *The Vice-Admiralty Courts and the American Revolution*, 17.

Acting in their capacity as prize judges, Vice Admiralty judges applied the law of nations rather than maritime law.[56] Prize warrants, in fact, specifically directed judges to proceed "According to the Course of Admiralty & Laws of Nations," and the letters of marque and reprisal issued to privateers, which Vice Admiralty judges read as part of a prize case record, routinely urged captains not to "attempt any thing against the Laws of Nations."[57] In adjudicating these prize cases, which could become quite complex, judges also were required to interpret and balance other sources of law, including treaties, proclamations regarding the distribution of prize money, declarations of war, and Parliamentary statutes.

The South Carolina Vice Admiralty Court: Structure and Business

South Carolina's Vice Admiralty Court, like other colonial Vice Admiralty Courts, was a product of the 1697 reorganization of the colonial Vice Admiralty Court system. There, Vice Admiralty judges were empowered to act through High Court of Admiralty commissions that gave them "full power and authority to . . . hear and Determine all Causes whatsoever competent to the Jurisdiction of the said Court" and to enjoy the "fees Profits Perquisites Privileges Advantages and Emoluments incident thereto."[58] In South Carolina, however, the Court's initial establishment was complicated by the fact that the colony was a proprietary rather than a royal

[56] Owen and Tolley, *Courts of Admiralty*, 11.

[57] Prize warrant, 5 June 1756, South Carolina Vice Admiralty Court Minute Books, E-F vols., 115, NARA. Instructions accompanying letters of marque and reprisal issued to William Asserre & Joseph Prews, 22 November 1739, South Carolina Vice Admiralty Court Minute Books, C-D vols., 279, LOC.

[58] James Mitchie [Mickie] Commission, September 1752, South Carolina Vice Admiralty Court Minute Books, E-F vols., NARA.

colony.[59] Managed by Lords Proprietors who had been granted extensive control over law in the colony via royal charter (1665), they had the power "to do all and every thing and things, which, unto the compleat establishment of justice, unto courts, sessions, and forms of judicature, and manners of proceeding therein, do belong, although in these presents express mention is not made thereof." The charter also authorized the Proprietors to appoint judges, "to award process, hold pleas, and determine, in all the said courts and places of judicature, all actions, suits, and causes whatsoever, as well criminal as civil, real, mint, personal, or of any other kind or nature whatsoever."[60]

Given this extensive delegation of legal authority, in South Carolina and in other proprietary colonies like Pennsylvania, attempts to create royal Vice Admiralty Courts initially met with resistance.[61] At a Board of Trade meeting in 1696, a group of disgruntled proprietors complained that the "King having vested them with his powers both by Land and by Sea the[y] could not conceive but the power of Admiralty was also included therein." They moreover insisted that "if it were thought absolutely necessary that fresh courts should be erected," they would prefer to do it themselves, for "tho they insisted upon it as a right, they would receive it as

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[59] For a discussion of proprietary charters, see Christopher L. Tomlins, "The Legal Cartography of Colonization: The Legal Polyphony of Settlement: English Intrusions on the American Mainland in the Seventeenth Century," *Law and Social Inquiry* 26 (2001): 315-72. See also Vicki Hseuh, *Hybrid Constitutions* (Durham: Duke University Press, 2010).

[60] "Charter of Carolina," June 30, 1665, Yale Law School, The Avalon Project, http://avalon.law.yale.edu/17th_century/nc04.asp. The Proprietors believed that this broad grant included admiralty jurisdiction, and in the colony first governing document, the Fundamental Constitutions of Carolina, they made plans for a court that would "have ye power of the Court of Admiralty & also to heare & trye by Law-Merchant all cases in Matters of Trade between ye Merchants of Carolina." John Locke, First Draft of Fundamental Constitutions of Carolina, 21 July 1669, TNA PRO/24/47/3, 51. This court was never established, although the proprietors did commission a vice-admiralty judge in 1688.

[61] Owen and Tolley, *Courts of Admiralty*, 29; Andrews, *Colonial Period*, 4:227. On December 17, 1696, the King was advised of "the expediency of erecting Courts of Admiralty in the Colonies," and the Council obtained an opinion from the Attorney General that the King had power to erect courts of admiralty even in the proprietary colonies such as Pennsylvania, despite the rights reserved to the proprietors in their charters. Owen and Tolley, *Courts of Admiralty*, 107.

a favour."[62] The Proprietors' collective concerns, however, were never addressed, and in April 1697 the High Court of Admiralty issued a commission to Josiah Morton, South Carolina's first Vice Admiralty judge.[63]

Morton's commissioning did not quell local disputes over the new Vice Admiralty Court's jurisdiction, however. Morton himself suffered political reprisals and lost a chance at the governorship when a "combination was formed against" him because he "had made a breach of Trust to the Proprietors in accepting a Commission from the King to be Judge of the Admiralty here."[64] The province's Commons House of Assembly likewise sought to undermine the Court, passing a statute that reduced judges' fees and mandated trials by jury.[65] And South Carolina's Chief Justice of the Court of Common Pleas, anxious to safeguard his jurisdiction, attempted to circumscribe the Vice Admiralty Court's authority in a politically charged habeas corpus case in which he jailed the Court's deputy judge for failing to make a return of the writ.[66] These early attempts to curtail the Court's power ultimately failed, however, and upon Nicholas Trott's

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[62] Records in the British Public Record Office Relating to South Carolina, 1663-1782, edited by W. Noel Sainsbury, 36 vols., Emory University, Woodruff Library, Atlanta, G.A., 3:186-87.

[63] TNA, HCA 30/823.

[64] Joseph Morton to Board of Trade, 29 August 1701, BPRO, 5:17.

[65] "An Act for the Better Regulating the Proceedings of the Court of Admiralty in Carolina, and the Fees of the Same" (1700), *SAL,* 2:167-72. This statute was disallowed on the advice of Dr. Henry Newton, Advocate of the Lord High Admiral, who balked that it was "Derogatory to the Commission by which the Judge of the Admiralty there Acts." Henry Newton to Mr. Popple, 3 February 1702, BPRO, 5:29. Newton seemed particularly flabbergasted by the statute's jury requirement because it put "the Judgement in a manner in all Causes into the Hands and Power of Such, whose Interest it may be to consult their private Advantage." Henry Newton to Mr. Popple, 3 February 1702, *Ibid.,* 30. See also 28 January 1702 Board of Trade meeting, *Ibid.,* 20.

[66] For a more complete description of this controversy, see Randall Bridewell, "Mr. Nicholas Trott and the South Carolina Vice Admiralty Court: An Essay on Procedural Reform and Colonial Politics," *South Carolina Law Review* 28 (1976-77): 181-218.

appointment as Vice Admiralty judge in 1716 political squabbling about the Court largely ceased.[67]

Despite its status as a royal Court, early Vice Admiralty proceedings took place in less than regal surroundings. In fact, the Court often met in a "Publick House Licensed to Sell Strong Liquors" where litigants found themselves disturbed on occasion "by Drunken & disorderly persons."[68] Dislodged from its normal meeting place, the Court adjourned to the home of the presiding Vice Admiralty Judge.[69] This casual venue, however, did not mean that practice in South Carolina's Vice Admiralty jurisdiction was slipshod. Rather, the Court's judges typically had received some legal training, either at the Inns of Court or through local clerkships, although there is no evidence that any of the Court's personnel had civil law training.[70] The judges also sought as much as possible to conform their practice to that of the High Court of Admiralty in a way that was not dissimilar to attempts by colonial legislatures to model themselves after Parliament.[71] When asked by the House of Commons about practice in the Vice Admiralty Court, Judge Morton advised that he adhered to "Clarks Practice and Good Dolfin," the latter a reference to a treatise by English admiralty judge John Godolphin.[72] Unlike other colonial Vice

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[67] This was largely due to the fact that Trott also received an appointment as Chief Justice of the colony's common law court, thereby lessening the need for jurisdictional competition over legal fees. Moreover, Trott himself had been among the prime movers seeking to curtail the Court's power through legislation in the Assembly. Ibid.

[68] 30 June 1729, South Carolina Vice Admiralty Court Minute Books, A-B vols., 547, LOC.

[69] 14 October 1729, South Carolina Vice Admiralty Court Minute Books, A-B vols., 714, LOC. Court notices were tacked to "the publick Wash house in Charles Town." In re the ship *Revenge*, 19 November 1718, South Carolina Vice Admiralty Court Minute Books, A-B vols., 276, LOC.

[70] Nicholas Trott, in fact, was trained at the Inns of Court. John E. Douglass, "Power of Attorneys: Formation of Colonial South Carolina's Attorney System, 1700-1731," *American Journal of Legal History* 37 (1993): 6. Other judges, including William Blakeway and Benjamin Whitaker, served in a number of high-ranking legal offices in the province. Ibid., 9-10.

[71] Jack P. Greene, "Political Mimesis: A Consideration of the Historical and Cultural Roots of Legislative Behavior in the British Colonies in the Eighteenth Century," *The American Historical Review* 75 (1969): 337-60.

[72] Alexander S. Salley, ed., *Journal of the Commons House of Assembly of South Carolina for the Sessions Beginning October 30, 1700 and Ending Nov. 16, 1700* (Columbia: Historical Commission of South Carolina, 1924),

Admiralty jurisdictions, where historians have found "hardly any traces of the then High Court terminology," South Carolina judges and proctors did not frequently allow common law terms and usages to slip into the record.[73]

The jurisdiction that Trott and his successors oversaw was a busy one. South Carolina's surviving records from 1716 to 1763 include 139 cases, a run comparable to that of Maryland's colonial Vice Admiralty Court.[74] Moreover, between 1716 and 1749, the Court's caseload nearly doubled, an increase in business that tracks colonial South Carolina's growth as a commodity exporter over the first half of the eighteenth century. [SEE TABLE 3.1] Indeed, during this period, colonial South Carolina transitioned from an imperial backwater to one of colonial British America's most valuable colonies. This economic boom was inextricably bound up in colonists' growing ability to command slave labor and Charlestown's increasingly prominent position in both regional and Atlantic markets.[75]

Situated in a bustling urban environment that served both hinterland and the Atlantic, the Vice Admiralty Court was a point of legal contact for diverse populations that converged on Charlestown, from planters to merchants to sailors. The Court's business reflected its value to a multiplicity of constituencies. Between 1716 and 1763, the docket was nearly evenly divided

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16-17; John Godolphin, *A View of the Admiral Jurisdiction* (London, 1661), Early English Books Online, Chadwyck-Healey, eebo.chadwyck.com.

[73] Frederick Bernays Wiener, "Notes on the Rhode Island Vice Admiralty, 1727-1790," *Harvard Law Review* 46 (1932): 48. Wiener found this type of slippage in the records of the New York and Rhode Island Vice Admiralty Courts.

[74] See Owen and Tolley, *Courts of Admiralty*, *passim*.

[75] According to Peter Coclanis, "the rate of increase of personal wealth was 2 percent a year between 1720 and 1760." This extraordinary growth made the South Carolina Lowcountry "the wealthiest area in British North America, if not the entire world." Peter A. Coclanis, *The Shadow of a Dream: Economic Life and Death in the South Carolina Low Country 1670-1920* (New York: Oxford University Press, 1989), 121. For a discussion of Charlestown's growth in the eighteenth century, see Emma Hart, *Building Charleston: Town and Society in the Eighteenth-Century Atlantic World* (Charlottesville: University of Virginia Press, 2010). For an examination of Charlestown's importance as a regional financial market, see Menard, "Financing the Lowcountry Export Boom," 669-74.

between instance cases and prize cases, with the former comprising 42% and the latter 40% of total business. [TABLE 3.1] On the instance side, 40% of claims were for mariner's wages; 28% were warrants to survey unfit ships; 17% were cases of tort or petty crime; and 9% were salvage claims. [TABLE 3.2] Surprisingly given the colony's importance to Atlantic trade, cases involving the enforcement of the Navigation Acts comprised only 11% of the Court's caseload between 1716 and 1763. This low number distinguishes the Court's business from that of Vice Admiralty Courts in North Carolina and Virginia, and may indicate that merchants lading and unlading in the colony, whose trade was visibly concentrated in the port of Charlestown, largely complied with the Acts of Trade.[76] [TABLE 3.1] More likely, however, it suggests a reluctance to prosecute smugglers given the close connections between the Court and Charlestown's local merchant community. Indeed, local merchants were actively engaged in the Court's daily work, acting as vessel and cargo appraisers in a variety of matters, from prize cases to salvage claims. In a dispute over goods damaged during shipping, for example, the Court issued a warrant of survey to local merchants James Osmond, Benjamin Savage, and John Guerard.[77] Benjamin Savage, in fact, frequently appears in the Court's records as a surveyor or appraiser, along with other prominent merchants like Gabriel Manigault, who appraised a Spanish prize in 1740.[78] Even Henry Laurens, whose later interactions with the Vice Admiralty Court would cause him to criticize the Court for its "Accession of Jurisdiction" and lack of jury trials, occasionally acted as a court-appointed surveyor or appraiser.[79]

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[76] Ubbelohde, "The Vice-Admiralty Court of Royal North Carolina," 524; Owen and Tolley, *Courts of Admiralty*, 37.

[77] *Elizabeth and Thomas Jenys, Executrix and Executor of the Last Will of Paul Jenys of CT vs. Two Brothers, George Bowles, Master*, 3 January 1739, South Carolina Vice Admiralty Court Minute Books, C-D vols., 251, LOC.

[78] In re *William Lasserre of the Sloop Sea Nimph*, 29 January 1740, South Carolina Vice Admiralty Court Minute Books, C-D vols., 322, LOC.

[79] Henry Laurens, "A Few General Observations on American Custom-House Officers, and Courts of Vice-

Merchants' work as appraisers and surveyors extended not only to valuing ships and cargos, but also to putting a market price on slaves that litigants claimed as property. In 1737, for example, the Court issued a warrant of survey to merchants Thomas Gadsden, Benjamin Savage, and George Austin to "repair to the Common Goal in Charles Town and there to view examine and well and faithfully Appraise Three certain Negro Men Slaves named Francis Quaw & Quash." The Court then asked them to return "a true and perfect Appraisement of the said Three Negro Men Slaves according to the best of your skill and knowledge."[80] Similarly, in 1740 the Court ordered "Othniel Beale Ebenezer Simons and Isaac Beauchamp of Charles Town Merchants" to appraise a ship "now lying in the harbour of Charles Town," and also to value "certain Spanish Goods and Merchandizes and Two Indian and One Negroe Slaves lately taken and Seized."[81] These prominent merchants lent their expertise in valuing slave property to the Court, facilitating the sale of a ship's human cargo in order to pay out mariners' wage claims, prize proceeds, and the king's perquisites.

Claiming Slaves: People as Things in Colonial Vice Admiralty Courts

When merchants appraised human property at the behest of the Vice Admiralty Court, their work was a natural extension of the Court's business adjudicating a wide variety of cases

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Admiralty . . . " (Charlestown, 1769), 3, Eighteenth-Century Collections Online, Gale Group, galenet.galegroup.com. *On the petition of Peter Block master of the Vrow Dorothea*, 7 January 1756, South Carolina Vice Admiralty Court Minute Books, E-F vols., 102. The Court also issued warrants of appraisement or survey to local tradesmen to value ships, rigging, and tackle. See, e.g., *Middleton & Brailsford v. Snow Thomas*, 6 May 1754, South Carolina Vice Admiralty Court Minute Books, E-F vols., 76, NARA. For a description of Henry Lauren's conflict with Vice Admiralty Court judge Egerton Leigh, see Robert M. Calhoon and Robert M. Weir, "The Scandalous History of Sir Egerton Leigh," *WMQ* 26 (1969): 47-74 and Ubbelohde, *Vice Admiralty Courts and the American Revolution*, 105-14.

[80] *Dom. Rex v. Slaves*, 28 July 1737, South Carolina Vice Admiralty Court Minute Books, C-D vols., 151, LOC.

[81] *Jones v. Spanish Goods and Slaves*, 1 July 1740, South Carolina Vice Admiralty Court Minute Books, C-D vols., 352, LOC.

involving slaves. Between 1716 and 1763, over 21% of cases heard in the South Carolina Vice Admiralty Court included either claims to slave property or the regulation of life on transatlantic slave ships, and between 1716 and 1732 cases involving slaves comprised above 35% of the court's business. These cases were distributed across the court's docket, and could arise in the context of instance, prize, or Navigation Acts litigation. [TABLES 3.3 AND 3.4]

More than half of all slave cases in South Carolina involved claims to slaves as property. [TABLE 3.3]. These cases were astonishingly varied, as litigants of all sorts asked the Court to condemn and sell valuable slaves for their benefit. Claimants could be sailors, like the crew of the Sloop of War *Movil Trader* who libelled the Spanish Prize *Nuestra Senora de Candelaria* and "all & Singular the negro & Indian Slaves Goods & Merchandizes found on board the same late taken from the Subjects of the King of Spain."[82] Or they might be South Carolina colonists like Richard and Catherine Tuckerman, who were willing to pay the captors of the ship *Revenge* "money for the Salvage of the negro man Ned."[83] Colonists who lived in other provinces also claimed their property in the South Carolina Vice Admiralty Court with the help of local mercantile connections. In 1718, for example, John Hutchinson asserted a claim on behalf of Maryland merchant Richard Harrison to "two Negro Men Named Harry and Peter." These slaves were en route to Philadelphia when their ship was captured by the pirate ship *New York Revenge*.[84]

Even the Crown libelled slaves in the South Carolina Vice Admiralty Court. In *Dom. Rex v. Slaves*, South Carolina's Advocate General argued that three slaves taken on the high seas

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[82] In re *Nuestra Senora de la Candelaria*, South Carolina Vice Admiralty Court Minute Books, A-B vols., 413-21, LOC.

[83] In re *Sloop Revenge*, South Carolina Vice Admiralty Court Minute Books, A-B vols., 297, LOC.

[84] In re *Sloop New York Revenge*, South Carolina Vice Admiralty Court Minute Books, A-B vols., 370-71, LOC.

by the crew of the ship *Pool* belonged to the King "as Right & Perquisite of Admiralty."[85] This case reveals not only the Crown's active involvement in human trafficking, but also how easily the forms and practices of the Vice Admiralty Court were adapted to accommodate new kinds of property, and especially human property. Indeed, in this case and in other disputes over slaves, litigants and judges seamlessly analogized slaves to ships and other maritime property that centuries-old admiralty procedure permitted litigants to sue, attach, and sell with relative ease. As we shall see in *Dom v. Rex*, the extension of the Court's *in rem* jurisdiction to slaves benefited not only the king and wealthy colonists, but also sailors, many of whom were legally savvy despite contemporary assumptions to the contrary. All of these individuals considered slaves, first and foremost, as valuable property that might be claimed in the Vice Admiralty Court.

Dom. Rex v. Slaves began procedurally with a warrant issued to the marshal of the Vice Admiralty Court directing him to "arrest three Negro Slaves taken up on the High Seas and within the Jurisdiction of the Court of Admiralty of this Province."[86] This warrant followed the form of other countless other warrants that ordered the marshal to arrest ships and cargo. Indeed, the fact that slaves in South Carolina were deemed chattel property made it quite simple for the Court and for litigants and their proctors to treat them as any other type of *res* in pleadings, as the substitution of "slaves" in place of a ship's name in the case caption makes clear. With no concern that the property claimed was, in fact, three human beings, the Court issued the warrant, bringing the slaves before the judge as objects that might be appraised, attached, and sold. Thus properly before the Court, South Carolina's Advocate General claimed that the three slaves belonged "to our said Lord the King" because they had been found adrift on the high seas,

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[85] *Dom. Rex v. Slaves*, 28 July 1737, South Carolina Vice Admiralty Court Minute Books, C-D vols., 149, LOC.
[86] Ibid., 147.

presumably just like flotsam (floating wreckage), jetsam (jettisoned cargo or ship parts), or lagan (cargo on the bottom of the ocean), three other ancient *droits* (rights) of admiralty.[87] As rights and perquisites of the King and his Vice Admiralty Court, these slaves could be claimed to the profit of both the Crown and the Court's judge.

The captain and crew of the pink *Pool*, however, also recognized that these slaves were valuable property. Combined with a fairly accurate understanding of Vice Admiralty law and practice, this perception caused them to conceal their existence from the Court. As the Court's records reveal, the crew had found the slaves adrift on the high seas "about Ten Leagues distance from the Island of Cuba." They hauled the men aboard and eventually brought them into Charlestown harbor, but rather than libelling the slaves in the Vice Admiralty Court, the *Pool's* wily captain tried to hide them.[88] He knew that if he brought the slaves to the Court's attention the King could claim his valuable find, so he "Strictly Ordered and charged the Ships company not to discover that the Aforesaid three Negroes were taken up at Sea."[89] After a failed attempt to sell the slaves, he set them to "hard Labour in pumping" water from the hold of his leaky ship.[90]

It is unclear how the Court discovered the slaves, but the *Pool's* captain eventually found himself under arrest. Hauled before the judge to defend his actions, he shifted tactics, disclaiming "any Right or property" in the slaves. However, as he had been at great expense in

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[87] Ibid., 149

[88] Ibid., 148-49. The slaves were runaways, having set out in a canoe "from the Isle of Pinas." Affidavit of mariner Charles Watkins, 3 August 1737, *Dom. Rex v. Slaves*, 155. The crew believed that they were slaves because "One of the said negroes spoke English" and told them "they were all Slaves." Affidavit of Boatswain Henry Wright, 3 August 1737, *Dom. Rex v. Slaves*, 154.

[89] Ibid. Mariner Charles Watkins agreed that the captain "gave Strict Orders" to the crew not to reveal the presence of the slaves or that they "were taken up at Sea." Affidavit of mariner Charles Watkins, 3 August 1737, *Dom. Rex v. Slaves*, 155.

[90] Affidavit of Boatswain Henry Wright, 3 August 1737, *Dom. Rex v. Slaves*, 154.

their feeding and upkeep, he humbly suggested that the Court should deduct salvage costs and his expenses "out of the said Negroes."[91] After some deliberation, the Vice Admiralty Court judge ordered the slaves valued and sold, and the captain received his share for salvage.[92] The judge ultimately decided to sell the slaves, it seems, because he believed they would be too expensive to maintain, and as West Indian slaves it also would be "very difficult and hazardous" to keep them in the colony. Most importantly, however, the judge -- like the Advocate General and the crew of the *Pool* -- saw an opportunity to benefit from their sale. As he opined, the slaves were "Subject to Mortality," and their deaths would prevent all involved from turning a profit on the case.[93] Indeed, the judge preferred to take his cut up front rather than hazarding the risk that the slaves might die while in the Court's custody.[94]

As *Dom. Rex v. Slaves* makes clear, Vice Admiralty litigants, whether sailors or kings, benefited from procedures that were ready made to treat chattel slaves as marine property, just like boats and their cargos. Historians already have noted American colonists' tendency to compare slaves to other types of movable property, especially livestock, and Jennifer L. Morgan has suggested that this practice represented the "evocation of a degraded but fully present humanity."[95] That a similar process occurred in colonial Vice Admiralty Courts, where litigants conflated slaves with inanimate objects rather than animals, suggests that this was a more practical, legally inflected analogy that had little to do with acknowledging (or refusing to acknowledge) a slave's personhood. Rather, litigants and judges treated slaves as maritime

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[91] *Dom Rex v. Slaves*, 153.

[92] Ibid., 151, 161, 264.

[93] Ibid., 163.

[94] The slaves were sold to a colonist, John Parris, who never fulfilled the terms of his bond. In subsequent litigation, the Court ordered Parris's executors to return the slaves, which were sold yet again. *Dom. Rex v. 3 Slaves*, 23 January 1739, South Carolina Vice Admiralty Court Minute Books, C-D vols., 264, LOC.

[95] Jennifer L. Morgan, *Laboring Women: Reproduction and Gender in New World Slavery* (Philadelphia: University of Pennsylvania Press, 2004), 105.

property in pleadings without comment because both were, at law, chattel property that might be brought before the Court using procedures that had developed over centuries to facilitate oceanic commerce. The substitution of "slaves" in this case for other types of marine property, in fact, points to English law's astonishing ability to accommodate colonial circumstances, and to meet the changing claims of litigants throughout empire in places, climates, and economies far from England. Indeed, *Dom. Rex v. Slaves* shows us how seemingly fixed procedures and legal categories in fact were highly variable, as colonists and judges adapted age-old forms to suit their interest in treating African people who worked on the water as things that could be libelled, condemned, and sold.

Dom. Rex v. Slaves also shows that litigants claimed slaves first and foremost because they understood them to be exceedingly valuable commodities. In fact, slaves could be the most valuable cargo on a ship, as the case of the *Diamond* also illustrates. When John Stevens's ship ran aground at the Charlestown bar in 1717, he was carrying two male slaves valued at £500, a female slave worth £200, a head of rum appraised at £150, and muscavado sugar worth a mere £40.[96] The slaves on board the *Diamond* were by far the most valuable property in her hold. This is why Stevens was so disconcerted, as he told the Court, when Berkeley County planters Joseph Rivers, Richard Rivers, Joseph Danford, Alexander Spencer, and "Divers other Confederates," upon noticing the ship's distress, took a canoe out to the vessel and "did take & Carry away all the Singular the Negros Goods and Merchandizes."[97] At trial, Rivers and the other respondents offered to pay for the rum, arguing that although they "Saw a negro lie Dead

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[96] *John Stevens Master and Owner of the Sloop Diamond vs. Joseph River, Richard Rivers, James Denford & Alexander Spencer of Berkeley County Planters*, 18 December 1717, South Carolina Vice Admiralty Court Minute Books, A-B vols., 195, LOC. These prices are likely in South Carolina currency, not stirling.

[97] In re *Sloop Diamond*, 195.

and a Bald Eagle Picking the Carcass" they did not take or conceal the slaves.[98] But for Stevens this was no satisfaction. "It was not the rum that he matter'd," after all, "but the negroes which he Expected to have account of."[99]

The South Carolina Vice Admiralty Court was not alone in adjudicating claims to slaves as property. In fact, the importance of slaves as both commodities and as laborers throughout the British Atlantic World meant that other colonial Vice Admiralty Courts also heard these types of cases. Litigation in the Jamaican Vice Admiralty Court makes this clear. Although few original case records from this jurisdiction survive, it is possible to partially recreate the Court's docket through materials produced in appeals to the Lords Commissioners of Prize Appeals in London. A body that consisted of members of the Privy Council, the Commissioners heard prize appeals from the colonial Vice Admiralty Courts as well as the High Court of Admiralty.[100] They often were called upon to adjudicate prize appeals from Jamaica, by far the most important prize jurisdiction in North America.[101]

As in colonial South Carolina, litigants in Jamaican prize cases routinely claimed slaves as property. In the 1759 case of the *Victoria*, for example, the captors of a Dutch ship asked the Court to condemn "Thirteen Negroes and Mulattoes, the whole of the said Slaves on board the said Vessel." In the same case, Michael Walter, a burgher of the Dutch island of St. Eustatia and

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[98] Ibid. 204.

[99] Ibid., 203-4.

[100] Appeals from colonial Vice Admiralty Courts ran in instance matters to the High Court of Admiralty in London. Further appeal could be taken to the High Court of Delegates. In prize cases, appeals ran to the Lords Commissioners of Prize Appeals. On appeal, the case was tried de novo. Perhaps the most complicated Vice Admiralty appeal from the American colonies was the case of the *Vrouw Dorothea*, a hybrid prize and Navigation Acts case which involved underlying proceedings in both the South Carolina and Jamaican Vice Admiralty Courts. Until now, historians believed the records of this case to be lost. I discovered both appeals -- to the Lords Commissioners of Prize Appeals and to High Court of Delegates -- in the National Archives in Kew, United Kingdom. They can be found at TNA DEL 1/558 and PRO 31/17/36. The underlying case records are in TNA HCA 42/49.

[101] Jamaican appeals far exceed those from any other colony, although appeals from New York and Antigua also were common.

a "naturalized Subject of their High Mightinesses, the States General of the United Provinces," also maintained the he owned "several Negro Slaves named Kinsale, Salem, Phoenix, Tower-Hill, March, and April" that had been captured with the ship.[102] Relying upon the fact that he was the subject of a neutral nation, he wanted the judge to return his property rather than award the slaves to their captors as a prize. Similarly, when the ship *Thurloe* was captured, her captain claimed "Ten Negroes" who had been "put on board . . . to assist in navigating the ship," and he also asked the Court to return other "Negro Slaves" who were found on the vessel when it was captured. He argued that these slaves, rather than a lawful prize, were his personal property, transported "for his own private Adventure."[103] And in an unusual but incredibly lucrative 1758 prize dispute, the crews of the Sloops of War *Hornett* and *Port Royal* libelled the *De Jonge Isaac*, a slave ship that had been captured with a full cargo of slaves bound from Surinam to Cap Francois. The Court ultimately condemned the ship's contents, although the judge returned the significantly less valuable vessel to her original owner.[104]

From South Carolina to Jamaica, planters, merchants, sailors, and the Crown itself claimed slaves as property in Vice Admiralty Courts. They did so because they perceived slaves first and foremost as valuable property, and because the Courts made it procedurally easy to do so. Rather than working to reconcile their understanding of slaves as human beings with their economic need to treat slaves as property at law, they analogized slaves to other marine property. The Vice Admiralty Court's *in rem* process allowed them to do this with little trouble, and litigants took advantage of a way of proceeding at law that aligned with local legal practices that

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[102] In re *Victoria*, 22 January 1759, Records of the High Court of Admiralty and Colonial Vice-Admiralty Courts, TNA, HCA 45/4 (unless otherwise noted, dates given are libel dates in the Jamaican Vice Admiralty Court).

[103] In re *Thurloe*, 8 January 1760, Records of the High Court of Admiralty and Colonial Vice-Admiralty Courts, TNA, HCA 45/5.

[104] In re *De Jonge Isaac*, October 28, 1758 (date of capture), Records of the High Court of Admiralty and Colonial Vice-Admiralty Courts, TNA, HCA 45/5.

assumed slaves to be things. This procedural felicity benefitted all involved (other than those who were reduced to the status of prize goods), rather than just elite colonists, and sailors in particular gained from a system that awarded them slaves, which could be sold more easily and with a higher rate of return than other types of property.

African Mariners in Peril on the Sea

If white sailors benefitted from Vice Admiralty procedures, the Courts' heightened protection for mariners did not extend to Africans who labored at sea. In fact, Vice Admiralty Court records reveal that black sailors, whether enslaved or free, were particularly vulnerable to condemnation or sale, as the commodification of African bodies throughout the Atlantic World meant that any person of African descent might be libelled as property in a Vice Admiralty Court. This is particularly evident in early Vice Admiralty Court prize disputes over the contents of pirate ships, which often included claims to African crew members. These cases suggest the hazards that black mariners faced despite the many opportunities that life at sea offered them.

At the beginning of the eighteenth century, piracy had become a particular problem in the North American southeast and Caribbean, and the governors of Virginia and South Carolina engaged in serious efforts to eradicate buccaneers from the southeast coast of the American mainland in the first two decades of the century. This local "war against pirates" was part of a broader imperial campaign that culminated in a series of sensational piracy trials, including the trial and execution of Stede Bonnet in South Carolina.[105] High-stakes litigation over pirate ships and their contents often followed the capture and criminal conviction of pirates like Bonnet as

[105] Ritchie, *Captain Kidd*, 25, 235-36.

captors claimed these ships as prizes. But litigation also included local colonists' claims that African crewmembers were in fact their personal property. In the libel of Stede Bonnet's ship *Revenge*, for example, the captors asked the Court to condemn the ship and "all & Singular The Negroes Goods and Merchandizes aboard the Same."[106] These included a number of "Negroes, vizt. Prince Francois Sampson Yellow belly Mingo Tony Peter Ned Little Mingo a Negro Boy Ruby an Indian," who would have been valuable prizes for the captors to sell or to use as enslaved crew members on their own ships.[107] During the *Revenge* litigation, however, South Carolina colonists also asserted claims to individual slaves on the ship, asking the Court to return their property rather than grant it to the captors. As we have seen, Catherine and Richard Tuckerman claimed that Ned was their property, and they sought to prove their ownership rights by testifying that Catherine's first husband bequeathed Ned to her for the benefit of their children. Stephen Beaden, another South Carolina colonist, also lodged a claim to Peter in the *Revenge* case, claiming he was his "Sole Owner."[108]

As Court records reveal, both Ned and Peter were sailors of African descent. Ned, in fact, was a skilled maritime laborer who was hired out to ships' captains for his expertise as a diver on wrecks.[109] Although Peter's specific skill set is unclear, he also was a hired laborer in the maritime trades, and while travelling with a "shallop called the Golden Fleece" into "Turtle Key in Providence," the pirate Stede Bonnett "piratically" took him off the ship.[110] Indeed, although litigants occasionally claimed slaves who were specifically being transshipped as cargo -- as in

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[106] In re *Revenge*, South Carolina Vice Admiralty Court Minute Books, A-B vols., 276, LOC.

[107] Ibid., 276.

[108] Ibid., 288, 291. A case against the pirate ship *New York Revenge* included a claim to "Negros Charles Peter Harry Cesar William an Indian Named Slocumb." In re *New York Revenge*, 17 December 1718, South Carolina Vice Admiralty Court Minute Books, vols. A-B, 356, LOC.

[109] Ibid., 289-90.

[110] Ibid., 290-91.

the case of the captured slaver *De Jonge Isaac* -- sailors like Ned and Peter more typically were the object of litigants' claims.[111] When the prize ship *Thurloe* was captured and hauled to Jamaica, for example, litigants claimed ten enslaved mariners on board. According to witnesses, these slaves, including one named "Boatswain," belonged to Dutch residents of St. Eustatia, who hired them out "on Wages, and as Sailors."[112] Likewise, in 1760, John Downer complained to the South Carolina Vice Admiralty judge that "William Tysons and a Negro Slave Called Cato" were "Marriners belonging to your Petitioner's said Vessell," and had been improperly taken from him.[113]

In many cases, it is difficult to know with any certainty whether these individuals actually were enslaved people. It is possible that Ned and Peter, for example, had successfully escaped their masters and become free members of Stede Bonnett's pirate crew. Indeed, although most pirates were white, recent scholarship on the black Atlantic has uncovered a more polychromatic world in which black seamen and runaway slaves occasionally took to buccaneering. Certainly, pirates had no qualms about the buying and selling of slaves: they "generally sold captured slaves" or kept them aboard ship to pump bilges.[114] Nonetheless, for some skilled African mariners who managed to escape from their masters, the flag of King Death was far preferable to the "social death" of enslavement in a plantation society on the mainland or the islands. As Jeffrey Bolster has noted, these runaways joined with the "disgruntled white soldiers, sailors, and servants confederating as pirates along sun-drenched Caribbean sea-lanes" in part because pirate

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111 In re *De Jonge Isaac*, October 28, 1758 (date of capture), Records of the High Court of Admiralty and Colonial Vice-Admiralty Courts, TNA, HCA 45/5.

112 In re *Thurloe*, 8 January 1760, Records of the High Court of Admiralty and Colonial Vice-Admiralty Courts, TNA, HCA 45/5.

113 *John Downer et al of the Brigantine Two Sisters v. Wierner & Mullerson*, 19 June 1760, South Carolina Vice Admiralty Court Minute Books, vols. E-F, 339, NARA.

114 Bolster, *Black Jacks*, 15; Ritchie, *Captain Kidd*, 24, 34, 110.

crews recognized and valued their maritime skills.[115] Whereas pirates occasionally "elected skilled seamen of color to positions of authority," in "honest service" skilled African mariners "had little authority."[116]

In the Vice Admiralty records, access to Ned's story is mediated by white colonists who claimed him as their property. Nonetheless, even the Tuckermans' version of events gives us reason to believe that Ned may have made a new life for himself aboard a pirate vessel, or at least saw service on a pirate crew as a means to finding an escape route to Great Britain and freedom. Although the Tuckermans describe him as "taken" twice by pirates, it is not difficult to imagine a scenario in which a skilled slave like Ned voluntarily jumped ship to join a pirate crew and continued to change vessels until "he got into a Snow bound for Great Britain." Peter may have followed a similar intended path.[117] Whether Ned and Peter in fact turned pirate, or whether their skills as maritime laborers made them useful as enslaved members of Stede Bonnett's crew, their lives at sea created opportunities for autonomy and agency. As Ned's and Peter's fates reveal, however, these potential rewards came at great peril, and the net cast by Britain's martime law was wide. Litigants and judges rarely undertook any serious inquiry into the legal status of people claimed as property. Assumed to be things at law, African mariners and maritime laborers lived a vulnerable existence on the high seas.

This was true even when black mariners were known to be free people, as *King v. Harrison*, a 1758 South Carolina Vice Admiralty Court case, makes clear. In this rare felony prosecution, the gunner of the slave ship *Rainbow* accused Captain Joseph Harrison of murdering a sailor named Comer. Multiple witnesses in the case linked Comer's death to a whipping

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[115] Bolster, *Black Jacks*, 13.

[116] *Ibid.*, 15.

[117] In re *Revenge*, 289-90.

administered by a "Negro Fellow call'd Dick."[118] Although the litigation turned on whether the lashing was excessive, Court records also reveal an underlying concern to uncover why Harrison allowed Dick, an African man, to whip a white sailor.

What emerges from the trial records is a snapshot of the precarious life that Dick led as a free African maritime worker. A "Free Negro Man," Dick had been hired at "Benein" in order to serve "as a Linguist" who could help Captain Harrison communicate with his enslaved cargo.[119] It seems that some of the *Rainbow's* white mariners understood Dick's task to be an important one and "that his living onboard the said Snow was of great Consequence to the Interest of the Voyage." Because he was able to communicate with the slaves, Dick presumably could help to avoid or detect a slave revolt during their transatlantic voyage. Comer, however, took it upon himself to remind Dick that he walked a fine line between freedom and slavery. He taunted Dick, saying that he "was bought as a Slave by Capt. Harrison and wou'd be sold at the West Indies," that "he was no better than a Slave, and wou'd be Sold as Such." According to first mate John Dawson, "Dick grew Sulky" as a result of these threats, and he convinced the slaves onboard the ship to refuse their food. They "wou'd be under no Command as formerly, and in this humour they Continued for two days."[120] In addition to fomenting discontent, Dick also confronted the Captain and "demanded Satisfaction of the Said Comer." Although the Captain at first "told him he could give him no Satisfaction, having no power to beat any white Person on board," Dick refused to take no for an answer.[121] "[T]o prevent insurrection," then, Harrison finally allowed

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[118] *King v. Joseph Harrison,* South Carolina Vice Admiralty Court Minute Books, E-F vols., Deposition of John Alexander, 10 May 1758, 46, NARA.

[119] *King v. Joseph Harrison,* South Carolina Vice Admiralty Court Minute Books, E-F vols., Deposition of John Dawson, 22 June 1758, 49, NARA.

[120] Ibid.

[121] Ibid., 49-50.

Dick to revenge himself on Comer, authorizing him to whip the sailor "at two different times about three or four and twenty Lashes."[122]

As the only person on board who could communicate with the *Rainbow's* enslaved cargo, Dick's expertise made him an asset to the captain and crew. Indeed Captain Harrison's willingness to allow Dick to beat a white man suggests skilled black sailors and maritime workers could possess an impressive degree of power to shape their own lives. Nonetheless, Comer's insults, and Dick's visceral reaction to them, lay bare the fact that free African sailors like Dick always faced the possibility of enslavement, just as enslaved mariners might find themselves libelled and sold to a different master at any time. Although life on the high seas brought with it real opportunities for autonomy and agency, it also entailed tremendous risks to sailors of color, enslaved and free, when they came within the jurisdiction of a Court uniquely suited to transforming people into things.

This is not to suggest that African mariners never successfully overcame the overwhelming odds they faced when they were claimed in Vice Admiralty Courts. Indeed, black sailors adopted legal strategies that occasionally proved successful. One was to claim English subjecthood in order to avoid having a ship condemned as a prize. When the *Royal Fancy* was captured during the Seven Years' War, for example, "five Mariners and One Negroe . . . declared themselves to be English Subjects belonging to Rhode Island" and insisted that there were "no French subjects on board."[123] These sailors, displaying a keen understanding of the law of prize, realized that their best hope was to avoid capture altogether. Indeed, the African sailor on board

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[122] Ibid.

[123] *Peter McIntosh et al. vs. Sloop Royall Fancy*, 2 May 1760, South Carolina Vice Admiralty Court Minute Books, E-F vols., 304-5, NARA.

this ship likely knew that if the captors hauled the vessel in to a Vice Admiralty Court, he would be appraised and sold.

Similarly, in the remarkable 1747 case *Isabella v. 3 Slaves*, events took a surprising turn when the three libelled slaves petitioned the Court as free subjects of the King of Spain. "Manuel Barnadina & Gabriel Joseph two Indian men & Manuel Stephens a Negro Man Subjects of the King of Spain the three Persons libelled as Slaves in this Cause," advised the Court that they, in fact, were free, and asked the Court to interrogate witnesses on their behalf. Surprisingly, the judge in the case agreed over the captors' protests, and a witness testified that "the said Indians and Negro are Free Men and that their Fathers and Mothers were also Free."[124] Based upon this evidence, the Court ultimately decreed the men "to be free Persons," and also ordered the captors in the case to pay costs "on account of their having prosecuted the said three Persons and accordingly by their Defending their Freedom & Liberty as aforesaid."[125] As subjects of the King of Spain who could definitely prove their free status, these three men became visible to the Court as persons, not as property. And as persons at law, they were not liable to condemnation according to the terms of letters of reprisal and marque issued to the captors.[126]

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[124] *Owners Officers and Sailors of the Galley Isabella versus Sloop lately retaken and her contents, and also against three Spanish Slaves lately taken in the Ship Patience*, 10 September 1747, South Carolina Vice Admiralty Court Minute Books, C-D vols., 430, LOC.

[125] Ibid., 431.

[126] As a private ship of war, the *Isabella's* activities technically were limited by the specific terms of her captain's commission of marque and reprisal. Although in this particular case the commission does not seem to have survived, others issued during the course of the War of Austrian Succession suggest that privateers were only authorized to seize Spanish property, and specifically ships and cargo. Because "several unjust Seizures had been made and Depredations carried on in the West Indies by Spanish Guarda Costas, the king authorized private ships to be fitted out to capture "Ships Vessels and Goods belonging to the King of Spain his Vassals and Subjects." Allowing Englishmen to take this property would provide "Reparacion and Satisfaction for his injured Subjects." Commission of marque and reprisal, 22 November 1739, South Carolina Vice Admiralty Court Minute Books, vols. C-D, 276-277, LOC. Manuel Barnardina, Gabriel Joseph, and Manuel made a credible case that they were not property, and therefore not subject to confiscation. Although the Vice Admiralty Court might have chosen to disregard their evidence, in this case the judge honored their claims as persons and as subjects of the Spanish King, producing a result consistent with the law of nations. Indeed, although Eliga Gould has argued for the existence of a European "zone of law" juxtaposed against a colonial "zone of violence" during the eighteenth century, the South Carolina

The cases of the *Isabella* and the *Royal Fancy*, however, are exceptions that prove the rule rather than evidence of a pattern of successful litigation by African mariners in colonial Vice Admiralty Courts. They reveal a legal system that acted against powerful interests, but only under certain discrete circumstances, and only on behalf of those deemed persons. Indeed, the ease with which Courts adjudicated cases involving slaves as prizes and as property shows that individual positive results for African sailors never challenged local slave owning as a practice, and Africans claimed during the course of a Vice Admiralty trial were overwhelmingly likely to be condemned as property. Nonetheless, these cases do suggest that Vice Admiralty practice and procedure may have opened up at least one legal strategy for litigants of color who faced the possibility of sale in a Vice Admiralty Court. As the case of the *Isabella* in particular reveals, some Vice Admiralty Court judges cared about obtaining a legally correct result, and sailors of African descent who could prove through credible deposition evidence that they were free might avoid being condemned and sold.

Vice Admiralty Courts and the Slave Trade

Although slaves appear more frequently in South Carolina's Vice Admiralty Court records as claimed property, the Court also decided cases involving ships and sailors who were involved in the transatlantic and regional slave trades. By regulating life on slave trading ships, from pay structures to questions of discipline, the colonial Vice Admiralty Courts facilitated Britain's increasingly important commerce in slaves. Although early nineteenth-century Vice

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Vice Admiralty Court judge's decision in the case of the *Isabella* complicates this characterization. Some colonial judges, to the best of their ability, applied emerging legal norms governing the relations between nation states, faithfully adhering to the letter of commissions, proclamations, and treaties. Eliga H. Gould, "Zones of Law, Zones of Violence: The Legal Geography of the British Atlantic, circa 1772," *WMQ* 60 (2003): 471-510.

Admiralty judges may have worked to stop human trafficking on the West Coast of Africa, their eighteenth-century predecessors were an important legal resource for mariners who worked on slaving vessels, for the owners of slave ships who required the speedy adjudication of claims, and for imperial officials interested in curbing illicit slave trading, especially during war time.

With a "dramatic increase" of nearly 70% in slave purchasing between 1690 and 1740, South Carolina became the "largest continental slave importer in the eighteenth century." Charlestown in particular was the region's most important slave entrepôt, gaining market share not only because of its geographic location, but also because Charlestown-based merchants provided the capital that made slave purchasing on a large scale possible.[127] Given the town's prominence as a port of call for slaving ships, then, it should not surprise us that mariners who worked aboard slaving vessels called upon the colony's Vice Admiralty Court to adjudicate their claims at a voyage's end.

Wage disputes on slave ships were particularly common. These cases could be quite complex, requiring judges to have at least a rudimentary knowledge of customary practices in the slave trade. In the case of the *Ludlow* (1717), for example, the question before the Court was whether mariners on a slaving voyage should be paid after the cargo of slaves was unladed, even though they had signed contracts for a longer voyage. Indeed, the *Ludlow's* crew originally agreed to a voyage from London to Guinea, where they would acquire "a Cargoe of Negro Slaves." From there, they planned to travel to Barbados, Charlestown, and finally Virginia, unloading the slaves as they travelled from place to place.[128] Upon landing in Charlestown, however, and "finding Negroes hear a very good price," the captain decided to sell the rest of the

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[127] Russell R. Menard, "Financing the Lowcountry Export Boom: Capital and Growth in Early Carolina," *WMQ* 51 (1994): 669-70; Daniel C. Littlefield, "The Slave Trade to Colonial South Carolina: A Profile," *South Carolina Historical Magazine* 101 (2000): 110-11.

[128] In re *Ludlow*, 23 May, 1717, South Carolina Vice Admiralty Court Minute Books, A-B vols., 64, LOC.

cargo rather than proceeding to Virginia as planned.[129] The sailors requested their back wages and asked to be discharged, presumably so they would be free to seek other employment, but the captain refused to pay out. The Court ultimately granted the mariners' libel, ordering them to be paid in Carolina money proportionately to British pounds, not at face value in the substantially devalued local currency as the captain had suggested.[130]

The South Carolina Vice Admiralty Court also resolved questions about discipline on slave trading voyages. As we have seen, in *King v. Harrison* the Court was asked to determine whether a ship-board lashing was severe enough to result in the death of a crew member on a slave ship.[131] Similarly, in a 1753 case mariner James Littman asked the Court to arrest Peter Bostock, master of the ship *Prince George*, for chaining him and beating him "with force and arms" on a voyage to the River Gambia.[132] Littman sought monetary damages, but the master argued that he detained the sailor out of necessity, and that Littman, in fact, was a notorious drunk who was "very abusive to this Defendant & to the rest of the Officers belonging to the said Ship." Without provocation, he "did make a great riot & noise on board the said Ship & Cried out murder several times." More seriously, he "behaved himself in a very disorderly & mutinous mannor & threatened to carry away the Boat."[133] The Court found this answer convincing, and

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[129] Ibid.

[130] Similarly, the sailors of the Fly brigantine asked to decide whether their captain owed them back wages for a voyage "from London to Guinea for a Cargoe of Negroes," and then "from Guinea to Carolina." It emerged during the course of litigation that this voyage had been particularly hazardous. A number of sailors had died of illness, and the rest barely managed to escape from "Country Negroes" on the coast of Africa that "did Intend to rise and Come on board them...takeing advantage of their low number of hands." *Mariners of the Fly Brigantine against the Fly Brigantine and against the owners*, 9 November 1717, South Carolina Vice Admiralty Court Minute Books, A-B vols., 158, LOC.

[131] *King v. Joseph Harrison,* 22 June 1758, South Carolina Vice Admiralty Court Minute Books, E-F vols., 45-52, NARA.

[132] *James Littman v. Peter Bostock*, 19 September 1753, South Carolina Vice Admiralty Court Minute Books, E-F vols., 52, NARA.

[133] Ibid., 50.

ultimately dismissed the libel because the "putting the Actor in Irons upon the Coast of Gambia" was "Justified" by his "Turbulent & unruly behavior."[134]

The officers of slaving vessels also asked the Vice Admiralty Court to resolve disputes over slave sale commissions, a type of claim that merged concerns about the financial organization of slave trading voyages with questions about the ownership of slave property. In *Worsdale v. Barry*, for example, the mate of an Africa-bound Snow claimed that the ship's captain, Thomas Barry, had deprived him of his proper commission for the sale of slaves in Charlestown. According to Worsdale, for "disposing of the Cargo & purchasing the Negroes" he was entitled to "a Reward (according to Custom) One Moiety of Four Pounds for every One Hundred & Four Pounds for which the said Negroes should be sold in Carolina."[135] But in order to deprive him of his "said Priviledge and Liberty," the captain "did foreceably detain and confine this Libellant" on board the ship in order to prevent him from purchasing slaves. In this complicated dispute, the Vice Admiralty judge was called upon to calculate how many slaves were subject to commission, and how many actually belonged to Barry and other mariners as personal property. Revealing the extent to which sailors themselves participated and profited from slave trading ventures, Barry testified that fifteen of the slaves "were his Own Property, purchased with his own Private Goods, and another Slave belonged to the second mate of the

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[134] Ibid., 54. See also *John Harvey, John Heslom, Richard Robbins, John Parry and George Ferguson, Mariners, versus John Ebsworthy, Master of the Brigantine Seaflower*, 14 August 1738, South Carolina Vice Admiralty Court Minute Books, C-D vols., 169-84, LOC. In this case, John Harvey claimed that the master of the Seaflower "with force and arms...did beat wound and evilly entreat so that of his life it was dispaired and did also encourage the slaves on board the said vessel to beat him the said John Harvey." Ibid., 177.

[135] *Worsdale v. Barry*, 26 August 1729, South Carolina Vice Admiralty Court Minute Books, A-B vols., 610-65, LOC.

Said Snow name of Charles Smith And the other belonged to George Rocks Master of a Ship lost on the Coast of Africa."[136]

Barry, like most sailors, kept careful account of his enslaved property. Indeed, he knew which slaves were his because he had "caused [them] to be markt for his own proper use and account . . . branding them on the right Shoulder with a bowl of a Tobacco Pipe."[137] Historians have interpreted slave branding as a practice that revealed that masters perceived their slaves to be human. Jennifer Morgan, for example, has argued that a slave was "branded 'like' an animal in order to humiliate, not because she was an animal and was insensate."[138] In marking his "privilege" slaves with a tobacco pipe, however, Barry was engaged in a practice that speaks less to his understanding of slaves as human and more to his legal savvy. By branding his slaves, Barry was adhering to customary slave trade practice, a source of authority that not only the South Carolina Vice Admiralty Court, but courts throughout the British Atlantic World – and even judges in Westminster – recognized. In a 1768 Court of Exchequer dispute over a captain's privilege slaves, for example, the barons issued interrogatories in order to discover whether there was "any known Custom or usage in cases between Captains or Masters of Ships and their Owners or Merchants in the African Trade from Bristol with respect to the Masters privilege of Negroes." Interviewing several Bristol-based mariners, the Court learned that it was typical for captains to mark their privilege slaves, and that a ship's master earned "four pounds of every One hundred and four pounds after the factor has deducted five pounds p[er]cent from the gross Sales of the Cargo." By marking his privilege slaves, Barry was following a set of customary legal norms that were familiar to sailors who traversed the globe. And by claiming his four-

[136] Ibid., 617-18.

[137] Ibid., 664.

[138] Morgan, *Laboring Women,* 105.

pound commission on slave sales, the same number that a Bristol sailor quoted to the barons of the Exchequer, the libellant Worsdale also revealed himself to be versant in the standards and practices of the same legal culture.[139] Although it is tempting to read Worsdale's and Barry's actions for their ideological content, these were first and foremost attempts to conform their individual actions to widely accepted legal practice, all in the pursuit of economic advantage. Because they were legally savvy, both men could predict that judges would rule in their favor if they adhered to widely recognized customs, and they conformed their practices accordingly. Their choices lacked independent, idiosyncratic content -- they were not actions behind which stood fraught or complicated intentions -- and instead reflect adaptations on a micro-scale to Atlantic legal norms that touched even the most humble British subjects.

To an even greater extent than the South Carolina Vice Admiralty Court, the Jamaican Court resolved slave trade disputes during wartime, playing a particularly important role in preventing clandestine slave trading with the enemy.[140] Given the Court's strategic location and its institutional expertise in prize litigation, it was a natural choice for captors shopping for a convenient forum for the speedy condemnation of vessels. Prize Commission Appeals reveal that the Court was particularly active during the Seven Years' War. As the captors in the case of the Ship *Edward* explained, illegal slave trading operations in the Caribbean were frequent during the 1750s and 1760s as British and Dutch subjects took advantage of Dutch neutrality to smuggle slaves into the French sugar islands in Dutch bottoms. In these coordinated large-scale

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[139] *John Lean v. Edward Nichols et al.*, Depositions Taken at Bristol, 18 April 1768, TNA E134/8Geo3/East9.

[140] Because the majority of Jamaican cases that survive are prize cases, it is difficult to quantify the number of instance cases involving the slave trade that the Court heard. Jamaica's role as the most important slave entrepôt in the American colonies, however, makes it likely that the Court heard as many if not more slave trade instance cases than the South Carolina Court. As Kenneth Morgan and Trevor Burnard have noted, "Jamaica had the largest demand for slaves of any British colony in the Americas" and "received one-third of retained slave imports shipped by Britain." Trevor Burnard and Kenneth Morgan, "The Dynamics of the Slave Market and Slave Purchasing Patterns in Jamaica, 1655-1788," *WMQ* 58 (2001): 205.

smuggling operations "[v]essels from the North American Colonies were, or at least pretended to be, let out on Hire or Charter to the Dutch." These ships then proceeded to Saint Eustatia "or some other Dutch Settlement in the West Indies," where they were "fitted out with a Cargo of Negro Slaves, Goods, or Cash, in the Name of Dutch Merchants residing at such Settlement." With British captains on deck, the ships then proceeded to Hispaniola, and "were sometimes sent directly to the French Settlements; but more frequently were cleared out for Monte Christi." Finally, off the coast of Monte Christi, in "some Bay or Place near adjoining the French Settlements, they were met by Barks or small Craft" and their slave cargos were then sold to French subjects in exchange for "Sugars, Melasses, and other Goods."[141]

This illicit trade, using neutral parties as go-betweens, was of great concern to the Court as well as to imperial authorities, largely because it permitted the introduction of French sugars into the Atlantic economy at the expense of British sugar producers. Handwritten indices of "The Points Argued in the Several Cases" before the Commissioners show that questions about the legality of trading in neutral bottoms to the French preoccupied lawyers and administrators. What should Courts do "When the Ship is Dutch & provided with a Pass conformable to the Treaty of 1674 & wh[en] the cargo is contraband?" or "When by the Treaty of 1654 betw[een] Gr. Brit. & Portugal, Free Ships make Free Goods, whn. the Property of Ship & Cargo is proved?"[142] How should Vice Admiralty judges respond "When there is Proof of the Ships being bound to an Enemies Port?" and "When Proof Ship and Cargo being neutral Property, & wh. bound to a French Settlement?"[143]

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[141] In re *Edward*, Records of the High Court of Admiralty and Colonial Vice-Admiralty Courts, TNA, HCA 45/4.

[142] "The Points argued on the Several Cases, comprized in the 2d Vol. from July 1760 to March 1761 Inclusive," TNA, IND 1/8989.

[143] "The Points argued on the Several Cases, comprized in the 1st Vol. from June 1758 to July 1769 Inclusive," TNA, IND 1/8989.

As the appellants in the *De Jonge Isaac* case argued before the Commissioners, illegal slave trading in ostensibly neutral bottoms posed a particular problem to Britain's war goals because it provided the enemy with both a source of wealth and a much-needed labor supply. In fact, they insisted it should be immaterial to the Commissioners "whether the Ship and Cargo are, or are not, the Property of Neutrals." Rather, the ship in question should be condemned because it was proven to be on course for the French sugar islands, and "the Master's avowed Intention and Design was to have sold his Cargo of Negro Slaves to the Enemy, then in great want of them."[144]

Indeed, these Jamaican Vice Admiralty Court slave-trading cases highlight the important role that the colonial Vice Admiralty Courts played in Britain's eighteenth-century imperial wars. Although Vice Admiralty Courts provided significant legal resources for colonists and sailors, they also could serve broader policy objectives. In slave trading prize cases like the *De Jonge Isaac*, for example, the Jamaican Court prevented French colonists from acquiring the labor necessary to finance French military aspirations and thereby contributed to British war efforts. And in adjudicating prize claims to slave as property, Courts also effectively redistributed wealth in the form of slaves from the enemies of the British crown to British colonists and the royal navy.[145]

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[144] In re *Thurloe*, 8 January 1760, Records of the High Court of Admiralty and Colonial Vice-Admiralty Courts, TNA, HCA 45/5.

[145] In a 1740 South Carolina case, for example, the Vice Admiralty judge awarded "three Negroe slaves...belonging to the Subjects of the King of Spain" to "Edward Boseaven for the use of himself the officers and Seamen belonging to his Matys. said Ship of War" *Shoreham. Edward Boseaven Commander of the Ship of War Shoreham libel against Spanish privateer called the St. Joseph alias Le Pearl and four Negroes*, 2 May 1740, South Carolina Vice Admiralty Court Minute Books, C-D vols., 342-43, LOC. See also In re *La Ninfal*, 13 August 1719, South Carolina Vice Admiralty Court Minute Books, A-B vols., 429, LOC and In re *Nuestra Senora de Candelaria*, 11 August 1719, South Carolina Vice Admiralty Court Minute Books, A-B vols., 421, LOC.

Conclusion

In policing illicit slave trading, redistributing wealth in the form of slaves to British colonists, merchants, and mariners, and enforcing the Navigation Acts, the colonial Vice Admiralty Courts acted in ways that aligned with the desires of imperial administrators. But these institutions ultimately became a force for expansion because they benefited litigants throughout the Atlantic world. These individuals came to the Court to claim slaves, among the most valuable moveable property in empire, and colonial Vice Admiralty judges largely satisfied their desires. That admiralty courts had developed over centuries to allow litigants to claim maritime property made them particularly well suited to adapt to the expansion of the Atlantic slave economy over the course of the seventeenth and eighteenth centuries. Particularly in plantation colonies like Jamaica and South Carolina, where local legislation and vernacular practice deemed slaves as chattels, the Vice Admiralty Court gave legal sanction to local practices that commodified African bodies on land and at sea. Satisfying the commercial desires of merchants, planters, and even mariners to command slave labor, these Courts secured their prominent position in colonial legal life. Indeed, it was only when the Courts ceased to meet litigants' needs in the wake of the Seven Years' War -- when they transformed from versatile adjudicators to revenue collectors -- that they earned the ire of mainland Americans like Henry Laurens, who had in the not-too-distant past found them eminently useful.[146]

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[146] Henry's Laurens's interactions with the Vice Admiralty Court, and particularly with Vice Admiratly Judge Sir Egerton Leigh, played an important role in transforming Laurens into a critic of Great Britain's policies in America. In 1767, two of Laurens's coasting vessells, the *Wambaw* and the *Broughton Island Packet*, were seized by customs collector Daniel Moore for failing to post bond and obtain proper clearances. Vice Admiralty Judge Leigh condemned the *Wambaw*, but acquitted the *Broughton Island Packet*. In his decree Leigh did not find that Moore had probable cause to detain the vessel, which provided Laurens with an opportunity to sue Moore and his aid, George Roupell, in the Court of Common Pleas. The jury found in Laurens's favor and awarded him approximately £200 in damages. In retaliation, Roupell then seized another vessel belonging to Laurens, the *Ann*, offering "to release the vessel if Laurens would surrender his verdict in the *Broughton Island Packet* case." Laurens, however,

Attending to the work of these courts is important because it shifts our gaze from substance to procedure when it comes to assessing English law's expansion across the Atlantic World. Indeed, rather than supporting or challenging accounts about the anglicization of American law over the eighteenth century, colonial Vice Admiralty Court records instead force us to write a new narrative about legal adaptation, one that places process squarely at the center.[147] As these records show, litigants and judges adapted centuries-old legal categories to suit their commercial need to treat slaves as things. English admiralty practice, in fact, was ready-made for the economic realities of an empire increasingly reliant upon slave labor, and colonists throughout the British Atlantic World treated older legal categories as mere placeholders, substituting slaves for ships without critically interrogating this practice. Crucially, these creative adaptations at the level of practice were themselves part of a much longer history of procedural innovation in early modern England, and part of a shared creative process that linked American slave owning colonists to Britons around the globe. As Jack P. Greene has argued, such an environment was normative in a colonial world in which slavery was the rule rather than the exception, and viewing their actions through the lens of legal process helps us to see that they were engaged in practices of procedural adaptation that placed them well within the mainstream of British experience, not beyond its pale.[148]

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refused. At trial, Leigh acquitted the *Ann*, but this time pronounced probable cause, thereby preventing Laurens from prosecuting a suit against Roupell at common law. An enrgaged Laurens then proceeded to engage in a highly publicized pamphlet war with Judge Leigh in which he condemned the Vice Admiralty Court, customs officials, and British trade policies in America. Ubbelohde, *The Vice-Admiratly Courts and the American Revolution*, 109, 105-14. See also Calhoon and Weir, "The Scandalous History of Sir Egerton Leigh," 47-74.

[147] See John M. Murrin, "The Legal Transformation: The Bench and Bar of Eighteenth-Century Massachusetts," in *Colonial America: Essays in Politics and Social Development*, edited by Stanley N. Katz and John M. Murrin, et al. (New York: Alfred A. Knopf, 1983), 418-24; James Henretta, "Magistrates, Common Law Lawyers, Legislators: The Three Legal Systems of British America," in *The Cambridge History of Law in America*, edited by Michael Grossberg and Christopher Tomlins, 3 vols. (Cambridge: Cambridge University Press, 2008), 1:555-92.

[148] This comports with Jack P. Greene's argument that colonial slave societies were more normative as compared to New England settlements, and that these colonies also conformed more closely to English social developments.

Understanding procedure as a site of legal innovation also shatters any illusion that seemingly fixed legal categories were incapable of accommodating local conditions, or that the adaptation of English law to suit slave societies was a fraught process. Too often scholars assume that it was difficult for English law to acknowledge slavery in the American colonies given the lack of statutory sanction for slaveholding in England.[149] At the level of procedure, however, English law easily accommodated colonists' interest in treating slaves as property, just as it had proven capable, time and again, of absorbing distinctive property law regimes throughout the British Isles.[150] In a larger legal culture in which categories were frequently modulated to absorb local customs and practices, slavery appears less as an outlier and more as another unremarkable example of regional legal difference. Rather than a peculiar institution in search of a legal justification, then, slave law in plantation America was the natural outgrowth of a legal system that historically had been driven by procedural rather than substantive innovation.

Throughout the Atlantic World, judges, litigants, and lawyers as much as elite assembly members generated these innovations. Examining litigation in colonial courts like the South Carolina and Jamaica Vice Admiralty Courts helpfully reminds us that statutory law represents only one facet of slave law in the Atlantic World. Without an understanding of daily legal practice, including litigation in courts beyond those of common law, historians miss the extent to which a law of slavery both influenced and was influenced by the everyday needs of people throughout empire. From planters to merchants to sailors, early modern people saw slaves first and foremost as valuable property, and they arranged their legal lives in order to maximize their

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Jack P. Greene, *Pursuits of Happiness: The Social Development of Early Modern British Colonies and the Formation of American Culture* (Chapel Hill: University of North Carolina Press, 1989), 5.

[149] Watson, *Slave Law in the Americas*, 62.

[150] For an early modern view of English law's geographical specificity, particularly with regard to property law regimes, see Sir Matthew Hale, *The History of the Common Law of England* . . ., 2nd ed. (London, 1716), ECCO.

investments in human beings. Claiming slaves in colonial Vice Admiralty Courts, they took advantage of a way of proceeding at law that aligned with local norms of categorizing property and that suited their financial interests. They did so without concern for the fact that the slaves they libelled were, in fact, people, not things. Their actions directly contributed to the dehumanization of slaves throughout the Atlantic World, as commercial expediency and pre-existing legal categories combined to make it easy for colonists to ignore the personhood of Africans. Indeed, to do otherwise would have required unusual innovation to argue against the grain of precedents and forms expected by the law. Colonial assemblies erected a legal superstructure that enabled the global commoditization of human property, but litigants like the Tuckermans gave it motion and meaning. They *were* the empire, and they built a lived law of slavery from the bottom up.

TABLE 3.1[151]

South Carolina Vice Admiralty Court Business by Jurisdictional Basis, 1716-1763						
	Prize	**Navigation Act Violations**	**Instance**	**Piracy**	**Unknown**	**Total**
1716-1732	8	7	13	2	1	**31**
1736-1749	24	4	25	0	3	**56**
1752-1763	24	4	20	2	2	**52**
Total:	**56**	**15**	**58**	**4**	**6**	**139**
Percent of Total Cases:	**40.3%**	**10.8%**	**41.7%**	**2.9%**	**4.3%**	

[151] The research in this chapter and in the tables that follow is based upon an analysis of the entirety of South Carolina's surviving Vice Admiralty Court Minute Books, which run from 1716 to 1763. These records are housed in manuscript form at the United States National Archives Southeast Regional Authority and in photostats at the Library of Congress.

Cases that I have identified as slave cases do not include litigation where the cargo of a ship is unknown or unstated. If a case's records include appraisals or cargo inventories without specifically enumerating slaves, I have assumed that no slaves were at issue. This means I likely have underestimated the total number of slave cases in colonial South Carolina. Indeed, the Court register's practice changed in the 1730s and 1740s, and in this period case records often omit the substantive documents that would enable me to determine whether any slaves were at issue. In the case of the *Vrouw Dorothea*, for example, the South Carolina records do not enumerate enslaved cargo, but appeals records show that there was, in fact, a slave being consigned on the ship.

In assessing the Court's business, I have included a distinct category for piracy even though these cases technically were not heard by the Vice Admiralty Court. My rationale for this is that the Court's register included these cases in his record, and that the Court heard one trial (without a jury) in which the libel complained of both piracy and murder. Prize claims to pirate ships are categorized as prizes and allegations of mutiny are classified as crimes.

TABLE 3.2

South Carolina Vice Admiralty Court Instance Business, 1716-1763							
	Mariners' Wages	**Salvage**	**Crimes and Torts**	**Unfit Ship**	**Damaged Goods**	**Unknown**	**Total**
1716-1732	8	2	2	1	0	0	13
1736-1749	11	3	4	4	2	1	25
1752-1763	4	0	4	11	1	0	20
Total:	**23**	**5**	**10**	**16**	**3**	**1**	**58**
% of Total Cases:	**16.6%**	**3.6%**	**7.2%**	**11.5%**	**2.2%**	**0.7%**	
% of Total Instance Business:	**39.7%**	**8.6%**	**17.2%**	**27.6%**	**5.2%**	**1.7%**	

TABLE 3.3

South Carolina Vice Admiralty Cases Involving Slaves, 1716-1763	
Case Type	**Number**
Claims to slaves as property	17
Cases involving slave ships	10
Other[152]	3
Total:	**30**
Percentage of Total Cases (139)	**21.6%**

[152] This category includes one case brought by a "free Negro Man," presumably for unpaid wages. See *Thomas Ware vs. John Millar*, 29 June 1749, South Carolina Vice Admiralty Court Minute Books, C-D vols., NARA. I also have included a claim to a ship containing convict and indentured servants, largely because these servants were libelled in precisely the same way as slaves. See *In re the Eagle Galley als. The New Yorks Revenges Revenge*, 17 December 1718, South Carolina Vice Admiralty Court Minute Books, A-B vols., 380-412, LOC.

TABLE 3.4

South Carolina Vice Admiralty Cases Involving Slaves Over Time				
Date Range	**Number of Cases Involving Slaves**	**Total Number of Cases in Date Range**	**% of Cases in Date Range Involving Slaves**	**% of Total Slave Cases**
1716-1732	11	31	35.5%	36.7%
1736-1749	11	56	19.6%	36.7%
1752-1763	8	52	15.4%	26.7%
Total:	**30**	**139**		

Chapter 4
Slavery and Equity

In her 1714 bill initiating legal process in South Carolina's Chancery Court, Christian Arthur invoked the power of equity jurisdictions like Chancery to provide legal solutions for those "altogether remediless" under "the strict rules of the Common Law." Describing the Court as the only place where the "matters and frauds" she outlined in her bill might be "remeadied and redressed," she characterized Chancery as a venue in which the unique circumstances of litigants would be taken into account, a place where the rigor of the common law would be mitigated to produce a just and equitable result.[1] Simultaneously a justification for jurisdiction and a description of equity law, Arthur's language would have resonated with equity judges in Great Britain and throughout the British Atlantic World. Indeed, her bill closely mapped predominant early modern views of equity as both a concept and as a legal process, and adhered to familiar characterizations of Chancery as a court that could "correct Mens Consciences for Frauds, Breach of Trusts, Wrongs and Oppressions," a jurisdiction that could "soften and mollify the Extremity of the Law."[2]

If Arthur couched her claim in familiar language, however, the substance of her bill would surely have been novel to the Lord Chancellor sitting in Westminster. Whereas the English Chancery Court was accustomed to adjudicating land inheritance cases and business disputes involving traditional debt instruments, Arthur asked the South Carolina Court to

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[1] *Christopher Arthur, By Christian Arthur, His Prochien Amie and Guardian, v. John Gough*, 8 December 1714, Chancery Case Papers, 1700-1791, Court of Chancery Bundle 1700-1716, Nos. 1-17, No. 10, Oversize, S142001, South Carolina Department of Archives and History, Columbia, South Carolina.

[2] *The Earl of Oxford's Case* (1615), 21 Eng. Rep. 486.

determine legal title to an estate that consisted "chiefly of Negro Slaves."[3] Indeed, in this complicated estate litigation, Arthur and the executor of her brother's will sparred over the ownership and management of a plantation and its enslaved labor force. Whereas Arthur accused the executor of wasting the estate by selling or mortgaging "all or the greatest part of the hands and Negroes," the executor complained that Arthur herself had irreparably damaged the plantation by allowing the "Cattle and hoggs to destroy the Crops," and by "secreting the Negroes and hindring them from their work."[4]

In placing questions about human property before the South Carolina Chancery Court, Christian Arthur was not alone. South Carolina colonists, in fact, routinely claimed African slaves not only in law, understood as common law, but also in equity, asking the Chancery Court to recognize property interests in people and to facilitate the transfer of familial wealth in the form of slaves. Using procedures common to English equity courts and invoking familiar descriptions of equity, Arthur and litigants like her transformed the South Carolina Court of Chancery into a slave court. In this Court, equity law and procedure -- which had evolved to suit the needs of landholders in early modern England -- opened up space for litigants to articulate complicated claims to land *and* enslaved people, claims that assumed that "Real Estate would not be Capable of any Improvement" without a labor force.[5]

For these litigants, taking disputes over slaves to Chancery had distinct advantages. Whereas at common law complainants were constrained by traditional forms of action, Chancery procedures gave South Carolina colonists an opportunity to claim enslaved people when evidence had been destroyed, when relatives conspired to conceal slaves, or when witnesses

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[3] Answer of John Gough, 20 December 1714, *Arthur v. Gough*, Chancery Case Papers, 1700-1791, Court of Chancery Bundle 1700-1716 Nos. 1-17, No. 10, Oversize, S142001, SCDAH.

[4] Ibid; Answer of John Gough, 20 December 1714, SCDAH.

[5] Ibid.

could not be located. And whereas common law venues could only provide monetary damages, in Chancery aggrieved colonists could request equitable remedies. They could request the specific performance of a slave hiring contract, for example, ask the chancellor to prevent a party from removing specific slaves from the province, or demand a court-administered sale of slaves to pay outstanding debts. Using the relative openness of Chancery bill procedure to tell their complicated stories, they asked the Court to intervene and adjudicate the space between the customary and legal. In doing so, they lay bare the dense web of arrangements and assumptions involving human property that made their plantation economy work, and the Court's role in perpetuating those arrangements.

Despite the fact that claims to enslaved people comprised a significant percentage of cases heard by South Carolina's Chancery Court -- over 40% of all litigation -- scholars have ignored this important business just as they have failed more broadly to investigate colonial chancery courts. Although early modern English historians have acknowledged the importance of English equity jurisdictions into the eighteenth century, early American historians have neglected colonial equity courts or have dismissed them as unimportant when compared to common law venues.[6] Most recently, for example, G. Edward White has argued that colonial

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[6] There has been no systematic study of litigation in colonial South Carolina's Chancery Court, although John Edker Douglass provided an overview of the court in his dissertation, "The Creation of South Carolina's Legal System, 1670-1731" (Ph.D. diss., University of Missouri-Columbia, 1984). Anne Gregorie and J. Nelson Frierson also provide useful introductions to Chancery practice in South Carolina in their edited volume of court records. Anne King Gregorie, ed., *Records of the Court of Chancery of South Carolina, 1671-1779* (Washington: American Historical Association, 1950). For a discussion of the shortcomings of this edition, see Notes on Sources and Methodology, infra. William Nelson briefly discusses South Carolina Chancery practice in William E. Nelson, *The Common Law in Colonial America, Vol. II: The Middle Colonies and the Carolinas, 1660-1730* (New York: Oxford University Press, 2013), 72-73.

Nineteenth-century legal historians, and particularly Hendrik Hartog, have attended to equity law in the early republic and antebellum United States, emphasizing the role of equity judges in the development of American family law. Hartog primarily has emphasized practice in New York's Chancery Court. Hendrik Hartog, *Man and Wife in America: A History* (Cambridge: Harvard University Press, 2002). For equity courts in England, see Amy Louise Erickson, *Women and Property in Early Modern England* (London: Routledge, 1993), 114-28; David Lemmings, *Professors of the Law: Barristers and English Legal Culture in the Eighteenth Century* (New York:

chancery courts were insignificant because "they did not assume the English role of providing a clear alternative to the procedures of the common-law courts."[7] Lawrence Friedman has offered a similarly dismissive characterization of colonial chancery practice, suggesting that because equity courts sat "only in the capital," equity law, "unlike the common law, was not brought to the town square and the village, where everybody had access."[8] Whether insisting that chancery courts lacked a clear institutional identity or depicting them as unpopular and elitist jurisdictions, scholars tend to gloss quickly over equity courts in their haste to reconstruct the activities of common law lawyers, judges, and litigants.

This lack of attention to chancery stems in part from the fact that older institutional legal histories primarily emphasized developments in the New England colonies, most of which did not establish separate equity courts. Indeed, Puritan settlers carried with them a hostility to the Court of Chancery in England. Rather than establishing separate equity jurisdictions, they created common law courts that also administered substantive equity law.[9] Equity courts also

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Oxford University Press, 2000), 150-202; Henry Horwitz and Patrick Polden, "Continuity or Change in the Court of Chancery in the Seventeenth and Eighteenth Centuries?" *Journal of British Studies* 35 (1996): 24-57; Mark Fortier, *The Culture of Equity in Early Modern England* (Aldershot: Ashgate Publishing, 2005), 59-86.

An important exception to this general trend has been the work of colonial gender historians. Tracing the legal history of female property ownership in early America, for example, Marylynn Salmon has found that equity courts, which could enforce marriage settlements, benefitted women. Salmon's work, however, relies largely upon a reading of marriage settlements and nineteenth-century Chancery cases, not colonial litigation records. Marylynn Salmon, *Women and the Law of Property in Early America* (Chapel Hill: University of North Carolina Press, 1986), 11. See also Marylynn Salmon, "Women and Property in South Carolina: The Evidence From Marriage Settlements, 1730-1830," *WMQ* (1982): 655-85; Carole Shammas, Marylynn Salmon, and Michael Dahlin, *Inheritance in America From Colonial Times to the Present* (New Brunswick: Rutgers University Press, 1987), 7.

[7] G. Edward White, *Law in American History: Volume 1 From the Colonial Years Through the Civil War* (Oxford: Oxford University Press, 2012), 82.

[8] Lawrence Friedman, *A History of American Law*, 3d. ed. (New York: Touchstone, 2005), 21. This may have been true for colonial New England, but in South Carolina, the colony's major jurisdictions were located in Charlestown. Charlestown's central role in the colony's legal life meant that colonists were required to travel to town not only to litigate in equity, but also at law.

[9] Neither Connecticut nor Massachusetts had equity jurisdictions, for example. As Marylynn Salmon has noted, the lack of equity institutions in Puritan-dominated colonies was a natural outgrowth of seventeenth-century English political conflicts over the High Court of Chancery. Although "Puritan legal reformers in England did not succeed in abolishing" the court, "in America the Puritans got what they wanted." Substantive equity law in the New

remain relatively understudied because the commingling of executive, legislative, and judicial functions in early America makes them difficult to see. In royal colonies like South Carolina and Jamaica, for example, governors and council members served in a judicial capacity as chancery judges, and early equity records often appear in council journals rather than as a distinct run of litigation documents. Non-common law courts in early America did not conform to a modern conception of the separation of powers, and this has obscured their important role in colonial society. Finally, the criticism of equity courts lodged by mainland American colonists in the run-up to the American Revolution and the subsequent abolition of many equity courts in the early republic has created the misimpression that these courts were neither widely utilized nor significant.[10] Certainly American colonists, including those in South Carolina, criticized chancery courts for their costliness and dilatory procedures, and hostility to these courts was "fairly widespread in the eighteenth century." These criticisms, however, were not novel, nor were they a distinctively colonial phenomenon. In fact, American complaints about Chancery echoed those of Britons who characterized the eighteenth-century English Chancery Court as an "elaborate racket in the administration of the law," a worthy predecessor of the unwieldy institution later ridiculed in Charles Dickens's *Bleak House*.[11]

In this chapter, I reconstruct the business of South Carolina's Chancery Court, arguing that despite colonists' complaints about equity law and its administration, Chancery was an institutionally distinct jurisdiction that was particularly useful for colonial slave owners. Piecing together the Court's docket through an analysis of surviving manuscript litigation records (which

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England colonies was administered in the courts of common law. Salmon, *Women and the Law of Property in Early America*, 11. For an analysis of the "gravitational pull" of New England in early American legal histories, see Sally E. Hadden and Patricia Hagler Minter, "Introduction," in *Signposts: New Directions in Southern Legal History*, edited by Sally E. Hadden and Patricia Hagler Minter (Athens: University of Georgia Press, 2013), 2.

[10] Lawrence Friedman argues that Chancery Courts were unpopular because they were "closely associated with executive power, hence, with the English colonial masters." Friedman, *A History of American Law*, 21.

[11] *Ibid.*; Lemmings, *Professors of the Law*, 186.

scholars have ignored in favor of a substantially incomplete printed edition), I show that the South Carolina Chancery Court, unlike English Chancery, maintained a steady business throughout the colonial period largely because it offered a meaningful alternative to the colony's common law jurisdiction, the Court of Common Pleas. Indeed, whereas business in England's Chancery constricted over the course of the eighteenth century, litigation in South Carolina's Chancery Court held steady because the Court continued to be useful to slave-owning litigants. With the capacity to bring before itself voluminous evidence of complicated and customary transactions involving slaves, the Court was an attractive venue for colonists engaged in business enterprises and joint planting ventures. Likewise, in a province where an intemperate subtropical climate frequently led to the destruction of important legal records, Chancery offered a venue where disputes over slaves could be litigated even when documentary evidence was lacking. Chancery procedure, in fact, was well suited to meet the needs of colonists living in places where climate inhibited record keeping.

Finally, and perhaps most importantly, Chancery continued to attract South Carolina litigants because it was the only local venue with the capacity to sort through complicated inheritance disputes involving both real and personal property. As in England, Chancery practice in South Carolina primarily revolved around estate disputes; however, in South Carolina, where slaves were colonists' most valuable property aside from land, many of these disputes concerned the ownership of enslaved people. Crucially, slaves that were claimed in the context of South Carolina estate disputes frequently belonged to widows and daughters, and men typically sued alongside their wives to collect their bequests. The South Carolina Chancery Court was in practice a slave court that operated to transfer women's wealth in the form of enslaved people to husbands.

Beyond proving the relevance and even existence of functioning equity jurisdictions in early America, attending to South Carolina's Chancery Court provides an opportunity to reassess the place of plantation colonies in the British Atlantic legal world. In fact, understanding South Carolina's jurisdictional map as complex and varied -- not just populated by common law institutions -- helps us to see South Carolina colonists as engaged participants in a broader Anglo-American legal culture rather than as figures who strained to fit the legal aberration of slavery with an English legal tradition whose institutions have seemed predisposed to encourage liberty. Like Britons across the globe, South Carolina colonists drew upon a legal source culture that was dynamic and complex, and not immune to influences from so-called rival legal systems that derived from Continental legal practice, including Chancery.[12] They operated in legal environments where jurisdictional diversity was the norm, and where venues beyond common law courts offered meaningful alternatives. These included not only chancery courts, but also ecclesiastical courts, admiralty courts, and extra-judicial means of dispute resolution. South Carolina colonists, then, experienced a legal topography that was variegated, not flat, one that opened up opportunities for formulating sophisticated legal strategies, for forum shopping, and for interacting with different types of law.[13]

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[12] Christopher Tomlins, *Freedom Bound: Law, Labor, and Civic Identity in Colonizing English America, 1580-1865* (Cambridge: Cambridge University Press, 2010), 188.

[13] For recent work on the importance of non-common law institutions and concepts in colonial environments, see Tomlins, *Freedom Bound*, 6-7*;* Lauren A. Benton, *A Search for Sovereignty: Law and Geography in European Empires, 1400-1900* (Cambridge: Cambridge University Press, 2009), 32-33; Ken MacMillan, *Sovereignty and Possession in the English New World: The Legal Foundations of Empire, 1576-1640* (Cambridge: Cambridge University Press, 2006), 7-14; and Lisa Ford, *Settler Sovereignty: Jurisdiction and Indigenous People in America and Australia, 1788-1836* (Cambridge: Harvard University Press, 2010), 5-6. These works are a natural extension of an English legal historiography has moved from assuming that English law and legal institutions were isolated from Continental legal developments to acknowledging the importance of the *ius commune* in England. T.F.T. Plucknett, "The Relations Between Roman Law and English Common Law Down to the Sixteenth Century: A General Survey," *The University of Toronto Law Journal* 3 (1939): 24-50; M. Sarfatti, "Roman Law and Common Law: Forerunners of a General Unification of Law," 3 *International Comparative Law Quarterly* 1 (1954): 102-15; R.C. van Caenegem, *The Birth of the English Common Law* (Cambridge: Cambridge University Press, 1973); Ralph V. Turner, "Roman Law in England Before the Time of Bracton," *The Journal of British Studies* 15 (1975): 1-25;

At the same time, reconstructing South Carolina's variegated legal landscape lays bare slavery's profound impact on legal practice in the colony. South Carolina colonists experienced legal institutions in a way that placed them within the mainstream of British legal experience, but they used those institutions for different ends. South Carolina colonists deployed equity law first and foremost to meet their needs as slave owners operating in a high-mortality plantation environment, and this helps to account for litigation patterns that differed from those in English Chancery. Whereas evidence from English Chancery litigation reveals a shift from country-based litigation over land to town-centered business litigation over the course of the eighteenth century, South Carolina colonists overwhelmingly and consistently used Chancery to litigate over land and slaves in the context of inheritance disputes over female property. In a society in which women's property often took the form of slaves and in which high mortality rates among white settlers inhibited traditional wealth-building strategies, Chancery provided a convenient venue for managing, distributing, and re-assembling familial wealth across generations.

In the first part of this chapter I briefly describe the development of equity as a concept and as a legal process in early modern England, concluding with an examination of practice and procedure in the English Court of Chancery. I then turn to a discussion of the South Carolina Chancery Court and its institutional history, suggesting that although the South Carolina Court closely mimicked Chancery in Westminster, it also differed in important respects. In South Carolina, for example, the governor and members of the council sat as equity judges. Moreover,

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Charles Donahue, Jr., "Ius Commune, Canon Law, and Common Law in England," *Tulane Law Review* 66 (1992): 1745-67; R.H. Helmholz, "Continental Law and Common Law: Historical Strangers or Companions?" *Duke Law Journal* 6 (1990): 1207-28; David J. Seipp, "The Reception of Canon Law and Civil Law in the Common Law Courts before 1600," *The Oxford Journal of Legal Studies* 13 (1993): 388-420; R.H. Helmholz, *The Ius Commune in England: Four Studies* (Oxford: Oxford University Press, 2001).

In this chapter, I follow Hendrik Hartog in his use of the term "jurisdictional diversity" to describe legal environments in which litigants can avail themselves of different courts. Hartog refers narrowly to the forum choices available to litigants in the nineteenth-century United States as a result of the layers of judicial structures created under an American federal system. Hartog, *Man and Wife in America*, 310.

the South Carolina Court entirely lacked a Latin side, which in England proceeded according to common law. Next, I examine in depth the business of South Carolina's Chancery Court, drawing upon an analysis of 127 cases heard between 1700 and 1780. These cases reveal a vibrant jurisdiction that entertained a variety of causes, but primarily heard colonists' disputes over estates. In part three, I turn to an examination of slave litigation in South Carolina's Chancery Court, following colonists as they fought over enslaved people in the context of business, debt, and inheritance disputes. Although slave litigation set South Carolina's Chancery Court apart from English Chancery, in claiming slaves South Carolina colonists took advantage of time-worn English Chancery procedures even as they drew upon a discourse of equity that was familiar to Britons the world over.

Colonists most typically claimed slaves in the context of inheritance suits over female property, and I conclude by examining the role of women in Chancery slave litigation. As a direct consequence of South Carolina decedents' relatively liberal provisions for widows and daughters, women comprised a surprisingly high percentage of named litigants in equity suits. Suing with their husbands, they sought to claim inheritance (usually in the form of slaves) from estate executors and administrators. The frequent appearance of women in Chancery proceedings, however, does not suggest that South Carolina's Chancery Court was a proto-feminist institution. Rather, the Court helped to reinforce patriarchal social structures in the colony by providing a legal mechanism by which husbands could claim valuable property in right of their wives. At the same time, Chancery records reveal that in practice some South Carolina widows wielded significant authority over land and slaves. Following colonists as they exhaustively detailed the perfidy of propertied widows shows that administratrices and executrices often took control over slaves on behalf of themselves and their children. Their

refusal to surrender valuable human property resulted in protracted inter-family struggles in which colonists revealed the extent to which slave ownership shaped their expectations about inheritance.

Chancery In England

Early modern England, according to Mark Fortier, had a "culture of equity." Indeed, equity as a term and as a concept enjoyed "widespread use," not only in law, but in religion, politics, and literature, so much so that it constituted "one of the key ideas in general currency." Equity was pliable; it meant different things to different people, and it was not distinctively English. Rather, equity was "thousands of years old," meandering to the British Isles "from Athens, from Rome, from the Holy Land, from Wittenberg and Geneva."[14] William West, writing about the origins of equity, rooted it firmly in religion, as did many early modern writers. "God," he wrote, "is the efficient cause of Equitie."[15] Put another way by a complainant in England's Chancery Court, "equity speaks as the Law of God speaks." Presumably his adversary, who sought to "silence Equity," also sought to silence God.[16] Equity's intellectual pedigree, however, was more complicated, and West and other writers also acknowledged that it derived from "[t]he Law of Nature, the Law of Nations, and good man[n]ers."[17] In fact, equity was commonly associated with a grab-bag of western philosophical, legal, and political traditions, including "natural law, fundamental law, God's law, the public good, the king's conscience, the

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[14] Fortier, *The Culture of Equity*, 1-3.

[15] William West, *The Second Part of Symboleography* (London, 1601), 175, Early English Books Online, Chadwyck-Healey, eebo.chadwyck.com.

[16] *The Earl of Oxford's Case* (1615), 21 Eng. Rep. 486.

[17] West, *Symboleography*, 175.

individual (Christian) conscience, or reason."[18]

As a legal concept, equity was an inseparable part of law. Equity was law's "life, spirit and intention." Whereas the letter of the law "resembleth the flesh," equity was the "reason, the Soul" of law.[19] Law and equity were fused together. Yet equity also maneuvered externally to law, outside and above it. "Laws covet to be ruled by equity," according to Christopher St. German, and equity's task was to correct for law's inability to track the variability of human experience. Equity was necessary, in fact, because "Mens Actions are so divers and infinite, That it is impossible to make any general Law which may aptly meet with every particular Act, and not fail in some Circumstances."[20] Equity, then, assessed and accounted for unique circumstances, and it adjusted for factors unforeseen by fallible human legislators. Capturing the mutable, mystical quality of equity in early modern English legal thought, St. German invoked the prince's prerogative power to miraculously intervene in individual cases when the letter of the law became divorced from its soul. Indeed, equity was "a right wiseness that considereth all the particular circumstances of the deed" but which, according to St. German, was also "tempered with the sweetness of mercie."[21]

For most early modern legal thinkers, the intended object of this miraculous intervention was the common law, a set of procedural and substantive laws associated with the superior courts of common law in England: the Court of King's Bench, the Court of Common Pleas, and the Exchequer of Pleas. Common law in these three courts developed over the early modern period to encompass complicated legal procedures, including a writ system that limited a subject's

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[18] Fortier, *The Culture of Equity*, 4.

[19] West, *Symboleography*, 175-76.

[20] *The Earl of Oxford's Case* (1615), 21 Eng. Rep. 486.

[21] Christopher St. German, *The Dialogue in English Between a Doctor of Divinity and a Student in the Laws of England* (London, 1660), 27, EEBO.

remedies, and a formalized structure of pleading by which parties came to "issue," a legal question to be decided. Practice in common law courts was technical and constrained, and common law judges' scrupulous application of rules meant that litigation in these venues could produce results in individual cases that seemed unjust. Equity law, then, worked to undo hardships created by common law and the judges who administered it. Indeed, "Equity," according to eighteenth-century legal treatise writer Thomas Wood, "[a]bat[ed] the Rigour of the common Law." It considered "the Intention" rather than the "Words of the Law," and it was tasked with "Exerting Power in Cases wherein the Subject is without Remedy in the Courts of Common Law."[22] Equity judges, deciding cases based upon a full consideration of the facts and the dictates of conscience, would "supply the defects" of law when the "rigor of general rules" was "hard upon individuals."[23]

Although equity as a concept could be pliable, it also referred to a set of distinctive practices and procedures that emerged around the Court of Chancery in Westminster.[24] In this court, the most important of England's equity courts, a judgment "obtained by Oppression, Wrong and a hard Conscience" would be set aside, "not for any error or defect in the Judgment, but for the hard Conscience of the Party."[25] Overseen by a Chancellor who derived his authority from his possession of the Great Seal, the Chancery Court exercised jurisdiction on two different "sides" of the court by the eighteenth century. The first, called the Latin or ordinary side, proceeded "according to the Laws and Statutes of the Realm." Process was issued under the

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[22] Thomas Wood, *An Institute of the Laws of England*, 2 vols. (London, 1720), 2:789, Eighteenth-Century Collections Online, Gale Group, galenet.galegroup.com.

[23] Sir William Blackstone, *Commentaries on the Laws of England*, 4 vols. (Chicago: University of Chicago Press, 1979), 3:60.

[24] Other courts that proceeded in equity were the Court of Star Chamber, the Court of Requests, and regional councils.

[25] *The Earl of Oxford's Case* (1615), 21 Eng. Rep. 487.

Great Seal in Latin and "according to the Common Law."[26] Reflecting Chancery's medieval origins as the administrative center of the king's household, the Latin side heard litigation relating to Crown property and Crown appointees. With "Jurisdiction to Hold Plea of Scire Facias for Repeal of the King's Letters Patents," the Latin side also could hear actions "By or Against Any Officer" of the court.[27] Likewise, the Latin side entertained petitions "seeking redress against the Crown," and was responsible for issuing "all commissions of charitable uses, bankrupts, sewers, lunatics."[28] Appeals from the Latin side by writ of error were heard in King's Bench.[29]

More important for our purposes, the Chancellor also exercised equitable jurisdiction on the English side of Chancery (the "Extraordinary Court"). The chancellor's English jurisdiction (so-called because bills were written in English) grew out of his authority as the pre-eminent member of the king's council. In this capacity, he heard bills of complaint from aggrieved subjects who alleged "interference with the common law," and he dispensed justice where a common law remedy was unavailable or where the strict application of common law might work a hardship in an individual case.[30] Chancery practice developed over time to give chancellors the flexibility required to decide cases "according to Equity and Good Conscience."[31] Indeed, legal process that was streamlined (in principle if not always in practice), in the vernacular, and

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[26] Wood, *Symboleography*, 787-88.

[27] *Ibid.*, 788.

[28] J.H. Baker, *An Introduction to English Legal History*, 4th ed. (London: Butterworths Lexis Nexis, 2002), 101; Wood, *Symboleography*, 789. In order to issue these commissions, the Court was always open, unlike common law jurisdictions, which were only open during four yearly terms.

[29] *Ibid*.

[30] Baker, *An Introduction to English Legal History*, 101. Although at first chancellors referred these bills to other jurisdictions for adjudication, eventually the chancellor began to issue decrees providing novel remedies. These decrees were not precedential – they bound only parties to the suit – and indeed, the English side of Chancery was not considered a court of record like King's Bench or Common Pleas.

[31] Wood, *Symboleography*, 794.

avoided the technicalities of the common law writ system allowed chancellors access to all of the facts of the case. Without concern for "the blinkers of due process," for "Form or Mispleading," or for the possibility of creating harmful precedents, chancellors weighed these facts and ruled accordingly.[32]

When compared to process in common law venues, where the "possibilities of technical failure were legion," legal process on the English side of Chancery was simple [33] Complainants (plaintiffs) were not required to seek an original writ, which was necessary to begin a common law action. Instead, they could initiate process through a bill, which detailed in English (not in Latin, as with common law writs) the specific nature of the complaint and the relief sought. Bill procedure provided litigants with an opportunity to fully explain the unique circumstances of a case without the constraints of adhering to formulaic common law writs. It also allowed litigants to demand relief where no writ -- and therefore no remedy -- was available at common law. For example, if a litigant entered into a parole (oral) contract, he was without a common law writ, and therefore without a remedy in a common law court. In Chancery, however, the court would consider all the circumstances outlined in the complainant's bill rather than refuse to enforce the contract merely because it was oral. Chancery, then, acknowledged that neither prescriptive written law nor common law could not adequately capture the complexity of human behavior, and provided remedies for those who could not find justice elsewhere.

Uninhibited by the restraints of common law procedure and substance, the Chancellor could do any number of things that could not be done at common law. In Chancery, relief might be "Given For or Against an Infant, notwithstanding His Minority; For or Against a Married

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[32] *Ibid.* Indeed, the Court of Chancery was not a court of record whose decisions were binding on other parties: a decree (decision) in Chancery bound only the parties. Baker, *An Introduction to English Legal History*, 104.

[33] *Ibid*., 102.

Woman, notwithstanding her Coverture." Likewise, complainants could sue to correct "All frauds and Deceits for which there is no remedy at Common Law" and "All Breaches of Trust and Confidence."[34] The Court also recognized and enforced trusts, a legal mechanism that gave landowners greater control over their property, but which were not enforceable at common law.[35] In all of these matters the court could grant equitable relief, whereas common law courts might only assess monetary damages. Because justice in Chancery was not viewed in strictly monetary terms, judges could narrowly tailor remedies to suit the needs of individual litigants who might not otherwise be made whole by an award of damages.

Flexibility and ease of process in the English side of Chancery continued throughout the course of litigation. Adhering to Continental civil procedure rather than common law procedure, Chancery did not require litigants to conform to strict forms of common law pleading. Rather, the Chancellor, presiding without a jury, issued a decree based upon on all of the facts described in the written record. This record could include written testimony in the form of affidavits, oaths, and responses to interrogatories, all of which were elicited and recorded by chancery masters.[36] Significantly, Chancellors also possessed enforcement mechanisms that ensured cases moved swiftly to resolution. After the filing of a bill, for example, Chancellors issued subpoenas directing respondents to answer allegations "under pain of" a monetary fine. If a respondent refused to answer, chancellors also could order the attachment of property, or in extreme

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[34] Wood, *Symboleography*, 793.

[35] Over the fifteenth and sixteenth centuries, Chancery's jurisdiction over uses and, later, trusts helped to attract litigants. Baker, *An Introduction to English Legal History*, 251-52.

[36] As in other jurisdictions that derived procedures from civil law, witnesses in Chancery suits typically did not provide in-court testimony.

circumstances direct the contumacious respondent to be taken "to Fleet Prison."[37] Chancellors also could issue injunctions, which ordered common law tribunals to stay proceedings pending the outcome of Chancery litigation, and they could hold parties in contempt for failing to adhere to final decrees.

Flexibility of process and the availability of effective enforcement mechanisms helped to attract litigants to Chancery in the fifteenth and sixteenth centuries, even as these procedural advantages elicited heated criticism from common law judges. By the eighteenth century, however, this relative flexibility had begun to harden as the Court developed its own substantive and procedural rules.[38] Partly as a result of this, but also in keeping with broader litigation trends in all of the Westminster Courts, Chancery suffered a "truly massive decline in litigation" in the eighteenth century. By 1750, the number of bills filed in Chancery had been reduced to one-fifth the number of bills filed in 1700-01.[39] The Court's reputation likewise began to suffer, and over the course of the eighteenth century Chancery became synonymous with dilatory and expensive process. Although the court once attracted litigants with its speedy and economical adjudication of complicated cases, the multiplication of interlocutory business (motion practice) made Chancery expensive and sluggish.[40] Indeed, complaints about the cost of Chancery litigation "increased during the early eighteenth century," and most barbs were aimed at "creeping administrative and procedural growth."[41]

Despite these criticisms, Chancery continued to offer advantages to litigants. Equity

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[37] Wood, *Symboleography*, 795-96. The chancellor's arsenal of subpoenas included subpoenas to make better answer; to reply, to rejoin; for witnesses to testify; for publication of depositions; to hear Judgment; and to bring in writings.

[38] Baker, *An Introduction to English Legal History*, 110.

[39] Lemmings, *Professors of the Law*, 184. As Lemmings notes, despite this fact, Chancery remained "an excellent place of employment for barristers."

[40] *Ibid.*

[41] *Ibid*., 185.

"remained more flexible than the common law" because it could still take into account "individual circumstances." Likewise, the Court continued to be the only recourse for litigants seeking to resolve disputes involving trusts, which common law courts could not recognize, and which had become a popular means by which wealthy Britons protected landed inheritance. Indeed, for litigants with sufficient resources, Chancery remained an attractive venue, and eighteenth-century treatise writers insisted that the Court was still effective in "Abating the Rigour of the common Law" and offering relief "in Cases wherein the Subject is without Remedy in the Courts of Common Law."[42] In fact, despite Chancery's eighteenth-century slump, these treatise writers characterized Chancery as the most important Court in Westminster. For Wood, writing early in the eighteenth century, the "Jurisdiction and Power of This Court of Equity" was of "vast Extent." In fact, "almost All Causes of Weight and Moment, First or Last, have Their Determination here."[43] William Blackstone, supplanting Wood as the century's most important treatise writer, agreed, calling Chancery "the court of the greatest judicial consequence." For Blackstone, this was particularly true with respect to disputes over property, in which Chancery was "by much the most important of any of the king's superior and original courts of justice."[44]

Chancery in South Carolina

Although historians largely have ignored colonial chancery courts, English settlers and colonial projectors -- particularly in southern and Caribbean colonies -- reproduced an English

[42] Wood, *Symboleography*, 789.

[43] *Ibid.*, 792.

[44] Blackstone, *Commentaries*, 3:46.

legal landscape by establishing equity jurisdictions that provided an alternative to common law courts. Virginia and Maryland had equity jurisdictions, for example, as did the West Indian colonies of Barbados, St. Christopher, Antigua, and Jamaica. In Carolina, too, the Lords Proprietors expected that their fledgling province would maintain a functioning equity jurisdiction from an early date. Drawing upon the extensive powers granted to them under their 1665 charter "to award process, hold pleas, and determine, in all the said courts and places of judicature, all actions, suits, and causes whatsoever," they outlined plans for a "Chancellor's Court" in the Fundamental Constitutions of Carolina.[45] This court would consist of "one of ye proprietors & his six councillers," who would possess the "seal of ye Palatinate" and would have jurisdiction over all commissions, grants, and treaties with Indians. Consonant with accepted understandings of English Chancery as a court of conscience, they also gave the court jurisdiction over cases involving the "law of liberty of conscience, & all disturbances of [th]e publique peace upon pretence of religion."[46] This Chancellor's Court, however, was never established. Indeed, by the time that the first Carolina colonists embarked for the New World in 1669, it was already clear to the Proprietors that the elaborate administrative structures prescribed in the Fundamental Constitutions, including its court system, could not be fully

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[45] "Charter of Carolina," June 30, 1665, Yale Law School, The Avalon Project, http://avalon.law.yale.edu/17th_century/nc04.asp.

[46] John Locke, First Draft of Fundamental Constitutions of Carolina, 21 July 1669, The National Archives, Kew, United Kingdom, PRO/24/47/3. That Anthony Ashley Cooper sought to establish a court of Chancery in Carolina, his pet project, is not surprising given his legal background. Indeed, in October of 1672, Charles II named Cooper Lord Chancellor of England, and in this capacity he not only presided over numerous suits in Chancery, but also initiated a series of legal reforms meant to streamline procedure. The legal historian W.S. Holdsworth remarked that these reforms were "a complete code of procedure: and they show that Shaftesbury was quite able to appreciate the principles which should underline the procedure of the court, and the main evils against which it was necessary to guard." W.S. Holdsworth, *A History of English Law*, 14 vols. (London: Methuen & Co., 1924), 6:615. K.H.D. Haley, *The First Earl of Shaftesbury* (Oxford: Clarendon Press, 1968), 311.

implemented.[47] Nonetheless, during the early proprietary period Carolina did maintain a functioning equity jurisdiction, which was overseen by the Governor and the Grand Council.

A 1721 Commons House of Assembly statute prescribed the institutional structure that South Carolina's Chancery Court retained, with minor modifications, throughout the colonial period.[48] The Court consisted of the Governor, who sat as Chancellor, aided by a majority of the members of the royal Council. A master, appointed by royal commission, reviewed complaints and made written recommendations to the Chancery judges.[49] The Court also had an official register who signed writs, kept official records of court proceedings, and issued written interrogatories to witnesses.[50] According to the 1721 statue, the register also was responsible for providing notifications of all causes scheduled for hearing by tacking a list of cases "at the public

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[47] In a set of instructions to Carolina in July, 1669, the Proprietors noted: "In regard ye number of people w[hi]ch will at first be sett downe at Port Royall, will be soe small, together w[i]th want of Landgraves & Cassiques, that it will not be possible to putt o[u]r Grand Modell of Goverm[en]t in practice at first." "Copy of Instruccons Annexed to Ye Commission For Ye Govern[men]t & Councell," 27 July 1669, *The Shaftesbury Papers*, edited by L. Cheves (Charleston: Home Press, 2010), 119-20.

[48] "An Act for Establishing a Court of Chancery in This His Majesty's Province of South Carolina" (1721), in *The Statutes at Large of South Carolina*, edited by Thomas Cooper and David J. McCord, 10 vols. (Columbia: A.S. Johnston, 1836-41), 7:163-65. South Carolina's 1776 state constitution altered the chancery court's structure, stipulating that the court would consist of the "Vice President of the Colony and Privy Council." The Court was again altered in 1778, when the lieutenant governor replaced the Vice President. When Charlestown surrendered to the British in 1780, pending Chancery cases were discontinued, but were re-opened after the American Revolution. Gregorie, *Records of the Court of Chancery*, 8.

[49] The form of a master's commission to Alexander Cramahe read: "To Alexander Cramahe Gent: I reposing Special Trust and Confidence in your Loyalty Integrity and Ability have Constituted and assigned and by these Presents Do Constitute Authorize and Assign you the said Alexander Cramahe to be Master of our Court of Chancery in our Province of South Carolina. To Have hold Exercise & Enjoy the said Office of Master of our said Court of Chancery During our pleasure and your Residence within our said province Together with all and Singular the Rights, Salaries fees profits priviledges and Emoluments thereunto Belonging or in anywise appertaining." 2 July 1734 (Recorded 8 July 1734), Anne Gregorie Papers, 28/17/3, South Carolina Historical Society, Charleston, South Carolina.

This position, it seems, was not particularly lucrative. As governor Robert Johnson wrote to the Duke of Newcastle on the death of Chancery Master Theophilus Gregory, although the place required "a great deal of Attendance," it was "triffling as to the Income and Proffits, the greatest part of it depending on the allowance of ye Assembly will think fit to Annex to it." Robert Johnson to the Duke of Newcastle, 7 August 1734, Records in the British Public Record Office Relating to South Carolina, 1663-1782, edited by W. Noel Sainsbury, 36 vols., Emory University, Woodruff Library, Atlanta, G.A., 17:4. Nonetheless, the position could be a powerful one. Indeed, the master determined "which cases were heard by the court and when." Douglass, "The Creation of South Carolina's Legal System," 266.

[50] Ibid., 261, 266..

watch-house in Charlestown."[51] Both the master and register were legally obligated to live in Charlestown and to personally perform their jobs "on pain of being removed from their respective offices."[52] This stipulation reflected the centrality of Charlestown in South Carolina's legal culture. Unlike Virginia, where a county government system meant that colonists could access courts closer to home, South Carolinians seeking to litigate their disputes were forced to travel to Charlestown to avail themselves of common law, vice-admiralty, chancery, or ecclesiastical courts. Indeed, the critical mass of legal institutions in Charlestown and their relative absence in the hinterland well into the 1760s has led William Nelson to call the town a "city-state."[53]

The 1721 statute endowed the Chancery Court with significant powers, giving the chancellor and judges the authority to "have, exercise and use the same jurisdiction . . . in granting and issuing forth all original and remedial writs and other process whatsoever, and in hearing, adjudging and determining all causes and suits in equity, in as full and ample manner as any chancellor, or court or courts of chancery, in America, can, may or ought to do."[54] It likewise directed the Court to adhere as closely as possible to the "known laws, customs, statutes and usages of the Kingdom of Great Britain, and also as near as may be, according to the known and established rules of his Majesty's high court of chancery in South Britain."[55]

If colonists hoped the Court would conform as closely as possible to English precedents and procedures, however, it fell short of this standard in significant respects. Perhaps most importantly, the blending of gubernatorial and judicial duties in Chancery marked South

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[51] *SAL*, 7:164.

[52] *Ibid.*, 164.

[53] Nelson, *The Common Law in Colonial America*, *passim*.

[54] *SAL*, 7:163.

[55] *Ibid.*, 165.

Carolina's Court -- as well as other colonial Chancery Courts -- as different from English Chancery. And as was true in other colonies, an overlapping colonial judiciary and its attendant administration concerned South Carolina colonists. For example, after the overthrow of proprietary government in 1719, South Carolina's revolutionaries immediately sought to separate the Court of Chancery from the Grand Council, putting the Court on an independent statutory footing and creating a Chancellor who could be removable only by the king.[56] Their reforms were short-lived, however, and the 1721 statute returned the Court to its previous configuration.[57] Nicholas Trott, South Carolina's most important legal figure in the early eighteenth century, also complained that Chancery lacked clearly defined administrative positions. "The Officers of Register and Examiner in Chancery have been usually granted to the same Person," he lamented, while "the Masters office has some times been annexed to the Secretary's office, at other times to the Office of Clerk of the Council."[58] Imperial administrators might be forgiven for ignoring Trott's complaints, however, given that he not only served as the Chief Justice of the Court of Common Pleas, but also as a Chancery and Vice Admiralty judge. In fact, during Trott's tenure in office, it was said that there were "no appeals but from himself to himself."

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[56] Douglass, "The Creation of South Carolina's Legal System," 155; See also Friedman, *A History of American Law*, 21.

[57] This reconfiguration never received the Crown's approval. Scott Douglas Gerber, *A Distinct Judicial Power: The Origins of an Independent Judiciary, 1606-1787* (Oxford: Oxford University Press, 2011), 210-11. Colonists in other provinces where governors acted as chancellors echoed these complaints. In Jamaica, for example, the governor and council, empowered by royal commission, comprised the colony's Chancery Court. There, the governor's authority over the chancery court concerned colonists who were worried that governor retained too much power over property litigation, a mainstay of colonial chancery courts. As one early eighteenth-century Jamaican pamphleteer complained, the governor of Jamaica was "not only CAPTAIN GENERAL and Commander in chief of that Island." He was "likewise CHANCELLOR." This engrossing of governmental and judicial functions posed a danger, according to this pamphleteer for colonists keen to secure their property. *The Groans of Jamaica Express'd in a Letter* (London, 1714), vi-vii, ECCO.

[58] Nicholas Trott, "Observations on the Present State of the Courts of Judicature In his Majesty's province of South Carolina" (1730), South Carolina Court Records, 1730-1788, AC 1399, Library of Congress, Manuscripts Division, Washington, D.C. J. Nelson Frierson, "Introduction," in Anne King Gregorie, ed., *Records of the Court of Chancery of South Carolina, 1671-1779* (Washington: American Historical Association, 1950), 12.

South Carolina's Chancery Court also did not have a Latin side. Indeed, despite the 1721 statute's expansive language, South Carolina's Chancery judges never believed they were "authorized . . . to issue any Original Writ," nor did they extend "their Jurisdiction any farther than hearing and determining Causes and Suits in Equity." As Trott lamented, "[t]here is no plea or Petit Bag side, nor any officer appointed or properly invested with a Power to issue writs Original or remedial, Commissions, or other process."[59] Judges instead consistently refused to exercise Latin side jurisdiction. They believed that doing so "would be like erecting a new Court of Judicature not before erected or established in this Province," which was prohibited by the Governor's instructions. As a result of this significant and extended exercise in judicial restraint, the Governor and councilors confined themselves "to the hearing of Causes in Equity only" until 1746, when a statutory revision formally precluded the possibility of Latin side jurisdiction.[60]

For defenders of the royal prerogative like Trott, the lack of a Latin side in Chancery was highly problematic. Indeed, without a Latin side (or a Court of Exchequer, which Trott desired), there was no legal means by which the king could enforce his rights in South Carolina, and Trott cited numerous instances in which the lack of Latin jurisdiction had infringed on "the prerogative of the Crown." For example, the members of the Chancery Court had never "taken upon themselves to hold plea of Scire Facias to the Kings Patent or Grant." This was particularly troublesome when land was "granted by several Patents to several Persons," or when "the King or his Governor" was "deceived by false Suggestion" into granting land. In these circumstances,

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[59] Ibid., 1.

[60] Ibid., 2-3. "An Act to Impower his Excellency the Governor, or the Commander-In-Chief of this Province for the time being, and a majority of the Members of his Majesty's Honorable Council who shall be in this Province, to hold a Court of Chancery; for repealing the First and Ninth Paragraphs of [the 1721 act]...and for preventing the Discontinuance of Process, and the Abatement of Suits in the Courts of Justice" (1746), *SAL*, 7:191.

which Trott suggested were commonplace, the Crown lacked a judicial mechanism for retracting duplicative patents.[61]

Similarly, without a Latin side the Crown could not collect its feudal incidents, which were payments or obligations that subjects owed the Crown.[62] Chancery could not issue commissions "for taking Inquest of Office on forfeitures in Case of Treason or felony or Escheats upon failure of Heirs General or Special," for example, which in England were "within the Ordinary Jurisdiction of the Court of Chancery."[63] As colonist and judge Benjamin Whitaker observed, the Court's refusal to issue commissions "to take Inquisitions" or to "To enter into Lands Escheated" made it "impossible but that a failure of Justice in many cases must happen."[64] Perhaps more importantly, it meant the loss of revenue that could be used to fund the government.[65]

In addition to lacking a Latin side, the South Carolina Chancery Court was technically restricted in its ability to grant injunctions, a type of equitable remedy granted by the English Chancery Court to stay common law proceedings pending the outcome of equity litigation. The 1721 Act specifically limited the availability of injunctive relief, stipulating that injunctions could not be issued "of course, or by surprise." Injunctions, in fact, would only be granted when requested in the bill of complaint, and when opposing parties were provided with at least two days' notice. This provision was a direct response to colonists' concerns that writs of injunction

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[61] Trott, "Observations," 3.

[62] William Stubbs, William Stubbs, *The Constitutional History of England in its Origin and Development*, 6th ed., 3 vols. (Oxford: Clarendon Press, 1903-1906), 1:47.

[63] Trott, "Observations," 3.

[64] Benjamin Whitaker to Henry McCulloh, 3 February 1742/3, transcription in Anne Gregorie Papers, 28/17/3, SCHS.

[65] Ibid.

issued too freely under the proprietary government, and that this had infringed upon the colony's common law jurisdiction, the Court of Common Pleas.[66]

While Assembly members clearly sought to limit the availability of injunctive relief, it is less certain whether this statutory restriction was scrupulously followed. Court records, in fact, show that Chancery litigants continued to request injunctions throughout the colonial period.[67] In 1713, for example, Benjamin Schenckingh asked the Court to issue a writ of injunction "for the Staying of process at the Common Law against" him in a debt dispute.[68] John Moore also requested an injunction staying common law proceedings for failure to perform a contract.[69] Anecdotal evidence suggests that the Court occasionally granted these requests. When Peter Manigault sought to enforce a judgment against perpetual debtor Richard Stobo, for example, he complained that the Court of Chancery had "granted" Stobo "a Protection for a few Months." As the frustrated Manigault noted, Stobo "now walks publicly about Town And I dare not arrest him."[70]

Early practice in South Carolina's Chancery Court likewise differed from English Chancery practice. The Court's venue set the tone, as judges met for hearings in a local tavern. This casual setting appalled Assembly members, who thought it a "disgrace to the Country & even Scandalous [tha]t [the]e most publick Courts of Judicature Should be held in a Tavern as

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[66] Gregorie, *Records of the Court of Chancery*, 54.

[67] Douglass, "The Creation of South Carolina's Legal System," 262.

[68] *Edward Holmes v. Benjamin Schenckingh, Executor of Berringer*, 12 February 1713, SCDAH; Gregorie, *Records of the Court of Chancery*, 95.

[69] *John Moore v. Benjamin Godin and Benjamin De La Conseillere*, 18 February 1716, Chancery Case Papers, 1700-1791, Court of Chancery Bundle 1700-1716 Nos. 1-17, No. 13, Oversize, S142001, SCDAH.

[70] Peter Manigault to Isaac King, 21 October 1768, Manigault Papers, Box 11/278/7, 80-81, Peter Manigault Letterbook, 1763-1773, SCHS. See also Nelson, who argues that the Court frequently granted injunctions. Nelson, *The Common Law in Colonial America*, 72.

they now are."[71] The Court's informal atmosphere was matched by the poor quality of early legal representation. Indeed, the 1721 statute complained that "divers unskillful persons" acting as solicitors "in the courts of law and equity" had done "unspeakable damage" to their clients by misfeasance.[72] Gradually, however, practice in the Court began to conform more closely to English Chancery practice.[73] Improvements in the colonial bar help to account for this. After 1721, for example, only solicitors who were formally admitted to practice by the chief justice of the Court of Common Pleas tried Chancery cases, and many of these practitioners had received a legal education at the Inns of Court in London.[74] Given this educational background, they "possessed not only a detailed understanding of chancery procedure but also fairly extensive knowledge of equity law," and they closely adhered to the "jurisdiction and procedure of the English Court of Chancery."[75]

As in England, process in South Carolina's Chancery Court began when a solicitor filed a bill of complaint with the register of the Court, who then issued a subpoena to the respondent (defendant) directing him to answer the bill. The respondent could answer the bill, or he could allege that the bill was deficient in some way. When the respondent finally answered, the complainant had an opportunity to respond to the answer (a replication), to which the respondent could again reply with a rejoinder. Litigants also could file exceptions to the pleadings, which

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[71] A.S. Salley, ed., *Commissions and Instructions From the Lords Proprietors of Carolina to Public Officials of South Carolina, 1685-1715* (Columbia: Historical Commission of South Carolina, 1916), 270.

[72] *SAL*, 7:173.

[73] Douglass, "The Creation of South Carolina's Legal System," 259.

[74] Ibid., 260. South Carolinians maintained a distinction between "solicitors" and "counselors" that tracked the distinction in English legal practice between "barristers" and "solicitors." Frierson, "Introduction," 15.

[75] Douglass, "The Creation of South Carolina's Legal System," 255-56; Gregorie, *Records of the Court of Chancery*, 36. Court records suggest that litigants and their solicitors understood that proceeding in equity was distinct from proceeding at common law. They invoked Chancery jurisdiction in cases of fraud and collusion, where witnesses could not be located, where written evidence was lacking, and, perhaps most importantly, where there was no common law remedy.

were the equivalent of demurrers at common law. They also might choose to examine witnesses through written interrogatories, even if those witnesses were located outside of the province.[76] After the completion of written discovery, the Court – often on the recommendation of the master in complicated cases – would issue a final written decree, which could be appealed to the Privy Council if the value of the case exceeded £300 sterling.[77]

Just as the South Carolina Court's procedures resembled English Chancery practice, so too did colonists' complaints about the price and pace of eighteenth-century Chancery litigation echo those of Britons in the metropole. South Carolinians, in fact, were outspoken critics of Chancery, lamenting the Court's costliness and dilatoriness. In advising two English merchants to re-think their plans to bring a Chancery suit in South Carolina, for example, Henry Laurens explained that an equity suit would be lengthy and costly. "This Court," he explained, "is here as in all other places as much reputed for its costliness & delay as it is reverenc'd for its equity."[78] Peter Manigault likewise commented on the Court's penchant for delay, advising his clients that he was "afraid a Chancery Suit" was "unavoidable," and this unfortunately meant that "Delays which are the Delight of some Folks" also would be inevitable.[79] Manigault advised another client that a Chancery suit would be "attended with a great Expence" and recommended that it should therefore be avoided.[80]

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[76] In 1743, for example, a commission issued to take examinations in Bristol and Liverpool in the complicated business dispute *Samuel Wragg v. Joseph Wragg*. *Samuel Wragg v. Joseph Wragg,* 16 June 1743, Balzano Collection, 110.20 (Misc. MSS), SCHS.

[77] *SAL*, 7:165. This statute required the appellant to provide double security. Losing appellants were required to pay the costs of the suit. During the proprietary period, appeals ran to the governor and council, or by petition to the Lords Proprietors. Few appeals were taken to the King and Council prior to 1768. Frierson, "Introduction," 15.

[78] *HLP,* 4:546.

[79] Peter Manigault to Isaac King, undated [spring 1771], Manigault Letterbook, 152.

[80] Peter Manigault to Dr. John Delahow, 2 March 1772, Ibid., 175.

Few complete Chancery Court case records survive, but those that do suggest that colonists' complaints about equity law and its administration may have matched reality. For example, *Executors of Baker v. Executors of Jenys* lingered from 1739 until 1750, while *Durand v. Guichard* dragged on from 1742 to 1753, lengthy suits even by English Chancery standards. These delays may have stemmed from the multiplication of motions and interlocutory appeals (appeals taken before the conclusion of litigation), as was the case in England, or the fact that colonial governors and council members typically lacked legal training.[81] More concretely, it seems clear that Chancery litigation in South Carolina was protracted because the Court had difficulty maintaining a quorum – under the 1721 statute, a majority of the Council. "[M]any of the [Council] Members," James Glen complained, were frequently absent from the Province," and this occasioned delays in Chancery that sometimes lasted "many years." Indeed, the Court's business was "entirely at a stand" when enough Council members could not be located, and delays occasioned by the lack of a quorum had led to "a total failure of Justice" on a number of occasions.[82] As a result of the "Cries of the Suitors for dispatch," the Assembly amended the 1721 statute. After 1746, Chancery could sit with a majority of Council members *actually resident* in the colony rather than a majority of all Council members.

The Business of Equity

Despite colonists' complaints about Chancery, which reflected evident problems with the Court's administration, the jurisdiction remained busy throughout the colonial period. [TABLE 4.1] Overwhelmingly, South Carolina's Chancery Court adjudicated complex disputes over

[81] Frierson, "Introduction," 11.

[82] 10 October 1748, BPRO, 23:218.

inheritance. Indeed, between 1700 and 1780, 47% of the Court's business involved disputes over decedents' estates, which included both real and personal property. Moreover, the number of inheritance cases litigated in Chancery nearly doubled over the course of the colonial period, an increase that roughly tracks developments in English Chancery.[83] [TABLE 4.1] Henry Horwitz and Patrick Polden have argued that the decline of church courts (which typically heard estate disputes) rather than changing rates of testation accounts for an expanding estate business in English Chancery, but it is difficult to determine whether a similar phenomenon was at work in South Carolina.[84] Although South Carolina did have a Court of Ordinary—charged with adjudicating cases relating to wills and inheritance—its records are too incomplete to determine whether Chancery engrossed the Court of Ordinary's business over time.[85] We do know, however, that rates of testation in South Carolina did not significantly change over the colonial period; other factors, therefore, must account for increased inheritance litigation in Chancery.[86] One possible explanation is that as South Carolina colonists became wealthier over the course of the eighteenth century, the expense of estate litigation in Chancery became more economically justifiable. Indeed, as Peter Coclanis has shown, the mean total wealth of inventoried white decedents in South Carolina grew from £416.79 sterling in the period 1722-1726 to £862.71 sterling in the period 1757-1762. Given this pattern, the financial stakes for heirs may have

[83] Horwitz and Polden, "Continuity or Change," 35.

[84] Ibid., 39.

[85] South Carolina Court of Ordinary records only survive for the period 1771-1775.

[86] John E. Crowley, "Family Relations and Inheritance in Early South Carolina," *Histoire Social – Social History* 17 (1984): 40n.

become high enough to drive more litigants into Chancery even while testation rates remained static.[87]

As in English Chancery, the number of debt cases in South Carolina also fell over the colonial period, although South Carolina's Chancery Court did not experience the same proportional decrease in debt suits as the English Court.[88] Indeed, disputes over debt were the second most litigated type of case in South Carolina, comprising 17% of the court's business, and although the number of debt cases declined by almost one-half between 1700 and 1731, litigation over debt remained steady between 1731 and 1780. [TABLE 4.1] Horwitz and Polden have suggested that the greater availability of equitable remedies in common law courts explains the sharp decrease in English Chancery debt cases in the early modern period. Similarly, the evolution of more streamlined common law debt collection procedures may have driven litigants from Chancery to South Carolina's common law jurisdiction, the Court of Common Pleas.[89] Indeed, over the course of the eighteenth century, attorneys in Common Pleas began to bypass the complicated procedural maneuvering that typically accompanied common law debt cases. In particular, debtors could appoint an attorney to "confess judgment" of a specific amount that they owed to a creditor rather than forcing creditors to sue out a writ of inquiry.[90] Combined

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[87] Peter A. Coclanis, *The Shadow of a Dream: Economic Life and Death in the South Carolina Low Country 1670-1920* (New York: Oxford University Press, 1989), 89. The size of plantation units and the number of slaves per household also grew. John J. McCusker and Russell R. Menard, *The Economy of British America, 1607-1789* (Chapel Hill: University of North Carolina Press, 1991), 182. The number of slaves per household in St. George's Parish, for example, grew from 8 in 1720 to 24 by 1741. *Ibid.*, 182.

[88] Horwitz and Polden, "Continuity or Change," 35.

[89] *Ibid.*, 38-39.

[90] Nelson, *The Common Law in Colonial America*, 72. As part of a broader debt collection strategy, creditors might request that a debtor confess judgment, which the creditor could then choose to execute at a later date. This effectively provided the creditor with security for the debt. James Mickie explained this process to a Scottish correspondent: "What I mean by Confessing a Judgment," he explained to a Scottish correspondent, "is this I have brought an Accon for Breach of Covenant (for not Paying the money wch you advanced for you could not Sue the Bond wch was not due nor in my Possession) and on this a Judgment is confessed in order to give you a preference

with the lower cost of litigating at common law, this procedure may account for the decline in debt cases in South Carolina's Chancery Court.[91]

If expanding inheritance litigation and contracting debt litigation in South Carolina's Chancery Court roughly mimicked litigation patterns in English Chancery, in other significant respects the South Carolina Court's business differed. Chancery in South Carolina, for example, did not experience a substantial increase in business litigation, while the number of business cases in English Chancery nearly tripled between the seventeenth and nineteenth centuries.[92] Instead, business disputes occupied a meager 15% of the South Carolina Chancery Court's docket, and the number of cases heard by the Court remained steady between 1700 and 1780. [TABLE 4.1] At first glance, this is surprising. Indeed, historians have characterized South Carolina colonists as particularly engaged participants in a wider Atlantic economy, and we might expect that as elite colonists expanded their businesses and plantations over the course of the eighteenth century, commercial disputes in Chancery would increase.[93] One possible explanation for this unexpected result is that the cost of bringing a suit in Chancery was only justifiable in the most valuable cases, which typically were disputes over estates, not contract disputes. Likewise, litigants may have hesitated to bring disputes over contracts to deliver commodities -- which had fluctuating prices -- to a Court notorious for delay.

Jurisdictional competition also may account for the relative lack of business litigation in South Carolina's Chancery Court. Indeed, just as an increasingly sophisticated common law

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on the arrears of the Estate for the Satisfaction of Sunderlands Bond." James Mickie to [Sir Alexander Nisbet], 7 March 1745, GD237/1/154/2, Scottish National Archives, Edinburgh, Scotland, United Kingdom.

[91] According to Nelson, the greater availability of printed legal forms over the course of the eighteenth century also may have "streamlined the debt collection process" while providing creditors with written instruments on which to sue in Common Pleas. Nelson, *The Common Law in Colonial America*, 72.

[92] Horwitz and Polden, "Continuity or Change," 35.

[93] See S. Max Edelson, *Plantation Enterprise in Colonial South Carolina* (Cambridge: Harvard University Press, 2006), 174-86.

debt practice may have attracted litigants to Common Pleas, so too did Common Pleas provide remedies that appealed to litigants in business cases. As William Nelson has observed, by the eighteenth century Common Pleas had a thriving writ system that gave potential litigants access to a number ways to proceed at common law. Available writs included "writs of debt, trespass, and assumpsit" in addition to "actions of account, covenant, detinue, ejectment, replevin, and trover, as well as qui tam actions."[94] With a variety of common law remedies from which to choose, business litigants were more likely to seek relief in the less expensive Court of Common Pleas unless they required equitable remedies or faced evidentiary problems that prevented them from suing at common law.

Finally, whereas in England the number of trust cases increased significantly in the early modern period, the South Carolina Court heard a statistically insignificant number of trust disputes.[95] Trusts were equitable estates that were recognized in equity law but not in common law, and they emerged in England primarily to provide "an escape from the inflexible certainty of the legal rules of succession." For example, they allowed a landowner to "provide for younger sons, daughters, bastards, remote relations, or charities" by conveying an estate to trustees for the use of beneficiaries rather than by passing legal title directly to heirs.[96] In the English Chancery Court, the most significant type of litigated trust was a marriage settlement, which conveyed property to trustees for the benefit of a woman, usually in anticipation of her marriage.[97] The relative lack of trust litigation in South Carolina reflects the fact that marriage settlements in the province were uncommon. Indeed, as Marylynn Salmon has shown through a

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[94] Nelson, *The Common Law in Colonial America*, 70.

[95] Horwitz and Polden, "Continuity or Change," 35. In fact, I have only located one dispute over a marriage settlement in South Carolina's manuscript case records, although Salmon suggests there may be several more cases based upon an examination of the Court's printed minute books.

[96] Baker, *An Introduction to English Legal History*, 252.

[97] Horwitz and Polden, "Continuity or Change," 34.

quantitative analysis of marriage settlements between 1785 and 1810 (a period during which all settlements were recorded and reliable census data exists), only "1-2 percent of marrying couples created separate estates" through marriage settlements. In fact, settlements "were far from the common occurrence that some historians have believed, at least in South Carolina," where only the wealthiest female colonists had separate estates.[98]

Despite Chancery's obvious deficiencies, colonists nonetheless found the jurisdiction useful and, in some cases, indispensible for resolving their disputes. An English legal heritage may have predisposed them to embrace jurisdictional diversity, but Chancery's procedures also made it particularly well-suited for colonists who hoped to resolve their lengthy and complicated disputes over slaves, and especially disputes over inheritance. Not only did Chancery bill procedure open up space for colonists to fully explain their often-convoluted claims, the Court's willingness to accept oral evidence and to painstakingly trace title to slaves back over generations merged with their legal needs. In a place where records frequently were destroyed and in which undocumented customary arrangements often organized plantation life, colonists continued to seek justice in Chancery even if its pace was slow.

An Equitable Slave Court

The single most important difference between Chancery practice in England and South Carolina was that 41% of all cases heard by the South Carolina Chancery Court involved slaves. Indeed, South Carolina colonists routinely used their local equity court to litigate claims to enslaved people, primarily in the context of inheritance disputes (65%). [TABLE 4.2] Cases

[98] Salmon, "Women and Property in South Carolina," 663. Salmon also found that marriage settlements "most often included slaves, money, cattle, and household goods, but not land." Ibid., 665.

involving slaves, however, were spread across the entirety of the Court's docket between 1700 and 1780, as colonists also argued over slaves in business disputes (19%) debt litigation (12%) and conflicts over leases (2%). [TABLE 4.3] The ubiquity of slaves in Chancery proceedings reveals their centrality to South Carolina's economy. More importantly, slave litigation in Chancery shows that slave owners found the procedures of equity as much as its substance useful when they asked the Court to adjudicate their complex cases. Taking advantage of bill procedure and deploying the language of equity uncritically, they sought legal recognition for the most inequitable of practices.

Business disputes over slaves in Chancery took a variety of forms. Some colonists litigated over contracts in which one party promised to deliver goods or provide services to another party. In these cases, slaves typically appeared as laborers, rather than as the property objects of colonists' claims. In 1716, for example, John Moore asked the Court to relieve him of a contractual obligation to make pitch, which he could not perform because it had "pleased god to Vissitt this Province with an unhappy Warr with the Infidell Indians." As he explained to the Court, during the Yamassee War his "Slaves and Servants hire were Cutt off, and Driven from theire plantations," and along with Moore they did not dare return for "fear of theire lives." Consequently, if he were "compelled to performe the Strictness of such his Contract or Agreement," he would "be a verry, great Sufferer," particularly as the price of pitch had "vastly Risen" in the interim. Because "the hand of god" prevented his performance, holding him to his agreement "would be Contrary, to Equity and good Conscience."[99]

Litigants in Chancery also sparred over slave hiring contracts and plantation leases, revealing the extent to which renting land and slaves remained a significant practice despite

[99] *John Moore v. Benjamin Godin and Benjamin De La Conseillere*, Filed 18 February 1716, Chancery Case Papers, 1700-1791, Court of Chancery Bundle 1700-1716 Nos. 1-17, No. 13, Oversize, S142001, SCDAH.

historians' emphasis on the importance of fee simple ownership in plantation economies. Slave and plantation hiring not only provided a source of income for colonists with slaves they could not put to work. It also gave less wealthy colonists access to land and labor for a lower cost, thereby removing barriers to entry for poor whites who aspired to slave and plantation ownership. These rental arrangements often were customary or unwritten, and hiring cases were brought in Chancery rather than Common Pleas because colonists lacked written records. For example, in 1715 John Kincaird, a "Berkley County planter," sued in Chancery over a parole (oral) plantation lease that entitled him to use "Eleven Negroes and one Indian slave (vizt) Jack. Jacko. Quaminash. Boson. Tony. Prince. Cudjo. Pussaugh. Moll. Doll. Hannah and Guay an Indian." Although Kincaird and the plantation owner intended to memorialize their agreement, the owner was killed in the Yamassee War before it could be reduced "into writeing." Lacking any proof of the lease, Kincaird was subject to harassment from the heir, who "dayly" threatened to "take away the said negroes" and to "cut down take and carry away the Crop now growing."[100] Similarly, Jamaican merchant William Hawett brought a suit in Chancery because, "being an Aged man," he had "lost or Mislaid" letters outlining the terms of a plantation management agreement with Elizabeth Moore. Hawett alleged that Moore had agreed to take "care of the Negroes and Stock" on one of his South Carolina plantations and to "Improve the same to the best Advantage and Live on the Same For the space of Sevean years" in exchange for an annuity. However, Moore had never "returned . . . one penny of the Encrease or profitts of the said

[100] *John Kincaird v. Mathew Beard,* October 1715, Chancery Case Papers, 1700-1791, Court of Chancery Bundle 1700-1716 Nos. 1-17, No. 11, Oversize, S142001, SCDAH.

Farme." Instead, she had wasted the property and had caused Hawett's "Negroes on the said Plantation to be Attached" when the annuity was not paid.[101]

Cases like Hawett's lay bare the widespread but largely hidden customary economic system by which planters created working arrangements that hinged on transferring and selling slave labor. In a place where small-scale business deals involving slaves were made informally, Chancery could give legal force to a wide variety of undocumented arrangements. The Court's bill procedure made this possible. Colonists like Hawett described in detail the contract they hoped the Court would enforce, and explained why they lacked written evidence of their agreements. But written discovery, in the form of depositions and interrogatories, also gave the Court access to evidence of local custom, which judges used to adjudicate disputes over slave and plantation leases. Indeed, parties could propound interrogatories to witnesses inquiring about local slave hiring customs, which the Court could then take into account in formulating a decree. For example, complainant John Brown sued in Chancery to recover costs he incurred providing medical treatment for "fifteen Negroe and Indian" hired slaves. He also asked to be compensated for money he had expended capturing these slaves when they ran away, an apparently frequent occurrence. In this case, witnesses were asked to answer questions about when colonists like Brown were entitled to recompense. "What is the Custom of South Carolina when Slaves are hired with a Plantation for a Term of Years by Lease"? Was it customary "to Allow for Sick or Black Days or run away Days of said Negroes in Such case or not?" One witness suggested that when slaves were hired by the year, they were not allowed "Sick or Black days" unless that was part of the contractual agreement. The respondent in the case agreed,

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[101] *William Hawett v. Thomas Moore and Wife*, Filed 9 November 1716, Chancery Case Papers, 1700-1791, Court of Chancery Bundle 1700-1716, Nos. 1-17, No. 17, Oversize, S142001, SCDAH. Elizabeth, for her part, admitted that she had attached the slaves "in order to recover the Arrears of her said Annuity," but only after discovering that she had been written out of Hawett's will, the old man "being more carefully and watchfully guarded by his Dependants than the Golden Fleece." Answer filed 7 March 1717.

suggesting that there was a "Wide Difference in the Case where Slaves are lett per Week or Month and where they are leased for years." Whereas the "Sick Days or Physick be Sometimes allowed where Slaves are hired per Week or Month," this was because "Slaves lett per Week or Month are lett at Rack Rates to witt at double the price at what they are generally leased." In this case, she argued, because the renter received a bargain rate of "Two hundred Pounds per Annum" for the lease of a plantation and "Fifteen Negroes and Indians Slaves," the complainant was not entitled to collect medical costs.[102]

The Chancery Court's ability to inquire into these complicated customary practices made it an invaluable resource for colonists who sought a narrowly-tailored solution to their particular problems. These colonists expected and received justice that took into account local and customary assumptions about how slave and plantation hiring should work, and who should bear the potentially significant costs of caring for sick slaves. Far from an insignificant or powerless jurisdiction, Chancery in South Carolina was a venue in which an elaborate system of customary management and exchange, centered on the hiring of slaves and plantations, could be adjudicated, and in which those who sought to violate this system could be called to account. By providing a mechanism for interrogating and upholding customary practices, the Court in turn encouraged the elaboration of a practical law of slavery, one in which the value of a slave-as-property was not fixed at a sale price, but modulated according to a renter's labor needs in any given season.

Just as the Court's procedural flexibility made it a useful venue for inquiring into and adjudicating the terms of customary arrangements, so too did this flexibility make it ideal for resolving complex business disputes over slaves. South Carolina's Chancery Court, and particularly the master in Chancery, could pick through voluminous correspondence and

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[102] *John Brown v. Eleana Wright,* Answer filed 16 February 1717, Chancery Case Papers, 1700-1791, Court of Chancery Bundle 1717-1720, Nos. 1-8, No. 1, S142001, SCDAH.

financial accounts in order to unravel even the most complicated business arrangements. Disputes over joint planting ventures and co-partnership agreements could be particularly vexing and were well suited for disposition Chancery. Indeed, litigants could ask the Court to review articles of agreement as well as extensive financial documents in order to determine how a firm's assets and debts should be allocated. For example, when Kinsey Burden and Richard Moncrief, two Charles Town-based carpenters, fought over the dissolution of their partnership in 1773, they asked the Court to determine whether Burden should be compensated because Moncrief had breached his contractual obligation to pay for hired slave labor. Burden alleged that in articles of copartnership Moncrief had agreed to "pay for one able white Man or two negroe Men" to complete "Houses and Buildings and all other Carpenters and Joiner's Work," an obligation he had allegedly failed to perform.[103]

In these complicated copartnership disputes, questions about allocating assets typically were combined with allegations of fraud, which justified Chancery jurisdiction. In 1770, for example, three partners in a planting venture clashed over the sale of a plantation when the partnership was dissolved. Specifically, they squabbled over whether one of the partners had caused "some Cattle, one Negroe Boy, and a few Horses to be moved to Georgia" with "an Intent or Design . . . to injure or defraud" another partner.[104] Similarly, in a dispute involving a slave-trading firm, Samuel Wragg alleged that his brother and copartner Joseph Wragg had mismanaged the firm's assets and concealed accounts. While the Britain-based Samuel Wragg toiled to "procur[e] and mak[e] Consignments of Negroes and other Commodities" to his brother, Joseph had contracted "large Debts" in South Carolina by "making purchases, carrying on

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[103] *Kinsey Burden v. Richard Moncrief*, Bill filed [23 January 1773], Chancery Case Papers, 1700-1791, Court of Chancery Bundle 1770-1779, Nos. 1-16, No. 3a, S142001, SCDAH.

[104] *Jonathan Williamson v. James Thompson and Robert Thompson,* Answer filed 30 June 1770, Chancery Case Papers, 1700-1791, Court of Chancery Bundle 1767-1769, Nos. 1-16, No. 16, SCDAH.

Expensive Buildings, & Decorations And in private Adventures in the way of Trade."[105] Allegations of fraud like Wragg's placed colonists' claims squarely within the Court's ambit, echoing not only contemporary justifications for English Chancery jurisdiction, but also an older early modern equitable discourse. They also reveal a world in which the resident planter presiding over enslaved workers on a single plantation was only one possibility among the variety of economic arrangements that mobile slave labor, organized in a customary legal framework, encouraged to generate wealth.

In addition to litigating a wide variety of business concerns involving slaves in Chancery, South Carolina colonists also litigated over slaves in the context of debt disputes. As we have seen in Chapter 2, South Carolina colonists primarily purchased slaves on credit, structuring their purchases with debt instruments like conditional bonds and mortgages.[106] When a debtor defaulted on a loan, creditors could sue on these instruments in the Court of Common Pleas. Occasionally, though, written instruments were lost or damaged, which caused some litigants to seek relief in Chancery. In 1701, for example, Jamaican merchant Jacob Mears sued Charles Town merchant Simon Valentine for debts incurred purchasing "Wheat flower, Indico, Negroes, Sugar, and such like Comodities" because he could not prove the debts with a written instrument. The unlucky Mears apparently lost all of his business records in an earthquake which had "Indiscriminately Swallowed up" the house where "he allwaies kept his books of Accounts."[107]

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[105] *Samuel Wragg v. Joseph Wragg*, Bill filed 2 March 1742, Chancery Case Papers, 1700-1791, Court of Chancery Bundle 1721-1735, No. 12, S142001, SCDAH.

[106] Kenneth Morgan, "Remittance Procedures in the Eighteenth-Century British Slave Trade," *The Business History Review* 79 (2005): 715-749; Bonnie Martin, "Slavery's Invisible Engine: Mortgaging Human Property," *The Journal of Southern History* 76 (2010): 817-66; Russell R. Menard, "Financing the Lowcountry Export Boom: Capital and Growth in Early Carolina," *The William and Mary Quarterly*, 3rd ser. 51 (1994): 659-76; David Hancock, "'Capital and Credit with Approved Security': Financial Markets in Montserrat and South Carolina, 1748-1775," *Business and Economic History* 23 (1994): 61-84.

[107] *Jacob Mears v. Simon Valentine,* 26 August 1701**,** Chancery Case Papers, 1700-1791, Court of Chancery Bundle 1700-1716, Nos. 1-17, No. 2, Oversize, S142001, SCDAH.

That Chancery provided relief for Mears and other colonists who lacked written records helps to explain its continuing appeal in colonies like South Carolina, where climate, military conflict, and natural disasters made record keeping difficult. Historians have noted that climate had profound implications for material life and provincial identity formation in the Greater Caribbean region, but natural disasters and climatological factors also had significant *legal* ramifications.[108] None was more important than the destruction of legal records, not only because these records memorialized important agreements and proved title to property, but because their mere physical existence allowed colonists to sue in common law courts. By offering colonists an alternative venue, one that did not require legal documentation, Chancery became particularly useful to legal consumers like Mears who operated in harsh new world environments.

Even when colonists retained records, the Chancery Court's ability to offer injunctive relief made it an appealing court of last resort for debtors who could not pay for their slaves and found themselves sued in Common Pleas. In Chancery, these colonists could describe in great detail the circumstances that had prevented them from discharging their obligations, and could ask the Court to stay proceedings. Thomas Smith, for example, sought injunctive relief in Chancery when his creditors sued him in Common Pleas for failing to deliver "Twenty Three hundred and Sixty Barrells of Tarr" in payment for "Twenty Eight Negroe Slaves." Smith claimed that he had discharged the debt by delivering the tar, but that the respondents had failed to collect the tar in a timely manner.[109] It was unjust, he argued, for the Court of Common Pleas

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[108] Matthew Mulcahy, *Hurricanes and Society in the Greater British Caribbean*, *1624-1783* (Baltimore: Johns Hopkins University Press, 2005), 2-3. Jack P. Greene, *Imperatives, Behaviors and Identities: Essays in Early American Cultural History* (Charlottesville: University of Virginia Press, 1992), 13-67.

[109] *Landgrave Thomas Smith v. Richard Beresford and Richard Splatt***,** 15 August 1720, Chancery Case Papers, 1700-1791, Court of Chancery Bundle 1717-1720, No. 17, S142001, SCDAH.

to penalize him under these circumstances, and he asked Chancery to intervene and enjoin the attachment of his property. As we have seen in Chapter 2, preventing the attachment of property, and particularly slaves, was an important goal for South Carolina debtors like Thomas Smith. Not only did the attachment of slaves mean the loss of valuable economic assets; without slaves, debtors like Smith could not hope to repay their creditors. By providing a means to stop the attachment process, Chancery gave debtors one last opportunity to thwart their creditors and to continue to use their slaves productively to discharge outstanding debts.

Just like business litigants in Chancery, debt litigants also relied upon allegations of fraud, conspiracy, or collusion in order to justify Chancery jurisdiction. Jacob Yorkson's framing of his quest to redeem his mortgaged slave from Grace Buckley reveals the extent to which it was important for litigants to position themselves as victims in Chancery pleadings. Finding himself short of money, Yorkson borrowed twenty-six pounds from Buckley, securing his debt with the mortgage of "one Negroe boy named Robin." According to Yorkson, when the debt came due, he offered Buckley payment, but she refused to take it, saying that "it would be a great kindness to her" to allow Robin to continue working "till she was capable and had an opportunity of buying one in his Room." Year after year, Yorkson offered to discharge the mortgage and retrieve Robin, but year after year, Buckley convinced him to let her keep the slave "with fair Speeches." Yorkson eventually grew suspicious that Buckley would "take Advantage of his Mortgage and of his not Redeeming the said Negroe," suspicions that proved correct. As he explained to the Court, Buckley had combined with "divers Persons unknown to your Orator," and now she gave out that he had "forfeited his Negroe by not Complying with his Mortgage." Indeed, she refused to "deliver up" Robin, for whom he had been "offered Three hundred pounds." Calling upon the Court to exercise jurisdiction, Buckley, like other South Carolina

colonists and, indeed, like English litigants in Chancery, claimed that Yorkson's actions were "contrary to all Equity and Good Conscience."[110]

Whether they positioned themselves as victims of fraudulent defendants, the Lowcountry's subtropical climate, or simply bad luck, colonists took advantage of equity procedures to lay claim to slaves. Free to launch into a lengthy explanation of their grievances, they called upon the Court to craft a remedy that suited their individual circumstances, even when they lacked documentary evidence to substantiate their claims. They did so using a much older equitable discourse, one that they wielded uncritically as they fought over enslaved people. Indeed, for colonists like Buckley, the phrase "Equity and Good Conscience" was an empty one, a mere catch-phrase that granted him access to Chancery Court, its substantive law, and most importantly, its procedures.

Women and Slaves in Chancery

When written evidence was lacking, when business affairs were complicated, and when individuals conspired to defraud South Carolina colonists, Chancery provided a venue in which litigants might seek relief in cases involving slaves. Overwhelmingly, however, South Carolina's Chancery Court was a resource for colonists who litigated claims to slaves in the context of inheritance disputes. Indeed, 65% of all Chancery inheritance cases in South Carolina involved claims to slaves as personal property. [TABLE 4.3] In some of these cases, litigants asked the Court to perform administrative tasks, including dividing personal property or granting executors permission to sell a decedent's slaves. For example, Benjamin Godin's executors

[110] *Jacob Yorkson v. Grace Buckley*, 6 August 1719, Chancery Case Papers, 1700-1791, Court of Chancery Bundle 1717-1720, No. 15, S142001, SCDAH.

sought relief in Chancery because they did not have "Cash in hand Sufficient to discharge the Several pecuniary Legacies bequeathed by" Godin, and they asked the Court for the "Liberty to Sell the Negroes and other of the personal Estate of the said Deceased."[111] The executors of John St. John also asked the Chancery Court to divide "several negroes" belonging to St. John's estate, which had not originally been included in the estate's inventory.[112] Aside from the fact that inheritance disputes like this were within Chancery's jurisdictional orbit, as a practical matter the Court was better suited to craft individual solutions to the vexing problem of dividing human property than Common Pleas. The Court could order slaves to be sold and divide the proceeds, which it occasionally did. But because Chancery had potentially unlimited access to accounts, witness testimony, and voluminous pleadings, judges also were able to make informed decisions about the relative value of slaves and how they should be allocated among creditors and heirs.

Chancery's capacity to bring before itself a complete record of an estate also benefitted heirs who were concerned that executors were mismanaging plantations and slaves. Indeed, complainants in Chancery frequently alleged that executors wasted estates, and particularly that they improperly disposed of enslaved property through sales and mortgages. As we already have seen, Christian Arthur complained that her brother's executor, John Gough, had wasted the estate by selling and mortgaging "all or the greatest part of the hands and Negroes" to the detriment of her minor son, who was heir at law. Not only did Arthur want the Court to prevent Gough from continuing to waste the estate; she also asked the Court to compel Gough to produce estate

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[111] *Executors of Benjamin Godin, deceased*, 18 December 1749, Chancery Case Papers, 1700-1791, Court of Chancery Bundle 1736-1760 Nos. 1-21, No. 10, S142001, SCDAH.

[112] *Elizabeth Beatty, Executrix of John St. John and Others v. Lambert Lance, Executor of John St. John*, 20 April 1767, Chancery Case Papers, 1700-1791; Court of Chancery Bundle 1763-1766, Nos. 1-12, No. 4, S142001, SCDAH.

accounts. She wanted to know "What goods and Effects either in goods Merchandizes Negroes and Slaves or bond persons he has sold or disposed off . . . [a]nd what Negroes or hands belonging to the said reall Estate he has mortgaged and sold and upon what account." This type of request was not unusual. Because chancellors had the authority to compel testimony and to bring important financial documents into the court's record, Chancery was a useful place for remote heirs to gain a more accurate picture of an estate's financial footing. In this case, Arthur's prodding produced an admission that Gough did, in fact, mortgage ten slaves, but he denied that he "Sold any of the Negros or Slaves" or mortgaged any additional slaves without Arthur's permission.[113]

In her request for additional information about the management her brother's plantation, Arthur's claim was typical. So too was the fact that Arthur, a female, was a named party to the case. Indeed, between 1700 and 1780, 52% of all South Carolina Chancery cases included named female litigants. This percentage was even higher in Chancery litigation over slaves (65%). [TABLES 4.4 AND 4.5] The high incidence of female litigants in South Carolina's Chancery Court is striking when contrasted with the number of named female litigants in English Chancery. Horwitz and Polden, for example, found that women comprised only 18.8% of all named Chancery litigants in 1627 and 30.6% in 1818/19.[114] Amy Louise Erickson arrived at slightly different figures, determining that women comprised 17% of litigants in Chancery between 1558-1603 and 26% between 1613-1714.[115] Whichever figures one chooses to credit,

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[113] *Christopher Arthur, By Christian Arthur, His Prochien Amie and Guardian, v. John Gough*, Filed 8 December 1714, Chancery Case Papers, 1700-1791, Court of Chancery Bundle 1700-1716 Nos. 1-17, No. 10, Oversize; S142001, SCDAH.

[114] Horwitz and Polden, "Continuity or Change," 45.

[115] Erickson, *Women and Property in Early Modern England*, 115.

women in South Carolina were much more frequently named in Chancery suits than were women in England.[116]

The high incidence of named female litigants across all South Carolina Chancery business reflects women's significant role in colonial South Carolina's economic life, in turn a result of negative demographic conditions in the province.[117] High mortality in South Carolina inhibited family formation even as it made traditional estate management strategies impractical. Significantly, the "cultural preference for adult, male heirs often simply could not be exercised," and South Carolina colonists relied upon widows as executrices even as they bequeathed valuable property, usually in the form of slaves, to wives and daughters.[118] Indeed, as Marylynn Salmon, John Crowley, and S. Max Edelson have shown, women in South Carolina enjoyed significantly more legal authority over property than women in other provinces, and this was a direct result of high mortality rates among white males. Because male heirs often were unavailable, provisions for South Carolina widows were "liberal." Nearly two-thirds of testators named their wives to share in the estate's residue (usually the most valuable portion of an estate), while childless testators also "made their wives their most important single heir."[119] In leaving property to widows, testators did not necessarily seek to ensure their maintenance. Rather, as Cara Anzilotti has argued, testators consciously arranged their affairs to ensure the "creation of a family estate, a rice plantation that would be passed from one generation to the next." Husbands

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[116] *Ibid.*, 115.

[117] Coclanis, *The Shadow of a Dream*, 38, 42.

[118] Crowley, "Family Relations and Inheritance in Early South Carolina," 43.

[119] Ibid., 45; Salmon, *Women and the Law of Property*, 157; S. Max Edelson, "Reproducing Plantation Society: Women and Land in Colonial South Carolina," *History of the Family* 12 (2007): 130-31.

hoped that their widows would serve as the "regents necessary to perpetuate" a dynasty, passing wealth in tact to the next generation.[120]

Generous provisions for wives in South Carolina were accompanied by a more equitable distribution of personal property among daughters.[121] As we have seen in Chapter 1, in 1712 South Carolina formally adopted English intestacy laws, which gave eldest sons the right to an intestate father's lands, but provided for partible inheritance of personal property regardless of sex. As slaves were the most valuable type of personal property in South Carolina, this could operate to the benefit of daughters. Likewise, as John Crowley discovered in his study of colonial South Carolina wills, testators' frequently bequeathed slaves to their daughters, an inheritance that could be more valuable than a decedent's real estate, particularly if the land was unimproved. As was the case with wives, liberal provisions for daughters in South Carolina wills were not meant to set women up as female planters. Bequests to daughters, instead, primarily were meant "to attract suitors."[122]

Testators' careful arrangements for daughters and widows, however, were contested in the Court of Chancery as litigants sparred over valuable patrimony in the form of slaves. Watching colonists argue over female inheritance in Chancery reveals that husbands were eager to use the Court to collect the property they expected to receive in right of their wives. Rather than providing a venue for the expression of independent female agency, then, South Carolina's Chancery Court provided a mechanism by which husbands could claim a wife's marriage portion. In Chancery, enslaved people were transferred down the generations and across patriarchal lines through women. At the same time, however, Chancery litigation reveals that dynastic wealth

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[120] Cara Anzilotti, *In the Affairs of the World: Women, Patriarchy and Power in Colonial South Carolina* (Westport: Greenwood Press, 2002), 143.

[121] Crowley, "Family Relations and Inheritance in Early South Carolina," 47.

[122] Edelson, "Reproducing Plantation Society: Women and Land in Colonial South Carolina," 133.

building was a fraught process. Although women primarily were meant to hold and transfer property in tact to heirs, in practice some women sought to retain during their lifetimes real familial power. Reluctant to cede control of slaves, widows in particular retained considerable authority over an estate's most valuable property when they maintained actual possession of slaves.

In Right of My Wife

If Christian Arthur's suit was typical in some ways, in other respects the case deviated from the typical Chancery inheritance suit. Indeed, whereas Arthur sued alone on behalf of her minor son, most Chancery inheritance disputes were brought by husbands suing with and in right of their wives. Although married female complainants in South Carolina (and England) could sue without their husbands -- which was not permitted at common law -- most did not do so.[123] Rather, husbands and wives sued together in Chancery to recover female inheritance in the form of slaves. South Carolina's first equity case, in fact, assumed this procedural posture. In 1677, Margaret Yeamans and her spouse asked the Grand Council, sitting as an equity court, to enjoin her deceased husband's heir from transporting fourteen slaves out of the province. Yeamans and her new husband wanted "her thirds," her right to her first husband's property, and they sought relief in equity because a common law court could not grant her an injunction.[124]

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[123] Erickson has observed, even though women might sue separately from their husbands in Chancery, in contrast to common law courts, "it was clearly prudent to do so in Chancery too, although it was not mandatory." Erickson, *Women and Property in Early Modern England*, 115.

[124] Alexander S. Salley, Jr., ed. *Journal of the Grand Council of South Carolina*, 2 vols. (Columbia: Historical Commission of South Carolina, 1907), 1:81.

Yeamans's case was a harbinger of things to come, and throughout the colonial period, husbands and wives sued together to claim a wife's enslaved property.[125] George Bassett, for example, sued with his wife Mehatabel to demand slaves she had inherited from her deceased first husband. These slaves had been seized by the estate's executors, who gave "notice in Writing at all the public places" that they intended to sell the property, presumably to pay the estate's debts.[126] Male litigants like Bassett routinely claimed slaves "in right of" their wives, asserting that through intermarriage with an heiress widow, they acquired title to her property. Likewise, husbands also joined with their wives in Chancery to collect a wife's inheritance from her father. As John Crowley has noted, daughters in South Carolina typically inherited personal property, including slaves, equally with their brothers. If a father did not act to shield this property -- either by inserting proper limiting language in a will or by creating a separate estate through a marriage settlement -- when a daughter married her husband acquired a right to her slaves. In some instances, this was desirable from a father's perspective. Indeed, fathers in South Carolina specifically provided for their daughters in order to encourage eligible suitors, and single male colonists in South Carolina "unabashedly pursued women for their inheritances."[127] Through Chancery litigation, husbands sought to make good on a father's promise to provide for his daughter in his will, and they used the Court to ensure that a wife's inheritance was managed properly. For example, Thomas and Ann Everleigh asked the Chancery Court to intervene to protect Ann's inheritance, which they complained was being grossly mismanaged by her uncle. Although the "Plantations and Negroes belonging to the

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[125] Anzilotti, *In the Affairs of the World*, 143.

[126] *George Bassett on behalf of Mehatabel, his wife, late widow of James Gilbertson, and of Anne Gilberston, age 5 years*, January 1722, Chancery Case Papers, 1700-1791, Court of Chancery Bundle 1721-1735 Nos. 1-13, No. 2, Oversize; S142001, SCDAH.

[127] Edelson, "Reproducing Plantation Society," 133.

Estate" were of "considerable" value, they argued, the uncle seldom could clear more than a two or three percent profit per year "owing to the Lands being unimproved or other Causes of Mismanagement." Thomas and Ann had "often applied" to her uncle "in a friendly Manner," asking him to sell the "Slaves belonging to the Estate" and to put "the Monies to Interest," but to no avail.[128]

That the Everleighs brought their case against an executor is not surprising. Indeed, husband-and-wife complainants in Chancery frequently alleged that executors and administrators mismanaged estates or refused to distribute assets. In South Carolina as in England, executors and estate administrators (who were appointed by the Court of Ordinary when a decedent died without a will) were endowed with significant power to manage estates, to pay creditors, and to make distributions to heirs. Appointing an executor was "the most important decision a testator made," and acting as an executor required a unique "combination of business and personal honor." Executing or administrating estates also could prove lucrative, and some colonists earned a livelihood from managing decedents' property.[129] This important role was not limited to male colonists, however. Indeed, in South Carolina widows were named as executrices "in a majority of estate cases," and many also served as administratrices.[130] Acting in this capacity gave them significant power over estates, including enslaved people. But it also brought them into conflict with their own children. Reading colonists' complaints about female estate managers reveals the extent to which widows could upset settled expectations about inheritance by refusing to deliver enslaved people to a decedent's heirs. Although women theoretically were meant to possess and transfer property intact to the next generation, in practice some women

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[128] *Thomas Eveleigh & Others v. Thomas Farr, Executor of James Simmons*, Decree filed 1777, Chancery Case Papers, 1700-1791, Court of Chancery Bundle 1770-1779, Nos. 1-16, No. 10, S142001, SCDAH.

[129] Crowley, "The Importance of Kinship," 568.

[130] Edelson, "Reproducing Plantation Society," 132.

used their economic control over inherited property to continue to exert one household's influence over the next generation.

In Chancery, heirs and heiresses complained that widows refused to distribute assets, and particularly enslaved people. Indeed, once in possession of valuable estate property, some widows proved reluctant to part with it, as Benjamin Schenckingh discovered. Although his father died possessed of a "very considerable personall Estate," including livestock and slaves, his mother convinced her children to "forbear giveing her any Trouble" about their inheritance because "she beleived she had butt a Little time to Live." She promised instead to provide for her children in her will, but much to Schenckingh's consternation, failed to make the expected bequests.[131] Abraham Saunders went so far as to accuse his sister-in-law, Mary Saunders, of forging a will "whereby she pretend[ed]" his deceased brother gave her "all his Estate both Real & Personal" and made her his executrix. Acting under "the Colour of the said Will" she had "taken & detained" twelve slaves, "their Issue & increase as Part of the Personal Estate."[132] Similarly, in 1719, George and Mary Flood sued Mary's stepmother, the administratrix of her father's estate, for threatening to "sell at Public Vendue" Mary's inheritance, including "Negroes Household Stuff Plantation Tool and Implements."[133] Whether widows technically had a right to enslaved property or not, mere possession put them in a position of significant strength vis-à-vis a decedent's heirs. Indeed, these women could put slaves to work on plantations or sell them

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[131] *Benjamin Schenckingh et al v. Job Howes and Hugh Grange, Executors of Elizabeth Schenckingh*, 28 December 1704, Chancery Case Papers, 1700-1791, Court of Chancery Bundle 1700-1716 Nos. 1-17, No. 4, Oversize; S142001, SCDAH.

[132] *James Stewart & Mary, his wife v. Abraham Saunders,* Decree filed 2 August 1731, Chancery Case Papers, 1700-1791, Court of Chancery Bundle 1721-1735 Nos. 1-13, No. 10, Oversize, S142001, SCDAH.

[133] *George and Mary Flood v. Johanna Baker, Administratrix of Thomas Baker*, 23 July 1719, Chancery Case Papers, 1700-1791, Court of Chancery Bundle 1717-1720, No. 14, S142001, SCDAH.

knowing that, short of a time-consuming and expensive Chancery suit, heirs had few legal options for reclaiming slaves.

Chancery pleadings, which allowed colonists to complain at length about the behavior of widows, reveal the extent to which female control of property had the potential to disrupt settled expectations about the descent of land and slaves. Both male and female complainants reacted swiftly and severely when faced with recalcitrant widows, drawing upon time-worn stereotypes to depict these women as connivers, tempters, and conspirators. Complaints about one widow reached hyperbolic proportions in 1767 litigation over the estate of Royal Spry. Spry was a wealthy colonist who died "possessed of a very considerable personal Estate consisting of Negroes and other Slaves Horses Cattle Household Goods Plate and other Effects." He bequeathed his property to his son, Joseph, but if Joseph died without heirs, the property was to descend to Martha Ferguson. At the time of his father's death, Joseph was a "Minor very imprudent and easily imposed on," and a ripe target for one Catherine Tucker. Joseph was "drawn in and deluded without the Consent or approbation of his Mother . . . to intermarry" with Catherine, who not only was a "Woman older than" Joseph but also was "without any Fortune whatsoever." What Catherine lacked in material wealth, however, she apparently made up for in "indigent and greedy Relations" who "surrounded" Joseph and drove him away from his family. Bereft of relatives to guide him, Joseph "was led to a Practice of Gameing Drinking Folly and Disperation" by Catherine, who sought to seize his sizeable "personal Estate." Indeed, while Joseph was "greatly impaired" he "was wrought upon to make a Will" that left all of his property to Catherine, and that also named her his executrix. Joseph finally succumbed to his debauchery, and Martha Ferguson, suing with her husband, tried to claim Joseph's personal estate. They complained that even though they were entitled to the property under Royal Spry's will,

Catherine had "prevented and interrupted" them from "taking Possession of the said Slaves." Her actions, they argued, were "contrary to Equity and Good Conscience," and tended to "injure and defraud" the Fergusons.[134]

If complainants in Chancery found it difficult to dislodge slaves from widows like Catherine Tucker, they discovered that forcing a distribution was even more difficult when widows remarried. When heiresses were widows, the extent to which new husbands could make a colorable claim to slaves depended entirely upon whether the decedent died with or without a will. In South Carolina, when a husband died intestate, his widow received one third of his estate, with a life interest in the real property and outright ownership of the personal property, including slaves. This meant that if the widow of an intestate remarried, under the common law doctrine of coverture her new husband gained title to her personal property. Testates could alter these dispositions, and indeed, many male colonists chose to write wills in order to circumvent intestacy rules that allowed slaves to pass outside the family when a widow remarried. As Chancery suits against widows and their new husbands show, however, it was difficult in practice to prevent second husbands from asserting claims to a widow's slaves, particularly when she joined him in a suit.

Colonists frequently brought Chancery claims against widows and their new husbands, claiming that they refused to make a distribution of personal property, including slaves. For example, Abraham Saunders alleged that his brother's widow and her new husband had "detained in ther Possession" twelve "Slaves their Issue & increase" and that her second husband now "use[d] and employ[ed]" the slaves "in Pretence of the Right of his s[ai]d Wife." Saunders asked the court to issue a Decree directing the couple to deliver "ye s[ai]d twelve Slaves with

[134] *Thomas Ferguson and Martha His Wife v. Catherine Spry and Joseph Fabian, Administrator CTA of Royal Spry, Deceased,* Filed October 12, 1767, Chancery Case Papers, 1700-1791, Court of Chancery Bundle 1763-1766, Nos. 1-12, No. 12, S142001, SCDAH.

their Issue & Increase," and he moreover wanted his sister-in-law to "account with & pay" to him "all the Profits which have been made of the s[ai]d Slaves."[135] When a widow died, it could be particularly difficult to regain control over assets if a second husband remained in possession of the estate, as John Cantey learned. He sought relief in Chancery because his stepfather had secreted away his mother's estate, including "all the Household Goods plantation Tools and Implements and Even some of your petitioners Wearing apparel." More significantly, he had "Carr[ied] away the Slaves" that belonged to his deceased father's estate.[136] Although Cantey's stepfather did not technically have a legal right to the slaves, the fact that he actually possessed them made it difficult for Cantey to enforce his rights.

Chancery litigation could become particularly acrimonious when widows remarried, and disputes over slave inheritances led to bitter family quarrels. When Sarah Lewis's father died leaving a "considerable personal Estate consisting of Negro Slaves Cattle Household Goods etca.," her mother Mary remarried John Saseau, a planter who took it upon himself to manage the estate. Family relations became strained, however, when John and Mary refused to deliver Sarah's inheritance. As Sarah and her husband complained, "Since his Intermarriage with the said Mary," John "hath had the whole Management of the said real and personal Estate," and he had "made great profit and Gains as well by the work as the hireing out of the said Negroes." In fact, he had benefitted from the "considerable Increase of the said Negroes To the Number of four or five Children or Thereabouts." Rather than relinquishing them to Sarah, however, John and Mary maintained that Sarah's father had "dyed considerably in Debt," and that his personal

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[135] *James Stewart & Mary, his wife v. Abraham Saunders,* Decree filed 2 August 1731, Chancery Case Papers, 1700-1791, Court of Chancery Bundle 1721-1735 Nos. 1-13, No. 10, Oversize; S142001, SCDAH.

[136] *John Cantey, on behalf of the Children of Joseph Child, deceased,* Filed 8 March 1722, Chancery Case Papers, 1700-1791, Court of Chancery Bundle 1721-1735 Nos. 1-13, No. 3, Oversize, S142001, SCDAH.

estate had been used to discharge these debts as well as to clothe and educate his children. Taking full advantage of Chancery bill procedure to hurl invectives at her mother and stepfather, Sarah and her husband suggested that John and Mary in fact spent a paltry sum in maintaining the children. Indeed, there "was very little difference or distinction made" between Sarah and her siblings and "the Negroes." They "were never Taught to Write Read . . . or any other School Work or Learning," and "wore nothing but Negroe Cloathing."[137] Not to be outdone, Mary and John replied that before Sarah was married, she "lived much better than plaintiff Evan now keeps her."[138]

Conclusion

In bitter and protracted Chancery suits, colonists like Sarah and Evan Lewis exposed the intimate power struggles over slaves that prompted them to seek relief in equity. Indeed, South Carolina colonists' "liberal" provisions for widows and daughters led directly to contentious disputes over enslaved people, disputes that were too complicated and too personal to be resolved at common law. Colonists called upon South Carolina's Chancery Court to resolve these disputes. There, pleadings that were highly individualized gave them space to describe in detail their specific complaints, to make it plain why they should inherit slaves. Drawing upon English legal traditions, they used the time-worn language of equity to frame their complaints. Like English litigants, they claimed to have lost records; they argued that "unknown" persons had colluded to defraud them; they insisted that the behavior of widows and stepfathers was

[137] *Evan and Sarah Lewis v. John and Mary Sauseau and Jonathan Milner,* Filed October 1716, Chancery Case Papers, 1700-1791, Court of Chancery Bundle 1700-1716 Nos. 1-17, No. 16, Oversize, S142001, SCDAH.

[138] Ibid.

"contrary" to equity and good conscience. But unlike English litigants, they deployed this discourse to claim human property.

Although few Chancery decrees survive, it seems clear that the Court did not hesitate to resolve colonists' familial conflicts at the expense of enslaved people, to reach equitable solutions that involved selling slaves or separating enslaved families. The Court ultimately satisfied litigants like Thomas and Ann Everleigh, for example, by ordering eighty-one slaves to be "publickly Sold" by the Chancery master.[139] In fact, South Carolina's Chancery Court provided legal consumers with precisely what they desired, which helped to make the jurisdiction consistently useful throughout the colonial period even as English Chancery business declined. In a colony where white colonists died frequently and slaves were increasingly valuable commodities, Chancery provided litigants with a meaningful alternative to common law, one that gave them the procedural flexibility to make claims to slaves that belonged to female heiresses.

Understanding the Court in this way lays bare the invidious consequences of jurisdictional diversity. It allows us to see that variegated legal landscapes did not always empower the disempowered; rather, jurisdictional complexity and competition created spaces for colonists to treat human beings as property in different venues. It multiplied colonists' options as they sought to manage enslaved people, constricting rather than expanding opportunities for slave agency. Indeed, in equity, colonists deployed but another language of English law, another discourse that allowed them to claim slaves in a highly individualized way. South Carolina colonists did not critically examine the morality of deploying an equitable discourse to claim people as property; in Chancery they merely saw useful procedures and remedies, albeit

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[139] *Thomas Eveleigh & Others v. Thomas Farr, Executor of James Simmons*, Decree filed 1777, Chancery Case Papers, 1700-1791; Court of Chancery Bundle 1770-1779, Nos. 1-16, No. 10, S142001, SCDAH.

expensive ones. The use of equitable language gave them access to those procedures, justifying Chancery jurisdiction and delivering them from the constraints of common law. Drawing upon a language of conscience and equity in connection with their claims to slaves did not lead colonists to interrogate slaveholding as a practice or generate cognitive dissonance over the ethics of human enslavement. Rather, pleas of fraud, unfairness, collusion, and injustice were mere jurisdictional triggers, devoid of independent ideological content.[140]

Just as the availability of alternative courts like Chancery negatively affected slaves, like those sold on behalf of the Everleighs, jurisdictional diversity in South Carolina failed to provide tangible benefits for female colonists. In fact, attending to Chancery litigation complicates narratives that assume non-common law jurisdictions provided opportunities for women to assert control over their own lives. Amy Louise Erickson, for example, has argued that ecclesiastical and chancery courts treated early modern English women more fairly than common law venues. Marylynn Salmon also has depicted the availability of chancery jurisdictions as a net positive for women, while Laura Edwards has argued that local law in the early republic offered women opportunities to obtain justice that were unavailable at common law.[141] In South Carolina, however, female Chancery litigants were not empowered by equity procedures that allowed wives to sue without their husbands. In fact, few women did so. Although it is possible that some female Chancery litigants acted in concert with their husbands, women were impleaded in South Carolina Chancery proceedings primarily to establish a husband's claim to female inheritance, not to allow women to obtain control over property in their own right. Far from a

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[140] This view supports and extends the work of scholars who have suggested that legal pluralism had invidious consequences in colonial contexts, providing practical and theoretical justifications for a variety of unfreedoms in the Atlantic World. Tomlins, *Freedom Bound*, 143, 188.

[141] Erickson, *Women and Property in Early Modern England*, 19; Salmon, *Women and the Law of Property in Early America*, 12; Laura F. Edwards, *The People and Their Peace: Legal Culture and the Transformation of Inequality in the Post-Revolutionary South* (Chapel Hill: University of North Carolina Press, 2009), 8.

proto-feminist institution, Chancery worked to ensure that testators' patriarchal dynastic ambitions were fulfilled, despite the fact that some women sought to retain power over the next generation by exercising control over slaves.

Most important, Chancery litigation in colonial South Carolina lays bare the complicated and interlaced customary arrangements that made plantation economies work, and the Court's institutional role in facilitating those arrangements. Indeed, Chancery was a useful venue because its procedures allowed judges to adjudicate the space between the customary and the explicitly legal when it came to owning slaves. Despite the commonplace assumption that the master-slave relationship was of primary importance in slave societies, the reality was more complex. Legal ownership and mastery were not synonymous, particularly in a place where the mobility and liquidity of slaves was highly valued. Slaves were routinely hired, raising important questions about who should be held financially accountable for their well-being. Plantation leases, conducted with a handshake, might leave room for determining who was entitled to benefit from the labor of particular slaves, and how much. Widows, though not technically the owners of slaves, could benefit from the actual possession of slaves even when they had no legal right to them. Chancery sanctioned this world of flexible mastery, in which legal ownership, customary use, and temporary command were all ways in which slaves could be put to work in the Lowcountry.

TABLE 4.1[142]

South Carolina Chancery Court Cases by Type, 1700-1780								
	Inheritance	**Business Disputes**	**Debt**	**Land Disputes**	**Marital Causes**	**Other**	**Unknown**	**Total**
1700-1730	17	8	10	7	0	4		**46**
1731-1760	17	5	6	0	2	1	1	**32**
1761-1780	25	6	6	8	0	1	3	**49**
Total:	**59**	**19**	**22**	**15**	**2**	**6**	**4**	**127**
Percentage of Total Cases:	**46.5%**	**15.0%**	**17.3%**	**11.8%**	**1.6%**	**4.7%**	**3.2%**	**100.0%**

[142] Chancery records from South Carolina survive in three forms: in entries in the Grand Council Journals; in miscellaneous manuscript case papers from 1700-1791; and in minute books (which summarize actions that the Court took on particular cases). The Littleton Griswold Fund of the American Historical Association underwrote the preparation of an edited volume of a portion of South Carolina's Court records. Although a useful resource, this edited volume does not accurately reproduce the extent of Chancery materials available. Rather, the edited volume contains only the Court's minute books from 1721-1736; 1737-1766; 1770-1774, as well as case papers from 1700-1720. This printed edition also includes a summary of cases from 1767-1770 based on a calendar prepared in 1933 for the South Carolina Bar Association. These papers were lost after the South Carolina courthouse was remodeled.

This chapter is based upon a reading of the entirety of the Court's manuscript case records from 1700 to 1780, which are original litigation materials rather than summaries or accounts of proceedings. The AHA edition includes these records from 1700 to 1720, but the South Carolina Department of Archives and History holds hundreds of manuscript case records that were omitted from the printed edition, and upon which I rely here. Most surviving case records include at least a bill; some also contain replications, masters' reports, interrogatories, and decrees. Few records are complete.

Because Chancery did not proceed by writ, categorizing the Court's business is difficult and necessarily unscientific. Categories, in fact, can overlap. For example, many inheritance disputes also concerned an estate's debts. Lease disputes also could be business disputes. In hard cases, I have assigned categories by identifying the legal question that seemed to be of the greatest import to the complainant. I arrived at the figures in the table below by counting discrete cases – duplicates have been omitted. In assessing the number of slave cases in Chancery, I erred on the side of undercounting. Indeed, I have only counted cases where slaves are specifically mentioned, and have not included broader claims to "personal estate," which likely included claims to slaves.

TABLE 4.2

South Carolina Chancery Court Cases Involving Slaves, 1700-1780		
		Percentage of Total Cases
1700-1730	22	17.3%
1731-1760	10	7.9%
1761-1780	20	15.8%
Total:	**52**	**40.9%**

TABLE 4.3

South Carolina Chancery Court Slave Cases By Type, 1700-1780			
		Percentage of Slave Cases	**Percentage of Total Cases**
Inheritance	34	65.4%	26.8%
Business Dispute	10	19.2%	7.9%
Debt	6	11.5%	4.7%
Leases	1	1.9%	0.8%
Other	1	1.9%	0.8%
Total:	**52**	**100.0%**	**40.9%**

TABLE 4.4

South Carolina Chancery Court Cases With Named Female Litigants, 1700-1780		
		Percentage of Total Cases
1700-1730	22	17.3%
1731-1760	19	15.0%
1761-1780	25	19.7%
Total	**66**	**52.0%**

TABLE 4.5

South Carolina Chancery Court Slave Cases With Named Female Litigants, 1700-1780		
		Percentage of Slave Cases
1700-1730	14	26.9%
1731-1760	7	13.5%
1761-1780	13	25.0%
Total	**34**	**65.4%**

Chapter 5
Slavery and War

In November 1781 the Board of Police, an administrative entity responsible for governing Charlestown during the British occupation of 1780-82, heard the petition of Nathaniel Cary, one of the king's "Liege Subjects." Cary, who had always been "well disposed for Government," complained to members of the Board that British troops had destroyed his property during the re-conquest of South Carolina. Indeed, he had "Suffered greatly" at the hands of the King's men, who demolished "twenty three Houses & three Gardens." Perhaps more importantly, American troops also had taken "his Slaves," who provided the labor Cary needed to make a living. Thus "reduced to Indigent Circumstances," Cary and his family had been "obliged to fly to Town" where they survived as best they could, enduring conditions far worse than those to which they had become accustomed. Cary hoped that the Board would remedy his situation, praying that members would provide a "place of Shelter to accommodate his distressed family" and "such further relief" as they in their "Wisdom" saw fit.[1]

It is unclear whether Cary was ever compensated for his losses, but his circumstances were not unusual. Throughout the American Revolution, soldiers and civilians stole, sold, and transported enslaved Africans, just as slaves themselves took advantage of wartime disruptions and British promises of freedom to run away from their masters. Indeed, as historians have recently begun to recognize, the Revolutionary War in the southeast triggered an unprecedented movement of enslaved people over land and sea as increasingly brutal warfare devastated the plantation economy. This mobility of slaves -- both forced and voluntary -- complicated an already difficult situation for British military commanders and civilian leaders, who debated

[1] Petition of Nathaniel Cary, 27 November 1781 [signed 21 May 1781], CO 5/520, 34v-35r, Records of the Board of Police (BOP), British Occupation of Charleston, May 1780-Oct. 1782, B800127, South Carolina Department of Archives and History, Columbia, South Carolina.

whether and how slaves should contribute to the war effort as people and as property. They balanced a desire to tap the strategic advantage of threatening a slave uprising against concerns about the moral and practical consequences of destabilizing the institution on which the Lowcountry's wealth and order rested.[2] The stakes of this balancing act were high: slaves were useful to the British military as laborers, but many enslaved people expected that their service would be rewarded with freedom. At the same time, slaves were subject to the property claims of loyalists, whose tenuous allegiance to the Crown officials sought to maintain.

Most scholars, following a tendency in Revolutionary War historiography to depict Britain's wartime leaders as inept, have suggested that British military and civilian officials ultimately never answered the strategic, logistical, and moral question of what to do with slaves in the southeast.[3] For Sylvia Frey, the British failed to balance their need to maintain a functioning plantation economy with the moral imperatives of honoring promises of freedom made to enslaved people. Their inability to formulate a coherent plan with regard to the treatment of slaves had serious consequences for British war efforts, they argue; indeed, it "fatally weakened" Britain's southern strategy.[4] Jim Piecuch, too, has characterized British slave policy in the southern campaigns as "ambiguous," and like Frey has argued that this ambiguity

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[2] Studies of the role of slaves in the American Revolution include Benjamin Quarles, *The Negro in the American Revolution* (Chapel Hill: University of North Carolina Press, 1996); Alan Taylor, *The Internal Enemy: Slavery and War in Virginia, 1772-1832* (New York: Norton, 2013); Jim Piecuch, *Three Peoples, One King: Loyalists, Indians, and Slaves in the American Revolutionary South, 1775-1782* (Columbia: University of South Carolina Press, 2013); Woody Holton, *Forced Founders: Indians, Debtors, Slaves, & the Making of the American Revolution in Virginia* (Chapel Hill: University of North Carolina Press, 1999); Silvia R. Frey, *Water From the Rock: Black Resistance in a Revolutionary Age* (Princeton, 1991); Robert Olwell, "'Domestick Enemies': Slavery and Political Independence in South Carolina, May 1775-March 1776," *The Journal of Southern History* 55 (1989): 21-48; Bobby G. Moss and Michael C. Scoggins, *African-American Loyalists in the Southern Campaign of the American Revolution* (Blacksburg, SC: Scotia Hibernia Press, 2005).

[3] Andrew O'Shaughnessy, *The Men Who Lost America: British Leadership, the American Revolution, and the Fall of the Empire* (New Haven: Yale University Press, 2013), 6-7.

[4] Frey, *Water From the Rock*, 141.

led to British defeat as officials failed to tap the military potential of enslaved people.[5] At the same time, scholars have favorably contrasted British commanders' treatment of slaves with that of American civilian and military leaders. Although historians acknowledge that few Britons "were prepared to debate" emancipation in 1776 and that offers of freedom to slaves were never meant "to overthrow the system," they also remark positively on the fact that the British were willing to free some slaves, and that individual soldiers and administrators began questioning slavery as an institution as a result of their first-hand experience with slaves during the war. British policy may have been "ambiguous," but it was still superior to that of "southern Whigs," who "stubbornly clung to their belief that blacks were nothing more than property and deserved to be treated as such."[6] Historians of slavery and the American Revolution, then, have focused on the instability of slavery during a war for liberty, especially as a way of taking stock of the moral failings of the slaveowners' provisional government and the British imperial state in coming to terms with the threat slavery posed to public order. What this historiography fails to consider is that revolutionaries and imperial officials alike understood the challenges of slavery in wartime first and foremost as practical, rather than moral, problems, and that their legal solutions to these problems supported rather than challenged slavery.

In this chapter, I examine the practical, legal solutions that British administrators and soldiers in occupied South Carolina developed to manage slaves, and I follow one administrator, Robert McCulloh, as he profited from slave ownership during the occupation. Watching the day-to-day administration of the colony reveals less tension and ambiguity than we might expect when it came to managing slaves. Certainly the question of how to treat enslaved people, and particularly slaves that had been promised freedom in exchange for military service, was a

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[5] Piecuch, *Three Peoples, One King*, 270.

[6] *Ibid.*

difficult one for British military and civilian officials. Indeed, both Frey and Piecuch are right to suggest that at the level of high policy, this question was never answered definitively. At the local level, however, policy priorities appear more consistent. For example, both civilian and military officers in occupied South Carolina made a meaningful distinction between "public" and "private" slaves, which allowed them to determine when slaves should be returned to loyal colonists and when they should be freed. They also prioritized restricting the movement of slaves, seeking to limit the number of slaves who sought refuge with the British army, while preventing the (forced and unforced) clandestine departure of enslaved people to the West Indies and other places in the British Empire. These objectives had practical limitations. Loyalists routinely stole slaves or smuggled them out of Charlestown harbor; slaves also "stole" themselves by running away; and by the end of the conflict agreements with American leaders narrowed the options of British officials. Nonetheless, military and civilian authorities largely agreed on these policy objectives, even if fully implementing them proved impossible.

At the same time, analyzing the day-to-day practices of administering South Carolina during the British occupation reveals that officials conformed their legal practice as much as possible to colonial precedents. Their legal solutions to the problem of mobile slave populations were inherently conservative ones that respected rather than challenged colonists' expectations about the administration of slave law. Although the military occupation of Charlestown dramatically altered the colony's legal landscape – the courts were closed and the Commons House of Assembly did not meet – customary slave law persisted. This persistence is not surprising given the fact that many administrators had previously served in South Carolina, often as judges or lawyers. Familiar with the colony's laws and its people, they replicated lowcountry legal traditions, drawing upon the substance and procedure of a displaced legal system to govern

the colony during wartime. Indeed, this is a story of continuity more than change, one that recognizes the disruptive power of a bloody and violent conflict, but also the compelling pull of legal custom. Britain's southern military campaigns may have set unprecedented numbers of people in motion, but British soldiers and administrators wielded old laws as they sought to return them to their proper places.

These wartime administrators betrayed little concern about the moral implications of recognizing property rights in people. Although some individual Britons expressed qualms about slave holding as a practice (and particularly the cruel treatment of slaves by American slaveholders) these qualms did not prevent them from brutally repressing slave rebellions, personally profiting from the work of enslaved people, and using slaves to perform hard labor in support of Britain's war effort. In plantation America, slavery remained a thriving, economically viable institution that benefitted not only the oldest South Carolina planting families, but also the British soldiers and administrators who occupied Charlestown and its immediate hinterland. These newcomers to South Carolina quickly adopted an economic calculus that required the commodification of human beings in pursuit of profit. They learned to buy, sell, and argue over slaves as they sought to supplement their incomes in an economy organized around slave labor. In fact, when we look at daily practice, we can see that their treatment of slaves differed little from that of American colonists in rebellion.

Because American colonists and British administrators shared a practical worldview that acknowledged slaves as property, the administration of law during the British occupation of South Carolina reinforced rather than challenged slavery.[7] Individuals may have been willing to grant some slaves freedom, but during wartime slavery's laws operated according to a

[7] This position conforms to that of Davis, who argued that despite war-time disruptions, the "war brought no major weakening of the slave system, except in the North." David Brion Davis, *The Problem of Slavery in the Age of Revolution, 1770-1823* (Oxford: Oxford University Press, 1999), 79.

conservative logic, regardless of moral sensibility. This was in part because the British were not interested or willing to disrupt the principles and precedents that these laws established: they had been proven effective in suppressing rebellion, policing mobile slave populations, and maximizing the value of enslaved people. As a practical matter, displacing a workable colonial system made little sense. At the same time, respecting local customs and laws helped the British to win and keep the support of loyalist slaveholders. American colonists in the run-up to the American Revolution had equated British tyranny with the displacement of local government and local justice. By respecting and enforcing local slave laws, British administrators appeased these fears and appealed to slave owning colonists whose military support they both expected and desired.

In this chapter, I move from an examination of legal practice in occupied Charlestown to a discussion of how one British administrator adapted to life in a slave society. In part one, I provide an institutional overview of the Charlestown Board of Police as well as an analysis of its practice. Supplanting South Carolina's courts, grand juries, and legislature, the Board of Police functioned as an administrative entity and as a judicial tribunal, and was the only operating court during the occupation of South Carolina (with the exception of the Court of Ordinary, which probated wills, and courts martial, which tried cases involving military personnel). Although the Board represented a distinct break with institutions of colonial government, it nonetheless drew extensively upon colonial precedents as members resolved cases involving slaves and sought to regulate slave life in Charlestown.

As they responded to British promises of protection for slaves who fled behind British lines, more enslaved people fled to Charlestown than the army could usefully employ. In Part 2, I examine how the Board, working in conjunction with military authorities, balanced the need to

return these slaves to their owners with promises of freedom made to slaves in military service. Whether an enslaved person would be emancipated, depended not upon the slave's military service, but upon a master's loyal status. Once again, the fate of the enslaved hinged far less on who they were as people and what they did, and far more on how white subjects of the King related to one another in the eyes of the law. Whereas slaves belonging to loyal colonists were "private" property and must be returned, those belonging to rebels were "public" slaves, who, after serving in the military or on public works projects, would be freed. In Part 3, I analyze how these authorities drew upon colonial statutes to prevent the clandestine removal of slaves from South Carolina by land and sea as military and civilian authorities sought to police the ingress of slaves into Charlestown. As colonists exited Charlestown with stolen or mortgaged slaves, and as slaves stowed away on ships in the harbor, authorities again found colonial precedents useful in regulating the outward flow of enslaved people. Finally, in the last section of this chapter, I follow Robert McCulloh, Deputy Superintendant of the Port of Charlestown, as he worked to improve his fortunes through slave ownership. Although war disrupted life on the confiscated plantations that McCulloh held in trust, it also presented opportunities for profit. Like countless colonists before him, McCulloh learned to participate fully in South Carolina's plantation economy.

Policing Slaves

After enduring a grueling three-month siege, Continental General Benjamin Lincoln formally surrendered Charlestown on May 12, 1780 to British General Sir Henry Clinton. The American defeat at Charlestown was the "largest loss sustained by the Continental Army during

the Revolutionary War" and gave the British possession of the most populous port town south of Philadelphia, along with a significant number of vessels, naval stores, gunpowder, and ordnance.[8] The terms of surrender foreshadowed the bitter and bloody conduct that would come to characterize the southern campaigns of the American Revolution. Still smarting from the Continental Congress's failure to honor the surrender terms granted to General John Burgoyne after the battle of Saratoga, Clinton denied Lincoln and his men the full honors of war, which would have enabled them to "surrender with their flags flying and drums beating as an acknowledgement of their honorable resistance."[9] Instead, the 2,571 captured Continental troops were "confined as prisoners of war" to hulks in the harbor, while officers were housed at Haddrell's Point, located on the mainland across from Sullivan's Island. Civilians in the town and militia members were deemed prisoners on parole and were permitted to return home.[10] Although Clinton initially offered a pardon to South Carolinians who returned their allegiance to the Crown (with the exception of those who were "pol[l]uted with [spilling] the blood of their fellow-citizens"), he quickly reversed course, revoking paroles, requiring residents to take oaths of loyalty, and commanding all colonists to take up arms in the King's service.[11] Essentially, this policy was "designed to force the hand of anyone who had not taken advantage of his original offer of a pardon," and it effectively "made neutrality impossible."[12]

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[8] O'Shaughnessy, *The Men Who Lost America*, 230.

[9] *Ibid.*, 230-31.

[10] George Smith McCowen, *The British Occupation of Charleston, 1780-1782* (Columbia: University of South Carolina Press, 1972), 9.

[11] Proclamation, 1 June 1780, *Royal South Carolina Gazette*, Thursday, 8 June 1780, P900046, SCDAH.

[12] O'Shaughnessy, *The Men Who Lost America*, 231. Ultimately, however, this policy backfired, leading many South Carolinians who had hoped to remain neutral to re-join the Continental army when General Horatio Gates marched to Camden in August 1780. Robert M. Weir, *Colonial South Carolina: A History* (Columbia: University of South Carolina Press, 1997), 335.

The capitulation of Charlestown marked the beginning of military rule in South Carolina. Indeed, despite the fact that Clinton initially promised to "permit the Restoration of Civil Government" and to return citizens to "the full possession of that Liberty in their Persons and Property, which they had before experienced," civil government was never restored in British-occupied South Carolina.[13] The decision to retain military rule was a direct response to earlier experiences with the re-institution of civil government in Georgia. There, Clinton had reluctantly agreed to allow a governor and royal assembly to govern the colony, but these civilians repeatedly clashed with military officers over war goals and policy issues.[14] Clinton was determined not to repeat this mistake, and although James Simpson, South Carolina's former attorney general, urged him to restore civil government in order to "prevent that Anarchy and Confusion which will, otherwise, infallibly ensue," Clinton never returned control of the colony to a civilian establishment.[15] Instead, while South Carolina remained under British control, the colony was divided into military districts and Charlestown was "placed under the jurisdiction of a military commandant," who carried out policies developed by Clinton and his successors, Lord Charles Cornwallis and Sir Guy Carleton.[16]

For most of the British occupation of Charlestown, the Commandant was Nisbet Balfour. Later criticized by South Carolina patriot and historian David Ramsay as a military autocrat who displayed "all the frivolous self-importance, and all the disgusting insolence, which are natural to

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[13] Proclamation, May 1780, *RSCG*, Thursday, 8 June 1780.

[14] Frederick Bernays Wiener, *Civilians Under Military Justice: The British Practice Since 1689 Especially in North America* (Chicago: University of Chicago Press, 1967), 151. Whereas the newly-restored Governor wanted to complete the military conquest of Georgia immediately, Major General Augustin Prevost and Brigadier General Alured Clarke, ranking officers in the colony, were "painfully aware of other and more pressing military requirements." According to Wiener, civil and military officials also quarreled over "quarters for the courts" and the "service of writs upon military officers."

[15] J. Simpson to [Cornwallis], undated, The National Archives, Kew, United Kingdom, PRO 30/11/4, Cornwallis Papers, 437.

[16] McCowen, *The British Occupation of Charleston*, 13.

little minds when puffed up by sudden elevation," Balfour delegated the day-to-day government of Charlestown to a Board of Police, which Cornwallis had established at Clinton's suggestion.[17] Modeled directly after Boards of Police that had been formed to manage other British-occupied cities, including New York, Savannah, and Philadelphia, the Board was headed by an Intendant of Police who was appointed by the Commandant, and also included local representatives from the merchant, planting, and military "interests."[18] Board intendants typically had "extensive legal and administrative experience," and most had served in South Carolina prior to the Revolutionary War. For example, James Simpson, the Board's first Intendant, was a former attorney general of South Carolina who made himself useful to American Secretary George Germain by providing intelligence about the strength of loyalism in the southern colonies. Sir Egerton Leigh, who later served as Intendant, also was familiar with the colony and its legal system, having acted as a colonial Vice Admiralty judge, attorney general, and royal council member. William Bull, who succeeded Simpson in February 1781, was a former lieutenant governor of the colony, and Thomas Knox Gordon had served as its chief justice.[19]

Throughout the British occupation, these men directed the Board as it acted in place of South Carolina's now-defunct courts, grand juries, and Commons House of Assembly. Indeed, a review of the Board's records reveals an astonishingly broad purview for action that was sometimes specifically delegated, and other times merely assumed by members as they searched for solutions to tangled problems of governance. The Board acted as both an administrative authority and a court, concerning itself with town governance as well as the adjudication of civil

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[17] *Ibid.*; David Ramsay, *History of South Carolina* (Newberry, S.C.: Duffie, 1858), 253.

[18] McCowen, *The British Occupation of Charleston*, 14.

[19] *Ibid.*, 16-18.

disputes between civilians.[20] In its administrative capacity, the Board was charged with a wide variety of tasks, including overseeing poor relief, maintaining proper weights and measures, and preventing price gouging, particularly by bread, flour, and fish sellers. In fact, the Board spent a great deal of its time regulating Charlestown's vendors, partly in order to prevent food shortages, but also to ensure that the occupying army would be regularly and cheaply victualed.

Regulating markets was one of the Board's significant administrative functions, but it also was responsible for the day-to-day management of slaves in Charlestown and on surrounding plantations. Although colonial Charlestown always had a large black presence, the number of enslaved and free Africans in the town swelled with the arrival of the British army and navy. Slaves themselves were in large part responsible for this demographic transformation. Taking advantage of war-time disruptions and British promises of freedom, they ran away in unprecedented numbers, seeking refuge behind British lines. This included slaves like Titus, a native "of Africa," who escaped to Charlestown "about a week before the town surrendered." Although his master thought he might "pass for a fool," Titus displayed he was far from foolish when he slipped away during the chaotic siege and took refuge in town.[21]

Slaves like Titus may have abandoned plantations in direct response to General Clinton's 1779 "Philipsburgh" proclamation. Issued from his headquarters in Philipsburgh, New York, the proclamation threatened that all slaves found in the service of rebel masters would be sold for the benefit of their captors, but also gave slaves who deserted the rebels "full security to follow within [British] Lines." As Frey has noted, this proclamation "did not directly alter the legal status of slaves." It did, however, "raise the specter of emancipation," and upon Clinton's

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[20] Inhabitants of Charlestown could be tried by courts martial for crimes. See Wiener, *Civilians Under Military Justice*, 58.

[21] *RSCG*, 20 June 1780.

landing in South Carolina "thousands" of enslaved people interpreted the proclamation as an offer of freedom.[22] They absconded to the British much to the chagrin of colonists like John Harleston, who complained that "56 of the primest" of his "Negroes Followed the Army some to Charlestown," and wondered whether he should "ever gett them again."[23] Daniel McCormick provided an answer to this often-repeated question: slave owners "might as well enquire for last years snow, as the Runaway Negroes."[24]

Many of the slaves who fled to Charlestown sought service with the British military, acting as "teamsters, wagon drives, guides, scouts, spies, and pioneers."[25] Although most worked as physical laborers, some enslaved people served in important posts. Indeed, a *South Carolina Royal Gazette* article from 1781 listed the number of "NEGROES in the ENGINEER DEPARTMENT that joined the Army since the landing under SIR HENRY CLINTON" as 214 adult slaves and four children.[26] Newspaper reports also documented that slaves were employed in the Commissary General's Department, the Quarter-Master General's Department, the Barrack Master's Department, the Commissary of Prisoner's Department, the Royal Artillery Department (as artificers, drivers, and laborers), and the General Hospital in Charlestown (as nurses and laborers).[27] Enslaved people served as messengers and couriers, including one man described by Colonel Alexander Innes as an "Ethiopian Refugee" who had fled from his owner after "making Love Successfully to a White Girl."[28] Finally, British officers welcomed slaves

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[22] Frey, *Water From the Rock*, 113-14, 118.

[23] John Harleston to Robert McCulloh, 5 June 1780, TNA, C 106/89.

[24] Daniel McCormick to Robert McCulloh, 11 December 1780, TNA, C 106/89.

[25] Bobby G. Moss and Michael C. Scoggins, *African-American Loyalists in the Southern Campaign of the American Revolution* (Blacksburg, SC: Scotia Hibernia Press, 2005), vi.

[26] *Royal Gazette*, 7 March – 10 March 1781, P900047, SCDAH.

[27] *Ibid.*, 10 March – 14 March 1781.

[28] A. Innes to Robert McCulloh, 22 May 1780, TNA, C 106/89 (emphasis in original).

familiar with Charlestown's waterways service, and sought out the skills of pilots and "Boat Negroes because they know this country."[29]

Runaway slaves employed by military departments in Charlestown were joined by countless others who were sent to town by loyalist slave owners as they sought to shield their valuable human property from rebel capture. Between the capture of Charlestown in 1780 and 1781, the war in South Carolina was characterized by increasingly violent partisan conflict in the backcountry as the Continental Army and local militia units pushed British troops back into the vicinity of Charlestown.[30] These partisan bands, acting on their own authority or with the support of the revolutionary government-in-exile, took slaves from loyalists' plantations and put them to work as noncombatants with General Nathaniel Greene's army, or distributed slaves to new recruits as an enlistment bounty. To prevent their slaves from being carried away, loyalist owners sent them to Charlestown. In 1780, for example, James Clitherall asked his overseer to send his slaves to town by the "first safe opportunity by water."[31] Robert McCulloh's plantation manager, fearing for "the worst," likewise ordered all of his "Negros and those of Doctor Clitherals to town" where they would "endeavour to find work for them."[32]

British soldiers, too, brought slaves into Charlestown, claiming them as spoils of war.[33] Indeed "[b]y custom and by law, slaves were regarded as property, subject, therefore, to the practices governing spoils," and military commanders had considerable discretion to distribute

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[29] A.I. [Alexander Innes] to Robert McCulloh, 19 May 1780, TNA, C 106/89.

[30] By September 1781, only Charlestown and its immediate environs remained in British control. Weir, *Colonial South Carolina*, 336.

[31] James Clitherall to Robert McCulloh, 15 July 1780, TNA, C 106/89.

[32] Crookshanks & Speirs to Robert McCulloh, 15 May 1782, TNA, C 106/89.

[33] Moss and Scoggins, *African-American Loyalists*, vi.

captured property, including slaves, to soldiers.[34] Although American forces in the southeast were notorious for stealing slaves and using them to "attract recruits and to pay officers and men," British soldiers also stole slaves and routinely received them as booty.[35] Plantations and slaves, in fact, were "plundered on both sides," as American and British troop alike took "Negroes and property."[36] This practice occasionally received official sanction from British high command. Prior to the Charlestown siege, General Clinton went so far as to make formal arrangements to distribute property taken from rebel plantations, appointing Lt. Col. James Moncrief and two other loyalist civilians to gather slaves and forage, and to disperse them among British troops as needed.[37] As a result, many British officers came to believe that they owned the slaves that they captured or received as booty, which created tensions between troops and colonists, who expected that their property rights in people would be honored under the British military government as they had been under the British colonial government.[38]

The Board was responsible for managing these slaves, who had been funneled into Charlestown by a staggering variety of means and for wide variety of reasons. In regulating slave life in town, members theoretically were to exercise broad police powers to develop solutions to daily problems of governance. Watching the Board at work, however, reveals that members closely adhered to colonial precedents. This was particularly true when it came to identifying and remedying nuisances. For example, the Board was preoccupied with preventing the congregation of slaves, and especially nocturnal gatherings that involved alcohol. Concerns

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[34] Frey, *Water From the Rock*, 91.

[35] *Ibid.*, 134.

[36] Bernard Hale to Earl Cornwallis, 6 November 1780, TNA, PRO 30/11/3, Cornwallis Papers.

[37] Piecuch, *Three Peoples, One King*, 216.

[38] General Alexander Leslie to Sir Guy Carleton, 18 October 1782, item 5924, Sir Guy Carleton Papers, B800120, SCDAH.

about the dangers posed by "disorderly Persons and negroes" gathering in punch houses closely tracked pre-Revolutionary complaints about the social habits of Charlestown's slaves and free Africans, who were characterized in 1772 as "idle, loose, disorderly, vagrant and run-away negroes" interested in little more than "loitering, gaming, drinking," and "thieving."[39]

The Board's desire to prevent such gatherings and to limit slaves' access to alcohol was directly linked to a more pressing concern that they shared with colonists of all political persuasions: preventing a slave insurrection. This possibility seemed increasingly likely given Charlestown's expanding slave population as well as the presence of large numbers of unsupervised slaves on abandoned outlying plantations. In theory, plantations and slaves belonging to rebellious colonists were assigned to the custody of the commissioner of sequestered estates, John Cruden, who put the slaves in his charge to work on abandoned plantations producing food for the British military.[40] Nonetheless, the difficulties of administering the sequestration system meant that many slaves remained largely unsupervised. Cruden himself feared that "numbers of Negroes" had been taken from sequestered estates into town and went "about uncontroulled, to the distress of the inhabitants, the detriment of the Government and in direction violation of orders that have been repeatedly issued to prevent such practices." Although he sought to institute a pass system and "empowered" a delegate to "hire out all such negroes as shall not be employed," Charlestown continued to teem with masterless enslaved men and women, much to the chagrin of military and civilian officials alike.[41]

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[39] 29 September 1780, CO 5/520 (1780-81), 17r, BOP, SCDAH; Letters of "The Stranger," *South-Carolina Gazette*, September 17 and September 24, 1772. The Board's concerns likewise differed little from those expressed by a grand jury in 1742, which complained about the "disorderly assembling and caballing of the Negroes in Charles-Town," especially "on the Sabbath Days" when it was more difficult to monitor their behavior. *SCG*, 8 November 1742.

[40] Frey, *Water From the Rock*, 125.

[41] *RG*, 22 December-26 December 1781.

Even slaves who remained subject to their masters' oversight seemed to pose a constant threat, as they took advantage of wartime disruptions of the plantation economy to run away or shirk work. Throughout the British occupation William White, a barely-literate overseer at Silk Hope plantation on the Savannah River, supplied his employer, Robert McCulloh, with countless missives lamenting the fact that his "Negers" refused to follow orders. They were "a g[ai]en out in the Woods," he complained, and refused to "Cum to town."[42] Indeed, he "Could not git the hands to Work For the Space of 2 Mont[h]s," and even then they refused to perform their "Custemmerey Dayes Works." As White explained to McCulloh, if he failed to "Com to Rectefi the negers" he would be forced to "Luck out For Besnes [business]" at the end of the year; his meager salary was not adequate compensation for the headaches he endured managing McCulloh's increasingly unruly slaves.[43]

Fielding complaints about rebellious slaves on sequestered estates and abandoned plantations, the Board acted swiftly and brutally to prevent insurrection. After receiving a report that slaves owned by absentee patriot Ralph Izard had manifested an "ill behaving and insurrectious Conduct . . . towards their Overseer," members asked the Commandant to send "a party of Soldiers" to the plantation "to inflict such Punishment upon the Principal offenders in the Insurrection as may be adequate to their Crimes." This show of force not only was meant to be retributive; the Board also believed that it was "most likely to prevent such Behavior in the future."[44] In repressing this potential slave uprising using military force, the Board mimicked the behavior of South Carolina colonists and pre-revolutionary legal institutions, which quickly responded to the threat of slave rebellion with violence. This included South Carolina's

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[42] William White to Robert McCulloh, 6 March 1782, TNA, C 106/89.

[43] William White to Robert McCulloh, 23 October 1780, TNA, C 106/87.

[44] 14 July 1780 and 18 July 1780, CO 5/519 (1780), 4r-5r, BOP, SCDAH.

revolutionary government, which the British invasion had displaced. After the effective collapse of British rule in 1775, the colony was run by a Provincial Congress, which in turn empowered a Council of Safety to act as executive.[45] The Council was preoccupied with anticipating and preventing a slave insurrection. Acting on rumors that the British sought to arm Indians and slaves in advance of an invasion, Council members stringently enforced slave laws that previously had been ignored.[46] They also reacted violently to rumors of a planned slave uprising that they suspected was led by Thomas Jeremiah, a free African American harbor pilot, by capturing, trying, and hanging Jeremiah on flimsy evidence.[47] And members of a committee tasked with defending the colony from invasion proposed removing slaves from coastal plantations to prevent them from uprising and collaborating with the British.[48] Indeed, South Carolina colonists and British officials were united in their concerns about the dangers inherent in a massive slave revolt, dangers that seemed all the more pressing given the growing numbers of slaves in town and on sequestered estates. They offered an extremely constricted path to freedom for some slaves in South Carolina, one that was built around the idea of special exceptions for individuals to general policies. However, when it came to enforcing order among slaves collectively, they were conceived of as a threatening "internal enemy," not as human beings or subjects of the Crown who might be entitled to protection or rights.[49]

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[45] In the spring of 1776, South Carolina adopted its first constitution, which was replaced by a state constitution in 1778. For an extensive discussion of these constitutions, see Scott Douglas Gerber, *A Distinct Judicial Power: The Origins of an Independent Judiciary, 1606-1787* (Oxford: Oxford University Press, 2011), 213 *ff*.

[46] Weir, *Colonial South Carolina*, 322.

[47] See J. William Harris, *The Hanging of Thomas Jeremiah: A Free Black Man's Encounter With Liberty* (New Haven: Yale University Press, 2009) and William R. Ryan, *The World of Thomas Jeremiah: Charles Town on the Eve of the American Revolution* (Oxford: Oxford University Press, 2012).

[48] Piecuch, *Three Peoples, One King*, 77.

[49] Taylor, *The Internal Enemy*, 23.

In addition to exercising police powers to prevent slave rebellions and to regulate the activities of Charlestown-based slaves, the Board also functioned as a clearinghouse for requests for slave labor. During the British occupation of Charlestown the Board exercised authority to impress and distribute slaves to labor on public works, a power once wielded by the Commons House of Assembly. For example, in order to execute their responsibility for maintaining roads and bridges in and around Charlestown, Board members routinely requisitioned slaves from local planters. When they received a complaint that fallen trees were preventing "the free Intercourse between Town and Country," the Board recommended that an order be issued to "Some proper person" to remove the obstructions from roads and bridges. This person would be empowered to "go to the nearest adjoining Plantations," and to "require" local planters "to send so many negroes to work upon the Road or to repair the Bridges as may be necessary."[50] Similarly, the Board routinely requisitioned slaves to keep the streets of Charlestown clean and free of refuse. In the spring of 1782 for example, the Board fielded a request from the Commissioners of Streets in Charlestown to provide the town scavenger (who was responsible for removing "Rubbish and dirt thrown into the Streets and vacant Lots") with "twenty Negroes for the Space of four or five days" to clean the town.[51] The Board also took on responsibility for "Cloathing the Negroes who are employ'd in cleaning & keeping the Streets &c in order" and "for paying an Overseer of the said Negroes his wages."[52]

The Board's power to impress slaves for road repair and rubbish removal extended to requisitioning slaves to construct and repair fortifications. Working in conjunction with different military departments, the Board supplied the army and navy with slaves that were employed to

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[50] 1 August 1780, CO 5/520 (1780-81), 5v-6r, BOP, SCDAH.

[51] 18 April 1782, CO 5/525 (1782), 4r-4v, BOP, SCDAH.

[52] 22 October 1781, CO 5/520 (1780-81), 36r, BOP, SCDAH.

complete a wide variety of military jobs, and particularly tasks requiring hard physical labor. For example, on November 7, 1780, the Board issued warrants directing the recipients to "make a Requisition from the Owners of the Slaves in your District (always having a due regard to their respective abilities and their attachment to His Majesty's Government) of so many Slaves as you shall judge they can, conveniently, and, in fairness and Equity, they ought to furnish." These slaves would work on fortifications "for one Month and no longer," and would be housed and fed by the army. Neither the Board nor the army, however, would provide oversight, and therefore the Board requested owners "to send down" "Overseers or other White Persons" with their slaves "to take the Charge and Care of them" and to "prevent any loss."[53] The Board also supplied slave labor to the navy, fielding requests for slaves to assist with emergency ship repairs. Indeed, when His Majesty's Ship *Sandwich* required emergency repairs, the Board ordered its agents to "immediately take possession" of the "Publick Warf, Stores, &ca. at Hobcaw, and also of three fourths of the Negroes lately employed there."[54] These slaves, some of whom were likely skilled in maritime trades, would labor for the navy until necessary repairs were completed.

In impressing slaves at the Hobcaw wharf and plantations near Charlestown, the Board was not engaged in an innovative practice. Rather, they built upon a long-established colonial custom of requisitioning slaves from local planters to labor on public works projects. Indeed, throughout the colonial period, the Commons House of Assembly empowered commissioners to impress local slaves to clear roads, build fortifications, and even serve in militias. Slave owners

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[53] 7 November 1780, CO 5/520 (1780-81), 21r-21v, BOP, SCDAH. The Board also could authorize the impressment of slaves from specific plantations, as was the case in 1780, when "one hundred able bodied Negroes were wanted for about a Fortnight to repair some of the Works and Lines about the Town." These slaves were to be provided from plantations belonging to Thomas Ferguson, William Skirving, Thomas Osborne, William Clay Snipes, Thomas Bee, John Matthews, Philip Smith, and Joseph Glover. 8 September 1780, CO 5/520 (1780-81), 11v, BOP, SCDAH.

[54] 8 September 1780, CO 5/520 (1780-81), 11r-11v, BOP, SCDAH.

were familiar with (although they frequently grumbled about) the requisitioning process.[55] For example, patriot Henry Laurens, like many other colonists, complained of this practice in 1765, seeking an "indulgence" from the Commissioners for High Roads in St. John Parish to "postpone the execution of it until" he had "got thro" his "first cutting of Indigo." Although Laurens's "inclination" was "at all times to be obedient to Laws," in this case "rigid compliance" would be "very distressing."[56]

The colonial governments' requisitioning of slaves to labor on public works, which Laurens and other colonists complied with even if they occasionally found it onerous, extended to work on fortifications. South Carolina's revolutionary government, in fact, provided a recent precedent for conscripting slaves to work as military non-combatants on labor-intensive fortification projects. For example, rumors of a British invasion in 1777 prompted the Council of Safety send slaves belonging to loyalists to fortify Charlestown. These slaves ultimately were put to work digging a channel connecting the Cooper and Ashley rivers.[57] Familiar with customary practice when it came to impressing slaves, Board members simply extended this practice as they sought solutions to the day-to-day problems of labor management that occupied a great deal of their time. Indeed, the everyday tasks of governing South Carolina were so bound up in the legal use of slave labor for various projects that even the disruption of invasion and occupation by a force that was willing to use manumission as a military tactic followed a path of least resistance. Because colonial slave law gave administrators the procedural mechanisms and precedents for mobilizing enslaved laborers, it continued to be of practical utility, and therefore a

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[55] "An Act for Raising and Enlisting Such Slaves as shall be thought serviceable to this Province in time of Alarms" (1704), *The Statutes at Large of South Carolina*, edited by Thomas Cooper and David J. McCord, 10 vols. (Columbia: A.S. Johnston, 1836-41), 7:347.

[56] Henry Laurens to James Cordes, Jr., 30 August 1765, *The Papers of Henry Laurens*, edited by Philip M. Hamer et al., 16 vols. (Columbia: University of South Carolina Press, 1968-2003), 4:670.

[57] Piecuch, *Three Peoples, One King*, 122.

means by which British administrators reinforced slavery as a working institution despite the political, military, and economic upheaval of the war.

The Board's decision to build upon rather than work against existing colonial precedents made the institution more responsive to the community's needs when it acted as an administrative body. In the Board's judicial capacity, it also sought to conform its practice to colonial precedents, although its procedures initially marked it as innovative. As a court, the Board was a hybrid tribunal, hearing a variety of disputes that would otherwise have been adjudicated in the Court of Common Pleas and the Court of Chancery, and it followed a unique blend of equity and common law procedures.[58] Like South Carolina's Chancery Court, the Board proceeded by petition rather than writ in order to streamline the resolution of claims, even when claims were brought as common law causes of action. Those who thought "themselves aggrieved by the nonperformance of any Bargain or Agreement," for example, were to petition the Intendant of Police "plainly and distinctly setting forth the Cause and Nature of their Complaint." The Clerk of the Board then would issue a summons in the Intendant's name bringing the defendant before for the tribunal. The Board likewise possessed enforcement mechanisms that made it similar to an equity court.[59] Nonetheless, the Board also adhered to common law procedure by hearing testimony *viva voce* rather than through written depositions and interrogatories, as would have been the case in an equity jurisdiction.[60]

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[58] The court of ordinary eventually was opened for "the proving of Wills, granting Licenses and Letters of Administration, and other Matters incident to that Jurisdiction." James Simpson to Sir Henry Clinton, 30 August 1780, Clinton Papers.

[59] In cases where creditors were "apprehensive" that a debtor might "abscond and leave the province without making satisfaction," the Board could issue a warrant "to hold such Person to Bail in the amount of the sum Sworn to, and as much more as the Intendant may think will answer the Costs of prosecuting the Suit." CO 5/519, 27 June 1780, 2v, BOP, SCDAH.

[60] CO 5/519, 27 June 1780, 2r, BOP, SCDAH. They also adhered to a fee schedule set by the colonial legislature, requiring litigants to pay to the Gaoler and Clerk of the Board "such Fees as they would have been liable to pay if

Although James Simpson, the Board's first Intendant, believed that South Carolinians "appeared to have a confidence" in the Board's "Justice," the reality seems to be more complex.[61] Indeed, the Board's odd combination of common law and equity procedures and the fact that judges were accountable to military authorities may have been off-putting to potential litigants, who complained that the Board's "mode of proceeding" was "too summary." Aware of this criticism, the Board eventually altered their procedures, providing more specific rules and a formal appeals process in order to make litigating before the Board "more consonant to the established Practice and Constitution of the Country."[62] The Board's use of arbitrators to find facts in most cases also proved unpopular and practically difficult. Although the Board persuaded to Commandant to allow them to exact penalties upon colonists who refused to serve as arbitrators, they eventually discarded arbitration in favor of a jury system that followed colonial precedents.[63] Ultimately, "the great number of Suits" litigated at the Board caused members to limit their caseload to litigation "of pressing and immediate necessity; such as where the Defendant" was "about to remove himself, or his property, out of the reach of process" or where there were allegations of fraud. They reserved the resolution of "all other Claims for a Season of Peace and Tranquillity" which would "admit of the full Establishment of a Civil Government."[64]

The Board's procedural volte-face represented an attempt to establish its legitimacy by adhering to the legal expectations of South Carolina colonists. Much of Britain's southern

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they had been litigated in Court of Justice, and as they are fixed by Acts of Assembly." June 1780, CO 5/519, 2v, BOP, SCDAH.

[61] James Simpson to General Sir Henry Clinton, 16 July 1780, Item 2915, Sir Guy Carleton Papers, B800120, SCDAH.

[62] 11 September 1780, CO 5/519, 29v-30v, BOP, SCDAH.

[63] 30 January 1782, CO5/523, 24r-24v, BOP, SCDAH; 30 January 1782, CO5/523, 34v-36v, BOP, SCDAH.

[64] 30 January 1782, CO5/523, 33v, BOP, SCDAH.

strategy depended upon mobilizing the support of slave owning loyalists and in winning the support of rebellious or neutral slave owners. These colonists feared and expected that British rule would mean the destruction of local institutions of government and a more centralized administration of justice. Indeed, in South Carolina as in other colonies, pre-Revolutionary political conflicts had centered on the question of whether the colony's constitution was derived from the Crown, or whether local practice and precedents were a source of constitutional authority. Arguing that their rights sprang from their English subjecthood, colonists also insisted that local custom and precedents – "what has prevailed from the Beginning of the Colony" – were "Part of the Constitution."[65] Although British administrators in South Carolina disagreed with this sentiment as political theory, in practice they conformed to the colonial view, aligning their institutions to suit colonists' expectations about how justice should be administered in the colony. In doing so, they hoped to put to rest colonists' fears about the encroachment of British tyranny.

Despite initial concerns about the Board's procedures, it became a useful venue for colonists who sought legal relief, particularly in debt disputes.[66] Many of these debt cases involved slaves.

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[65] *The Nature of Colony Constitutions, Two Pamphlets on the Wilkes Fund Controversy*, edited by Jack P. Greene (Columbia: University of South Carolina Press, 1970), 186.

[66] At first, the Board only heard disputes over agreements entered into after the capitulation of Charlestown, but it eventually was empowered to hear suits for debts incurred "prior to the breaking out of the present Rebellion, and to do therein what appertains to Law and Equity." June 27, 1780, CO 5/519, 2r, BOP, SCDAH; Order from Nisbet Balfour, 2 April 1781, CO 5/521, 47v-48r, BOP, SCDAH. Sir Henry Clinton disliked the extension of the Board's jurisdiction to include debts incurred prior to the conflict, finding that "the Powers of the Police have been extended beyond what they themselves say the Courts at Westminster or any other civil Jurisdiction under the British Government have a Right to Exercise," and moreover were not exercised by the New York Board of Police. Sir Henry Clinton to Lieut. Gen. Leslie, 17 March 1782, Item 4248, Sir Guy Carleton Papers, B800120, SCDAH. As Clinton explained to Lord George Germain, he had been "uniformly of Opinion that Military Establishments taking Cognizance or enforcing the Payment of Debts contracted prior to the Rebellion, or an improper Interference with the Real Property of Rebels lying within the British Lines must ultimately embarrass Government, injure the British Merchant, and be always immediately fatal to the Loyalists in America." [Clinton] draft letter to Lord George Germain, 18 March 1782, Item 4249, Sir Guy Carleton Papers, B800120, SCDAH.

In addition to debt and contract litigation, the Board also heard cases involving the billeting of military officers in Charlestown, and particularly disagreements over housing. Criminal cases, including frequent complaints about

Indeed, as we have seen in Chapter 2, slaves were an important form of collateral in plantation America, and colonists routinely leveraged the value of enslaved people to underwrite the expansion of plantations and businesses. For loyal South Carolinians, the Board provided a forum for attaching slaves that rebel debtors had risked as collateral at a time when many of these colonists were pressed to meet basic needs. As historians have begun to appreciate, the southern campaigns devastated South Carolina's plantation economy, and loyalist colonists suffered greatly due to the ravages of war. "Nothing but the Evidence of my Senses," James Simpson wrote, "would have convinced me, that one half of the distress I am a Witness to could have been produced in so short a Time, in so rich and flourishing a Country as Carolina was when I left it." Families "who four Years ago abounded in every convenience and Luxury of Life, are without Food to live on, Clothes to cover them, or the Means to purchase either."[67] By bringing a petition before the Board, these impoverished loyalist creditors could have the slaves of rebel debtors (many of whom had fled the province) seized by the Sheriff, appraised, and sold to pay outstanding debts. In 1781, for example, the Board awarded a creditor plaintiff possession of "three Negroes" who had been "adjudged the Property" of an "absent Debtor."[68] On the same day, the Board also awarded "thirty Negroes and a quantity of Rice in the Straw supposed to be about two hundred barrels on the Plantation of the Defendant" to a creditor plaintiff in payment of a debt.[69] Later that year, the Sheriff attached "a Negro Woman named Lucy," and after the

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stolen watercraft, also occupied some of the Board's time. On any given day the Board heard (or referred to arbitration) a wide variety of cases, including litigation "for nonpayment of an Account for Furniture sold to the Defendant"; "for unlawfully obtaining possession of the Complainants House"; "for unlawfully taking & detailing the Complainant's Schooner"; "for unlawfully taking & detaining the Complainant's Boat"; "for nonperformance of an Agreement"; "for nonpayment of an accot. for hire as a Nurse"; and "for pulling down & destroying the Complainant's Wall." 14 July 1780, CO 5/519, 6v-7v, BOP, SCDAH.

[67] J. Simpson to Sir Henry Clinton, 1 July 1780, Item 2877, Sir Guy Carleton Papers, B800120, SCDAH.

[68] 3 January 1781, CO 5/521, 20v, BOP, SCDAH.

[69] Ibid., 21r.

Board determined that she belonged to the "absent Debtor," ordered her "appraised" and "delivered over" to the creditor.[70]

In debt cases, the Board adhered to colonial precedents as much as possible, even going so far as to selling attached slaves according to the procedures outlined in a colonial statute.[71] For example, when "a Negroe Wench named Binkey and a Negroe Woman named Lucretia and her five Children named Dye, Jeffrey, Binkey, Andrew and Well" were "adjudged to belong to the absent Debtor," the Board specifically ordered them to be appraised and sold by Sheriff "pursuant to the Act commonly called the attachment act," passed by the Commons House of Assembly in 1744, with money arising from the sale used to discharge the debt.[72] Indeed, South Carolina's colonial laws provided a legal framework that Board members did not seek to alter as they adjudicated disputes over slave property. Familiar with South Carolina's laws and aware that those laws were effective at balancing the needs of creditors and debtors in an economy where slaves commonly served as collateral, members of the Board saw no need for innovation or improvement -- colonial debt laws were of practical utility. But the application of these laws also served to legitimate the Board's administration by giving loyalists access to a time-honored way of proceeding at law that respected their property rights in slaves. The law in occupied South Carolina, then, worked to ensure the loyalty of its subjects by making it possible to seize valuable human property in payment of outstanding debts.

Because the Board retained jurisdiction over "Contests between Individuals concerning Matters of Property," members also heard disputes over the ownership of enslaved people, and

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[70] 17 August 1781, 5/522, 27r-27v, BOP, SCDAH.

[71] 13 September 1781, 5/522, 28v, BOP, SCDAH.

[72] Ibid. See "An Act for the Better Securing the Payment and More Easy Recovery of Debts due from Any Person or Persons Inhabiting, residing or Being Beyond the Seas . . .," *SAL*, 3:616.

particularly trover cases (for the taking of personal property) involving slaves.[73] Indeed, throughout the British occupation of South Carolina, slave stealing or "inveighling" was a particular problem as some loyalists took the law into their own hands to recoup the slaves they had lost to rebel incursions. Slaves on sequestered estates, which were "the property of the enemy," were "clandestinely carried away" with an alarming frequency by loyal colonists, and sometimes brought to Charlestown, where they were "held . . . by people who have no right or authority to detain them." [74] The Board and its arbitrators picked through complicated ownership histories in order to determine the rightful possession of valuable human property. Often, they discovered that a fraudulent slave sale was at the heart of theft allegations. For example, in July 1780 John Night complained to the Board that Smith Clarendon had unlawfully taken and carried away his "Negro Wench named Suey." As the Board discovered, however, Suey actually "was the property of Mr. Clarendon's Child," and Night had purchased her from a man who in turn acquired Suey "at an illegal Sale." The case was dismissed when the seller agreed to indemnify Night for damages he sustained "on account of the said Negroe."[75] In a similar fact pattern, John Pearson sued Jacob Valk "for the value of a Negroe warranted by the said Jacob Valk & proved to be the Property of another person."[76]

Determining whether a slave was fraudulently sold could be a complicated matter, particularly when colonists fled outside of the province with enslaved people. For example, in 1780 the executrix of loyalist Charles McKinnon asked the Board to restore his slaves "for the

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[73] 11 August 1780, CO 5/519, 7v, BOP, SCDAH. The Board also heard cases seeking damages for the beating of slaves, although these were less common. In August 1780, for example, Robert Brisbane sued Peter Delacourt for "wounding and beating" his slave, "whereby he was deprived of his Service." The Board ordered arbitrators to determine the amount of damages. 25 August 1780, CO 5/519, 23r, BOP, SCDAH.

[74] *RSCG*, 30 April 1782; *RG* 22 December-26 December 1781.

[75] 11 July 1780, CO 5/519, 4v-5r, BOP, SCDAH.

[76] 22 August 1780, CO 5/519, 22r-22v, BOP, SCDAH.

benefit of his Widow and Orphan Children." The slaves in question had travelled with McKinnon to St. Augustine at the outbreak of the war, but were captured, condemned by a Congressional Vice Admiralty Court, and sold to South Carolina colonist Edward Weyman. Weyman, however, "refused to deliver the Negroes," arguing that "he had bought them at public Sale" and that they were his legal property. The Board sided with McKinnon's estate, ordering that "the Negroes in dispute should be delivered up to the Plaintiff, and that the Defendant" should "pay the Costs of Suit."[77] As the McKinnon case and other slave sale cases reveal, the breakdown of legal exchanges in wartime South Carolina created confusion about slave ownership. To restore order and to establish its legitimacy as a legal body, the Board sought to root out cases of fraudulent sale, something they did emphatically by adjudicating the distance between possession and ownership.

None of these fact patterns led the Board's members to question the enslaved status of the Africans and African Americans in dispute. Rather, the Board assumed *arguendo* that slaves were property, and sought to trace a chain of title back to the proper owner, to whom the slave would be returned or who was entitled to compensation. Indeed, the fate of McKinnon's slaves is a helpful reminder that the unprecedented movement of enslaved people across provincial boundaries, over oceans, and on battlefields provided unique opportunities for escape from the subjugation of their masters, which many slaves seized. Nonetheless, geographic mobility enabled by war also made enslaved people particularly vulnerable to capture and re-sale. Despite the occasional concern expressed by high-ranking military officials to honor promises

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[77] 10 November 1780, CO 5/521, 7r-9r, BOP, SCDAH. At times, the Board's jurisdiction in determining questions about slave ownership was questioned, particularly when soldiers were parties. In October 1781, for example, the Sheriff seized "a certain Negroe Man Slave named Edmund" pursuant to a writ of fieri facias. He was hindered in his duty, however, when the slave "was rescued and taken out of his Possession by Capt. Alex. Campbell of the South Carolina Royalists." Campbell then "threatened to split down the Head any Person who should again take hold of the said Negroe, and alledged he was his Property." The Board referred the matter to the Commandant of Charlestown. 23 October 1781, 5/523, 2r-2v, BOP, SCDAH.

made to slaves, in practice Board members routinely acknowledged property rights in people. They never questioned the legal validity or the morality of treating people as things, in part because there was no need to do so to fulfill the larger objectives of securing the loyalty of subjects and maintaining the social fabric of South Carolina's slave society. But more important, these administrators treated slaves as property because there was no space in the law's procedures for them to do otherwise. As was true in all of slavery's varied laws, slave law as administered in occupied South Carolina ultimately reinforced slavery as a system because it offered procedures for managing slaves that required individuals to follow a set pattern -- one that assumed slaves were things.

Entrances: "Public" and "Private" Slaves

Rather than challenging slavery as an institution, the Board worked in tandem with military authorities as a gatekeeper, seeking to stem the flow of slaves to Charlestown and to the army. Indeed, members played an important role in a broader legal-administrative system that sought to impose order upon increasingly mobile black populations. A primary goal of both the army and the Board was to limit the movement of large numbers of slaves behind British lines. Although slaves were a "large and valuable pool of laborers for the army and simultaneously diminished the rebels' labor resources," the army also had attracted "more slaves . . . than it could possibly employ."[78] British military and civilian officials understood that these slaves would be more useful to Britain's war effort if they could be returned to agricultural labor. As Andrew O'Shaughnessy has noted, the British army suffered from significant supply problems throughout the American Revolution, and maintaining a functioning plantation economy

[78] Piecuch, *Three Peoples, One King*, 216.

powered by slave labor was essential for ensuring that military forces were properly provisioned.[79]

At the same time, British officials also understood that they could not expect "to retain the loyalty of people who had come to them seeking freedom only to be returned to their plantations."[80] Although historians agree that British military officials did not seek to challenge slavery as an institution, as a practical matter and as a matter of honor many did see value in keeping promises made to slaves. For example, Lieutenant Colonel James Moncrief, head of the Engineering Department in Charlestown, urged Clinton to formulate a plan for treating slaves in his department, not only because the "want of proper care and that degree of attention which is necessary to be given them" might make them "lay aside the confidence which they always placed in us." The neglect of these slaves might also make it "very difficult to keep them together" and to call upon their labor going forward.[81] Aware of the value of slaves as laborers, officers like Moncrief saw no benefit in alienating them from the Crown.

Military officers relied upon Board members to balance these concerns and to develop a plan for returning slaves to their loyalist owners without betraying promises of protection that already had been made to those who fled behind British lines. Officers valued the Board's advice precisely because its members were familiar with the country and its people. Indeed, in June 1780, Nisbet Balfour sought to "avail himself" of the Board's "knowledge and Experience" about the "very great Inconvenience" that "was already found from Negroes leaving the service of their Masters and coming to the British Army." As the Commandant explained, "many bad

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[79] O'Shaughnessy, *The Men Who Lost America*, 14.

[80] Piecuch, *Three Peoples, One King*, 222.

[81] Lieut. Colonel James Moncrief to Sir Henry Clinton, 13 March 1782, Item 9955, Sir Guy Carleton Papers B800120, SCDAH.

Consequences would most certainly ensue unless they could be sent back to their Labour," and he asked the Board for "their Opinion on that subject." For the Commandant, there were two primary concerns. First, he would prefer if slaves "could be persuaded to return voluntarily" to plantations, likely because he was aware that any scheme to forcibly return slaves would result in violent resistance. Moreover, he wished "to prevent the Negroe's [sic] being punished by his Master for an Offence which the Master might think was committed by the Slaves in leaving his Service to join the King's Army." Concerned to ensure that slaves who returned to plantations were not mistreated, Balfour sought some type of mechanism by which the army could hold slave owners accountable for their treatment of slaves.

The Board immediately understood Balfour's dilemma. They agreed that "it was a Matter of so very important and interesting a Nature that it could not have failed to have been frequently the subject of very serious Consideration," particularly because "the advanced Season of the year required the immediate Labour of the Negroe to cultivate the Crop, which otherwise must be lost." The Board also suspected that failure to stop the flow of slaves into Charlestown would encourage unruly behavior, supplementing Balfour's more practical concerns about returning slaves to work with their own particular fears about the link between idleness and slave insurrection. Indeed, they worried that "the Negroes would be very apt to contract bad Habits, and such as might be dangerous to the Community hereafter, if they were suffered to remain in a State of Idleness." After due consideration, the Board suggested that Balfour create a new administrative apparatus, overseen by three men "appointed to receive and take care of all Slaves who have come into the British Lines," that would be responsible for returning loyalist-owned slaves. "Loyalists" entitled to the return of their slaves would include "such Persons whose Sentiments have been ever loyal" or those who had returned to the king's protection

those ,whose paroles had been discharged by Sir Henry Clinton's proclamation but who took an oath of loyalty, and former militia members who would agree to return to their allegiance.

In order to satisfy the Commandant's concerns that returning slaves would not be punished, the Board also suggested that loyal slave owners would only receive a certificate authorizing them "to take up such Slave or Slaves" after making a "solemn promise not to resent the Behaviour of the Slave for having left his Service." Should the commissioners learn that the slave had been punished in contravention of these regulations, the owner would receive no aid in recovering other slaves who ran away.[82] This provision likely provided little real protection for slaves who were returned to plantations, but it apparently satisfied Balfour, who adopted the Board's proposals and appointed William Carson, Robert Ballingate and Thomas Inglis to oversee the return of loyalist slaves. Military necessity, however, required Balfour to adjust this policy. Indeed, the British army had come to rely upon slaves as labor source, and Balfour found that he could not afford to return them to their owners without undermining British war efforts. At the same time, slaves were "exceeding unwilling to return to hard labour" on plantations, and it seems that many refused to do so.[83] As a result, Balfour ultimately ordered that slaves in army departments could not be returned to their owners without the slave's consent, and that the government would compensate the owners of slaves who did not wish to return to agricultural labor.[84] Although the act of fleeing behind British lines did not ultimately redefine African and African American slaves as a group at law, it did carve out room for individual enslaved people to seek exceptions to the law's rigor.

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[82] 13 June 1780, CO 5/520, 1r-3r, BOP, SCDAH. Until slaves were claimed, they were to be maintained by the commissioners and put to work "for such Purposes as are most beneficial for the publick Service." Owners would be required to pay one shilling per day for their maintenance upon their return.

[83] Leslie to Sir Guy Carleton, 18 October 1782, Item 5924, Sir Guy Carleton Papers, B800120, SCDAH.

[84] Piecuch, *Three Peoples, One King*, 223.

In practice, determining whether a complainant was entitled to the return of a slave who had served the British military or runaway behind British lines hinged upon a claimant's loyal status. Although historians have suggested that British policy with regard to slaves in the mainland southeast was "ambiguous," military and civilian officials alike relied upon a public/private distinction to guide them as they determined whether they should return or emancipate enslaved people.[85] Specifically, officials considered slaves of loyalists to be private property, returnable if the slave owner promised not to mistreat the fugitive slave. However, runaway or confiscated slaves owned by "Rebels and those persons who are not under Protection of Government" belonged "of course . . . to the Public."[86] According to Clinton, "after serving faithfully during the War," these "public" slaves were "entitled to their freedom."[87] What determined the status of any slave behind British lines, then, was not his or her rights as a subject, but rather the political affiliations and sensibilities of his or her master, some of whom retained their rights at law, and others who had vacated them.

This public/private distinction flowed from the Crown's obligation to protect the private property of its subjects, and helped officials to balance the claims of slaves, who believed they should be freed for their military service, against the property demands of loyalists, many of whom had taken oaths of allegiance largely to secure the return of their property. Indeed, as Maya Jasanoff has shown, loyalism was not monolithic; individuals remained loyal or returned their allegiance to the Crown for different reasons.[88] For southeastern loyalists, the potential restoration of slave property was a compelling reason to take an oath, and they routinely made

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[85] *Ibid*., 270.

[86] Memoranda for the Commandant of Charlestown and Lieut. General Earl Cornwallis Head Quarters Charles Town, 3 June 1780, Item 2800, Sir Guy Carleton Papers, B800120, SCDAH.

[87] *Ibid.*

[88] Maya Jasanoff, *Liberty's Exiles: American Loyalists in the Revolutionary World* (New York: Knopf, 2011).

property claims based upon the fact that they had once again become loyal British subjects. For example, Alured Clarke, the Commandant of Savannah, complained that he received "daily applications from the Masters of Negroes," who argued that their property should be returned to them because they had "conformed, and become good Subjects."[89] Returning their allegiance to the Crown, they sought the restoration of their private property, often to the chagrin of those who had remained consistently loyal. Writing from Georgia, one unwavering loyalist griped that "[t]he Rebels fight us now with a double Edge Sword - they plundered this province & all the kings friends to the very day we had here the news of the Surrender of Charlestown - and <u>now</u> they <u>come Claim</u> & <u>forcibly take</u> all those negroes either Captured from them or that under the Sanction of Sir Henry Clinton's Proclamation came & join'd the British troops." Indeed, the "more a Rebel has Sinned & made himself conspicuous in a daring Rebellion," he continued, the "more notice is taken of him & the better terms he is intitled to." A rebel may have been "a man who had some parts," but a "Loyal Subject" was "a dull fool - unworthy of any notice."[90]

In articulating a distinction between "public" and "private" slaves, Clinton and other officials fulfilled loyalists' expectations that as subjects of the Crown, their property would be protected. Proving their subjecthood, therefore, mattered greatly to alleged loyalists who hoped their slaves would be returned to them. But this distinction also had important consequences for slaves. Whereas slaves belonging to rebel colonists might be freed, those owned by loyalists struggled to make good on British promises of freedom, even when they had voluntarily aided the British war effort. Indeed, the factual question of whether a colonist was loyal or rebellious was a high-stakes one for enslaved people who made claims to freedom based upon their military service.

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[89] Alured Clarke to Lord Cornwallis, 10 July 1780, TNA, PRO 30/11/2, Cornwallis Papers, 260r.

[90] F.P. Fratia to [Robert McCulloh], 28 July 1780, TNA, C 106/87.

The outcome of their claims turned not upon their service records, but upon the subjecthood of their alleged owners, as the case of "Negro Will" reveals.

In 1781 "Negro Will" found himself in a magistrate's court in the Bahamas. How he arrived there and where he should go next was the subject of dispute in this case, which hinged upon Will's testimony (presumably allowed because he claimed to be a free man) and that of two other witnesses. According to Will, he was the slave of Willis Morgan of Bermuda "who sent him to Carolina," where he was sold "before the present Wars." After the outbreak of the Revolution, "his Master became an Officer in the American Service," and his "Property was declared forefeited." Will subsequently joined "the King's Army, serving in the "Defence of Savanna against the French & Rebels," and earning "a free pass" from the Georgia Board of Police for his service. Presumably, Will believed that this "free pass" was not a mere passport that allowed him to travel, but a pass signifying his emancipation. Indeed, he testified that after receiving the pass he was "employed as a free Man in the Transport Service at the Reduction of Charlestown." At some point after the siege, Will decided to travel to the Bahamas, where he hoped to catch a ship to Bermuda and reunite with "his old Master." He eventually secured a passage with one Captain Lighbourn, "who told him to go on Board & work," and who claimed that if he worked "for him twelve months and no Body claimed him, he should be free." Crucially, by this time, Will no longer had his pass -- "he had lost it" at some point along his journey.

Will's mobility and the uncertainty of his precise legal status posed a dilemma for Captain Lighbourn and for the Bahamanian magistrate, both of whom were unsure how to proceed once he arrived in the Bahamas. Under examination, Lighbourn corroborated Will's testimony, concurring that he had brought Will to Providence, but also intimating that he was unsure as to Will's free status. Indeed, he found Will passage back to Bermuda, presumably because he

believed that Will still belonged to Morgan. Morgan, however, clarified to Lighbourn that Will was no longer his property "but had been sold in Charlestown some years before." This put Lighbourn in a difficult situation. Afraid that he might be held legally accountable for carrying Will away, he told the magistrate that he was willing to "deliver" Will to any "such Person" who would take him back to South Carolina. Ultimately, the Court agreed with the facts as Will presented them, holding that he "was a Bermuda Slave & Sold to a Person in Rebellion in Georgia," and that he had subsequently "joined the King's Army & was in actual Service at the Sieges of Savannah & Charlestown." Moreover, he concurred that Will "had a Passport signed with Genl. Prevost's Name and was afterwards in the King's Service in the Transport Department," although they believed that he was never discharged from service. However, the Bahamanian magistrate did not consider Will's "passport" to be a "free pass," and did not at any point identify Will as a "free man," as Will himself did in his testimony.

Having found these facts, the Court then admitted its own ignorance in this particular case: "In what Manner Negroes, circumstanced as Will is, are treated, and upon what Footing they are put by the King's Officers, we know not." Was Will free by virtue of his military service? The Court was unsure, largely because they could not answer one dispositive question: Had Will's rebellious owner returned his allegiance to the Crown? "[I]t is undoubtedly true," the magistrate observed, "that Pardons are granted to all who come in to the King's Standard & take the Oath of allegiance to him." In such cases, "their Property wherever found, is restored & secured to them." Therefore, the Court held that "should Will's Master return to his Allegiance, he would have an undoubted Right to Will, as his Property."[91] Indeed, rather than assuming that Will's military service had emancipated him, rather than interrogating the military service of the slave, the Court

[91] [unknown] to John Maxwell Esq. Captain General, Governor & commander in Chief of the Bahama Islands, 20 September 1781, TNA, C 106/88.

chose to question the subject status of his alleged owner. Unable to determine whether he had returned his allegiance, the Governor of the Bahamas, John Maxwell, decided to transport Will back to Charlestown, enclosing the Magistrate's report, and leaving it to administrators in Charlestown to resolve the case, perhaps using the possibility of Will's return as an incentive to induce his master to take an oath of loyalty. In fact, rather than urging his Charlestown correspondent, Robert McCulloh, to immediately "put the penalty in force," he instead suggested that McCulloh should "keep in readiness, Should" Will's owner "not recover his Senses & ask pardon."[92]

We do not know what happened next to Will. What is certain, however, it that his fate rested not upon his own record of service to the Crown, but upon the subject status of his alleged owner. Indeed, Bahamian officials replicated the public/private slave distinction adopted by Clinton, refusing to resolve the case because he did not know whether Will's alleged master had taken an oath of loyalty. They fully expected that administrators in Charlestown would apply the same distinction, which suggest that Clinton's public/private slave dichotomy was known and followed throughout the greater British Caribbean during the War. Working together to reverse the flow of slaves behind military lines, these officials accepted that the distinction between subject and rebel was the distinction that made a difference when it came to honoring a slave's claim to freedom. Although in Will's case all of the individuals he encountered seemed sympathetic to his claims, they found themselves bound by the law to respect slave property. They agreed that Will came in "to the King's Standard," but this did not result in his automatic emancipation. Instead, Will remained object, not subject, in the eyes of local administrators, who did not hesitate to respect property rights in people and to peg those rights to an owner's

[92] John Maxwell to Robert McCulloh, 26 September 1781, TNA, C 106/88.

loyal status, not a slave's service. Law's interstices were not so large as we might expect, even in a time of tremendous social disruption, and slaves like Will often could not find room to slip through the cracks.

Exits By Land and Sea

The Board of Police and military officials not only sought to control the movement of slaves into Charlestown behind British lines. They also made a concerted effort to regulate the outward flow of slaves, particularly to the West Indies. The transportation of slaves outside of the province posed several problems. First, officials feared that indebted colonists might seek to remove mortgaged slaves from South Carolina clandestinely, thereby defrauding their creditors. Colonists also might attempt to depart the province with stolen slaves, usually in order to sell them at a later date in the British Caribbean. Finally, as a policing matter, officials hoped to prevent the voluntary exodus of slaves from South Carolina, as runaways stowed away on watercraft or sought passage as crew members on naval or merchant vessels. These problems were not merely hypothetical. Indeed, over the course of the British occupation of Charlestown, administrators seemed one step behind colonists who attempted to remove slaves clandestinely, and slaves themselves who sought freedom beyond the province's borders.

As a primary matter, the Board sought to prevent the sale of stolen or mortgaged slaves by closely monitoring sales at their source in Charlestown (where most slave sales occurred). They required vendue masters, who conducted public auctions, not only to obtain a license, but also to give public notice of all sales and to "give Bond, with Security for a due observance" of the

Board's regulations.[93] Likewise, the Board required colonists to seek its permission before selling their slaves and leaving the province. Prior to travelling to Ireland, for example, Thomas Eustace petitioned the Board for permission to sell two lots, a tract of land, and "two negroes," which the Board granted.[94] And in 1780 the Board granted William Wilkie's petition to sell "a Negroe, some Household Furniture and Carpenter's Tools."[95] Petitioners also were required to advertise the names of slaves to be sold in the newspaper, a measure meant to ensure that stolen slaves were not re-sold, and also that creditors had ample time to claim mortgaged slaves. For example, in response to Ann Timothy's 1780 petition for "leave to sell some Negroes," the Board ordered Timothy to first publish "the Names of the Negroes intended to be sold in the Gazette three times before the day of the Sale."[96] Members also required John Massey to "state the Names of the Negroes he wishe[d] to sell or carry off" to the West Indies, presumably to allow both creditors and bona fide owners time to make claims prior to his departure.[97] By tightly policing slave sales in Charlestown, the Board hoped to limit the possibility that colonists could depart the province without satisfying their creditors. At the same time, they made it more difficult for colonists to acquire stolen slaves or to clandestinely purchase large lots of slaves for re-sale outside of the province.

Smuggling slaves out of the province by water was a particular problem that the Board and military authorities sought to curtail. John Cruden hinted at the ubiquity of this practice when he warned loyal colonists multiple times in newspaper advertisements that if they were caught

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[93] 22 September 1780, CO 5/520, 15v, BOP, SCDAH.

[94] 19 September 1780, CO/5/519, 34r, BOP, SCDAH.

[95] 22 September 1780, CO 5/519, 35r, BOP, SCDAH.

[96] 19 September 1780, CO 5/519, 34v, BOP, SCDAH.

[97] 18 August 1780, CO 5/520, 10r, BOP, SCDAH.

"removing negroes on board ships" they would be "punished as aiding and abetting Rebellion."[98] Runaway ads in loyalist newspapers also reveal that slave smuggling (often with collusion on the part of a slave and a ship's captain) was rampant. In July 1780, for example, John Russell "warned" all "masters of transports and other vessels . . . not to harbour" his slave Jack, who was "by trade a caulker." Russell suspected that Jack, who spoke "tolerable good English," might "have gone on board some vessel in the harbour."[99] Likewise, Henry Reeves offered ten guineas for the capture of his slave Cuffee, a "sensible and artful fellow" who had "attempted to pass for a free negro." Reeves forbade "all masters of vessels and others, from "harbouring, concealing, or carrying" Cuffee "out of this province, as they may be assured of being prosecuted to the utmost rigour of the law."[100] And in 1781, John Wells suspected that his slave, Prince, "a great rogue" who was "fond of rum, and can tell a very plausible story," was "harboured on board some vessel where he can be very useful as a cook," and "in which capacity he sailed several voyages on board a Guinea vessel."[101]

Just as the Board relied upon colonial precedents in its daily case management and administrative practices, in monitoring the waterside exits of colonists and their slaves its members, working in tandem with military authorities, relied upon procedures originally developed by South Carolina's colonial legislature. Concerned that "Several Negroes, the property of divers Persons Inhabitants of this Province" had been "carried off the same by Masters of trading vessels and others," General Cornwallis issued a proclamation ordering merchant ships' captains to comply with two acts of the Commons House of Assembly, passed in

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[98] *RSCG*, 30 April 1782.

[99] *RSCG*, 6 July 1780.

[100] *RSCG*, 2 May 1782.

[101] *RG*, 10 March – 14 March 1781.

1698 and 1739, regulating the transport of slaves out of South Carolina.[102] These statutes required masters of vessels to present themselves to the governor within forty-eight hours of arriving in the province, and to enter into a £1000 penal bond twenty-four hours later with two securities agreeing not to "take on board and carry away or suffer to be taken on board and carried away, any person or persons whatsoever" without a license. Masters who failed to enter into a bond within the required time limit were subject to a £50 penalty.[103]

These colonial statutes were meant to prevent the carrying off of mortgaged and stolen slaves, but they also effectively made ships' captains (and their securities) responsible for runaway slaves who clandestinely stowed away on vessels. Under the Assembly statutes and the proclamation that adopted them, then, ship captains could be held legally responsible for transporting runaways like Jack and Cuffee. Indeed, if a captain discovered an enslaved stowaway and failed to return the slave, his securities could be sued, and they would in turn seek indemnification from the captain. This helps to explain Captain Lighbourn's concern in the case of "Negro Will" that he could be held legally accountable for transporting Will to the Bahamas. Lighbourn was aware that Clinton's proclamation held him responsible for carrying Will away, even if Will had deceived him as to his legal status. Because he had given "a Bond in Charlestown, not to carry away any Person without License," he knew that "he must some how

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[102] 29 August 1780, CO 5/519, 25v, BOP, SCDAH.

[103] It is unclear whether the penalty amount was £50 South Carolina currency or Sterling. "An Act for the Entry of Vessels" (1698), *SAL*, 2:140; "An additional and explanatory Act to an Act for the Entry of Vessels" (1739), *SAL*, 3:526 (the editors of SAL claim that the original of this statute has been torn extensively). The Board specifically recommended the 48-hour provision to the Commandant, noting that it "would be attended with beneficial Consequences if such parts of the Acts of Assembly for the Entry of Vessels as direct the Masters to wait upon the Commandant in forty eight hours after their Arrival and to give Bond with Security not to carry away any Persons inhabiting or residing in this Province without the License of the Commandant" were to be adopted. It seems that the Board urged military authorities to adopt these statutory provisions, arguing that "it would be attended with beneficial Consequences if such parts of the Acts of Assembly for the Entry of Vessels as direct the Masters to wait upon the Commandant in forty eight hours after their Arrival and to give Bond with Security not to carry away any Persons inhabiting or residing in this Province without the License of the Commandant" were to be adopted. 27 June 1780, CO 5/519 (1780), 2v-3r, BOP, SCDAH.

or other" make "harmless his Security."[104] Such a concern for obeying the law reiterates how legal actors at all levels were made aware of the terms of securing slave property and given incentives and disincentives to comply with those terms. Lighbourn may or may not have had moral scruples over the decision to return Will, but he followed the prosaic pattern of compliance as dictated by a law that only asked him to obey its letter, not consult his conscience.

Loyal colonists, too, were aware of these terms, and they used the threat of prosecution to convince captains to return their slaves. In January 1782, for example, colonist William Rhett complained that one Captain Lester had "Caryed" his "Negro man Prince off," which was "one of the greatest breach[es] of the Laws of this Province as well as a Violation of his own faith & trust." Rhett was convinced that he had been the victim of a conspiracy, a "piece of rogury" on the part of "Ill fellows" with designs "purely to Deprive" him of his slave. Nonetheless, he believed it was Captain Lester's sole responsibility to "Secure" his slave "and send him back." Indeed, "by carying him off" Lester "must be answerable & his Security Lyable to be Prosecuted for his Villanious action." He urged Lester to follow the conduct of one (perhaps apocryphal) Captain Meade, who "was Served much Such Trick some time agoe" when "a Negro man . . . Stole on board him & was hid by some of his pe[o]ple," only to be discovered later by the crew. Meade followed the law and "brought or sent him back Safe & he was delivered to his Master free of any charge," and Rhett believed that Lester should do the same. If not, Rhett would be "oblidged to Sue his Securitys."[105]

Rhett used the threat of legal action to obtain the return of his slave. Other colonists brought their cases to the Board of Police, asking members to punish captains who had violated the

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[104] [unknown] to John Maxwell Esq. Captain General, Governor & commander in Chief of the Bahama Islands, 20 September 1781, TNA, C 106/88.

[105] William Rhett to Capt. John Smyter, 9 January 1782, TNA, C 108/132.

proclamation as well as the relevant colonial Assembly statutes. For example, in August 1780, the Board heard complaints against two ship captains who had failed to "enter into Bond at the Secretary's Office, for which they were ordered to pay a fine of fifty pounds current money each as directed by statute."[106] The following year, the Board also investigated the "Conduct of Capt. Thomas Nowland of the Ship Polly." Nowland was accused of planning to carry "Negroes from this Province" to Jamaica, and the Board opined that he had indeed "inveighled and concealed" six slaves "the property of the Inhabitants of this Province" on his ship. Members fined him £100 -- the equivalent of the prices of approximately two slaves -- and ordered him "committed" until the sum was paid.[107]

Despite these attempts to curtail the removal of slaves from South Carolina by sea, the problem of water-based slave smuggling only intensified as American victory seemed increasingly likely. Tasked with the unenviable task of overseeing the British evacuation of Charlestown, Sir Guy Carleton tried in vain to prevent British soldiers and loyalists from carrying off slaves in contravention of a 1782 treaty between British and American commissioners. The treaty, which was quickly breached by both sides, was meant to "prevent the great loss of property and probably the ruin of many families, which might be occasioned by the removal of such Slaves as are within the British Lines, when the Troops shall be withdrawn from Charles Town." It restored possession of "all the Slaves of the Citizens of South Carolina" to their owners, with the exception of slaves that "rendered themselves particularly obnoxious on account of their attachment and Service to the British Troops, and such as have had Specific

[106] 29 August 1780, CO 5/519, 25v-26r, BOP, SCDAH.

[107] 13 March 1781, CO 5/521, 37v, BOP, SCDAH.

promise of Freedom."[108] British officials struggled to enforce the treaty's provisions, in part because officers who had served in South Carolina had come to "look on negroes as their property." These officers sought to include their slaves in "the number to be brought off," and were prepared to go to great lengths to ensure that this claimed property could be evacuated in British transports. Aware of the terms of the treaty, they "pretend[ed]" that their slaves were "spys, or guides, and of course obnoxious, or under promises of freedom" in order to lade them on ships.[109] The clandestine removal of slaves was not limited to military officers. Some civilians also hoped to profit from the removal of slaves, claiming that their slaves were excepted under the treaty, only to sell them at a later date in the Caribbean. These included a "certain Mr. Gray," who "under pretence of bringing Negroes from Carolina to prevent them from being punished by their owners" instead sold them in Tortola. John Cruden, now the Governor of Tortola, found this "shocking to humanity," not because it harmed slaves, but because it was "a Roberry in every sence of the Word."[110]

Loyalists whose property had been confiscated and sold under legislation passed by the South Carolina state government in exile, which operated from Jacksonborough, South Carolina, also sought to re-claim slaves as they prepared to evacuate South Carolina. Promulgated in early 1782 by the "Rebel Assembly," these confiscation statutes were designed "to raise revenue for

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[108] 10 October 1782, Item 5844, Sir Guy Carleton Papers, B800120, SCDAH. Owners would be compensated for the value of these slaves. The British secured a promise that slaves restored to their former owners "by virtue of this agreement" would not be punished "for having left their Masters and attached themselves to the British Troops," and that "no violence of Insult shall be offered to the persons or Slaves of the Families of such person as are obliged to leave the State for their adherence to the British Government when the American Army shall take possession of the Town." Any slaves confiscated from loyalists who subsequently ran away and were carried off by British subjects were not held to violate the agreement. Ibid.

[109] Alexander Leslie to Sir Guy Carleton, 18 October 1782, Item 5924, Sir Guy Carleton Papers, B800120, SCDAH.

[110] J. Cruden to Hon. George Nibbs, 16 Mar 1783, Item 7144, Sir Guy Carleton Papers, B800120, SCDAH.

the state government" by seizing the estates of "the most notorious Loyalists."[111] In order to recoup the losses of their slaves, individuals listed in the confiscation acts colonists carried off enslaved people "found on the sequestered Estates" or asked the British government to sell sequestered slaves to compensate them for their losses. Even John Cruden, commissioner of sequestered estates, hoped to be made financially whole by the sale of slaves he held in trust. Owed ten thousand pounds for administering the sequestered estates, he asked to be repaid "from a proportional sale of the Negroes" in his charge before he left Charlestown.[112]

By the end of the war, as evacuation became inevitable, the British military abandoned efforts to police the exits of slaves and instead aided loyalists as they departed the province with their human property. Indeed, because slaves were moveable rather than fixed property in fact as well as law, they had become even more valuable to loyalists who faced the prospect of abandoning their South Carolina real estate. Alexander Leslie, for example, explicitly authorized the use of British troops to "rescue" slaves as compensation for loyalists. On one mission, after receiving a "report that the enemy were driving away the negroes from the plantations of the loyalists," he detached cavalry "across the Cooper River" to catch them. The cavalry failed to arrive in time, but he "brought away about a hundred of the enemies' negroes" to redistribute to loyalists in place of their stolen slaves.[113] Officials also provided transports for loyalists and their slaves, eventually evacuating most to St. Augustine or the British West Indies. In the belief that slaves would be "useless" in northern colonies because "they cant bear the Cold," Leslie

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[111] Piecuch, *Three Peoples, One King*, 281. Other loyalists were charged a 12 percent fee on their estates. *Ibid.*

[112] A. Leslie to Sir Guy Carleton, 10 August 1782, Item 5262, Sir Guy Carleton Papers, B800120, SCDAH. It is unclear whether Cruden calculated this debt in South Carolina currency or pounds sterling. In 1775 the average rate of exchange in South Carolina currency for £100 sterling was £758.67. John J. McCusker, *Money and Exchange in Europe and America, 1600-1775: A Handbook* (Chapel Hill: University of North Carolina Press, 1992), 224.

[113] Lieut. General Alex. Leslie to Sir Henry Clinton, 30 March 1782, Item 9957, Sir Guy Carleton Papers, B800120, SCDAH.

requested a "Convoy to send their Negroes to Jamaica" or other West Indian destinations.[114] By providing transports and even acting to acquire slaves to recompense loyalists, British army officers and administrators made it possible for some loyalist refugees to resurrect their fortunes as masters of slaves in other parts of British plantation America.

Adapting

When the British evacuation fleet departed Charlestown on December 14, 1782, it carried on board 3,794 whites and 5,333 people of African descent. These men and women joined a larger loyalist diaspora that fanned across the British Empire, as individuals and families sought to rebuild their lives and fortunes with varying degrees of success.[115] Although not a part of the final evacuation fleet, Charlestown-based British administrator Robert McCulloh and his family also were forced to flee South Carolina at the end of the war. Like many other refugees, they brought their slaves with them. During his tenure in Charlestown, McCulloh profited from South Carolina's slave economy, using his influence and connections to become a manager of sequestered properties and, finally, a slave owner himself. His experiences stand in for those of other British administrators who readily adapted to life in a slave society. Far from challenging slavery as an institution, these administrators supplemented their salaries through slave ownership and learned to buy and sell slaves like born-and-bred South Carolinians. They replicated the day-to-day practices of managing slaves that South Carolinians had long found effective, just as they reinforced and extended slavery's law in the context of war. And they had

[114] A. Leslie to Carleton, 11 June 82, Item 772, Sir Guy Carleton Papers, B800120, SCDAH.

[115] Jasanoff, *Liberty's Exiles*, 15-16.

the same financial stakes in preserving the vernacular and official legal cultures that made slave property secure, productive, and easily exchanged. Even as the war disrupted the plantation economy and set thousands of slaves in motion, British administrators took advantage of this tumultuous situation to profit from owning people just as thousands of colonists had done before them over the course of the previous century.

Robert McCulloh was an experienced administrator by the time he arrived in Charlestown to serve as Deputy Superintendant of the Port in 1780, and he was a logical choice for the post. McCulloh already had served as Deputy Collector of the Port of Charlestown, but lost his office in 1776 when it "was taken from him by the Rebels." In the early years of the war, he had worked in various posts in North America, including the Quarter Master General's department in New York and the provincial store in Philadelphia. When he embarked with the army for the siege of Savannah in 1779, he served as Collector of the Port there, until he finally was promoted to the Deputy Superintendant Post at Charlestown, when "that Nest of Pirates & Robbers," was "reduced to His Majesty's Arms."[116] An important figure in South Carolina's British establishment during the War, McCulloh went on to become a justice of the peace, Deputy Post Master General of the Southern District of North America, and Paymaster of the Provincial Troops.[117]

McCulloh quickly re-settled into life in Charlestown after his appointment as Deputy Superintendant, working tirelessly to administer the busiest port in the mainland southeast. His official duties were demanding. McCulloh not only kept accounts of ingoing and outgoing

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[116] The Memorial of Robert McCulloh of Charlton in the County of Kent late Deputy Collector of the Port of Charlestown in the Province of South Carolina, 22 March 1784, TNA, C 106/88; Step[hen] Prosser to Robert McCulloh, 24 May 1780, TNA, C 106/89.

[117] George Dirbage to Robert McCulloh, 8 December 1779, TNA, C 106/89; Commission to Robert McCulloh, 3 July 1780, TNA, C 106/87; F.P. Fratia to Robert McCulloh, 12 July 1780, TNA, C 106/87.

cargos, he also was responsible for ensuring that naval officers and crews received their share of prizes hauled into Charlestown and condemned by the British Vice Admiralty Court there. Like many colonists hired as "plantation managers," he supplemented these duties by acting as an attorney or representative for absentee landowners who needed a trusted local contact to help them manage their South Carolina properties. Just as South Carolina colonists traveling abroad before the war depended upon local contacts to look after their property, so too did loyalists in exile or South Carolinians travelling abroad ask British officials like McCulloh to safeguard their estates. For example, Lord William Campbell, South Carolina's last royal governor, tapped McCulloh to manage his South Carolina estates, and throughout the War McCulloh worked to improve Campbell's land and protect his slaves.[118] McCulloh's location in Charlestown also made him a recipient of frequent requests for aid in finding runaway slaves. In 1780, for example, Dr. James Clitherall took "the liberty to entreat" his help "in procureing any . . . negroes you may hear of in the circle of your Business." He enclosed an order authorizing McCulloh "to take" his "Negroes where ever they" were "to be found" and to send them to Charlestown.[119] Loyalist Alexander Garden also requested McCulloh's help recovering "a Field wench" who had been "seized & Carried off" by an artillery officer.[120]

McCulloh used his connections to profit from his time in Carolina, supplementing his annual salary by managing sequestered plantations. In 1779, Lieutenant Archibald Campbell, commander of His Majesty's Forces in Georgia, granted him "the use of a Plantation lately occupied by John Habersham (a Rebel) Called Dean's Forrest" in "consideration" of his

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[118] Power of Attorney, 6 January 1779, TNA, C 106/88. McCulloh paid for the medical care of Campbell's slaves in June 1780. See receipt signed by John Boyd, June 1780, TNA, C 106/87.

[119] James Clitherall to [Robert McCulloh], 2 July 1780, TNA, C 106/88. McCulloh's overseer eventually put Clitherall's slaves to work at Silk Hope. William White to McCulloh, 6 March 1781, TNA, C 106/88.

[120] Alexander Garden to Robert McCulloh, 3 November 1780, TNA, C 106/88.

"Services." In exchange for the plantation, McCulloh was required to account for "& preserve the same till such time as His Majesty's Pleasure is known with respect to Rebel property."[121] McCulloh later acquired Silk Hope plantation, another confiscated Habersham property. These estates, according to McCulloh, were in disarray when he received them. Slaves from a nearby plantation had "Stole" all the hogs, while poor white "Crackers and Others passing in the late Alarm" had "destroy'd the greatest part of the rice in the Straw."[122] Both were filled not only with slaves from the Habersham estates, but also from nearby plantations. A "Return" of slaves from Silk Hope, for example, reveals that in 1780 forty-four adult slaves and ten children, gathered from several other sequestered or abandoned plantations, lived on the premises.[123]

Like South Carolina planters before the Revolution, McCulloh sought to manage Habersham's estates and the slaves that worked them from afar. From his residence in Charlestown, he hired managers and installed overseers to protect and improve the properties in his charge. These included William White, who acted as overseer at Silk Hope and corresponded frequently with McCulloh, advising him as to crop prospects, seeking supplies (and particularly clothing) for the slaves, and alerting McCulloh about the slaves' welfare. This correspondence reveals the extent to which the war altered plantation life, prompting supply problems, work stoppages, and, most significantly, the forced and coerced movement of large numbers of slaves. At the same time, these letters show that the McCulloh, White, and other estate managers took advantage of these disruptions to profit from slavery, buying choice slaves that had been sold for debts and installing them on the plantations in their care.

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[121] 6 January 1779, TNA, C 106/87.

[122] Robert McCulloh to Lewis Johnson & Martin Jollie, 21 August 1779, TNA, C 106/87.

[123] "Return of the Negro's at Silk Hope, &c.," 10 January 1780, TNA, C 106/87.

Both McCulloh and White were particularly concerned to safeguard the enslaved people on the plantations from theft, as the movement of both American and British troops near Silk Hope and Dean Forest threatened to make off with slaves. Indeed, Silk Hope and Dean Forest were routinely threatened by troops from both sides as well as loyalists who recently had taken an oath of allegiance and sought to claim the slaves, or their equivalents, that they had lost. One of McCulloh's correspondents found these "Rebel Carolinians newly converted to the faith" of loyal subjecthood particularly worthy of scorn. He warned McCulloh that they were "very thick in the Woods, Skulking to get back what they presume to Call their negroes runnaway," and advised that they had already stolen a number of his slaves from Silk Hope.[124] American troops were equally predatory. When a party of "Rebels Came With in Five Miles of the plantation" they "put the negers to the Rout." However, White managed to get "them togather a gain" and planned to remain "on Duty" in the near future to prevent further depredations.[125] Moving slaves out of the path of armed whites to more protected outlying plantations, into the woods, or into towns was the plantation manager or overseer's most promising option as he sought to protect the slaves in his charge from theft. For example, in response to information that rebel forces planned to indemnify officers and troops for back pay "by the Capture of the different Persons Negroes – in the Neighbourhood obnoxious to their Government," McCulloh's property managers ordered his slaves to Savannah for their protection.[126]

Disciplining slaves during this tumultuous time was difficult. Aware of the movement of troops nearby, slaves routinely stopped work or stole provisions. In October 1780, White

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[124] F.P. Fratia to Robert McCulloh, 12 July 1780, TNA, C 106/87. In July 1780, the same correspondent advised that sixteen slaves had been taken off his plantations "without any formality whatsoever." P. Fratia to [Robert McCulloh], 28 July 1780, TNA, C 106/87.

[125] William White to Robert McCulloh, 18 May 1781, TNA, C 106/88.

[126] Crookshanks & Speirs to Robert McCulloh, 15 May 1782, TNA, C 106/89.

warned McCulloh that the crop would be poor because he "Could not git the hands to Work For the Space of 2 Monts."[127] He routinely begged McCulloh to travel to his plantations to "Mak[e] a proper Regulation among the negers," who continued to "Rob the Field of Corn and grabble the purtaters" to sell in town. These depredations were not limited to one or two slaves. Indeed, if "it Wos one two or three that Did it" he "would Floug them." However, the bewildered White lamented that "thare is a number of them So that" he could not "tell What to Dow."[128] Not only did the slaves on Dean Forest and Silk Hope steal and market the meagre crop; they also left the plantation, sometimes running away permanently, other times absenting themselves for short periods of time. As his property managers informed McCulloh in December 1781 the "whole" of his "Negroes (excepting four) ha[d] absented themselves, from the plantation."[129] In early 1782, White also informed McCulloh that nine of his slaves had run away, including the cooper, a skilled slave employed to make the barrels in which the crops were packed and shipped.[130] Some of these slaves eventually returned, but some did not. These included "8 or 9 of Lucenas negroes that" did "not come back," White complained, as well as two of McCulloh's own slaves.[131]

As the custodian of slaves that did not technically belong to him, McCulloh, his overseer, and his managers also were particularly concerned to ensure that these slaves were not arbitrarily removed from the plantations in payment of debts. As noted above, litigation before the Board of Police often involved debt disputes over slaves, and White kept his employer informed when slaves on his plantations were attached for debt or when colonists engaged in self-help. For

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[127] William White to Robert McCulloh, 23 October 1780, TNA, C 106/87.

[128] William White to Robert McCulloh, 30 October 1780, TNA, C 106/87.

[129] Crookshanks & Speirs to Robert McCulloh, 11 December 1781, TNA, C 106/89.

[130] William White to Robert McCulloh, 4 January 1782, TNA, C 106/89.

[131] Crookshanks & Speirs to McCulloh, 18 January 1782, TNA, C 106/89.

example, on September 7, 1780, he wrote that "5 negeres" had been "taken From the Plantation" that were "Formerley the properte of John:a Berthams," and that these slaves had been "Seased For Former Dets."[132] White's vigilance helped to ensure that McCulloh carried out his obligations as a caretaker of a sequestered estate by preventing the improper loss of human property. However, McCulloh's desire to be kept informed of slave attachments was not merely an exercise in good stewardship. Rather, McCulloh also sought to profit from the attachment of slaves, authorizing his agents to make purchases of debt slaves that he would then put to work on the plantations in his charge. This was the case when Moses Nunis sought to attach slaves belonging to a Mr. Dupont for a debt of £91.[133] McCulloh's agent "prevailed" upon the parties to postpone the sale of the attached slaves, and particularly a slave named Ben and his family, so McCulloh would have an opportunity to purchase them.[134] Nunis, however, became "anxious for a Settlement," and threatened to move forward with the sale.[135] His concerns apparently were warranted, as soon after that the debtor, "with a white man & a Negro," visited Dean Forest at night "and forcibly carried off Twelve Negroes Working fellows & four Children."[136] Nunis was "very uneasy about it as he might have secured the amount of his Debt long since," but had "put off the Sale" at McCulloh's request.[137] However, this self-help not only caused problems for Nunis, who now lacked slaves to sell in payment for the debt. It also disrupted life for slaves

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[132] William White to Robert McCulloh, 7 September 1780, TNA, C 106/87.

[133] J. Evans to Robert McCulloh, 10 December 1780, TNA, C 106/89.

[134] J. Evans to Robert McCulloh, 28 December 1780, TNA, C 106/89. The sale had been planned in order to "secure the debt and prevent the Negroes running off to Carolina." J. Evans to Robert McCulloh, 29 December 1780, TNA, C 106/89. The real value of the slaves Nunis sought to seize was far in excess of the value of the debt. In 1774 the average price of a slave in South Carolina was £58.63. David Eltis, Frank D. Lewis, and David Richardson, "Slave Prices, the African Slave Trade, and Productivity in Eighteenth-Century South Carolina: A Reassessment," *The Journal of Economic History* 66 (2006): 1056.

[135] J. Evans to Robert McCulloh, 17 March 1781, TNA, C 106/89.

[136] J. Evans to Robert McCulloh, 7 April 1781, TNA, C 106/89.

[137] Ibid.

who remained on the plantation. These slaves had been "put . . . in a quondarey" by the theft because they believed that "thare Master" would come to "tak them next." Although White tried to "ke[e]p them in heart a[s] Mutch" as possible by telling them that "thare Master is Reables that they Cant tak them" and that McCulloh was "a Bout Byen them," such assurances were probably cold comfort for enslaved people concerned that their families might soon be forcibly separated.[138]

McCulloh profited from his management of Silk Hope and Dean Forest, learning to buy and sell slaves as deftly as a seasoned South Carolinian. For example, after the affair with Nunis, he purchased Ben and his family for £110.10, a price his agent hoped he did not think "too high."[139] He also bought other slaves from James Habersham's estate, including "a Negro man named Donold" who had been "employed as a Driver" on one of McCulloh's plantations; "Lupes, July, Boson his Wife Sally & Child & Phibo a Negro Woman," and "a Negro Man Named Ben his Wife Nanny & Child Billy late the property of Jonathan Bryan of Georgia."[140]

Producing evidence of these purchases when he presented his claim for compensation as a loyalist, McCulloh described an exodus from South Carolina that suggests he had readily adapted to life in a slave society. Although he complained that the had been "cast away" and lost "the greatest part of his effects on the bar of Saint Augustine" as well as "Cattle plantation tools and Ten Negroes besides a Crop of Rice which he computes at £500," like other loyalists he still

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[138] William White to Robert McCulloh, 20 April 1781, TNA, C 106/89.

[139] Crookshanks & Speirs to Robert McCulloh, 13 June 1781, TNA, C 106/89. This figure is presumably in pounds sterling.

[140] John Simpson to Robert McCulloh, 22 May 1781, TNA, C 106/88; 16 May 1783, C 106/87; 17 May 1783, TNA, C 106/89. Bryan was one of Georgia's richest colonists. See Allan Gallay, "Jonathan Bryan's Plantation Empire: Land, Politics, and the Formation of a Ruling Class in Colonial Georgia," *The William and Mary Quarterly*, 3rd ser. 45 (1988): 253-79.

retained possession of some of the slaves he acquired during his service.[141] He first attempted to remove these slaves to St. Augustine, where his wife daily expected to receive "the Negroes that will come by land."[142] Eventually, however, McCulloh sent a number of his slaves to Jamaica, but rather than selling the slaves in the West Indies, he settled on a plan to hire them out. His Jamaica-based agent, "pleased" that McCulloh was "satisfied" with his "Conduct respecting" his "Negroes," advised him that as "long as the Negroes" could be rented, it was in his best "Interest to keep them in prefference to desposing of them." This was because "New Negroes" sold "much higher than the most Valuable Slaves that have come from America." However, if McCulloh were offered an "adequate price," he advised him to "let them go." Several of the slaves were "running Old," and besides, "they have not the Advantages which the Carolina Plantations afforded them for their Support." Quickly moving from an expression of concern for the welfare of McCulloh's slaves to an expression of even greater concern for the bottom line, his agent promised to "get them a good Master," but also reassured McCulloh that he would "make them return . . . as much as can be got by their Labour."[143]

Conclusion

Robert McCulloh's experiences as a manager of slaves and later as a slave owner encapsulate the larger process by which British soldiers and administrators adapted to life in a slave society. The ultimate irony is that this process of adaptation featured little adaptation at all. Indeed, men like McCulloh saw great opportunities to profit from the labor of enslaved people,

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[141] The Memorial of Robert McCulloh of Charlton in the County of Kent late Deputy Collector of the Port of Charlestown in the Province of South Carolina, 22 March 1784, TNA, C 106/88.

[142] Ann McCulloh to Robert McCulloh, 2 February 1783, TNA, C 106/87.

[143] Anthony Roxburgh to Robert McCulloh, 30 January 1784, TNA, C 106/88.

and they did not hesitate to take advantage of those opportunities. Although extended contact with enslaved people, particularly within the military, may have led some to question the morality of treating people as property, for the vast majority of military officers and administrators, first-hand experiences with slaves did not result in either individual or structural critiques of slavery. As Christopher Brown has shown, those came after the war, when many more Britons moved from antislavery sentiment to abolitionist action.[144]

This is in part because Britons who served in slave societies during the American Revolution did not experience slavery as a crumbling economic system. Rather, they eagerly sought access to a plantation economy that was thriving on the eve of the Revolution, and that despite war-time devastation remained potentially viable. Slave ownership gave individuals like McCulloh access to this system, as it had done for newcomers throughout the colonial era. Indeed, by tapping into a much older logic of slaveholding in which purchasers expected investments in slaves to yield high returns in a short period, Britons like McCulloh took advantage of war-time disruptions to profit from South Carolina's slave economy. At the same time, slave labor remained incredibly useful for a British military that was pressed to solve the problem of supplying a large army fanned out across a vast territory. As agricultural workers and as laborers in other military departments, slaves provided the manpower that was necessary to keep Britain's military operating in the American southeast – they were the sinews of war that made the British army work.

The usefulness of slaves to the British military and their profitability to individual Britons goes a long way toward explaining why these newcomers did not act decisively to undermine slavery during the American Revolution. But the tremendous power of custom, as enshrined in

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[144] Christopher Leslie Brown, *Moral Capital: Foundations of British Abolitionism* (Chapel Hill, University of North Carolina Press, 2006), 26-27.

positive law, also helps to explain why Britons during the Revolutionary War often acted as a "shield" to slavery rather than a "sword," and why they continued to rely upon colonial precedents to manage slaves.[145] Indeed, late eighteenth-century Britons inhabited a world in which slaveholding was normal, legal, and customary, despite growing antislavery sentiment in the United Kingdom and in some parts of the American mainland. Even in the wake of the *Somerset* decision, which historians now agree produced only a narrow holding as to the status of enslaved people in England, slavery was widely accepted and practiced in Britain's colonial possessions, and particularly in the British West Indies, where it was a source of great profit.[146] Moreover, colonial legislatures had developed positive laws, promulgated by local assemblies, to authorize and regulate slavery, which even the *Somerset* decision acknowledged as binding.

British newcomers to South Carolina, accustomed by the late eighteenth century to consider legislative acts to be authoritative, acknowledged the precedential weight of local statutes, including those governing slavery. This was particularly true in South Carolina, where local statutes governing slavery codified customary practice, as we have seen in Chapter 1. Indeed, South Carolina's statutory laws of slavery were tailor-made to suit the needs of colonists operating in a commercial environment that required capital in the form of slaves to be liquid, divisible, and mobile. British military and civilian personnel found that these colonial slave laws, sanctioned by custom and local legislation, also suited their practical needs when it came to policing a highly mobile slave population. The combination of custom, statute, and practical utility made it unlikely that British soldiers or administrators in Charlestown would look elsewhere for legal precedents as they sought to manage South Carolina's slaves. Instead, like

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[145] Frey, *Water From the Rock*, 141.

[146] George Van Cleve, "Somerset's Case and Its Antecedents in Imperial Perspective," *Law and History Review* 24 (2006): 602-3.

countless colonists before them, they turned to past practice as a guide, acknowledging the enduring power of colonial South Carolina's laws of slavery in war as well as peace.

Conclusion

In 1783, South Carolinian John Sommers waxed optimistic about the future of his new state, writing to his father in England that the "happy effects of peace" already were beginning to be "felt." Not only did "all Kinds of European goods . . . most Amazeingly sell," but Charleston's wharfs were "Crowded with Ships of Different nations," including "prusians, Danes, Swedes, British, French, Duch, & Ships of the United States of A." True, money was scarce, but crops were "promising," and Sommers himself had recently invested in a new plantation on credit. This acquisition, when improved through the labor of African slaves, would allow Sommers and his family to make their way in "this new world." For Sommers, who initially did not "expect to see any Satisfaction more in this country," the opportunity to profit from planting was too alluring to abandon.[1] Just as had been the case for countless colonists before him, purchasing land and slaves remained the key to wealth building in post-Revolutionary South Carolina.

Despite Sommers's optimism, much about this "new world" was frightening. The Revolutionary War not only physically devastated South Carolina; it also cut off merchants and planters from trade with Europe and the Caribbean, leading to economic stagnation in the last two decades of the eighteenth century. This stagnation was exacerbated by a manpower shortage in the immediate aftermath of the war, as South Carolina and Georgia plantations lost nearly "one-quarter of their pre-Revolutionary slave populations."[2] The "desertion & death of their Slaves" combined "with the destruction of their Crops & Cattle" brought "most of the Planters"

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[1] John Sommers to Father, 28 June 1781, John Sommers Papers, Fl. 1777-1789, Misc. MSS Collection, AC17, 415, Library of Congress, Manuscripts Division, Washington, D.C.

[2] Philip D. Morgan, *Slave Counterpoint: Black Culture in the Eighteenth-Century Chesapeake & Lowcountry* (Chapel Hill: University of North Carolina Press, 1998), 666.

to "a low ebb," explained Josiah Smith, Jr. to a London correspondent.[3] Slaves who had not successfully escaped with the British had to be retrieved and made to return to work, a process that proved difficult in practice. As Elias Ball complained, he was having a "grate deal of trouble" bringing his "new perchased Negroos" to "a proper method of work" because they had been in "such an ill habet of work last year."[4] Slaves in Charleston (which was incorporated in 1783) were reluctant to give up the autonomy that had accompanied war time disruptions. As Sarah DeFollenare, who had hired out her "Wench," Nanny, for "three years in Town," complained, Nanny now refused to remit her wages to her mistress, and she threatened her with sale "at Public Vendue" to compel her obedience.[5] Although the war did not result in significant legal changes for slaves, the continued mobility of enslaved people in the conflict's immediate aftermath posed significant challenges for owners like Ball and DeFollenare, who sought to reclaim their slaves and to put them back to productive work. As these owners understood, it was only through mobilizing slave labor that they could revive plantations and businesses, and thereby attain pre-war levels of prosperity. The unprecedented mobility of enslaved people during the war, then, ultimately had the effect of shoring up rather than undermining "slaveholder commitment to bondange" as South Carolinians sought to reassemble an enslaved labor force in the immediate post-war period.[6]

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[3] Josiah Smith, Jr. to James Poyas, 5 December 1780, Josiah Smith Letterbook, 411; 413, Southern Historical Collection, University of North Carolina, Chapel Hill, North Carolina.

[4] Elias Ball to [unknown], 25 July 1784, Ball Family Papers, 369.01 (c) 03-01, South Carolina Historical Society, Charleston, South Carolina.

[5] Sarah DeFollenare to [unknown], 28 May 1784, Grimke Papers, 11/172/11, SCHS.

[6] As Davis has observed, slavery "had done more than simply survive the disruptions of a half-century of war and revolution. The system had proved to be far more vigorous, adaptable, and expansive than critics had imagined." David Brion Davis, *The Problem of Slavery in the Age of Revolution, 1770-1823* (Oxford: Oxford University Press, 1999), 83.

In addition to forcing slaves they already owned to return to work, planters and merchants also purchased new slaves. Between 1783 and 1784 the average price of a slave jumped from £59.79 to £67.82 as a result of increased demand and the expectation of planters like Sommers that crops were "promising." Although prices dropped again in 1785 due to crop failures in 1783 and 1784, by 1806 slaves were trading at an average price of £70.66.[7] Indeed, during the postwar period the "Lower South witnessed a huge expansion of slavery," in part to meet the growing demands of the state's backcountry region.[8] Fueled by extensive immigration from the middle colonies, the backcountry's white population had nearly doubled between 1750 and 1770.[9] By 1760, 50% of the colony's white population lived in the backcountry, and this figure reached nearly 75% in 1770.[10] These backcountry settlers provided a ready market for slaves as they turned to indigo planting or provisions farming in service of lowcountry plantations.[11] Twenty years earlier Henry Laurens, who began his mercantile career as a slave trader, had identified this region as a "large field for trade," observing that the "vast number of people seting down" in the backcountry would pay "the highest prices" for slaves.[12] Peter Manigault agreed, noting that the "back parts" had "settled extremely fast," and that as a result

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[7] David Eltis, Frank D. Lewis, and David Richardson, "Slave Prices, the African Slave Trade, and Productivity in Eighteenth-Century South Carolina: A Reassessment," *The Journal of Economic History* 66 (2006): 1056. South Carolina outlawed the transatlantic slave trade in 1787, but trade was reopened between 1803 and 1808. Joyce E. Chaplin, *An Anxious Pursuit: Agricultural Innovation & Modernity in the Lower South, 1730-1815* (Chapel Hill: University of North Carolina Press, 1993), 320.

[8] Morgan, *Slave Counterpoint*, 666.

[9] Robert M. Weir, *Colonial South Carolina: A History* (Columbia: University of South Carolina Press, 1997), 205-06.

[10] *Ibid.*, 209.

[11] S. Max Edelson, *Plantation Enterprise in Colonial South Carolina* (Cambridge: Harvard University Press, 2006), 258.

[12] Henry Laurens to Richard Oswald & Co., 15 February 1763, *The Papers of Henry Laurens*, ed. Philip M. Hamer et al., 16 vols. (Columbia: University of South Carolina Press, 1968-2003), 3:259-60.

over "two thirds" of the slaves imported into South Carolina had "gone backwards."[13] Their appraisal of the region's potential as a market for slaves proved prescient. In the last decade of the eighteenth century and into the early 1800s, South Carolina imported fifteen thousand slaves from Africa. A majority of these new slaves "went inland," where they labored on backcountry farms and plantations.[14]

With this re-commitment to slavery came a recommitment to slavery's laws. Disciplining unruly slave populations after the war became an issue of prime concern, particularly as South Carolinians, participating in what would soon become a booming internal slave trade, began to import more slaves from the Chesapeake. As Virginia transitioned from a labor-intensive tobacco export economy to cereal cultivation, Chesapeake planters found themselves "with a surplus of human property."[15] By the 1790s, Virginia, Maryland, and Delaware had become net exporters of slaves into South Carolina and the opening frontiers of the Deep South.[16] Between 1790 and 1860, more than one million slaves were transported from the Upper South to the Lower South, while twice that number were traded within the South at the local level.[17] South Carolina alone received approximately four thousand slaves from the Chesapeake region between the 1790s and the early 1800s. While this internal slave trade began

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[13] Peter Manigault to W[illiam] Blake, [December 1772], Manigault Papers, 11/278/7, Peter Manigault Letterbook, 1763-1773, 192-93, SCHS.

[14] Chaplin, *An Anxious Pursuit*, 321.

[15] Steven Deyle, *Carry Me Back: The Domestic Slave Trade in American Life* (Oxford: Oxford University Press, 2005), 4.

[16] Michael Tadman, *Speculators and Slaves: Masters, Traders, and Slaves in the Old South* (Madison: University of Wisconsin Press, 1989), 11-12.

[17] Deyle, *Carry Me Back*, 4.

slowly between 1787 and 1807, it accelerated after the closure of the transatlantic African slave trade, feeding the labor demands of backcountry and Deep South cotton plantations.[18]

The influx of new slave populations into the backcountry raised fears of slave insurrection, particularly on the part of lowcountry planters who believed that backcountry settlers, as less experienced slave owners, neglected the law. Indeed, the backcountry's reputation for lawlessness, which arose in part due to the Regulation movement of the 1760s, aroused concerns that these poor white "crackers" were unwilling or unable to manage their slaves properly.[19] One lowcountry judge, after touring the backcountry, expressed his concern that settlers had "neglected" the "patrole law," and that this was particularly disturbing given "great introduction of so many people of color into this State from Maryland, Virginia, & No Carolina." Just as colonists had once considered slaves from the West Indies to be prone to rebellion and, therefore, less desirable, so too did South Carolina slave owners fear that Chesapeake slaves would prove particularly unruly. As a result, enforcing South Carolina's slave laws was "more requisite" than it ever had been, according to the judge. He urged backcountry jurors to "carefully peruse that Law & the other Acts relative to the Government of Slaves," and to educate their neighbors about their findings. Paying "more attention" to "those useful Laws" would "be followed by the happiest consequences."[20]

These "useful Laws" were South Carolina's colonial slave laws. Despite the significant legal changes wrought by the Revolution, much remained the same.[21] South Carolinians became

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[18] Tadman, *Speculators and Slaves*, 17.

[19] For a discussion of the Regulator movement in South Carolina, see Rachel N. Klein, *Unification of a Slave State: The Rise of the Planter Class in the South Carolina Backcountry, 1760-1808* (Chapel Hill: University of North Carolina Press, 1990).

[20] [J.F. Grimke] Grand Jury Charge, [undated], Grimke Papers, 11/172/33, SCHS.

[21] Jack P. Greene, "Colonial History and National History: Reflections on a Continuing Problem," *The William and Mary Quarterly*, 3rd ser. 64 (2007): 235-50.

citizens of a state, not subjects of a king. The state's judicial system was reorganized, and in 1785 the state legislature, now called the General Assembly, passed a statute establishing a county court system.[22] Nonetheless, citizens continued to view the 1740 Negro Act as a guide for managing their slaves in the new republic. Indeed, colonial slave statutes remained in force with little change through 1865. This meant not only that the policing of slaves in the state would be similar. It also meant that slaves would continue to be treated de jure and de facto as chattel property. South Carolinians did not choose to alter the English property law framework that had served them so well in the past. Rather than taking the Revolution as an opportunity to remake their entire system of slave laws, they doubled down on a colonial system, derived from English law, that had proven responsive to their commercial need to treat slaves as things.

As a practical matter, the continuation of chattel slavery into the new republic also meant that South Carolinians would continue to replicate English legal forms and procedures as they conducted routine transactions involving slaves and as they litigated over slaves in state courts. John Phillips's legal precedent book, written between 1788 and 1839, contained a multitude of English forms that he believed remained useful to a lawyer practicing in the new United States. These included form declarations to "recover for an unsound Negro sold for a sound price," for "covenant on Warranty for selling an unsound negro," and "for harboring a Negro." He also included a form of a "Writ retorno habendo in fi[eri] fa[cias]" for failure to prosecute a slave detention case, and a "Writ of Injunction in Equity" to restrain a defendant from removing a slave. Just as Phillips substituted the word "iron grey mare" for the word "negro," citizens and lawyers substituted the word "colony" for the word "state" in pre-printed English forms that they used to buy, sell, and mortgage slaves. In a 1777 printed writ of attachment, for example, the

[22] "An Act for establishing County Courts, and for regulating the proceedings therein" (1785), *The Statutes at Large of South Carolina*, ed. Thomas Cooper and David J. McCord, 10 vols. (Columbia: A.S. Johnston, 1836-41), 7:211.

word "colony" is stricken out and "state" written in.[23] A printed bill of sale for a slave from 1784 follows the form of colonial bills of sale, with two exceptions: a caption that reads the "State of South Carolina" has been added, and references to the regnal year are replaced with a tally of years since independence.[24] Phillips himself copied out a slave mortgage form in his book of legal precedents. As South Carolinians like Phillips discovered, English law and English legal procedure continued to be readily adaptable for citizens living in a slaveholders' republic. Republican forms were not, in the end, different from forms used under a monarchy: both could be used to manage slaves at law.

Perhaps most importantly, at the level of practice, the language of English law and the authority that language conveyed continued to be deployed by South Carolinians as they managed their slaves on a daily basis. Citizens, like colonists, continued to use the language of "issue and increase" to transfer slaves, adhering to an older worldview in which property was bifurcated into chattels and real estate. For example, in 1795, Mary Allston, a "Spinster," gave to her brother "[t]o have and to hold" in trust for his daughters her "Wench Catharine and her Two Children Dinah and Jenny with all their Future Issue and Increase Also to Charlote Atchinson Allston Wench Jenny and Two Children Besty and Peter with all their future Issue and Increase."[25] As they wrote their wills, South Carolina's slave owning citizens also continued to group slaves with livestock. When John Coming Ball drafted his will in 1792, for example, he grouped his slaves with his cattle, giving his sister the pick of "any Negro girl among my female Slaves she may prefer" and John Ball the right of first refusal for his "Stock of Cattle at

[23] 7 January 1777, Baker Family Papers, 1138.00, 11/535/29, SCHS.

[24] 19 August 1784, Broughton Papers, 11/93/9, SCHS.

[25] 17 July 1795, Allston Family Papers, 1164.01, 12/6/14, SCHS.

Jericho."[26] Too, South Carolinians continued to finance their purchases with slave bonds and mortgages. When a member of the Pringle family disposed of a plantation "For the sum of Thirty two thousand Doll[ars]," the land and slaves were "secured by Bonds & Mortgage with the mortgage of additional property as Security."[27] As Bonnie Martin has shown, slaves were a source of collateral for over 80% of the capital raised in recorded mortgages during the early national period. This trend was in keeping with patterns established during the colonial period, as citizens used the value that inhered in the bodies of enslaved people to finance post-war recovery and expansion.[28]

Mobilizing slave labor also continued to result in complicated arrangements like those colonists once litigated in Chancery Courts. These included an 1819 "swap" of slaves, in which John H. Fisher and his wife, Elizabeth, gave Charlotte A. Allston the use of an enslaved women and her two youngest children "during her life time." The parties agreed that Allston would be responsible for paying "their taxe's and finding them in cloathing & victuals," and that Allston also would "put out" the slave's older children." The female children would "be taught to sew, wach &c.," while her son would be "put to the carpenters trade." After their apprenticeship, these slaves would "return" to the Fishers's service. In order to compensate the Fishers for Suzy's labor, Allston also agreed to give them "during her life Boson," who would nonetheless be "considered as her property at her death."[29] Just as mastery and ownership were not necessarily synonymous during the colonial period, so too did legal flexibility, inherited from English law, open up space for citizens to craft individualized legal solutions to their labor needs.

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[26] Will of John Coming Ball, 3 December 1792, Ball Papers, 11/5/5-27, SCHS.

[27] [undated], Mitchell-Pringle Collection: James R. Pringle Papers, 11/323/13, SCHS.

[28] Bonnie Martin, "Slavery's Invisible Engine: Mortgaging Human Property," *The Journal of Southern History* 76 (2010): 840.

[29] 27 February 1819, Allston Family Papers, 1164.01, 12/6/14, SCHS.

English law also continued to be a cultural touchstone for South Carolinians as they sought to reorganize the state's institutions in the wake of independence. Drawing upon a shared English legal past, some South Carolinians defended the maintenance of jurisdictional diversity in the face of legislative attempts to consolidate the state's judiciary. For example, South Carolina's common law judges cited English law and legal precedents as they complained about the legislature's attempts to merge the state's common law, equity, and ecclesiastical jurisdictions. In part, their concerns stemmed from the fact that they were asked to do more work for less pay. Judicial independence, it seemed, came at a high price for judges who found themselves no longer entitled to fees, which had been "taken altogether" and replaced with salaries that were "not one third of their amount." These judges defended the autonomous jurisdiction of multiple courts based upon English practice, drawing a line of continuity between medieval legal precedents and their own constitutional roles. Although the judges admitted that the legislature had the authority under the 1790 constitution to erect "Superior & Inferior Courts both of Law & Equity," they denied that legislators were empowered "to blend either the Superior & Inferior Jurisdictions in one Court, or to authorize those who are appointed Judges of a Court of Common Law, to entertain appeals brought as from an inferior Court whose mode of decision is guided by the rules of the Canon or Civil Law." Citing Blackstone, they claimed that blending these jurisdictions violated the "forms & principles of our particular Constitution," and they warned of the "great confusion" that would follow from "overturning long established forms & new-modelling a course of proceedings that has now prevailed for 7 Centuries."[30] In South Carolina, colonial traditions and practices modeled on English law continued to be an

[30] Draft letter from Judges to Governor, 19 February 1791, Grimke Papers, 11/172/18, SCHS.

important source of legal authority despite the upheavals of war and the proliferation of republican institutions in the immediate post-war period.

This legal continuity calls into question Laura Edwards's suggestion that the confusion created by the Revolutionary War created space for enslaved people and women to seek justice at the local level. Before the hegemony of state law, she argues, citizens sought to maintain "the peace." Doing so, as a practical matter, meant ceding authority to local actors despite their race and gender.[31] This narrative assumes that consistently administered state law – and particularly appellate practice that disciplined lower courts – was necessary for subjugating African Americans. In early republic South Carolina, however, the legal status of African American slaves was clearly established both by statute and custom. Although the war disrupted life on plantations, it did not disrupt the legal classification of slaves as property or, more importantly, daily legal practices that taken together dehumanized slaves and denied them legal status before the law. Citizens brought with them into the nineteenth century not only an English legal heritage in which maintaining the king's peace was important. They also carried with them a host of other English legal precedents and practices that facilitated the buying, selling, and bequeathing of slaves. Formal institutions of state law were not necessary for deploying either.

Ultimately, South Carolina's doubling down on slavery's laws increasingly set South Carolinians other citizens in the Deep South apart from the rest of the United States. Although the Revolutionary War did not alter South Carolina's slave laws, it did spark lasting legal changes in northern and mid-Atlantic states that would come to heighten legal distinctions between places where slaves were property and places where they were not. Vermont's 1777 state constitution, for example, asserted that no individual "born in this country, or brought from

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[31] Laura F. Edwards, *The People and Their Peace: Legal Culture and the Transformation of Inequality in the Post-Revolutionary South* (Chapel Hill: University of North Carolina Press, 2009), 7-8.

over sea, ought to be holden by law to serve any purpose, or servant, slave or apprentice," without their consent.[32] Massachusetts's courts likewise construed the state's 1780 constitution to prohibit chattel slavery, articulating this principle for the first time in a series of decisions related to litigation over the legal status of the slave Quock Walker. Other states followed suit -- perhaps most famously Pennsylvania -- instituting a series of gradual emancipation schemes.[33] Northern courts also increasingly grew unwilling to grant comity to the slave codes of southern states in the context of freedom suits. Whereas northern judges, in determining whether slaves brought by southern masters into their states, had traditionally denied freedom to the slave, over the first three decades of the nineteenth century they began to deny comity and free enslaved plaintiffs. This jurisprudential transformation was epitomized in *Commonwealth v. Aves* (1836) in which Chief Justice Shaw held that a slave carried to Boston could not, as a matter of public policy, be recognized as property in Massachusetts, over arguments that the state should grant comity to the laws of Louisiana.[34] The process by which this transition occurred was by no

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[32] Gordon S. Wood, *Empire of Liberty*: *A History of the Early Republic, 1789-1815* (Oxford: Oxford University Press, 2009), 519.

[33] *Ibid*., 520.

[34] *Commonwealth v. Aves*, 35 Mass. 193 (1836). This is not to suggest that post-revolutionary waves of emancipatory legislation in the North and mid-Atlantic flowed from the elimination of racist sentiment. Indeed, as a number of scholars have noted, the status of northern free blacks became increasingly tenuous as Revolutionary zeal faded. Richard Newman, for example, has shown that the free black community in Philadelphia faced persecution over the course of the early nineteenth century as a post-Revolutionary window of opportunity for interracial harmony closed. Richard S. Newman, *Freedom's Prophet: Bishop Richard Allen, the AME Church, and the Black Founding Fathers* (New York: New York University Press, 2008), 191-94. Claire Lyons, too, in her study of the free black community in Philadelphia concurs that possibilities for free blacks were foreclosed as sexual deviance was re-inscribed, via cultural processes, onto the bodies of lower class and free black women. Claire Lyons, *Sex Among the Rabble: An Intimate History of Gender & Power in the Age of Revolution, Philadelphia, 1730-1830* (Chapel Hill: University of North Carolina Press, 2006), 3-4. In his social history of free black seamen in the north, W. Jeffrey Bolster, too, has argued that the lives of these men gradually worsened as revolutionary zeal faded. W. Jeffrey Bolster, "'To Feel Like a Man': Black Seamen in the Northern States, 1800-1860," *Journal of American History* 76 (1990): 1174, 1177. Likewise, scientific racism took hold in north as well as south, and was even used to justify the activities of nascent antislavery movements, and especially the American Colonization Society. See, e.g., Newman, *Freedom's Prophet*, and Richard S. Newman, *The Transformation of American Abolitionism: Fighting Slavery in the Early Republic* (Chapel Hill, University of North Carolina Press, 2001). The "unrelenting mob terrorism against immediate abolitionists and African-American communities that swept the North between 1831

means uniform, nor was it predestined. In 1783, South Carolinians were not yet "crouched in a defensive posture against the North that they assumed in the decades before the Civil War."[35] Nonetheless, the post-Revolutionary abolition of slavery in northern and middle states via state constitutions, gradual emancipation schemes, or judicial decisions signaled regional divergence in the period immediately following the American Revolution.

This had far-reaching and negative consequences for slaves. As South Carolina's statutory law of slavery became the model for slave codes in the Deep South, so too did the language, practices, and precedents of chattel slavery. The economy of the nineteenth-century internal slave trade, which nineteenth century historians have only begun to reconstruct, is the legacy of a legal culture that in prescription and practice treated slaves as things. Considered chattel property in nearly every Deep South state, slaves could be bought, sold, and mortgaged at will. Owners and slave traders devised increasingly ingenious ways to maximize their value as property, taking advantage of advances in communication, transportation, and finance to traffick in human beings.[36] In the long term, the removal of restraints on alienation and inheritability that South Carolinians pioneered does not map easily onto a post-Revolutionary triumphalist narrative that takes the removal of feudal restraints at its end point. As we have seen, this was the continuation of an older and far more tragic story in which English law was both prop and principal actor. We still live with its consequences today.

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and 1838" represented the full flowering of this racial thinking. James Stewart, "The Emergence of Racial Modernity and the Rise of the White North," *Journal of the Early Republic* 18 (1998): 181.

[35] Edelson, *Plantation Enterprise*, 260.

[36] Deyle, *Carry Me Back*, 119; Adam Rothman, *Slave Country: American Expansion and the Origins of the Deep South* (Cambridge: Harvard University Press, 2005), 4; 223; Calvin Schermerhorn, *Money Over Mastery, Family Over Freedom: Slavery in the Antebellum Upper South* (Baltimore: Johns Hopkins University Press, 2011), 211-12.