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Slavery and the Arkansas Supreme Court

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I. INTRODUCTION

Slavery existed within the boundaries of the present state of Arkansas as early as 1720 when African slaves arrived with a group of German emigrants.¹ The colony soon failed, and most of the Germans and their slaves returned to New Orleans. Throughout the remainder of the Eighteenth Century the number of slaves at Arkansas Post, the only European settlement in the area that now includes Arkansas, remained small.² By 1798 there were only fifty-six African slaves at Arkansas Post, although they constituted about fourteen percent of the non-native population.³

Arkansas became a part of the United States in 1803 when the American government purchased the Louisiana Territory from France. The first U.S. census conducted in 1810 listed 136 slaves within the current state, 107 at Arkansas Post and 29 at the settlements of Hope Field and St. Francis in eastern Arkansas along the Mississippi River.⁴ In 1819 Congress created Arkansas Territory, whose boundaries included the current state of Arkansas and most of present-day Oklahoma. During the debate over legislation creating the new territory, attempts by northern congressmen to bar the further introduction of slaves into the territory failed by only a few votes.⁵ By the time of the 1820 census there were 1617 slaves in a total population of 14,273.⁶ This was still an insignificant absolute number of slaves when compared with southern states further east. In fact, there were fewer slaves living in Arkansas in 1820 than in either New York or New Jersey.⁷ However, the future of slavery in Arkansas was decided in 1820 when Congress approved the Missouri Compromise establishing a demarcation line between slave and

¹ ORVILLE W. TAYLOR, NEGRO SLAVERY IN ARKANSAS 5 (1958). The early French settlers of Arkansas Post enslaved some Indians, but when the French transferred possession of the area that now includes Arkansas to Spain in 1763, the Spanish prohibited future enslavement of Indians. MORRIS S. ARNOLD, COLONIAL ARKANSAS, 1686-1704, at 65 (1991).
² The 1744 census showed 10 slaves, and the 1771 census showed 16 slaves. TAYLOR, supra note 1, at 12 (citation omitted).
³ ARNOLD, supra note 1, at 65.
⁴ TAYLOR, supra note 1, at 19. These figures do not include any of the 287 slaves recorded in the New Madrid District, which straddled portions of the current states of Arkansas and Missouri. TAYLOR, supra note 1, at 20.
⁵ TAYLOR, supra note 1, at 21.
⁶ TAYLOR, supra note 1, at 25.
nonslave states at 36 degrees, 30 minutes latitude, which ran along the northern
boundary of the state. Under the terms of the Missouri Compromise, Arkansas
was admitted to the union as a slave state in 1836, and for the next twenty-eight
years, slavery remained legal in Arkansas.

The slave population of the state grew steadily during that period, both in
absolute numbers and as a percentage of the total population:

<table>
<thead>
<tr>
<th>Census</th>
<th>Slave Population</th>
<th>Total Population</th>
<th>Percentage Slave</th>
</tr>
</thead>
<tbody>
<tr>
<td>1820</td>
<td>1,617</td>
<td>14,255</td>
<td>11%</td>
</tr>
<tr>
<td>1830</td>
<td>4,576</td>
<td>30,388</td>
<td>15%</td>
</tr>
<tr>
<td>1840</td>
<td>19,935</td>
<td>97,574</td>
<td>20%</td>
</tr>
<tr>
<td>1850</td>
<td>47,100</td>
<td>209,897</td>
<td>22%</td>
</tr>
<tr>
<td>1860</td>
<td>111,115</td>
<td>435,450</td>
<td>26%</td>
</tr>
</tbody>
</table>

During the period between its admission as a state in 1836 and the
abolition of slavery by the Constitution of 1864, Arkansas developed a body
of constitutional law, statutory law, and common law dealing with the
institution of slavery. It was not sufficient for the law merely to recognize that
slavery was legal. The state was obliged to develop detailed rules regulating
the relationship between owner and slave, between slave and third parties, and
between a slave's owner and third parties. These rules had to be fitted into a
broader scheme of criminal, tort, property, and commercial law. Much of the
statutory framework for slavery was laid down in the 1837 session of the
Arkansas General Assembly. The session approved laws dealing with the

8. TAYLOR, supra note 1, at 21-22.
9. TAYLOR, supra note 1, at 47-58 (devoting an entire chapter to the demographics of the
slavery population in Arkansas).
10. The first General Assembly was elected in August of 1836 and met on the second
Monday in September 1836. ARK. CONST. of 1836, Schedule, § 7 and § 8. At that first session
the legislature authorized the governor to appoint two persons to revise and codify the laws of
the state, which at that time consisted of a polygenetic mix of statutes approved by the
legislative bodies of the Arkansas Territory, the Missouri Territory, and the Louisiana Territory.
Pursuant to that authorization, Sam C. Roane and William McK. Ball prepared a code of civil
and criminal laws, which was submitted to the October 1837 session of the General Assembly.
After making some amendments to the proposed codes, the legislature approved and published
the Revised Statutes of Arkansas in early 1838. See the preface to the Revised Statutes of
crimenal prosecution of slaves, dower rights in slaves, the emancipation of slaves, gifts of slaves, slave patrols, runaway slaves, and detailed regulations governing the conduct of slaves and third parties who dealt with slaves. However, it was not possible for the General Assembly to envision and address every legal question spawned by the institution of slavery, and this lack of comprehensive coverage forced the newly created Arkansas Supreme Court to fill in the gaps. Unlike the courts in neighboring Louisiana, the Arkansas court was too grounded in common law tradition to rely on the civil law for assistance. Because slavery was never widespread in Great Britain, the English common law also afforded limited guidance. The Arkansas court did at times compare the master-slave relationship to various relationships known to the common law such as employer-employee, master-apprentice, father-son, and husband-wife, but none of these common law relationships corresponded precisely to that existing between an owner and a slave. To the extent it relied on precedent, the Arkansas Supreme Court looked primarily to the decisions of appellate courts in other slave states, but in several situations, the court established legal precepts that were unique to Arkansas.

This article examines the Arkansas Supreme Court’s development of a common law of slavery during the brief period between statehood in 1836 and the emancipation of slaves in 1864. Articles and books have addressed the

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Arkansas at V-X(1838).

11. ARK. REV. STAT. ch. 44, Art. IV (1838).
12. ARK. REV. STAT. ch. 52, §§ 20-25 (1838).
13. ARK. REV. STAT. ch. 56 (1838).
14. ARK. REV. STAT. ch. 71 (1838).
15. ARK. REV. STAT. ch. 109 (1838).
16. ARK. REV. STAT. ch. 132 (1838).
17. ARK. REV. STAT. ch. 142 (1838).
20. The Emancipation Proclamation issued by President Abraham Lincoln on January 1, 1863, freed slaves within those areas controlled by the United States Army. On January 1, 1863, the vast majority of Arkansas slaves lived in areas under Confederate control and were not officially freed until the adoption of the Constitution of 1864. See Graves v. Pinchback, 47 Ark. 470 (1886). Graves overruled sub silentio Jacoway v. Denton, 25 Ark. 625 (1869), appeal
treatment of slavery by appellate courts in other states, 21 but the Arkansas experience is relatively unmined. 22 When compared with the high courts of states further east, the Arkansas Supreme Court had less opportunity to produce an extensive body of law applicable to slavery. Arkansas was one of the last slave states admitted to the union, and slavery was legal for less than three decades after Arkansas became a state. Moreover, the supreme court was much less active during the antebellum period than it is today. Between 1836 and 1864 it handed down few written decisions written decisions, and only a small percentage of these dealt with slaves. From this small body of case law, it is nevertheless possible to distill much about the court’s attitude toward a group of Arkansans who by 1860 constituted over one fourth the population of the state.

A principal legal question confronted by courts in those states in which slavery was legal was whether to treat slaves as property or as human beings. Aristotle classified slaves as “thinking property,” 23 and the term aptly portrays the dilemma faced by courts in the slave states. Slaves were property that could be bought, sold, pledged, gifted, devised, and seized by creditors, but slaves were also rational human beings, capable of independent thought and action, and these qualities created legal questions that did not arise with respect to other forms of property. As the court itself put it in a postbellum reference to the slave, “[h]e was a person and property, and capable of being acted upon by law in either capacity, and therefore entitled to a position before the law that could not be claimed for property that was purely chattel . . . .” 24 The Arkansas Supreme Court was not consistent in its resolution of the property versus person dilemma. In most situations it treated slaves as property, but it sometimes recognized that slaves were also persons. Ironically, when the court

dismissed, 154 U.S. 583 (1872), which had held that Arkansas slaves in Arkansas became free as they came under the control of the United States government.


22. U.S. District Judge Jacob Trieber published an article entitled Legal Status of Negroes in Arkansas Before the Civil War, 3 PUB. ARK. HIST. ASS’N. 175 (1911), but it deals primarily with statutory law regulating slaves and free blacks. See also, Florence R. Beatty-Brown, Legal Status of Arkansas Negroes Before Emancipation, 28 ARK. HIST. Q. 6 (1969).

23. The phrase “thinking property” is used in Watson, supra note 18, at 1335. He attributes it to ARISTOTLE, POLITICS, Bk. 1, Ch. 4-6. See also id. at Bk. 1, Ch. 13.

did choose to treat a slave as a person, the result was usually detrimental to the slave.

The court’s response to the dual character of slaves was conditioned by several concerns. Foremost in the minds of the justices was the need to justify and preserve slavery as a legal institution. By the 1830s the southern states had developed a siege mentality on the issue of slavery, and Arkansas was swept up in the political passions rocking the country at the time it became a state. The state’s major newspapers bombarded their readers with proslavery editorials throughout the territorial and antebellum periods. After 1835 the Arkansas Gazette refused to print letters questioning slavery because “mischievous consequences” might result if the legality of slavery was questioned. Rumors of slave uprisings in eastern Arkansas kindled at least two pogroms in which both blacks and whites suspected of abolitionist sympathies were killed by mobs. The Methodist Church in particular was considered “soft” on slavery, and several Methodist ministers were lynched for questioning the morality of slavery. By 1858, the need to present a monolithic front on the slavery issue prompted the Arkansas General Assembly to pass a statute making it a crime for a free person “by speaking or writing, [to] maintain that owners have not right of property in their slaves . . . .” This repressive political climate placed enormous pressure on the Arkansas Supreme Court to defend slavery as a legal institution when addressing slave-related issues.

A second theme pervading many of the court’s opinions was central to its defense of slavery—a belief that blacks were inferior to whites. Southern

25. According to one school of history, support in the south for slavery solidified as a result of four events in the period 1829-1832: the publication in 1829 of a pamphlet by David Walker, a free black, urging an armed revolt by slaves; the publication in 1831 of the first edition of William Lloyd Garrison’s abolitionist magazine The Liberator; the Nat Turner rebellion in 1831, which led to the death of 60 whites; and the Virginia Slavery Debates of 1831-32. Nash, A More Equitable Past? Southern Supreme Courts and the Protection of the Antebellum Negro, supra note 21, at 212 (1970).
26. DOUGAN, supra note 7, at 154.
27. DOUGAN, supra note 7, at 167.
28. TAYLOR, supra note 1, at 172-173.
29. DOUGAN, supra note 7, at 167.
slavery was often referred to as the “peculiar institution,” and it was peculiar in one respect. Slavery had existed since antiquity in many cultures, but historically slavery had nothing to do with race. Slavery in the American South, as well as elsewhere in the New World, was based on race, and the theoretical justification for the enslavement of Africans was their alleged inferiority to other races.31 The justices of the Arkansas Supreme Court sincerely believed that:

There is a striking difference between the black and white man, in intellect, feelings and principles. In the order of providence, the former was made inferior to the latter; and hence the bondage of the one to the other. For government and protection, the one race is dependent on the other. It is upon this principle alone, that slavery can be maintained as an institution.32

Many of the court’s decisions clearly and frankly reflect its perceived need to maintain the white racial dominance that underpinned slavery.

A third major concern of the court was protection of the property interest of the slave owner. Slaves were extremely valuable property. The average Arkansas slave was worth as much as an eighty acre farm or a substantial city residence.33 It is hardly surprising that the supreme court would approach many legal questions involving slaves from the economic perspective of the slave owner. The court was only indirectly responsible to the general electorate. It consisted of three justices elected to eight year terms by the General Assembly.34 During the years prior to the Civil War, the plantation owners of eastern and southern Arkansas dominated the legislative branch of government35 and were doubtlessly in a position to ensure that justices named to the court were sympathetic to the property interests of slave owners. Moreover, many of the early supreme court justices were themselves the owners of slaves. Daniel Ringo, who served as Chief Justice of the court from 1836 to 1844,36 and David Walker, who was Associate Justice from 1848 through 1855,37 were both listed in the 1850 census as major owners of

33. TAYLOR, supra note 1, at 78-79, n. 79. Taylor also notes that slaves were more valuable in Arkansas than in states further east. TAYLOR, supra note 1, at 78.
34. ARK. CONST. of 1836, art. VI, §§ 2 & 7.
35. According to the official history of the state, “Four or five hundred planters who owned most of the slaves had practically run the political affairs of the State” during the pre-Civil War period. ARKANSAS AND ITS PEOPLE 115 (David Y. Thomas ed., 1930). Dougan attributes the political ascendancy of the planters to the fact that they were the wealthiest and best educated group in a primarily frontier economy. DOUGAN, supra note 7, at 153, 172.
37. Id. at 451.
slaves. Chief Justice Elbert H. English, who served from 1854 until the
adoption of the Constitution of 1864, was also a slave owner.

A final concern that influenced the court’s decisions was the tension
between those Arkansans who owned slaves and those who did not. Even
though the slave population of Arkansas grew steadily during the period before
the Civil War, the vast majority of white Arkansans did not own slaves. Even
in 1860, when the slave population peaked, less than four percent of the white
population owned slaves. Since those who did not own slaves tended to be
poor and unlettered, they left a meager written record of their attitude toward
slavery, but they almost certainly envied and resented their richer, slave-
owning neighbors. Slave owners were the primary proponents of statehood,
and evidence of the division between those who owned slaves and those who
did not was apparent in an anonymous 1835 letter to a Little Rock newspaper
opposing statehood:

Of the whole white population, for one who has twenty slaves, we will find
you twenty who have no slaves. The one, then, will be the sufferer by the
abolition of slavery in the Territory, and to enable him to loll in ease and
affluence and to save his own delicate hands from the rude contact of the
vulgar plow, the twenty who earn their honest living by the sweat of the
brow are called upon with the voice of authority assumed by wealth to
receive the yoke. They must consent to a tenfold increase of tax for the
support of a state government, because my lord is threatened with danger
of desertion from his cotton field if we remain as we are.

It would go too far to suggest that any sizable number of Arkansans
favored the abolition of slavery. Most probably supported slavery, particularly in light of the political climate discussed above, but a non-slaveowner
who was the victim of a crime or tort committed by a slave was unlikely to be
overly concerned about the property interests of the slave’s owner. Although
somewhat insulated from the electorate by the manner in which they were
selected, supreme court justices could not entirely ignore the interests of those
Arkansans who did not own slaves when deciding slave-related questions.

38. Robert B. Walz, Arkansas Slaveholdings and Slaveholders in 1850, 12 ARK. HIST. Q. 38 (1953) (containing a directory of 522 Arkansans who owned twenty or more slaves in 1850).
40. TAYLOR, supra note 1, at 54.
41. TAYLOR, supra note 1, at 56. Out of an 1860 white population of 324,143, there were
11,481 slave owners, or approximately 3.5 percent. TAYLOR, supra note 1, at 56. The number
of persons who were members of slave owning families was obviously greater than 3.5 percent.
42. TAYLOR, supra note 1, at 38 (quoting Times (Little Rock), June 13, 1835).
43. Dougan states that support for slavery in Arkansas cut across class lines. DOUGAN, supra note 7, at 154.
II. Slaves and the Criminal Law

For purposes of the criminal law, a slave was regarded as a person and was subject to prosecution by the state for breaking the law. The supreme court explained the reason for so treating slaves in an 1856 case:

The slave, however, is a human being—he is regarded as a rational creature—a moral agent. He, as well as the master, is the subject of government and amenable to the laws of God and man.\(^44\)

But a slave was also a valuable piece of property, and a criminal prosecution of a slave placed in jeopardy both the person of the slave and the property of the owner. For this reason, the criminal codes of many slave states established special procedures to protect the property interests of owners when slaves were prosecuted for crimes. In Louisiana, slaves accused of crimes were tried by a special court consisting of two justices of the peace and ten slave owners.\(^45\) South Carolina employed a similar system but with a smaller number of slave owners.\(^46\) Virginia tried slaves before four or more justices of the peace who could not impose the death penalty unless a majority of the court, but no less than four justices, concurred.\(^47\) Other states provided for slaves to be tried by juries but took steps to ensure that slave owners were represented on juries. North Carolina required all jurors in a slave's trial to be slaveholders.\(^48\) When it was admitted to the Union in 1791, Tennessee initially followed the North Carolina model but was forced to abandon the requirement in 1836 when it proved difficult to find twelve slaveholders to hear every case in which a slave was accused of a crime.\(^49\) In 1836 Alabama adopted a statute requiring half of the panel summoned for jury duty to be slave owners; this was later modified to require two-thirds of the jurors actually chosen to be slaveholders.\(^50\)

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46. Capital offenses were heard by two justices of the peace sitting with three to five slave owners. One justice of the peace and two slave owners could hear noncapital cases. The law was later changed to require a minimum of three slave owners. Thomas D. Morris, *Southern Slavery and the Law*, 1619-1860 (1996), at 215.
47. Morris, supra note 46, at 214. A. Leon Higginbotham, Jr. & Anne F. Jacobs, *The 'Law Only as an Enemy': The Legitimization of Racial Powerlessness Through the Colonial and Antebellum Criminal Laws of Virginia*, 70 N. C. L. Rev. 969, 984-87 (1992). In 1819 the law was amended to require a unanimous verdict to impose a death sentence. Id. at 993.
49. Morris, supra note 46, at 218.
50. Morris, supra note 46, at 218.
In contrast to most southern states Arkansas did not establish special courts or procedures to try slaves accused of crimes. Article IV, section 25 of the Constitution of 1836 specifically guaranteed slaves the right to trial by an impartial jury, and the first General Assembly adopted a statute providing that slaves who committed felonies "shall be tried in the same court, and the same rules of evidence observed, as in cases of white persons committing the like offense." The law did not mandate that slave owners be represented on juries that tried slaves. Such a requirement would have posed problems in the northwest part of the state where the number of slave owners was relatively low. More importantly, it would have deprived slaves of the "impartial jury" guaranteed by the Arkansas Constitution.

Article IV, Section 25 of the Constitution of 1836 also required courts before whom slaves were tried to assign them counsel for their defense. Arkansas was one of the few states in which a slave's right to assigned counsel was constitutionally guaranteed. Under Article II, § 11 of the Constitution free persons charged with offenses in Arkansas courts had the right to retain counsel of their choice, but the constitution was silent on their right to assigned counsel. Neither the statutory law nor the case law clearly identified who

51. Since the proposed constitution was presented to Congress at the same time as the petition for statehood, the purpose of this provision may have been to assuage opposition to admission of Arkansas as a slave state. The sponsor of the legislation admitting Arkansas, then senator and future president James Buchanan, argued that by securing for slaves the right to a trial by jury, the proposed constitution placed slaves on an equal footing with whites. Taylor, supra note 1, at 45.

52. Ark. Rev. Stat. ch. 44, art. III, § 6 (1838). In trials of slaves, the rules of evidence were relaxed in at least one respect. A slave was not a competent witness in a criminal trial of a white person, but a slave could testify when the accused was another slave. Id. at ch. 158, § 25. Permitting slaves to testify for and against other slaves was probably prompted by practical considerations rather than concerns about procedural fairness. Barring the testimony of slaves in the criminal trials of other slaves would in many cases exclude the testimony of the only witnesses to a crime. See Thomas D. Morris, Slaves and the Rules of Evidence in Criminal Trials, 68 Chi.-Kent L. Rev. 1209, 1215 (1993).

53. Several states had statutes requiring the owner to furnish counsel. Morris, supra note 46, at 252. Virginia required that counsel be assigned to defend slaves accused of capital offenses. In Higginbotham & Jacobs, supra note 47, at 1014, the authors suggest that the Virginia legislature provided counsel to slaves in capital cases because of concern about the state's obligation to reimburse owners of executed slaves. Arkansas did not compensate the owner of an executed slave, so it is unlikely that a similar concern explains the right of Arkansas slaves to appointed counsel. By including the special protection for Arkansas slaves accused of crimes in the constitution, the drafters of the proposed constitution may have hoped to make the proposed document more attractive to Northern members of Congress. See supra note 51.

54. The General Assembly did pass legislation requiring a trial court to assign counsel to any person charged with a felony who was unable to employ counsel. Ark. Rev. Stat. ch. 45, § 112 (1838). In Brown v. State, 12 Ark. 623 (1852), the court ruled that when the trial record was silent, it was presumed that the trial court had assigned counsel to defendant.
paid for the legal defense of a slave, but in all likelihood the attorney fees were
taxed as a cost of the case. This meant that the county paid the cost of defense
if the slave was acquitted. If the slave was convicted, the slave owner was
offered the opportunity to pay costs, and if he failed to do so, the slave was
sold and the costs paid from the proceeds of the sale. If a slave was convicted
of a capital offense and executed, the county paid the costs. In any event, as
a result of the constitutional guarantee of counsel, slaves accused of crimes in
Arkansas courts were often defended by the ablest members of the Arkansas
bar.

A. Slaves as Criminal Defendants in Capital Cases

The Constitution of 1836 specifically addressed the imposition of capital
punishment on slaves. It provided that any slave convicted of a capital offense
was to “suffer the same degree of punishment as would be inflicted on a free
white person, and no other.” In an 1850 opinion, the supreme court
construed the provision as requiring that the same method of capital punish-
ment be applied to all persons, whether slave or free:

If the offence charged against [a slave] had been declared capital, whether
committed by a white man or a negro, but that, in the case of the former,
the mode of execution should be by hanging by the neck, whereas the latter
should first be scourged, and then burned, and finally destroyed by
hanging, there can be no doubt but that such act would be unconstitutional
and consequently void. The provision was doubtless inserted in the
constitution from a feeling of humanity towards the unfortunate African
race, and in order to secure them against that barbarous treatment and
excessive cruelty which was practiced upon them in the earlier period of
our colonial history.

The court went on to rule, however, that the constitution did not preclude the
legislature from identifying offenses that were punishable by death only when
committed by slaves.

The General Assembly exercised sparingly the power to single out slaves
for capital punishment. Responding no doubt to white concern with sexual

59. Id. at 404-405.
60. Id. at 404.
61. By contrast, slaves in Virginia could receive the death penalty for at least sixty-eight
offenses that were not considered capital offenses when committed by a white person.
relations between black men and white women, the legislature made it a capital offense for a person of African descent to commit certain sexual offenses. The antebellum criminal code imposed the death penalty on whites convicted of forcible rape of a white woman, but whites convicted of statutory rape or sodomy were punished by imprisonment for not less than five years nor more than twenty-one years. The code provided, however, that:

If any negro or mulatto shall commit any of the before enumerated offenses, which are punishable by death, or shall commit the infamous crime against nature, with man or beast, he shall be punished by death, and if such negro or mulatto shall attempt to commit any of such offenses, although he may not succeed, on a white woman, he shall suffer death on conviction thereof.

Slaves accused of capital offenses fared rather well before the supreme court. During the period that slavery was legal in Arkansas, the court heard six appeals by slaves sentenced to death for crimes against white persons. It upheld only one conviction; the other five were reversed. This success rate

Higginbotham & Jacobs, supra note 47, at 977.

After passage of the Penitentiary Act of 1838 persons convicted of second degree murder were punished by imprisonment for not less than five nor more than twenty-one years. Gould's Digest ch. 51, pt. IV, art. I, § 8 (1848). Since slaves were not subject to imprisonment in the penitentiary, a slave could not be convicted of second degree murder. The inability of the jury to convict a slave of the lesser included offense of second degree murder probably increased the chances that a slave accused of murder would receive the death penalty.

62. English's Digest ch. 51, pt. IV, art. IV, § 2 (1848); Gould's Digest, ch. 51, pt. IV, art. IV, § 2 (1858). The Penitentiary Act, passed on December 17, 1838, provided that a white man convicted of forcible rape was subject to imprisonment. The punishment for forcible rape by a white man was changed to death by legislation approved December 14, 1842. See Dennis v. State, 5 Ark. 230 (1843).

The forcible rape statute did not specifically exclude slave women from its protection, but Taylor is clearly correct when he states, "Legally, there was no such thing as the rape of a slave woman by a white man." Taylor, supra note 1, at 201. See also Morris, supra note 46, at 306. Slaves in other states were sometimes charged with the rape of a slave woman, Morris, supra note 46, at 306, but there is no reported case of such a prosecution in Arkansas.

63. Statutory rape was defined as sexual intercourse with a female under the age of puberty. English's Digest ch. 51, pt. IV, art. IV, § 4 (1848); Gould's Digest ch. 51, pt. IV, art. IV, § 4 (1858).

64. Neither sodomy nor buggery was defined by statute.

65. English's Digest ch. 51, pt. IV, art. IV, § 5 (1848); Gould's Digest ch. 51, pt. IV, art. IV, § 5 (1858).

66. Penitentiary Act of December 17, 1838, codified as English's Digest ch. 51, pt. IV, art. IV, § 9 (1848); Gould's Digest ch. 51, pt. IV, art. IV, § 9 (1858).

67. Slaves accused of capital crimes were often the victims of vigilante justice. Taylor describes several lynchings of slaves who allegedly committed murder or rape. Taylor, supra note 1, at 235-36.

68. One slave was tried twice for a capital offense and successfully appealed both convictions. See infra text accompanying notes 112-124.
is surprising, particularly when compared with the reversal rate for blacks sentenced to death in the years since the Civil War.  

Only one of the six death penalty appeals heard by the high court involved the prosecution of a slave for murder. In *Austin v. State* the defendant was in the process of escaping from his owner when he was stopped by the owner and a group of white men. The owner ordered Austin to lay down an axe he was carrying. Austin replied that he would not be whipped by the owner or anyone else, and that he would kill the first man that attempted to take him. As Austin continued talking with his owner, one of the other white men, Hiram Payne, attacked Austin from behind with a pine plank. Austin warded off Payne's blow with his left arm, and with his right arm struck Payne in the head with the axe, inflicting a wound from which Payne later died. Austin was convicted of murder and sentenced to death.

Austin appealed, citing among other errors the trial court's refusal to permit his owner to testify as a defense witness. During the twelve months before the *Austin* appeal, the supreme court had ruled in three different civil cases that a person with a pecuniary interest in the outcome of a civil case was not a competent witness. The question raised by Austin's appeal was whether the pecuniary interest rule should be extended to a criminal case. If a slave was simply another type of property, the solution was straightforward—the pecuniary interest rule should apply to bar the testimony of the slave's owner. The problem was that applying the pecuniary interest rule to criminal cases would primarily impact slaves accused of criminal offenses. Rarely would a witness in the prosecution of a free person have the type of direct pecuniary interest in the outcome of the prosecution that would bar the witness's testimony. The *Austin* opinion conjectured that a father might have an interest in the services of a minor son accused of a crime, or a master might have an interest in the future services of an apprentice. By contrast, the pecuniary

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69. During the antebellum period the court heard four appeals from free persons convicted of capital offenses. It reversed convictions in Dunn v. State, 2 Ark. 229 (1840) and Bivens v. State, 11 Ark. 455 (1851); and affirmed death sentences in Shropshire v. State, 12 Ark. 190 (1851) and Doghead Glory v. State, 13 Ark. 236 (1853).

70. 14 Ark. 555 (1854).
71. *Austin*, 14 Ark. at 559.
72. *Id.*
73. *Id.*
74. *Id.*
75. *Id.*
76. *Id.* at 558.
77. *Id.* at 563.
78. Scott v. Jester, 13 Ark. 437 (1853); Turner v. Huggins, 14 Ark. 21 (1853); Carnall v. Wilson, 14 Ark. 482 (1854).
79. *Austin*, 14 Ark. at 564-565.
interest rule would bar the owner’s testimony in every criminal prosecution of
a slave.\(^\text{80}\)

The supreme court ruled that the trial judge erred when he barred
testimony by Austin’s owner, but whether it did so out of concern for Austin’s
procedural rights or his owner’s procedural rights is unclear. The court
purported to be concerned about the fairness of denying to a slave the benefit
of his owner’s testimony because it quoted the following language from a
Mississippi decision:

The master has the custody of his slave and owes to him protection, and it
would be a rigorous rule indeed if the master could not be a witness in
behalf of his slave. What would be the condition of the slave, if the rule
which binds him to perpetual servitude, should also create such an interest
in the master as to deprive him of the testimony of that master? The
hardships of such a rule will illy (sic) comport with that humanity which
should be extended to that race of people. In prosecutions for offences,
negroes are to be treated as other persons: and although the master may
have had an interest in his servant, yet the servant had such an interest in
the testimony of his master as will outweigh mere pecuniary consider-
ations, nor can he be deprived of the benefit of that testimony by the mere
circumstance that in a civil point of view he was regarded by the law as
property.\(^\text{81}\)

This passage, which emphasizes fairness to the slave as a person, was
counterbalanced by a second quote from a Tennessee decision which suggests
that the court was also concerned with protecting the property rights of the
slave owner:

[T]he law, upon high grounds of public policy, pretermits for a moment
that relation (of slave and master), takes the slave out of the hands of his
master, forgets his claims and rights of property, treats the slave as a
rational and intelligent human being, responsible to moral, social and
municipal duties and obligations and gives him the benefit of all the forms
of trial which jealousy of power and love of liberty have induced a freeman
to throw around himself for his own protection. If then the master knows
any fact tending to save the life of the slave, shall society, who have taken
from him the slave for the purpose of trial, say to him, not that you are
master, and we will weigh your credit, but you are master and shall not
speak at all! On grounds of public policy, of common humanity, of

\(^{80}\) Barring the owner’s testimony could cut both ways. In some cases, the owner would
be the best, if not the only, witness to a slave’s crime.

\(^{81}\) *Austin* at 566 (quoting Isham v. State, 7 Miss. (6 How. Rep.) 35 (1841)).
absolute necessity, the master must be held to be competent as a witness for or against the slave.\textsuperscript{82}

The defense in \textit{Austin} also challenged the trial court’s instruction to the jury distinguishing murder from manslaughter.\textsuperscript{83} Austin struck the blow that killed Payne after the latter attacked him with a stick. Under Arkansas law, then and now, an assault and battery against the defendant was considered provocation sufficient to reduce murder to manslaughter.\textsuperscript{84} The trial court, however, had given an instruction to the effect that if Austin was acting in rebellion to his master, then he was guilty of murder “even although the striking of the defendant by Payne would have been evidence to show an extenuation of the killing of Payne by the defendant from murder to manslaughter.”\textsuperscript{85}

The lower court’s manslaughter instruction in \textit{Austin} provided a second opportunity for the supreme court to address the property versus person issue. If a slave was a rational human being, answerable to the state when he committed a crime, then his conduct should be excused or mitigated when he succumbed to normal human passions and emotions. But the court rejected this analysis in favor of one that stressed the need to safeguard the slave’s character as property:

\begin{quote}
[T]he tranquility of the public at large, the security of the master, the value of the slave as property, and the just protection and comfort of the slave himself, all depend so essentially upon his entire subordination to the lawful authority of his master, that we would hesitate long before we would declare otherwise than that the principle, laid down in this charge, was any other than a sound general principle of the common law of slavery, as it exists in our slave States. . . . And when a slave is in rebellion to the lawful authority of his master, whatever force may be necessary to bring him within the pale of subordination, graduated upon principles of law and humanity, let it come from what quarter it may, invades no right of the slave, and consequently does him no wrong as the law can recognize as a mitigation or excuse for crime.\textsuperscript{86}
\end{quote}

\begin{itemize}
\item \textsuperscript{82} Quoting from Elijah v. State, 20 Tenn. 99 (1 Hum. 102) (1839).
\item \textsuperscript{83} \textit{Austin}, 14 Ark. at 567.
\item \textsuperscript{84} \textsc{English’s Digest} ch. 51, pt. IV, art. II, § 2 (1848) provided: “Manslaughter must be voluntary, upon a sudden heat of passion, caused by provocation, apparently sufficient to make the passion irresistible.” By providing that a slave convicted of manslaughter was to be imprisoned not exceeding seven years, the criminal code recognized that a slave could be convicted of manslaughter. \textit{Id.} at ch. 51, pt. XII, § 9.
\item \textsuperscript{85} \textit{Austin}, 14 Ark. at 567.
\item \textsuperscript{86} \textit{Austin}, 14 Ark. at 567-68 (citation omitted).
\end{itemize}
Subordination of slaves was too essential to the preservation of the institution of slavery for the law to recognize that slaves were persons, subject to the same emotions and reactions as white persons. Two consequences flowed from the court’s decision to emphasize the importance of slaves as property. First, any white person, not just the slave’s owner, was legally justified in using physical force to overcome a slave’s rebellion. Second, it was very unlikely that a slave who killed a white person would be convicted of voluntary manslaughter. Since a slave could not be convicted of second degree murder under the Arkansas criminal code, this meant that a jury considering the fate of a slave charged with murder had two choices—convict of a capital offense or acquit.\(^{87}\)

The other five death penalty appeals heard by the antebellum court involved convictions of slaves for sexual offenses against white women. Although it upheld a conviction for rape in *Dennis v. State*,\(^{88}\) it reversed four convictions for attempted rape.\(^{89}\) The first reversal occurred in *Sullivant v. State*.\(^{90}\) The prosecutrix testified that she awoke in the middle of the night and upon extending her hand felt some person over her “in the act of committing a rape.”\(^{91}\) When she touched the intruder, he sprang from the bed and ran out the door.\(^{92}\) The defendant was later brought to the prosecutrix’s home where his feet were determined to fit the tracks left by the intruder.\(^{93}\) In a statement recorded by a justice of the peace, the defendant admitted having entered the woman’s house on the evening of the incident and staying about one hour.\(^{94}\) One of the guards who conducted the defendant to jail following his arraignment testified that the defendant admitted his guilt even though he had pled not guilty at the arraignment.\(^{95}\) The jury convicted Sullivant, and the trial court sentenced him to be hanged.\(^{96}\)

On appeal the supreme court reversed the conviction, citing a number of procedural errors in an opinion that strikes the modern reader as unduly formalistic. The indictment was defective because it charged that the defendant

\(^{87}\) Morris, who examined thousands of antebellum homicide cases, could not find a single instance of a slave being convicted of the manslaughter of a white person. Every case in which a slave was charged with the homicide of a white person ended in a murder conviction or a not guilty verdict. *Morris, supra* note 46, at 292.

\(^{88}\) 5 Ark. 230 (1843).

\(^{89}\) As explained *supra* text accompanying note 66, attempted rape was a capital offense only when committed by a person of African descent.

\(^{90}\) 8 Ark. 400 (1848).

\(^{91}\) *Id.* at 401.

\(^{92}\) *Id.*

\(^{93}\) *Id.* at 402.

\(^{94}\) *Id.* at 402-403.

\(^{95}\) *Id.* at 403.

\(^{96}\) *Id.* at 401.
“did feloniously attempt to commit a rape on one Emeranda Clemens, a white woman.” This failed to charge the facts and circumstances constituting the crime with sufficient certainty to apprise the defendant of the charges against him.

The indictment . . . not only fails to charge that the defendant assaulted Emeranda Clemens, and attempted to ravish and carnally know her forcibly and against her will, but it utterly fails to charge any assault whatever. These are facts that enter into the very essence and definition of the crime, and an indictment in which they are not alleged is consequently a mere nullity.

The court also found that the evidence presented at trial was not sufficient to prove the crime of rape. Clemens testified that the party who invaded her home attempted to rape her. This the court characterized as a conclusion of law which invaded the province of the jury. The witness should have simply stated the facts, and allowed the jury, under instructions from the court, to determine whether those facts constituted an attempted rape. Finally, the court termed the conviction deficient because there was no evidence that the alleged offense took place in Dallas County.

Two years later the court reviewed a conviction in Charles v. State involving somewhat similar factual circumstances. The defendant in that case was a slave charged with the attempted rape of a fourteen year old white girl. The victim testified that she was sleeping on the floor of a house with several other young school girls, when a partially undressed man took hold of her shoulder and turned her over. She grabbed the man and called for help, but the man pulled away from her and left the room. The owner of the house in which the girl was sleeping testified that he was awakened by the girl's cries and upon entering the room discovered the front door partially open. He followed bare footprints in the mud from the door to a cabin about twenty

97. Id. at 404-05. During these early years, indictments were strictly construed. See, e.g., State v. Hand, 6 Ark. 165 (1846), in which the court ruled that an indictment omitting the defendant's last name in one allegation was defective even though the defendant's full name was included at two other places in the indictment. Id. at 166-167. Defective indictments led to the reversal of slave convictions in a number of other southern states. See Nash, Fairness and Formalism in the Trials of Blacks in the State Supreme Courts of the Old South, supra note 21, at 79-81.

98. Sullivant, 8 Ark. at 406.

99. Id.

100. 11 Ark. 389 (1850).

101. Id. at 390.

102. Id. at 392.

103. Id.

104. Id. at 393.
paces away in which he found the defendant feigning sleep. With the assistance of his son and a minister who was also spending the night in the house, the owner tied the defendant to a post and sent for the defendant’s owner. While awaiting the arrival of the owner, the defendant admitted to taking two $5 gold pieces from pants in the same room several nights earlier. The following morning, while he was still tied with a rope and his legs were chained, the defendant told a doctor that he had entered the room in which the girls were sleeping to wake the owner of the house and warn him that someone was at the barn stealing corn. Based on this testimony the jury convicted the defendant, and the court sentenced him to be hanged.

The defendant appealed, and the supreme court reversed the conviction because the evidence failed to show that the defendant intended to use force against the victim if she resisted his advances:

It is certain that the accused in this case used no force, nor is it probable, from all the surrounding circumstances, that the idea of force entered into his original design, and in case his intention was to effect his purpose while she was asleep, the authority cited shows that he is not guilty of the offence charged against him. We do not think that the testimony evinced that settled purpose to use force, and to act in disregard of the will of the prosecutrix, which the law contemplates as essential to constitute the crime.

This reasoning can be contrasted with that in decisions rendered after the Civil War in which the court upheld attempted rape convictions despite evidence that the victim was asleep at the time of the alleged act.

Pleasant v. State, the last of the attempted rape cases, was appealed twice to the supreme court. In the first trial the prosecutrix, whose name was Sophia Fulmer, testified that the defendant came to her house, threw her to the ground several times, threw her on the bed, pulled her clothes over her head, and got upon her. By drawing up her legs and otherwise resisting him, she was able to prevent his penetrating her body. The defendant then left, and

105. Id. at 393-94.
106. Id. at 389.
107. Id.
108. Id. at 395.
109. Id. at 391.
110. Id. at 410.
111. Harvey v. State, 53 Ark. 425, 14 S.W. 645 (1890); Maupin v. State, 54 Ark. 5, 14 S.W. 924 (1890).
112. 13 Ark. 360 (1853).
113. Id. at 363.
114. Id.
Fulmer ran about a half-mile to a mill and reported the incident.\textsuperscript{115} There was also testimony showing that Fulmer and her husband agreed to drop the prosecution in exchange for the payment of $125 by the slave’s owner.\textsuperscript{116} The jury returned a verdict of guilty, and the trial court imposed a death sentence.\textsuperscript{117}

On appeal, the supreme court reversed the conviction for several reasons, the most important of which was the failure of the state to present evidence that the prosecutrix was white. The court conceded "a strong moral conviction"\textsuperscript{118} that the prosecutrix was a white woman and agreed that the jurors observed Fulmer when she testified and might have inferred her race from their own inspection of her appearance.\textsuperscript{119} The court noted, however, that "a fair complexion is not inconsistent with the taint of negro blood"\textsuperscript{120} and ruled that the state must offer some testimony that Fulmer was white: "Her own statement, to that effect, or that of any witness who knew her, though matter of opinion founded on her appearance, might be sufficient to satisfy the allegation of the indictment."\textsuperscript{121}

On remand, the defendant was successful in getting venue changed to Ouachita County. Fulmer’s testimony regarding the alleged attack was generally consistent with her testimony in the first trial. The alleged attempt by the slave’s owner to settle the matter privately was more extensively developed than in the first trial. The owner negotiated with Fulmer’s husband and a man named Landers, to whom the husband was indebted. Fulmer and her husband eventually agreed not to appear against the defendant in exchange for the payment of $50 to Landers and $75 to Fulmer and her husband. The owner and Landers went to authorities to stop the prosecution but were unsuccessful in getting the charges dropped.

In the second trial the defense strongly attacked the character of the prosecutrix. The court permitted several defense witnesses to testify that her reputation for chastity and virtue were bad, but it ruled out a number of questions designed to elicit testimony of specific instances of improper behavior. The second jury also convicted Pleasant, and the trial court again sentenced him to be hanged.

In the second appeal the defense raised numerous pro forma objections to rulings or instructions of the trial court, all of which were rejected by the supreme court.\textsuperscript{122} The defense also objected to the court’s refusal to permit

\textsuperscript{115} Id.
\textsuperscript{116} Id. at 365.
\textsuperscript{117} Id. at 369.
\textsuperscript{118} Id. at 375.
\textsuperscript{119} Id. at 376.
\textsuperscript{120} Id. at 376.
\textsuperscript{121} Id.
\textsuperscript{122} Pleasant v. State, 15 Ark. 624 (1855).
testimony of specific bad behavior by Fulmer. The court, after an extensive
discussion of English authority as well as cases from other American states,
concluded that the defense in a rape prosecution could offer evidence of the
prosecutrix's general reputation for chastity and virtue but not evidence of
specific instances of unchastity or of "criminal connections" with any person
except the defendant.\textsuperscript{123} The trial court had barred at least one defense witness
from testifying about the general character of Mrs. Fulmer for chastity, and the
high court ruled that excluding this evidence constituted reversible error. The
trial court had also excluded the testimony of the slave's owner, presumably
because the owner had a pecuniary interest in the prosecution. Because the
court had recently ruled in \textit{Austin v. State}\textsuperscript{124} that the owner of a slave was
competent to testify was a witness for his slave, this also constituted reversible
error.

In overturning death sentences in these five appeals, the Arkansas
Supreme Court displayed an extraordinary solicitude for the procedural rights
of slaves accused of crimes. One possible explanation for this record is that the
Arkansas high court was genuinely concerned with ensuring procedural
fairness for the slaves. At least two scholars have argued that southern
appellate courts were generally protective of the procedural rights of slave
defendants.\textsuperscript{125} In the absence of an English common law of slavery, the
Arkansas court often looked to the decisions of other slave states for precedent,
and the Arkansas experience may be a reflection of this broader pattern of
concern.

Alternatively, the Arkansas Supreme Court's concern for procedural
fairness to slave owners, not slaves, may explain the unusual appellate success
of slaves convicted of capital offenses. When a slave was convicted of a capital
offense and executed, the owner incurred a large financial loss.\textsuperscript{126} This gave
the owner a substantial incentive to come to the defense of a slave accused of
a capital offense and explains the active involvement of the owner in behalf of
his slave in both \textit{Pleasant v. State}\textsuperscript{127} and \textit{Austin v. State}.\textsuperscript{128} An 1854 letter to the
\textit{Arkansas Gazette - Democrat} indicates that some owners resorted to more

\textsuperscript{123} \textit{Id.} at 648.
\textsuperscript{124} 14 Ark. 555 (1854). The case is discussed \textit{supra} at note 70.
\textsuperscript{125} See Flanigan, \textit{supra} note 21, and Nash, \textit{supra} note 21. This benevolent view of
antebellum appellate courts is questioned in Higginbotham & Jacobs, \textit{supra} note 47.
\textsuperscript{126} Abraham v. Gray, 14 Ark. 301 (1853), describes a slave owner who lost more.
Edwards purchased a slave from Gray by delivering to Gray a promissory note for one thousand
dollars. The slave subsequently killed Edwards and was tried and executed for the murder.
Gray brought suit on the note against Edwards's executor, who defended on the grounds of
failure of consideration. The supreme court ruled that Edwards acquired valid title to the slave
and that his estate was obligated to pay the promissory note. \textit{Id.} at 303-04.
\textsuperscript{127} 15 Ark. 624 (1855).
\textsuperscript{128} 14 Ark. 555 (1854).
radical measures to save their investment in a slave accused of a capital offense:

In order to punish negroes, who are guilty of great crimes, and prevent their masters from running them off before they are convicted, it is necessary to pass a law to pay the master one-half or two thirds of the value of such negroes as are condemned and executed. This is done in most of the States by a tax on slaves, which all slaveholders are ready and willing to pay; but such is our constitution that no tax can be levied for this purpose, on slaves, without at the same time, being levied on all other property, and this would be unjust, therefore the law to pay for slaves has never been passed though much needed.129

Whether for the reason stated in the letter or for other reasons, Arkansas never enacted a procedure for compensating the owners of executed slaves. The fact that owners were not compensated for executed slaves may have inclined the supreme court to insist that the state comply scrupulously with procedural technicalities before it took valuable property from an owner.

B. Slaves as Criminal Defendants in Noncapital Cases

Slaves committed assault, arson, theft, and other crimes that were not punishable by death. Owners or overseers often disciplined slaves for minor offenses without resorting to the courts, but more serious offenses were prosecuted by the state, particularly if the victim was a third party.130 The Arkansas Supreme Court considered several convictions of slaves for noncapital offenses. Even though the slave’s life was not at stake, the appeals often raised the property-versus-person question. When a slave was convicted of a noncapital offense, the owner did not lose valuable property, but was deprived of the slave’s services and might be forced to pay the court costs.131 The Constitution of 1836 did not address the punishment for slaves convicted of non-capital offenses, and criminal code penalties for slaves often differed from those meted out to white convicts. The 1837 General Assembly adopted numerous criminal statutes defining offenses punishable by imprisonment, fine, and public whipping. Initially the law applied these punishments to all persons, whether free or slave.132 However, by 1838 the state built its first

129. ARKANSAS GAZETTE, July 14, 1854, at 2.
130. TAYLOR, supra note 1, at 203. See also MORRIS, supra note 46, at 249-251.
131. Technically, the costs of prosecuting a slave were not assessed against the owner, but a slave convicted of an offense could be sold to pay court costs not paid by the owner. See supra note 55.
132. Only white persons were subject to fines. A slave convicted of an offense punishable by fine could receive only corporal punishment. ARK. REV. STAT. ch. 44, div. VIII, art. III, § 2
penitentiary in Little Rock, and late that year, the legislature passed the Penitentiary Act, which modified the penal code to conform to the availability of a state facility in which to incarcerate prisoners. Section 10 of the Penitentiary Act excepted slaves from imprisonment in the penitentiary and stated that they were to be punished "according to the law heretofore enacted." Because the Penitentiary Act in general lengthened the terms of imprisonment for various noncapital offenses, the effect of the legislation was to subject whites to a longer period of imprisonment than slaves convicted of

(1838).

133. DOUGAN, supra note 7, at 89.
134. Law of December 17, 1838.
135. Id. codified at ENGLISH'S DIGEST ch. 51, pt. XII, § 7 (1848); GOULD'S DIGEST ch. 51, pt. XII, § 7 (1858). After 1849, runaway slaves not claimed by their owners were sent to the penitentiary, but they were held there by the state as slaves for life, not as inmates. GOULD'S DIGEST ch. 162, art. III, § 17 (1858).
the same offense. The following chart\textsuperscript{136} compares the imprisonment applicable to white convicts versus slave convicts during most of the antebellum period:

<table>
<thead>
<tr>
<th>Offense</th>
<th>White Convict</th>
<th>Slave Convict</th>
</tr>
</thead>
<tbody>
<tr>
<td>Voluntary</td>
<td>Not less than 2 years or more than 7 years</td>
<td>Not more than 7 years</td>
</tr>
<tr>
<td>Manslaughter</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Maiming</td>
<td>Not less than 1 nor more than 7 years</td>
<td>Not less than 7 years</td>
</tr>
<tr>
<td>Kidnaping</td>
<td>Not less than 3 nor more than 21 years</td>
<td>Not less than 1 year</td>
</tr>
<tr>
<td>Arson</td>
<td>Not less than 2 nor more than 10 years</td>
<td>Not less than 1 year and 3 hours in pillory</td>
</tr>
<tr>
<td>Burglary</td>
<td>Not less than 3 nor more than 7 years</td>
<td>Not less than 6 months and 39 lashes</td>
</tr>
<tr>
<td>Robbery</td>
<td>Not less than 1 nor more than 15 years</td>
<td>Not less than 1 year; 50 lashes; and 2 hours in pillory</td>
</tr>
<tr>
<td>Larceny</td>
<td>Not less than 1 nor more than 5 years (Not less than 5 nor more than 15 years for horse stealing)</td>
<td>39 lashes; 1 hour in pillory</td>
</tr>
</tbody>
</table>

\textsuperscript{136} The table of punishments is derived by comparing the penalties for various offenses set out in \textsc{Gould's Digest} ch. 51 (1848) with those set out for the same offenses in \textsc{Ark. Rev. Stat.} ch. 44 (1838).
In addition, the General Assembly adopted a number of "police regulations" governing the conduct of slaves. They subjected slaves to criminal prosecution for such conduct as providing liquor to another slave, leaving the premises of their owner without a pass, possessing a firearm without the written permission of their owner, or participating in unlawful assemblies or seditious speeches. Although most police regulations were directed at slaves, several imposed criminal sanctions against white persons who, without the consent of the owner, drank or gambled with slaves, permitted slaves to remain on their property more than four hours, or permitted more than five slaves to gather on their property.

As in the case of slaves charged with capital offenses, the supreme court treated slaves charged with noncapital offenses with a sensitivity to the property interests of slave owners. One example of the court's tendency to protect the property interest of the slave owner was its construction of an 1838 statute which provided:

In all trespasses and offences, less than felony, committed by any slave, on the person or property of another person, the master may compound with the injured person, and punish his own slave, without the intervention of any legal trial or proceeding, and the compounding and satisfaction to the person injured, shall be a bar to any further prosecution.

On its face the statute appears simply to have exempted the parties from any legal prohibitions against giving or accepting compensation for not prosecuting a criminal offense. The language "may compound" suggested that neither the master nor the injured party was obliged to compound. The Arkansas Supreme court, however, interpreted the statute as imposing an affirmative duty on the slave's victim to apply first to the slave's owner for punishment of the slave and compensation for any injury. Only if the owner refused to compound (i.e., to negotiate in good faith with the victim) was the victim free to seek criminal prosecution of the slave. In Bone v. State the court reversed the conviction of a slave for assault and battery of a white woman because the

146. 18 Ark. 109 (1856).
indictment neglected to state and the evidence failed to show that the slave's owner had refused to compound with the injured party.

The slave owner was the primary beneficiary of the court's determination that compounding was a prerequisite to the successful criminal prosecution of a slave for minor offenses. The court conceded this in Bone v. State when it stated:

But, surely, it is reasonable provision of law, that the master should first be applied to, and have an opportunity of punishing his slave, and compensating the injured party for the trespass, before he is subjected to the inconvenience, loss of labor and costs of having the slave arrested, and taken off to Court to go through the forms of a legal prosecution.  

The injured party also profited from the compounding requirement. Although forced to negotiate with the owner before seeking the criminal prosecution of the slave, the victim did receive monetary compensation for the injury as well as the emotional satisfaction of knowing that the slave would be punished by the owner. The only real loser was the slave, who did not escape punishment for his crime because part of the bargained for consideration between owner and victim included the punishment to be inflicted on the slave. In fact, the slave probably had less protection against arbitrary or cruel treatment when punished by private agreement than when punished by the state.

Although the compounding statute did not apply when a slave was charged with a felony, the court invited compounding in felony prosecutions. As discussed above, Pleasant v. State was the prosecution of a slave for the attempted rape of a white woman. Because the attempted rape was a felony, and a capital offense, the duty to compound did not apply. The defense offered evidence showing that the victim and her husband had agreed not to prosecute the slave if the slave's owner whipped the slave and paid the victim $125. The supreme court ruled that the trial court erred by not requiring the victim to answer whether she had offered to drop the prosecution in exchange for money:

If answered in the affirmative, the jury might possibly have inferred, from her own estimate of the injury alleged to have been committed, that it was not worth the forfeit of a human life: or that the motive being mercenary, her story may have been in whole, or in part, a fabrication.

147. *Id.* at 112-13.
148. 13 Ark. 360 (1853).
149. The victim initially wanted $200 for dropping the prosecution, but eventually settled on $125 after the master claimed that he only paid $500 for the slave and could not afford to pay $200 for his release. Apparently, the victim never received even the $125. *Id.* at 365.
150. *Id.* at 378.
The effect of the ruling was to encourage the owner to compound with the victim when his slave was accused of a felony. Even if the attempt to compound was unsuccessful, the fact that negotiations occurred might be used to impeach the testimony of the victim.\textsuperscript{151}

The supreme court balked at a more radical argument, the acceptance of which would have extended the duty to compound to all noncapital offenses by slaves. An 1848 act amended the penal code to define the term "felony" as an offense punishable by death or imprisonment in the penitentiary. This led to some confusion regarding the scope of the duty to compound since slaves were not subject to imprisonment in the penitentiary. The defendant in \textit{Mary v. State}\textsuperscript{152} was a slave charged with arson, and her counsel argued that the duty to compound applied because arson by a slave was not punishable by imprisonment in the penitentiary. The supreme court ruled, however, that arson by a slave was a felony even though slaves were exempt from the punishment used to classify offenses as felonies.\textsuperscript{153} A decision to the contrary would have broadened the duty to compound to include all offenses by slaves other than those punishable by death.

One of the few situations in which the supreme court unequivocally elected to treat a slave as a person rather than property was when a slave asserted the "Nuremberg defense" to a criminal charge—i.e., she was only following orders when she committed the crime. In \textit{Sarah v. State}\textsuperscript{154} a slave was charged with assault and battery on a white child. The trial court refused to permit the slave’s owner to testify that he ordered the slave to strike the child. On appeal, the slave’s attorney argued that by reason of the peculiar relationship of slave to master, only the master was responsible for an offense committed by the slave at the master’s direction.\textsuperscript{155} This defense must have troubled the court. On one hand, the justices had announced in several opinions that the institution of slavery was based on the absolute subordination of slaves,\textsuperscript{156} and they were probably reluctant to endorse a rule suggesting that slaves should question the lawfulness of orders. On the other hand, a white person who was assaulted by a slave or whose property had been stolen or

\textsuperscript{151}. Accepting compensation to abstain from prosecuting a felony was a crime. ENGLISH’S DIGEST ch. 51, pt. VII, art. III, § 6 (1848). However, this did not concern the court in \textit{Pleasant v. State}, and there is no record at the appellate level of a slave owner or a victim being prosecuted for attempting to compound a felony by a slave.

\textsuperscript{152}. 24 Ark. 44 (1862).

\textsuperscript{153}. \textit{Id.} at 49.

\textsuperscript{154}. 18 Ark. 114 (1856).

\textsuperscript{155}. \textit{Id.} at 116.

\textsuperscript{156}. See, e.g., Austin v. State, 14 Ark. 555 (1854) discussed \textit{supra} at note 70, and Brunson v. Martin, 17 Ark. 270 (1856) discussed \textit{infra} at note 164.
burned by a slave would object to a rule that absolved from punishment the slave who successfully pled obedience to orders. In resolving the question, the supreme court examined the common law rules applicable to the husband-wife relationship versus that of master-servant. At that time, Arkansas followed the common law rule that a woman who committed a wrongful act at the command of her husband was not criminally liable for her act. A servant who committed a criminal offense at the direction of his master was liable to both criminal prosecution and civil action. The court opted to apply the master-servant rule with a ringing acknowledgment that the slave was a person:

The slave, however, is a human being—he is regarded as a rational creature—a moral agent. He, as well as the master, is the subject of government, and amenable to the laws of God and man. In all things lawful, the slave is absolutely bound to obey his master. But a higher power than his master—the law of the land—forbids him to commit crime. The mandate of the law extends to every rational subject of the government. None are high enough to claim exemption from its penal sanctions, and none too low to be reached by them. Where the mandate of the law, and the command of the master come in conflict, the obligation of the slave to obey the law is superior to his duty of obedience to his master.

Sarah v. State was unusual because the court decided that treating a slave as a human being was more important than ensuring her subservience to her owner.

157. Permitting the slave to escape prosecution did not leave the victim without a remedy in the criminal courts. The owner of a slave who ordered his slave to commit a crime was also guilty of the crime. Hubbard v. State, 10 Ark. 379 (1850) (upholding the slave owner’s conviction for removing timber from land reserved to schools based on evidence that his slave cut several loads of wood from the land and unloaded the wood at the owner’s house).

158. The common law rule was codified in English’s Digest ch. 51, pt. I, § 8 (1848), which provided:

Married women, acting under the threats, commands or coercion of their husbands, shall not be found guilty of any crime or misdemeanor, if it appear from all the facts and circumstances of the case, that violence, threats, commands or coercion were used; and in such cases the husband shall be prosecuted as principal, and receive the punishment which otherwise would have been inflicted on the wife if she had been found guilty.

This statutory provision probably went further than the English common law, which did not excuse a wife who committed treason, murder, or robbery at the coercion of her husband. See Freel v. State, 21 Ark. 212 (1860) (homicide prosecution in which the court ruled that coercion of the wife was not presumed from the mere presence of her husband at the commission of an offense).

159. Sarah, 18 Ark. at 117. The court went on to conclude that a slave who committed a crime at the direction of the master should not be punished as severely as for a voluntary crime. It ordered that on retrial, testimony that the owner directed the slave to commit the assault and battery should go to the jury in mitigation of the punishment of the slave. Id. at 118.
This result contrasts with that reached in *Austin v. State*, where the court refused to allow a provocation instruction in a homicide prosecution because in that context subordinating a slave to his owner outweighed recognizing the humanity of the slave. The two cases are consistent insofar as the result in each appeased the feelings of third parties—the family of the man killed by Austin and the family of the child assaulted by Sarah. As was usually the case, the recognition in *Sarah v. State* that a slave was a person did not ensure justice for the slave. On the contrary, the holding of the case placed the obedient slave who was ordered by her owner to commit a crime in an untenable position. The slave could obey the owner and risk punishment by the state or disobey the owner and risk punishment by the owner.

C. Slaves as Victims of Crimes

Slaves were undoubtedly the victims of crimes, but the appellate record suggests that in Arkansas such crimes were seldom prosecuted. Not a single case involving the prosecution of a white person for killing or injuring a slave was appealed to the Arkansas Supreme Court. By contrast the appellate records in most other southern states reflect criminal prosecutions of whites for crimes against slaves.

*Brunson v. Martin* sheds some light on the Arkansas Supreme Court’s attitude toward the homicide of a slave. An overseer sued to recover wages from a plantation owner, who refused to pay because the overseer had shot and killed one of the slaves assigned to his supervision. The overseer spent the morning of the homicide drinking at a store near the plantation, where he boasted that “he would make the negroes obey him, or he would kill them.” At about two or three in the afternoon the overseer approached a slave working

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160. 14 Ark. 555 (1854). *See supra* note 70.
161. *Austin*, 14 Ark. at 567.
162. There are newspaper reports of white men being prosecuted for the murder of slaves. *Ark. Gazette*, March 11, 1829, at 3 (reporting that a man in Chicot County prosecuted for murder of his slave); *Ark. Gazette*, December 22, 1830, at 3 (reporting that a Little Rock man held in jail for killing “a young and valuable” slave); *Ark. Gazette*, July 15, 1847, at 2 (reporting that a Johnson County man bound over on $5,000 bond for shooting his own slave).
164. 17 Ark. 270 (1856).
165. *Id.* at 274.
in the field and with a whip in his hand told the slave that he had "come for his shirt," indicating his intention to whip the slave. The slave replied that "he had pulled off his shirt to the last overseer." The overseer drew a pistol and told the slave that he "had come for his shirt, and intended to have it or hurt him." Saying "shoot and be damned," the slave advanced on the overseer with cotton in one hand and nothing in the other. The overseer then shot the slave three times, killing him. The plantation owner promptly fired the overseer, who then sued the owner for the value of his services rendered prior to his discharge. The owner responded by seeking to recoup the damages he sustained through loss of the slave. The case was submitted to a jury with an instruction that the plantation owner was entitled to recoup the value of the slave if the overseer "negligently and without necessity" killed the slave. The jury returned a verdict for the overseer, and the plantation owner appealed.

The supreme court affirmed the jury's verdict. It cited Austin v. State for the proposition that a slave owner, his representative, or even a complete stranger had an absolute right to "overcome by proper means, graduated upon principles of humanity and law, the slave's rebellion against the lawful authority of his master." Although the court expressed some reservations about the verdict, it ruled that the trial court's instruction essentially conveyed this standard to the jury, and application of the standard to the particular facts of the case was the function of the jury. The holding failed to protect the property rights of the slave owner, but only because the court endorsed a principle deemed more important to preserving the institution of slavery—the right of any white person to overcome a slave's rebellion against lawful authority.

The opinion in Brunson v. Martin provided no guidance as to the degree of physical force that could be used to overcome a rebellious slave other than it must be "graduated upon the principles of humanity and law," a phrase that first appeared in Austin v. State. According to the court: "To determine from the evidence, whether the means used for overcoming the rebellion in this case, were graduated upon the principles of humanity, was the appropriate province of the jury . . . ." The Constitution of 1836 authorized the General Assembly

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166. Id.
167. Id. at 274-75.
168. Id.
169. Id. at 275.
170. Id. at 275.
171. Id. at 272.
172. 114 Ark. 555 (1854). See supra note 70.
174. See quoted material supra at note 86.
175. 17 Ark. at 273-74.
to pass laws requiring the owners of slaves "to treat them with humanity," but the supreme court never delineated the point at which the disciplining of a slave became a criminal offense. Other slave states struggled with the same issue, and most managed to develop statutory or common law limits on the power to punish slaves. The absence of standards in Arkansas made it extremely difficult to prosecute a white person for using excessive physical force against a slave and may explain why Arkansas was one of the few slave states in which there is no appellate record of such prosecutions.

One civil case decided by the supreme court provides some indication of what the court considered to be force that exceeded what was necessary to discipline a slave. *Pyeatt v. Spencer* was an action for breach of warranty in connection with the sale of a female slave named Sophia. When Pyeatt sold the slave to Spencer, he warranted that she was sound and healthy. The sale separated Sophia from her children, to whom she was devoted, and she made several attempts to run away to go to her children. Spencer sued Pyeatt alleging that the slave was mentally deranged at the time of sale and that Pyeatt was aware of her condition. The jury found that the slave was unsound when sold and awarded Spencer $716 in damages. According to the supreme court:

A few days after Spencer bought the slave, he was found whipping her. He had her *stripped, and staked down* on the ground; her feet and hands extended, and fastened to stakes; and her face downwards. He appeared calm and deliberate, and was whipping her at intervals, using a cowhide, with a plaited buckskin lash about fifteen inches long. He asked her what made her [run away], and she said that Bedford and Buchanan told her, that if she staid there, she would be whipped to death. The witness examined the negro, and found her to look wild. Spencer had drawn some blood, but not a great deal. *He took salt and a cob, and salted her back.* The witness stated that he thought her deranged. He had never seen her before, but has often seen her since, and she is deranged and valueless.

In a day when most opinions were lengthy and the court rarely overturned a jury verdict, the court tersely reversed the judgment and awarded a new trial, stating: "[i]t is with pain and sensibility, that the court feels itself constrained to remark, that whatever seeming wildness and aberration of mind might be perceived in the slave, it is but reasonable to suppose, was caused by grief, and

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176. **ARK. CONST. of 1836, art. VII, §1.**
177. *See, generally, MORRIS, supra note 46, at 182-208. The inability of slaves to testify against a white person presented evidentiary obstacles to the prosecution of an owner for exceeding the standards. MORRIS, supra note 46, at 184.*
178. 4 Ark. 563 (1842).
179. *Id. at 563-64.*
the excessive cruelty of her owner." Unfortunately, the court's resolution of the case offered no protection to the slave. Pyeatt failed to recover damages for breach of the seller's warranty of soundness, but he retained possession of the slave and was not subjected to criminal prosecution or any other penalty for treating her in a manner sufficiently barbarous to outrage even the court.

III. SLAVES IN CIVIL CASES

A. Civil Liability of Owner for Injuries Committed by Slaves

The dual character of a slave as both person and property was particularly problematic for the court when it considered the question of an owner's civil liability for the tortious acts of his slave. If the owner directed the slave to injure the property or person of a third party, then clearly the owner should be liable to the third party. But what if the acts that injured the third party were not authorized by the owner or even contrary to the express orders of the owner?

The court addressed that question in McConnell v. Hardeman, which was a civil action against a slave owner whose slave had taken the plaintiff's horse. The court never seriously considered applying common law rules imposing strict liability for injuries caused by cattle or vicious domestic animals. Having decided for purposes of the criminal law that a slave was a person, capable of independent thought and action, the court could hardly treat the slave as simply another type of property for civil liability purposes. Besides, such a rule "would render it necessary to [the owner's] own preservation from ruin, to keep [his slaves] up, as he does his beasts, to prevent their going on the premises of another."

A second possibility open to the court was to apply the doctrine of respondeat superior to the master-slave relationship. Even at this early point in the development of tort law, the Arkansas court imposed liability on an employer for the acts of employees within the scope of their employment. In
Duggins v. Watson,\textsuperscript{185} which was a suit against the owners of a steamboat for the negligent actions of the officers employed to operate the boat, the court announced:

[T]he only safe rule of law is, that the master is liable for the tortious act of his servant, engaged in his employment, though done willfully, without orders, or even against orders. If the servant's disobedience of instructions, will exonerate the master, the proof, easily made, virtually does away with the maxim of \textit{respondeat superior}, designed for the protection of innocent third persons, and obliging the principal to be careful in the employment of agents, to whom he entrusts the means of committing an injury.\textsuperscript{186}

The court would later apply the master-servant analogy to hold a slave criminally liable when she committed a crime at the direction of her master,\textsuperscript{187} but in \textit{McConnell v. Hardeman} it refused to apply the master-servant rule when the issue was the civil liability of a slave owner for the tortious acts of a slave:

It is quite apparent that there is but little similarity in the relation of master and slave, and that of master and servant, at the common law. The slave is property, and though, for some purposes, treated as a person, amenable to the law, and, at the same time, entitled to its protection for offences committed by or against him, the dominion of the master is absolute, except so far as it may be restrained or regulated by statute. The duty of the slave is obedience . . . . Negro slavery . . . . is not founded in any contract between the master and the slave; and while the \textit{status} or condition of the slave continues, no valid contract can be made between them. If the slave be injured by third persons, the redress by action is in the master, nor can the slave become civilly liable for injuries done by him to the master or to third persons.

On the other hand, at the common law, the servant, though a menial, has civil, and may have political rights; his service begins, continues, and terminates in contract with the employer. Though necessity may often be a powerful incentive to obedience, he owes no duty beyond the obligation of complying with his agreement for service . . . . The liability of the master for the misconduct or negligence of the servant, while engaged in his employment, implies a corresponding liability on the part of the servant to the master for the consequences of his fault. The loss of service and character may also be checks upon persons of this class, ensuring their fidelity and good behavior.\textsuperscript{188}

\textsuperscript{185} 15 Ark. 118 (1854).
\textsuperscript{186} \textit{Id.} at 127.
\textsuperscript{187} See Sarah v. State discussed \textit{supra} at note 159.
\textsuperscript{188} McConnell, 15 Ark. at 152-53.
Although it identified differences between the relationship of master-slave and that of master-servant, the court never clearly articulated why these differences made the doctrine of respondeat superior inapplicable to master-slave relationship. What the court appeared to be saying was that the relationship between master and servant was founded on a contract, which provided a basis for defining the scope of the servant’s employment and hence the liability of the master for the servant’s acts. No contract existed to limit the master’s liability in the case of a slave. The master had absolute control over a slave, and if the doctrine of respondeat superior were applied literally, all acts of a slave would be within the scope of the master-slave relationship. 189

The court’s reluctance to apply respondeat superior to the master-slave relationship appears also to have been based on its belief that a servant was easier to control than a slave. The passage quoted above discussed “incentives” to a servant’s obedience and “checks” that ensure a servant’s fidelity and good behavior. Later in the opinion the court referred to a South Carolina case in which slaves were described as “in general a headstrong, a stubborn race of people, who had a volition of their own, and the physical power of doing great injury to neighbors and others, without the possibility of their masters having any control over them, especially when absent from them . . . .” 190

Having rejected respondeat superior as a basis for liability, the court could have opted to treat the unauthorized acts of a slave as an intervening cause and exonerate the owner completely from liability for such acts. This, according to the court, was the rule followed in Tennessee. 191 Absolving the owner of civil liability for the acts of a slave probably comported most closely with the pro-owner inclinations of the court, but such a ruling would have been extremely unpopular with those Arkansans who do not own slaves.

189. The Arkansas court noted one South Carolina decision, Snee v. Trice, 2 S. C. L. (2 Bay) 345 (1802), in which the doctrine of respondeat superior was applied when the master permitted the slave to provide services to the general public. Examples cited were a slave who was permitted to work as a blacksmith or a ferryman. In these situations the slave’s status is the same as servant and the master’s liability should correspond to his common law liability for the acts of a servant. MORRIS, supra note 46, at 358.

190. McConnell, 15 Ark. at 154, (citing Snee v. Trice, 2 S.C. (2 Bay) 345 (1802)).

191. Id., (citing Wright v. Weatherby, 15 Tenn. (7 Yer.) 367 (1835)). Like its Arkansas counterpart, the Tennessee Supreme Court rejected both the vicious domestic animal analogy and the master-servant analogy and declared that the common law did not provide a remedy for the injuries resulting from the acts of a slave. See the discussion of Wright v. Weatherby in Corre, supra note 18, at 1375-79 (1993). According to the Arkansas court, the Tennessee rule was also followed “in a very doubtful and hesitating manner” by the Mississippi Supreme Court in Leggett v. Simmons, 15 Miss. (7 S. & M.) 348 (1846).
The court managed to emerge from the quagmire by cobbling a solution that was unique to Arkansas. When the Arkansas Supreme Court addressed the issue, it had the benefit of a statute which provided:

Masters of slaves in this State shall be held responsible for the full amount of single damages and costs of the trespass of his slaves, and any person injured by the trespass (sic) of any slave, shall have his action against the master for the damage he may have sustained by such slave.

Because the statute appeared in a part of the criminal code dealing with the criminal prosecution of slaves, the court interpreted the statute as restricting the owner’s civil liability to trespasses by a slave that were indictable as criminal offenses. This solution dovetailed nicely with the compounding statute discussed above, which the court cited as an additional indication that the master was civilly liable for injuries resulting from the commission of criminal trespasses by his slave. Although not articulated in the opinion, the court may have felt more comfortable with the indictable offense limitation for another reason. Throughout the opinion the court expressed concern about the difficulty of controlling the tortious behavior of slaves. By limiting an owner’s liability to those trespasses of a slave that were indictable offenses, the court carved out an area of limited owner liability in which the threat of criminal prosecution might deter tortious conduct by a slave.

In the final analysis, the court in McConnell v. Hardeman was determining which of two parties—the slave owner or the injured person—should bear the economic cost of a slave’s tortious act. The justices were not completely satisfied with the balance struck by their solution, which left the injured party without legal redress when the slave’s tortious act was not an indictable trespass. The opinion closed with the court’s suggestion that the legislature consider changing the law:

In any future expression of the legislative will, it will be for that department to consider, whether the true interests of slave-holders would not be promoted by making them liable for all trespass committed by their slaves, thus removing many causes of jealously and ill-feeling against the owners of that species of property, and at the same time protect them by limiting their liability, as at the civil law, to the value of the offending slaves.

192. Missouri also limited recovery to injuries resulting from certain offenses but damages could not exceed the value of the slave. MORRIS, supra note 46, at 365.
193. ENGLISH'S DIGEST ch. 51, pt. XII, Sec 3. (1848).
194. See supra text accompanying note 144.
195. McConnell, 15 Ark. at 158. According to Corre, the owner’s liability under the civil law was not limited to the value of the slave. The owner could elect either to surrender the slave to the injured party in full satisfaction of any liability or to contest liability. If the owner contested liability, the monetary value of the slave was not a cap on the damages that could be
The General Assembly failed to follow the court's suggestion, and the court continued to apply the indictable trespass limitation on an owner's civil liability for the acts of a slave. The court held in *Ridge v. Featherston*¹⁹⁶ that a slave's owner was responsible for a horse killed by the slave since the wilful and malicious killing of a horse was an indictable trespass. In *Graham v. Roark*²⁰⁷ the rule was applied when the defendant's slaves cut down and carried away the plaintiff's crops despite the defendant's attempt to escape liability on the grounds that the overseer supervising the slaves had ordered the destruction of the crops.

B. Civil Liability of Third Parties for Injuries to Slaves

In addition to considering the liability of an owner for injuries committed by his slaves, the Arkansas Supreme Court addressed the civil liability of third parties for injuries to slaves. One of the features of slave law copied by Arkansas from other states was the patrol system. The county court was authorized to appoint a patrol within each township of the county consisting of a captain and up to ten persons to visit all slave quarters and other places that slaves might assemble within the area assigned to the patrol.²⁰⁸ If the patrol found a slave at an unlawful assemblage or found a slave "strolling about from one house or plantation to another, without a pass from his master, employer, or overseer," it could administer up to twenty lashes to the slave.²⁰⁹

In *Hervey v. Armstrong*²¹⁰ a patrol appointed by the Ouachita County Court for Jefferson township had crossed into the neighboring township of Marion. There the patrol came upon a group of slaves returning from a religious gathering and, after determining that the slaves had no pass, proceeded to whip the slaves. The owner of the slaves filed a civil action against the members of the patrol, and a jury returned a verdict in favor of the owner.²¹¹

On appeal the supreme court upheld instructions of the trial court to the effect that a patrol's jurisdiction was limited to the township for which it was

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¹⁹⁶. 15 Ark. 159 (1854).
¹⁹⁷. 23 Ark. 19 (1861).
¹⁹⁹. Id. ch. 109, § 5 (1838). A white person caught in the company of slaves at night "in suspicious places" could also receive up to twenty lashes, but only if first convicted by the circuit court. Id. at § 6.
²⁰⁰. 15 Ark. 162 (1854).
²⁰¹. Id. at 163. The report of the case does not indicate the amount of damages awarded to the owner.
appointed. This meant that the defendants could not rely on the patrol statute as justification for any injuries inflicted on the slaves.\textsuperscript{202}

The supreme court had more difficulty with the trial court’s refusal to give an instruction requiring the slave owner to show special damages in order to recover damages. The requested instruction raised the question whether a slave was a person or only property. The supreme court conceded that under the criminal code a slave was considered “a person capable of committing a crime, and against whom offences may be committed,”\textsuperscript{203} but the court refused to treat the slave as a person for purposes of a civil action to recover damages. The only civil injury recognized by the law was to the property of the owner, for which the owner could recover only if he showed special damages, such as medical expenses or loss of service of the slave: “[f]or the breach of the peace, the offender may be punished by a public prosecution, which the master can set on foot. But for the cruel injury, treating slaves as property, the master can only recover damages upon the ground of compensation.”\textsuperscript{204}

The court’s justification for limiting the right of recovery to cases in which the owner suffered economic injury demonstrated once again the importance it attached to white racial dominance:

We apprehend the reason why the master cannot have a civil action for the battery of his slave without special damage, is, that it would encourage slaves, of their own propensity, or by the sufferance of their masters, to be insolent by word or demeanor. The elevation of the white race, and the happiness of the slave, vitally depend upon maintaining the ascendancy of one and the submission of the other. The rights of individuals must yield to the necessity of preserving the distinction between races.\textsuperscript{205}

In short, allowing a civil right of action for the personal injury of a slave might discourage third parties from using physical force to keep slaves in their place. The right to recover had to be carefully limited to cases in which the property rights of the slave’s owner were harmed. The ruling is entirely consistent with the court’s opinion in \emph{Austin v. State},\textsuperscript{206} where it held that assault of a slave by a white person did not constitute provocation, and its opinion in \emph{Brunson v. Martin},\textsuperscript{207} where it refused to find that an overseer used excessive force when he killed a slave who refused to submit to a whipping.

\footnotesize
202. \textit{Id.} at 164.
203. \textit{Id.} at 166.
204. \textit{Id.} at 167 (Citations omitted).
205. \textit{Id.} at 168-69.
207. 17 Ark. 270 (1856). \textit{See supra} text accompanying note 173.
IV. EMANCIPATION OF SLAVES

The Constitution of 1836 specifically prohibited the freeing of slaves without the consent of their owners, but the document did authorize the legislature to pass laws permitting voluntary emancipation of slaves by their owners so long as the rights of creditors were protected and the slaves did not become a public charge. On February 19, 1838, the General Assembly enacted legislation that allowed an owner to emancipate a slave by will or by any other written instrument attested by two persons and proved in the circuit court. Freed slaves remained subject to the claims of the owner's creditors to satisfy any debt contracted by the owner prior to the emancipation. Moreover, the former owner was liable for the support and maintenance of a freed slave who was not of sound mind, who was over the age of forty-five, who was under the age of twenty-one in the case of males, or who was under the age of eighteen in the case of females.

The same session of the legislature also established a detailed procedure for determining whether a person was entitled to freedom. The act authorized a person held in slavery to petition the circuit court for leave to sue as an indigent "to establish his right to freedom." If the court determined that the petition contained sufficient information to authorize the commencement of a suit, it issued an order allowing the person to sue as an indigent, granting the person sufficient liberty to consult with counsel, and preventing the person's removal from the jurisdiction of the court or punishment for filing the petition.

An emancipation petition was characterized by the statute as a suit for false imprisonment. By treating the action as one for false imprisonment the legislature ensured that a jury resolved factual disputes in suits for freedom. This was probably thought at the time to be a constitutional requirement. The Arkansas Supreme Court later denied slaves the right to seek liberty by habeas corpus because the absence of a jury trial in a habeas hearing meant that the owner of a slave might be deprived of property without the due process

208. ARK. CONST. of 1836 art. VII, § 1. The prohibition on legislative emancipation of slaves was a controversial issue when the proposed constitution was submitted to Congress. TAYLOR, supra note 1, at 44.
209. ARK. REV. STAT. ch. 56, § 1 (1838).
210. Id. § 3.
211. Id. § 4.
212. Act of December 18, 1837, codified as ARK. REV. STAT. ch. 66 (1838).
213. ARK. REV. STAT. ch. 66, § 1 (1838).
214. Id. § 2.
215. Id. § 9.
guaranteed by the constitution. In any event, the supreme court usually insisted that a suit in circuit court for false imprisonment was the exclusive procedure for determining a slave's claim to freedom. In addition to denying relief via a writ of habeas corpus, the court ruled that a probate court had no jurisdiction to declare a slave free, even when the claim to freedom was predicated on a will being probated in the court.

Although numerous emancipation suits were appealed to the Arkansas Supreme Court, it is difficult to discern from the court's disposition of the appeals a consistent resolution of the person versus property question. Based on the cases discussed above, one would expect the court to be hostile to attempts by slaves to gain their freedom, but this was not necessarily the case. It may be that the justices had mixed feelings about emancipation suits because the property interest of slave owners as a group was not always clear. A ruling in favor of emancipation cut off the property interest of the particular person who claimed to be the owner of a slave, but the property interest of a slave owner included the right to set the slave free, and any curtailment of that right infringed on the property rights of slave owners in general.

A complicating factor that influenced the court's resolution of emancipation cases was the changing public attitude toward emancipation. According to Taylor, "[t]hat attitude ranged from bare tolerance at the time of achievement of statehood in 1836 to bitter animosity by 1858." The resistance to emancipation was motivated in part by concerns of skilled white laborers who feared competition from freed slaves, but most of the opposition to liberating slaves came from slave owners, who believed that the presence of free blacks in the state provoked unrest and discontent among blacks who were not free.

The 1837 session of the General Assembly also approved detailed legislation designed to discourage the immigration into Arkansas of freed slaves from other states. Free persons with at least one black grandparent immigrating to Arkansas from another state were required to file with the clerk of the county court in the county in which they wished to settle both a certificate evidencing their freedom and a five hundred dollar bond for good

217. See Aramynia v. Woodruff, 7 Ark. 422 (1847) (reversing a decree of a probate court setting slaves free). In Phebe v. Quillin, 21 Ark. 490 (1860), the court declined to rule out completely the possibility of equitable relief through a suit in chancery court but indicated that in most cases the plaintiff should pursue the statutory remedy in circuit court.
218. TAYLOR, supra note 1, at 244.
219. TAYLOR, supra note 1, at 111. In the fall of 1858, white mechanics and artisans in Little Rock held several public meetings to protest the use of slaves and free blacks in skilled jobs. TAYLOR, supra note 1, at 111.
220. TAYLOR, supra note 1, at 250.
221. ARK. REV. STAT. ch. 103 (1838).
behavior and for the payment of their support in the event they were unable to support themselves. Those who failed to register could be taken before a justice of the peace and required to prove their free status. Persons who could not show they were free were dealt with as runaway slaves. Persons who were able to show they were free could still be fined, whipped, and deported from the state for failure to file the five hundred dollar bond. Exceptions were provided for freed slaves employed on steamboats, as wagon drivers or messengers, or as servants to travelers.

In 1843 the General Assembly barred the further immigration of freed slaves into the state. Persons of African descent living in the state prior to that date were allowed to remain, but were required to file with the clerk of the county court a bond of five hundred dollars to assure their good behavior and support. John Pendleton, a free black living in Crawford County, challenged the statute on the grounds that it violated his constitutional rights as a citizen of the United States and the state of Arkansas. Ten years before the United States Supreme Court reached the same conclusion in the *Dred Scott* case, the Arkansas Supreme Court summarily disposed of Pendleton's case by holding that only white persons were citizens entitled to the protection of the United States and the Arkansas Constitutions.

Opposition to the emancipation of slaves continued to grow throughout the 1840's and 1850's. In 1859 the General Assembly at last bowed to public pressure and approved legislation that banned any further emancipation of slaves and required all free blacks to leave the state by January 1, 1860, or be sold into slavery at public auction. The Constitution of 1861, adopted when Arkansas seceded from the Union, declared that the legislature had no power to pass laws for the emancipation of slaves. The fact that these bans came so close in time to the emancipation of all slaves in Arkansas makes it

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222. ENGLISH'S *DIGEST* ch. 75, § 2 (1848). The immigration bar took effect on March 1, 1843.
223. ENGLISH'S *DIGEST* ch. 75, § 10 (1848).
228. ARK. CONST. of 1861, art. VII, § 3. The Constitution of 1861 also limited most basic procedural rights in criminal cases to “free white men and Indians.” See ARK. CONST. of 1861, art. II, § 6 (right to trial by impartial jury), § 10 (right to due process of law), § 14 (right to indictment), and § 16 (right to bail).
difficult to assess their impact on the voluntary emancipation of slaves by their owners.

Against this changing political backdrop the supreme court considered appeals in several emancipation suits. The cases fall into two general categories. In the first category are those cases in which the petitioner had clearly once been a slave. The question before the court was whether the owner had legally freed the petitioner. A second category of cases consists of cases in which the petitioner claimed to be a white person who could not legally be held as a slave.

A. Statutory Emancipation

Several emancipation verdicts in the first group were reversed because the court regarded the power to emancipate slaves as derived solely from the 1838 statute and therefore demanded strict compliance with the mode of emancipation set out in that statute—i.e., a slave could be freed only by will or by written instrument attested by two witnesses and proved in the circuit court. An example of the court's insistence that emancipation conform to statutory formalities was its decision in *Jackson v. Bob.*

George Brown emigrated to Arkansas from Virginia in 1835, bringing with him a teenaged slave named Bob. Brown sold Bob to Robert Hamilton in exchange for $600 in goods. Hamilton agreed in writing that at the end of six years, Bob was to be appraised and then freed after he had worked out the value at which he was appraised. Unfortunately, Hamilton died without freeing Bob, and the slave was sold under execution as the property of Hamilton. Bob brought a circuit court action for his freedom against his current owner, Jackson. The case was submitted to a jury which returned a verdict in favor of Bob, and the circuit court entered judgment ordering his liberation.

Jackson appealed and the supreme court reversed the judgment. The court conceded that Hamilton had a contractual obligation to set Bob free, but the suit for freedom failed because Hamilton failed to execute a will or other properly attested written document effectuating the emancipation. The court analogized the institution of slavery to that of marriage. Each relationship was a legal "status" in which not only the parties but the entire community had an interest. To end either the owner-slave or the husband-wife relationship, the parties had to comply strictly with the mode of termination prescribed by law.

229. 18 Ark. 399 (1837).
230. It is unclear whether the sale occurred before or after the death of Hamilton. See id. at 412.
The plaintiff argued that the circuit court had the power to order the execution of any instrument necessary for his emancipation, but the supreme court rejected this argument on two grounds. First, there was no one whom the court could order to execute such an instrument. According to the court, Jackson, the current owner, was under no contractual obligation to emancipate Bob; Hamilton, the former owner, was dead; and the executor of Hamilton's estate was not a party to the proceeding. The court's explanation ignored the fact that Bob was not a slave for life. Hamilton's interest in Bob was limited by his contract with Brown, and Hamilton could not convey more than his interest. A deed conveying a slave typically included a warranty that the slave was a slave for life. If Bob was not a slave for life, then the purchaser's remedy was to sue the seller for breach of this warranty.

The court said that a second obstacle to ordering the execution of an emancipation instrument was that Hamilton's obligation to set Bob free was to Brown, not to Bob. The court stated that even if Bob had been a party to the emancipation agreement, he could not compel specific performance of Hamilton's promise because the consideration for Hamilton's promise—i.e., the labor of the slave—was furnished by Brown, not by Bob. The only person with standing to enforce the contract was apparently Brown, the owner who originally entered the contract, but the court deemed it unnecessary to decide whether Brown, who was not a party to the action, had any remedy against the representatives of Hamilton for breach of contract.

Since Jackson v. Bob was the only case in which the Arkansas Supreme Court considered a contract to liberate a slave at a future date, the scope of the ruling is unclear. The case can be interpreted narrowly as denying a slave any rights to enforce, as a third party beneficiary, a contract between two white persons. However, the reasoning of the court, particularly its conclusion that the owner, not the slave, furnished the consideration for the contract, indicates that it would also have refused to enforce a contract between a slave and his owner for the liberation of the slave. To induce faithful service owners sometimes promised slaves their freedom at a future date. There are reported cases from Tennessee, Kentucky, and Louisiana enforcing such agreements.

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231. Compare Strayhorn v. Giles, 22 Ark. 517 (1861). There the seller's agent executed a bill of sale warranting that a particular slave was a slave for life despite the agent's knowledge of rumors that the slave was free. When the slave subsequently obtained a judgment of liberation, the purchaser successfully brought an action against the agent for fraud. The court stated in dictum that if the agent had advised the purchaser of the emancipation rumors, the purchaser's sole remedy would have been to sue the seller for breach of warranty.

232. Morris discusses cases in these states recognizing the right of a slave to make and enforce a contract for his own freedom. MORRIS, supra note 46, at 380-85. Compare Anthony R. Chase, Race, Culture, and Contract Law: From the Cottonfield to the Courtroom, 28 CONN. L. REV. 1, 29-32 (1995).
but *Jackson v. Bob* indicates that the Arkansas Supreme Court considered such agreements unenforceable because the consideration promised by the slave already belonged to the owner. The Arkansas court would have presumably reached the same result if the owner agreed to free a slave upon payment by the slave of a specified sum. Since any property of the slave belonged to the owner, the consideration for the agreement was money that was already the property of the owner.\(^{233}\) The rigidity exhibited by the court in *Jackson v. Bob* reflects the court's one dimensional view of slaves as property rather than persons.\(^{234}\)

In *Harriet v. Swan & Dixon*,\(^{235}\) the owners' failure to comply with the statutory formalities of emancipation similarly thwarted the attempts of a woman and her children to gain their freedom. Gilbert Barden, the original owner of the family, had executed a written instrument granting the family freedom after the death of his wife, Charlotte Barden, provided the family "continue faithfully and obediently to serve my said wife... as dutiful slaves to her during her life..."\(^{236}\) By separate deed Gilbert Barden also gave the family 29 acres of land when they obtained their freedom. Gilbert Barden died, and his widow, Charlotte Barden, was appointed administrator of his estate. She filed an inventory with the probate court that included the slaves and paid some claims against the estate, but she never sought to set apart her dower interest in the estate or to distribute the assets of the estate. When Charlotte Barden died, she left a will providing for the immediate emancipation of the two adult members of the slave family. The children were to be hired out until each reached the age of twenty-one at which time he or she was to be set free and was to receive half the proceeds of the hiring out.\(^{237}\)

The heirs and distributees of the estate of Gilbert Barden brought suit in chancery court to recover from the estate of Charlotte Barden all property, including the slaves, that came into the widow's hands as administrator of the

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233. The inability of a slave to enter a contract with his owner did not appear to discourage another common arrangement between owners and their slaves. Slaves who were skilled artisans often entered into informal contracts with their owners. The slaves were granted considerable "freedom" to find employment in their particular craft. In return, the slaves agreed to provide their own housing, food, and clothing and pay a fixed sum from their earnings to their owners. For a general description of this arrangement as it evolved in Little Rock, see Paul D. Lack, *An Urban Slave Community: Little Rock, 1831-1862*, 61 ARK. HIST. Q. 258 (1982). The practice probably violated a police regulation that imposed a fine on an owner who permitted his slave "to go at large, upon a hiring of his own time, or to act or deal as a free person." ENGLISH'S DIGEST ch. 153, § 34 (1848).

234. Compare the quote set out supra in text accompanying note 188, where the court again stated that no valid contract could be made between an owner and a slave.

235. 18 Ark. 495 (1857).

236. *Id.* at 499.

237. The other half of the proceeds of the hire went to the Methodist Church.
estate of Gilbert Barden. The slaves were allowed to interplead and assert their right to freedom under the instruments executed by the two Bardens. The chancery court ruled against the claim for freedom, and the family appealed.

The supreme court affirmed the chancellor's decision. It ruled that the family was not entitled to freedom based on the instrument executed by Gilbert Barden, because it was not attested and proved in circuit court at the time of its execution as required by the emancipation statute. Citing its decision during the same term in *Jackson v. Bob*, the court insisted "that where the law prescribes a certain form and manner for manumission, no other manner or mode can be adopted or pursued by which it can be lawfully effected."238

In the alternative, the family argued that Charlotte Barden had acquired title to them by adverse possession and that they were entitled to freedom under her will. Although the record is ambiguous, the family was apparently in the possession of Mrs. Barden for at least twelve years following the death of her husband.239 The statute of limitations on an action to recover possession of a slave was five years.240 The supreme court rejected this argument on the grounds that Charlotte Barden was in possession of the slaves either as administrator of the estate of her husband or as a tenant in common with the heirs of her husband. In neither capacity would her possession be adverse to that of the heirs, and consequently the statute of limitations did not run against the heirs.

A third emancipation action addressing the validity of a written instrument of emancipation demonstrates that the court was prepared to liberate a slave provided the owner complied with the formalities prescribed by statute. In *Bob v. Powers*241 a slave brought an action for freedom in the Yell County Circuit Court against the administrator of the estate of his former owner. While still alive the owner had executed an instrument, which was properly acknowledged by two witnesses and proved by the owner before the Yell County Circuit Court, granting freedom to nine slaves, including the plaintiff, after the owner's death. The trial court refused to permit the slaves to introduce the emancipation deed on the theory that the deed took effect on the owner's death rather than immediately. This, according to the trial court, rendered the deed testamentary in character, and it could not be introduced into evidence in circuit court as a testamentary emancipation unless it was first probated in probate
court. Without the deed the jury probably had little choice but to return a verdict against the slaves.

On appeal, the supreme court ruled that the trial court erred in excluding the deed. The deed in question was properly attested by two witnesses and proved in the circuit court as required by the emancipation statute. The court rejected the administrator’s assertion that the deed was testamentary in character by analogizing it to a deed that conveyed a slave to a third party while reserving a life estate to the grantor. Such a deed, if delivered to the grantee, passed a present title to the grantee and was not considered testamentary in character.242

The plaintiff also introduced at trial the will of his former owner in which the owner reiterated his intent that the plaintiff be set free at his death. The administrator of the estate argued that a testamentary emancipation was not effective until the administrator consented or until two years had passed from the date he was appointed administrator.243 He also argued that no testamentary emancipation was effective until the running of the time within which the widow of the owner could assert her dower interest in the slaves.244 The supreme court ruled that under the deed executed by the owner during his life, the slaves became free immediately on the death of the owner, and that no interest in the slaves passed to the administrator, the widow, or the creditors of the estate. The court did acknowledge that the plaintiff’s right to freedom was subordinate to the creditors of the owner at the time of emancipation.245 The right of these creditors to payment was to be satisfied, however, not by selling the slaves but by hiring out the slaves until sufficient funds were raised to pay their claims.

So long as the owner complied with the statutory formalities for emancipation, the court continued to uphold the right of owners to free their slaves, even in the face of mounting public opposition to the practice. As discussed above, in 1843 the General Assembly enacted a statute barring the immigration of freed slaves into the state after March 1, 1843. The court

242. The court was following the prevailing view in recognizing that a deed of emancipation could become effective at a future date. The more difficult question posed by in futuro manumissions was the status of children born to a female slave between the date of the emancipation deed and the date it became effective. See cases discussed in MORGAN, supra note 46, at 404-12. This issue never arose in an Arkansas Supreme Court case.

243. The administrator could not be required to pay distributive shares until two years after receiving his letters of administration. ENGLISH’S DIGEST ch. 4, § 131 (1848).

244. A widow who elected to take dower in lieu of the provisions of her husband’s will had to make such an election within one year from her husband’s death. ENGLISH’S DIGEST ch. 59, § 14 (1848).

245. The court presumably meant creditors at the time the deed was executed. Persons who became creditors after that date were placed on notice when the owner proved the deed before the circuit court.
considered the effect of the 1843 legislation on the ability of Arkansas slave owners to emancipate their slaves in *Campbell v. Campbell*. The case involved the probate of the estate of a slave owner named Duncan Campbell, who when he died was survived by a three year old daughter named Viney whose mother was one of his slaves. In his will Duncan Campbell gave his daughter the sum of five thousand dollars and directed his sister "to take charge of the above named Viney, and take care of her until she arrives to the age of fifteen years, when she is to be free and receive her legacy." After qualifying as executor of the will, the testator's brother, Samuel Campbell, took Viney to Missouri and sold her as a slave. On learning of the sale, the chancellor before whom the probate was pending ordered the executor to produce the child, and when the executor failed to do so, the chancellor imprisoned him for contempt and appointed a guardian to find and reclaim the child. The guardian eventually found the child in Missouri and was able to recover her by filing a writ of habeas corpus in that state. Once the child was safely back in Arkansas, a court battle ensued between the siblings of Duncan Campbell over the status of Viney and the disposition of their late brother's estate.

By this stage of the proceedings it was clear to all parties that after paying debts of Duncan Campbell, his estate would be less than the five thousand dollars he gave to Viney. One group of siblings, led by Samuel Campbell, argued that by prohibiting the immigration of free slaves into the state, the General Assembly impliedly repealed all statutory authority for the emancipation of slaves: "If free negroes are not suffered to settle in Arkansas, it would seem to follow, as a necessary consequence, that they could not be emancipated." If Viney was still a slave, then she was incapable of inheriting from her father, and the property of Duncan Campbell passed to his brothers and sisters. A second group of siblings, led by Cornelius Campbell, insisted that Duncan Campbell had often expressed his intention to set the child free when he died. They supported the daughter's claim to her freedom as well as her claim to Duncan Campbell's estate.

In a resolution worthy of a novel by Charles Dickens, the circuit court of Chicot County decreed that the child was free and was entitled to the $5,000 legacy left her by her father. The court also appointed Cornelius Campbell as the child's guardian.

The losing heirs appealed, but the supreme court affirmed the circuit court's decision. It ruled that despite some ambiguity in the language of the will, it was clear that Duncan Campbell intended that Viney be freed at his
death, not at age fifteen. The court also rejected the argument that the 1838 statute authorizing emancipation by will or by deed had been impliedly repealed by the 1843 statute prohibiting the immigration of free blacks to the state. Apparently, statutes in some other southern states allowed emancipation only on condition that the liberated slave immediately leave the state. The effect of such statutes was to “impose on other States the burden of an unfortunate class of population.”

The court characterized the 1843 Arkansas statute prohibiting the immigration of freed slaves into the state as a “measure of self-defense,” designed to protect Arkansas from slaves freed in other states, but it found no similar legislative intent to prohibit the freeing of Arkansas slaves, noting, “[W]e will tolerate the evils resulting from the emancipation of our own slaves, until such time as the sense of the people may require an avowed change of policy.” That time came in 1859, some six years after the court’s decision in *Campbell v. Campbell*, when the General Assembly finally banned the voluntary emancipation of slaves.

The 1859 ban on voluntary emancipation of slaves produced *Phebe v. Quillin*, the court’s final opinion addressing compliance with the formalities of emancipation. Joshua Averett died in 1853 leaving a will providing that all of his slaves were to be freed seven years after his death and that until such date the testator’s nephew was to have charge of the slaves and receive the revenue they produced. In 1857 one of the slaves, along with eighteen of her children and grandchildren, filed suit in chancery court against the nephew and two other men to whom he had purported to sell several of the plaintiffs “with a view of appropriating them as slaves for life.” The chancery court dismissed the action, and the plaintiffs appealed.

The supreme court wasted little time with the defendant’s argument that emancipation was barred by the 1859 act; it ruled that the act did not apply retroactively to instruments of emancipation executed prior to its passage. It did, however, conclude that the chancellor correctly dismissed the action because the suit was premature. The plaintiffs were to be free seven years from the 1853 death of their former owner, and until the seven years expired, they had no right on which to base a suit. The opinion was an improvement on *Jackson v. Bob*, at least to the extent it recognized that a slave who was emancipated at a future date had a judicial remedy when that date arrived.

Although the justices in *Phebe v. Quillin* again rejected attempts to restrict the right of slave owners to set slaves free, the opinion reveals that they were

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249. *Id.* at 521.
250. *Id.* at 522.
252. 21 Ark. 490 (1860).
253. *See supra* text accompanying note 229.
clearly aware of the changing public sentiment toward emancipation. The court felt obliged to end its opinion with an editorial comment explaining its attitude toward suits for freedom:

Much has been said, by the counsel for the respective parties, upon the liberality and strictness with which suits for freedom should be treated by courts.

In the earlier cases, the general rule of the courts, in States that are now slave States, seemed to be and was often so announced from the bench, that the courts would lean towards the grant of freedom, while, in the latter decisions, there would seem to be reason to fear that the great reaction in public sentiment, in the southern States, relative to the emancipation of slaves, may produce a habit of construction so stringent as to endanger the even balance which should ever be extended to the rich and the poor, the white and the black, the free and the bond.

The question of freedom should be determined, like every other question made before the courts, solely upon its legal aspects, without partiality to an applicant for freedom, because he may be defenseless, and a member of an inferior race, and certainly without prejudice to his kind and color, and without regard to the sincere convictions that all candid, observing men must entertain, that a change from the condition of servitude and protection, to that of being free negroes, is injurious to the community, and more unfortunate to the emancipated negro than to any one else.\textsuperscript{254}

B. Emancipation Based on Race

In a second group of emancipation cases decided by the court, compliance with the formalities of the emancipation statute was not the issue. Instead, the plaintiffs sought their freedom on the grounds that they were members of the white race and could not be held as slaves. Because cases in this second group did not involve the right of slave owners to set slaves free, they provide a much better test of the court's stance on the person versus property issue in emancipation cases.

The second group of cases raised a question that lay at the very heart of the institution of slavery. If the legal and moral justification for slavery was the "striking difference between the black and white man, in intellect, feelings and principles,"\textsuperscript{255} the court had to develop a racial definition that classified the significant percentage of the population of Arkansas with both black and white

\textsuperscript{254} \textit{Phebe}, 21 Ark. at 500.
\textsuperscript{255} The court's entire quote is set out \textit{supra} in text accompanying note 32.
Moreover, application of that racial definition in a particular case was usually a jury question. When freedom turned on the factual question of the plaintiff’s race rather than the owner’s compliance with the legal requirements of the emancipation statute, the supreme court was forced to defer to the findings of the jury. Slaves who sued to gain their freedom on racial grounds often found jurors more sympathetic than the high court, which suggests that jurors in emancipation suits may have been more likely than the justices to identify with slaves as fellow human beings than as chattels, particularly when the person claiming freedom appeared to the jurors to be “white.”

The leading emancipation case involving race was *Daniel v. Guy*, which was a suit for false imprisonment by Abby Guy and her four minor children against Daniel, who claimed they were his slaves. Guy presented testimony that she and her children had lived as free persons for some eight or nine years in Ashley County. The oldest child boarded out and attended school, and the family went to a white church and socialized with white persons. Daniel countered with testimony that Guy was the daughter of a slave named Polly formerly owned by Daniel’s father, that Polly had passed to Daniel’s sister on the death of the father, and that Daniel had purchased Guy from his sister. Two physicians testified for Guy as “experts” on the physical characteristics that distinguish one race from another. The Ashley County jury returned a verdict in favor of the Guy family, and the circuit court ordered them liberated.

Daniel appealed, citing as error several of the circuit court’s instructions to the jury. The circuit court appeared to have proceeded with impeccable logic in crafting its instructions. Arkansas law defined a “mulatto” as “every person, not a full negro, who shall be one-fourth or more negro.” The statute regulating suits for emancipation provided, “If the plaintiff be a negro or mulatto, he is required to prove his freedom.” Based on this authority the circuit court instructed the jury that if “the plaintiffs were less than one-fourth negro, they were presumed to be free, and the burden of proving them to be slaves was upon the defendant.” After reviewing numerous Arkansas statutes using the term “mulatto,” the supreme court concluded, however, that the General Assembly used the term to refer to any person with a black ancestor “without regard to grades.”

From this conclusion the supreme court

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256. In the 1850 census, 67% of free blacks were of mixed blood compared to 16% of slaves. By the 1860 census, 61% of free blacks and 13% of slaves were classified as having mixed ancestry. TAYLOR, supra note 1, at 240.
257. 9 Ark. 121 (1857).
258. ENGLISH’S DIGEST ch. 75, § 1 (1848).
259. Id. ch. 74, § 12 (1848).
261. Id. at 134.
announced the following rules of evidence applicable to emancipation suits in Arkansas:

1. When a person held as a slave, sues for freedom, and it manifestly appears that he belongs to the negro race, whether of full or mixed blood, he is presumed to be a slave, that being the condition generally of such people in this State.
2. If it appear that he belongs to the white race, he is presumed free.
3. If it be doubtful, whether he belong to the white or the negro race, there is no basis for legal presumption, one way or the other, but it is safest to give him the benefit of the doubt, as the courts should be careful that a person of the white race be not deprived of his liberty.262

Because the circuit court’s instructions were contrary to these evidentiary rules, the supreme court reversed and remanded the case for a new trial.

By treating a person with a single African ancestor as black, the Arkansas Supreme Court went further than any other southern State at the time. Daniel v. Guy was the only example prior to 1865 of the “one drop” rule of racial definition that became the norm in many southern States after the Civil War.263 Most other southern States required a person to be at least one-fourth African in order to raise the presumption that the person was a slave.264 The evidentiary rules announced by the court in Daniel v. Guy were probably mitigated somewhat by the difficulty of proving that a person had African ancestors. A person was presumed to be a slave if it “manifestly” appeared that he was of African descent. Although the party opposing freedom could offer testimony about the ancestry of a person claiming to be free, the jurors were the final arbiters of the person’s race. When the evidence was conflicting, the jurors probably based their verdict on their own conclusions regarding a person’s race.

This point was demonstrated by what happened on remand in Daniel v. Guy. The owner, perhaps fearing that Guy’s neighbors believed her and her family to be white, was granted a change of venue to Drew County. This failed to help the owner’s case because after receiving instructions substantially in accord with the rules of evidence announced in the first appeal, a Drew County

262. Id. The presumption that a black person was a slave apparently applied only in emancipation cases. In State v. Alford, 22 Ark. 386 (1860), the jury convicted the defendant of second degree murder and imposed a punishment of imprisonment in the penitentiary for eighteen years. The state appealed the verdict on the grounds that the defendant was a slave and that slaves convicted of murder could only be sentenced to death. The indictment alleged that the defendant was black, but no evidence was offered at trial to show he was a slave. The supreme court rejected the state’s contention that the defendant was presumed to be a slave because of his race and affirmed the sentence to imprisonment.

263. MORRIS, supra note 46, at 27.

264. MORRIS, supra note 46, at 27.
jury also returned a verdict for the plaintiffs. The owner again appealed to the supreme court. This time he contended that the circuit court erred when it permitted the plaintiffs to remove their shoes and socks, and exhibit their bare feet to the jury. The supreme court disagreed, noting that "an inspection of [the foot] would ordinarily afford some indication of the race." The supreme court affirmed the judgment of freedom although it could not resist announcing that it considered the jury's verdict contrary to the weight of the evidence. Thus, the free status of the Guy family was finally confirmed only weeks before the outbreak of the Civil War.

In a second emancipation case involving the question of the plaintiff's race, the court was again hostile to emancipation. *Gary v. Stevenson* was a suit by a sixteen-year-old male named Gary who claimed to be the son of Thomas Gary and a white woman with whom Thomas Gary cohabited in Alabama. Thomas Gary moved to Louisiana, and after marrying another woman, sent his son to live with a man named Armstrong, "who was to keep and maintain him until his father should see fit to call for him." Armstrong died and the administrator of Armstrong's estate asked a man named Holman to take Gary back to his father in Louisiana. Holman instead sold Gary as a slave to Stevenson, who lived in Crawford County, Arkansas, with the understanding that Stevenson would liberate Gary when he reached the age of twenty-one. Thomas Gary, the plaintiff's putative father, then appeared on the scene and asserted that the teenager was his slave. At this point, with both his father and Stevenson claiming him as a slave, the younger Gary absconded "that he might the better have an opportunity to assert his right to freedom in a Court of justice." Stevenson further complicated matters by delivering a bill of sale conveying the teenager to Brown. Rather than bring an action for false imprisonment, as permitted by Arkansas law, Gary's attorney sought an injunction in chancery court to prevent any of the persons claiming Gary as a

266. Two physicians had testified in the first trial that the feet were among the physical characteristics that distinguish the races. Daniel, 19 Ark. at 127.
267. Daniel, 23 Ark. at 52.
268. Id. at 55.
269. Guy later sued Daniel to secure the return of personal property seized by Daniel when he reduced her to slavery, but the supreme court sustained Daniel's plea that the statute of limitations had run on the right to recover the property. Daniel v. Roper, 24 Ark. 131 (1863).
270. 19 Ark. 580 (1858).
271. Id. at 581. The source of the quoted language, which appears in the court's opinion, is unclear.
272. Id.
273. Id. at 582.
slave from commencing suit for his possession or otherwise attempting to restrain his liberty.\footnote{Id.}

As in \textit{Guy v. Daniel}, the lower court in \textit{Gary v. Stevenson} heard pseudoscientific testimony from three doctors on the physiognomic differences between the black and white races. The testimony of the doctors, while somewhat tentative, tended to support the plaintiff’s assertion that he was white.\footnote{Gary, 19 Ark. at 584.} The defendants, however, offered uncontroverted testimony that Gary was the son of a female slave who had been emancipated in accordance with Arkansas law some two years earlier.\footnote{Id. at 584.} The circuit court dismissed the action, the plaintiff appealed, and the supreme court affirmed the dismissal. The court agreed with the trial court that the preponderance of the testimony showed that the plaintiff was of African descent, thereby invoking the evidentiary presumption that he was a slave “notwithstanding the admixture of African blood may be but small.”\footnote{Id. at 583-584. The testimony is discussed in \textit{MORRIS, supra} note 46, at 27.} The only evidence offered at trial, according to the court, supported rather than repelled that presumption. This comment probably refers to the uncontested testimony that the plaintiff’s mother was a slave.\footnote{Id. at 586.}

The decision suggests that in determining race direct evidence of African ancestry was more important than physical appearance. Gary’s attorney probably committed a tactical error when he sued for injunctive relief. Had he framed the action as one for false imprisonment, the question of Gary’s race would have been submitted to a jury which might have given more weight to Gary’s physical appearance.

\textbf{V. Conclusion}

Although emancipation was not the precise issue, one final case sums up the court’s views on the institution of slavery as well as Arkansans of African descent. In \textit{Ewell v. Tidwell}\footnote{20 Ark. 136 (1859).} a slave owner had executed a will that freed most of his slaves and bequeathed to the newly freed slaves the remainder of his estate, consisting of lands, personal property, and a slave named Charles.\footnote{Id. at 137.} The precise issue before the court was the ownership of Charles. The other heirs of the slave owner claimed that freed slaves could not legally own slaves\footnote{Taylor reports several instances of freed slaves purchasing slaves in Arkansas, but} and that Charles became their property.

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\begin{itemize}
  \item \footnote{Id.}{Id.}
  \item \footnote{Id. at 583-584.}{Id. at 583-584. The testimony is discussed in \textit{MORRIS, supra} note 46, at 27.}
  \item \footnote{Gary, 19 Ark. at 584.}{Gary, 19 Ark. at 584.}
  \item \footnote{Id. at 586.}{Id. at 586.}
  \item \footnote{Id. at 584.}{Id. at 584.}
  \item \footnote{20 Ark. 136 (1859).}{20 Ark. 136 (1859).}
  \item \footnote{Id. at 137.}{Id. at 137.}
  \item \footnote{Taylor reports several instances of freed slaves purchasing slaves in Arkansas, but}{Taylor reports several instances of freed slaves purchasing slaves in Arkansas, but}
The court rejected a Georgia Supreme Court decision holding that free blacks should not be permitted to own property of any description:

The negro, though morally and mentally inferior to the white man, is, nevertheless, an intellectual being, with feelings, necessities and habits common to humanity. By the act of emancipation, the reciprocal obligations and duties between master and slave, by which the slave owes obedience and fidelity to the master, and the master owes to the slave support and protection, are ended. When this takes place, no one is interested in the protection of the negro. If, under such circumstances, he could not make and enforce contracts, it is difficult to understand how he could, with any certainty, supply his commonest necessities. Such a condition would be inconsistent with civilization. And, besides this, the negro, having no power to acquire property, or certain means of gathering the fruits of his labor, every incentive to industry would be at once destroyed; and, sinking into idleness and depravity, he would become an intolerable nuisance.282

But, said the court, whether a freed slave could own a slave was an entirely different question:

There is a striking difference between the black and white man, in intellect, feelings and principles. In the order of providence, the former was made inferior to the latter; and hence the bondage of the one to the other. For government and protection, the one race is dependent on the other. It is upon this principle alone, that slavery can be maintained as an institution. The bondage of one negro to another, has not this solid foundation to rest upon. The free negro finds in the slave his brother in blood, in color, feelings, education and principle. He has but few civil rights, nor can have, consistent with the good order of society; and is almost as dependent on the white race as the slave himself. He is, therefore, civilly and morally disqualified to extend protection, and exercise dominion over the slave.283

More than any other case, this holding demonstrates the supreme court's conviction that the institution of slavery was legally and morally justified by differences between the races. The law could recognize slaves as persons but only when that recognition promoted rather than jeopardized the racial dominance on which slavery was based. In an article discussing the colonial and antebellum slave laws of Virginia, Judge Higginbotham uses a topic heading that succinctly describes the attitude of the antebellum Arkansas

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these appear to be cases in which the purchaser's purpose was to free a relative from slavery. TAYLOR, supra note 1, at 254.

282. Ewell, 20 Ark. at 143.
283. Id.
Supreme Court toward the slave—always property, sometimes a person, and never a citizen.284