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## NEGRO RIGHTS, UNIONISM, AND GREATNESS ON THE SOUTH CAROLINA COURT OF APPEALS:

### THE EXTRAORDINARY CHIEF JUSTICE JOHN BELTON O'NEALL

A. E. KEIR NASH\*

#### I. INTRODUCTION

The prisoner has been severely whipped, — and even if that was too small a punishment, do the humane principles of the common law demand anything further? Sure am I they do not. *If the prisoner was a white man, and not a negro, could such a course receive the countenance of anyone?* . . . I close now my duty to this case, with the happy relief, that, if I have been in error, it has been corrected by the better judgment of my brethren,—and I am sure, I am more gratified by the consciousness, that none of the blood of this negro will rest upon me, than the prosecuting parties can be, who will now be gratified by offering up his blood, as a sacrifice on the altar of public justice.<sup>1</sup>

The year was 1851; the place, the South Carolina Court of Appeals for the Correction of Errors in Law. With these words John Belton O'Neall—for three and a half decades, from 1830 to 1863, the dominant member of the South Carolina appellate court structure<sup>2</sup>—registered his pained dissent from his brethren.

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1. *State v. Nathan*, 5 Rich. 219, 232-33 (S.C. 1851) (emphasis added).

2. I use this choice of words advisedly. In 1835 the state legislators, piqued for reasons described below, dissolved the court of appeals which they had created in 1824 and which consisted of three men unencumbered by circuit duties exercising final jurisdiction in both law and equity. The legislators restored the pre-1824 system of two separate conference appellate courts, one in law and one in equity, each comprised by the several circuit judges and chancellors assembling at Columbia and Charleston. A year later the legislators created a kind of "troika" by providing that split-decisions on either conference court could be appealed to a combined conference court. They thus created an extraordinarily Byzantine structure which could result in one judge hearing a case three times. He might decide a case one way on circuit, find himself reversed on appeal to the conference court in equity, and then find himself sustained by the combined appellate court! In 1859 the legislature wisely restored the 1824 structure, and officially recognized O'Neall's dominance by creating for him the title of Chief Justice.

ren's refusal to uphold a Negro's claim that he had been subjected to double jeopardy. The slave Nathan had been first convicted and given one hundred lashes for *simple assault and battery*. In a second trial he was sentenced to death for robbing the female whom he had assaulted. O'Neill, at chambers, granted a writ of prohibition on two grounds: one, that the first conviction, coming upon an indictment for *assault and battery with intent to rape*, negatived felonious intent and thus made impossible a second felony trial; and two, that the facts proved on the second trial did not amount to robbery. The State appealed O'Neill's order successfully and two further trials were held—the first resulting in a mistrial and the second in a conviction. Nathan appealed again, but on this occasion he had the misfortune to come before Judge David Wardlaw<sup>3</sup> who, though refusing to rule, delivered an obiter essay favoring the State and sent the case straight up to the Combined Court. That court upheld Wardlaw's view that the two offenses, attempt to rape and robbery, could arise separately from the same action, and moreover, that the facts did constitute robbery. Nathan might well be getting a deal as existentially raw as his back after his whipping, yet the state's prosecutory procedure did not contravene the South Carolina Constitution.<sup>4</sup>

Wardlaw was, I think, technically correct. Yet the fact of O'Neill's instant error—if it be that—should not dull us to the salient importance of his opinion. That is, of course, contained in the sentence I have italicized: "*If the prisoner was a white man and not a Negro, could such a course receive the countenance of anyone?*" A statement like that, delivered even as a dissent from the highest tribunal of the state which was to lead the South out of the Union not ten years later, is, at a minimum, intriguing. When—as I shall argue—such a statement is not merely a momentary aberration but rather illustrates a major thrust of a judicial career spanning a third of a century and capped just two years before Fort Sumter by promotion to the chief justiceship of the state, then we have grasped something which bears extended scrutiny. Such scrutiny seems warranted

3. On the Law Court 1842-1859, and like O'Neill, a Unionist in 1860-1861.

4. It should perhaps be noted that no federal constitutional claims arose in Nathan's case. Here—as in virtually all the Negro cases dealing with procedural rights—the state supreme courts were, prior to the passage of the fourteenth amendment in 1868, final arbiters—a fact of "power" and "status" which, I am sometimes tempted to think, may account in part for the generally high quality of antebellum state decisions throughout the South.

for at least three reasons. First, O'Neill's career does not square with a major tenet of "Northern" historiography about the climate of opinion and politics in the Old South. That perspective of the South—what we might call the Harriet Beecher Stowe perspective, or if we chose to give it the greater dignity of the major post-Civil War historian, James Ford Rhodes, the Rhodesian interpretation—would be hard put to find a just place for John Belton O'Neill and his court in an antebellum scheme peopled solely by brutish slave-masters, fire-eating red-necks, and cringing Negroes. Nor would placement be substantially easier for contemporary "Neo-Rhodesian" views depicting the Old South as a gigantic concentration camp for blacks exploited by capitalists in planters' clothing, themselves driven unconsciously by the profit-spurs of laissez-faire economics.<sup>5</sup> Second, Southern "Revisionist" interpretations—those which, beginning in the 1890's under Dunning at Columbia and reaching an apogee in his pupil, U.B. Phillips of Georgia, rather thoroughly revised "accepted" Northern views during the first decades of this century<sup>6</sup>—cannot easily do a great deal better with the datum of O'Neill. If as Revisionists have urged, Yankee abolitionism drove the previously "Jeffersonian-liberal" seaboard South into a monolithic pro-slavery "concert of defense" during the early 1830's, why was O'Neill worrying in 1851 about not treating Negroes on trial as favorably as whites? Third, there is a final reason for scrutiny—one that has contemporary practical, and not merely historical, interest. If O'Neill's statement was not an isolated phenomenon but rather characterized a persistent strand of concern for the Negro in what was then—before the fourteenth amendment—a rather potent "third branch" of South Carolina's government, how shall we explain it other than by an analysis which would see a good deal more diversity of racial outlook in South Carolina history than either Rhodesian or Revisionist theories can readily accommodate?

Discussing, in 1938, the shaping of the peculiar contours of American law during the century after the Revolution, Roscoe Pound suggested a list of "ten judges who must be ranked first

5. For examples of this "Neo-Rhodesian" trend see S. ELKINS, *SLAVERY* (1959); J. FRANKLIN, *THE MILITANT SOUTH* (1956).

6. For an extended discussion of various interpretations of the antebellum South and the origins of the War Between the States, see T. PRESSLY, *AMERICANS INTERPRET THEIR CIVIL WAR* (1954).

in American judicial history.<sup>7</sup> This list by the late "dean" of American legal scholars bore witness to the ample vitality of the state judiciaries during the antebellum era. Six of the ten judges made their imprint on American law from state benches. Of these six, two—Spencer Roane of Virginia and Thomas Ruffin of North Carolina—were Southerners. None came from South Carolina or the Gulf States. To a substantial extent this North-South imbalance was doubtless due to the importance of a particular field of the law—commercial jurisprudence—whose major development naturally came in regions involved earlier than the Deep South in the industrial revolution. Yet if we were to fix our attention upon the ancestry of a more problematic contemporary issue, race relations, which is still being threshed out and whose threshing still creates havoc with inter-governmental balances of power, then we might well come up with a different membership of such a "formative list" as Pound's. Such a list might well begin with the elder John Marshall Harlan—the "great dissenter" of *Plessy v. Ferguson*<sup>8</sup> and the *Civil Rights Cases*<sup>9</sup>—and work back to a largely Southern membership of antebellum slave state appellate judges. These are men who, with a few exceptions, have been treated unkindly by time. But given the contemporary patterns of consuming racial conflict and urban cleavage, it seems hardly rash to urge that these men, who first attempted to impose a solid rule of law upon the American Negro's condition, merit attention. This is not the place to enumerate the precise composition of such a list and even less to explain particular choices. It is, however, appropriate to assert that hardly anyone could come away from a study of the not quite two hundred men who sat on these antebellum southern appellate courts, and draw up such a list excluding O'Neill. Why? Let me suggest one reason now—at the risk of letting the analytical cat prematurely out of the narrative bag.

John Maynard Keynes once somewhat naughtily contrasted two of his major predecessors in economic theory by observing

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7. R. POUND, *THE FORMATIVE ERA OF AMERICAN LAW* 4 (1938).

8. 163 U.S. 537 (1896). Let me emphasize that the point here has nothing to do with approving or disapproving of "separate but equal" as opposed to "integration", or of the elder Harlan's reasoning. Granted the path which the contemporary Warren Court has taken, the analytic issue is a question of the ancestry of power, not of values.

9. 109 U.S. 3 (1883).

that one<sup>10</sup> chiselled in stone while the other—usually regarded as the more important<sup>11</sup>—knitted in wool. O'Neill, it strikes me, engaged in both activities. His dissent in *Nathan* was an unsuccessful example of the latter judicial handicraft. On other occasions—as in his loosening of South Carolina's restrictions on emancipation of individual slaves during the 1830's—he managed to knit a fabric which for several years kept the wool over pro-slavery eyes. On still other, and rarer, occasions—as in his onslaught against nullification—he chiselled an edifice out of—if not granite—at least a fairly solid Carolina limestone which the legislature could only remove by dissolving the court.

## II. THE UNION AND THE SOUTH CAROLINA COURT OF APPEALS

During the six years between the creation of the three-man court of appeals in 1824 and O'Neill's appointment to it in 1830, its judges began to hew out a view of the Federal Union which was to place it—once O'Neill was ensconced—in radical opposition to the tide of nullification mounting in the state's legislative and executive branches. While the notes of union sounded by judges David Johnson and Abraham Nott during the 1820's were softer than those to be trumpeted by O'Neill after 1830, they deserve examination—both as prelude and because, where they have not been overlooked, they have been susceptible to misinterpretation. Charles Warren has not stood alone in his view of their refusal to follow the declaration of their former colleague, William Johnson,<sup>12</sup> that the South Carolina laws forbidding Negro sailors to enter the State were unconstitutional. Warren's view that they thus displayed a provincial and willful disregard for the Constitution and simply typified South Carolina's retrograde outlook on the world has been widely shared.<sup>13</sup> Yet it is unfair to the South Carolina judges in two ways.

10. W.S. Jevons.

11. Alfred Marshall.

12. Jefferson's first appointment to the Marshall Court, William Johnson, had served prior to 1804 on the pre-1824 "conference-style" appellate court to which Nott and David Johnson had previously belonged.

13. See 1 C. WARREN, *THE SUPREME COURT IN UNITED STATES HISTORY* 624-27 (rev. ed. 1926) [hereinafter cited as WARREN] and 2 WARREN 168-71. Particularly, "[t]he officials and Courts of South Carolina continued for over twenty-five years to disregard Judge Johnson's opinion . . ." 1 WARREN 627. And see his striking expression of what I would call a Neo-Rhodesian summary of Southern reaction to Johnson, and to *Gibbons v. Ogden*: "So the long-continued controversy as to whether Congress had exclusive or concurrent

First, William Johnson gave his opinion in a case which turned on a narrower question.<sup>14</sup> *Elkison v. Deliesseline*<sup>15</sup> was an application for a writ of habeas corpus, or alternatively for a writ *de homine replegiando*, to release a British colored sailor arrested by the sheriff of Charleston District on his arrival aboard a Liverpool ship. Johnson was "decidedly of the opinion"<sup>16</sup> that the provision of the 1822 statute under which the sheriff had acted<sup>17</sup> contravened the commerce clause. Yet he found that he could not grant either relief prayed for: habeas corpus, because the Federal Judiciary Act of 1789 did not authorize its issuance when a prisoner was in state custody; and *de homine replegiando*, because it did not lie against a sheriff. Consequently, Johnson's assertion of unconstitutionality was *obiter dictum*. And it was dictum in a circuit decision—the United States Supreme Court never heard the case. Consequently, there was no reason why the South Carolina judges should have felt themselves bound by it.

Second, pre-1830 opinions do not suggest that the South Carolina judges were anxious to underwrite the Colored Seaman Acts. Indeed, their handling of the two cases<sup>18</sup> arising before that date indicates precisely the opposite. The South Carolina court did its best to nullify convictions without reaching the constitutional merits.

In *Calder v. Deliesseline*<sup>19</sup> a British merchant living in Charleston who was the consignee of a Nassau sloop had been forced to pay detention fees for the sloop's first mate, a free man of color, and four slave members of her crew before she was allowed to sail.<sup>20</sup> He then sued Sheriff Deliesseline to recover the money on the ground that all British subjects were protected by treaty from seizure. Losing in the lower court, he

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jurisdiction over commerce was not a conflict between theories of government, or between Nationalism and State-Rights, or between differing legal construction of the Constitution, but was simply the naked issue of State or Federal control over slavery." *Id.* at 627-28.

14. A point which Warren omits.

15. 8 F. Cas. 493 (No. 4366) (C.C.S.C. 1823).

16. *Id.* at 496.

17. 7 S.C. Stat. 461 (1822).

18. *State v. Shaw*, 4 McCord 480 (S.C. 1828); *Calder v. Deliesseline*, 1 Harper 186 (S.C. 1824).

19. 1 Harper 186 (S.C. 1824).

20. The arrest of the sailors had not been made until the ship was getting clearance for leaving. This explains why there was no attempt to procure habeas corpus from the state courts. It would have taken more time than simply paying the fees and contesting later.

appealed. The constitutional court in a brief opinion by Justice Gantt unanimously awarded a new trial, noting that the Act did not apply to slaves and ignoring the circumstances that the mate, as a free man, could have been prosecuted under it.

The court of appeals used much the same technique four years later to void the conviction of a New Hampshire captain who had brought a free Negro cook on his ship into Charleston. Captain Shaw had been tried in the city court of Charleston. This would not do, the court said, for the cook had been arrested while the ship lay at anchor in Charleston harbor just outside the city limits. The captain should have been brought before the Charleston district court. Here the court of appeals was displaying a fine appreciation for procedural niceties—an appreciation which its members had not displayed on other occasions when the result would have thrust differently.

Indeed, the judges seemed to feel called upon to justify themselves. To be sure, they observed, such rigid adherence to form could be productive of much inconvenience. But even if they had the power to overlook the jurisdictional question, they “would not be inclined to do so in a case in which all the reasons of the general rule would apply.”<sup>21</sup> What were the reasons? Essentially just one: The common law insists on trial where the offence is committed because of the “supposed facilities which a Jury of the vicinage have in investigating the truth of the facts.” It might be argued, the court continued, virtually contradicting itself, that the rule did not apply in all its force to Shaw’s case. Of course it did not. A jury selected solely from the city of Charleston was not going to find it any harder than one from the slightly larger district of Charleston, to determine whether or not Shaw had brought a Negro cook into the harbor. Nonetheless, asserted the court, it would not do to make an exception today when tomorrow a sailor might be tried in Columbia for entering the state at Beaufort.

I find it tempting to conclude that in *Caldier* and *Shaw*, far from seeking to jettison the claims of Union, the judges were doing their best to avoid both convictions and constitutional issues. Many judges opposed to legislative sentiment have acted similarly. Yet such limited dispositions are not always possible and the day came, less than a year after *Shaw*, when they were

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21. *State v. Shaw*, 4 McCord 480, 482 (S.C. 1828). Contrast the lesser concern for procedural fastidiousness in the cases discussed, *infra*, at notes 107 and 115.



forced to face a conflict between federal and state laws. Ironically, it was William Johnson who forced them to the wall—not by a judicial decision on the Seamen's Acts, but by a personal action which undercut another "safeguard" law, a South Carolina statute of 1819 requiring all slaveholders to perform patrol duty. William Johnson refused to be a patroller or to hire a substitute—as the law allowed in instances of personal inconvenience. It certainly would be inconvenient for Justice Johnson to gallop around the back country of South Carolina at night when he was supposed to be deciding cases in Washington. In his view he should be excused from patrolling under a Congressional Act of 1792, which exempted all federal officers from militia duty. But the officers of the Charleston Neck Rangers thought otherwise and summoned a court-martial which fined the justice \$100. He then applied to his old friend, Judge Elihu Bay,<sup>22</sup> for a writ to prohibit the officers from collecting the fine.

The venerable Bay agreed with John Gadsden, the United States District Attorney arguing Johnson's case,<sup>23</sup> that there were essentially two questions at stake. First, was patrol duty a form of militia duty? Second, if it were, did Congress have the power to say who should not serve in the militia, either as a consequence of its power of organizing the militia or as an incident of its power to employ public functionaries?

However, he did not agree with the affirmative answers which Gadsden advocated. In the first place, Bay said, the patrol was not really a part of the militia. Rather it was

a system of police, essential, under the institutions of this State, for the protection of the lives and property of the citizens; and . . . all who enjoyed that protection, were bound to contribute to the burden which it imposed on the community.<sup>24</sup>

Consequently, Bay asserted, the 1792 Act did not extend as far as Johnson wanted it to. In any event, he concluded, if it did, the subject not being legitimately within the control of Congress, the Act was, so far, inoperative.<sup>25</sup> Nor did he think that

22. Bay had been a circuit judge on the pre-1824 court. He continued to sit in Charleston but was relieved from riding circuit on account of his age (born 1754).

23. Brother of the diplomat who secured the Gadsden Purchase.

24. State *ex rel.* Johnson v. Martindale, 1 Bail. 163, 164 (S.C. 1829).

25. *Id.* at 165.

the general power of employment could be construed so broadly. Associate Justice Johnson would have to pay up.

From this unfriendly verdict, William Johnson appealed to the high court of South Carolina and the court split. David Johnson penned a truly nationalistic opinion. Of course, he stated, Congress could not as a general matter forbid citizens from joining the militia any more than it could prevent a state from calling on its militia to prevent invasion by a foreign country. "These are rights which are inalienable, and without which, civil liberty could not exist."<sup>26</sup> However, when the law imposes two mutually inconsistent duties, "the citizen is bound to discharge that of superior obligation."<sup>27</sup> The real question was which law created the superior obligation; and the answer was obvious. What would happen if William Johnson had to leave Washington whenever the captain of his patrol summoned him?

Shall the car of State stand still . . . ? Shall the suitors in the Supreme Court pocket their briefs . . . ? Certainly not.

. . . .

Next to the paramount obligation which all mankind owe to the Creator, moralists place our duty to our common country; descending, by regular gradations, through all the various divisions and subdivisions of the departments of the government and society, to the domestic circle.<sup>28</sup>

With this leaf from Daniel Webster's book Judge Charles J. Colcock was not happy. Here was Johnson sounding like a Yankee only a few months after the passage of the Tariff of Abominations; his expressions could not be in any manner helpful to the establishment of what Colcock considered the "right doctrine," nullification. Admittedly, Colcock wrote, requiring Supreme Court Justices to perform patrol duty was an inconvenience from which, perhaps, they ought to be exempted.

But I take it *that* is not the question. The true question is whether the State has, or has not, a right to impose this duty, however irksome and incompatible it may be.<sup>29</sup>

26. *Id.* at 167.

27. *Id.*

28. *Id.* at 168.

29. *Id.* at 170 (emphasis added).

Concede such a power of exemption to the federal government and all United States officers would be exempted. Quite apart from the practical chaos which this could induce, there was a more general and more important problem—the correct order of allegiance to different branches of the government. David Johnson's descent through regular gradations, according to Colcock, was wrong.

[I] take a different view of the construction of our government, and the relative duties to each which devolve on individuals. In descending the circles of duty, I should say the first and nearest is the domestic duty; that the general government has no right to interfere in the domestic concerns of the States, except where specifically authorized by the constitution; and that the right to elect a Judge . . . does not give them exclusive power over him as a citizen.<sup>30</sup>

Far from it, concluded Judge Colcock, cutting the federal government down to a very small size indeed—to the District of Columbia:

Their exclusive jurisdiction over any portion of the citizens of the United States, *as such*, is confined to their ten miles square.<sup>31</sup>

Not so, replied David Johnson. "[A]n object might be indirectly effected which . . . cannot be directly attained."<sup>32</sup> And Abraham Nott agreed. By two votes to one, the South Carolina Appeals Court of 1829 held tenaciously to a nationalist interpretation of the Federal Constitution. For Johnson and Nott the Union was supreme over the states.

Shortly after Justice Johnson's case, Abraham Nott died and Charles Colcock retired from the bench in order to stump the state in opposition to the 1828 Tariff Act. One might well have expected the legislature to turn the tables on David Johnson and reduce his judicial nationalism to a minority of one by appointing two new judges with "safer" views. Yet, curiously, the legislators virtually duplicated, in O'Neill and the ardently proslavery Chancellor, William Harper, Nott's and Colcock's respective views. The results of this duplication were two split decisions in the 1830's which gravely irritated the nullifiers. In

30. *Id.* at 170-71.

31. *Id.* at 171 (emphasis added).

32. *Id.* at 170.

both decisions the Court majority's theme was the same—federal supremacy—and it suffices to consider the first where the court could more easily have ducked the issue.

The new oath of office set by the 1833 Nullification Convention required all state officers to swear as follows: "I, A.B., do solemnly swear . . . that I will be faithful, and true allegiance bear, to the State of South Carolina."<sup>33</sup>

A passivist court could have construed the oath as an innocuous recital not requiring the primacy of State over Union. However, the judges decided to meet the matter head on. In both *State ex rel. M'Cready v. Hunt*<sup>34</sup> and *State ex rel. M'Daniel v. McMeekin*<sup>35</sup> mandamus was sought by individuals whose state militia commissions had been withheld for refusing to take the oath. In *M'Cready* the trial judge—the by-now extremely venerable Bay—refused, while in *M'Daniel*, Judge Richardson granted mandamus. The arguments on both sides were impressive and must have gone on for many hours, for the reporter's summaries exceed 100 pages—much of it taken up by the arguments of the defendants' counsel, that chief of South Carolina fire-eaters, Robert Barnwell Rhett. Contending that a divided sovereignty between State and federation would force divided allegiance upon the citizen, a fate abstract, cruel, and impossible, Rhett argued that sole sovereignty lay in the State. Accordingly, there was nothing unconstitutional about the oath. It merely asked for the minimum that any sovereign could, and should, require—loyalty. Chancellor Harper agreed. The other two judges, however, did not.

David Johnson's attack was the more limited. The oath collided with the 1778 Constitution which dictated the correct form of oaths for officeholders in the executive branch—simply requiring them to carry out legitimate statutes passed by the legislature. Since the 1833 convention had been called by the legislature to consider nullification, in changing the 1778 form the delegates had exceeded their allotted powers. However, Johnson cautiously observed, a duly called constitutional convention *could* enact such an oath. Nothing in its wording inherently conflicted with the Federal Constitution. Nonetheless, he added, Rhett and Harper were wrong in thinking that

33. *State ex rel. M'Cready v. Hunt*, 2 Hill 1, 3 (S.C. 1834).

34. *Id.* at 1.

35. *Id.*

allegiance could not be divided; in simple point of fact, in the United States it *was*. Johnson seemed to occupy a middle ground—wiping out the oath, but handing a sugar-coated pill to the nullifiers.

O'Neill's attack was on much higher ground. The first half of his lengthy opinion was really an *obiter dictum* essay on the nature of allegiance. O'Neill doubted strongly that allegiance citizen and State. Nor did he at all appreciate Rhett's tracing citizen and state. Nor did he at all appreciate Rhett's tracing allegiance back to its feudal origin in England. The fact that one could find this concept in the polity from which South Carolina was created—the United Kingdom—did not mean that it fitted today. After all, "[m]any a noble river may be traced back to some marsh . . ."<sup>36</sup> O'Neill did not care, certainly, for the marshy origins. He held to an almost classic nineteenth century view of the "ancient Anglo-Saxon freedoms" tragically lost in 1066. The Norman conquerors had imposed feudalism "at the point of the sword," and compelled "the free spirit of the Saxon to meditate in darkness at the sound of the curfew."<sup>37</sup> O'Neill asked: "Do we claim our notions of allegiance, in this free country, as arising from this age of slavery?"<sup>38</sup> He "would as soon say that darkness was parent of light, because the latter merges from the former."<sup>39</sup> In any event, specific historical cataclysms broke the feudal chains. In England, the revolutions of the seventeenth century abrogated whatever historic claims allegiance might have levied. As for the ex-colonies: "In the rugged wilds and mountain fastnesses of America, the sturdy republican wanderer, clothed in the skins won by his bow and spear, drinking from the bubbling brook, and eating the bread produced by the sweat of his brow, [had been pursued] by this phantom of allegiance."<sup>40</sup> The phantom had been slain at Yorktown. O'Neill, indeed, rejected allegiance completely as a political concept "in the land of Washington and Franklin . . . [a]llegiance is . . . an unfit garb to clothe the republican. It is like putting on the statue of Washington the robe of the Caesars."<sup>41</sup> What then defines the citizen's duty? "It is alle-

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36. *Id.* at 211.

37. *Id.* at 212.

38. *Id.*

39. *Id.*

40. *Id.*

41. *Id.* at 214.

giance in the dominion of the [a]utocrat of all Russias: it is here constitutional obedience."<sup>42</sup>

Having thus circumscribed American political obligation in a fashion that would look libertarian today, O'Neill grudgingly consented to use the term "allegiance" to describe the follies of the loyalty oath's defenders. Then he made short shrift of Rhett's argument about the abstract, cruel impossibility of divided allegiance. Rather, it was Rhett who was indulging in abstractions: the obvious empirical point was that allegiance—or preferably "constitutional obedience"—was owed to both state and Union in their respective constitutional spheres. And, "[w]hether this be divided or single allegiance, it is exactly our condition in point of fact, and it is in vain, therefore, to assert an abstraction against positive, certain, existing and real duties, which we daily practice and perform."<sup>43</sup>

Furthermore, there were six reasons—at least—why South Carolinians owed "allegiance" to the Union. First, it was as "clear as a sunbeam"<sup>44</sup> from the governor's oath in the 1778 Constitution and in subsequent legislative provisions of 1784, 1786, and 1788. Second, as another matter of empirical fact, for forty years South Carolinians had never doubted it. Third, if allegiance were not owed to the Union, then South Carolina statutes on naturalization were senseless. They recognized the congressionally required oath of allegiance taken by naturalized citizens as sufficient to confer South Carolina citizenship. Fourth, the residents of federal territories could hardly be said to owe allegiance to the Union if citizens of states did not. Yet to no other government could they owe it—and they must owe allegiance—or, better, "constitutional obedience"—to some government. Pure nonsense would be the logically entailed result of Rhett's argument—that allegiances changed whenever a state citizen took up residence in a territory, and vice versa. Fifth, the United States Constitution empowered the federal government to punish treason against it—and "[w]hoever heard of treason being committed against any of the subordinate parts of a government?"<sup>45</sup> Sixth, another clause of the Constitution made it obvious that the federal Union was supreme over the states; namely, the amendatory power of article V. By this

42. *Id.* at 220.

43. *Id.* at 215.

44. *Id.* at 217.

45. *Id.* at 221.

power, three-fourths of the states could bring about a change in the Constitution which most South Carolinians might greatly dislike,<sup>46</sup> yet they would be legally bound by such a constitutionally-instituted amendment.

O'Neill had caustic words for those running around the state declaring that the present Union was oppressive and that the old Confederation of 1776-1789 had been a higher form of government. Of the Confederation he declared:

I had regarded it as settled, and given up nearly 50 years ago as a matter of history, that it was an impracticable government . . . .<sup>47</sup>

To have this old horse dragged out in 1834 could only lead a rational observer to conclude that "[w]e must live in an age of political wonders and miracles, if not of natural ones."<sup>48</sup>

### III. THE FREEING OF SLAVES—O'NEALL VERSUS THE LEGISLATURE

Simultaneously to repudiating nullification, O'Neill—with the able assistance of David Johnson—was carving out a libertarian policy toward bequests of freedom which hardly endeared him to pro-slavery stalwarts.

Between 1830 and 1835 O'Neill and Johnson radically sapped the 1820 Manumission Act. In *Linam v. Johnson*,<sup>49</sup> trover of a slave whom the plaintiff had permitted to buy his freedom was denied. The issue at stake was much like one which had been raised in an astonishing case some forty years earlier, *Sally's Guardian*.<sup>50</sup> Could a master be held to contract with his own slave for the purchase of freedom? In light of a central doctrine of slavery jurisprudence that the slave, qua chattel, could not own property but that all his "possessions" were at law the master's, it would seem very odd to hold that a slave who earned extra money by "moon-lighting" could prevent his master from changing his mind about the "deal." In light of section 36 of the Act of 1740, which allowed such "moon-lighting" only on the condition that the master received "the whole of the earnings

46. O'Neill does not say, but seems to imply, that it might be something such as Emancipation.

47. State *ex rel.* M'Cready v. Hunt, 2 Hill 1, 219 (S.C. 1834).

48. *Id.* at 218.

49. 2 Bail. 137 (S.C. 1831).

50. 1 Bay 260 (S.C. 1792).

of such slave", an attempt to hold the master would appear doomed. Yet in *Sally's Guardian*, John Rutledge ruled against the master.<sup>51</sup> Here, in *Linam*, the master had the apparent advantage that the 1820 law no longer left the larger issue of freedom open to the extent of the 1740 statute: Bill Brock's freedom clearly contravened the later enactment. In the hands of the judges that advantage turned to water. Ignoring the point that the contract was illegal, Justice Johnson observed that while caption might have been possible, trover could not avail. The defendant, Bill Brock's guardian, had acted only "with the humane view of giving effect, as far as he could, to a contract which the plaintiff had himself made, upon most ample consideration, and which he now seeks to avoid."<sup>52</sup> Two years later, *Cline v. Caldwell*<sup>53</sup> reached a similar result—allowing quasi-emancipation. But, to reach this end the judges had to reverse the apparent procedural rules of *Linam*. In *Cline* they granted trover to the slave's wife, a free mulatto who claimed to have purchased him, and voided a prior caption by the former white owner's heirs who argued that the sale contract contained a secret clause of illegal emancipation. Generalizing from the dictum of an earlier case<sup>54</sup>—that a manumission by will is not executed until the executors actually effect it—the court ruled that until a Negro slave was actually permitted to go at large, no legally cognizable act had taken place. Thus, a contract

absolute on its face, but with a secret trust, to let the negro go at large as a freeman, or with a view to future emancipation, is no violation of the Act of 1820, and is obligatory between the parties . . . .<sup>55</sup>

By placing the point of legally cognizable freedom so late, the South Carolina court was opening the gates to manumission in two ways. First, it could now be argued that not a will itself, but rather the executor's pursuit of its dictates, "effected" the freedom. Thus, neither the State nor the residuary heirs could prevent execution if the executor chose to liberate the slaves

51. As this was a circuit decision delivered while Rutledge was Chief Justice of South Carolina (he was not confirmed to the United States Supreme Court as a political punishment imposed by Alexander Hamilton for his qualms about the Jay Treaty), there was no reason for the court of 1831 to consider it binding.

52. *Linam v. Johnson*, 2 Bail. 137, 141 (S.C. 1831).

53. 1 Hill 423 (S.C. 1833).

54. *Lenoir v. Sylvester*, 1 Bail. 632 (S.C. 1830).

55. *Cline v. Caldwell*, 1 Hill 423 (S.C. 1833) (syllabus).



out-of-state. Second, in regard to either a will or a conveyance for a purely nominal sum, slaves could not be seized of land without a convincing showing that they had been permitted to go at large. And a court inclined to the general propositions of *Oline* might well require a very heavy proof indeed. In short, *Sylvester*, *Linam* and *Oline* could be the spadework for undermining the prohibitory structure of the 1800 and 1820 Acts.

Two years later the three-man court in one of its last decisions decisively opened the first of these gates—out-of-state manumission. An action was brought to void “as being contrary to the policy and laws of this State,”<sup>56</sup> an 1824 will directing the executors to hire out certain slaves to raise money so they could be sent “with the assistance of government . . . to St. Domingo to be colonized, or to any part that they with government may choose.”<sup>57</sup>

Quite apart from the central difficulty of apparent conflict with the 1800 and 1820 statutes, this will contained three provisions which conservative pro-slavery judges could have easily seized upon in order to void it. First, it required slaves to make an election as to destination. Such a choice, it could readily be argued, was legally impossible as long as the Negro remained a chattel. Second, pro-slavery judges could consider the slaves being hired out to earn their transportation money as an unlawful quasi-emancipation. Third, it conflicted with a quarter-century-old decision, *Bynum v. Bostick*,<sup>58</sup> which held that a grant of freedom taking effect after the master's death was void under the act of 1800.

Oddly enough, *Frazier v. Executors of Frazier* was first heard on circuit by the author of *Bynum*, the redoubtable Chancellor William Henry DeSaussure, the “Father” of South Carolina equity jurisprudence.<sup>59</sup> DeSaussure was a man with highly cohesive conservative views and given to considerable worry about the future of slavery from an early date. In the 1790's he had opposed both eliminating property qualifications for

56. *Frazier v. Executors of Frazier*, 2 Hill Eq. 304, 306 (S.C. 1835).

57. *Id.* at 305.

58. 4 Desaus. Eq. 266 (S.C. 1812).

59. See 1 J. O'NEALL, BIOGRAPHICAL SKETCHES OF THE BENCH AND BAR OF SOUTH CAROLINA 243-52 (1859). O'Neill—highly charitable as always—called him the “Kent” of South Carolina. *Id.* at 245. Benjamin Perry, the Unionist Governor of South Carolina immediately after the War, described him as the “Chesterfield” of South Carolina. 2 B. PERRY, REMINISCENCES OF PUBLIC MEN 59 (1889) [hereinafter cited as PERRY].

voting and redistricting the state legislature in order to reduce the imbalance then existing in favor of the coastal counties. His opposition stemmed from an intriguing source—his belief that redistricting and extending the franchise would enforce the erroneous notion of equality which would in turn lead to instant freeing of the slaves and the ruination of both white and black races.<sup>60</sup> DeSaussure's anxieties had not lessened by 1833. Indeed he found *Frazier* an apt occasion on which to deliver an alarmist lecture on the state of the Union. The will clashed fatally with clear legislative intent "to prevent the emancipation of the slaves held in the State."<sup>61</sup> The law was "founded on deep policy, and was intended to prevent emancipation . . . as a great political evil, dangerous to the institutions of the State, and injurious to the property and interest of the citizens."<sup>62</sup> Directing the executor "to do what the owner is prohibited from doing cannot be permitted to defeat the prohibition. Such an easy evasion would be making the statute a mere cobweb."<sup>63</sup> DeSaussure thought that the executors' counsel was fully aware of "the frailty of the argument"<sup>64</sup> since he "had endeavoured to sustain it by saying the executors might and were bound, as trustees, to carry it into effect, by sending the slaves out of the State, and there emancipating them . . ."<sup>65</sup> To DeSaussure this argument, the very one employed by the court that same year in *Oline*, was frivolous.

Finally, he saw no escape in the argument that the will requested the assistance of "government." DeSaussure bolstered his position with alarm.

Besides, what government is meant? If the State government, that has no foreign relations with St. Domingo . . . . If the government of the United States be meant, assuredly neither the State nor its authorities, nor any of its citizens, would ever permit the interference . . . with that subject, on which the government of the United States has no right to intermeddle, and on which, if it made any attempts directly or indirectly, a disruption of the bonds which bind and unite the

60. See F. GREEN, CONSTITUTIONAL DEVELOPMENT IN THE SOUTH ATLANTIC STATES, 1776-1861 (1930).

61. *Frazier v. Executors of Frazier*, 2 Hill Eq. 304, 306 (S.C. 1835).

62. *Id.*

63. *Id.*

64. *Id.*

65. *Id.*

States, would necessarily take place. It is the *noli me tangere* subject.<sup>66</sup>

While the executors could still try to get a special act through the legislature, in the meantime the will was an attempt to evade the statute and thus merely null and void.

Two years later, on appeal, Judges O'Neill and Johnson proceeded to "make the statute a mere cobweb."<sup>67</sup> Admitting the consonance of DeSaussure's reading with the letter of the 1820 law, O'Neill asserted that it clashed with the law's spirit<sup>68</sup> and adduced an argument which seems to me as "frail" as it did to several later South Carolina judges.<sup>69</sup> Asserting that the 1820 statute should be construed in the light of other relevant laws, O'Neill found two which gave off singular rays. According to O'Neill, the 1820 and 1823 Acts prohibiting the entry of free Negroes showed that the legislature's intent had been only to prevent an increase in domestic free Negroes. This might well have been the case with these two laws; but that they justified such a reading of the 1820 Manumission Act is notably less manifest to me than it was to O'Neill.

Possibly aware that to this point DeSaussure's reading looked more sound, O'Neill adduced another argument. The 1820 Act could not have prevented owners from taking their slaves out-of-state, and it "could not . . . have effect upon emancipation beyond the limits of the State."<sup>70</sup> Unless a specific statutory prohibition existed, an executor could be empowered by a testator to dispose of any property in the same ways that lay open to the testator when still living. Therefore the executors could remove the slaves. This was an argument with at least three peculiarities.

First, it does not adequately distinguish—indeed it is tempting to believe that it deliberately confuses—two sorts of "out of State" taking, lawful and unlawful. True enough it was that

[s]laves within her limits, when lawfully removed beyond them, ceased to be liable to her jurisdiction. They then became liable to another jurisdiction, and were to be held, enjoyed or disposed of, according to its laws.<sup>71</sup>

66. *Id.* at 307.

67. Harper was either absent or dissented silently. See the reporter's note. *Id.* at 318.

68. *Id.* at 314.

69. See note 132 *infra*.

70. *Frazier v. Executors of Frazier*, 2 Hill Eq. 304, 314-15 (S.C. 1835).

71. *Id.* at 315.

But it is not obvious that the executors' proposed removal *was* lawful. That was the point to be proved. What was the proof that O'Neill offered—after coming perilously close to assuming the answer? The principle of *Oline* that a South Carolinian could not go out of state, capture Negroes under the authority of the Act of 1800, bring them back, and hold them. But how is this relevant to a situation in which the slaves had not yet been removed?

Second, it collided head-on with DeSaussure's old 1812 opinion in *Bynum*. O'Neill emerged tactically triumphant from the collision simply by overruling it. Yet, to do so, he had to imply that DeSaussure was stupid or careless, to distort DeSaussure's position, and to ignore blithely a crucial part of the Act.

For O'Neill, DeSaussure's opinion

was certainly prepared under a strange misapprehension of the law, and without looking at the Act. For it states that the "statute expressly forbids any emancipation in any other way than by deed executed in the lifetime of the master . . . ." On looking at the Act, (2 Faust 355), it will be seen that there is not a word said about the deed being executed "in the lifetime of the master . . . ." This shews at once the unsoundness of that decision.<sup>72</sup>

While O'Neill's textual observations are correct, they do not, I think, lead to his conclusion. On the contrary, what the Act does say is that no emancipation shall be valid unless it conforms to the procedure laid down for the master of appearing before a court and persuading it to issue a certificate, that any person can capture a slave set free in another way, and that "no part of this act shall be construed so as to . . . invalidate any disposition by will of persons now deceased . . . ."<sup>73</sup> This last clause seems crucial. DeSaussure must have believed that the legislators included it because otherwise the law would have voided wills pending settlement in 1800; and conversely that they intended to void all such wills after that date. An alternative reading is barely possible—namely, that the legislature intended to allow future wills directing the executor to apply to court and prove good character. But this would require an oddly-phrased will: "free my slaves if . . . ." Since the legislators

<sup>72</sup>. *Id.*

<sup>73</sup>. 7 S.C. Stat. 443 (1800).

were clearly cognizant of the problems posed by wills, almost certainly they would have worded the final clause differently. I take it that DeSaussure meant by "expressly," not that the legislature used his very words, but simply that the statute, construed as a whole, indicated legislative restriction to lifetime manumission. At the very least, O'Neill's failure to deal with the final proviso of the Act is a more serious omission than DeSaussure's. As *Frazier* stands, it simply falls short of persuading me that it, rather than *Bynum*, was the neutral decision.

Third, O'Neill's opinion is extraordinary for the high ground to which it finally leaps. Even following O'Neill to the conclusion that an executor cannot be stopped by the state or the heirs from carrying out a direction to remove and free, I am surprised by the additional territory which O'Neill seizes. The first half was necessary to freeing Frazier's slaves—namely, that O'Neill declare inconsequential the word order of "liberation" and "removal", for *Frazier* had directed "liberation" then "removal." But the other half—that the court could compel a reluctant executor to carry such a bequest into execution—was wholly unnecessary as the executors were already attempting to do so. *Frazier*, in sum, looks extraordinarily like a deliberate opening of an avenue to liberty which the legislature had intended should remain shut.

It was just six months later that the legislature decided to abolish the three-man court of appeals and restore the separate Law and Equity Conference Courts. With a minimal show of respect for judicial independence, O'Neill and Johnson were not thrown out completely in the cold. O'Neill was assigned to the law court, while Johnson and Harper were appointed to the equity bench.

#### IV. O'NEALL, 1835-1842, AND THE PROBLEM OF MOTIVE

The Unionist libertarians thus dispersed, it would not have been surprising had their handiwork been undone. Yet for the next seven years the reverse was true. Not only was the path of out-of-state freedom left untouched, but the alternate route of in-state quasi-emancipation was widened.

In 1838 the law court upheld a bequest of slaves to one John Dangerfield notwithstanding a condition explicit in the will:

[F]or this purpose only, that . . . Dangerfield . . .  
[does] permit and suffer the slaves . . . to apply and

appropriate their time and labor to their own proper use . . . without the intermeddling or interference of any person . . . further than may be necessary for their protection under the laws of this State . . . .<sup>74</sup>

The will also gave him the rest of the testator's estate on condition that the slaves be allowed to use it "without the interference or meddling of the said Dangerfield, or any person . . . ."<sup>75</sup> Dangerfield argued that he had not yet actually freed the slaves, notwithstanding testimony that during the first year of his "possession," he had more or less let them do what they wanted on a plantation half-a-mile from his own residence. The lower court judge, A.P. Butler, charged the jury that the will was "a palpable attempt to defeat and evade the laws of the State against the emancipation of slaves"<sup>76</sup> and that they were liable to capture if it had been carried into effect. However, the jurors found that the slaves were not yet free, and the law court, while admitting that equity might yield the opposite result, refused to disturb their verdict. *Rhame* indicated that, granted a willing jury, quasi-emancipation could be substantial. The State could not act.<sup>77</sup>

Three years later the law court struck out in a newly expansive direction, and brought the disapproval of both the legislature and later judges down upon its head. *Carmille v. Carmille's Administrator*<sup>78</sup> involved an attempt by a white female to void the quasi-emancipation of her mulatto half-brothers and half-sisters. The father had deeded them to defendants Pringle and Chartrand for a nominal consideration on the express condition that they be allowed to work for themselves and pay only \$1 per year to the defendants. Hearing the case on circuit, Chancellor Benjamin Faneuil Dunkin delivered an opinion in no way redolent of his Massachusetts family background, his Philadelphia birth, or his Harvard education.<sup>79</sup> Dunkin thought

74. *Rhame v. Ferguson*, 1 Rice 196, 197 (S.C. 1839).

75. *Id.* at 198.

76. *Id.* at 201.

77. But, it could prosecute successfully a premature captor. See *State v. Singletary*, 1 Dudley 220 (S.C. 1838). And compare the conservative equity court which seventeen years later held the trust illegal, *Ford v. Dangerfield*, 8 Rich. Eq. 95 (S.C. 1856).

78. 2 McMul. 454 (S.C. 1842).

79. A "Faneuil" of Boston's Faneuil Hall, and a teetotaling Episcopalian. See 1 PERRY 208-13. Perry entertained a very high view of his judicial abilities despite their political differences, and thought the Reconstructionists mistaken for removing him from the Chief Justiceship. He succeeded O'Neill in 1863.

it "too clear to admit of argument, that the bill of sale . . . [was] an undisguised attempt to evade the law . . . forbidding emancipation . . . ." <sup>80</sup>

On appeal, the slaves hired one of the leading anti-nullifiers, Thomas Grimke, as counsel. Feeding back *Oline* to its progenitor, Grimke urged that the conveyance was not contrary to the spirit of the law.

O'Neill gladly accepted his argument and reversed in a fashion which, I believe, justifies the criticism later levelled by Chancellor G. W. Dargan:

It is impossible to deny that this decision afforded a precedent, and a form by which the Act of 1820 might be practically annulled and the policy of the State baffled. <sup>81</sup>

In O'Neill's view the slaves were not free because "[t]he hire which they pay, however inconsiderable, is a constant recognition of servitude." <sup>82</sup> Yet if one dollar per year sufficed to show slavery, how often could the judges find quasi-emancipation? Furthermore, *Linam* had indicated that the proper means of effecting the Act of 1820 was by caption. *Frazier*, drawing on *Sylvester*, deferred legal caption to a time such that no one could stop willing trustees or executors from sending slaves out of state to freedom. *Rhame* left the determination of in-state quasi-freedom to the jury by refusing to reverse a finding of fact. Yet here in an equity suit where there had been no jury and the chancellor had found quasi-emancipation, the court was willing to overrule. O'Neill's motives seem clear to me in one passage:

If it was so that a man dared not make provision to make more comfortable faithful slaves, hard indeed would be the condition of slavery. For then no motive could be held out for good conduct; and the good and the bad would stand alike. Such has never been the rule applied to our slaves, and such I hope it never will be. <sup>83</sup>

This was perilously close to admitting that Carmille had made not an outright gift with some "advice" which the administrators were (as they claimed) free to disregard, but rather an illegal trust.

80. *Carmille v. Carmille's Adm'r*, 2 McMul. 454, 456 (S.C. 1842).

81. *Morton's Heirs v. Thompson*, 6 Rich. Eq. 370, 375 (S.C. 1854).

82. *Carmille v. Carmille's Adm'r*, 2 McMul. 454, 468 (S.C. 1842).

83. *Id.* at 470.

There was an additional problem. In a second deed Carmille had conveyed two other slaves, whom he apparently did not so favor, to Pringle and Chartrand on the condition that they were to labor to the use of the five beneficiary slaves until the youngest reached twenty-one. Then they were to be sold, and the proceeds divided among the five. This second deed put O'Neill in a difficult position. He began by suggesting that it would be regarded as similar to the first deed, as a conveyance to Pringle and Chartrand with some helpful and optional advice attached. But this view ran afoul of an earlier case, *Fable v. Brown*.<sup>84</sup> In *Fable*, Harper, with O'Neill concurring, determined that property so devised escheated to the state. Now O'Neill declared that he had never agreed with Harper's reasoning but only in the result, and turned back fifty years to *Sally's* case. Those two cases, he urged, were the only instances denying the absolute right of the owner, to property acquired by the slave. *Sally*, he thought, went "further" than he would have gone in order to deny "the right of the owner . . . to the acquisitions of a slave, and sustain the freedom of a negro, purchased by a slave out of her own earnings."<sup>85</sup> But he approved its "ample authority to prove . . . a slave might acquire personal property, and that such a thing as an escheat was not an incident of it."<sup>86</sup>

This, I submit, is Justice O'Neill carefully picking and choosing in order to uphold *Carmille's* quasi-emancipation. He selected just enough from *Sally's* doctrine to suit the purpose. Anything else would be fatal. Less, and the defendants would not have been able to keep the trust—under *Fable* it would have escheated. More, and both the trust and the quasi-free status of the slaves would be imperiled: it would be very difficult to argue that the slaves held absolutely *à la Sally's* purchaser, and not also to admit that they were enjoying a condition strangely unlike slavery, and thus subject to distribution or caption. O'Neill's position very neatly both thwarted Carmille's daughter in the immediate suit and minimized the possibility of later capture. That this picking and choosing was deliberate is suggested by the circumstance that on the next occasion—six years later—when O'Neill saw fit to rely on *Sally*, he would place another gloss on it.<sup>87</sup>

84. 2 Hill Eq. 378 (S.C. 1835).

85. *Carmille v. Carmille's Adm'r*, 2 McMul. 454, 471 (S.C. 1842).

86. *Id.*

87. *Vinyard v. Passalaigue*, 2 Strob. 538 (S.C. 1848).



Is this a fair interpretation of O'Neill's purpose? I think so for two additional reasons.

First, by the time O'Neill wrote his opinion it was pellucidly clear that the legislature did not consider the court's treatment of the 1820 statute from *Linam* through *Rhame* correct. Between the time of *Carmille's* referral from the Appellate Chancery Court and its determination by the combined court of appeals because of disagreement among the chancellors, the legislature passed a new statute designed specifically to close down the paths to freedom which the court had been opening up.<sup>88</sup> On December 20, 1841, the legislature passed without a recorded division<sup>89</sup> a law whose four sections can hardly be interpreted as anything other than a direct slap at the O'Neill-dominated court.

The first section voided any post-mortem bequest, deed of trust, or conveyance "whereby the removal of any slave . . . without the limits of the State, is secured, or intended with a view to the emancipation of such a slave . . . ."<sup>90</sup>

The second section voided lifetime deeds "accompanied by a trust, secret, or expressed"<sup>91</sup> for removal and liberation.

The third section voided all bequests and conveyances with either "secret or expressed" trusts for in-state "nominal servitude."<sup>92</sup>

The fourth section voided all gifts of property with attached secret or express trusts that it be held "for the benefit of any slave . . . ."<sup>93</sup>

The third and fourth sections seem to me, as to Dargan, aimed directly at *Carmille*. One could, I think, perceive it as a direction by the legislature to the court to uphold Dunkin's view of *Carmille*. However, O'Neill, though doubtless unhappy with the

88. Dargan, in *Morton's Heirs v. Thompson*, 6 Rich. Eq. 370 (S.C. 1854), states that "[t]he case of *Carmille v. Carmille*, and other cases occurring about the same time, gave rise to the Act of 1841. This Act was intended . . . to provide for cases which, according to judicial construction, were not embraced in any previous legislation." *Id.* at 375. Dargan seems to imply, and other historians have taken him to mean that O'Neill's *Carmille* opinion was primarily responsible for the Act. That is impossible since the Act was passed before the opinion was delivered. More likely, the other cases—*e.g.*, *Rhame* and perhaps *Farr v. Thompson*, 1 Cheves 37 (S.C. 1839)—and perhaps the split on the Equity Bench in *Carmille*, produced the law.

89. Neither the House nor the Senate journal contains any debates illuminating the reasons for passage.

90. *Morton's Heirs v. Thompson*, 6 Rich. Eq. 370, 375 (S.C. 1854).

91. *Id.*

92. *Id.* at 376.

93. *Id.*

sudden dismantling of his libertarian edifice, found a way to secure one final victory. Carmille's daughter might think that the 1841 Act was designed to affect retrospectively all pending wills, "but on carefully considering it," O'Neill determined: "[A]ll its provisions are future, and I rejoice that they are so. For I should have thought it a stain upon the purity of our legislation, if it had been true that an Act had passed to defeat vested rights."<sup>94</sup> Otherwise it would have been an unconstitutional violation of due process of law. Of course, it only would have violated due process under O'Neill's interpretation of the Act of 1820, not under Dunkin's, nor under the legislature's—but O'Neill did not point that out, and Carmille's slaves got by just under the wire.

Whose "vested rights?" The phrase suggests another possible motivation for O'Neill's—or his brethren's—debilitation of the 1820 Act than the one which we have implied up to now—humanity. Certainly one should not neglect the possibility that O'Neill was concerned not for the slave's vested right to freedom, but for the master's absolute property right to dispose of his estate however he willed. Indeed, a later case suggests this. In May, 1844, the court ruled unconstitutional an 1835 statute<sup>95</sup> providing for the forfeiture of slaves taken north of the Potomac by their masters and returned to South Carolina.<sup>96</sup> The legislators might be anxious to prevent contamination of the Negro mind by Yankee principles of abolition yet, the court insisted, they could not take away property without due process of law.

And, there is a further candidate for consideration as motive. In *Carmille* O'Neill urged the merits of an alternate policy to the severe repressiveness of the legislature:

Kindness to slaves, according to my judgment, is the true policy of slave owners, and its spirit should go (as it generally has) into the making of the law . . . . *Nothing will more assuredly defeat our institution of slavery, than harsh legislation rigorously enforced.* On the other hand, as it hitherto has been, with all the protections of law and money around it, it has nothing to fear from fanaticism abroad or examination at home.<sup>97</sup>

94. *Carmille v. Carmille's Adm'r*, 2 McMul. 454, 471 (S.C. 1842).

95. 7 S.C. Stat. 472-73 (1835).

96. *State v. Simons*, 2 Speers 761 (S.C. 1844).

97. 2 McMul. 454, 470 (S.C. 1842).

Perhaps O'Neill's activism proceeded mainly from the view that the best hope of preserving slavery was to eliminate as many of its brutalities as possible.

Without denying altogether the presence of either motive—but without flatly asserting it either—I would argue that O'Neill's activities, both on and off the Bench, in the years after 1841, warrant three inferences about his attitudes which set him measurably apart from the prototypic pro-slavery southerner.

The first inference is that, despite his feeling that white and black were unequal castes, his curiously mixed bag of attitudes contained a broad strand of humanity toward the Negro, qua human. The second inference is that he was, at least unconsciously, troubled by the peculiar institution and cannot be adequately described as an unusually devious opponent of abolition who advocated changing the institution solely in order to preserve it. The third inference is that he did not become more comfortable about slavery as its Northern enemies pressed their case politically during the 1840's and 1850's.

Four types of evidence lead to these inferences: first, his behavior in criminal trials concerning Negroes; second, his continuing attempt to pull the court towards freedom in manumission suits; third, his strenuous efforts to find in favor of persons claiming to be whites rather than free Negroes; and fourth, the far-reaching reforms of the Negro Code which he urged in a treatise written in 1848.

## V. CRIMINAL PROSECUTIONS AND THE NEGRO

In recent years angry words have been heard concerning the attitudes of southern state appellate courts toward enforcing the "law of the land." Some have argued vehemently that these courts were a dead-end to those appealing for judicial action to make the rule of law prevail over nocturnal vigilante administration of violence.<sup>98</sup> Others have urged with equal vigor that so to depict these benches is manifestly unfair.<sup>99</sup> Without entering this thicket of political value judgments, let me urge this: Whatever may constitute the best paradigm of contemporary southern appellate decision-making, no paradigm can fairly extrapolate behind the Civil War a pattern of general

98. See, e.g., Meltsner, *Southern Appellate Courts: A Dead End*, in *SOUTHERN JUSTICE* 136-154 (L. Friedman ed. 1965).

99. See, e.g., *Symposium: Southern Justice*, 37 *MISS. L.J.* 396 (1966).

unreceptivity to the claims of Negroes for justice before the law. If antebellum judges varied substantially among themselves in dealing with suits for freedom, virtually all were seemingly anxious to do their best to protect the antebellum Negro whether he was on trial for criminal activity or whether a white was on trial for unlawful injury to him.

Nowhere was this concern more fully displayed than on the O'Neill court. The display is clearer if we perceive it in light of a central historical fact.

By 1830 the statutory position of the slave was much less fortunate in South Carolina than in some other slave states, for instance, North Carolina. This was so for two reasons. First, there had been no South Carolina equivalent to the North Carolina statutory provisions of 1793 and 1818 that the Negro should enjoy the full panoply of trial rights as a white person accused of a felony. Second, neither the South Carolina legislature nor the pre-1830 court had decided that the slave was entitled to the protection of the common law. During the first quarter of the nineteenth century, the North Carolina court had diligently worked to bring the slave under the cloak of the common law by accepting the dubious analogy between medieval English villeinage and American slavery. In South Carolina the slave was—logically enough, if harshly so—only protected insofar as the legislature had expressly cut away parts of the master's absolute right to do what he willed to the slave *qua* captured enemy alien. Granted, then, this inherently less favorable position, the South Carolina Negro fared uncommonly well when he managed to get his case heard by the court of appeals.<sup>100</sup>

We should begin by observing that any notion that South Carolina courts did not concern themselves at all with attacks by whites upon Negroes is erroneous. Between 1830 and 1860 the court of appeals heard seventeen appeals by whites convicted for actions, ranging from inadequate provision of food to slaves<sup>101</sup> and unlawful assault upon a free Negro,<sup>102</sup> to murder.

100. This essay does not attempt to determine how frequently Negroes' fates—as opposed to whites'—were "settled" by extra-judicial processes of violence, or never proceeded beyond the local court level. However, two points may be noted. First, a random sample of Southern Reports suggests that there was no great imbalance between felonies appealed by whites and Negroes, and the ratio of whites and Negroes among the population. Yet second, and thrusting in the opposite direction, O'Neill's views as to the procedural inequities of South Carolina's system of magistrates and freeholders courts were surely sound.

101. *State v. Bowen*, 3 Stro. 573 (S.C. 1849).

102. *State v. Harden*, 2 Speers 152 n (S.C. 1832).

The prosecutory system was hardly wholly inactive and presumably other prosecutions occurred which the defendants won or failed to appeal. Further suggestive are the ratios of appeals heard to appeals sustained in two fields: whites prosecuted for attacks upon Negroes; and Negroes accused of crimes. Only three of the seventeen whites received new trials. By contrast, six of the nine Negro appellants were successful. John Belton O'Neill, we should note, differed with his brethren in directions we might suspect. O'Neill wished to convict one more white and to award two more new trial to Negroes, than did the court majority.

The essential neutrality of the majority's position in one case, *State v. Nathan*, has already been discussed in the opening paragraphs of this essay. O'Neill's objection to executing a slave after carrying out a prior trial's sentence of one hundred lashes may have been generous but it was hardly required by law. What then of the other two refusals to reverse? In *State v. Friday*<sup>103</sup> the court declined to hear an appeal after a previous application to the judge on circuit had failed. Here, even O'Neill agreed, the law was clear: The court of appeals had no power to overrule a circuit refusal. In *Ex parte Boylston*<sup>104</sup> a master sought unsuccessfully to stay the whipping imposed upon his slave for insolence to a white person by a court of magistrates and freeholders. The court record does not allow for easy judgment of the merits of the master's complaint that the court had exceeded its statutory discretion in trying such a case. The court majority, rejecting his contention, asserted that both dictum in an eighteenth century case and settled practice in local courts allowed prosecutions for insolence. It further urged that an intolerable situation would result if a white had no legal redress. Holding that the magistrates' court had no such power, would promote violent private redress by the aggrieved white and cause a decline in respect for law. O'Neill, dissenting, stated that he had never heard of such a case since he had entered the bar, and that the outcome of clothing magistrates with such power would be equally bad. "[N]o jurisdiction ever did exist, which is liable to more abuse than that exercised by magistrates over slaves . . . [T]he result will be that passion [and] prejudice,

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103. 4 Rich. 291 (S.C. 1851).

104. 2 Strob. 41 (S.C. 1847).

and ignorance will crowd abuses on this inferior jurisdiction to an extent not to be tolerated by slave owners."<sup>105</sup>

Be the respective insights in *Boylston* as they may, any doubts engendered must, I suspect, be laid to rest when placed against the successful appeals by Negroes. The judges were perfectly willing to grant another claim of double jeopardy when they were convinced of its validity.<sup>106</sup> So too, they were willing to make a dubious expansion in procedure to prevent the execution of a Negro sentenced to death for burglary.

In *State v. Ridgell*<sup>107</sup> the slave had been so sentenced despite proof that no one had been sleeping in the building from which he had stolen. Prior to *Ridgell*, writs of prohibition had been granted only when the appellant could show that the lower court had acted beyond its jurisdiction. But here there was no other means of barring execution.<sup>108</sup> The case was too revolting not to expand the writ's usage. This theme of expansion in order to secure substantive justice appears to have generally pervaded the court, and the attitudes expressed in *State ex rel. Matthews v. Toomer*<sup>109</sup> may be taken as representative of its decision-making in criminal trials of Negroes.

*Toomer* was the more remarkable in light of two points. First, the prosecution was brought against one slave for killing another—proof that in that era the rule of law reached to the internal affairs of Negro society. The law did not limit itself to acting when a Negro had injured a white. Second, little substantive doubt of the defendant's guilt existed. The appeal, nonetheless, succeeded on a nicety which might not have prevailed in a later age. The defendant Negro had been tried in Christ Church parish, where he had inflicted the fatal wound; not in Charleston parish where the victim had shortly thereafter died. The trial rules of Charleston parish required unanimity as to guilt among the magistrates and freeholders, whereas Christ Church parish required only a majority. The slave, on appeal, argued that a 1793 act should be applied to him, and the court responded generously:

105. *Id.* at 47.

106. *Ex parte Jesse Brown*, 2 Bail. 323 (S.C. 1831).

107. 2 Bail. 560 (S.C. 1831).

108. Originally at English common law—and in South Carolina at the time—burglary required, in addition to breaking and entering, that it be done at night and in a residence.

109. 1 Cheves 106 (S.C. 1840).

The act of 1793, was passed for the purpose of settling a doubtful question on an important subject. The terms are very general, and, perhaps, were not intended, at the time, to embrace the homicide of one slave by another. At least, considering the policy of the country, then, in regard to slaves, it may well be doubted whether such cases were contemplated at the time the Act was passed. Yet the terms are so broad and comprehensive, that they do, literally, embrace all cases of homicide. But the tendency of our modern legislation has been such as to promote a more favorable regard for the life of the slave, and we think the presiding Judge below was right in ordering the prohibition. The last clause of the Act, on a fair and liberal construction, applies as well to the trial of slaves as of white persons.<sup>110</sup>

It would be possible to ascribe the impartiality of results in trials of slaves solely to solicitousness for the property interests of masters were it not for two additional phenomena. The first was the fair-minded disposition of prosecutions of whites for injuries to free Negroes.<sup>111</sup> To be sure, the court was not arguing that free Negroes should be treated on a dead-level plane with whites. Thus, O'Neill observed: "Free negroes belong to a degraded caste of society; they are, in no respect, on a perfect equality with the white man."<sup>112</sup>

Yet at that time, in the second quarter of the nineteenth century, throughout the United States the essential question about racial relations was not, should Negroes be treated as fully integrated members of American society? After all, a generation later Abraham Lincoln was to doubt the Negroes' inherent capacities for living in equality with whites, while Ohio, Indiana, and Illinois were barring free Negroes from settling within their territory. The question was, rather, how unequal were Negroes to be?<sup>113</sup> Once the question is thus properly phrased in terms of the time and culture, O'Neill's statement must rank as significant.

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110. *Id.* at 107-08.

111. *See* State v. Hill, 2 Speers 150 (S.C. 1843); State v. Harden, 2 Speers 152 n (S.C. 1832).

112. State v. Harden, 2 Speers 152 n, 155 n (S.C. 1832).

113. L. LITWACK, NORTH OF SLAVERY (1961).

The unlawfulness of an assault and battery upon a free negro, without reasonable provocation, cannot be doubted. For to no white man does the right belong of correcting, at pleasure, a free negro. The peace of society is as much broken by an assault and battery upon him, as it is upon a white man.<sup>114</sup>

Far from demonstrating after 1830 a callous disregard for the free Negroes' condition in the wake of mounting anger at Yankee abolitionism, the judges continued a protective tradition which reached back before the creation of the 1824 court to the less troubled days of the early nineteenth century and is best exemplified by the words of David Johnson when still a circuit judge. Denying an appeal by a white who had been stopped while attempting to kidnap a free Negro boy and sell him into slavery, Johnson admitted that the writ under which he had been apprehended was irregular since it had been issued by a local commissioner of the poor who apparently simply devised it out of whole cloth. Johnson rebuffed the white kidnapper's objections to the writ's illegality by fiat: "[I]t is not necessary to consider, as it . . . subverted the cause of justice and humanity . . ."<sup>115</sup> That—the cause of justice and humanity—seems to have been the judges' dominant concern.

This impression is strengthened by an examination of prosecutions of whites for attacks upon slaves. As we have already noted, the fact that only two of the sixteen appellants succeeded is in itself suggestive. And the suggestion is strengthened by the circumstance that one of the two had clearly been subjected to double jeopardy,<sup>116</sup> while the other had never been furnished with a copy of his indictment.<sup>117</sup>

*State v. Winningham*, the latter case, produced O'Neill's only dissent in this area. Yet its foundation, in O'Neill's belief that the defendants were "plainly guilty of the most atrocious murder, ever committed in the State,"<sup>118</sup> and his consequent desire to

114. *State v. Harden*, 2 Speers 152 n, 154 n (S.C. 1832).

115. *Welborn v. Little*, 1 Nott & McC. 263, 264 (S.C. 1818). See also the following instances of prosecutions of whites for injury to free Negroes: *State v. Wilson*, 2 Mill's Const. 135 (S.C. 1818); *State v. Greenwood*, 1 Mill's Const. 420 (S.C. 1817) (the state was prosecuting a policeman); *Pepoon v. Clarke*, 1 Mill's Const. 137 (S.C. 1817).

116. *State v. McKee*, 1 Bail. 651 (S.C. 1830).

117. *State v. Winningham*, 10 Rich. 257 (S.C. 1857).

118. *Id.* at 270.



hold that they had waived their right to demand such a copy, is better testimony to O'Neill's proclivity for justice of the heart than for any hypothesis that the majority was straying from neutrality in order to excuse a white murderer of a slave. Furthermore, there were numerous instances in which they could have indulged such inclinations yet did not—as when confronted by objections to the vagueness of a statute prohibiting cruel punishment of slaves and to the introduction at trial of evidence obtained only as the fruit of an induced confession.<sup>119</sup>

Finally, we should note two possible objections to the interpretation offered here. One—that the judges acted only in the extreme cases of homicide—is untenable in light of convictions upheld for pistol-whipping a slave, for punishing a slave with two hundred strokes of an India rubber whip, and for failing to renew slaves' clothing for seventeen months.<sup>120</sup> The other objection would suggest again the dominance of property motives. The master, on this showing, had an interest in the state's prosecuting whites who harmed his chattel property. Certainly, he frequently did. But what of the occasions when the state acted against the master himself for an injury to his own slave? What of *State v. Bowen* in which the master was found guilty of poor treatment of his property? And finally, what of state prosecutions of the master for murdering his own slave?<sup>121</sup> There he did not have much of an interest in prosecution at all. On balance, one is well-nigh forced to conclude that the South Carolina court's record in protecting slaves and free Negroes was marked by a persistent demand that the lower castes—though lower—be accorded, not “equal protection” but, and still remarkable, what may be best summed up as “due protection and ordered process.”

#### VI. MANUMISSION AND COMITY: O'NEALL VERSUS THE CONSERVATIVE CHANCELLORS

The structural changes of 1835 and 1836 had potentially limited the scope of O'Neill's influence in manumission cases.

119. See *State v. Motley*, 7 Rich. 327 (S.C. 1854); *State v. Wilson*, 1 Cheves 163 (S.C. 1840).

120. See, e.g., *State v. Harlan*, 5 Rich. 470 (S.C. 1852); *State v. Bowen*, 3 Strob. 573 (S.C. 1849); *State v. Wilson*, 1 Cheves 163 (S.C. 1840).

121. See, e.g., *State v. Bradley*, 9 Rich. 168 (S.C. 1855). Such instances were admittedly rare in South Carolina. Yet the four prosecutions fit into an overall pattern of southern justice in which over one-third of all prosecutions of this sort were brought against masters.

He had no voice in equity decisions unless they went beyond the Equity Appeals Bench to the combined court. After *Carmille* and the 1841 Act, potential became actual. In two important respects conservative chancellors were able to carve out a more pro-slavery line than O'Neill liked.

The first was their abandoning of O'Neill's strictly prospective interpretation of the 1841 Act. In July 1844 the highly eccentric, pro-slavery but unionist Chancellor Job Johnstone<sup>122</sup> seized the first opportunity to question the latitudinarian doctrines of his former law partner, John Belton O'Neill. *Gordon v. Blackman*<sup>123</sup> involved a will whose probate had begun in 1839, but whose provisions had not been carried out by the time the 1841 Act was passed. The will directed the executors to apply for a special legislative grant of in-state freedom, or that failing, to send those Negroes who wished to a free state or Liberia. Johnstone viewed the will as

another of those cases, multiplying of late, with a fearful rapidity, in which the superstitious weakness of dying men, proceeding from an astonishing ignorance of the solid moral and scriptural foundations . . . of slavery . . . and from a total inattention to the shock which their conduct is calculated to give to the whole frame of our social polity, induces them, in their last moments, to emancipate their slaves in fraud of the indubitable and declared policy of the State.<sup>124</sup>

His repugnance to the bequest was stronger than he could express, yet he felt too "bound by one or two decisions . . . to declare it void."<sup>125</sup> *Frazier* "hedged in on all sides";<sup>126</sup> and while he saw a clear factual distinction between *Carmille*'s deed and *Gordon*'s bequest, O'Neill's hyperactivism in *Carmille* barred him: The "opinion delivered in that case [was] . . . so sweeping"<sup>127</sup> as to leave no precedential room to draw a distinction on circuit. Therefore he sent the case upstairs.

122. Cf. 2 PERRY 134. In early life he was a doctor. When a judge, he once knocked down a man who innocently addressed him by the former title, disliked circuit riding because of bedbugs of which "[n]o one ever had a greater horror," (*Id.* at 132) and had positively Hobbesian fear that he would be thrown from his mount and trampled underfoot by the horses of lawyers accompanying him!

123. 1 Rich. Eq. 61 (S.C. 1844).

124. *Id.*

125. *Id.* at 64.

126. *Id.*

127. *Id.*

Once before the chancellors, O'Neill's limitation of the Act to post-1841 bequests fell unceremoniously to the ground. Chancellor Harper, with Johnstone and Dunkin concurring, ruled the Negroes firmly into slavery. *Frazier* no longer applied since the 1841 law had intervened. Nor could objections avail that the Act thus construed violated constitutional prohibitions against impairing the obligation of contracts and passing *ex post facto* laws. Even under *Frazier*, Harper declared, the Negroes belonged to the executor as slaves; therefore they could not contract, and could not have raised that issue. Consequently, these slaves had no status to raise an *ex post facto* claim. As for the executor's interest, the law *would* have been unconstitutionally retroactive, had he already sent them out-of-state and had the law been read to allow the residuary legatees compensation for the slaves. But that was not relevant here when the executor simply stood "in the place of the testator."<sup>128</sup> The law was no more retrospective "than if the testator himself had expressed an intention of liberating . . . and before his execution . . . an act of the legislature had forbidden it."<sup>129</sup> Thus Harper demolished *Frazier* and *Carmille* as guides for the equity court in all cases of pending wills and unexecuted deeds, and expanded the 1841 Act to the dimensions that the legislature probably intended.

Though the chancellors continued reluctantly to uphold grants to freedom effectuated before 1841,<sup>130</sup> they held fast to the restrictive doctrine of *Gordon*<sup>131</sup> while broadening the range of their jurisprudential potshots to include disapproval of *Carmille* in addition to *Frazier*.<sup>132</sup> The court also attacked the other road which O'Neal had opened—in-state quasi-freedom. In *Johnson v. Clarkson* Chancellor Dunkin found an almost invisible difference from *Rhame*. *Rhame* had enabled the executor to take slaves and property because the testator had merely advised him to allow quasi-freedom and let the slaves use the property. *Johnson* made in-state freedom or removal and the

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128. *Blackman's Ex'r v. Gordon*, 2 Rich. Eq. 43, 44 (S.C. 1845), *dismissing appeal from Gordon v. Blackman's Ex'r*, 1 Rich. Eq. 61 (S.C. 1844).

129. *Id.*

130. *See Broughton v. Teffer*, 3 Rich. Eq. 431 (S.C. 1851).

131. *See Johnson v. Clarkson*, 3 Rich. Eq. 305 (S.C. 1851); *Finley v. Hunter*, 2 Strob. Eq. 208 (S.C. 1848).

132. *Finley v. Hunter*, 2 Strob. Eq. 208 (S.C. 1848). Johnstone refers to *Frazier* as a case "by which I am bound, however much I doubt its correctness." *Id.* at 214.

Negroes' use of the property a condition of the bequest. Therefore Clarkson's executor could not take.<sup>133</sup>

Their final gambit was an assault on property bequests to Negroes which, though technically correct in its earlier stages of voiding gifts to slaves,<sup>134</sup> reached on the eve of the Civil War a disregard for interstate comity equalled only by the Georgia court and the post-1859 Mississippi court.

In *Willis v. Jolliffe*<sup>135</sup> the chancellors failed to snatch back into slavery a group of Negroes who had reached the soil of Ohio in the nick of time. Their master, a chronic alcoholic whose visions of black avenging angels had apparently caused him to take them to free territory, had died a few minutes after crossing the Ohio River, and his intent freed them irrevocably. But he had also left them a bequest of property in his will, which the chancellors refused to turn over on the grounds that the will was contrary to the policy of the state. Chancellor Francis H. Wardlaw wrote an opinion justifying the refusal on the theory that the Negroes would have still been slaves in South Carolina and could not have taken bequests there.

When the Negroes' case reached the new three-man supreme court, O'Neill secured one final victory. Writing for Job Johnstone and himself, O'Neill declared that the Negroes were entitled.

[I] should feel myself degraded if, like some in Ohio and other abolition States, I trampled on law and Constitution, in obedience to popular will.<sup>136</sup>

Giving the Negroes the property might well, O'Neill implied, run against South Carolina popular sentiment. But that was no excuse for Wardlaw's behavior. The record might show that

133. However Dangerfield's will was worded as a "condition." I find the difference hard to see. *But see* *McLeish v. Burch*, 3 Strob. Eq. 225 (S.C. 1849) (seemingly closer to Dangerfield). *Quaere*: Did two Chancellors change their mind between 1849 and 1851? Or was it that the question of freedom was moot since the executor had already disregarded the "advice" and sold the slaves, and the issue was merely whether he had to pay the residuary heirs? Or that *McLeish* was heard by the combined court with O'Neill present? The justices split in *McLeish*, 6-2. Pro the executor and pro the alleged trusts: O'Neill, Richardson, Evans, Frost, JJ., Caldwell, Dunkin, CC. Anti: David Wardlaw, J., Dargan, C. Absent, Withers, J.

134. *See* *Mallet v. Smith*, 6 Rich. Eq. 12 (S.C. 1853); *Thorne v. Fordham*, 4 Rich. Eq. 223 (S.C. 1852); *Swinton v. Egleston*, 3 Rich. Eq. 201 (S.C. 1851). But O'Neill personally disapproved of this view.

135. 11 Rich. Eq. 447 (S.C. 1860).

136. *Id.* at 516.

Willis had lived in concubinage with one of the slaves whom he had freed and that the others were their mutual half-breed children. But that did not allow the justices to write their moral disapproval of miscegenation into the law when there was "no law in South Carolina which . . . declare[d] that the trusts in their favor [were] void."<sup>137</sup> Indubitably, they were free.

## VII. CROSSING THE COLOR BAR

While O'Neill's decision making in manumission suits sometimes suggested that more than property rights and a unionist insistence on comity were at stake—as in his pained dissent when no other judge would consent to presume the passage of a special legislative act freeing a slave<sup>138</sup>—the presence of other motives was more apparent in his treatment of free persons who claimed to be whites and thus exempt from the Free Colored Persons' Headtax. Arguably, he was less isolated here, for most of his brethren displayed some tendencies to "level up." In one instance, the venerable Bay had barred the tax collector from collecting on the somewhat amazing grounds that the plaintiff's darkish complexion was adequately explained by his claim to be a North Carolinian of Egyptian ancestry, notwithstanding his thoroughly Anglo-Saxon name, "Miller."<sup>139</sup> In another case, O'Neill persuaded all but one of his colleagues that the failure of one of three plaintiffs who were brothers to appear in court should not vitiate a lower court jury finding that they were all whites.<sup>140</sup> O'Neill stressed the impartiality of the jury finding, but ignored ample lower court testimony that the plaintiffs had Negro blood in them, had been regarded by many whites in their community as "colored," and particularly that the absent brother was of considerably darker complexion than the two

<sup>137.</sup> *Id.*

<sup>138.</sup> In *Vinyard v. Passalaigue*, 2 Strob. 536 (S.C. 1845) despite absence of proof which should have been relatively easy to come by had it existed, O'Neill argued vehemently for allowing "good slaves" to become resident free Negroes. "The first thing which ought to be done, is to get back alongside of such men as C.J. Rutledge . . . in the case of the *Guardian of Sally v. Beatley* [sic] . . ." *Id.* at 549. Rutledge's was "an expression of the benevolent feelings which had been tried in the crucible of the revolution." *Id.* Changing his legal assessment of *Sally* from the days of *Carmille*—when he had found it to contain enough right for his instant purpose—O'Neill stated, "there was perhaps no very correct notion of law in the ruling of the case, yet it spoke what, I think, always belongs to Carolina—a love of mercy, of right, and a hatred of that which is mean or oppressive." *Id.*

<sup>139.</sup> *Johnson v. Basquere*, 1 Speers 329 (S.C. 1843).

<sup>140.</sup> *Johnson v. Boon*, 1 Speers 268 (S.C. 1843). Andrew Pickens Butler, later Senator, thought the appearance of all indispensable. *Id.* at 271.

who showed up. He also ignored his own instructions to the jury at the first trial.

I said to the jury, that when men had been acknowledged as white men, and allowed all their privileges, it was bad policy to degrade them to the condition of free negroes.<sup>141</sup>

Granted that their association with whites, though generally permitted, had been "never without question"<sup>142</sup> and that the attempt of one to vote had been negated by the election official, these instructions were hardly unbiased. O'Neill seemed impressed by their respectable character (their father had been a Methodist preacher) and inclined to give them the benefit of the doubt.

Three years later O'Neill tried unsuccessfully to give greater benefits. In *White & Bass v. Tax Collector*<sup>143</sup> some grandchildren of a "well known and much respected mulatto woman about Camden"<sup>144</sup> had been declared white by one jury, while others had been declared mulatto by another jury. O'Neill's report of their circuit trial to the court made his personal feelings clear:

I wish the court may be able to find some ground to give a new trial. For if any people tinged with African blood are worthy to be rated as white, the relatrix and relators present the very best claim to be so rated.<sup>145</sup>

But the grounds were virtually non-existent, and O'Neill's wish failed by three to two. Judge Edward Frost wrote the majority opinion denying a new trial, and observing: "The constant tendency of this class to assimilate to the white, and the desire of elevation, present frequent cases of embarrassment and difficulty."<sup>146</sup>

#### VIII. THE PROOF OF THE PUDDING: O'NEALL'S "SUBVERSIVE PAMPHLET"

Pursuant to a resolution of the state agricultural society, O'Neill produced what is probably the most remarkable document on slavery written by a deep southerner during the 15

141. *Id.* at 270.

142. *Id.* at 269.

143. 3 Rich. 136 (S.C. 1846).

144. *Id.*

145. *Id.* at 137.

146. *Id.* at 139.

years before Fort Sumter. His *Digest*<sup>147</sup> was considerably more than a mere collection of existing laws. It was a policy document recommending far-going liberalization of the South Carolina Slave Code—a fact which the Senate Judiciary Committee noted with distaste when it was referred to them by Governor Johnson. In late December, 1848, that committee, headed by a nephew of Chancellor DeSaussure, reported back to the Senate floor “their belief that as a compilation of law, it is valuable . . . . But the incorporation of private opinions, however high the source from which they emanate, may tend to lead the unskilled into error.”<sup>148</sup> Senator Wilmot DeSaussure and his colleagues were insistent that the work should not be published at the expense of the State, since in many particulars, it contained opinions at variance with the settled policy of the State. Behind their insistence lay a vastly different view of proper slave policy—a fact which became evident in the ensuing battle of words between two Columbia papers, the *Telegraph*, which adopted the committee’s view, and the official organ of the South Carolina Temperance Society, which vehemently supported O’Neill’s.

O’Neill got off to a quick start by trying to impose his own views on the law of presumptions arising from color. In the first chapter he argued that “[w]hen the [Negro] blood is reduced to, or below  $\frac{1}{8}$ , the jury ought always to find the party white.”<sup>149</sup> He then argued that in the Colored Tax cases the burden of proof ought always to lie on the tax collector. To both of these assertions the committee objected, noting that the case in question did not settle the first point and that O’Neill’s proposal about the tax collector amounted to reversing the “general rule . . . that the onus of proof rests upon such as claim a higher status or color.”<sup>150</sup> The judiciary committee liked his next suggestion even less. O’Neill urged that the term “white man” in the state constitution’s suffrage provisions meant only to distinguish Negroes from whites and that consequently a case barring Indians from voting or holding office should be re-

147. J. O’NEALL, *DIGEST OF THE NEGRO LAW OF SOUTH CAROLINA* (1848) [hereinafter cited as O’NEALL, *DIGEST*].

148. *Columbia Telegraph*, Dec. 25, 1848 (Columbia, South Carolina).

149. O’NEALL, *DIGEST*, ch. I, § 8.

150. *Columbia Telegraph*, Dec. 25, 1848 [hereinafter cited as 1st *Telegraph*; while the *Telegraph*’s Jan. 6, 1849, “rebuttal” to the Temperance Advocate is cited as 2nd *Telegraph*]. The Advocate article appeared (according to the *Telegraph*) the previous Thursday [hereinafter cited as *Advocate*].

versed.<sup>151</sup> Wilmot's committee disagreed for two reasons. First, the Indian already enjoyed immunity from taxation, and the "allowance, therefore, of suffrage and holding office would place him upon a better condition than the whites."<sup>152</sup> Second, the well established policy of the State denying the franchise to free Negroes was

a strong reason why the Indian should be debarred, in this respect, from an equality with the white man. So closely does the color of these two races assimilate, that granting these privileges to one, may effect an entrance for the other, and lead to a disregard for color, the observance of which is one of the strong supports of the [peculiar] institution.<sup>152a</sup>

Following his proposal for political equality between Indian and white, O'Neill made explicit the views which had underlain his manumission decisions from *Sylvester* to *Vinyard*. He began by arguing that the law of 1820 had "done harm instead of good."<sup>153</sup> It had produced "evasions without number" which succeeded "by vesting ownership in persons legally capable . . . and thus substantially conferring freedom, when it was legally denied."<sup>154</sup> Though marginally citing *Oline*, *Singletary*, *Rhame*, and *Carmille*, O'Neill failed to note that only they had made the evasions "legally" successful. Then he confronted the legislature point blank.

My experience as a man, and a Judge, leads me to condemn the Acts of 1820 and 1841. They ought to be repealed and the Act of 1800 restored. The State has nothing to fear from emancipation, regulated as that law directs it to be.<sup>155</sup>

O'Neill believed that a master ought to have power to free faithful slaves, for freedom was the only reward which both appreciated and "in a slave country, the good should be especially rewarded."<sup>156</sup> Urging that the peculiar institution would be strengthened against abolitionists if the legislature heeded his advice, he warned that "unjust laws, or unmerciful manage-

151. State *ex rel.* John Marsh v. Managers of Elections for York District, 1 Bail. 215 (S.C. 1829); cf. O'NEALL, DIGEST, ch. 1, § 19.

152. 1st Telegraph.

152a. *Id.*

153. O'NEALL, DIGEST, ch. I, § 37.

154. *Id.*

155. *Id.* ch. I, § 44.

156. *Id.*



ment of slaves, fall upon us, and our institutions, with more withering effect than anything else."<sup>157</sup> He concluded: "I would see South Carolina, the kind mother and mistress of all her people, free and slave. To all extending justice and mercy."<sup>158</sup>

According to the *Temperance Advocate*, O'Neill's reading of these words at a Spartanburg meeting of the State Agricultural Society was received with a rapturous burst of applause. The judiciary committee, however, had different feelings about increasing the number of free Negroes living in South Carolina.

The creation of a class differing by no distinctive color . . . from the servile class . . . cannot fail to produce in the lower caste envy and heart-burning, the result of which may be most disastrous.<sup>159</sup>

Even if servile insurrection did not ensue, "[t]he indolent character of the race, and their indisposition to labor, when livelihood can be obtained by other means, would have a tendency to create a class seriously prejudicial to the interests and morality of the country."<sup>160</sup>

In addition to making it easier for slaves to become free Negroes and for light coloreds to assimilate to whites, O'Neill urged vast increases in the legal protections cloaking them in their respective stations. To begin with he wished to remove what he regarded as absurdities imposed by the 1740 Slave Code such as restrictions on slaves' clothing,<sup>161</sup> playing of trumpets and partying,<sup>162</sup> and on their use of the public highways.<sup>163</sup> He further proposed three fundamental reforms in slave life. First, he wanted a substantial reduction in the maximum-hours law which permitted masters to demand 15 hours work per day during the summer and 14 during the winter. O'Neill argued that the maximum should be reduced, respectively, to 12 and 10 hours. Second, he felt that the "maltreatment" statute was much too mild and that the provision allowing the master to exculpate himself by oath should be removed. He regretted "to say, that there was in such a State as ours, great occasion for the enforcement of such a law, accompanied by severe penalties,"<sup>164</sup> and

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157. *Id.*

158. *Id.*

159. 1st Telegraph.

160. *Id.*

161. O'NEALL, *DIGEST*, ch. II, §§ 48-49.

162. *Id.* ch. II, §§ 56-57.

163. *Id.* ch. II, §§ 51-52.

164. *Id.* ch. II, § 26.

thought that the grand jury of each district should be required by law at each court term "to enquire of all violations of duty, on the part of masters . . . and . . . that every one by them reported, should be ordered instantly to be indicted."<sup>165</sup> Third, he disapproved of the legal inability of slaves to marry with the result that offspring of a slave and a free Negro could not inherit their free parent's property. While O'Neill did not explicitly advocate legalized marriage between slaves, he seemed to feel that the legislature ought to rethink the matter, and, at the very least, pass an act allowing the bastard offspring of slaves and free Negroes to inherit.

Turning to the protection of free Negroes, O'Neill became more explicit about interracial marriage. While, according to the *Advocate*, he deplored "such marriages as much as any other man," he argued that precedent proved them legal. With this, as with his assertion about maltreatment of slaves, the committee took strong issue. Wilmot DeSaussure and his colleagues accused O'Neill of misusing precedent in regard to interracial marriage by trying to give his special concurrence, in the relevant case,<sup>166</sup> the weight of the majority opinion which had decided the case on a narrower ground and not considered the issue. Whatever the legal merits of the dispute, the *Telegraph* said, echoing the committee's views, "the policy of the State is decidedly against it. Whatever tends to break down the barriers between the two classes of color, must weaken the institution."<sup>167</sup> Hardly less pernicious was O'Neill's slight upon masters' treatment of slaves:

The Committee expresses a decided dissent to the charge . . . that negroes in South Carolina are so badly provided with clothing, food, etc., as to need the enforcement of the existing statutory enactments by severe penalties. As a peasantry, their provision is more ample than in any other part of the world except the slaveholding States . . . . The exceptions, if any exist, must be very rare.<sup>168</sup>

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165. *Id.*

166. *Bowers v. Newman*, 2 McM<sup>l</sup>. 472 (S.C. 1842). The committee seems to have had the better of the argument, notwithstanding the *Advocate's* attempt to support O'Neill on the issue.

167. 1st *Telegraph*.

168. *Id.*

O'Neill was equally unhappy with two statutes which placed the free Negro below the white. The provision for sale of free Negroes unable to pay their capitation tax was, he thought, of "exceedingly questionable"<sup>169</sup> constitutionality. So, too, was the law forbidding them to return to the state if they journeyed north of Washington, D.C. He saw no necessity for restricting the free Negro's right to travel and consequently was disposed to repeal it. Behind his recommendations lay a view of the free Negro's rightful position in society which was anathema to the committee. For O'Neill, the free Negro might well be naturally inferior to the white. Nonetheless, he was embraced in South Carolina's "Social Contract" at least to the extent of having a right to the basic immunities from arbitrary governmental power (if not all the positive privileges such as voting). The committee, opposed to all measures which would diminish the barriers between the two races, saw nothing unconstitutional about the statutes since the "term 'freeman' used in the Constitution, [did] not . . . apply to free persons of color."<sup>170</sup>

On that ground too, the members opposed O'Neill's insistence that free Negroes had a right to habeas corpus<sup>171</sup>—though here they stood on weaker ground than usual since the specific removal of the right in the anti-immigration statute implied that Negroes enjoyed it as a general rule. On this and one other ground—their view that Negroes were naturally lazy liars—they opposed most of O'Neill's major suggestions for reform in the Black Criminal Code. True, they did not explicitly reject O'Neill's assessment of trial by magistrates and freeholders as "the worst system which could be devised,"<sup>172</sup> or his insistence that the slave's right of appeal was too limited. But, they notably failed to except from their general condemnation of his *Digest*, or to adopt, the solutions he urged: trial by a 12-man jury, the right to ten peremptory challenges of the 24-man panel, a court-appointed counsel, and extension of the right to appeal from capital to all non-capital cases.<sup>173</sup> And they explicitly repudiated O'Neill's proposal that slaves and free Negroes should be examined under oath in court. O'Neill believed:

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169. O'NEALL, *DIGEST*, ch. I, § 55.

170. 1st Telegraph.

171. O'NEALL, *DIGEST*, ch. I, § 48.

172. *Id.* ch. III, § 32.

173. *Id.* ch. III, §§ 31-32.

Negroes, (slaves or free) will feel the sanctions of an oath, *with as much force as any of the ignorant classes of white people*, in a Christian country . . . . The course pursued on the trial of negroes, in the adduction and obtaining testimony, leads to none of the certainties of truth. Falsehood is often the result, and *innocence is thus often sacrificed on the shrine of prejudice*.<sup>174</sup>

The committee differed sharply. Ignoring O'Neill's equation of poor whites and Negroes, it observed:

The obligation of an oath is too great to be administered to a class so illiterate as to be unable to understand its nature, and whose proverbial mendacity would generally lead to its violation.<sup>175</sup>

O'Neill may have seen some merit in the committee's point about illiteracy for he offered a solution: teach slaves to read and write. The prohibitory Act of 1834 had grown

out of a feverish state of excitement produced by the *imprudent* meddling of persons out of the slave States . . . . That has, however, subsided, and I trust we are now prepared to act the part of wise, humane, and fearless masters, and that this law, and all of kindred character, will be repealed.<sup>176</sup>

Repeals of the anti-reading act and of the 1820 and 1841 emancipation statutes were two of the six major repeals which O'Neill urged that would have radically changed the nature of South Carolina's peculiar institution—if not, indeed, as the committee feared, have led to its speedy collapse.<sup>177</sup>

One of O'Neill's principal reasons for urging the reading statute's repeal stood also behind his third proposal—that the legislature should repeal an 1803 statute requiring the presence of whites at Negro church services and limiting their hours. O'Neill insisted that these restrictions were "a reproach upon us in the mouths of our enemies, in that we do not afford our slaves that free worship of God, which he demands for all his people."<sup>178</sup> The committee's weak rejoinder that they were only enforced in rare instances of necessity did not satisfy him.

174. *Id.* ch. I, § 52 (emphasis added).

175. 1st Telegraph.

176. O'NEALL, DIGEST, ch. II, §§ 41-42.

177. The causes of the 1834 Act "have by no means abated, but rather increased." 1st Telegraph.

178. O'NEALL, DIGEST, ch. II, § 47.

They, if ever resorted to, are not for doing good, but to gratify hatred, malice, cruelty, or tyranny. This was not intended, and ought to have no countenance or support, in our Statute law.<sup>179</sup>

He frankly found it impossible to justify as a Christian "that a slave is not to be permitted to read the Bible."<sup>180</sup> Nor was he convinced by the committee's argument that the rapid expansion of domestic missionaries "within the last few years"<sup>181</sup> provided an adequate substitute. Although it was the *Advocate* rather than O'Neill himself which expressly took the most dare-devil position on the future of slavery itself, the tenor of his argument, his position as president of the Temperance Society, and his obvious connivance in the *Advocate's* rebuttal to the *Telegraph*, make it unlikely that the editor's views diverged from his. The *Advocate* urged that it would be a libel on the very name of Christian to say that forbidding slaves to read was justifiable while paying "[t]ens of Thousands to have Asiatics, and the inhabitants of the distant isles of the sea, taught to read the Scriptures."<sup>182</sup> Having "beseech[ed] Christians of every sect to look to this," the *Advocate* insisted: "If we cannot reconcile slavery with the Bible, where can we go? If the religious instruction of the slave, including, of course, his reading of the word of God, be incompatible with slavery itself, how can Christians defend it?"<sup>183</sup>

For the Deep South of the late 1840's this was remarkable ground to take—not, of course, for its writer's belief in the scriptural foundations of slavery, but rather for his explicit ordering of contingencies. Here "ideology" did rather more than rationalize; here it threatened to determine the social scheme of things. To the committee's alarm O'Neill counterposed three reassurances whose compatibility was at best skin-deep. First, the "best slaves in the State, are those who can and do read Scriptures,"<sup>184</sup> which seemed to imply flatly that the committee's viewpoint was empirically wrong. But second, immediately before saying this O'Neill had used a very peculiar choice of words: "It is in vain to say there is danger in"<sup>185</sup> permitting

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179. *Id.*

180. *Id.* ch. II, § 42.

181. 1st *Telegraph*.

182. *Advocate*.

183. *Advocate*.

184. O'NEALL, *DIGEST*, ch. II, § 42.

185. *Id.*

slaves to read. Significantly unclear is whether it is vain because it is not "Christian" or because it is empirically wrong. The ordering of words seems initially to suggest the latter. But the assertion that the best slaves are Bible readers is followed by a third rationale which runs counter to it. "Such laws look to me as rather cowardly. It seems as if we are afraid of our slaves. Such a feeling is unworthy of a Carolina master."<sup>186</sup> At the last O'Neill appealed to Southern chivalry.

O'Neill's peculiar view of the peculiar institution led him to argue for a fourth change—reducing slave stealing and enticing slaves to escape, to non-capital offenses. For this the committee took him to task, arguing that "recent events have demonstrated that fanaticism will go to such extreme lengths as to need laws of a most penal character, for self-defense."<sup>187</sup> Unabashed, O'Neill requested the *Advocate* "to say that he [had] no apology to make for such sentiments. With two exceptions, (murder and rape) he would, if he could, abolish every capital punishment in the State, and substitute punishment in a penitentiary."<sup>188</sup>

O'Neill's final two suggestions were no less contrary to the committee's views of sensible policy. With an optimism that the committee did not share, O'Neill argued that most slaves taken to the North would not be contaminated by abolitionist ideas. Most, he predicted, would "return to their Southern homes, better slaves."<sup>189</sup> With the rest, he would take his chances. Not so said the committee, whose response to his final proposal was frigid indeed. Having argued for returning to a more permissive manumission structure by repealing the 1820 and 1841 Acts, in a way that evidently would have allowed freed slaves to remain in the state, O'Neill wound up by proposing that the gates of South Carolina be re-opened to incoming free Negroes, as well as to South Carolina Negroes who visited at the North. Advocating repeal of the 1835 successor to the Colored Seaman's Act which William Johnson had suggested was unconstitutional twenty-five years earlier, O'Neill stated:

"The first, second, third, and fifth sections of the Act of 1835, are to my mind, of so questionable policy, that I should be disposed to repeal them. They carry with

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186. *Id.*

187. 1st Telegraph.

188. *Id.*

189. *Id.*

them so many elements of discord with our sister States, and foreign nations, that, unless they were of paramount necessity, which I have never believed, we should at once strike them out. I am afraid too, there are many grave constitutional objections to them, in whole or in part."<sup>190</sup>

Section 1 barred out-of-State Negroes from settling in South Carolina, and section 5 prevented South Carolina Negroes from returning. Sections 2 and 3 provided for imprisonment and fining of colored seamen. A prudent regard for comity might have led O'Neill to advocate repeal of sections 2 and 3, but his suggestions about the first and fifth sections must have stemmed from something more—from, probably, a view that free Negroes had certain basic rights under the Federal Constitution. And that view was, it should be strongly stressed, more liberal than not only the United States Supreme Court in the Dred Scott case, but also the legislatures and courts of the old Northwest Territory States of Ohio, Indiana, and Illinois which either barred free Negro settlement altogether or made it contingent upon deposit of a large sum of money for a privilege which white persons received free. It is in that comparative light that we must assess O'Neill's liberalism, and, I believe, conclude that for its time and place, it was substantial—if not what the committee thought, ridiculous and extreme.

The policy of the State in excluding from its limits by stringent laws, Free Negroes and persons of color, coming from other places, is so firmly established and their wisdom so generally conceded, that no reasoning is needed on the part of the Committee for differing in opinion from the author in chap. 1, sec. 65.<sup>191</sup>

On balance, it is hard not to agree from the standpoint of "preservation of slavery" and white supremacy if not from that of "morality," with the *Telegraph's* second editorial:

(O'Neill's) . . . philanthropy in this instance may be productive of untold evils, if the circulation of this book is to produce upon all the effect which it was wrought upon our neighbor, who not only justifies but commends suggestions which would put the black on a footing of perfect equality with the white race.

190. O'NEALL, DIGEST, ch. I, § 65.

191. 1st Telegraph.

Believing all steps which would introduce such a policy to be equally fatal to the happiness and well-being of both races, we feel it our duty solemnly to protest against any and every attempt to take the initiative towards them, and therefore warn the public against the adoption of a book which would prove Amalgamation legal!<sup>192</sup>

The *Telegraph* might be exaggerating in saying that O'Neill suggested perfect equality with the white race. However, that the enactment of his proposals into law would have radically altered South Carolina's course seems to me a proposition hard to refute.

#### IX. EPILOGUE

As soon as news of Lincoln's election reached Charleston, Secessionists began to rejoice. No longer could the temporizing Co-operationists force them to the bitter cup of compromise. The admission of California as a free state, the bootless struggle over Kansas, Charles Sumner's insolence, the subversive "higher law" doctrine of William Seward, John Brown's raid at Harper's Ferry, the willful failure of Northern courts to enforce the Fugitive Slave Law—all these outrages of the past decade might have been insufficient to goad the dominant faction of South Carolina politics down the road to independence. But a black republican in the White House! That would force the hand of the Co-operationists' leader, James L. Orr, former speaker of the house. The junior senator, James Chesnut, was willing to resign his seat in Washington, and his more cautious colleague, James Henry Hammond, would have to follow suit. The withdrawal of all South Carolinians from federal offices: that would be the first step. And the second, a convention to sunder the ties of Union, was already in the offing. Governor William Gist was eager to ask the legislature to call for such an assembly. The results would be decisive: Carolina would secede first, and the gulf states would follow. A Southern nation was imminent.

On a frosty morning late that month two elderly men stood atop the steps of the courthouse of a small Piedmont countyseat, Newberry. A crowd of a hundred or so milled around on the street in front of the building. First the taller man, then the shorter, spoke. The crowd, respectfully silent for the first few

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192. *Id.*



minutes, began to stir. What the listening Secessionists heard was not what they liked to hear from two justices of the state supreme court. They were particularly irritated with the shorter man's words. John Belton O'Neall might be the chief justice, the former president of the Greenville & Columbia Railroad, and a lifelong resident of Newberry, but he had no right to speak of the virtues of the Federal Union at this point in history. It was too much. Eggs and turnips began to fly through the air. Chief Justice O'Neall wiped the yolk off his coat and continued to speak. When he had finished, he walked down the steps with his fellow judge, Job Johnstone. Johnstone climbed into a waiting carriage, and the chief justice followed him—though more stiffly for he was nearly seventy years of age. Taking the reins, he drove the three miles to his winter plantation.

John Belton O'Neall died in 1863—the year in which the tide of battle shifted, with Gettysburg and the fall of Vicksburg, against the new nation whose founding O'Neall had vainly opposed, and the thirty-fourth year of an extraordinary career upon the bench. Granted its time and place, two aspects of its extraordinariness—its persistent drives toward the maintenance of Union and toward the improvement of the Negro's condition—are now apparent. Yet what of the third characteristic ascribed to it at the outset of this essay—greatness?

Undeniably, there is something problematic in such an assessment when we are confronted by two obvious facts. First, in view of the direction which South Carolina affairs took, O'Neall's career did not terminate in that crudest sign of stature—conspicuous long-term influence: His decision-making did not shape the contours of later generations' politics in the grand fashion of a John Marshall, nor even did the stamp of his decisions mold jurisprudential channels of the future in the narrower fashion of say Chancellor Kent of New York, or Judge Cooley of Michigan. Second, his decisions do not by and large display either that remorseless political logic which characterized the writings of the leading antebellum South Carolinian, John C. Calhoun, or the sheer analytic power of a judge like Justice Samuel Miller. The day is too long past when we can sensibly conclude with the fulsome biographical kindnesses so popular in O'Neall's day.

Nonetheless I would argue that O'Neill's career, despite its limited compass, partook of greatness on four counts. First, he could—once beyond the imagistic foothills exemplified by his “sturdy republican wanderer” clothed in skins and drinking from the bubbling brook—chisel out passages of ample logical power—as his six point rebuttal to Rhett's political theories. His point about “allegiance” and congressional territories constituted a turn of the analytic knife sufficiently sharp for many a unionist United States Supreme Court justice not to have been displeased had he turned it himself. When O'Neill was less persuasive, it was generally because he illustrated in a distinctly personal way—a characteristic Oliver Wendell Holmes once rather left-handedly ascribed to his colleague, the elder Harlan. Harlan, Holmes observed, had a mind like a powerful vice, the jaws of which could not get closer than two inches apart. The jaws of O'Neill's mind were usually both gentler and closer together, as when he was seeking to cajole his colleagues into allowing bequests of freedom. When fixed apart, they were generally stuck upon a gristly piece of inhumanity which he could not smoothly digest. And that, I think, suggests a second aspect of greatness—O'Neill's quintessential humanity. It was almost always outrage at iniquity which derailed his logic. And that, again, is perhaps the best way to be derailed. Thirdly, for a judge with such distaste for politics, O'Neill had a remarkably acute sense of the politically possible. Shortly after the 1860 Democratic debacle at Charleston, when the party split hopelessly into northern and southern wings, O'Neill indulged in a striking bit of Jeffersonian agrarianism. Writing to the local Newberry paper, he stated: “I regard politics as a sorry trade! I have never found the man whom it warmed, fed, or clothed. But I know many . . . whom it has made naked, cold, and hungry. Employment and attention to a man's own business is the best antidote to politics. The honest laborious farmer, mechanic, or merchant is no politician.”<sup>193</sup> Yet, his own manner of attending to his own business on the court evidenced a well-nigh maximal use of the power available to a single judge operating in a milieu such as South Carolina of his day. True, his decisions had twice been rebuked by the legislature. Nonetheless, his tactical mistakes—if such they were—did not add up to a

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193. H. SCHURZ, NATIONALISM AND SECTIONALISM IN SOUTH CAROLINA, 1852-1860, at 6 (1950) (quoting from a letter to the Newberry Conservatist, July 10, 1860).

strategic debacle. O'Neill had a curious capacity to surface once more to wield judicial power. Fourth and finally, one must say something about his sense of the larger political realities of nineteenth century America's evolution. Robert Barnwell Rhett won in the short-run. Indeed, O'Neill was in no position—either by himself or in company with the minority band of unionists—to prevent South Carolina from trying Rhett's secessionist solution to the vexing problems confronting a slave society increasingly encircled by freer politics. O'Neill lived long enough to see dashed hopes which he had expressed just six weeks before Lincoln's election to his friend, Senator James Henry Hammond: "I hope that South Carolina never will be represented, or rather misrepresented, by Rhett, or any of his bullying set."<sup>194</sup> Yet, looking back a century, whose policies appear more expedient? Rhett's plan to cut bait, or O'Neill's to continue fishing in Union waters? In retrospect, what is remarkable about the War Between the States is not that the South ultimately lost, but rather that the contest was so close. O'Neill may or may not have been intellectually sound in declaring to Hammond: "I regard Secession, as Revolution, exactly equal to that in '76".<sup>195</sup> And he may or may not have been correct in observing—not asking, for he significantly omitted the question-mark: "Have we any cause for that."<sup>196</sup> Yet, it is hard to dispute that his Burkean sense of continuity and gradualism led him correctly to the belief that South Carolina's long-term influence and prosperity—no matter how much diminished from the halcyon days of the early Republic—would remain greater by keeping within the Union. The trouble with Rhett's politics was precisely that its practice did make many naked, cold, and hungry. O'Neill illustrated far better than most of his contemporaries another Holmesian adage: "A page of experience is worth a thousand pages of logic." O'Neill's page of experience expressed a keen understanding of the art of the possible.

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194. Letter, entry 24481 and 24482, in the James Henry Hammond Collection, Library of Congress.

195. *Id.*

196. *Id.*