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JUDICIAL NULLIFICATION OF STATE STATUTES RESTRICTING THE EMANCIPATION OF SLAVES: A SOUTHERN COURT'S CALL FOR REFORM

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I. INTRODUCTION

From 1820 until the mid-1840s the South Carolina Court of Appeals, the state's highest court during that period, judicially nullified state statutes that restricted the emancipation of slaves. The proemancipation thrust of these judicial decisions and the antiemancipation directives of the statutes the court interpreted reveal both the complexity of Southern discourse on slavery and race relations and the conflicting forces at work in Southern antebellum society. In addition, the extended debate between the state's appellate court and the legislature improves our understanding of nineteenth-century jurisprudence and the roles played by the judiciary and the legislature in the law-making process.[1]

The central slavery questions confronting judges and legislators of the time were whether the institution should be continued and, if so, in what form. The emancipation issue compelled lawmakers to confront the morality of slavery and the prospect of an interracial society in which blacks greatly outnumbered whites. As legislators responded by passing anti-emancipation laws that made slavery increasingly repressive, judges openly nullified the statutes to implement reform.[2]

These judicial decisions were made at a time when it is difficult to imagine that the legislature would tolerate opposition to its will. Yet the judges, all of whom were appointed by the legislature, were neither censured nor removed, even when the legislature had the clear opportunity and authority to act.

During the period in which the judges decided in favor of emancipation, strident calls for abolition emanated from both the North and the South. The ever-present fear of slave revolt was made real by the slave insurrection led by Denmark Vesey in 1822. Race war was, as de Toqueville said, "a nightmare constantly haunting the American imagination."[3] The abolitionist movement and the occurrence of slave insurrections strengthened the arguments of those who believed that the preservation of slavery depended on the enactment of repressive laws.

Strong economic arguments also existed for strengthening the chains of bondage. In the early 1800s South Carolina experienced an extended economic depression. As the price of short-staple cotton plummeted and banks failed, many planters stood on the brink of economic ruin. Slave property held its value, however, and for many, the income from the natural increase of slaves made the difference between

1. *See infra* notes 68-192, 221-28 and accompanying text.

2. *See infra* notes 68-192 and accompanying text.

3. A. DE TOCQUEVILLE, DEMOCRACY IN AMERICA 329 (J. Meyer & H. Lerner ed. 1966).

solvency and bankruptcy. As antislavery organizations began to mount their campaigns, many South Carolinians feared that a widespread loss of confidence in slavery would depress the price of slaves and lead to the planters' financial ruin. Those who held this view supported restrictive legislation to fortify the institution against assault.[4]

Throughout the antebellum period, the South Carolina Court of Appeals actively participated in the discussion about the future of slavery. Although Court of Appeals judges had widely varying attitudes toward slavery, their judicial decisions were decidedly pro-emancipation. The language of the decisions does not suggest that the judges experienced a conflict between their judicial role and their individual perspective[5] despite the court's flagrant disregard of the legislative will. To the contrary, the language of the opinions demonstrates that the judges purposefully attacked the emancipation statutes and resolutely pursued their objective.[6]

One might be tempted to argue that a judicial decision in favor of emancipation was nothing more than a decision to strengthen the slave owner's property rights and to give him unfettered dominion over his chattel. That theory may apply to cases in which the plaintiffs were slave owners attempting to free their slaves. It does not explain, however, the cases in which slaves claimed their right to freedom over the objection of their owners.

Despite the judicial assault on the legislative will, the South Carolina Legislature took no action against the judges who decided in favor of emancipation. During the period under discussion, the legislature controlled both the selection and tenure of judges. Although the legislature reorganized the courts twice, it did not demote, reassign or refuse to reappoint the judges who had thwarted the will of the legislature.[7] This apparent tolerance, however, was not reflected in the legislature's institutional response to the judiciary's decisions. Later statutes eliminated judicially-created exceptions to the emancipation statutes.[8]

The purposes of this Article are to discuss the context in which these cases arose and to suggest some reasons why these cases were decided as they were. Part II provides a brief history of the development of slavery in South Carolina. Part III describes the statutory regulation of emancipation from 1690 to 1800. Part IV analyzes the regu-

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4. *See infra* notes 48-50 and accompanying text.

5. *See generally* State v. Mann, 13 N.C. (2 Dev.) 229 (1829) (providing a famous example of judicial tension concerning slavery in North Carolina); R. COVER, JUSTICE ACCUSED 1-7 (1975) (general discussion of judicial tension).

6. *See infra* text accompanying note 174.

7. *See infra* notes 160-62, 185-87 and accompanying text.

8. *See infra* notes 110-12, 179-80 and accompanying text.

lation of emancipation, both by statute and case law, from 1800 to 1861. Part V discusses why the emancipation cases were decided as they were and why the legislature did not remove the judges who decided them. Part VI, the conclusion, discusses the implications of these decisions.

II. THE HISTORY OF SLAVERY IN SOUTH CAROLINA

The history of slavery in South Carolina is as old as the history of the colony itself. The narrative begins in Barbados, from which South Carolina's first permanent settlers embarked. In the 1620s Barbados was a tobacco-growing colony with a labor force consisting mainly of white indentured servants.[9] However, by 1640 Barbadian planters were growing sugar instead of tobacco. The effects of this change were immediate and profound. Planters found themselves in the midst of a sugar revolution that created legendary fortunes. In a short time Barbados became the richest of the New World Colonies.[10]

The sugar revolution in turn transformed the character of the labor force. As pestilence, extreme weather conditions, and long hours of back-breaking toil made white labor scarce, the planters turned to black slavery to fill the void. By 1680 over 40,000 slaves worked 175 great plantations and about 1,000 smaller ones. The number of white servants had dwindled to 2,300.[11] The rapid development of sugar cultivation and of slavery produced a plantation economy in its starkest form.

> [The sugar revolution] soon created a strong and cohesive planter class, which consolidated the best lands in the hands of a few wealthy proprietors . . . . Barbados was the first English colony to gravitate toward the extreme model of speculative profits, absentee proprietorship, mono-culture, soil exhaustion, a stunted institutional life, and a white population notorious for its vulgarity, alcoholism, and general improvidence. By 1712, the colony's white population was hardly half as large as it had been in 1655; in the same interval, as a result of heavy importation from Africa, the number of slaves had more than doubled.[12]

The massive introduction of slaves into the West Indies soon took its toll. During the second half of the seventeenth century slave insurrections were frequent, especially in Jamaica. Caribbean planters

9. E. MORGAN, AMERICAN SLAVERY-AMERICAN FREEDOM 298 (1975).

10. D. DAVIS, THE PROBLEM OF SLAVERY IN THE AGE OF REVOLUTION 1790-1823, at 51-52 (1975); W. ROSE, SLAVERY AND FREEDOM 156 (1982).

11. W. ROSE, *supra* note 10, at 156.

12. D. DAVIS, *supra* note 10, at 51-52.

quickly perceived a correlation between the number of native Africans in the slave population and the slaves' likelihood of revolt.[13] In response to fears of slave rebellion, Barbados designed a slave code to secure the planters' economic and personal safety at the expense of the slaves' well-being.

The Barbadians who settled South Carolina left the island when the sugar revolution was well underway and the plantation system had determined the contours of the island's economy. These early settlers brought with them visions of vast plantations cultivated to produce sudden and fabulous wealth. They also brought black slave labor to make their dreams a reality. The existence of slavery in the new colony was an accepted fact. The moral questions of slavery already had been decided by the time the early settlers left Barbados. Their primary concerns were securing their own wealth and safety, maximizing their profits, and making their slaves' subjugation absolute.[14]

The cultivation of rice in the late seventeenth century changed South Carolina the way that cultivation of sugar had transformed Barbados a half-century before.[15] Rice yielded dazzling profits and destined the colony for a plantation economy based on black slave labor. As rice cultivation became profitable, South Carolinians began to import blacks in large numbers. Soon South Carolina was the only mainland colony where black slaves formed a majority of the population.[16] By 1740, over two-thirds of the colony's population was black.[17]

With the rapid increase of blacks, white planters turned to the law to resolve the tension between what they perceived to be the colony's economic and safety needs. As the expanding economy called for the importation of more and more black slaves, white colonists increasingly demanded the imposition of restraints on the growing black population.[18]

The early settlers' success in duplicating the Barbadian economic experience had important consequences for the development of the South Carolina slave institution and of the laws that regulated it. From the outset the development of the institution was shaped by the dominant concerns of the planter class: fear of insurrection by blacks and an economic need to preserve the plantation economy.

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13. W. ROSE, *supra* note 10, at 157. The Jamaican labor system was one in which slaves were over-disciplined and underfed, while their owners were typically under-disciplined and overfed. *Id.*

14. *See* A. HIGGINBOTHAM, IN THE MATTER OF COLOR 154 (1978).

15. W. ROSE, *supra* note 10, at 159; Phillips, *The Slave Labor Problem in the Charleston District*, 22 POL. SCI. Q. 417 (1907).

16. A. HIGGINBOTHAM, *supra* note 14, at 152.

17. G. ROGERS, JR., A SOUTH CAROLINA CHRONOLOGY 1497-1970, at 8 (1973).

18. A. HIGGINBOTHAM, *supra* note 14, at 215.

III. EARLY STATUTORY REGULATION OF EMANCIPATION: 1690-1800

South Carolina's slave law developed differently from that of the other mainland common-law colonies. First, unlike the other colonial slave systems, South Carolina's slave law was both statutory in origin and intended to be a complete body of slave law. In these respects, it resembled Louisiana's Black Code, which followed the civil law approach of creating a comprehensive body of statutory law to regulate slavery.[19]

Second, unlike other mainland common-law colonies, South Carolina's slave law developed quickly. Its key characteristics were firmly in place by 1740. This rapid development can be attributed to the strong influence of the Barbadian experience, the rapid rise of the plantation economy, the numerical dominance of black slaves, and a slave rebellion in 1739.

From the outset South Carolina's slavery statutes reflected the concerns of large plantation owners in the coastal area of the colony. Planters from the coastal area controlled the legislature and held the most important government offices. These coastal planters cultivated rice and long-staple cotton in the rich, alluvial soil of the region. Often a single family owned several plantations, but lived on only one. Gangs of slaves did back-breaking field work in the steamy Southern heat, directed by white or black overseers. Because the coastal plantations employed large numbers of slaves, and the owners were often absent, it is unlikely that the white owners knew black field hands as individuals to any significant extent.[20]

In the coastal regions blacks vastly outnumbered whites. Blacks in the coastal region were frequently recent arrivals from Africa. They spoke a foreign language and introduced foreign customs. The low country planters, therefore, produced a slave code designed to protect their investments in slave property and guarantee the security of the white community. The code adopted oppression as its approach to slave regulation and largely ignored the less restrictive aspects of slavery that developed in other parts of the colony.[21]

Between 1690 and 1740 South Carolina statutes increasingly restricted a slave's opportunity for emancipation. The South Carolina

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19. *See generally* BLACK CODE OF LOUISIANA (1806). In contrast, slave law developed more gradually in other mainland colonies like Virginia. *See generally* 1 W. BLACKSTONE, COMMENTARIES 46-47 (Tucker ed. 1803).

20. The preceding description of coastal plantations is based on W. FREEHLING, PRELUDE TO CIVIL WAR: THE NULLIFICATION CONTROVERSY IN SOUTH CAROLINA 8-11, 71 (1965).

21. *Id.* at 11 (depiction of low country slaves). For a discussion of the policies of the slave code, see *infra* notes 34-37, 229-63 and accompanying text.

Act of 1690, an Act for the Better Ordering of Slaves,[22] is reported to be the first South Carolina law exclusively devoted to slavery.[23] The legislature passed the 1690 Act at a time when the plantation economy was beginning to take hold in South Carolina. The Act restricted slaves' freedom of action, gave masters absolute power over their slaves, and provided owners with compensation for harm to their slave property.[24] More importantly, however, the Act's provisions introduced an important restriction on the emancipation of slaves. The change in the law was based on a change in the policy arguments used to justify slavery.

During the first half of the 1600s the justification for slavery in the English mainland colonies was that the slaves, whether black or Indian, were heathens.[25] In South Carolina, as in other colonies, slaves who converted to Christianity had the chance to become free persons.[26] Thus, conversion to Christianity presented an opportunity to be free that, to a very limited extent, made slaves participants in the choice between freedom and slavery.

The possibility of emancipation as a consequence of a slave's conversion to Christianity presented the South Carolina planter with a dilemma. Converting slaves to Christianity, an act regarded as a moral

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22. Act of 1690, 1690 S.C. Acts 343-47.

23. G. ROGERS, JR., *supra* note 17, at 12.

24. The origins of the 1690 Act are unknown, but it probably was influenced by the Barbadian codes, as its 1712 successor clearly was. The 1690 Act, which applied to both Indian and Negro slaves, was very oppressive. Slaves governed by the Act were forbidden to leave their owners' plantations without a pass, and their houses were searched monthly for weapons and stolen goods. The penalty for striking a white person (first offense) was a whipping. The penalty for a second offense was a severe whipping, slitting the offender's nose, and burning the offender's face. The penalty for a third conviction was death. Act of 1690, § I, 1690 S.C. Acts 343. The brutality of the Slave Code's penalties could be attributed, in part, to the general severity of punishments of lawbreakers in the late seventeenth century. For example, a 1679 Virginia statute imposed the following punishments for theft of a hog: for the first offense, the thief had to pay 1,000 pounds of tobacco or provide a year's service to both the hog's owner and the informer; for a second offense, the thief's ears would be nailed to the pillory and then cut off; for a third offense the thief would be executed. E. MORGAN, *supra* note 9, at 217. Despite the general severity of punishments, however, slaves generally were punished more harshly than whites. 1 W. BLACKSTONE, *supra* note 19, at 62.

Under the Act owners were permitted to impose capital punishment as a penalty for a runaway slave. Act of 1690, § XIV, 1690 S.C. Acts 344. The Act also protected an owner's rights in his slave property: a third party who killed another person's slave would be imprisoned for three months and fined fifty pounds. *Id.*, § XII, 1690 S.C. Acts 346-47.

25. *See* E. MORGAN, *supra* note 9, at 331.

26. Before the 1660s, many people assumed "that Christianity and slavery were incompatible. Negroes and Indians held in slavery who could prove that they had been baptized sometimes sued for their freedom and won it." *Id.*

and social good, threatened the owner's economic interest in his slave property. The South Carolina Act of 1690 resolved this dilemma by justifying slavery on the basis of race instead of heathenism and by abolishing the slaves' opportunity to become emancipated by conversion to Christianity.[27] Although the stated policy of similar laws in other colonies was to encourage planters to Christianize their slaves,[28] it seems more than a coincidence that this important route to freedom was eliminated just as the plantation economy began to flourish in South Carolina. This change eliminated the slave's limited opportunity for self-determination and made the owner's power over the emancipation of slaves absolute.

In 1712 the South Carolina Legislature enacted a slave code that was more restrictive than the Act of 1690.[29] Largely a copy of the Barbadian Slave Code,[30] it explicitly equated slavery with race.[31] Like its predecessor, the Act of 1712 was designed to perpetuate slave labor for the development of the plantation economy and to provide for the physical security of the white community.[32] The Act of 1712 required emancipation of slaves to be based on merit. Emancipation could be effected by the Governor, by an act of the legislature, or by the slave's owner.[33]

The Act of 1735[34] imposed further restrictions on emancipation. It required owners who freed their slaves to ensure that the former slaves left the colony within six months after the emancipation. Former slaves who remained in South Carolina longer than six months, or who returned to South Carolina within seven years were returned to slavery.[35] Later, the South Carolina Legislature passed the Act of 1740,[36] a

27. Act of 1690, § II, 1690 S.C. Acts 352-53.

28. According to St. George Tucker, Virginia had passed a similar act in 1667 to encourage slave owners to Christianize their slaves. 1 W. BLACKSTONE, *supra* note 19, at 45.

29. Act of 1712, 1712 S.C. Acts 352-65.

30. *See* H. HENRY, THE POLICE CONTROL OF THE SLAVE IN SOUTH CAROLINA 4 (1968); K. STAMPP, THE PECULIAR INSTITUTION 206 (1956).

31. Act of 1712, Preamble, 1712 S.C. Acts 352.

32. *See generally id.* For example, slaves were not permitted to leave their plantations without a pass. *Id.* § II. Branding, amputation of ears, and castration were included among the punishments inflicted on runaway slaves. *Id.* § XIX. Owners who refused to administer the punishments were subject to fines, and penalties could be publicly administered to the slaves. *Id.* Slaves' houses were to be searched every fortnight. *Id.* § III. Plantation slaves were forbidden to enter Charleston on Sundays. *Id.* § VIII. All Negroes and slaves were prohibited from carrying firearms without supervision by a white person. *Id.* § V.

33. *Id.* § I.

34. Act of 1735, 1735 S.C. Acts 385-97.

35. *Id.* § XXXV.

36. Act of 1740, 1740 S.C. Acts 397-417.

comprehensive law that formed the nucleus of South Carolina's Slave Code from 1740 until 1861.[37] Curiously, although the Act of 1740 was passed in the aftermath of the Stono Rebellion, one of the most violent slave revolts during the colonial period,[38] it did not contain any restrictions on the emancipation of slaves. Owners therefore could emancipate their slaves by deed or by will. In addition, the Act of 1740 introduced for the first time procedures by which a person who claimed to be wrongfully enslaved could have a suit for freedom prosecuted on his behalf by a court-appointed guardian.[39]

During the period between 1740 and 1800 there was little, if any, regulation of an owner's right to free his slaves. During this period, the South Carolina Legislature also periodically restricted foreign slave trade.[40] The legislature generally believed that native-born slaves were less threatening than foreign-born slaves.

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37. State v. Boozer, 36 S.C.L. (5 Strob.) 11, 12 (1850) ("Our fundamental [slave] code, now time honored, is that of 1740. It was enacted soon after a violent, barbarous and somewhat bloody servile outbreak at Stono." *Id.*); *see also* W. ROSE, *supra* note 10, at 56.

38. S. ELKINS, SLAVERY: A PROBLEM IN AMERICAN INSTITUTIONAL AND INTELLECTUAL LIFE 286 (1976); A. HIGGINBOTHAM, *supra* note 14, at 192. Higginbotham has described the rebellion in the following way:

> The Stono Rebellion began Sunday, September 9, 1739, approximately twenty miles from Charlestown. A group of twenty slaves [from the Stono River plantation] broke into a store, stole guns and powder, and killed the storekeepers, leaving their heads on the front steps. [Having heard that the Spanish had promised freedom to slaves,] the group moved southward toward St. Augustine burning and killing whites as other slaves joined the band. The group was seen by Lt. Gov. Bull while riding on horseback to Charlestown, whereupon he alerted whites . . . . The Negroes had proceeded on, dancing, singing, and beating drums so as to attract more slaves. By Sunday afternoon the group stopped after having traveled more than ten miles and decided to wait until morning before crossing the Edisto River. The Negro group, numbering sixty to one hundred, was met by a group of white planters, numbering twenty to one hundred, whereupon a battle ensued. The uprising was suppressed by nightfall according to some secondary accounts. Others show that a small band of slaves had continued to the southern border and was met by whites the following Saturday. The colonists were on guard for some time after the rebellion, several moved for better security, and a special patrol was placed in the area in January. One ringleader of the slaves was not captured until three years later by two runaway slaves. He was tried and immediately hanged. McCrady estimates that twenty-one whites and forty-four Negroes died in the Stono Rebellion.

Id. at 192-93.

39. Act of 1740, § 1, 1740 S.C. Acts 398.

40. For a history of the restriction of the slave trade in South Carolina, see REPORT OF THE SPECIAL COMMITTEE OF THE HOUSE OF REPRESENTATIVES OF SOUTH CAROLINA OF 1857, SLAVERY AND THE SLAVE TRADE 33 (1857); *see also* G. ROGERS, JR., *supra* note 17, at 22, 31, 49.

An owner's right to free his slaves remained unchanged until 1800, when the South Carolina Legislature passed the first in a series of acts that significantly restricted an owner's right to emancipate his slaves. Several economic, political, and social factors brought about this change in the law.

IV. THE LAW OF EMANCIPATION: 1800-1861

A. Background to Change

The early nineteenth century was a prosperous time for South Carolina planters. Rice cultivation flourished, especially in the low-country coastal swamps where the rise and fall of the tide flooded and drained the rice beds.[41] The swampland also was well suited to the cultivation of long-staple cotton from which fineries such as lace were made. When the development of the cotton gin in 1793 also assured the profitability of short-staple cotton, many South Carolinians moved inland to cultivate the South Carolina upcountry. Thus, from the turn of the century, the South Carolina economy was based on rice and on long- and short-staple cotton, three crops that required slave labor. The federal government, however, outlawed foreign slave trade in 1807, fourteen years after the invention of the cotton gin had seemingly assured prosperity for cotton growers.[42]

Anticipating the closing of the foreign slave trade, South Carolinians imported more than 40,000 slaves.[43] The importation of 40,000 black Africans increased South Carolina's total population of 345,000 by almost 12%. These massive imports may have been regarded as having a destabilizing effect on South Carolina's black population as a whole. The situation was very much like that of a hundred years earlier when the importation of black Africans in large numbers prompted adoption of restrictive laws.[44]

At the turn of the century, three factors may have encouraged South Carolina legislators to restrict emancipation: the belief that the state would enjoy continued prosperity; the belief that white laborers would not, and perhaps could not, endure the back-breaking toil of cultivating cotton and rice; and the belief that importing large numbers of black Africans would destabilize the native black population.

During the first half of the nineteenth century, the South Carolina

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41. G. ROGERS, JR., *supra* note 17, at 47.

42. The first large shipment of cotton that resulted from the invention of the cotton gin was made in 1793. *Id.*

43. *Id.*, at 53-54; W. FREEHLING, *supra* note 20, at 11.

44. *See* Act of 1735, 1735 S.C. Acts 385-97; Act of 1712, 1712 S.C. Acts 352-65.

Legislature continued to limit emancipation by passing increasingly restrictive laws.[45] From 1820 until the beginning of the Civil War the justification for these restrictive measures changed dramatically. At the turn of the century economic prosperity and the importation of large numbers of foreign slaves justified restrictive measures. After 1820, however, the laws were passed in response to a broad-based assault on many aspects of the South Carolina way of life.

In 1820 the South Carolina Legislature passed the second of three laws that restricted emancipation significantly. By 1820 the fortunes of the state had changed dramatically. The state experienced what was to become a widespread economic depression, the antislavery movement was underway, and there were several incidents of slave violence against whites. These events contributed to an environment that encouraged legislative efforts to make the slave institution secure, including restrictions on freeing slaves.

The impact of the South Carolina depression,[46] which had begun in 1819 with a currency contraction, was initially felt by debtors, especially planters with heavy mortgages. In 1822, however, the price of short-staple cotton, a product of the state's inland area, began a substantial decline that continued into the 1830s. During that same period the cost of living increased dramatically. These problems were compounded by serious erosion of upcountry topsoil, which not only made increased cotton production impossible, but also caused crop yields of substandard quality and quantity.[47]

The upcountry planters' hope for economic recovery lay in the natural increase of their slaves, a hope that proved to be well founded.[48] Slave prices, though subject to some variation, remained fairly stable and profits from the sale of slaves offset the loss of income caused by the drop in cotton prices. During the decade beginning with 1824, the period of greatest economic crisis, the average price of a prime field hand varied between $450 and $525, with a decade average of $485.[49] Thus, the sale of slaves saved many from economic ruin and the preservation of slavery became the source of economic salvation for many upcountry planters.[50]

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45. *See infra* notes 68-179 and accompanying text.

46. *See generally* W. FREEHLING, *supra* note 20, at 26-36 (discussing the effects of the depression in South Carolina).

47. *Id.*

48. *See id.* at 36-37.

49. Phillips, *supra* note 15, at 436.

50. *Id.* The low country planters did not experience the desperate plight of upcountry planters during these troubled years. Low country crops continued to bring in substantial revenues. Rice prices held and luxury cotton declined in price only slightly. Not all coastal planters, however, escaped the depression. Those with heavily mortgaged

Skilled white laborers also experienced substantial hardship during the decade of the depression, particularly those living in the Charleston area. Between 1810 and 1820 the number of free blacks in the total population almost doubled. The growth of the free black population caused greater competition for the few labor jobs. Free blacks usually prevailed in the competition for these jobs because they would accept lower wages than whites and because they were believed to be more subservient than white laborers.[51]

During the period between 1820 and 1832 South Carolinians faced a widespread depression that affected all economic levels. Upcountry cotton planters suffered the effects of lower prices, declining yields, and tight credit. The introduction of the steamboat cost Charleston merchants their upcountry wagon trade. Tideland planters with heavily mortgaged property felt the squeeze of the currency contraction. It was in the interest of all these groups to make the slave institution more secure. Slaves posed less of a competitive threat to white laborers than did free blacks. Slave property also held its value. At that time South Carolinians owned about eighty million dollars worth of slave property. Many feared that any loss of confidence in the security of the slave institution would not only jeopardize that investment, but would make both tideland and inland plantations valueless.[52]

Violent slave insurrections in South Carolina added to the planters' concerns about the security of the slave institution. These were the Denmark Vesey Rebellion of 1822[53] and the Georgetown Insurrection Scare of 1829.[54] Many whites were particularly disturbed that among the leaders of the Denmark Vesey Rebellion were free blacks and

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property suffered from the currency contraction, but at least the steady income produced by their cash crops held out the possibility of economic recovery. *See* W. FREEHLING, *supra* note 20, at 32-36.

51. *Id.* at 40.

52. *Id.* at 51.

53. G. ROGERS, JR., *supra* note 17, at 59.

54. *Id.* at 61. Authorities discovered the Georgetown insurrection before the revolt actually began. Local magistrates tried the slaves involved in the plot and sentenced them to exile from the United States, never to return again, under penalty of death. *See* Kinloch v. Harvey, 16 S.C.L. (Harp.) 508 (1830). In *Kinloch* the owner of one of the slaves challenged the validity of the proceedings; he claimed that the statute of limitations had expired and that the common-law rules of evidence had not been applied in the proceeding. To the latter argument the court replied that trials of slaves were not subject to the common law. The owner also claimed that in cases in which the death penalty is not at issue the appropriate punishment is whipping or some other form of corporal punishment and not transportation out of the country. The court rejected the argument and stated that courts had imposed exile in similar circumstances, such as the Denmark Vesey Rebellion, and that exile was an appropriate penalty both in situations in which the court needed to protect the security of the community and in which the court wanted to impose a merciful or lenient sanction. *Id.*

trusted house servants who had enjoyed more liberal treatment than most slaves. Before the Denmark Vesey Rebellion it had been widely believed that slave revolts were more likely to occur when the slave population included large numbers of foreign blacks. The rebellion, however, was organized by slaves who in many cases had received relatively good treatment and had been taught to read and write. The leader of the rebellion, Denmark Vesey, a free black, was a highly literate, intelligent man who quoted *The Bible* and the Missouri Compromise as authority for his arguments that slavery should be abolished. After the insurrection free blacks were regarded as a threat to the slave institution.[55]

During the 1830s, fear of insurrection was fueled by several incidents in which slaves violently turned against their owners. In 1832 a group of slaves strangled an overseer, a slave murdered his owner, and another slave murdered his owner's daughter.[56] On July 4 of that year, a slave cook poisoned a Fourth of July feast. Seven people died and 200 others became ill.[57]

Slave insurrections were not the only threat to slavery during the 1820s and 1830s. By 1820 attacks against slavery had begun both at home and abroad. In 1823 the South Carolina House of Representatives considered a petition for the emancipation of slaves. The legislature rejected the petition because of its expense.[58] In 1825 there were over 220 abolitionist societies in England alone.[59] The debates in Parliament that eventually resulted in the emancipation of slaves in the British West Indies had already begun. In the United States the issue of slavery had been raised in Congress during the debates leading to the Missouri Compromise.[60]

During the 1830s the agitation against slavery increased. Charles Mercer of Virginia called for federal contributions to colonize free Negroes abroad. Many South Carolinians perceived Mercer's proposal as a "first and important step on the road leading to federal control of slavery and, finally to emancipation."[61] Antislavery organizations were also being formed in the United States, at first primarily in the South.[62] By 1831 William Lloyd Garrison's antislavery crusade was

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55. *See* W. FREEHLING, *supra* note 20, at 53-61.

56. *Id.*, at 250.

57. *Id.*

58. *Id.* at 78. (The cost of freeing the slaves was estimated to be $80,000,000).

59. THE NULLIFICATION ERA: A DOCUMENTARY RECORD 18 (W. Freehling ed. 1967) [hereinafter NULLIFICATION].

60. W. FREEHLING, *supra* note 20, at 53.

61. *Id.*, at 196.

62. In 1827 there were four times as many antislavery organizations present in the slave states as in the free states. D. DAVIS, *supra* note 10, at 165.

well underway. Garrison was joined by two sisters who were members of the Grimké family of South Carolina, one of the state's most prominent families. Sarah and Angelina Grimké wrote widely circulated antislavery tracts that called for immediate emancipation of the slaves.[63]

When one considers the effects of the economic depression, slave insurrections, and antislavery activities, it is not surprising that many large slaveholders supported legislation to make the institution more secure, including legislation that restricted emancipation. What perhaps is unexpected is that during the same period, especially from 1830-1841, the highest court in South Carolina launched a protracted assault on the statutes that restricted emancipation. The court for a time accomplished its apparent objective, judicial nullification of the statutes. Ultimately, however, the legislature prevailed by asserting its right to have the last word.

B. 1800-1861: Legislative Acts and Judicial Response

From the early 1800s until the beginning of the Civil War the South Carolina courts engaged in an ongoing debate with the state legislature about the future of slavery and the means of dealing with slave disaffection. The legislature passed increasingly restrictive laws throughout the period. The laws, which essentially prohibited emancipation of slaves, reflected a legislative emphasis on the repressive aspects of slavery. The courts argued for improved treatment of slaves, either to encourage them to accept their lot or to effect substantial reform of the institution itself.

Cases interpreting statutes that restricted manumission—formal release from servitude—involved emancipations attempted by deed and by will. In both types of cases the courts usually ruled in favor of emancipation, especially when the emancipation interests of the slave were challenged by the slave's former owner or the owner's heirs.[64] In a few cases the courts did not allow emancipation, primarily when it adversely affected the property rights of innocent third parties.[65] The few decisions against emancipation were often made by a single judge presiding in a bench trial.[66] Juries and the judges of the South Carolina Court of Appeals consistently ruled in favor of emancipation or upheld arrangements in which former slaves, although technically not free,

63. 4 DICTIONARY OF AMERICAN BIOGRAPHY 634-35 (1960 ed.).

64. *See infra* notes 72-91, 114-35, 147-58, 168-78, 182-84, 188-92 and accompanying text.

65. *See infra* notes 92-109, 136-46 and accompanying text.

66. *See infra* notes 92-99.

conducted their lives in virtual freedom.[67]

1. *The Act of 1800*

In 1800 the South Carolina Legislature passed the first of a series of laws restricting emancipation.[68] According to the Act of 1800, the restriction was meant to prevent the emancipation of slaves who possessed a bad character or were incapable of supporting themselves because of age or infirmity.[69] The Act required an owner who desired to

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67. *See infra* notes 72-91, 114-35, 147-58, 168-78, 182-84, 188-92 and accompanying text.

68. *See* Act of 1800, 1800 S.C. Acts 440-43.

69. Sections VII and VIII of the Act of 1800 are stated as follows:

VII. *Whereas*, it hath been a practice for many years past in this State, for persons to emancipate or set free their slaves, in cases where such slaves have been of bad or depraved character, or, from age or infirmity, incapable of gaining their livelihood by honest means; to prevent which practice in future, *Be it enacted* by the honorable Senate and House of Representatives, now met and sitting in General Assembly, and by the authority of the same, That from and after the passing of this Act, it shall not be lawful for any person or persons to emancipate or set free his, her or their slave or slaves, except according to the forms and regulations hereinafter prescribed, to wit: Whenever any person or persons shall intend to emancipate or set free his, her or their slave or slaves, he, she or they shall signify such intention to some justice of the quorum, who is hereby authorized and required thereupon to summon to meet, at a convenient time and place, five indifferent freeholders living in the neighborhood of the person or persons so intending to emancipate or set free his, her or their said slave or slaves. And when the magistrate and the freeholders summoned as aforesaid, shall be convened, the person or persons proposing to emancipate or set free his, her or their slave or slaves, shall produce the said slave or slaves before the said magistrate and freeholders, and shall answer to them, upon oath, all such questions as they shall ask concerning the character of the said slave or slaves, and his, her or their ability to gain a livelihood in an honest way; and in case it shall appear to the said magistrate and freeholders, or a majority of them, that the said slave or slaves so produced before them, is or are not of bad character or characters, and is or are capable of gaining a livelihood in an honest way, they shall give the following certificate, to wit:

We hereby certify, upon the examination, on oath, of A B, the owner of a certain slave or slaves, named C D, or E, as the case may be, (here describe the slave or slaves) satisfactory proof has been given to us, that the said slave or slaves, is or are not of bad character or characters, and is or are capable of gaining a livelihood, as the case may be, by honest means.

VIII. *Be it enacted* by the authority aforesaid, That no emancipation of any slave shall be valid or lawful, except it be by deed, and according to the regulations above prescribed, and accompanied by the above mentioned certificate. And furthermore, that every person freeing any slave, shall cause to be delivered to him or her, a copy of the deed of emancipation and certificate aforesaid, (within ten days after such deed shall have been executed) attested by the clerk of the court of the district, who shall record the said deed in the

free any of his slaves to appear with the slaves before a judge and five freeholders who, through interrogation, would determine whether the slaves in question had bad characters or were incapable of supporting themselves. If the panel decided in favor of emancipation, it issued a certificate to that effect. The Act of 1800 further provided that "no emancipation of any slave shall be valid or lawful, except it be by deed, and according to the regulations . . . and accompanied by the above mentioned certificate."[70] Consequently, as of 1800, a slave could be freed by deed only, and not by testamentary disposition. Illegally emancipated slaves were subject to capture by third parties, who returned them to slavery as if they were abandoned property. Although the Act of 1800 was superseded in 1820,[71] the application of the earlier statute continued well into the 1830s as cases based on events that occurred early in the century continued to arise.

a. Emancipation by Deed

In every case governed by the Act of 1800 that involved emancipation by deed the court ruled in favor of freedom. In 1834 the South Carolina Court of Appeals decided *Monk v. Jenkins*[72] and unanimously upheld a deed of emancipation that failed to meet the requirements of the Act of 1800. In 1806 John Fields had executed a deed of manumission and freed his slave, Judy. The deed, however, was never recorded and delivered as required by the Act of 1800. The Act expressly provided that the deed was void if it were not properly recorded.[73] In his will Fields bequeathed certain slaves and other property to Judy. Fields died in 1817, and Judy died shortly thereafter. Subsequently, Fields' heirs took possession of the property willed to Judy and the administrator of Judy's estate sued for return of the legacy.

Judge William Harper, a leading apologist for slavery, wrote the majority opinion and John Belton O'Neall and David Johnson concurred. O'Neall was an advocate of slave reform. Johnson's views on slavery are not known to the author. Harper concluded that Judy had been emancipated with respect to her former owner, Fields, and those

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respective offices; and that the said clerk shall be paid therefor by the person emancipating, the sum of four dollars; and that all deeds and certificates of manumission, shall be void and of noneffect, unless such deed and certificate shall be recorded within six months from the time the same shall have been executed.

Id. §§ VII, VIII (emphasis in original).

70. *Id.* § VIII.

71. Act of 1820, 1820 S.C. Acts 459-60.

72. 11 S.C. Eq. (2 Hill Eq.) 9 (1834).

73. Act of 1800, § VIII, 1800 S.C. Stat. 443.

claiming under him. He reported that

> Judy had the uninterrupted enjoyment of freedom from the date of the deed to her death, and was recognized as a free person by the will of her former owner, John Cato Fields. Under these circumstances . . . neither John Cato Fields, nor any person claiming as a volunteer under him, could dispute the validity of the emancipation, even if there had been no deed.[74]

According to Harper, "[a]s between the slave and the master, or those claiming under him, it is merely a question of individual right."[75] Harper wrote further that:

> Where the master had emancipated the slave in an irregular manner, it was held that, however the slave might be liable to seizure under the terms of the Act, the master's property was divested, so that he could not maintain an action to recover the slave. There can be no slave without a master, and it follows, that after such irregular emancipation, until seizure is actually made [by a third party], the emancipated slave must stand on the footing of any other free negro.[76]

The *Jenkins* court interpreted the provisions of the Act of 1800 that restricted emancipation as directory rather than mandatory. Accordingly, noncompliance subjected the parties to some disability but did not render the entire proceeding void. The owner lost his property right in the slave, and the illegally emancipated slave was subject to capture by third parties. But, until any capture occurred, the *de facto* emancipation would be given effect.[77]

Monk v. Jenkins contains two important keys to understanding the emancipation cases. First, the case stresses that even if a slave's emancipation were illegal, as between the owner and the slave, the slave was free. Once a slave was emancipated, even if illegally, the owner and his heirs lost all property rights in the emancipated slave. Illegally emancipated slaves remained free so long as they were not seized by a third party. Therefore, the law's prohibition against emancipation would be given effect by self-help remedies of private citizens rather than by the court's voiding the emancipation. Second, the court addressed the competing claims of the owner and the slave as equitable claims of two individuals, rather than viewing emancipation strictly as an exercise of an owner's dominion over his property. The *Jenkins* court explicitly recognized the slave's humanity. The Act of 1800, in contrast, dealt with emancipation as an exercise of the owner's prop-

74. *Jenkins*, 11 S.C. Eq. (2 Hill Eq.) at 12.
75. *Id.* at 14.
76. *Id.* at 13-14.
77. *Id.*

erty rights.

The views expressed by the *Jenkins* court regarding the relative rights of the owner and the former slave were consistent with the rationale of an earlier judicial decision, *ex rel. Sally v. Beaty*.[78] *Sally* was an emancipation case decided by a trial court before the Act of 1800 became law. At the time the court decided *Sally*, no restrictions existed on an owner's right to free his slaves.

The case involved a young female slave, Sally, who had been befriended by an older woman, also a slave, whose name is unknown. The woman had received permission from her owner, Beaty, to work for hire in town with the understanding that she would keep part of the earnings. Over time the woman saved a considerable sum of money, over and above the amounts she had agreed to pay her owner. The slave used her earnings to purchase Sally. Subsequently, the woman freed Sally.

After some time had passed, Beaty claimed ownership of Sally, arguing that property acquired by a slave belonged to the master. The plaintiff, Sally's guardian, contended that because Beaty had been paid all he was due from the slave woman's earnings, the "plain principles of justice must sanction"[79] the slave's act of freeing Sally. The plaintiff further argued that because the slave, instead of purchasing her own freedom, had remained in bondage so that Sally could be free, the act was one "so singular and extraordinary in itself, so disinterested in its nature, and so replete with kindness and benevolence, that to thwart or defeat the [slave's] intention, would be doing violence to some of the best qualities of the human heart."[80]

Chief Judge Rutledge charged the jury, made up of local freeholders, that "although the case was a new one, . . . [he] found no difficulty whatever in forming an opinion on it . . . ."[81] He hoped the jury would allow Sally her freedom, because a decision to the contrary would do "manifest violence to so singular and extraordinary an act of benevolence."[82] The jury, without leaving the box, returned a verdict for Sally and she was set free.

Sally prevailed even though the law clearly supported Beaty's position. The Act of 1740 not only required slave owners to receive "the whole of the earnings of slaves they hired out,"[83] it also prohibited slaves from owning property or goods in their own right.[84] Further-

78. 1 S.C.L. (1 Bay) 260 (1792).
79. *Id.* at 262.
80. *Id.*
81. *Id.*
82. *Id.*
83. Act of 1740, § XXXIII, 1740 S.C. Acts 409.
84. *Id.* § XXXIV.

more, slaves could not legally enter contracts.[85] Nevertheless, the court's decision implicitly permitted slaves to own property and to dispose of it as they wished. It also enforced two transactions to which the slave had been a party: the purchase of Sally and her subsequent emancipation. Sally prevailed because the decision was based not on the statutory slave law, which would have compelled a contrary result, but on principles of equity and justice. The focus of the plaintiff's argument and the judge's opinion was on the humanity of the slave and the generosity of her act, rather than on the status of the slave as property or the owner's legal property rights.

It is clear from the court's decision that the interests of the owner were not disregarded entirely. The court held Beaty to his agreement with the slave. Because he had received from her the amount of her earnings that he had required, the court held that Beaty had not suffered an injury, even though the Act of 1740 entitled him to the full amount of his slave's earnings. The equities of the case demanded that Sally should be set free.

In 1835, the year following *Jenkins*, the court of appeals decided *Miller v. Reigne*.[86] The case involved an action in trover for an alleged slave named Nelly, the daughter of Sam Bennet. Sam Bennet had once been a slave. During the last twenty years of his life, Sam had lived as a free person and was recognized as such by both his former owner and the community at large. In 1814 a woman named Mrs. Peigne purchased Sam's wife, Chloe, and daughter, Nelly, for Sam. Thereafter, Nelly and Chloe lived with Sam. When Mrs. Peigne died in 1821, her son, the administrator of her estate, presented Sam Bennet with a bill for the price paid for Chloe and Nelly. Although the bill presented to Bennet apparently remained unpaid, Peigne did not sue Bennet for the money. Nelly and Chloe continued to live with Sam until his death in 1833. After Sam Bennet's death, Peigne seized Nelly and detained her in the workhouse. The administrator of Sam Bennet's estate brought an action in trover against Peigne and others holding Nelly.[87]

At trial, the jury found for the plaintiff. The defendants appealed, claiming that Sam Bennet's emancipation had not complied with the Act of 1800, and that the plaintiff had not demonstrated that Sam Bennet had a property right in his daughter.[88]

The court of appeals, in a decision written by Judge O'Neall, unanimously upheld the jury's verdict for the plaintiff. On the first is-

85. *Id.* § XXXIII.

86. 20 S.C.L. (2 Hill) 592 (1835). The surnames of two of the defendants in the case were Reigne and Peigne. *Id.*

87. *Id.*

88. *Id.* at 593.

sue the court ruled that the lapse of twenty years during which Sam Bennet acted as a freeman raised a presumption of emancipation according to law, and that the jury's verdict gave legal effect to the presumption. The court chose not to apply the presumption mandated by the Act of 1740 which provided that in suits testing whether a person was a slave or free person, the person was presumed to be a slave.[89] Furthermore, the court found persuasive the facts that Mrs. Peigne had purchased Nelly and her mother for Sam and that Nelly had been in Sam's possession for several years before his death. Mrs. Peigne, formerly an owner of Nelly, had acted in a manner inconsistent with her son's later claims to Nelly.[90] Consequently, the defendants were found liable for wrongful detention of Nelly. *Miller v. Reigne* reinforced the *Monk v. Jenkins* decision, which held that a lapse of time during which a former slave lived as a free person raised a presumption that the person had been legally emancipated.

Monk v. Jenkins and *Miller v. Reigne* both involved emancipations that were accomplished during the lifetimes of the former owners. In each case the owner was held to have relinquished all rights in his slave property even though the emancipation did not comply with the Act of 1800. When the emancipation rights of the slave conflicted with the property rights of the owner, the slave won. For cases involving the property rights of innocent third parties, however, the outcome was less certain. This point is demonstrated by *Bynum v. Bostick*.[91]

b. Testamentary Emancipation

Bynum v. Bostick, unlike *Monk v. Jenkins* and *Miller v. Reigne*, involved emancipation by testamentary disposition, a method forbidden by the Act of 1800. *Bynum* also involved the property rights of creditors of the deceased.

Bynum is one of two known cases decided between 1812 and 1842 that ruled against emancipation.[92] It was later overruled, however, by the South Carolina Court of Appeals. Chancellor Henry William De Saussure, a distinguished jurist who was later referred to as the Kent

89. *See* Act of 1740, § I, 1740 S.C. Acts 398.

90. *Miller*, 20 S.C.L. (2 Hill) at 593-94.

91. 4 S.C. Eq. (4 Des.) 266 (1812). Two other cases, which arose during the first two decades of the nineteenth century, dealt with whether slaves in South Carolina who claimed to be free had been liberated properly in their home states: Coleman v. Guardian of a Free Negro Named Ben, 2 S.C.L. (2 Bay) 485 (1803) (the court upheld a finding in favor of freedom) and Maverick v. Stokes, 2 S.C.L. (2 Bay) 511 (1803) (the court granted a motion for new trial after a jury found in favor of freedom).

92. The other case is Lenoir v. Sylvester, 17 S.C.L. (1 Bail.) 632 (1830).

of South Carolina,[93] decided *Bynum* in the chancery court.

In *Bynum* the testator devised real and personal property to named trustees to be held in trust for his slave, Betsey, and her children. The testator further directed the trustees to emancipate Betsey and her children. The slaves, however, had been mortgaged to secure a debt of the testator and upon his death, the creditor enforced his rights by selling the slaves to pay for the debt. The action was brought to determine whether the slaves had been emancipated under the will and whether the bequests to the slaves were valid. The court decided against the slaves on both issues.[94]

The case is noteworthy for several reasons. First, the result seems consistent with the policy of a slave society that was beginning to feel economic, social, and political pressure to secure the institution. Second, the judicial method is very different from the *ex rel. Sally v. Beaty* and *Monk v. Jenkins* decisions prior to and subsequent to *Bynum*. In *Sally* and *Jenkins*, the courts' analyses emphasized the equities involved in the particular situations. There was little or no analysis of the statutory requirements. The *Bynum* court, in contrast, specifically referred to the Act of 1800 and found its express language determinative. The *Bynum* court held the attempted emancipation invalid because the statute forbade emancipation other than by a deed executed during the lifetime of the master.[95] Chancellor De Saussure characterized the testator's bequest of the slaves to a trustee with a direction to free them according to law as an untenable attempt to evade the statutory requirements.[96] The court further held the devises and bequests to slaves invalid because slaves were legally incapable of taking property by descent or purchase.[97]

Chancellor De Saussure did not discuss the equities of the case, even though the case was decided in a court of chancery. De Saussure's deference to the statutory law contrasts strikingly both with the methods of his predecessor and with later emancipation cases decided between 1820 and 1841. His method anticipates that of the late antebellum period, when judges felt constrained by statutory language and precedent. His decision in *Bynum* is relentless in its application of the law, evoking the harshest aspects of the slave institution—the denial of promised freedom. As the court stated, "Many cases of beneficent provision for slaves, are allowed to take effect sub silentio, by the human-

93. 1 J. O'NEALL, BIOGRAPHICAL SKETCHES OF THE BENCH AND BAR OF SOUTH CAROLINA 245 (1859).

94. *Bynum*, 4 S.C. Eq. (4 Des.) at 266-67.

95. *Id.* at 267.

96. *Id.*

97. *Id.*

ity of those interested. *But when the law is appealed to, it must take its course.*"[98] The court's statement suggests a tension between what it apparently viewed as the extra-legal practice of private acts of kindness toward slaves, apparently common occurrences, and the contrasting strictures of the law. In this case, the court strictly applied the statutory law.

Bynum involved the property rights of the testator's creditors, rights that the court did not hesitate to protect.[99] In this regard, the case is very much like the earlier case of *Johnston v. Dilliard*,[100] in which the court deferred to the property rights of third parties in the slave at issue.

Decided in 1792, the same year as *ex rel. Sally v. Beaty*, *Johnston* involved an attempted emancipation by deed, rather than a testamentary disposition. The plaintiffs were Quakers who, as the court stated, had taken "uncommon pains," including riding over ten thousand miles, to procure the freedom of several slaves. The slave at issue in *Johnston* was a woman named Miley who had been transferred by Charles Moorman, a resident of Virginia, to his daughter Mary upon her marriage to John Taylor in 1769. Miley remained in the possession of the Taylors until 1778, when she was sold to the defendant, Dilliard, who claimed ownership of the slave.[101] The plaintiffs claimed that the transfer of Miley to Mary Taylor was a loan and not a gift, and that, because Miley had been freed by deed of emancipation before Moorman's death, the subsequent transfer from Taylor to Dilliard was void. As evidence they presented a deed of emancipation dated May 28, 1778, executed in Virginia, and an authenticated will, probated in Virginia, which stated that the slaves had been lent to Moorman's children and that they were to be freed when they reached a certain age.[102]

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98. *Id.* (emphasis added).

99. An interesting comparison may be made between *Bynum* and the approach taken by the Virginia Supreme Court in Patty v. Colin, 11 Va. (1 Hen. & M.) 519 (1807). In *Colin*, the testator, Frances Timberlake, emancipated her slaves in her will. Unfortunately, Mrs. Timberlake died with substantial debts. The slaves, as a result, were not emancipated, but instead the sheriff sold them to satisfy an execution against the Timberlake estate. Writing for the court, Judge St. George Tucker decided that if Timberlake's nonhuman property could be used to satisfy the debts, the slaves should be freed. If the other property were not sufficient, however, the slaves should be sold for a term of years to pay the debts. If the slaves' entire value was needed to pay the debt, then their suit for freedom should be dismissed. Judge Roane, in a separate opinion, emphasized that if the slaves had to be sold for a term of years, they should be declared free after the expiration of that time.

100. 1 S.C.L. (1 Bay) 232 (1792).

101. *Id.* at 232-33.

102. *Id.* The deed freed the female slaves at age 18 and freed the male slaves at age 21.

The plaintiffs also produced a special act passed by the State of Virginia in 1783 which sanctioned the Moorman deed of manumission and the will, "saving, nevertheless, the *rights of individuals*, who might have a *legal claim* on any of the negroes in question."[103]

Dilliard[104] argued the importance of upholding gifts made in consideration of marriage, particularly when, as here, the slave in question had remained in the daughter's household for almost nine years without objection by the father and before the deed of manumission had been executed. The defendant also argued that the special act of the Virginia Assembly had expressly included a clause that protected the rights of third parties. In his charge to the jury, Judge Bay emphasized both the policy of upholding gifts in consideration of marriage and the acquiescence on the part of the father. He concluded that "the deed of manumission was utterly void in law" with respect to the slave Miley.[105]

Judge Bay's approach in *Johnston v. Dilliard* can be explained by the competing interests at stake. In *ex rel. Sally v. Beaty*, *Monk v. Jenkins*, and *Miller v. Reigne*, the interests of a black slave were opposed to those of the white owner, or someone claiming through him. The rights of innocent third parties were not involved. The courts and juries did not hesitate to defeat the expectations of the owner when to do otherwise would be unjust to the slave, even though the owner's claims were justified by statute. In *Johnston,* however, two strong policy interests prevented the emancipation of the slave. The first, clearly the dominant one, was the policy interest in upholding gifts made in consideration of marriage. The second was the interest in protecting the property rights of an apparent bona fide purchaser.

Johnston, however, did not compel the decision reached in *Bynum v. Bostick*. Chancellor De Saussure could have reached the opposite result by turning to the 1797 case of *Snow v. Callum*[106] for guidance. Like *Bynum*, *Snow* involved an attempted emancipation through a testamentary disposition. Unlike the *Bynum* opinion, however, Chancellor Rutledge's opinion in *Snow* upheld the emancipation of the children of

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103. *Id.* at 233 (emphasis in original).

104. One of the attorneys for the defendant Dilliard was John C. Calhoun, who, as South Carolina's United States Senator, would play a central role in the Nullification Crisis thirty years later.

105. *Johnston*, 1 S.C.L. (1 Bay) at 233-35. The final result of the case is unclear. The reporter's note at the conclusion of the case indicates the defendant prevailed. The jury's verdict, however, was recorded to be for the plaintiff. *Id.* at 235.

106. 1 S.C. Eq. (1 Des.) 542 (1797). For a different result, see Maria v. Surbaugh, 22 Va. (2 Rand.) 228 (1824) (court adopted a formalistic approach and deferred to the legislative will, thus defeating the attempted testamentary emancipation of the freed slave's children).

a slave, Minda. The emancipation was effected through a will which provided that ten years after the testator's death Minda and her increase would be freed. Minda died within ten years and the question before the court was whether the children were nevertheless free. Giving effect to what was deemed, without discussion, to be the clear intent of the testator, the court found that the children were free even though the mother had died within the ten-year period.[107]

The presence of the *Snow v. Callum* case complicates the historical analysis of the cases. A court of chancery decided *Snow* in connection with the disposition of the decedent's property that, the case suggests, was insufficient to pay the decedent's debtors. Although a contrary result clearly would have increased the assets of the estate and secured greater protection for the creditors, the court unhesitatingly found in favor of freedom.[108] The *Snow* court gave the slaves' interests in emancipation precedence over the property interests of the creditors.

It may be possible to distinguish between *Snow* and *Bynum* because when *Snow* was decided there were no legislative restrictions on emancipation. The policy considerations of decisions like *Johnston v. Dilliard* and *ex rel. Sally v. Beaty*, however, presented the court with opportunities to avoid the harsh application of statutes that restricted emancipation. In *Bynum*, Chancellor De Saussure chose not to follow *Snow*. Instead he acted to protect the rights of third parties at the expense of the slaves. Although *Bynum* clearly was consistent with the language of the statute and the legislative policies regarding emancipation, it did not withstand subsequent reconsideration by the South Carolina Court of Appeals, which expressly overruled it in 1835.[109]

2. *The Act of 1820*

In 1820, the South Carolina Legislature passed a law that forbade private emancipation.[110] The important term of the act was expressed simply: "No slave shall hereafter be emancipated but by act of the Legislature."[111] The preamble of the Act of 1820 and its other provisions make clear that it was passed in response to the perceived problem of a rapid increase in the population of free blacks.[112] This prob-

107. *Snow*, 1 S.C. Eq. (1 Des.) at 543.

108. *Id.*

109. *See* Frazier v. Frazier's Ex'rs, 11 S.C. Eq. (2 Hill Eq.) 304 (1835).

110. Act of 1820, § I, 1820 S.C. Acts 459.

111. *Id.*

112. The preamble stated: "The great and rapid increase of free negroes and mulattoes in the State, by migration and emancipation, renders it expedient and necessary for the Legislature to restrain the emancipation of slaves, and to prevent free persons of

lem was undoubtedly highlighted by the doubling of the free Negro population in Charleston during the previous two years.[113]

Some of the emancipation cases decided under the Act of 1820, such as those discussed above, continued to hold owners to the terms of their emancipation agreements, even when the emancipation clearly violated the Act of 1820. In other situations, however, courts avoided the application of the statute entirely by deciding that the former slave had not in fact been emancipated, even when the facts seemed to indicate otherwise. The cases include emancipations accomplished both by deed and by testamentary disposition.

a. Emancipation by Deed

In 1831 the South Carolina Court of Appeals decided *Linam v. Johnson*,[114] which upheld an apparently illegal emancipation. In 1818 the plaintiff, Linam, had purchased a slave, Bill Brock, for $300 in cash and $600 in promissory notes. Testimony at trial indicated that Brock himself had paid the $300 cash and that he had made payments to Linam on the notes. At the time of the sale, Linam gave the bill of sale to Brock for safekeeping, and Brock began to live as a free man. Four years later, in 1822, Brock presented an accounting to Linam. The accounting established that Brock had overpaid Linam, and that money was due Brock. Linam apparently did not dispute the accounting. At that time, Brock began paying the poll-tax levied on free blacks who wished to vote. The following year, Johnson, the defendant, became Brock's guardian (as required by law).[115] Claiming Brock was his property, Linam sued Johnson to recover possession of Brock. Judge David

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colour from entering into this State." *Id.*

113. *See supra* text accompanying note 48. The Act of 1820 also prohibited the immigration of free blacks into the state. Violators who did not leave the state immediately were subject to be sold into slavery for a three to five year period. On the other hand, free blacks who were involuntarily brought into the state and sold into slavery could recover money damages. The latter provision may have been a response to cases like Pepoon v. Clarke, 8 S.C.L. (1 Mill) 137 (1817). In *Pepoon* the employer of a young, free black servant who had been brought into South Carolina attempted to enslave her. A guardian who brought suit to obtain the girl's freedom additionally sued for $400 in damages. The court, denying defendant's motion for a new trial based, *inter alia*, on a claim that the damages were excessive, stated:

> I cannot forbear to declare my own conviction, that there had been a base attempt to consign to slavery, for life this unfortunate being, whose very situation called loudly for the protection of every feeling and honest man. With this view of the case, I should not have been disposed to grant a new trial, if the damages had been much greater.

Id. at 141-42.

114. 18 S.C.L. (2 Bail.) 137 (1831).

115. *See* Act of 1822, 1822 S.C. Acts 461-62.

Johnson tried the case. A jury found for Brock's guardian, the defendant, and Linam appealed.[116]

Judge Johnson was also a member of the appellate panel and wrote the appellate opinion. The court held that Linam, as Brock's alleged owner, could not maintain an action in trover because, by emancipating Brock, Linam had relinquished the rights of property and immediate possession essential to such an action.[117] The court thus held Linam to his act of emancipation even though the court expressly recognized that it was void under both the Act of 1800 and the Act of 1820. The court also ruled that the Act of 1820 did not abrogate third parties' rights, established under the Act of 1800, to capture illegally emancipated slaves.[118] A contrary ruling on this issue would have permitted an owner like Linam, who had illegally emancipated a slave, to change his mind later, recover the slave property, and thus nullify the emancipation without penalty to himself. This possibility seemed to concern the court and, in fact, the issue was raised in a later case.[119]

The court had decided that Brock was subject to capture by third parties, and concluded that Johnson's act of becoming Brock's guardian, like capture, terminated all other claims to Brock. The court held that it was of no consequence that Johnson's act "was not intended as a seizure or conversion to his own use, but on the contrary, was evidently intended to protect [Brock] in the enjoyment of what he supposed was his right to freedom."[120] The decision, arguably, also gave effect to the contract between Brock and his former owner, a contract Brock lacked the legal capacity to enter. The court found the defendant in the *Linam* case had only acted "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."[121]

Linam v. Johnson is reminiscent, in several respects, of *ex rel. Sally v. Beaty* and *Monk v. Jenkins*. In all these cases, the court enforced a contract between a slave and his owner, to the disadvantage of the owner, even though the slave lacked the legal capacity to enter the contract. The court's decision in these cases, furthermore, seemed to rest heavily on principles of equity. Finally, the opinion in *Linam*, as in *ex rel. Sally v. Beaty*, upheld a verdict returned by a jury of men of

116. *Linam*, 18 S.C.L. (2 Bail.) at 137-39.
117. *Id.* at 140.
118. *Id.*
119. Cline v. Caldwell, 19 S.C.L. (1 Hill) 423 (1833); *see infra* note 134 and accompanying text.
120. *Linam*, 18 S.C.L. (2 Bail.) at 139-40.
121. *Id.* at 141.

property.[122]

In the 1833 case of *Cline v. Caldwell*[123] the court of appeals affirmed per curiam a trial court opinion that permitted an evasion of the Act of 1820. The rationale of *Cline*, which upheld a decision in favor of de facto emancipation, differed from other decisions that involved emancipation by deed. In *Cline* the former slave was declared not to have been emancipated, even though he was permitted to go at large without supervision. In other decisions, the act of emancipation, though illegal, terminated the rights of the former owner in his slave property.

Cline was an action in trover for a slave named John. Elizabeth Cline, the plaintiff, was John's wife and a free black woman. In 1822 John had been sold to a man named Setzler for $650. John paid $300 of the price and Setzler paid the remaining $350. John and Setzler agreed that John would be freed once he paid Setzler $350. Through a series of subsequent transactions, Joseph Caldwell and George Suber each acquired a one-half interest in John. Caldwell and Suber conveyed John to Cato Gallman, a free black man. A witness to this last transaction testified that he saw no money exchange hands when the transfer was made, but that the buyer, the seller, and the slave were all present. Gallman subsequently sold John to John's wife, Elizabeth Cline, and the couple moved to Georgia. Some time later Joseph Caldwell purported to convey his interest in John again. This time the conveyance was to his brother, Samuel Caldwell. Samuel died a short time later. The beneficiaries of Samuel Caldwell's estate alleged that the transfers to Cato Gallman and to Elizabeth Cline were void, seized John in Georgia and claimed him as their slave. Cline then brought an action in trover to recover her husband.[124]

Judge John Belton O'Neall conducted the trial. Judge O'Neall's report of the trial proceeding stated that he had submitted certain questions to the jury, two of which were: (1) whether the bill of sale from Joseph Caldwell to Cato Gallman was void; and (2) whether John was at any time emancipated contrary to the Act of 1820.[125] O'Neall further reported that "[u]pon each of these questions, I was with the plaintiff, and so expressed my opinion to the jury."[126] The plaintiff prevailed. The South Carolina Court of Appeals affirmed the result, and Judge O'Neall's report of the trial, in a three line per curiam

122. Monk v. Jenkins, 11 S.C. Eq. (2 Hill Eq.) 9, 10 (1834) was not a jury trial.
123. 19 S.C.L. (1 Hill) 423 (1833).
124. *Id.*
125. *Id.* at 425.
126. *Id.*

opinion.[127]

In his report of the trial, Judge O'Neall first addressed the issue of whether the sale of John from Joseph Caldwell to Gallman was void. Judge O'Neall believed that the deed would be good against the grantor even if it had been intended as an evasion of the Act of 1820. He compared it with a deed executed for the purpose of defrauding creditors, which would remain good between the parties themselves. To meet the challenge that the transfer was void for lack of consideration, he characterized the transaction as a gift and held that it was binding against the grantor.[128] Once again, the equities of the case prevailed. Wrongdoing parties were held to their bargain, even though doing so resulted in an evasion of the Act of 1820.

Having found the deed valid between the parties, Judge O'Neall then considered whether it was void under the Act of 1820. He concluded that the deed was not void. He first advanced the technical argument that the action was one of trover for a slave, not a claim of emancipation. He then maintained that even if there had been a secret trust to avoid the Act of 1820, Caldwell's beneficiaries could not challenge the deed because Caldwell had been a party to it. Finally, reading the act literally, Judge O'Neall concluded that: "[T]he Act of 1820, does not declare a deed absolute on its face, but intended as a covert emancipation void: it simply enacts, that emancipation shall not take place, but by act of the legislature."[129] According to Judge O'Neall, because the execution of the deed and bill of sale for John had conveyed a right of property, "there is, in such a transfer, although made with a view to future emancipation, no violation of the Act of 1820."[130]

Judge O'Neall next considered what type of emancipation would violate the Act of 1820. He held that emancipation "means parting with the possession of the slaves, and permitting them to go at large, and act for themselves."[131] He concluded that the act was not violated until the owner permitted a slave to go at large as a free man without the control of an owner. John had never been without an owner, even though he was virtually a free man, because he now was owned by his wife. Judge O'Neall observed that because John lived with his owner, "there was as much an actual possession of him as ever does exist between master and slave."[132] John, therefore, had never been emancipated within the meaning of the Act of 1820. The implication of *Cline*

127. *Id.* at 428.
128. *Id.* at 425-26.
129. *Id.* at 426.
130. *Id.*
131. *Id.* at 427 (quoting Lenoir v. Sylvester, 17 S.C.L. (1 Bail.) 632, 641 (1830)).
132. *Id.*

was that a slave could live in a state of virtual freedom as long as someone held a deed to him and purported to be his owner.

The state of the law after *Cline*, particularly in the context of *Linam v. Johnson*,[133] is worth some consideration. In *Linam*, as in *Cline*, the status of a black person was directly at issue and the parties to the legal contest were a white seeking to enslave the black and a benefactor acting to preserve his freedom. The benefactor in *Linam* was a white guardian; the benefactor in *Cline* was a free mulatto woman who was the slave's wife and apparent owner. In both cases the slave had been emancipated by deed, although not according to the terms of the Act of 1820. Both courts enforced the deed, effectively emancipating the slave against the interests of persons who had taken a role in the emancipation and had profited from the action. The *Linam* court found that Brock had been emancipated and that the appointment of a guardian protected Brock from recapture by his former owner. The *Cline* court ruled that an emancipation had not occurred because someone in fact held title to the former slave. In the absence of an unequivocal emancipation, the slave could not legally be captured.

The *Linam* decision left unanswered the question of whether a slave who had been illegally emancipated and who had not been captured by third parties might legally be seized by his former owner. *Cline* answered that question. The *Cline* the court concluded that even if John had not been legally emancipated he could not be seized by the former owner who had attempted the emancipation.[134]

As a result of these two cases, the scope the Act of 1820 was substantially restructured. Its provisions applied only when a freed slave was permitted to go at large without a representative of any kind. Emancipators or their representatives were not permitted to challenge the emancipation or to seize the freed slave. Third parties could not capture a former slave who had either a nominal owner or a guardian. It did not matter that the former slave was virtually free as long as someone, whether black or white, guardian or owner, was, in some sense, the slave's legal representative.[135]

b. Testamentary Emancipation

The 1830 case of *Lenoir v. Sylvester*[136] was the first known challenge to the Act of 1820. *Lenoir*, decided by the South Carolina Court

133. For a discussion of *Linam*, *see supra* text accompanying notes 114-22.
134. 19 S.C.L. (1 Hill) 423, 425 (1833).
135. *See supra* notes 118-20, 131-34 and accompanying text.
136. 17 S.C.L. (1 Bail.) 632 (1830).

of Appeals, involved an attempted testamentary emancipation. It was one of few known cases that ruled against emancipation during the antebellum period in South Carolina,[137] but its precedential value was soon diminished by the same court that decided it.

The testator in *Lenoir*, William Wright, died in 1808. Wright's will named his wife, Martha Wright, and two friends as executors of the estate. Wright also appointed the two friends as guardians of several of his slaves. Wright left Martha a life estate in the slaves. Upon Martha's death the guardians were to free the slaves.

Throughout her life, Martha Wright claimed absolute ownership of the slaves, alleging that her husband's attempted emancipation violated the Act of 1800. She compared her possession of the slaves to a capture of illegally emancipated slaves. Possession, therefore, vested full title to the slaves in her. Martha outlived the other two executors of her husband's estate. In 1825 she purported to convey a remainder interest in the slaves to the plaintiffs, while retaining a life estate in them for her own use. When Martha died in 1828, the defendant captured the slaves. He alleged that they had been illegally freed under the Act of 1800 and that Martha Wright's claim to more than a life estate in them was invalid. The plaintiffs brought an action in trover to recover the slaves. The court held that neither party would be awarded the slaves and that the slaves would revert to the testator's estate for the benefit of the residuary legatees.[138]

Judge O'Neall, then a recent appointee to the court, wrote the opinion of the court of appeals. The first issue O'Neall addressed was whether the slaves were unlawfully freed by the testator and thus were subject to capture. He decided that they were not because the will itself had not conferred freedom on the slaves. The slaves had not been permitted to go at large as though they were free, and the executors had not attempted to free them. The slaves, therefore, had not been illegally emancipated within the meaning of the act and were not subject to capture. O'Neall concluded that so long as the slaves remained in possession of a master, whether as part of a life estate or otherwise, the "evil" to be remedied by the act had not occurred.[139]

In dictum Judge O'Neall also concluded that the executors, as legal owners of the estate in question, possessed the legal capacity to free the slaves as directed by the testator. The executors could produce the slaves, answer the required questions, obtain the necessary certificate

137. *See supra* notes 92-109 and accompanying text.

138. *Lenoir*, 17 S.C.L. (1 Bail.) at 644.

139. *Id.* at 641. According to Judge O'Neall, the sole purpose of the Act of 1800 was to prevent the emancipation of slaves who had a bad character or were unable to support themselves. *See id.* at 637-38.

and draw up the deed of emancipation. Judge O'Neall determined that the acts of executors would not constitute a testamentary emancipation because they were independent of the testamentary directives.[140]

By finding that the slaves were not free as long as they had a legal master in any form, and by concluding that executors could emancipate slaves if they followed the requirements of the Act, Judge O'Neall contributed to the judicial erosion of South Carolina's emancipation legislation. This type of judicial activism was to become characteristic of the South Carolina Court of Appeals during the next decade. On its face, the Act of 1800 required emancipation to be effected by deed during the master's lifetime.[141] O'Neall's opinion suggested that emancipation pursuant to a testamentary disposition also would be permissible, although this result was not the holding of the case. Only five years later, however, the court used Judge O'Neall's arguments to support a ruling in favor of a testamentary bequest of emancipation.[142]

In addition to ignoring the language of the statute, in *Lenoir* Judge O'Neall also summarily dealt with earlier cases that may have led to a different result. He said:

> I presume, however, that in [those] cases the question was not presented, whether the executors could not emancipate the slaves under the act of 1800. If, however, it was made, and the point expressly decided, yet this Court is not bound by it. Up to 1824, we had two co-ordinate [sic] tribunals, pronouncing on cases in Law, and Equity, in the last resort, and often differing in their decisions on the same legal questions: and it was to remedy this evil, and insure uniformity of decision, that this Court was established. In the discharge of this high trust, it has the unquestionable right to review not only its own decisions, but also those of the Courts in whose place it was created: and the decisions of the old Court of Appeals in Equity, although entitled to great respect, as the decisions of wise and learned men, cannot certainly be regarded as imperative, but when, in the judgment of this Court, they are clearly erroneous, they must be overruled.[143]

The final result of *Lenoir*, however, did not rest on O'Neall's finding that the slaves' emancipation had not violated the provisions of the Act of 1800. Judge O'Neall further ruled that Wright's 1808 will had not given the slaves any vested rights to freedom. Freedom for the slaves could occur only if the executors complied with the Act of 1800

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140. *Id.* at 640-41.

141. *See* Act of 1800, 1800 S.C. Acts 442-43.

142. *See* Frazier v. Frazier's Ex'rs, 11 S.C. Eq. (2 Hill Eq.) 304 (1835).

143. *Lenoir*, 17 S.C.L. (1 Bail.) at 641-42. The quoted language foretold the court's subsequent 1835 overruling of Bynum v. Bostick, 4 S.C. Eq. (4 Des.) 266 (1812) in Frazier v. Frazier's Ex'rs, 11 S.C. Eq. (2 Hill Eq.) 304, 315 (1835).

and, even then, freedom was not guaranteed. If any right to freedom was to arise, it would do so only after Mrs. Wright's death. Mrs. Wright, however, died after the Act of 1820 was passed. This act provided that no slave could be freed except by act of the legislature. Judge O'Neall found that the Act of 1820 applied to the *Lenior* situation and concluded that the slaves should remain in bondage. The *Lenoir* court denied freedom to the slaves in question, but opened the door to an interpretation of the slave statutes that would permit testamentary emancipation.[144]

The outcome of *Lenoir*, at first, is puzzling in light of the court's later attack on the Act of 1820, and its apparent willingness to give effect to testamentary emancipations. The particular facts of the case, however, did not present the court with a ready means of avoiding the Act of 1820. The case is a study in "what ifs." First, Martha Wright survived both her husband and the two other executors who were also the slaves' guardians. The language of the opinion makes it clear that had Martha died before 1820, the executors would have been permitted to free the slaves as directed by the will.[145]

Once the Act of 1820 was passed, the fate of the slaves was sealed. The deaths of the coexecutor guardians left the slaves with no one to speak on their behalf during the court proceedings, or to watch over them once they were free. The surviving executor, Martha Wright, although she was a guardian, apparently opposed the slaves' release. The remaining claimants under the will acted on their own behalf to protect their property interest in the slaves. Finally, the will apparently did not provide support for the slaves once freed.[146] None of the other cases in which emancipation was effected involved slaves who were simply turned loose upon society, without a guardian or benefactor, or without a means of support.

Despite its finding against freedom, *Lenoir* indirectly advanced the cause of emancipation. Five years later, the dictum in *Lenior* provided, in part, the basis for a decision in favor of freedom.

In *Frazier v. Frazier's Executors*[147] a will written by James Frazier in 1824 specified that, upon his death, several of his slaves were to remain with his widow to provide for her comfort. Other slaves were to be hired out during the widow's lifetime and the money from their hire was to be set aside in a special fund. Upon the widow's death, Frazier's executors were to emancipate the slaves. The money from the special

144. *Lenoir*, 17 S.C.L. (1 Bail.) at 643-44.

145. *Id.* at 640, 642.

146. The will simply stated that upon Martha Wright's death, "I give Leah, Esther, and Letty their freedom." *Id.* at 634.

147. 11 S.C. Eq. (2 Hill Eq.) 304 (1835).

fund was to be equally divided among the slaves so that they could go to Santo Domingo or to some other place to be colonized. After the widow died, the executors attempted to carry out the provisions of the will. Frazier's next of kin sued and claimed that the provisions concerning the slaves were void because they violated the Act of 1820.

At the time the court of appeals heard the case, two elements of South Carolina jurisprudence seemed to require a ruling in favor of the next of kin. One was the Act of 1820; the other was an earlier decision, *Bynum v. Bostick*.[148] Although the *Bynum* decision was based on the Act of 1800, the facts of *Bynum* were similar to those in *Frazier*. In *Bynum* the testator had directed that certain real and personal property should be held in trust for his slave Betsey and her children. The testator also had directed the trustees to emancipate Betsey and her children according to law. The *Bynum* court held that the bequest of property to slaves was void because slaves could not take property by descent or purchase. The bequest of the slaves to the trustees with directions to free them was also void because it did not comply with the Act of 1800.

Chancellor Henry De Saussure, the author of the *Bynum* opinion, decided *Frazier*. De Saussure held that Frazier's bequest of freedom to the slaves was void because it was prohibited by the Act of 1820.[149] The testator had not conditioned the bequest of freedom on prior legislative approval. The lower court reasoned that the testator's instructions to the executors to emancipate the slaves directed the executors to perform an act the law prohibited the owner from doing himself. De Saussure's opinion stated:

> [O]ur statute [of 1820] forbids the emancipation of slaves, and declares the act null and void.
>
> . . .
>
> The statute is founded on deep policy, and was intended to prevent emancipation of slaves as a great political evil, dangerous to the institutions of the State, and injurious to the property and interest of the citizens. I am aware that a statute is not to be enlarged beyond a fair and reasonable construction of its words and provisions, in order to give effect to some supposed recondite meaning. But Courts are bound to look to the real object of a statute, and to give it effect, if the meaning be obvious and the provisions of the statute sufficient to cover the meaning. In the case before us, it is quite obvious, the object and intent of the legislature was [sic] to prevent the emancipation of the slaves held in the State. A direction to others to do what the owner is prohibited from doing cannot be permitted to defeat the pro-

148. 4 S.C. Eq. (4 Des.) 266 (1812). For a discussion of *Bynum*, see *supra* notes 92-99 and accompanying text.

149. *Frazier*, 11 S.C. Eq. (2 Hill Eq.) at 306.

hibition. Such an easy evasion would be making the statute a mere cobweb.[150]

On appeal, the court of appeals upheld the bequest, with Judge O'Neall writing for the majority.[151] Judge O'Neall acknowledged that the words of the Act of 1820 seemed to prohibit emancipation both in the state and outside the state, and characterized his construction of the statute as one in keeping with its spirit rather than limited by its explicit terms. Turning to the preamble of the Act, he determined that the purpose of the Act was to prevent an increase of free blacks within the state. Judge O'Neall's conclusion that the legislature intended to regulate only acts of emancipation within the state, and not emancipations occurring outside of the state, therefore, would not violate the purpose of the Act.[152]

Judge O'Neall reasoned that if the owner were alive, he would personally be able to take the slaves out of the state to emancipate them and concluded that the executors could do likewise because "[a]s a general rule, . . . the owner of property may by his will direct his executors to dispose of it in any way which he could."[153] Because this conclusion contradicted the holding of *Bynum*, Judge O'Neall overruled the earlier case, and indicated that "that opinion was certainly prepared under strange misapprehension of the law."[154] According to Judge O'Neall, the misapprehension in question was a requirement that the deed of emancipation be executed during the owner's lifetime.

After finding that a testator could direct his executors to free his slaves outside of the state, Judge O'Neall determined the testator's intent by referring to the language of the will. He relied on a rule of construction that permitted the transposition of words and sentences to give effect to the testator's intent, and construed the will as though it directed the executors to take the slaves to a place where emancipation was legal and to free them there. This construction yielded an intent that was lawful under the court's interpretation of the Act of 1820.[155]

Judge O'Neall was also able to give effect to the provisions of the will that bequeathed money to the slaves. He observed that in the will the bequest of money followed the language that granted the slaves

150. *Id.* at 306-07.

151. *Id.* at 317.

152. *Id.* at 314. Judge O'Neall also expressed the view that limits upon South Carolina's jurisdiction prevented the Act of 1820 from prohibiting out-of-state emancipations. *Id.* at 314-15.

153. *Id.* at 315.

154. *Id.*

155. *Id.* at 314-15.

their freedom. According to Judge O'Neall, the sequence of the provisions demonstrated that the testator intended the slaves to receive property only after they became free persons. The legacy could therefore be upheld. Judge O'Neall concluded the opinion by directing the executors to take the slaves out of the state to a place where they could be emancipated legally.[156]

In *Frazier v. Frazier's Executors*[157] the court created an important exception to the Act of 1820. Testamentary dispositions of emancipation would be upheld if the slaves were to be freed outside South Carolina. It is clear from the opinions of both the trial and appellate courts that all of the judges knew the impact of these decisions. De Saussure had warned against "making a cobweb" of the statute.[158] Nevertheless, when an opportunity to decide in favor of emancipation presented itself, the appellate judges seized it.

The South Carolina Court of Appeals decided *Frazier* in 1835, the same year that it decided *Miller v. Reigne*[159] in favor of emancipation. That year, the South Carolina Legislature reorganized the courts by replacing the single court of appeals with separate courts of appeal for equity and law.[160] Appeals that involved both law and equity and also constitutional questions would be heard by a full assembly of the judges of both courts.[161]

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156. *Id.* at 317. Judge Johnson concurred with O'Neall's opinion. Judge Harper neither signed the opinion nor wrote a dissent.

In a later opinion, Willis v. Jolliffe, 32 S.C. Eq. (11 Rich. Eq.) 447 (1860), Judge O'Neall stated that *Frazier* stood for the proposition that:

> [The Act of 1820] could not "have effect upon emancipation beyond the limits of the State." It is very true my brother Harper, the other member of the Court, did not sign the opinion, but he gave no dissent, and I happen to know that his objection was more to the competency of slaves to have such a decree pronounced in their favor than to the principles of the decree.

Id. at 512.

157. 11 S.C. Eq. (2 Hill Eq.) 304 (1835).

158. *Id.* at 304, 307.

159. 20 S.C.L. (2 Hill) 592 (1835). For a discussion of *Miller*, see *supra* notes 86-91 and accompanying text.

160. *See* Act of 1835, 1835 S.C. Acts 334.

161. *Id.* § 3. At least one South Carolina jurist believed that *Frazier*, in part, prompted the legislature's reorganization of the courts. In Willis v. Jolliffe, 32 S.C. Eq. (11 Rich. Eq.) 447 (1860), Judge Wardlaw stated in dissent that *Frazier* "was followed in the same year by the disorganization of the Court which pronounced it, and, as many believe, served, to some extent, to produce this disorganization." *Id.* at 525. In other writings, however, Judges O'Neall and Johnson attributed the reorganization to the legislature's displeasure with the result in a nullification test oath case. Judge O'Neall wrote, "Upon the announcement of this [McCready] judgment, public denunciation of the majority came from the press, from the public assembly and from private coteries. . . . This, it is believed, was the leading cause which led to the abolition of the separate Court of Appeals in 1835." 1 J. O'NEALL, *supra* note 93, at 281.

The reorganization of the courts presented the state legislature with a clear opportunity to remove judges whose emancipation decisions had aroused alarm among low country planters. By 1835 these planters had attained a two-thirds majority in both houses of the legislature. The planters thus had the political power to express to their displeasure either by removing or failing to reappoint judges. Instead, however, the legislature reappointed all the judges. At the time the courts were reorganized, Judges Johnson and Harper became chancellors to hear appeals in equity, and Judge O'Neall was assigned to the law court.[162]

The reorganization of the court did not redirect the current of decisions in favor of emancipation. In 1839 the law court of appeals heard *Rhame v. Ferguson*,[163] an action in trover to obtain possession of fourteen slaves. The issue raised in the case was whether the slaves in question had been emancipated contrary to the Act of 1820.

George Broad, the original owner of the slaves, drafted a will that left certain slaves in trust to John Dangerfield. The will directed Dangerfield to permit the slaves to apply their time and labor solely for their own use without interference. The testator also willed the rest of his estate to John Dangerfield, to be used and enjoyed by the slaves.[164]

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162. In addition to Judge O'Neall, the new law court of appeals consisted of Richard Gantt, John S. Richardson, Balies J. Earle, Joseph J. Evans, and A. Pickens Butler. Richardson was an active Unionist and considered by many to be one of the best Unionist theorists. *See* W. FREEHLING, *supra* note 20, at 168. He was the Unionist counterpart of Judge William Harper, long regarded as one of the leading theorists among the Nullificationists. *Id.* Butler was a Nullificationist. The political persuasions of the others, with the exception of Judge O'Neall, who was a Unionist, are not known to the author. Their positions on slavery also are not known to the author.

163. 24 S.C.L. (Rice) 196 (1839).

164. The will provided in part:

> I give and bequeath to my friend John R. Dangerfield . . . my slaves Daphne and her children . . . and her grand children . . . together with the future issue and increase of such as are females: *in trust*, nevertheless, and for this purpose only, that the said John R. Dangerfield, his executors and assigns, do *permit* and *suffer* the slaves above mentioned, and each and every of them and their future issue and increase, *to apply* and *appropriate their time and labor to their own proper use and behoof, without the intermeddling or interference of any person or persons whomsoever*, further than may be necessary for their protection under the laws of this State, which now exist, or may be passed hereafter; then I give and bequeath all the rest . . . of my estate . . . to my said friend John R. Dangerfield . . . upon trust, nevertheless, and for this purpose only, that the said slaves above mentioned . . . and their future issue and increase, be permitted . . . to use and enjoy the said estate . . . *forever*, without the interference or meddling of . . . any person or persons whomsoever, further than may be necessary to secure to the said slaves the full use and enjoyment of the estate above mentioned.

Id. at 197 (emphasis in original).

George Broad died in 1836 and Dangerfield, as executor, apparently followed his wishes. The evidence revealed that the slaves had lived peaceably by themselves on the testator's estate and that Dangerfield, who lived nearby, supervised their work, paid their taxes and otherwise looked after them. The plaintiff, Mrs. Rhame, claimed the Negroes had been illegally emancipated, and attempted to capture them.

Judge Butler heard the case on circuit. He charged the jury that Broad's will was an attempt to evade the laws that restricted emancipation, and if in fact the slaves were enjoying the privileges of free persons without being subject to the control of a white person, the slaves were subject to seizure.[165] Butler also informed the jury that Dangerfield had legal title to the blacks.

The questions Butler put to the jury were: (1) whether the slaves had been emancipated de facto and (2) if so, whether the attempted seizure of the slaves was a valid capture under the laws of South Carolina.[166] The jury found that the slaves had not been emancipated. On appeal, the plaintiffs argued that the legislation that restricted emancipation was intended to prevent slaves from enjoying the benefits of freedom while nominally under the control of a white person. The court, however, was not persuaded. It unanimously upheld the jury's verdict.[167]

Together, *Linam v. Johnson*, *Cline v. Caldwell*, *Frazier v. Frazier's Executors*, and *Rhame v. Ferguson* created important exceptions to the Act of 1820. After *Linam* and *Cline*, quasi-emancipation could be accomplished through a deed with a secret trust. The appointment of a guardian or technical ownership by a free person, whether black or white, prevented capture of the emancipated slave by third parties. After *Frazier*, absolute emancipation could be accomplished through a will that directed executors to take the slaves outside South Carolina to free them. Additionally, slaves could inherit property, contrary to law. *Rhame* permitted a trustee who held legal title to slaves to allow them to enjoy the benefits of freedom and inherited property without direct, on-site supervision by a white person.

The last case brought under the Act of 1820, *Carmille v. Pringle*[168] was decided in February 1842, just a few months after the Act of 1841 became law. A combined court of the courts of appeal of both law and equity decided the case.

John Carmille died in July 1833, leaving a will. The will left

165. *Id.* at 200-01.
166. *Id.*
167. *Id.* at 202-03.
168. 27 S.C.L. (2 McMul.) 454 (1842).

Carmille's entire estate to his slave Henrietta and her children. The will further directed the executor to emancipate the named slaves if possible and, if not, to free them in a country in which emancipation could be accomplished. Carmille married after signing the will. The marriage produced a daughter, Julia Carmille. The daughter survived Carmille. On this basis, the court refused to probate the will.[169] Thus, Carmille effectively died intestate.

However, in 1830 Carmille had deeded the slaves in question to George Pringle and Phillip Chartrand for a nominal sum. The deeds created a special trust that directed Pringle and Chartrand to permit the slaves to work for their own maintenance and support and to retain their earnings for their own use. Carmille retained possession of the slaves until his death, at which time possession passed to Pringle and Chartrand, who were also the administrators of Carmille's estate. After Carmille's death, the daughter's representative sued on her behalf and claimed that the slaves should be included in Carmille's estate. The case went to trial in 1839, two years before the Act of 1841 was passed.[170] The lower court, ruling for the plaintiff, held that the deeds that purported to sell Henrietta and her children were undisguised attempts to evade the law that prohibited emancipation.[171] Judge O'Neall, writing for a unanimous court on appeal, overruled the lower court.[172] He relied on *Frazier v. Frazier's Executors* and *Linam v. Johnson*, and held that the Act of 1820 did not void emancipations effected by means other than acts of the legislature, but rather subjected illegally emancipated slaves to capture. Judge O'Neall cited *Lenoir v. Sylvester* and *Cline v. Caldwell*, and found that slaves in the legal possession of an owner were not subject to seizure. He characterized the requirement that the slaves pay the executors an annual sum of one dollar as a "constant recognition of servitude."[173] Judge O'Neall relied on *Cline* and found further that persons who claimed under the donor of an illegal deed could not set it aside. He found that the acquisition of personal property by slaves was lawful because, with the exception of prohibitions enumerated in the Act of 1740, slaves had customarily been permitted to acquire and hold property with the owner's consent.

In the opinion, Judge O'Neall advocated amelioration of the slave laws. He wrote:

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169. *Id.*

170. It is unclear whether the Legislature had *Carmille* in mind when it drafted the Act of 1841, but the terms of the Act seem to cover the situation presented by the facts of the case.

171. *Carmille*, 27 S.C.L. (2 McMul.) at 456.

172. *Id.* at 472.

173. *Id.* at 468.

> 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, and ought to be a ruling principle of its construction. *Nothing will more assuredly defeat our institution of slavery, than harsh legislation rigorously enforced.*[174]

Unlike earlier emancipation decisions of the court, *Carmille v. Pringle* relies heavily on precedent to support its conclusions. This reliance on precedent marks a change in judicial style from that found in earlier slavery decisions, particularly those of Judge O'Neall. Earlier opinions had been based on considerations of equity and policy rather than precedent.[175] The change in judicial style became important in later cases, however, because the precedential force of earlier emancipation cases bound later, and often unwilling, courts.[176] In *Broughton v. Telfer*,[177] for example, Chancellor Dargan wrote:

> I have never been satisfied with the decision in *Carmille v. Carmille* [*Carmille v. Pringle*]. I cannot pass it without expressing my dissent and disapprobation. It is founded upon what I conceive to be a very erroneous construction of the Act of 1820. That Act declares that there shall be no emancipation but by the Legislature. But the decision in *Carmille v. Carmille* declares that the emancipator has only to be secure of his trustee to effect the emancipation of his slaves, whom he desires to manumit, in as perfect a manner as if the Act of 1820 was not on the Statute Book.[178]

Broughton was not unique, and the force and effect of the decisions that predated the Act of 1841 continued for several years.

3. The Act of 1841

In 1841 the South Carolina Legislature passed a statute that prohibited indirect, as well as direct, attempts to emancipate slaves.[179]

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174. *Id.* at 470 (emphasis in original).

175. *See, e.g.*, Frazier v. Frazier's Ex'rs, 11 S.C. Eq. (2 Hill Eq.) 304 (1835).

176. *See, e.g.*, Morton v. Thompson, 27 S.C. Eq. (6 Rich. Eq.) 370 (1854); Broughton v. Telfer, 24 S.C. Eq. (3 Rich Eq.) 431 (1851); McLeish v. Burch, 22 S.C. Eq. (3 Strob. Eq.) 225 (1849); *see also* Gordon v. Blackman, 18 S.C. Eq. (1 Rich. Eq.) 61 (1844) (trial court opinion reserves a discussion of the "sweeping" decision in *Carmille* to the appellate court).

177. 24 S.C. Eq. (3 Rich. Eq.) 431 (1851).

178. *Id.* at 435-36.

179. *See* Act of 1841, 1841 S.C. Acts 168-69. The Act provided:

> I. . . . That any bequest, deed of trust, or conveyance, intended to take effect after the death of the owner, whereby the removal of any slave or slaves without the limits of this State, is secured or in-

The statute clearly was drafted with *Linam v. Johnson*, *Frazier v. Frazier's Executors*, *Cline v. Caldwell*, *Rhame v. Ferguson*, and, perhaps *Carmille v. Pringle*, in mind.[180]

The Act of 1841 eventually took its toll on attempted emancipations, several of which were struck down.[181] Nevertheless, at least two methods of emancipation—one by deed, the other by will—survived the scythe of the legislative reaper. In *Vose v. Hannahan*,[182] Judge O'Neall, writing for a unanimous court that included both the judges at law and at equity, upheld a deed that included a secret trust requiring the transferee to hold the slaves in nominal servitude only. Although the language of the Act of 1841 declared such deeds void,[183] the court held that the deed would be good against both the transferor and the administrator of his estate.[184] This holding was consistent with the court's earlier holdings in which the court enforced illegal emancipations against the claims of the owner.

Two years after *Vose*, the South Carolina Legislature once again reorganized the courts.[185] The legislature reinstated a three judge court of appeals for both law and equity, a return to the court structure in effect when Judges Johnson, Harper, and O'Neall had served on the

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> tended, with a view to the emancipation of such slave or slaves, shall be utterly void and of no effect.
>
> . . .
>
> II. That any gift of any slave or slaves, hereafter made, by deed or otherwise, accompanied by a trust, secret or expressed, that the donee shall remove such slave or slaves from the limits of this State, with the purpose of emancipation, shall be void and of no effect.
>
> . . .
>
> III. That any bequest, gift, or conveyance, of any slave or slaves, accompanied with a trust or confidence, either secret or expressed, that such slave or slaves shall be held in nominal servitude only, shall be void and of no effect.
>
> . . .
>
> IV. That every devise or bequest, to a slave or slaves, or to any person, upon a trust or confidence, secret or expressed, for the benefit of any slave or slaves, shall be null and void.

Id.

180. *See* Morton v. Thompson, 27 S.C. Eq. (6 Rich. Eq.) 370, 375-76 (1854).

181. *See, e.g.*, Lanham v Meacham, 23 S.C. Eq. (4 Strob. Eq.) 203 (1850); Finley v. Hunter, 21 S.C. Eq. (2 Strob. Eq.) 208 (1848); Dougherty v. Dougherty, 21 S.C. Eq. (2 Strob. Eq.) 63 (1848); Blackman v. Gordon, 19 S.C. Eq. (2 Rich. Eq.) 43 (1845); *see also* Mays v. Gillam, 31 S.C.L. (2 Rich.) 160 (1845) (an attempt to emancipate a slave contrary to law made the slave subject to seizure by third parties).

182. 44 S.C.L. (10 Rich.) 465 (1857).

183. *See* Act of 1841, § III, 1841 S.C. Acts 155.

184. *Vose*, 44 S.C.L. (10 Rich.) at 472-73.

185. An Act to Establish a Separate Court of Appeals, 1859 S.C. Acts 647 (1859).

single court of appeals.[186] Judge O'Neall became the chief judge and two chancellors of the former equity court of appeals served as his associate judges.[187]

In 1860 the reorganized court gave effect to apparently illegal emancipations in *Willis v. Jolliffe*.[188] The testator in *Willis*, Elijah Willis, had executed a will in 1854 that directed his executors to take his slave Amy and her children to Ohio and to free them there. The will, furthermore, left his estate in trust for the slaves. Not content with these provisions, however, Willis left South Carolina and moved to Cincinnati accompanied by Amy, her mother, and her children. Unfortunately, Willis died immediately after arriving in Ohio. Mr. Willis's next of kin, the plaintiffs in the case, challenged the provisions of the will that concerned the slaves as void under the Act of 1841.[189]

Judge O'Neall, writing for the court, upheld the emancipation of the slaves.[190] In his opinion, he characterized the central issue of the case not as whether the emancipation was permissible under the Act of 1841, but whether the slaves' arrival in Ohio had emancipated them. O'Neall based his decision to emancipate on the Ohio Constitution, which prohibited slavery within the state's borders.[191] He concluded that the protections of the Ohio Constitution extended to Willis's slaves because Willis had taken them there to emancipate then, and because the slaves had not been in Ohio as transients. Willis and the slaves both intended that Ohio would become the slaves' domicile. Thus, Willis's assent to emancipation while the slaves were on free soil effected the emancipation.[192]

Willis was the last in a series of slavery cases that spanned a forty-year period of South Carolina jurisprudence. During the 1820s and 1830s South Carolina was beset with economic and political troubles that resulted in dissension and turmoil. The state's economy was nearly bankrupt; banks failed and short-staple cotton prices plunged.

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186. *See* text accompanying notes 160-62.

187. One of the associate judges was Job Johnston, a former law partner of Judge O'Neall's in Newberry, South Carolina and, like O'Neall, a graduate of South Carolina College (later, the University of South Carolina). The third member of the bench was F. H. Wardlaw, a member of a family of distinguished jurists.

188. 32 S.C. Eq. (11 Rich. Eq.) 447 (1860).

189. *Id.* at 448-51.

190. *Id.* at 517.

191. *Id.* at 513.

192. *Id.* at 513-14. Judge Johnson concurred in the result without writing an opinion. *Id.* at 517. Judge Wardlaw dissented and questioned whether the slaves would be free even if only Ohio law were applied. Ohio law required free blacks to produce proof of their freedom and post bond before entering the state. Wardlaw doubted that Amy and her family could become free by entering the state unlawfully. *Id.* at 524-25. For a similar result, see Guillmette v. Harper, 38 S.C.L. (4 Rich.) 186 (1850).

Fears of slave rebellion were rampant, fed by the Denmark Vesey revolt in 1822 and the Nat Turner insurrection nearly ten years later. As abolitionist movements and colonization societies emerged, some of the most radical voices, such as those of the Grimké sisters, sounded from Charleston, the capital of the South Carolina low country.

The South Carolina Legislature responded to economic depression, fear of insurrection, and abolitionist campaigns, and assumed an increasingly militant states' rights stance. The legislature passed harsh laws intended to preserve the institution of slavery. Throughout the period between 1820 and 1845, however, South Carolina jurists actively limited the effect of the increasingly strict emancipation laws. The following section suggests some possible explanations for the South Carolina emancipation decisions.

V. WHY THE COURT DECIDED AS IT DID

The prolonged assault by the South Carolina Court of Appeals on the state statutes that restricted emancipation seems extraordinary, especially in light of the social and political context of much of the antebellum period. Nevertheless, it is clear that for a period of almost twenty years, the judges of South Carolina's highest court felt free to act on their policy views that were contrary to those of the legislature. It is extraordinary that such a purposeful assault could continue for so many years without threatening social disorder, or at least leading to the impeachment of some members of the bench. Yet, the social fabric of South Carolina remained intact. Although some of the judicial opinions were controversial, no apparent evidence exists that they caused any serious disruptions of life in the Palmetto State. The state legislature, which appointed the judges, had at least two opportunities to remove or demote unwanted jurists from the bench. The legislature, however, took neither course.[193]

At least five important circumstances of South Carolina social and political life help to explain the emancipation decisions and their open opposition to restrictive statutes. First, as the cases suggest, South Carolinians held diverse views about slavery. Appellate courts included both proslavery judges and advocates of reform. Even when members of the court held differing views, however, the particular nature of the emancipation issue offered opportunities for consensus on differing bases. Second, these judicial opinions reflected South Carolina's increasing recognition of the moral ambiguity of the proslavery position, especially in a country based on democratic ideals. The emancipation issue compelled the judges to confront directly the question of whether one

193. *See supra* notes 160-62, 185-87 and accompanying text.

person could enslave another against his will. Third, the jurisprudence of the period enabled the judges to accomplish their goals by using accepted principles of judicial decision making. Doctrines such as equity of the statute proved to be useful interpretive tools. Fourth, reform of the institution of slavery was often accomplished through changes in customary rather than statutory law. Thus, in keeping with common-law traditions, judicial decisions apparently were influenced by the customs and practices of the people rather than by legislative enactments. Finally, during the antebellum period South Carolina was governed primarily by a small group bound together by close social, educational, and family ties. The closed membership of government may have made dissent within the group permissible, although such dissent would have been intolerable had it been voiced by the general public.

A. South Carolina Views on Slavery and the Opportunity for Consensus

It is important to recall that no single judge's efforts produced the emancipation decisions. Panels of judges, numbering from three to eight, decided the cases. Furthermore, there were relatively few dissenting opinions. Most of the decisions were unanimous even when the panels included both known proslavery apologists, like William Harper, and advocates of reform like John Belton O'Neall.

In light of the individual judges' diverse views on slavery, an examination of the circumstances that permitted these decisions should begin with a consideration of the range and complexity of nineteenth-century Southern attitudes toward slavery and emancipation. The South Carolina economy was built on the backs of laboring black slaves. Many people feared that South Carolina's undiversified economy would collapse without slave labor. In addition, many South Carolinians' derived their wealth as much from holdings in slave property, as from real estate. Despite the social and economic threats posed by eliminating slavery, however, many Southerners were keenly aware of the injustices of the system and of the sharp-edged irony of the presence and defense of slavery in a country founded upon democratic ideals.[194]

The problems associated with emancipation, however, were significantly greater for Southerners than for Northerners. Although Northerners like Southerners, rejected the idea of a racially integrated society,[195] the situation in the South was complicated because blacks

194. *See infra* notes 202-03, 217-18 and accompanying text.

195. Ideas of white superiority and conceptions of the black race as a degraded caste

often outnumbered whites by as much as four to one. The ratio was even greater in South Carolina's tidewater areas, the location of many large plantations worked by hundreds of slaves.

In contrast, the Northern economy was substantially more diversified than that of the South. Additionally, Northern slave holders had opportunities for financial rescue that were unavailable in the South. Many sold their slaves to Southerners before Northern emancipation laws became effective.[196] Thus, with a single act, they avoided both the economic loss and racial integration that would inevitably result from emancipation of Southern slaves.

Despite the apparently overwhelming obstacles to ending Southern slavery, the results of the South Carolina emancipation decisions clearly seem to be the product of a court that was reform-minded on the issue of emancipation. One reason for this may be that the cases reflect views that were more widely held than is commonly assumed. A second explanation is derived from the emancipation issue itself. It presented opportunities for consensus among those who held widely-divergent views about slavery.

Attitudes toward slavery sometimes are characterized by reference to two models. The first model can be illustrated by abolitionists like the Grimké sisters, two members of a prominent Charleston family who, in the late 1830s, called for immediate emancipation to eradicate an absolute evil. The sisters freed their family slaves, wrote abolitionist tracts, and actively worked for many years in the name of emancipation.[197] The second model can be illustrated by the defenders of slavery like South Carolina jurist William Harper[198] who wrote an elaborate defense of slavery during the 1830s. That work is considered to be one

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were not confined to Southern society. Northern states like Illinois, which prohibited slavery, discouraged an interracial society by conditioning the entry of free blacks into the state upon the posting of a $1,000 bond. Once admitted to the state, however, free black persons still had a sorry lot. The provisions of the Illinois code that regulated servants had a striking resemblance to the Southern slave codes, including equating servant status with being a member of the Negro race. *See* ILL. REV. STAT. §§ 1, 2, 5, 9, 10-22 (1845), *reprinted in* J. WHITE, THE LEGAL IMAGINATION: STUDIES IN THE NATURE OF LEGAL THOUGHT AND EXPRESSION 471-74 (1973). Even President Lincoln doubted the desirability of a racially-mixed society. He favored the recolonization of blacks to Africa and succeeded in persuading Congress to appropriate money for the venture. Address on Colonization to a Deputation of Colored Men (August 14, 1862), *reprinted in id.* 462-63. Furthermore, members of the American Colonization Society, whose membership was drawn from both the North and the South, were often defenders of slavery. W. WIECEK, THE SOURCES OF ANTISLAVERY CONSTITUTIONALISM IN AMERICA 1760-1848, at 126-27 (1977).

196. A. DE TOCQUEVILLE, *supra* note 3, at 322.

197. *See* 4 DICTIONARY OF AMERICAN BIOGRAPHY pt. 1, at 634-35 (1964 ed.).

198. *See* 1 U. BROOKS, SOUTH CAROLINA BENCH AND BAR 90, 93 (1908); 1 J. O'NEALL, *supra* note 93, at 270-74.

of the most important proslavery tracts of the antebellum period.[199] Proponents of slavery believed that slavery was essential to the continued control of a class of people that should not be permitted to live as free persons. They often cited *The Bible* as authority for the proposition that the continued enslavement of blacks was a necessity.[200] On a pragmatic level, they argued that without slavery no one could be induced to work on the plantations, particularly in the swampy, malaria-ridden fields of the lowland plantations.

Although a slavery apologist, William Harper openly advocated improvement of the slaves' standard of living. His concern, however, for the slaves' well-being seemed to be as much a product of a desire to perpetuate the institution as it was a regard for humanitarian principles. Harper wrote:

> It is wise, too, in relation to the civilized world around us, to avoid giving occasion to the odium which is so industriously excited against ourselves and our institutions. For this reason, public opinion should, if possible, bear even more strongly and indignantly than it does at present, on masters who practice any wanton cruelty on their slaves. The miscreant who is guilty of this not only violates the law of God and of humanity, but . . . by bringing odium upon, endangers the institutions of his country, and the safety of his countrymen.[201]

Between these opposite views was a continuum of Southern perspectives that reflected a tension between aversion to the slave institution and fear that sudden emancipation would produce only economic ruin and racial warfare. For example, Virginia jurist St. George Tucker proposed a plan that called for the gradual emancipation of the slaves. He was only too aware that slavery was inconsistent with the principles of liberty that formed the foundation of our government. He, like Thomas Jefferson, believed that slavery poisoned the morals of the masters and destroyed their industry as well.[202] To him slavery was "the bitterest draught that ever flowed from the cup of affliction."[203] Yet, for Tucker, immediate emancipation was not the answer.[204] Tucker proposed the emancipation of all female slaves and their descendants after a certain date. As compensation for the cost of their

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199. 4 DICTIONARY OF AMERICAN BIOGRAPHY pt. 2, at 287 (1964 ed.).

200. W. FREEHLING, *supra* note 20, at 80, 328.

201. E. GENOVESE, ROLL, JORDAN, ROLL: THE WORLD THE SLAVES MADE 55 (1974) (quoting from Harper's writings on slavery).

202. *See* 1 W. BLACKSTONE, *supra* note 19, at 69.

203. *Id.* app., at 31.

204. Tucker wrote that "[t]he early impression of obedience and submission, which slaves have received among us, and the no less habitual arrogance and assumption of superiority, among the whites, contribute, equally, to unfit the former for *freedom*, and the latter for *equality*." *Id.* app., at 69 (emphasis in original).

care, the emancipated slaves would be required to continue to serve their former owners until they reached the age of twenty-eight. Their children, although free, would be bound in service to the overseers of the poor until they reached the age of twenty-one years.[205]

Although Tucker advocated the abolition of slavery he did not accept the idea of an interracial society. Under his plan the freed blacks would not be granted civil rights because he did not want to encourage them to stay in the United States. He believed that denying blacks their civil rights would make it in their best interests to live elsewhere.[206] Thus, Tucker was a Southerner who advocated gradual emancipation of blacks combined with incentives for them to leave the United States.

Byron Edwards was a Jamaican who was considered to be a preeminent statesman and intellectual of the slaveholding society. Although Edwards was a member of the plantation culture, he was no friend of slavery as it then existed. He actively worked for reform of the institution. His views were well known and his writings widely read.

Edwards proposed that slaves should be bound to the land. Slaves then could be sold only as part of an estate, and not as individuals. Edwards also helped to repeal laws that permitted creditors to sell slaves to satisfy their owner's debts. Edwards further proposed that slaves be paid for extra labor, that they be permitted to own property in their own right, and that they be permitted to have their own juries to judge one another. Although Edwards opposed the idea of racial equality, he accepted the reality of an interracial society. He feared, however, as did many of his contemporaries, that sudden emancipation would cause a race war and economic ruin.[207]

John Hartwell Cocke, a prominent Virginia planter, is also worthy of discussion. Cocke, like Tucker, believed that slavery was profoundly wrong. Yet, like Tucker, Cocke was not prepared for an interracial society in which blacks would overwhelmingly outnumber whites. Nevertheless, he devised a plan for the gradual emancipation of his slaves. He purchased a plantation that he dedicated to the purpose of preparing slaves for their freedom. Slaves living on the new plantation learned to read, write, and keep accounts, and they were trained in the agricultural, trade, and husbandry skills necessary to become economically self-sustaining. After a predetermined period had elapsed, Cocke freed those slaves who had completed their apprenticeship satisfacto-

205. *Id.* at 77-78.
206. *See id.* at 79.
207. D. DAVIS, *supra* note 10, at 189-95.

rily and arranged for their passage to Liberia.[208]

The Grimké sisters, William Harper, St. George Tucker, Byron Edwards, and John Cocke represent the spectrum of differing attitudes toward slavery present in slave holding societies. Because of the range and complexity of Southern attitudes toward slavery it is often difficult to append contemporary labels, such as libertarian or reactionary, to views held during the antebellum period. An examination of Judge O'Neall's views on slavery reveal the difficulty of labeling antebellum attitudes with contemporary terms.

Judge O'Neall's attitudes toward slavery were somewhere between those of St. George Tucker and those of Byron Edwards. His views were probably closer to Edwards', although Genovese has suggested that his views were more reform-minded than he generally expressed.[209] Throughout his judicial career Judge O'Neall called for slave reform.

In 1848 Judge O'Neall wrote a digest entitled *The Negro Law of South Carolina.*[210] The digest purported to be a compendium of South Carolina slave law. The digest became an instrument of slave law reform, a fact not lost on Judge O'Neall's contemporaries. One newspaper's account of the digest claimed that Judge O'Neall was attempting to put blacks on an equal footing with whites.[211] After completing the digest Judge O'Neall read it to the South Carolina Agricultural Society, an organization comprised of the state's plantation owners and farmers. The members of the Society apparently supported his views on the need for slave reform because they recommended that Judge O'Neall submit the work to the Governor for consideration by the legislature.[212]

In his digest Judge O'Neall advocated making it easier for mulattoes to be classified as whites, permitting miscegenation, limiting masters' punishment of their slaves, and improving slaves' working and living conditions and treatment by their owners. Owners that did not comply would be subject to stiff penalties. He endorsed Edwards' earlier proposal that slaves should be sold only with the land to avoid

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208. *See generally* DEAR MASTER: LETTERS OF A SLAVE FAMILY 35-36 (R. Miller ed. 1978).

209. *See* E. GENOVESE, *supra* note 201, at 52.

210. J. O'NEALL, THE NEGRO LAW OF SOUTH CAROLINA (1848).

211. *See* Nash, *Negro Rights, Unionism, and Greatness on the South Carolina Court of Appeals*, 21 S.C.L. REV. 141, 186 (1969) (quoting an editorial from the *Telegraph*).

212. At the Governor's direction, the Senate Judiciary Committee reviewed the work. The members described it as being a useful compilation of the law, but recommended that the state not publish the work since it contained opinions opposed to what was characterized as settled state policy.

breaking up families and to prevent slaves from having a succession of masters in a short period of time. He advocated the repeal of the Negro Seaman's Acts, as well as laws that restricted emancipation and laws that forbade teaching slaves to read or write. He also attempted to extend to slaves many of the guarantees of personal security that the common law extended to whites.[213]

It seems likely, then, that one explanation for the emancipation decisions is that advocates of reform existed throughout South Carolina's slaveholding society, and that their views were more widely accepted than has been assumed. First, the South Carolina cases themselves support this conclusion. Most of the decisions discussed in this Article were decided initially by a jury of property-owning men, and in almost every case the jury voted for emancipation. The court of appeals decisions generally were consistent with the jury decisions. Second, the Agricultural Society approved Judge O'Neall's proposals for reform and recommended them to the state legislature, which clearly indicates that his slaveholding counterparts were not entirely opposed to his ideas.

One is nonetheless compelled to ask why judges like William Harper, who were not reform-minded, voted with Judge O'Neall on the emancipation cases. Part of the answer may lie in the nature of the emancipation issue itself. It presented opportunities for consensus among those who held widely diverse views about slavery.

As late as 1845, Judge O'Neall argued that public opinion both in South Carolina and in other states opposed the statutes that restricted emancipation.[214] Antislavery reformers naturally opposed these statutes. Proponents of slavery might also have opposed these laws because they encroached upon the owner's authority to free his slaves, an authority that had been virtually unchecked from 1740 to 1800.

The power to emancipate was an essential power of the master class, enabling the master to "dispense the only reward, which either he, or his slave appreciates."[215] In addition, many Southerners believed that harsh laws would bring more attacks on slavery, rather than make it more secure. As Judge Harper wrote, slave owners believed it to be a misfortune that they were "compelled to subject to a jealous police, and to view with distrust and severity, . . . [slaves] we are disposed to regard with confidence and kindness."[216] It is probable, then, that a

213. *See generally* J. O'NEALL, *supra* note 210, at ch. I, §§ 8, 47, 65; ch. II, §§ 9, 17, 18, 20, 21, 25, 41, 64.

214. *See generally* Vinyard v. Passolargue, 32 S.C.L. (2 Strob.) 536, 547-48 (1846) (O'Neall, J. dissenting); J. O'NEALL, *supra* note 210, at ch. I, § 37.

215. J. O'NEALL, *supra* note 210, at 12.

216. *See* W. FREEHLING, *supra* note 20, at 67.

consensus could be formed of both opponents and proponents of slavery that would produce the judicial decisions that restricted the laws against emancipation. Acts of kindness and humanity toward individual slaves and protection of the owners' dominion over slaves continued to be permissible, even if dismantling the institution was not.

Furthermore, judges may have had greater opportunity to reach a consensus based on reform than did legislators. The judges, representing diverse geographic and political interests of the state, had equal votes. In contrast, as a result of restrictive practices and property requirements for holding office, the antebellum South Carolina Legislature was controlled by the tidewater planters, those with the largest plantations, with the least personal contact with their slaves, and, perhaps also, with the greatest to fear in terms of both economic ruin and threats to personal security should slavery be abolished.

B. Recognition of the Moral Ambiguity of the Proslavery Position

A second reason that the court decided the emancipation cases the way it did is that South Carolina slaveholders increasingly recognized the moral ambiguity of the proslavery position. When the emancipation issue was raised directly in the context of a dispute between the owner and the slaves themselves, the dispute became one between individuals. When freedom was at stake it was impossible to deny the humanity of the slave. Furthermore, when freedom was at stake, the judges and juries were compelled to face the central moral question of slavery: is it right for one human being to enslave another against his will?

Southerners were acutely aware that slavery undercut the moral fiber of a country founded on libertarian ideals. Henry Laurens of South Carolina favored abolition of slavery.[217] Judge William Gaston of North Carolina publicly denounced slavery as an institution that "poisons morals at the fountain head."[218] Allowing emancipation of individual slaves or small groups of them in specific cases permitted correct moral decisions without threatening the entire structure of society. It was no accident that the emancipation decisions, even when decided in the law rather than the equity courts, were based on fundamental equitable principles, rather than on legal analysis of statutes. These decisions did not merely erode legislative enactments; they seemed to be the beginning of an internal attack on the institution of slavery itself.

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217. Henry Laurens' views on slavery were described by his son, John Laurens, in a letter to his father in October 1776. The letter is reprinted in 5 *S.C. Hist. and Geneology Mag.* 205-06 (1904).

218. J. SCHAUINGER, WILLIAM GASTON, CAROLINIAN 166 (1949).

Slaves began to be regarded as human beings with compelling equitable claims, rather than as property.

For many Southerners the troubling issue was not abolition of the despised institution, but the problem of suddenly creating an interracial society that would be overwhelmingly black. Granting blacks civil rights would transform society and threaten the security of the white power structure. The emancipation cases considered solely whether the individual slave or slaves before the court were entitled to freedom. When confronted with the moral question of slavery on an individual basis, the judges and juries were willing to do what was clearly right. Freeing individual slaves did not pose a threat to the established social structure.

The limitations of the judicial decision making process may also have played a role in the emancipation decisions. The scope of influence of these judicial decisions was much more restricted than that of the legislature's enactments. Courts, by the very nature of their decision-making process, change the law incrementally. In contrast, the legislature makes broad statements of policy.[219] Furthermore, the jury system may permit the infusion of commonly held values into the legal system at an earlier point than does the legislative process. It is not surprising, therefore, that judges, rather than legislators, became the spokespersons for reform in antebellum South Carolina.

What seemed to be occurring in antebellum South Carolina has been suggested by T. Nicolaus Tideman in another context. Tideman proposed that "[w]hen through an evolution in our moral understanding we begin to realize that a class of entitlements is unjustly held, courts may begin to deny protection to those entitlements before we reform their holding through legislation."[220] In antebellum South Carolina, courts and juries defended the emancipation of slaves against owners and heirs who wanted to reenslave them as well as against the legislature that would deny the slaves freedom.

The possibilities for consensus between judges with differing views about slavery and the opportunities for making correct moral decisions may explain the results of the emancipation cases, but they do not explain why the judges felt free to express their views regarding restrictions on emancipation. The explanation lies in the characteristics of antebellum judicial decision making.

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219. For example, the state statutes that restricted emancipation may have been as much a reaction to external pressures on the institution of slavery, as a careful consideration of the state's policy of maintaining slavery. These laws may have been intended to serve as a warning to outsiders as well as a mandate to South Carolina residents.

220. Tideman, *Takings, Moral Evolution, and Justice*, 88 COLUM. L. REV. 1714 (1988).

C. *Characteristics of Judicial Decision Making in the Antebellum Period*

Despite the South Carolina courts' flagrant and persistent opposition to the will of the legislature, the emancipation decisions do not suggest that the judges experienced any conflict between their role as judicial enforcers of the law and their individual beliefs that the statutes were wrong.[221] To the contrary, the language of the opinions indicates that the judges purposefully nullified the emancipation statutes, pursuing their objective without any apparent tension between their judicial role and their individual views. One reason they were able to pursue such a course lies in the nature of the accepted jurisprudence of the day.

During much of the antebellum period, the instrumental style of judicial reasoning prevailed. Both questions of policy and of society's needs were prevalent in judicial reasoning. Judges did not regard themselves as will-less appliers of the law.[222] Landis has stated that a "chief point of departure between nineteenth- and twentieth-century theories of the law lies in the emphasis placed upon the judge as a creative artist in the making of law."[223] Judges' roles involved more than deference to precedent and legislative edicts. Early in the antebellum period, statutes and precedent, perhaps, were less controlling than they later became when judicial analysis began to emphasize analysis of legal rules, both common law and statutory. Thus, it is not surprising that in *ex rel. Sally v. Beaty*, *Linam v. Johnson*, *Cline v. Caldwell*, *Frazier v. Frazier's Executors*, and *Rhame v. Ferguson* the courts based their decisions on the equities of the case rather than on the statutes.

As time passed, however, the concept of judges as passive appliers of the law began to take hold. By the mid-nineteenth century, judges began to defer to a greater extent to legislative enactments and to judicial precedent. Beginning in the 1840s, South Carolina emancipation decisions began to reflect the change. By that time, however, there were enough decisions on the emancipation issue to establish legal precedent for the later courts, who felt bound to follow it. In *Broughton v. Telfer*,[224] for example, Chancellor Dargan felt compelled to follow

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221. *But cf.* R. COVER, *supra* note 5, at 6-7, 226-38 (discussing the conflict between judges' moral dilemma and restraints on the judiciary).

222. *See* L. FREIDMAN, A HISTORY OF AMERICAN LAW 100 (1973) (describing judges as becoming more active and creative in interpreting the law).

223. J. Landis, *Statutes and the Sources of Law*, in HARVARD LEGAL ESSAYS 213 (1934).

224. Broughton v. Telfer, 24 S.C. Eq. (3 Rich. Eq.) 431 (1851).

Carmille v. Pringle[225] even though he believed it was "a very erroneous construction of the Act of 1820."[226]

Antebellum judicial approaches to the interpretation of statutes also differed, in some respects, from today's approaches. Landis has described a doctrine called the equity of the statute that was used during the nineteenth century. According to Landis, the doctrine contributed to the "concept of the statute as a nursing mother of the law."[227] Statutes were used as a starting point for a judge's reasoning, but were not necessarily dispositive of the case. Equitable considerations predominated. Exceptions for particular circumstances, therefore, were judicially drafted into statutes which appeared on their face to be dispositive and statutes were applied to situations that seemed to lie outside of the statute's express terms.[228]

Landis' description of the doctrine is consistent with the reasoning found in the emancipation decisions. For example, *Frazier v. Frazier's Executors*, *Rhame v. Ferguson*, and *Cline v. Caldwell* were clearly based on the equities of the particular case and not on the clear language of the Act of 1820, which forbade emancipation except by act of the legislature. Thus, both the style of reasoning and the doctrine of the equity of the statute allowed judges to restrict legislative enactments.

D. The Importance of Customary Rather Than Statutory Slave Law

The attack on the statutes that restricted emancipation was also influenced by the presence of two competing systems for regulating slavery: a statutory system, which gave expression to slavery in its harshest form, and a customary law, or in-dwelling law as Daniel Boorstin has characterized it,[229] which gave expression to the more humane aspects of the institution. Alexis de Toqueville discussed the divergence between legal and customary treatment of black persons, whether free or slave. When comparing the treatment of blacks in the North with that of blacks in the South he observed that "legislation [in the South] is more harsh against [blacks], but customs are more toler-

225. 27 S.C.L. (2 McMul.) 454 (1842). *Carmille v. Pringle* is referred to in the *Broughton* decision as *Carmille v. Carmille.*

226. *Broughton*, 24 S.C. Eq. (3 Rich. Eq.) at 435.

227. J. LANDIS, *supra* note 223, at 214.

228. *See id.* at 215. For an illuminating discussion of the role of the contemporary common-law judge who must contend with what Grant Gilmore described as an "orgy of statute making," see G. CALABRESI, A COMMON LAW FOR THE AGE OF STATUTES 1, 163-66 (1982).

229. *See infra* notes 241-42 and accompanying text.

ant and gentle."[230]

The Act of 1740 was the cornerstone of South Carolina's statutory slave law until the Civil War. Like its predecessors, it reflected the concerns of the low country planter class. The preamble and many of the Act's general provisions were more temperate than one would expect given that the statute was enacted in the immediate aftermath of a slave insurrection. The strident language of the Acts of 1712 and 1722 that denounced the barbarism of the enslaved people was absent. Instead, the language of the new Act suggested a confident recognition that absolute slavery had been firmly established in South Carolina. The purposes of the slave law were to: (1) define the master's powers over his slaves so that he could keep them subjugated; (2) limit the master's authority in order to protect the slaves from excessive cruelty; and (3) preserve public peace and order.[231] Coercive necessity was the fundamental principle of the Act of 1740.[232]

The Act of 1740 created a slave system that differed in three important respects from the system created by the earlier South Carolina codes. First, it did not rely solely on force and repression to control slaves. It attempted to control by requiring better treatment of slaves so that they would become accepting of their lot and depend more on their owners.[233] Second, despite characterizing slaves as chattels, the

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230. A. DE TOCQUEVILLE, *supra* note 3, at 316.

231. Act of 1740, 1740 S.C. Acts 397. To distinguish the purposes of the Act of 1740 from that of prior acts compare the preamble of the Act of 1740 with the preambles of the Act of 1712, 1712 S.C. Acts 352, and the Act of 1722, 1722 S.C. Acts 371.

232. *See* Kinloch v. Harvey, 16 S.C.L. (Harp.) 508, 514 (1830).

233. The killing of a slave, including a killing by the slave's owner, became an indictable offense. If a slave was harmed and no evidence existed about the identity of the perpetrator, the Act established a presumption that the owner was responsible for the injury. Maiming a slave in the heat of passion and unlawfully beating a slave were also indictable offenses. Act of 1740, §§ VI, XXXVII, XXXIX, 1740 S.C. Acts 397, 399, 410-12. Owners who murdered their slaves were subject to a substantial fine (£700) and sentenced to seven years of hard labor if unable to pay the fine. They also were forbidden to hold civil or military office in South Carolina. *Id.* § XXXVII, 1740 S.C. Acts 410-11.

The punishment of slaves for private offenses against the master was limited to whipping. Public offenses were punished by whipping or, in the case of a capital offense, death. For both public and private offenses, the Act forbade the imposition of penalties such as branding, dismemberment, and castration of slaves. *See id.* However, slaves were not granted a right of action on their own behalf. Proceedings against the owner could be initiated either by public officials or concerned citizens. Incidents were prosecuted with some success. These changes in the law are significant. They mark a change from the stereotype of slaves as mere brutes and the beginning of a recognition of their humanity. For example, slaves could not be required to work more than 15 hours a day between March and September, the busy season, or more than 14 hours a day during the remaining months. *See id.* § XLIV, 1740 S.C. Acts 413. While these hours seem oppressive when measured by contemporary standards, Genovese has concluded that the hours the slaves worked were about average for the time. *See* E. GENOVESE, *supra* note 201, at 61. The

Act of 1740 expressly recognized the humanity of slaves. The Act, for the first time, gave slaves the right to a trial by jury.[234] Finally, the Act limited an owner's power over his slave. His dominion was no longer absolute. For the first time the law attempted to regulate the master-slave relationship in order to protect slaves from excessive cruelty.

The Act also prohibited slaves from raising animals for their own use, keeping canoes, engaging in barter on their own behalf, trafficking in any commodities, or renting real property of any kind.[235] The combined effects of these restrictive provisions and other provisions that required owners to provide food and clothing made the slaves completely dependent on their owners for every aspect of their subsistence. Control of slaves would be based, in part, on the slaves' dependence on their owners rather than solely on physical coercion.

The South Carolina legislature passed relatively few slave laws between 1740 and 1861. The laws that were passed made only minor revisions to the Act of 1740, which had become a permanent part of South Carolina's antebellum jurisprudence. Despite the few changes in statutory slave law, however, the institution of slavery underwent substantial change during this period. The changes occurred through developing the unwritten rules of customary law that governed the inhabitants of South Carolina.

During the late eighteenth century and the start of the nineteenth century, South Carolina developed three forms of slavery. The first developed in the lowland area of the state, where rice cultivation flourished in the coastal swamps.[236] The rich swampland was also well suited to the cultivation of long-staple cotton. The low country rice and long-staple cotton culture supported a style of living that typifies Southern antebellum plantation life. Low country planters were regarded as the aristocrats of South Carolina society. They lived in luxurious homes surrounded by immense plantations. Cultured minds, elegant styles of living, and gracious manners were held in high regard. As time passed, Charleston became the hub of South Carolina's tideland plantation life.

Large gangs of black slaves worked the coastal plantations supervised by white overseers. The ratio of blacks to whites varied between three to one and eight to one, depending on the county and the sea-

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Act also required owners to provide slaves with sufficient food, clothing, and shelter. Act of 1740, §§ XX, XXXVII, 1740 S.C. Acts 403, 411.

234. *Id.* §§ IX-XII, 1740 S.C. Acts 400-01. The Act's justification for the provision was that "[n]atural justice forbids that any person, of what condition soever, should be condemned unheard . . . ." *Id.* § IX, 1740 S.C. Acts 400. Jury trials had previously been extended only to free white persons under the common law.

235. *Id.* §§ XXX, XXXI, XXXIV, XLII, 1740 S.C. Acts 407-10, 412-13.

236. G. ROGERS, JR., *supra* note 17, at 47.

son.[237] During the summer the whites moved away from Charleston (some went as far as Newport, Rhode Island) to escape malaria and the other infestations of the disease-ridden swamps. In the lowland area whites' personal knowledge of individual slaves was restricted to slaves who were house servants or skilled laborers. Many large plantation owners knew little about the individual field hands. Thus, it is not surprising that lowland planters considered personal security extremely important.

The second form developed when the invention of the cotton gin in 1793 assured the profitability of short-staple cotton. Many South Carolinians left the tideland areas to become short-staple cotton planters in the South Carolina upcountry. The upcountry, however, never became an inland copy of the coastal region. Upcountry plantations were considerably smaller than their low country counterparts, and the cotton planters there owned fewer slaves. Plantation life did not dominate the upcountry as it did the coastal areas, and in the interior regions, blacks outnumbered whites only one and a half to one.[238] The opportunity for personal contact between blacks and whites was much greater in the upcountry than in the tidal areas. Because of the numerical balance, there may have been less fear of a race war in the inland areas.

The third form of slavery could be found in the commercial centers of the state, where slaves provided both the skilled and unskilled labor needed for the commercial economy. Slaves often were permitted to hire out their time, as well as to live in the community at large, thereby living in a state of quasi-emancipation.

Although the forms of slavery and attitudes toward the institution were diverse, the statutory regulation of the institution remained constant. The slave laws reflected the interests of the coastal slave owners. The other forms of slavery developed outside the law. Thus, the divergence between the practice of slavery and the actual slave statutes widened as the nineteenth century progressed.

Early in the eighteenth century, the South Carolina slave institution had earned a reputation for its "callous disregard for human life."[239] By the nineteenth century much had changed. Economic, political, and social forces had combined to create an environment conducive to improving the treatment of slaves. Bondsmen came to be

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237. *See* W. FREEHLING, *supra* note 20, at 7-11; *see also* Phillips, *supra* note 15, at 426-27 (giving population statistics for South Carolina lowland districts from 1790-1860).

238. W. FREEHLING, *supra* note 20, at 18.

239. *See* E. GENOVESE, *supra* note 201, at 54 (quoting F. MCDONALD, E. PLURIBUS UNUM: THE FORMATION OF THE AMERICAN REPUBLIC 1776-1790, at 65 (1965)); *see also* W. ROSE, *supra* note 10, at 161.

viewed not as barbarians to be dealt with ruthlessly, but as members of a large plantation family captured in a state of perpetual childhood.[240]

Although the progressive view of slavery did not refashion bondage into a system of beneficence, it did lead to improvement of the harshest aspects of the system. Yet, with few exceptions, these modifications were not recorded in statutes, but instead were found in the customs and informal rules of South Carolina society at large. Consequently, a tension developed between the harsh restrictiveness of the statutes and the liberalizing tendencies of the customary law.

According to Daniel Boorstin, in the South the "[g]reat planters actually ran their affairs by informal understandings, gentlemen's agreements and pledges of honor."[241] Legal papers rarely were used to conduct the business of the Southern plantation. Nor were they used much in Southern commerce during the early years of the nineteenth century. The Southern way of life revealed itself in courtliness, gallantry, and honor, not unlike the world created by Sir Walter Scott, whose works were read widely in the South. Southerners took pride in the relative meagerness of written slave law, perceiving this paucity as a virtue of the slave institution.[242] Thus, it was custom, not legal rules, that defined the slave institution. This perception of slavery did not develop spontaneously. Rather, it developed over time, as the plantation system prospered, as generations of American-born slaves left behind African customs and languages, and as the colonies moved toward and achieved independence from England.

As time passed, the concept of familial dependency became the dominant principle of a slave institution founded on customary law. The plantation owner's "family" came to include both black slaves and white freemen. The plantation unit, in fact, was perceived as a three family system consisting of the owner's immediate family, the slave family, and the larger plantation family.[243] Judge John Belton O'Neall gave voice to this perspective when he stated:

> The slave ought to be fully aware that his master is to him what the best administered government is to the good citizen, a perfect security

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240. W. ROSE, *supra* note 10, at 83.

241. D. BOORSTIN, THE AMERICANS: THE NATIONAL EXPERIENCE 199 (1965).

242. According to Boorstin, in many Southerners' minds:

> [T]he essence of slavery . . . was that it did not depend on explicit instrumental rules; and this was precisely its virtue. For, under slavery, . . . the laws of employment became one with the natural currents of social sentiment on both sides: kindness and generosity on the side of the employer, loyalty and industry on the side of the employed.

D. Boorstin, *The Perils of Indwelling Law* in THE RULE OF LAW 84-85 (R. Wolff ed. 1971).

243. *See* E. GENOVESE, *supra* note 201, at 73-75; W. ROSE, *supra* note 10, at 31.

> from injury. When this is the case, the relation of master and servant becomes little short of that of parent and child—it commences in the weakness of the one and the strength of the other.[244]

Judge O'Neall's comments reflect a paternalistic view of slavery; a view different from that expressed in statutory law. Both views presumed the inferiority of the slaves. Statutory law presumed that race relations were based on suspicion, mistrust, and fear.[245] The primary objective of the Act of 1740, as stated in its preamble, was to keep slaves "in due subjugation and obedience and to make slavery absolute."[246] The view of slavery and race relations described by Judge O'Neall was very different from the view expressed in the Act of 1740. The paternalistic view of slavery perceived slaves as inferior because they were childlike, dependent, and because they needed protection, not because they were considered threatening.[247] Attitudes toward slavery cannot be so easily defined. Nevertheless, the paternalistic view presented opportunities for improvement and reform not found in the harsher view of slavery expressed in statutory law.

Although much of the customary law of slavery remained unwritten, its prominence was shown through repeated incidents of willful disregard of the statutory law. The extent to which the oppressive provisions of the Act of 1740 were enforced has been the subject of debate.[248] For example, the Act expressly forbade teaching slaves to write. Anyone caught teaching a slave to write was to be fined 100 pounds.[249] Only three years after the Act was passed, however, the Society for the Propagation of the Gospel in Foreign Ports opened the Charleston Negro School for black children, both slave and free. Many

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244. Tennent v. Dendy, 23 S.C.L. (Dud.) 83, 86-87 (1837).

245. The characteristics of the two views of race relations are drawn from E. MORGAN, *supra* note 9, at 325, and P. VAN DEN BERGHE, RACE & RACISM: A COMPARATIVE PERSPECTIVE 31-33 (1967).

246. Act of 1740, 1740 S.C. Acts 397 (1840). Slavery was declared to be absolute. Slaves were forbidden to own real or personal property of any kind, to leave their owner's premises without permission, to assemble with other slaves without a white person being present, to learn to read or write, to engage in trade or barter, to carry firearms (except in the presence of a white person), or to bring legal actions on their own behalf, including suits for freedom. *See generally id.* §§ I, III, V, VII, XXIII, XXX, XXXI, XXXIII, XXXIV, XLII, XLIII, XLV, 1740 S.C. Acts 397-413.

Thus, from the mid-eighteenth century on, South Carolina had established a form of slavery which evoked the following response from de Toqueville almost a century later: "The Negro has reached the ultimate limits of slavery . . . . The Negro has lost even the ownership of his own body and cannot dispose of his own person without committing a sort of larceny." A. DE TOCQUEVILLE, *supra* note 3, at 293.

247. E. MORGAN, *supra* note 9, at 325; P. VAN DEN BERGHE, *supra* note 245, at 31-33.

248. *See* A. HIGGINBOTHAM, *supra* note 14, at 199.

249. Act of 1740, § XLV, 1740 S.C. Acts 413.

of the school's instructors were slaves owned by the Society. The school continued to teach blacks, apparently without incident, until 1765, when the last Negro teacher died and the school was unable to continue.[250]

This pattern of ignoring unpopular slave laws continued through the antebellum period. In 1834 the state legislature passed another law that forbade slave owners from teaching their slaves to read and write.[251] At the time the law was passed, Samuel Jackson, a New England Presbyterian minister who was traveling through South Carolina, wrote the following:

> A bill has just passed the [South Carolina] house forbidding to teach the blacks to read, under severe penalties of fine & imprisonment. It was brought forward by a *Presbyterian*, who is a *professor of religion*, a *new convert*, & just elected attorney general. [The reference was to Robert Barnwell Rhett, a leading nullifier.] Both parties are afraid that the blacks will take an opportunity in these commotions to cut their throats, yet they *appear* to disregard [the law] & not a word is said about it in print or public.[252]

Judge John Belton O'Neall was among those who openly called for the law's repeal.[253]

Similar attitudes prevailed toward regulations that governed the slaves' dress. The Act of 1740 prohibited slaves from wearing fineries and limited slave dress to livery or coarse clothing. The planters ignored the law and the authorities never enforced it. In 1848 Judge O'Neall advocated the law's repeal.[254] In addition, laws that forbade all Negro religious meetings and interracial religious meetings[255] were also ignored.[256] Finally, slaves were given private garden plots despite laws

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250. *See* A. HIGGINBOTHAM, *supra* note 14, at 200-01; G. ROGERS, JR., *supra* note 17, at 23.

251. Act of 1834, § I, 1834 S.C. Acts 468.

252. NULLIFICATION, *supra* note 59, at 165 (emphasis in original); *see also* E. GENOVESE, *supra* note 201, at 188 (describing the debate on whether slaves should be taught to read and write in the context of religion).

253. *See* J. O'NEALL, *supra* note 210, at 23.

> When we reflect, *as Christians, how can we justify it, that a slave is not to be permitted to read the Bible*? It is in vain to say there is danger in it. The best slaves in the State, are those who can and do read the Scriptures. Again, who is it that teach your slaves to read? It generally is done by the children of the owners. Who would tolerate an indictment against his son or daughter for teaching a favorite slave to read?

Id. (emphasis in the original).

254. *Id.* at 24-25.

255. Act of 1800, §§ I-II, 1800 S.C. Acts 440-41.

256. *See* E. GENOVESE, *supra* note 201, at 40-41; J. O'NEALL, *supra* note 210, at 24.

that forbade them to own property.[257] Similarly, the facts of *ex rel. Sally v. Beaty* reveal that slaves were permitted to own property, including other slaves, directly violating the Act's provisions.[258] In its decision the *Bynum v. Bostick* court expressly referred to slave benefits which were allowed to take effect sub silentio.[259]

As the above discussion suggests, the primary difference between customary and statutory law was that the statutes often ignored or denied the slaves' humanity. In the day-to-day interaction between master or overseer and slave, however, it was impossible to deny the human element of the relationship. This fact created an additional tension between statutory and customary law. Under statutory law slaves were treated primarily as chattels, deprived of almost all legal rights. Under customary law slaves could secure customary rights that were often respected by their masters.[260]

According to Genovese, "[p]aternalism and slavery merged into a single idea to the masters. But the slaves . . . acted consciously and unconsciously to transform paternalism into a doctrine of protection of their own rights—a doctrine that represented the negation of the idea of slavery itself."[261] The slave's ability to claim humanity made it impossible for the slave to remain nothing more than an extension of his master's will,[262] or a mere chattel, as he was defined under the statutory system. Because "no reasonable formula could be devised to mediate between counterclaims arising from the two sides of this dual system, much had to be left outside the law altogether."[263]

Reflecting the fears of the low country planters who controlled both houses of the state legislature, the statutory slave system became increasingly harsh. Repression was used to make slavery absolute. In contrast, slavery became less harsh under customary law. The amelioration of the slave institution was reflected first in the customs of the people and then in the legal system through the decisions of judges and juries made up of white men of property. The presence of competing systems of slave law, combined with the apparently commonplace disregard of unpopular slave statutes, may have allowed members of the South Carolina Court of Appeals to pursue their proemancipation policies.

The emancipation decisions resulted from many factors. The emancipation issue permitted judges with very different views concern-

257. *See* E. GENOVESE, *supra* note 201, at 30.
258. For a discussion of *Sally*, see *supra* notes 78-85 and accompanying text.
259. For a discussion of *Bynum*, see *supra* notes 91-99 and accompanying text.
260. *See* E. GENOVESE, *supra* note 201, at 45-46.
261. *Id.* at 49.
262. *See id.* at 47.
263. *Id.*

ing slavery to reach a consensus. The incremental law-making role played by the judiciary, in contrast with the legislature's larger role, permitted judges to make morally correct decisions without mounting a broad attack on the institution of slavery. Contemporary perceptions of the judicial role, accepted methods of statutory interpretation, and competing systems of slave regulation all laid the foundation for the emancipation decisions.

E. The Social, Economic, and Educational Background of the South Carolina Decision Makers

The legislature was aware of the judicial trend that favored emancipation. The Act of 1841 was clearly a response to the proemancipation decisions that preceded it. Although the South Carolina Legislature reorganized the courts twice during the late 1830s and the early 1850s, none of the court of appeals judges who voted in favor of emancipation was removed. In fact, all of the court of appeals judges were reappointed to the bench.

The unanswered question is why these judicial decisions were tolerated by the South Carolina Legislature during a time when there were significant attempts to suppress open discussion of the slavery issue. During the 1830s, political agitation in South Carolina was particularly pronounced. The nullification controversy had erupted. South Carolina attempted to have the mails censored in an attempt to stop the spread of abolitionist materials.[264] The State also demanded that the North take action to stop the antislavery movement. Public discussion of slavery was silenced to the extent possible. When a South Carolina journalist opened his newspaper to a "liberal and guarded" discussion of slavery, a riot ensued.[265] Freehling has suggested that as the decade progressed, "to hint at colonization, to criticize the Negro seamen law, to urge that slaves be allowed to read their Bibles—was cause for mob justice. . . . [The result was] the most thoroughgoing repression of free thought, free speech, and a free press ever witnessed in an American community."[266]

If open discussion of slavery was suppressed, then why were the emancipation decisions permissible at all? Why were the decisions not silenced by impeachment, by reorganization of the courts with the exclusion of the troublesome members, or by other means available to the legislature? The decisions may have been tolerated because the judges were members of an elite group that controlled South Carolina

264. *See* W. FREEHLING, *supra* note 20, at 340.
265. *See id.*, at 83-86.
266. *Id.* at 333.

political life and directed the affairs of the state. Membership in this exclusive club was limited to wealthy landowners.[267]

At a time when other states were undergoing political reform that provided for greater popular participation in the political process, South Carolina continued with its traditional ways. Substantial property ownership was required for holding public office, and most public officials were elected by the state legislature. As a result, a select group directed and controlled the affairs of the state. Common interests and social bonds joined the members of this group: they were large property holders; they were generally well educated; and they were members of the same social groups and often were from the same families. The names of the officials indicate that a select few held the important offices of the state. The judges were no exception.

On a visit to South Carolina in the late 1830s G.W. Featherstonhaugh, a visitor from England, observed that the South Carolina planters considered themselves "*the gentlemen of America.*"[268] Featherstonhaugh further reported:

> Some of them were very intelligent men, and hearty in their manners. What particularly struck me at this dinner was the total want of caution and reserve in the ultra opinions they expressed about religion and politics; on these topics their conversation was not at all addressed to me, but seemed to be a resumption of the opinions they were accustomed to express whenever they met, and upon all occasions. . . . It was quite new to me to hear men of the better class express themselves openly against a republican government, and to listen to discussions of great ability, the object of which was to show that there never can be a good government if it is not administered by gentlemen.[269]

The scene described by the English visitor was a political debate among members of the elite who openly expressed their desire to limit participation in the political process to members of the select group.

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267. The extent of the political influence wielded by this group can be understood best by analyzing the structure of South Carolina government. Two conflicting theories have been used to explain the structure of Southern antebellum governments. One view maintains that Southern governments were so tightly controlled by a planter aristocracy that representative democracy as we view it today did not emerge until after the Civil War. A second theory holds that although Southern governments were dominated by the planter class, representative democracy did exist, and elected officials were subject to the control of and responsive to the interests of the general population. *See generally* F. GREEN, CONSTITUTIONAL DEVELOPMENT IN THE SOUTH ATLANTIC STATES 1776-1860, at 171-296 (1930) (discussing Southern democracies). The first theory applies best to South Carolina, a state that perhaps showed more concern with the form of a representative democracy than with its substance.

268. NULLIFICATION, *supra* note 59, at 191 (emphasis in original).

269. *Id.* at 193.

This group apparently believed that it was social or economic status, rather than political philosophy, that provided the qualifications for holding public office.[270]

The social and political ties of the members of the state's judicial and legislative branches remained strong during the antebellum period. Although the South Carolina Constitution prohibited a judge from holding another office during his judicial tenure, in fact, judges retained strong links with the legislature. One reason is that they were elected by the legislature. A second reason is that, as the biographies of the judges suggest, election to the state legislature was an important and perhaps essential step toward election to the judiciary. Of the thirty-nine known judges and chancellors who served from 1779 to 1859, all but six served in the South Carolina Legislature before being elected to the judiciary. Three of the six nonlegislators held other elective offices before becoming judges. Only three of the men advanced to judgeships directly from the practice of law.[271]

The close ties between the state legislature and the judiciary suggest that South Carolina's government was controlled by a group of men drawn from a narrow circle of political and social groups that had a disproportionately large share of political power with respect to other members of society.[272] About seventy percent of these men were college educated, many at South Carolina College in Columbia. For example, Judges David Johnson and John B. O'Neall were classmates at the college, and Judge William Harper was also among its alumni. The Board of Trustees of the college was regularly composed of such luminaries as the state's governor, members of the state legislature, and members of the judiciary.[273] Occupations held by the South Carolina elite were those of planter, lawyer, and professional politician.[274] Not surprisingly, many of them were related. Several of the elites of the 1830s were the sons of the elites of the 1790s. Many were related by marriage.[275] Of the social circles that existed, the South Carolina rice planters constituted one of the closest knit and most aristocratic

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270. *See infra* notes 272-85 and accompanying text.

271. The foregoing statistics were compiled from judges' biographical information from the following sources: 1 U. BROOKS, *supra* note 198; 1 J. O'NEALL, *supra* note 93; 4 DICTIONARY OF AMERICAN BIOGRAPHY (1964 ed.); D. NORTON, A METHODOLOGICAL STUDY OF THE SOUTH CAROLINA POLITICAL ELITE OF THE 1830'S (1972) (unpublished thesis available in University of Pennsylvania Library and Sterling Library, Yale University).

272. *See generally* D. NORTON, *supra* note 271, at 138-209 (identifying the political elite in South Carolina).

273. *See id.* at app. D.

274. *Id.* at 223.

275. *See id.* at 278-79.

groups in the South.[276]

The importance of social position is illustrated by the planters' reaction to the election of South Carolina's Governor Geddes. Geddes was the son of a Charleston merchant. After serving in the South Carolina House of Representatives, including two terms as Speaker of the House, he was elected governor in 1818. The election of a member of the mercantile class to the governorship alarmed the South Carolina planter aristocracy.[277]

The South Carolina Constitution of 1790 was amended in 1810 to allow men who were not property owners to vote.[278] The right to vote, however, included only the right to vote for state legislators and representatives to the United States Congress. The state legislature elected all other government officials including the governor, superior court judges, commissioners of the treasury, the secretary of state, and the surveyor general.[279]

Although property qualifications were removed as requirements for suffrage, they were retained as qualifications for holding office. Members of the South Carolina House of Representatives were required to own either an estate of 500 acres of land and ten slaves or real estate valued at 150 sterling.[280] Senators were required to own estates valued at 300 sterling free of debt.[281] The qualifications for governor and lieutenant governor were an estate of 1500 sterling clear of debt.[282]

The property requirements for office combined with a representation formula based upon a district's free white population and taxable wealth[283] allowed the state's wealthy property owners to control the legislature. These men both controlled state policy and selected the persons to administer it. Consequently, planters from the low country controlled the Senate and held a disproportionate number of seats in the House. Eleven tideland districts, with a total population of approximately 78,000 whites, elected sixty-four Representatives and twenty-eight Senators to the South Carolina Legislature. The remaining eigh-

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276. *Id.* at 108.

277. *See* 2 J. O'NEALL, BIOGRAPHICAL SKETCHES OF THE BENCH AND BAR OF SOUTH CAROLINA 209-10 (1859).

278. S.C. CONST. of 1790, art. I, § 4 (amended December 19, 1810, 1810 S.C. Acts 184). Men who were not property holders had the additional requirement of being a resident of their voting district for six months prior to the election and of paying a three shilling tax in the previous year. *Id.*

279. *Id.* art. II, § 1, art. VI, § I (amended December 19, 1810, 1810 S.C. Acts 188, 190).

280. *Id.* art. I, § 6 (amended December 19, 1810, 1810 S.C. Acts 185).

281. *Id.* art. I, § 8 (amended December 19, 1810, 1810 S.C. Acts 186).

282. *Id.* art. II, §§ 2-3 (amended December 19, 1810, 1810 S.C. Acts 188).

283. *See id.* art. I, §§ 3, 7, 9 (amended December 17, 1808, 1810 S.C. Acts 193-94).

teen districts, with a white population exceeding 181,000, elected only sixty Representatives and seventeen Senators. A minority of less than one third of South Carolina's white population thus controlled both houses of the state's legislature.[284] One commentator observed that in South Carolina a "share of the government was nigh [like] a hereditament, and . . . a seat in the legislature, like a family pew descended to the heir at law."[285]

South Carolina's form of government probably was not one that would be characterized as democratic. The state lacked stable, populist-based political parties. Lines of contention typically were drawn according to individual issues rather than along broader party lines. Issues were often diffuse, and the voters were not presented with a clear choice among candidates.[286] Election by the legislature to important state offices turned on individual qualities and personal standing within the community, rather than on party affiliation. For example, in 1824, the legislature that passed the Smith Resolutions proclaiming federal protective tariffs unconstitutional elected Unionist John B. O'Neall as Speaker of the House and chose another nationalist as governor. Four years later, an even more adamant state rights legislature elected O'Neall to a judgeship over states rights advocate Josiah Evans.[287] Similarly, in 1840, Unionist John Richardson defeated Nullifier James Hammond in the election for governor.[288] Thus, heated controversy over important political issues often seemed to be intellectual debates among fellows in a closed community. Their views did not seem to jeopardize their opportunities for election or appointment to political office.[289]

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284. *See* F. GREEN, *supra* note 267, at 262.

285. *Id.*

286. It was not until the 1830s during the Nullification Crisis that legislative divisions resembling party lines began to emerge for the first time. *See* W. FREEHLING, *supra* note 20, at 212-13.

287. *Id.* at 117-20.

288. *See* D. NORTON, *supra* note 271, at 131.

289. An editorial published in one of the state's leading newspapers, the *South Carolinian*, on December 7, 1838, offers insight into the political structure of the legislature. The editorial stated:

> We are much gratified to see the harmony which exists among our political friends in the Legislature. All past distinctions on settled questions seem entirely forgotten—the Union men and Nullifiers . . . are mingling together as though such distinctions had never existed, and presenting a degree of general harmony and unanimity never before witnessed in this State, or probably any other. This is as it should be—showing as it does, that both parties have been governed heretofore, as now, by 'principles, not men' and are ever ready with a noble, disinterested and patriotic disregard of all selfish, personal or party consideration, to support all who support their principles, and views of the public good, and oppose all who oppose them no matter who. The result is most pro-

During the 1830s and much of the antebellum period, other Southern states struggled over the question of whether an elite minority should continue to control the majority. In response to populist agitation, the Southern states, with the exception of South Carolina, broadly extended suffrage and also provided for the direct election, by the voters, of those offices that had formerly been elected by the legislature. The turmoil caused by South Carolina's prolonged controversy with the federal government, however, prompted South Carolina Nullifiers, such as John C. Calhoun, to urge South Carolinians to suppress their disquiet about local issues in order to strengthen the state's position against the federal government. In 1838, in response to calls for a popular election of the governor, Calhoun argued that concern over a popular election of the governor would destroy the unanimity of the state and would weaken its resistance to intrusion by the federal government.[290]

The minority hold on the South Carolina government continued until the Civil War. During the 1850s a group in South Carolina called for equality of representation, popular election of the governor, and limitation of judicial tenure. The only change made was the imposition of a mandatory retirement age for judges.[291] The control of the state remained in the grip of a few wealthy men.

The closed structure of the government, which consisted mostly of legislators who were not bound to a political party, permitted dissent to flourish within the group with an intensity that would not have been permissible had the debates involved the general public. Dissent among members of a closed group with common interests may not have been perceived to be as threatening to domestic security and to the state's independence from the federal government as a general public discussion of these same issues would be.

The governing elite had doubts about letting the general public participate in the determination of public policy. Although the elites respected democracy, they were reluctant to extend it to the public at large. While all free men could vote, only a few were qualified to participate in the political process by holding public office. The controlling group may have preferred to tolerate dissension among the inner circle rather than to open the political process and the discussion of slavery to the general public.

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pitious to the State and honorable to its people; and presents a noble example to our sister States. South Carolinian, Dec. 7, 1838, at 2, col. 2.

290. *See generally* F. GREEN, *supra* note 267, at 248-50 (describing the lethargy of South Carolina in democratic reform).

291. *See id.* at 261.

VI. CONCLUSION

The South Carolina statutes that restricted emancipation and the judicial decisions that attempted to nullify them reveal the complexity of nineteenth-century jurisprudence and the diversity of Southerners' views on the issue of slavery. More importantly, however, the statutes clearly indicate the impossibility of achieving justice when interactions between individuals are based on stereotype and caricature. Early South Carolina statutes portrayed slaves as too brutish to live as free persons in a civilized society. The perpetuation of slavery was based on force and repression. Slaves were clearly victims of the repressive system. The system, however, also victimized the owners. As Judge Gaston recognized, slavery poisoned the soul of the southern way of life.[292] Customary law, in contrast, expressed a paternalistic view of blacks as a people condemned to a state of perpetual childhood. The customary justification for slavery was that the enslaved were dependent and incapable of caring for themselves in a world of adults.

Both systems of slavery harmed the slaves and their owners. The repressive approach discouraged interpersonal relations between the two groups and revealed the basest human instincts of the master class. The paternalistic view of slaves brought a different set of problems. Although this view emphasized the human qualities of the slaves, it denied their possibilities and their ability to be equal participants in a free society.

Of the two attitudes toward slaves, however, the paternalistic view provided some opportunity for reform. It enabled owners to regard their slaves as human beings, instead of mere property. It required owners to be responsible for the care of their slaves. It forced owners to face the brutal nature of the system and the brutalizing effects of slavery on the owners themselves. It encouraged owners to express their more humane instincts.

The most significant characteristic of the judicial decisions in favor of emancipation is that, despite the personal views of the judges who made them, the decisions implicitly rejected stereotypical views of the slaves and instead focused on the competing claims of two human beings. The cases were, as Judge Harper noted, disputes between individuals.[293] The language of the opinions suggests that the judges who decided in favor of emancipation regarded the parties before the court not as a free owner and a slave who was his property, but as individual human beings with competing equitable interests. The decisions recognized both the humanity and the adult status of the slaves. The lan-

292. *See generally* J. SCHAUINGER, *supra* note 218, at 166.
293. *See generally* Monk v. Jenkins, 11 S.C. Eq. (2 Hill Eq.) 9, 14 (1834).

guage of the opinions does not reveal any fear of the slaves about to be freed or suggest that the slaves were incapable of participating in a free society. The judges' ability, in those particular instances, to set aside stereotypical views of slavery freed them to do justice in the matter at hand.