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Chattel

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

That Phillips created a precedent book like this is not surprising, nor does his interest in slave litigation shock, especially given the fact that he

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

[2] John Phillips, Book of Precedents, 1788–1839, 34–400, 37, SCHS.

practiced in South Carolina, a Black-majority colony. What makes this particular entry in Phillips's precedent book noteworthy is the fact that he adapted the form to use in a case alleging trover for a horse. Indeed, it seems that he first made an exact copy of pleadings from litigation over a "Negro woman Slave" and only later edited his transcription, striking out "Negro woman slave" and replacing this phrase with "iron gray horse." When and why Phillips edited this entry is unclear, but his small act of dehumanization – substituting an animal for a person in a handwritten legal precedent book – encapsulates a larger process by which English property law, wielded by legally savvy colonists, transformed people into things throughout the British Atlantic World. In fact, when Phillips made this substitution, when he replaced one chattel with another that was to his mind legally identical, he repeated an act of analogy that had been performed countless times before by South Carolinians of all sorts as they managed their slaves. At the birth of a new nation and at the turn of a new century, Phillips drew upon a long history in which colonists cloaked the human tragedy of slavery in a distinctively English idiom of property law and inheritance. Using their knowledge of English property law to buy, sell, and devise slaves, these colonists exhibited the same dexterity in commanding enslaved people using the language of English property law as they did in manipulating the environment to suit the needs of rice agriculture.[3]

Historians have long understood that transforming people into property was Atlantic World slavery's defining characteristic, and have concluded that the dehumanization of slaves both in law and in daily life "was absolutely central to the slave experience." D. B. Davis, for example, has argued that "[f]rom antiquity, chattel slavery was modeled on the property rights traditionally claimed for domestic animals."[4] Eugene D. Genovese likewise has observed that slavery "rested on the principle of property in man," the idea that a slave was an "*instrumentum vocale* – a chattel, a possession, a thing, a mere extension of his master's will."[5] Similarly, for Philip Morgan, "masters thought of and acted toward" slaves "using the language of property."[6] Although historians are correct

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

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

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

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

to emphasize the property component of slavery, such a choice was not inevitable. In Spanish and French colonies, for example, an enslaved person was treated as an "inferior kind of subject" rather than "a special kind of property."[7] Although slaves in these colonies were bought, sold, and brutally exploited, they also could occasionally invoke the reciprocal bonds of allegiance and protection owed to them as subjects to make claims upon monarchs as people, not property. Relatively free from royal oversight when it came to making determinations about the status of slaves, English colonists chose a different path. They made a conscious decision to treat slaves not just as property at law, but as chattel property.

That momentous decision is one that can and should be placed in historical context. Despite the fact that "chattel slavery" has become an uninterrogated catchphrase used to describe the legal status of human property in British America and the United States South, the term had a distinct legal meaning, and perhaps more important, distinct legal and cultural consequences for both white colonists and enslaved people.[8] In English legal culture, defining something – or someone – as chattel property (i.e., moveable, personal property) endowed owners with a certain bundle of rights that allowed them to dispose of that property with little hindrance. Other types of property, especially real estate, conveyed a much more circumscribed bundle of rights. For colonists, then, classifying slaves as chattel property was a crucial first step in creating societies in which human beings could be transformed into moveable units of wealth, in which the slave became "a person with a price." This legal decision, in fact, was the sine qua non of an economic system that brought staggering riches to a few and untold suffering to millions more.

In this chapter, I examine the process by which colonists in South Carolina and throughout British America made critical determinations about how slaves should be treated as property at law. Throughout, I place their activities in an English legal context, examining how slave classificatory schemes endowed owners with particular rights and responsibilities. Colonists were keenly aware that their classificatory choices had serious consequences, and they made legal determinations about classifying slaves in order to maximize the value of the human beings that labored

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

[8] See, e.g., Morgan, *Slave Counterpoint*, 261; Winthrop D. Jordan, *White Over Black: American Attitudes Toward the Negro, 1550-1812* (Baltimore: Penguin, 1968), 98.

for their benefit. In expanding plantation colonies like South Carolina, treating slaves as chattel property helped to transform enslaved people into economic assets that they could transfer to other colonists and across generations. Classified as chattel, a slave became an investment whose value could be readily realized through sale, leasing, or borrowing in addition to a source of immediate labor. Chattel slaves could be attached by creditors and mortgaged to support the growth of plantations and mercantile enterprises. Likewise, they could be detached from the land they worked and forcibly transported to outlying plantations or frontier zones.

As colonists were well aware, decisions about how to classify slaves had significant legal consequences. But the choice to consider slaves chattel property was not merely a legal one; it also had profound cultural consequences. One of the most important of these was that making slaves legally equivalent to other types of moveable property invited colonists to compare slaves to livestock, which were also considered chattels under English law. Historians have long noted that colonists in plantation America analogized slaves to cattle, oxen, and other large farm animals, and recent work has made it clear that such analogies played a key role in dehumanizing enslaved people throughout the Atlantic World.[9] Showing that these analogies were rooted in a distinctively English legal heritage highlights the important role that English property law played in that process of dehumanization.

Indeed, taken together, statutory law and daily legal practice in South Carolina and other colonies reveal that the process of legal adaptation in plantation America was not fraught because there was no slave law in England. Rather, slave-owning colonists built an entire economic system upon the assumption that they could make slaves fit into an English property law rubric. English law provided the vocabulary, forms, and procedures that allowed colonists to treat slaves as things and to analogize people to livestock and other personal property on a daily basis. It was not a barrier to the development of slave societies; rather, English law made the dehumanization of slaves possible and even necessary by limiting colonists' choices when it came to slotting slaves into a preexisting property law rubric.

In making determinations about classifying slave property, colonists did not betray any concern with reconciling the humanity of slaves with

[9] Jennifer L. Morgan, *Laboring Women: Reproduction and Gender in New World Slavery* (Philadelphia: University of Pennsylvania Press, 2004), 167.

their legal classification as things, in part because they were used to conventions of a legalese that required specialized language. Slave owners were less psychologically or morally conflicted about the "slave as thing" paradox than we might expect, and they could modulate between understanding the slave-as-human and the slave-as-property without much cognitive dissonance. English property law, in fact, encouraged a type of thinking that allowed and even required colonists to obscure the humanity of enslaved people if they wished to maximize their economic value. If colonists' legal choices lacked ideological content, however, documenting how they compared people to things also reveals that moments of legal analogy had distinct ideological *consequences*. In the aggregate, South Carolina colonists internalized these analogies, and they were layered atop preexisting beliefs about African racial inferiority. English law, then, encouraged a type of mechanical thinking that led to the dehumanization of Black people, with invidious and lasting consequences.

In "Adapting English Property Law," I briefly describe the law of property in England, and examine how colonists throughout plantation America adapted English property law to suit their needs as slaveholders. Because the process by which these colonists used English law to transform people into things is immediately visible in the slave codes passed by colonial assemblies, in "Societies with Slaves," I examine these codes to show how colonists throughout British America categorized enslaved people as property via statute. Despite the assumption that slaves always were considered chattel property, colonists carefully weighed different classificatory schemes, modulating between treating slaves as real estate and slaves as chattels in order to balance the commercial needs of colonial debtors and British merchants. Classifying slaves as real estate, for example, protected slaves from creditors, but at the cost of contracting credit that was based on the slaves' underlying value; treating slaves as chattel property subjected them to creditors' claims while making it easier for heirs to inherit enslaved people when slave owners died without a will.

In "Negroes, Goods, and Merchandizes," I examine the development of slave law in South Carolina, placing the colony's slave codes against a backdrop of property law administration in the colony. Moving from a customary legal regime in which slaves were treated as chattels de facto to a statutory law of slavery that codified customary practice, South Carolina colonists did not experiment with treating enslaved people as real estate. Deviating from West Indian precedents, slave law in South Carolina instead paralleled the legal trajectory of New England colonies like Massachusetts Bay, where familiarity with practices in the slave trade

encouraged colonists to treat slaves as chattel property. Colonists eventually codified "pure" chattel slavery in the infamous Negro Act of 1740, an act that raised imperial administrators' suspicions but did little to change the actual practice of managing slaves in the colony. As I argue, enshrining chattel slavery in statute reveals South Carolina colonists as active participants in a broader imperial legal culture, one in which positive law was becoming an increasingly important source of binding legal authority.

The classification of slaves as chattel property in practice as well as at law in colonial South Carolina had decidedly tragic and long-lasting consequences for people of African descent. In this chapter's final section, I describe discrete moments in which colonists analogized slaves to other types of personal property in order to show that acts of categorization worked their own cultural violence. Most South Carolina colonists did not vocalize their mental calculations or even signal them, as Phillips did, by physically substituting the word "horse" for the word "slave." Nonetheless, in transactional documents and correspondence that supply our only evidence for daily legal practice, we can see that colonists frequently grouped slaves with other types of valuable personal property, including livestock. As D. B. Davis has shown, this sleight of hand, performed countless times over the course of a century and a half, fueled the growth of scientific racism in the late eighteenth and early nineteenth centuries.[10]

ADAPTING ENGLISH PROPERTY LAW

English property law, which provided the foundation for property law in the American colonies, divided property into real property and chattel property. Chattel property, also called personal or moveable property, included money, household furniture, clothing, debts, and livestock, while real estate typically denoted land.[11] Because land in England was central to economic, social, and political life, the law of property developed to provide significant protections for real property that did not apply to chattels. Specifically, unsecured creditors – those whose debts were not secured by land – could not attach a debtor's land upon his or her death,

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

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

and real property descended to a debtor's heirs "free of all legal claims" of unsecured creditors.[12] Likewise, even when land was offered as security, the cost and procedural difficulties of obtaining a judgment against the debtor in court made seizing land used as security impracticable. In contrast, debtors could seize and sell personal property to satisfy debts even if that property had not been offered as security.[13] Land, unlike personal property, also could be entailed, which prevented heirs from dividing or alienating (selling) an estate, and ensured that land would pass intact from generation to generation.[14]

In England, "four separate but overlapping legal systems" administered legal disputes over real and personal property: common law, equity, ecclesiastical, and local courts (including manorial and borough courts).[15] These jurisdictions applied different rules in determining legal questions about the transmission of property, although over the course of the seventeenth century jurisdictional competition and Parliamentary statutes had the overall effect of standardizing property law administration. Roughly, the rules of property law that these courts followed created two distinct but overlapping regimes: one that addressed questions about marital property and another that governed the inheritance of real and personal property upon an individual's death.[16] Rules pertaining to marital property primarily concerned the ownership and transmission of married women's property (although courts also adjudicated questions about widowers' rights to land and chattels). At common law, a married woman was considered feme covert, subject to the doctrine of coverture, which stipulated that during marriage her legal identity was "covered" by that of her husband. As a result, a married woman could not make contracts in her own name; she could not make a will; she could not sue or be sued without her husband; and she forfeited control over her dowry and all personal property.[17] However, upon her husband's death she became entitled to a dower portion, which consisted of one-third of her husband's real property for life and one-third of his personalty outright.[18]

Although these legal rules deprived women of meaningful property rights in theory, individuals sought to mitigate coverture's deleterious

[12] Claire Priest, "Creating an American Property Law: Alienability and Its Limits in American History," *Harvard Law Review* 120 (2006): 388.
[13] *Ibid.* [14] *Ibid.*, 419.
[15] Erickson, *Women and Property in Early Modern England*, 23. [16] *Ibid.*, 24.
[17] *Ibid.* Widows and single women, however, could and did make wills.
[18] Carole Shammas, Marylynn Salmon, and Michael Dahlin, *Inheritance in America: From Colonial Times to the Present* (New Brunswick: Rutgers University Press, 1987), 25.

effects in practice, in part because property holders valued their daughters and cared for their maintenance and comfort, but also because they sought to protect familial wealth by shielding it from creditors. Of primary concern was protecting an heiress's property from an irresponsible or avaricious husband (particularly a husband who was a chronic debtor), and to prevent husbands from controlling valuable property after a wife's death. In response to these intergenerational concerns, over the course of the seventeenth and eighteenth centuries propertied families in England began to shield familial assets through marriage settlements, which conveyed property to trustees for the benefit of a woman in anticipation of her marriage. These settlements ensured that a husband could not access or dispose of his wife's property. Instead, a wife maintained control over her property (usually through trustees) during her marriage, thereby safeguarding familial wealth from her husband and his creditors and ensuring its transmission intact to the next generation. Married women could not dispose of their property via testamentary bequest at common law, a restriction that marriage settlements superseded by including stipulations authorizing a married woman to make a will despite her coverture. Although they were unenforceable at common law, marriage settlements were honored and litigated in equity courts, a jurisdiction that will be discussed more fully in Chapter 4.[19]

In addition to addressing questions about female property, English property law evolved to govern the transmission of property upon an individual's death. The question of overarching significance to family members and courts was whether a decedent died with or without a will (intestate). In contrast to Continental legal systems, where testamentary freedom was limited, by the end of the seventeenth century English men (as well as unmarried women and widows) could dispose of both personal and real property via will with few restraints.[20] The act of writing a will gave testators the power to "disinherit whomever they pleased," only subject to a widow's dower claim.[21] Writing a will also allowed a testator to choose an executor (or executrix), the person responsible

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

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

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

for inventorying, managing, and distributing a decedent's estate to heirs, a process known as probate and overseen by ecclesiastical courts.[22]

For those who did not choose to make a will, the common law rules of inheritance governed the descent of real property. Under the "canons of descent," which had been followed since at least the thirteenth century, land descended by primogeniture (to the firstborn son), but in the absence of male heirs, daughters inherited jointly.[23] Over the early modern period, questions about the inheritance of intestates' personal property increasingly came to be governed by Parliamentary statute. Indeed, in the century immediately preceding the founding of the Carolina colony in 1670, a period of significant legal change in England, legislation rather than litigation or custom (with a few exceptions) controlled questions of inheritance. This trend culminated in a 1670 statute that gave intestates' widows one-third of a decedent's personalty (if the couple had issue) and provided for the equal inheritance of personal property by children.[24] Like testates' estates, intestates' estates were administered by ecclesiastical courts, which appointed an administrator (or administratrix) to manage, account for, and distribute the decedent's property to heirs at law. Parliament's resolution of what had previously been an anarchic system of intestate property distribution set an important precedent for colonists in South Carolina and in other colonies, who would primarily rely upon local legislation in delineating intestacy rules, and who would likewise use statutes to classify slaves as property for inheritance purposes.

The administration of English property law occupied significant institutional and mental space in early modern English legal culture. In fact, property law comprised the heart of English common law, which developed to provide litigants with a royal forum for adjudicating disputes over land.[25] Consequently, as English colonists began to settle in North America and the West Indies, adapting an English property law regime to suit colonial societies was of primary concern.[26] As Carole Shammas

[22] Erickson, *Women and Property in Early Modern England*, 27. [23] *Ibid.*, 26.
[24] Shammas, Salmon, and Dahlin, *Inheritance in America*, 26.
[25] Baker, *An Introduction to English Legal History*, 15.
[26] As John McLaren, A. R. Buck, and Nancy E. Wright have argued, "[t]he use and regulation of property are central to an understanding of the history and culture of the settler colonies of the British Empire." John McLaren, A. R. Buck, and Nancy E. Wright, "Property Rights in the Colonial Imagination and Experience," in *Despotic Dominion*, edited by John McLaren, A. R. Buck, and Nancy E. Wright (Vancouver, Canada: University of British Columbia Press, 2005), 1.

has shown, colonies typically "followed one of two patterns," either delaying the passage of "any very detailed bill on inheritance" or "continually fiddl[ing] with specific provisions." In general, colonies with large dissenting populations (primarily Puritans and Quakers) deviated most dramatically from English precedents and changed their inheritance schemes frequently.[27] In contrast, colonies in the Chesapeake and Carolina Lowcountry, as Marylynn Salmon has argued, adhered to English legal precedents as closely as possible, largely for cultural reasons. According to Salmon, settlers in these colonies came to America "unwillingly" in the hopes of amassing large fortunes and succeeded "at the price" of "their dignity," and, in response, they mimicked English forms "as closely as possible" to compensate for their supposed feelings of cultural inferiority.[28]

As we shall see, however, slave-owning colonists' decisions to adhere to English legal forms and procedures also represented a practical acknowledgment that English property law provided a workable framework for thinking about and adjudicating disputes over land and, more importantly, slaves. In plantation colonies that relied upon slave labor, assembly members classified slaves as real estate or as chattel property to suit the needs of the planter class they represented, working with rather than discarding English property law forms and concepts in order to maximize the value of their human property. Scholars' assumptions that slaves were a novel form of property and that adapting colonial laws to suit slave societies was a fraught process are incorrect: watching colonists adapt English property law to suit their plantation economy reveals how seamless this process was as a practical and theoretical matter.

SOCIETIES WITH SLAVES

As South Carolina transitioned from a society with slaves into a true slave society in the late seventeenth century, colonists began to erect a legal infrastructure that organized and sanctioned the exploitation of enslaved Black and indigenous laborers.[29] They were not alone in this enterprise. In acts of legal genesis remarkable for their destructive creativity, colonists

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

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

[29] Ira Berlin, *Many Thousands Gone: The First Two Centuries of Slavery in North America* (Cambridge: Harvard University Press, 1998).

throughout the Atlantic World assembled legal systems that made it possible as a practical and theoretical matter to coerce labor in the New World. These systems were many-faceted and complex and ranged from the vernacular legal practices associated with slave trading to the slave codes promulgated by colonial assemblies. Although the "private" law of slavery – embodied in quotidian transactions and routine litigation – will occupy us in the coming chapters, the statutory law of slavery is perhaps the most striking aspect of colonial slave law. Promulgated by local legislatures, so-called slave codes authorized systems of enslaved and indentured labor and "validate[d] . . . many customary elements of the legal relationship between white and black people in the colonial period."[30] We typically associate them with southern or West Indian colonies, but "each of the mainland colonies had at least the rudiments of a statutory law of slavery and nine of them had fairly elaborate slave codes," including New York, New Jersey, Pennsylvania, and Rhode Island.[31] Although slave codes varied from colony to colony, scholars have noted that most colonial assemblies engaged in "legal borrowing" as they drafted them with some codes – like the Barbados slave code – providing a template for a number of others.[32]

Slave codes have commanded significant scholarly attention and seem to show colonial legal deviance. Because "there was no slave law in England," American colonists appear to have generated slave codes "from scratch," drawing upon a wide variety of precedents to create a legal system that developed beyond the pale of English law.[33] This perception lingers despite recent efforts to uncover the English roots of slave codes, in part because the content of slave codes is viscerally shocking to modern sensibilities.[34] Slave

[30] As William Wiecek has shown, "by the time of the Revolution, each of the mainland colonies had at least the rudiments of a statutory law of slavery or race, and nine of them had fairly elaborate slave codes." William M. Wiecek, "The Statutory Law of Slavery and Race in the Thirteen Mainland Colonies of British America," *WMQ* 34 (1977): 258–259.

[31] *Ibid.*, 261–262.

[32] Bradley J. Nicholson, "Legal Borrowing and the Origins of Slave Law in the British colonies," *The American Journal of Legal History* 38 (1994): 38–54.

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

[34] Bradley Nicholson, for example, suggests that the law of slavery "was based on English legal traditions," although these traditions were outside of the common law. Specifically, England's "often brutal police law," developed in the sixteenth century as a response to the problem of "masterless men," provided a template for laws meant to control and police a lower stratum of people. While colonists did not transplant these policing laws "whole cloth," they did find portions of them useful in developing slave codes. Nicholson, "Legal Borrowing and the Origins of Slave Law in the British Colonies," 41. Robert Olwell likewise finds that "while inimitable in fact, the example of English criminal justice was nonetheless a very real presence in the mental worlds of South Carolina jurists" as

codes were bloody, and enshrined in law a regime of terror that was meant to coerce labor and prevent rebellion. Colonists relied upon cruel physical punishments – including whipping and branding – as well as an increasingly elaborate system of surveillance as they "mobilized the apparatus of coercion" to subjugate growing slave populations.[35]

In slave codes, the "limbs of 'Albion's Fatal Tree' that were unequal and brutal flourished," as Robert Olwell has shown. At the same time, "other branches that stressed due process and equality before the law withered."[36] Even as colonists legislated "new punishments" in the service of their expanding plantation economies, they simultaneously stripped enslaved people of the legal protections that white English men and women had come to expect as their birthright.[37] Although some codes sought to protect slaves against unduly harsh treatment, "[s]tatutory provisions directly or indirectly securing the rights of slaves were scanty." Slaves typically could not testify in court against whites, nor could they seek redress in colonial courts. Instead, slave codes instituted a separate criminal process for slaves, one in which colonists meted out a harsh brand of plantation "justice" without a jury.[38] As colonists made clear, these separate jurisdictions were justified and, indeed, necessary given the intrinsic inferiority of Black people Slaves were "Brutish" and "deserve[d] not" to "be tried by the Legal Trial of Twelve Men of their Peers or Neighbourhood," according to the Barbados Assembly. Due to "the Baseness of their Condition," their fate would instead be determined by justices of the peace and local freeholders, who tended to use slave trials to reclaim or reinforce their social standing within the neighborhood.[39] South Carolinians, too, insisted that "negroes and other slaves" were "generally of a barbarous and savage nature" and therefore were "unfit to be governed by the laws, customs and usages of England."[40] Previewing the language of scientific racism that would come to dominate planter

they crafted and interpreted slave legislation. Robert Olwell, *Masters, Slaves, and Subjects: The Culture of Power in the South Carolina Low Country, 1740–1790* (Ithaca: Cornell University Press, 1998), 61.

[35] Berlin, *Many Thousands Gone*, 115. [36] Olwell, *Masters, Slaves, and Subjects*, 71.

[37] Berlin, *Many Thousands Gone*, 115–116.

[38] For slaves and testimony, see Miles Ogborn, "The Power of Speech: Orality, Oaths, and Evidence in the British Atlantic Word, 1650–1800," *Transactions of the Institute of British Geographers*, 36 (2011): 109–25.

[39] *The Laws of Barbados* (London, 1699), 160. For practice in South Carolina's slave courts, see Olwell, *Masters, Slaves, and Subjects*, 71 ff.

[40] "An Act for the Better Ordering and Governing Negroes and Other Slaves" (1735), *SAL*, vol. 7, 385.

discourse in the nineteenth century, they rationalized deviations from English precedents by insisting that people of African descent were beneath the protections enjoyed by British subjects, if not subhuman.

When colonists instituted draconian punishments for slaves and simultaneously deprived enslaved people of the legal protections that white men and women enjoyed as a matter of course, they exposed the "core contradiction of slavery" – "treating persons as things" – as a legal fiction.[41] Slaves themselves precipitated this reckoning. Reading slave codes against the grain reveals that enslaved people constantly challenged white structures of authority in both overt and subtle ways. In acts of resistance great and small, enslaved people refused to allow Britons to erase their humanity and, indeed, forced white colonists to acknowledge their humanity in law. For example, prohibitions against slave gatherings, the consumption of alcohol, and unauthorized travel reveal that slaves participated in these very human activities.[42] More importantly, they suggest that colonists believed that these activities posed threats to plantation regimes. Slave criminality and its punishment exposed the chattel principle's fictiveness in a visceral way that cannot but command our attention. Indeed, it is crucial to notice the ways that enslaved people exposed cracks in a legal system by forcing white colonists to reckon with their humanity. However, we cannot forget that the effort to erase slaves' humanity was Herculean and that the language of English property law was instrumental to this project. Slave codes were not entirely comprised of criminal or policing provisions. Alongside prohibitions against criminality, colonial assembly members also fit their human property into an English legal rubric that divided property into chattel property and real estate. Notably, they never moved beyond this rubric to treat an enslaved person as an "inferior kind of subject," as was the case in other European colonies, or write into law another category for enslaved people.[43] They did not jump the ruts of English property law's well-worn categories. Rather, they maneuvered within those categories, subtly expanding them to accommodate property rights in people. If the criminal and policing provisions in slave codes mark colonists as legal outliers, property law provisions in slave codes remind us that – like Britons throughout the globe – they maneuvered within a distinctively English legal idiom. As

[41] Morgan, *Slave Counterpoint*, 257.
[42] For a contemporary critique of enslaved people's sociability, see Letters of "The Stranger," September 17 and 24, 1772, *SCG*.
[43] Goveia, "The West Indian Slave Laws of the Eighteenth Century," 584.

we shall see, the very act of sorting slaves into English law's categories ultimately worked its own violence.

"NEGROES, GOODS, AND MERCHANDIZES"

Even as colonists cobbled the criminal and policing provisions of slave codes from a variety of legal sources, they sought to ground property rights in people in English law. From an early date, Britons framed their legal discourse about slaves in familiar commercial terms by treating the slave as saleable or moveable property. Although England lacked a statutory framework authorizing or regulating the possession of slaves, slave trading and slave owning were accepted practices in the seventeenth century, and English slave traders and factors developed ways of proceeding in trade that were recognized as binding legal custom.[44] Perhaps the most important of these mercantile customs was to regard slaves as chattel property or "merchandise" until they were sold.[45] The Royal African Company, which exercised a monopoly on the transport and sale of slaves from Africa to the Americas between 1672 and the close of the eighteenth century (although the company continued to trade into the 1730s), routinely considered slaves to be merchandise.[46] For example, in legal agreements between the company and ship captains slaves were grouped with other commodities and merchandise that could be bought and sold on the African coast. John Sperriford "of London Marriner and master of the Good Ship or Vessel called the *Fortune*" agreed with the Royal African Company in 1695 to "transport and bring Negroes Elephants Teeth and any other Goods Com[m]odities and merchandizes" from Africa "unto any of the English plantat[i]ons in America."[47] In the same year, Sam Kelly, master of the galley *Mary & Margaret*, also entered into a charterparty (a shipping agreement) undertaking to deliver slaves and other commodities and

[44] Goveia puts the case for revising the common belief that English law did not recognize slavery, noting that under both West Indian and English laws, "trading in slaves was a recognized and legal activity. Under both, there were provisions for regulating the mortgage of slaves and obliging their sale as chattels in cases of debt. This point is worth stressing. The idea of slaves as property was as firmly accepted in the law of England as it was in that of the colonies." Goveia, "The West Indian Slave Laws of the Eighteenth Century," 584.

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

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

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

merchandise from the Angola region to the American colonies.[48] The wording of these agreements was nearly identical, suggesting that the company and its Court of Assistants used standard language in contracting with ship captains for the purchase and delivery of slaves bound for the Americas. Even at this early date, then, treating slaves as moveable property was routine legal practice among English slave merchants.

The grouping of slaves with other moveable property in legal documents reflected the imperatives of a commercial slave-trading system designed to dehumanize slaves. Stephanie Smallwood has described this system as one in which Africans were transformed into "human commodities" whose most important attribute was their "exchangeability."[49] Indeed, the Royal African Company paid slave-trading captains by the head, not by the ultimate sale price of slaves at their final destinations. This payment structure encouraged slave traders to perceive Africans not as human beings with individual qualities and characteristics, but as items that could be packed into the holds of ships. Associating slaves with merchandise in transactional documents was a natural outgrowth of a system of exchange in which slave traders reduced human beings to units of moveable property. When they conflated Africans with other types of fungible commodities like "Elephants Teeth," they made analogies that were readable in the context of a business that privileged calculation and valued enumeration in planning and conducting long-distance trade. This was a business in which traders filled their holds as quickly as possible with slaves.[50]

The decision to treat enslaved people as cargo or merchandise also made sense in an expanding commercial empire, one in which merchants and colonists increasingly relied upon preprinted transactional documents to manage long-distance trade. As we shall see in Chapter 2, these forms reduced transaction costs, making it easier as a practical matter for Britons to conduct business without a lawyer by simply filling in the blanks of a preprinted form. At the same time, the language in these forms disciplined commercial speech by forcing users to fit a wide variety

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

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

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

of transactions – including transactions involving human property – into forms that would be honored in extant legal systems.

We should not be surprised, then, to find that customary legal practices in the transatlantic slave trade provided early English colonists with workable precedents and that they took their cues from the merchants who had already found success in adapting familiar forms and practices to human trafficking. This was as true in New England as it was in plantation colonies. In the seventeenth and eighteenth centuries, slavery was not yet geographically confined to the area that would one day become the American South. Sanctioned by the Crown, slave trading was authorized and accepted by ordinary people who "told themselves and believed that even if enslaved people longed for freedom, their own personal enactment of slaveholding was permitted, protective, and unproblematic."[51] Early New England colonists, in fact, built upon the core principle that slaves were merchandise and wrote into slave codes an assumption that people could be property under English law. For example, the Massachusetts Body of Liberties (1641) often features in progressive narratives about the history of self-government and civil liberties, but the path-breaking document also recognized slave trafficking. While purporting to exclude slavery, the Body of Liberties sanctioned the enslavement of "lawful captives taken in just wars" and "such strangers" that were "sold" to colonists.[52] Building upon this precedent, the "Duke's Laws" in New York (1665) also recognized the buying and selling of slaves under certain circumstances.[53] Both of these early codes assumed that, when enslavement was legally justified, slaves might be bought and sold as goods or merchandise in keeping with customary practice in the slave trade. Even as they sought to prohibit slavery under most circumstances, these laws codified and legitimized the human trafficking that was already taking place in practice in New England ports.[54]

[51] Wendy Warren, *New England Bound, Slavery and Colonization in Early America* (New York: Liveright, 2016), 129.

[52] Massachusetts Body of Liberties, December 1641 in William H. Whitmore, *Bibliographical Sketch of the Laws of Massachusetts Colony from 1630-1686* (Boston: Rockwell and Churchill, 1890), 32–61. See also Wiecek, "The Statutory Law of Slavery and Race in the Thirteen Mainland Colonies of British America," 261; Warren, *New England Bound*, 34–35.

[53] Wiecek, "The Statutory Law of Slavery and Race in the Thirteen Mainland Colonies of British America," 261.

[54] According to Wendy Warren, "at a bare minimum at least nineteen documented trading voyages in the seventeenth century followed the telltale slaving route of New England to Africa to the West Indies and back." Warren, *New England Bound*, 45.

In New England and the Mid-Atlantic colonies, colonists continued to treat enslaved people as merchandise – or chattel property – despite the lack of specific statutory authorization from their assemblies.[55] Decidedly commercial in orientation and influenced by legal precedents in the slave trade, colonists in New England and the Mid-Atlantic assumed *arguendo* that enslaved people were merchandise and treated them as such. Into the eighteenth century, slave codes in these regions remained primarily concerned with drawing distinctions between white "Christian" servants and slaves and policing enslaved (and free Black) populations rather than defining what type of property slaves would be at law. For example, the Massachusetts Bay colony did not attempt to categorize slaves as a particular species property, although in wills, estate inventories, and bills of sale, "Negroes were listed in the same manner as bedsteads, china ware, guns, money, and horses." By 1675, slaves were also "placed in the same category" as other chattels, including "horses, sheep and swine," in tax rates.[56] Similarly, "even though colonial lawmakers never explicitly legalized race-based slave-holding" in Rhode Island, "they simply began legislating as if the institution were already in place."[57] Rhode Islanders may have been the "most deeply entrenched" in the slave trade; nonetheless, they did not seek to classify slaves via statute.[58] The same was true in New York and New Jersey. Although statutes declared that slaves were "property," neither colony explained what kind of property slaves would be at law.[59]

This lack of specificity did not extend to plantation America. In places where planters increasingly relied upon slave labor to produce commodities for Atlantic markets, colonists used slave codes to categorize enslaved people as property explicitly. Whereas New Englanders and Mid-Atlantic colonists were content to assume that slaves were chattel property in

[55] *Ibid.*, 112.

[56] Lorenzo Johnston Greene, *The Negro in Colonial New England, 1620–1776* (New York: Columbia University Press, 1942), 169–170.

[57] Christy Clark-Pujara, *Dark Work: The Business of Slavery in Rhode Island* (New York: New York University Press, 2016), 29.

[58] *Ibid.*, 28.

[59] "An Act for Regulating Slaves" (1702), *Acts of Assembly Passed in the Province of New York, from 1691–1718* (London, 1719), 59; "An Act for Preventing, Suppressing, and Punishing the Conspiracy and Insurrection of Negroes, and Other Slaves" (1712), *ibid.*, 14. For New Jersey, see an "Act for Regulating Slaves," *The Acts of the General Assembly of the Province of New-Jersey, from the Time of the Surrender of the Government in the Second Year of the Reign of Queen Anne, to this Present Time, being the Twenty Fifth Year of the Reign of King George the Second* (Philadelphia, 1752), 18–24.

keeping with mercantile practice, assemblies in plantation colonies began to experiment with different classification schemes. As we have already seen, English law bifurcated property into chattel property and real estate, and each of these categories conveyed a different bundle of rights that impacted masters' rights to sell, devise, and shield slaves from creditors. Because they sought to maximize their legal rights to alienate but also to shield their slave property from creditors' claims, assembly members in plantation colonies often wrote into law an odd (from an English perspective) distribution of property rights. Legislators treated slaves as real property in some circumstances (which technically ensured that eldest sons would inherit both land and slaves in cases of intestacy), but also deemed slaves chattel in order to expand credit with English merchants. Although the overarching trend, at least in statutory law, was a shift from classifying slaves-as-real estate to slaves-as-chattel, this move was halting and contingent, as colonists responded to local economic conditions as well as the realities of lawmaking in an imperial context. English property law, which reified categories and forms, may have appeared rigid at first glance, but in practice offered plantation colonists significant room to maneuver.

The development of chattel slavery can seem inevitable when we view it from a nineteenth-century perspective, but this was not the only option available to colonists. As Thomas Morris has shown, "for one reason or another rules of real property were applied in some instances in over one-third of the jurisdictions that made up the slave south."[60] Morris's study, which encompasses the nineteenth century as well as the colonial period, disproves the assumption that legislators or judges understood slaves to be exclusively chattel property from the beginning of the colonial period. In fact, classifying slaves as real estate had a number of advantages over "pure" chattel slavery, particularly in places where a planter's economic success depended upon his ability to combine both land and slaves into a productive unit. Because the laws of real property had evolved over time to encourage intergenerational transfers of real estate, classifying slaves as real estate allowed planters to annex their slaves to plantations and to transmit them together to their heirs according to the rules of intestacy. In other words, if a plantation owner died without a will, both his land and slaves would descend to his heirs together. This offered significant advantages to planters in high mortality environments, who could ensure that

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

whole plantations, including an annexed labor force, would pass intact to their eldest sons according to the canons of descent.

Keeping plantations and slaves together (and therefore profitable) after a planter's untimely death also tended to protect widows, who were entitled to a one-third of an estate's proceeds for life. In high-mortality colonies like Virginia, the fate of widows deeply concerned assembly members, who feared that classifying slaves as chattel property might imperil their wives' financial stake in plantations. Writing to the Board of Trade in 1728, for example, Lieutenant Governor Gooch of Virginia explained that some Virginia colonists took "great exception" to an "act to explain and amend the act for declaring the negroe mulatto and Indian slaves within this Dominion to be real estate" on the grounds that the act did not sufficiently protect widows' dower rights to slaves.[61] This concern was linked to plantation colonists' awareness that classifying slaves as chattel or real estate impacted creditor-debtor relations. Under English law, these creditors could not attach real estate to satisfy outstanding debts. Classifying slaves as real estate, therefore, allowed colonists to shield their human property from unsecured creditors (that is, creditors who did not have a bond that listed the property that secured the debt). In Virginia and Jamaica, where indebtedness to English merchants was sometimes framed as a pressing problem, classifying slaves as real estate was tantalizingly attractive. Colonists in both places had direct experience with creditors, who "attached and sold all the slaves on an estate" in order to satisfy outstanding debts. This left the planters and his heirs with "bare land without Negroes to manure the same," which spelled financial ruin. To keep "plantations as viable working units," then, colonists who were anxious about indebtedness favored classifying slaves as real estate.[62]

This legal reclassification of slaves as real property concerned British merchants. Plantation colonists were not the most principled debtors, and their British creditors kept a weather eye out for any potential impediments that might impede their right to seize planters' most valuable assets.[63] In

[61] Gooch to Board of Trade, June 8, 1728, *CSP*, vol. 36.

[62] Richard S. Dunn, *Sugar and Slaves: The Rise of the Planter Class in the English West Indies, 1624–1713* (Chapel Hill: University of North Carolina Press, 1972), 241.

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

Jamaica, for example, courts often refused to attach slaves to satisfy creditors' claims, a trend that merchants found alarming. Virginia colonists were also notorious for dodging their creditors, and merchants routinely complained about these practices until Parliament purportedly resolved the problem with the 1732 Debt Recovery Act.[64] Abolishing "the legal distinctions between real property, chattel property, and slaves in relation to the claims of creditors," the Debt Recovery Act made it possible for creditors to seize slaves and even land in payment of debts, regardless of the way in which colonial statutes classified assets.[65] No longer could colonists classify their slaves as real estate (or reclassify them) in order to shield them from creditors. The act was a decided victory for merchants, but plantation colonists responded less favorably. Virginians, who were well aware that the Debt Recovery Act would limit their ability to shield slaves from creditors, "fiercely" resisted the legislation.[66] Likewise, Barbadians asked the Board of Trade to declare that the act did not apply in the island. Failure to do so, they charged, would result in the "compleat the ruin of the inhabitants."[67] Plantation colonists may have overreacted to the Debt Recovery Act, but their visceral response reveals that the classification of enslaved people as property was more than merely a semantic issue. Like their British creditors, slave owners understood that the power to categorize allowed them to improve their position in commercial relationships in places where financial success depended upon an ability to command both labor and land. The Debt Recovery Act stripped them of this power, leaving them vulnerable to the claims of British creditors. Viewed in this light, colonists' reactions to the Debt Recovery Act begin to seem less like hyperbole and more like a shrewd assessment of what they had lost.

Plantation colonists may have objected to the Debt Recovery Act, but from an early date they too were aware of "the difficultys of making

[64] Priest, "Creating an American Property Law," 425. Representation of the President, Council and Assembly of Barbados to Board of Trade, January 18, 1733, *CSP*, vol. 40.

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

[66] Priest, "Creating an American Property Law," 425.

[67] This was because there was "but a very small currency of cash in this island," and therefore if the "best sugar-work plantation[s]" were sold by outcry to satisfy creditors, only English creditors would be able to afford to purchase them. Representation of the President, Council and Assembly of Barbados to Board of Trade, January 18, 1733, *CSP*, vol. 40.

a perishable thing governable by the ... rules of succession as lands of inheritance."[68] Classifying slaves as real estate may have allowed them shield slaves from creditors, but it was not a panacea. As a primary matter, treating slaves as real estate deviated from customary norms in the slave trade, as we have seen, and therefore made the rights and remedies of merchants and factors unclear when they unladed slaves in colonial ports. More importantly, classifying slaves as real property tended to contract credit. Because real property was difficult for unsecured creditors to attach, classifying slaves as real estate limited creditors' practical legal remedies when American creditors defaulted. As a result, English merchants were reluctant to extend much-needed credit to colonists when they were unable to attach their most valuable assets: their slaves. When Virginia colonists lamented that merchants only gave "credit according to the number of slaves they know a man is possess'd of," what they really meant is that merchants extended credit when slaves were available to attach.[69]

Aware of these limitations, assembly members in plantation colonies often wrote into law an odd (from an English perspective) distribution of property rights. Rather than limiting themselves to a binary choice – chattel or real estate – they modulated between treating enslaved people as chattel in some circumstances and real property in others. For example, although the 1698 Barbados slave code categorized slaves as "Estates Real, and not Chattels," the law specifically exempted merchants, factors, and agents: The slaves they imported to Barbados would be considered chattels until sold.[70] Virginia's 1705 slave code also declared slaves to be real estate for the purposes of inheritance, while allowing merchants, factors, and agents to treat slaves as chattels.[71] These exceptions codified customary practice in the slave trade and acknowledged that slave traders and factors required the maximum amount of legal flexibility in order to turn a profit on slave-trading voyages. They also reflected the fact that some (but not all) speculators in the

[68] Gooch to Board of Trade, June 8, 1728, *CSP*, vol. 36.

[69] Morris, *Southern Slavery and the Law*, 67. "An Act to explain and amend the Act, For declaring the Negro, Mulatto, and Indian Slaves, within this Dominion, to be Real Estate," William Waller Hening, *Statutes at Large: Being a Collection of all the Laws of Virginia, from the First Session of the Legislature in the Year 1619*, vol. 4, 225–226. Gooch to Board of Trade, June 8, 1728, *CSP*, vol. 36.

[70] "An Act Declaring the Negro-Slaves of this Island, to be Real Estates" (1668), *Acts Passed in the Island of Barbados, from 1643 to 1762, Inclusive* (London, 1764) (hereafter cited as *Barbados Acts*), 64–65.

[71] "An Act Declaring the Negro, Mulatto, and Indian Slaves within this Dominion, to be Real Estate" (1705), Hening, *Statutes at Large*, vol. 3, 333.

"Guinea" trade lacked the dynastic imperatives of colonists who sought to establish and transmit plantations and slaves to the next generation.

More importantly, plantation colonists – like British merchants – understood the broader financial implications of classifying slaves as real estate and specifically that treating slaves as real property contracted credit. As a result, assemblies classified slaves as real estate for inheritance purposes but allowed creditors to attach slaves in payment of debts. In 1672, for example, the Barbados assembly declared slaves to be "Chattels for the payment of Debts" but clarified that they would remain real estate "to all other intents and purposes."[72] Jamaica's 1696 slave code also considered slaves real property for the purposes of determining their descent upon an owner's death. In other words, English intestacy law would apply to slaves in the same way it applied to landed estates. However, slaves could be seized as chattels to satisfy creditors' claims until all of a decedent's debts had been paid. Only the slaves that remained after the payment of an owner's debts would descend as if they were land.[73] Assembly members in Virginia likewise adopted this modified approach. Following West Indian trends, in 1705 Virginia burgesses allowed creditors to seize slaves – otherwise treated as real estate – for payment of debts "as other chattels or personal estate may be."[74] Despite a statutory scheme that was generally protective of

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

[73] "An Act for the Better Order and Government of Slaves" (1696), *Acts of Assembly, Passed in the Island of Jamaica: From 1681, to 1737, Inclusive* (London: John Baskett, 1738).

[74] "An Act Declaring the Negro, Mulatto, and Indian Slaves within this Dominion, to be Real Estate" (1705), Hening, *Statutes at Large*, vol. 3, 334. The statute apparently created confusion about whether slaves could be entailed; however, this was resolved in a 1727 law that expressly authorized slave owners to entail their human property. Under this statute, executors and administrators could still seize slaves to pay the debts of the deceased, as was the case in earlier statutes, but only when the decedent's other personal estate was inadequate to pay those debts. Likewise, the statute provided some protection for wives' dower rights by maintaining that slaves "entailed and possessed by a husband in right of his wife could not be seized to satisfy his debts." Morris, *Southern Slavery and the Law*, 67. "An Act to explain and amend the Act, For declaring the Negro, Mulatto, and Indian Slaves, within this Dominion, to be Real Estate . . ., " Hening, *Statutes at Large*, vol. 4, 225–226. For a discussion of the practice of entailing slaves in Virginia, see Holly Brewer, "Entailing Aristocracy in Colonial Virginia: 'Ancient Feudal Restraints' and Revolutionary Reform," *WMQ* 54 (1997): 338–339. Brewer rebuts C. Ray Keim, "Primogeniture and Entail in Colonial Virginia," *WMQ* 25 (1968): 545–586. Analyzing wills from York County, Virginia, between 1715 and 1769, Morris has argued that most Virginians did not entail their slaves and that heirs who inherited slaves in fee tail could "dock" the entail easily. Morris, *Southern Slavery and the Law*, 71.

dynastic interests in land and slaves, Virginia's carve-out for creditors was a practical acknowledgment that in Virginia – as elsewhere in plantation America – credit was king.

CHATTEL BY CUSTOM

South Carolina's Commons House of Assembly passed its first slave code in 1691, and in this initial attempt to regulate slavery in the province, the assembly members followed West Indian precedents by stipulating that slaves should be freehold property (real property), except with regard to the payment of debts, in which case they should be "deemed and taken as all other goods and chattels."[75] However, the Lords Proprietors disallowed this law along with all other legislation passed during the gubernatorial regime of Seth Sothell, one of the infamous "Goose Creek" men who took control of the colony's government and later was recalled in disgrace by the Lords Proprietors.[76] For the next fifty years, statutory law in South Carolina remained surprisingly vague with regard to classifying slaves as property.[77] Indeed, colonists did not formally declare slaves to be chattels until 1740.[78]

In the absence of legislative guidance, South Carolinians followed customary mercantile practice and treated their slaves as chattel property. In early marriage settlement documents, slaves were listed with other personal property, and especially money, cattle, and household goods.[79] For example, in anticipation of Elizabeth Ashby's marriage to John Vinaridge, her family drew up a marriage settlement giving Elizabeth "separate use" of "all and Singular the Issue profits and increase of the negroes and other Slaves & all other the personal Estate whatsoever" without her husband's "hinderance." The assumption that slaves were personal estate was

[75] The law read: "[A]s to the payment of debts [negroes] shall be deemed and taken as all other goods and chattels . . . and all negroes shall be accounted as freehold in all other cases whatsoever, and descend accordingly." "An Act for the Better Ordering of Slaves" (1691), *SAL*, vol. 7, 343–344. This law is incorrectly dated to 1690 in *SAL*. See L. H. Roper, "The 1701 'Act for the Better Ordering of Slaves'," *WMQ* 64 (2007): 397, n. 1.

[76] Eugene Sirmans, "The Legal Status of the Slave in South Carolina, 1670–1740," *The Journal of Southern History* 28 (1962), 465.

[77] Although colonists continued to generate new slave legislation during this period, these codes primarily addressed concerns about policing the colony's expanding slave population. Between 1691 and 1740, colonists passed slave statutes (including minor revisions to older statutes) in 1693, 1695, 1696, 1701, 1712, 1714, 1717, 1722, and 1735.

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

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

reinforced later in the agreement, which also grouped Elizabeth's slaves with the rest of her "goods Chattles moneys or other personal Estate."[80] Slaves, Black as well as Native American, were also routinely included in South Carolina estate inventories, which only listed personal property. An early inventory dating to 1688, for example, included "one Indian woman named Francis," who was valued at £15 sterling.[81] And in slave-sale advertisements, South Carolina colonists called slaves "chattels," revealing that the term and its legal meaning were well understood from an early date. In 1735, for example, the *South Carolina Gazette* ran an advertisement for an estate sale of "all the Goods and Chattels" of the deceased, "consisting of Negroes, Household Goods and other Effects."[82] The phrase "Goods and Chattels" was a common trope, a piece of legal jargon with which colonists were familiar, and which appeared in a variety of places in conjunction with the word "negro" or "negroes." Elizabeth Ashby's marriage settlement included this grouping, but it also appeared in early colonial wills. In 1736, Jonathan Welden of Christ Church parish in Berkeley County left his "whole estate," including "both Negroes Horses and Cattle and all other my Goods and Chattels" to be shared equally among his wife and children.[83] Moses Wilson of Goose Creek also bequeathed his "well beloved" wife and her sons the residue of his estate, including his "Negroes Stock Goods Chattels & Estates."[84]

This de facto treatment of slaves as chattels parallels legal developments in New England, as we have already seen. Without discounting the many ways in with South Carolina's developmental trajectory diverged from that

[80] Articles of Agreement, February 9, 1729/30, Ball Family Papers, 33–83-1 (6) (oversized), SCHS. The agreement also empowered Elizabeth to devise her estate "both real and personal" by will.

[81] Roby Inventory, 1688, PROB 4/19619, TNA. See also Sirmans, "The Legal Status of the Slave in South Carolina, 1670–1740," 466–468.

[82] *SCG*, October 25, 1735, B3A3. Customary practice also dictated who would be deemed a slave. Enslaved people, according to assembly members in 1712, included "all negroes, mulatoes, mustizoes or Indians, which at any time heretofore have been sold, or now are held or taken to be, or hereafter shall be bought and sold for slaves." Moreover, "their children" also were "hereby made and declared slaves." "An Act for the Better Ordering and Governing of Negroes and Slaves" (1712), *SAL*, 7, 352. This language closely tracked that of earlier statutes (1691 and 1701). See Roper, "The 1701 'Act for the Better Ordering of Slaves'," for an extensive discussion of the 1701 act, which is located in manuscript at the British Library.

[83] Will of Jonathan Welden, July 26, 1736, ST 0505A, Secretary of State Recorded Instruments, Will books Vol. LL 1737–1747 S 213027, 12–14, SCDAH.

[84] Will of Moses Wilson, February 25, 1737/8, ST 0505A, Secretary of State Recorded Instruments, Will books Vol. LL 1737–1747 S 213027, 267–273, SCDAH.

of Massachusetts Bay or Rhode Island, these places shared a decidedly commercial outlook and an intimate familiarity with human trafficking. Dominated by an overlapping merchant and planter elite who did not shy away from discussing business affairs, South Carolina colonists engaged with the broader Atlantic marketplace, including the transatlantic slave trade.[85] Living "economic lives" that "shifted between production and exchange," South Carolina planters were connected to Atlantic mercantile life in a less attenuated way than their counterparts in Virginia, where the "tidewater gentry seemed disengaged from the details of Atlantic commerce."[86] This difference had significant cultural ramifications. Unlike other colonists in plantation America, and especially Virginia, South Carolinians "admitted the mundane world of production and exchange into polite society." They prided themselves on their commercial acumen and on their "commitment to business," which "became a normative standard around which elites oriented their values in the colonial era."[87] But South Carolina colonists' commercial orientation was also significant in that it bred familiarity with mercantile practice and particularly legal norms that governed daily practice in the slave trade, including treating slaves as chattel property.

Beyond these cultural reasons, South Carolinians may also have treated slaves as chattel property for the legal flexibility it conveyed. This may have seemed particularly important given the colony's rapid economic growth and, relatedly, its central role as a mainland slave importer by the middle of the eighteenth century. After a period of experimentation with a variety of commodities for export, the commercial production of rice accelerated at the turn of the eighteenth century and prompted South Carolina colonists to import larger numbers of enslaved Africans.[88] By 1740, the commercial production of rice and indigo in the colony had provided the foundation for an economy organized around increasingly diversified and far-flung plantation enterprises that relied heavily upon slave labor.[89] As a result, slaves made up an increasingly significant portion of colonists' wealth as the eighteenth century progressed. Slaves,

[85] Edelson, *Plantation Enterprise*, 174.
[86] *Ibid.*, 176, 177. Unlike Virginia and the West Indies, where commodity producers "tended to consign their staples for shipment to Europe," in South Carolina planters "sold almost all their rice and most of their indigo in town for an immediate return." *Ibid.*, 176.
[87] *Ibid.*, 174.
[88] Slave imports in South Carolina "rose markedly" in the 1720s and 1730s with importation rates nearly doubling in the 1730s. Morgan, *Slave Counterpoint*, 60.
[89] Edelson, *Plantation Enterprise*, 76, 111–112.

in fact, accounted for 40 to 50 percent of South Carolinians' movable property between 1720 and 1770, and this figure reached 68 percent in 1774.[90] By the middle of the eighteenth century, most colonists "had more wealth in slaves than land," and this made it particularly important to treat their human property in a way that would maximize colonists' ability to buy, sell, and move slaves to far-flung plantations.[91] Whereas in places like Virginia, classifying slaves as real estate kept land and labor together in a single productive unit that would descend intact down the generations, South Carolinians ensured a more equitable division of property upon death. Treating slaves as chattel property did this in two primary ways. First, it ensured that the children of South Carolina intestates would inherit the residue of personal property, including slaves, equally. Under the Intestates Estates Act, an English statute that South Carolina adopted in 1712, male and female children of intestates were entitled to inherit personalty equally.[92] This meant that – unlike colonies where slaves were real estate and would descend according to the canons of common law descent to the eldest son (primogeniture) – in South Carolina, daughters and sons alike would share in a decedent's enslaved property.[93]

In a high-mortality province like South Carolina, where colonists could not be sure of producing a surviving male heir, this was particularly important. Indeed, the interaction of disease, human actors, and the natural environment in the colony created a demographic profile that made it appear less like other mainland colonies and more like the British West Indies. Even by early modern standards, "which were nothing if not appalling," life in colonial South Carolina was "peculiarly fragile."[94] In the colony's "funereal lowlands," the white population "had difficulty sustaining itself naturally until the 1770s." Nearly one-third of the residents of who survived to the age of twenty died before they were forty, while the crude death rate in Charlestown among whites was "terrifically high: between 52 and 60 per thousand" between 1722 and

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

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

[92] 22 and 23 C. 2, c. 10, adopted in *SAL*, vol. 2, 523 ff.

[93] Morris, *Southern Slavery and the Law*, 83. As John Crowley has argued, colonial South Carolina's property law represented an attempt to "take into account the legal status of slaves as personalty in the division of estates." Crowley, "Family Relations and Inheritance," 52.

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

1732.[95] Colonists were aware they were likely to die young and without male heirs, and although South Carolinians typically have been perceived as less dynastically minded than their counterparts in Virginia, they nonetheless sought to ensure the transmission of wealth, which increasingly took the form of slaves, through at least one generation. Treating slaves as chattel property made this possible, even when colonists failed to produce a surviving male heir.

Relatedly, chattel slavery also clarified any potential concerns about a widow's entitlement to slaves upon her husband's death. In South Carolina (as in England) widows were entitled to receive one-third of the residue of a decedent's personal property after debts had been paid.[96] Treating slaves as chattel, then, provided widows with increasingly valuable human property for their support. Whereas in England a "widow's interest in the landed estate was sufficiently compensated by maintenance for life from one-third of its income," for many South Carolina widows, returns from land could not provide adequate support.[97] At the same time, slaves-as-chattels also ensured that in South Carolina creditors could attach slaves, even when they were claimed by widows. Unlike land, personal property was subject to creditors' claims and funeral expenses before the residue could be apportioned as a widow's third, and as we have already seen, creditors were reluctant to extend credit when assets could not be attached. This, after all, had been the point of the Debt Recovery Act, which sought to prevent colonial legislatures from reclassifying slaves as real estate in order to shield them from creditors. For precisely this reason, assembly members in provinces where slaves were treated as real estate for some purposes passed laws that were creditor friendly, particularly when it came to

[95] *Ibid.*, 42. [96] 22 and 23 C. 2, c. 10, adopted in *SAL*, vol. 2, 523 ff.

[97] The potential downside to South Carolina's intestacy scheme, however, was that a widow who remarried would take her deceased husband's slaves with her, which under the doctrine of coverture would become the property of her new husband and would no longer pass to her children upon her death. Slave owners could alter these "dangerous effects of intestacy" by writing a will that limited a wife's access to the estate. Salmon, *Women and the Law of Property*, 157. Wills were proved by the governor and council sitting as a Court of Ordinary. This court also had authority over the administration of intestates' estates. According to John Crowley, testation rates in colonial South Carolina were high, and testates usually comprised "between 40 and 50 percent of such listings as probated decedents, militiamen, and jurymen." As in England, wealthy decedents were more likely to leave a will. "Half of the testators with identifiable occupations were planters, one quarter were merchants, and another quarter were artisans and tradesmen. The proportion of widows varied between 8 and 19 percent." John E. Crowley, "The Importance of Kinship: Testamentary Evidence from South Carolina," *Journal of Interdisciplinary History* 16 (1986): 565–566.

widows' claims to slaves. Virginia burgesses, for example, worked hard to ensure that even though slaves were considered real property for the purposes of inheritance, creditors could still reach dower slaves.

South Carolina colonists arrived at a simpler solution. By treating slaves as chattel property, they ensured that creditors always and without question could attach slaves in the colony, even when those slaves were claimed by widows. Familiar with the needs of merchants and factors through their interactions with them in Charlestown and also by virtue of the fact that many South Carolina planters themselves were engaged in mercantile activities, slave owners crafted a customary legal regime that allowed them to maximize the availability of credit. Doing so was vital for colonists who increasingly relied upon credit to expand their plantation and mercantile enterprises. Indeed, the cycle of credit and debt in South Carolina relied upon the ready availability of this type of human capital, which was used to fuel the colony's geographic and financial expansion and helped make South Carolina's colonists the richest group on a per capita basis in North America on the eve of the American Revolution.[98]

THE "NEGRO ACT" OF 1740

In 1740, South Carolina finally enshrined the practice of treating slaves as chattel property in statute as part of a broader overhaul of the colony's laws. The Negro Act of 1740 extended and reinforced the colony's extant slave-policing regime.[99] Assembly members methodically eliminated slaves' ability to congregate, to move freely throughout the province, to access weapons, and to engage in marketing activities without permission. At the same time, they "stripped slaves of many of the individual protections customarily granted by the common law."[100] A legislative

[98] Slave mortgaging was a common practice in South Carolina as well as other plantation colonies, and colonists routinely risked slaves in order to fund purchases of additional land and slaves. As Russell Menard has shown, this type of plantation financing grew in tandem with the colony's increasingly prominent role as a commodity producer. During periods of prosperity, planters mortgaged slaves to finance the purchase of more slaves, which they hoped would allow them to participate more fully in South Carolina's bustling export economy. Slave mortgaging did not benefit great planters alone: many who engaged in this practice were "men of modest means" who used slave mortgages to help them build farms and accumulate wealth. Russell R. Menard, "Financing the Lowcountry Export Boom: Capital and Growth in Early Carolina," *WMQ* 51 (1994): 665.

[99] December 3, 1736, *Journal of the Commons House of Assembly* (*Journals*), November 10, 1736 – June 7, 1739, 30.

[100] Olwell, *Masters, Slaves, and Subjects*, 62, 66.

monument to the horrors wrought by the colony's participation in human bondage, the criminal and policing provisions in the act make it particularly worthy of notice. For our purposes, the Negro Act of 1740 is significant because it also codified chattel slavery in the colony, thereby distinguishing it from all other slave laws that preceded it and marking South Carolina's slave regime as different from others in plantation America.[101] In the Negro Act, assembly members specified that slaves would be "deemed, held, taken, reputed and adjudged in law, to be chattels personal, in the hands of their owners and possessors, and their executors, administrators and assigns."[102] Rather than stipulating that slaves would be considered chattel property in some cases and real estate for others, as was the case in Virginia and Britain's West Indian colonies, assembly members classified slaves as personal property "to all intents, constructions and purposes."[103]

The aberrance of this property law provision did not escape the attention of metropolitan legal authorities, including the Board of Trade's legal counsel, Matthew Lamb. Opining on the 1740 statue's legality, Lamb noted that the Negro Act was "[d]ifferent from all the Laws of the other Colonyes and Plantations" because it made "Negroes Chattells Personall," and he expressed concerns that the statute infringed upon the Debt Recovery Act. Although Lamb did not provide an elaborate explanation for his qualms about the Negro Act, it seems that he believed the Debt Recovery Act only authorized freehold slavery, not chattel slavery. Underlying this objection were deeper policy concerns about how classifying slaves as chattel property would impact imperial trade and defense, a point that the Privy Council repeated in 1751 when they rejected Virginia's bid to codify chattel slavery.[104] Classification schemes that "annexed Negroes to Land" had "increase[d] the Trade of Great Britain," "raise[d] the credit" of the colony, and "strengthen[ed] it in point of Defence," according to the Privy Council.[105] As a result, when Georgia sought to classify slaves as chattel property rather than real estate in 1766, they opined that the statute in

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

[102] *Ibid.* [103] *Ibid.* [104] Hening, *Statutes at Large*, vol. 5, 432.

[105] *APC*, vol. 5 (London, 1908–1912), 138.

question was "of publick ill consequence" because it would hinder "the Cultivation and Improvement of Farms and plantations."[106] Despite Lamb's concerns, however, the 1740 Negro Act was never disallowed, largely due to the lobbying efforts of South Carolina merchants, and with a few minor alterations, the legislation remained in force throughout the colonial period.[107]

South Carolina's powerful lobby may have overridden Lamb's objections, but his critique points to a broader question: why did South Carolina codify chattel slavery in contravention of West Indian practices and against the wishes of the Privy Council? Unfortunately, the *Journals of the Commons House of Assembly* are silent on the matter. South Carolina's decision to classify slaves as chattel property seems to have occasioned none of the heated debates that played out in Virginia's House of Burgesses. From the beginning, it seems, assembly members assumed that the law would codify chattel slavery. Indeed, the final copy of the Negro Act echoes language that was present in its earliest iteration, including the classification of slaves as "Chattels Personal" and the codification of *partus sequiter ventrem*, the doctrine that declared that all children born of enslaved mothers were to be considered as slaves in the eyes of the law.[108] Assembly members also "agreed to" this provision without debate, according to the *Journals*.[109] Instead, the act's most controversial provisions related to the punishment of slaves, including whether slaves should be "[p]unished with Death for running off the Province" (no) and whether the "Publick" should "bear the Expences" for noncapital slave prosecutions (yes).[110] In the aftermath of 1739's Stono Rebellion, in which a group of slaves rose up along the Stono River and killed at least two dozen colonists, members offered additional amendments to the bill that restricted the movement and congregation of slaves, prohibited teaching slaves "to write," and other changes that

[106] *Ibid.*, 40–41.

[107] Matthew Lamb to Board of Trade, November 2, 1748, BPRO, vol. 23, 261. The board ultimately declined to take action "due to the intercession of Charles Town merchants, who often owned slaves and who enjoyed considerable influence with the Board of Trade." Sirmans, "The Legal Status of the Slave in South Carolina, 1670–1740," 472. For a discussion of the South Carolina lobby's influence, see Huw David, *Trade, Politics, and Revolution: South Carolina and Britain's Atlantic Commerce, 1730–1790* (Columbia: University of South Carolina, 2018), *passim*.

[108] *Journals*, December 13, 1737, 362. [109] *Ibid.*, 364.

[110] *Journals*, January 26, 1737/8, p. 428. For additional debates, see pp. 429 ff, 511 (third reading).

reflected their concerns to prevent another slave insurrection.[111] However, the provision codifying chattel slavery remained the same.

This decision to codify chattel slavery in the Negro Act of 1740 is particularly puzzling, because enshrining customary practice in law did little to change the legal status quo in South Carolina. By 1740, colonists were already accustomed to treating slaves as chattel property in practice, as we have seen. As a result, classifying slaves as chattels would not have impacted inheritance patterns or South Carolina colonists' ability to access credit from English merchants, who already could attach slaves (regardless of classification) under the Debt Recovery Act. A purely instrumentalist perspective, then, fails to explain why South Carolina colonists finally chose in 1740 to clarify what had been a long-standing practice of treating slaves as chattels, when they had failed to do so multiple times before. Indeed, between 1691 and 1740, assembly members revised and reissued slave statutes numerous times without ever seeking to define enslaved people as property.[112]

Most recently, historians have analyzed the 1740 Negro Act to understand how South Carolina colonists perceived themselves as members of a broader British Empire, particularly given the fact that they owned human property. For Robert Olwell, the 1740 statute was a "cultural edifice," a law that "was both 'imagined' and constructed to reflect a metropolitan ideal."[113] Aware that the institution of slavery "engendered conflicts and incongruencies between the ideals and practices of English justice and its provincial counterpart," colonists drew upon English legal traditions in the Negro Act in order to recast their society as familiar.[114] Christopher Tomlins, too, has argued that in the Negro Act colonists signaled their "respect for English law" as part of a broader cultural performance in which they used a "discourse of legality" to serve their own self-interests.[115]

All of these things are true, but in describing the Negro Act of 1740 as a "cultural edifice," we cannot leave out the scaffolding. Not only did the substance of the Negro Act of 1740 imagine a more English South Carolina; the very act of codification marked South Carolinians as participants in a broader English legal culture, one in which statutes were increasingly eclipsing other sources of binding legal authority. This

[111] *Journals*, September 12, 1739–May 10, 1740, November 30, 1739, 68.
[112] Between 1691 and 1740, colonists passed slave statutes (including minor revisions to older statutes) in 1693, 1695, 1696, 1701, 1712, 1714, 1717, 1722, and 1735.
[113] Olwell, *Masters, Slaves, and Subjects*, 60. [114] *Ibid.*, 61.
[115] Christopher Tomlins, *Freedom Bound: Law, Labor, and Civic Identity in Colonizing English America, 1580–1865* (Cambridge: Cambridge University Press, 2010), 450–451.

trend began with the English Reformation, as King Henry VIII sought to ground his ecclesiastical authority in statute, and continued apace into the eighteenth century. The volume of Parliamentary legislation increased exponentially over the early modern period, according to Mark Knights. Between 1660 and 1688, "parliament passed on average about 26 statutes per session; between 1689 and 1714 this rose to 64 per session."[116] Not only did Parliament produce more legislation; statutes became longer and more elaborate with specific more preambles. Influenced by a shift in *mentalité*, "humanist legislators" who were "confident in their ability to improve things by the right use of power" sought to shape society through statutes.[117] Many of these statutes touched upon criminal law or policing. Over the early modern period, Parliament set criminal law on an increasingly draconian statutory footing, a trend that culminated in the infamous Black Act of 1723.[118]

Colonists throughout the British Atlantic World, then, were part of an imperial legal culture in which legislation increasingly defined the contours of society. In the eighteenth century, they accelerated this practice, relying upon statutory law to "bring colonial jurisprudence more in line with the standards of the metropolis."[119] The Negro Act of 1740 should be viewed in this broader context. Nearly forty years before Chief Justice Lord Mansfield claimed that slavery was "so odious" that it must be grounded in "positive law." South Carolinians were aware that codification made chattel slavery legally legible to Britons across the globe.[120] The purpose of the act was not to justify the institution itself. As the Negro Act's preamble made clear, slavery had already been "introduced and allowed" in "his Majesty's plantations in America." Rather, the act aimed to specify and regulate the nature of the relationship between masters and slaves in the province. In particular, assembly members thought that the power of masters over their slaves "ought to be settled and limited by positive laws" in order to keep slaves in "due subjection and obedience," but without "exercising too great rigour and cruelty over them."[121] As Robert Olwell has noted, "[t]he framers of the Negro Act

[116] Mark Knights, *Representation and Misrepresentation in Later Stuart Britain: Partisanship and Political Culture* (Oxford: Oxford University Press, 2005), 11–12.
[117] Baker, *An Introduction to English Legal History*, 207.
[118] Olwell, *Masters, Slaves, and Subjects*, 67. For a discussion of the "Black Act," see E. P. Thompson, *Whigs and Hunters: The Origin of the Black Act* (New York: Pantheon, 1975).
[119] Olwell, *Masters, Slaves, and Subjects*, 67.
[120] *Somerset* v. *Stewart* (1772) 98 Eng. Rep. 499, 510. [121] *SAL*, vol. 7, 397.

made no apologies." Rather than justifying slavery as an un-English or aberrant institution, as had been the case in previous legislation, "the Negro Act sought to locate itself and slavery within the established practices of the metropolis."[122] This included codifying a "judicial system founded on the principle of racial caste" as well as a "larger legal and economic system based upon the primacy of property."[123] Although historians have emphasized the Negro Act's policing and criminal provisions, formally defining slaves as chattel property was crucial to this process of legitimation. The Negro Act not only demonstrated that South Carolina colonists conformed as much as possible to English criminal law, but also that they grasped the intricacies of the property law system that was at the heart of English law. Indeed, codifying property rights in people – and specifying what type of property slaves would be under English law – helped to mark the Negro Act of 1740 as a thoroughly English slave code.

"ALL THE NEGROES, CATTEL, [AND] HORSES"

Legislative and customary determinations about how slaves should be classified had significant legal ramifications. As we shall see in the chapters that follow, treating enslaved people as chattels for all purposes allowed South Carolina colonists to slot slaves into an extant English legal framework, complete with forms and procedures that allowed them maximize their value. Rather than creating sui generis a new legal system to accommodate their desire the hold property in people, colonists simply fit slave ownership into English property law's extant rubric. In custom and statute, slaves became yet another species of property that fit into the category "chattel."

Considering slaves to be chattel property, however, did not just create a legal ripple effect. Rather, it also had profound cultural consequences because it encouraged white colonists to compare slaves to livestock and moveable property in legal documents. Historians have long understood that colonists analogized slaves to livestock and that comparing slaves to animals played an important role in the dehumanization of enslaved people. Rooted in antiquity and fertilized by a Judeo-Christian worldview that posited an "almost unbridgeable gap between humans and animals," the animalization of "increasing numbers of outsiders" during the age of expansion removed the "inner human qualities that helped to protect an adult man or woman from being treated as a mere object – as opposed to

[122] Olwell, *Masters, Slaves, and Subjects*, 66. [123] *Ibid.*, 69.

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a moral 'center of consciousness'."[124] For Davis, the process of dehumanization "made slavery possible" by severing "ties of human identity and empathy." It allowed slave owners to overcome, albeit incompletely, the "problem of slavery," which was the "impossibility, seen throughout history, of converting humans into totally compliant, submissive chattel property."[125] Dehumanization, in fact, has primarily been seen as a psychological process, one in which conflating slaves with animals functioned to overcome the cognitive dissonance generated by treating people as property when they were, in fact, valued for their human capacities.[126] But dehumanization in British plantation colonies was first and foremost a legal process, an attempt to fit slaves within a familiar property law rubric in order to make this category of property instantly legible. As such, animal analogies demanded only a formal association of slaves and livestock within the well-worn pattern dictated by the law, not an explicit or ideological consideration of the comparison from first principles. Rather than reading colonists' dehumanizing language as reflecting a conflicted mental state, the grouping of slaves and livestock more often than not was a practical decision driven by twinned legal and economic imperatives.

South Carolina colonists, like those throughout plantation America, routinely described slaves using dehumanizing language. When Henry Laurens, who acted as a factor for British slave-trading merchants, intervened on behalf of a slave purchaser to request an abatement in price, he described the purchased slave in distinctly animal terms as a "Creature" and an "Idiot" who as "very Mauger & full of sores." Arguing on behalf of the "poor Industreous shoemaker" who now owned the defective slave, he suggested that even if the slave were "sound he would not be worth a Groat" given the fact that he was such "a Loathsome Carcass." According to Laurens, the buyer was "much to be pittied." Not only had he purchased a slave that "no one will take off of his hands at any rate," he was also forced to gaze upon "such an object in View that is shocking to human Nature."[127] Laurens's choice of vocabulary in referring to this particular enslaved person was not unusual. South Carolinians routinely referred to enslaved people in ways that suggested they were less than human, ranging from describing slaves as

[124] Davis, *The Problem of Slavery in the Age of Emancipation*, 22, 26, 13.
[125] *Ibid.*, *passim*.
[126] "Slaveowners linked the reproductive lives of men and women to those of agricultural commodities in gestures that read as efforts to either establish distance from or to distinguish between their own struggles with 'increase'." Morgan, *Laboring Women*, 83.
[127] Austin & Laurens [Henry Laurens] to Robert & John Thompson & Co., April 20, 1757, *HLP*, vol. 2, 523–524.

"stock" (that is, as a form of productive capital) to summarily appraising female slaves along with their "issue and increase."[128] For example, describing his own slave, Nanny, Laurens characterized her as "a breeding Woman." Indeed, he expected that "in ten Years time" she would "double her worth in her own Children."[129] When colonists like Laurens deployed this type of language in connection with slaves, they engaged in a cultural practice that had become commonplace by the eighteenth century. As Davis and others have shown, slave owners in plantation America hearkened back to a much older discursive tradition when they analogized Africans to beasts, signaling their belief in the inherent inferiority of Black people by describing them as less than human.[130]

More than a cultural practice however, when English colonists grouped slaves with livestock, their linguistic choices also reflected their belief that slaves and livestock were similar from a legal perspective. Both were considered chattel property, and when colonists grouped them together, their decision to do so was driven in part because they recognized this fact. In fact, classifying slaves as chattel had practical legal ramifications that compelled colonists to associate slaves with livestock in transactional documents. For example, because slaves were not real estate, buyers could not assume that plantations would be conveyed along with the slaves who worked them. Colonists seeking to sell plantations, then, were required to stipulate whether slaves were included in a sale. As a result, sellers often grouped slaves with livestock and plantation equipment in conveyancing documents. For example, when William and Bridget Sereven sold Rene Ravenel a plantation in Berkley County, the sellers also included in the sale "one negro man named Jack one negro Woman named Bronka and one negro boy named Quashee and ye cart that belongs to ye said Plantation with all the working oxen their yokes and chains."[131] Peter Manigault, writing to David Deas, gave his correspondent "notice" that William Blake had purchased not only "Jasper's Barony" but also "all the Negroes Cattel Horses & all Stock whatsoever with the Plantation Tools & Provisions of every kind/merchantable Rice only excepted."[132] Detailing precisely what

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

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

[130] Davis, *The Problem of Slavery in the Age of Emancipation*, 11.

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

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

personal property would be included in a real estate sale helped to ensure that a conveyance embodied the intent of both the buyers and the sellers and that the sale price accurately reflected the value of the property conveyed.

Because slaves were among a colonist's most valuable chattel property, testators also routinely listed them together with livestock in wills. As Lawrence Sanders Rowland has shown, slaves and livestock were the two most valuable types of personal property listed in colonial inventories from the Sea Islands of South Carolina.[133] In the period immediately prior to the colony's rice boom, livestock also "provided a source of income" and "represented the major form of wealth" in the colony.[134] Devising both livestock and slaves, then, was among a testator's most important final acts. In fact, South Carolina colonists associated testation with the possession of both slaves and cattle. Eliza Lucas Pinckney, who is best known for introducing commercial indigo planting in South Carolina, explicitly linked will making with the ownership of livestock and slaves. Pinckney spent one particularly slow social season learning "the rudiments of the law" from Thomas Wood's two-volume *Institute of the Laws of England*, and she explained to a correspondent that she used her newfound knowledge to provide legal services to her "poor Neighbors." These unfortunate individuals had "few slaves and Cattle to give their children" and consequently never thought of making a will until "they come upon a sick bed and find it too expensive to send to town for a Lawyer."[135] Pinckney's impression that colonists with slaves and cattle more typically wrote wills was correct. As John Crowley has shown,

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

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

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

testation in colonial South Carolina was "frequent," and "its likelihood increased with decedents' wealth."[136]

In their wills, South Carolina colonists typically devised their livestock and slaves in tandem. For example, in 1727 Dunkan MacGregror named his wife Mary his executrix and gave her one-third of all of his "Negroes Cattle and household goods."[137] Duncan McQueen of Pon Pon also left his "natural Son" John McQueen "one Negroe boy now at Savannah Town . . . together with half of Hogg's Horses and Mares about Savannah Town."[138] Likewise, Peter Gurry gave his "Beloved Wife" Marget one-third of the remainder of his estate, "that is to say Negro's horses Cattle and all what I posses except Lands."[139] More than a means by which planters "enacted a moral grammar through which they attained fluency in the practice of slaveownership," testation was a highly practical process. Colonists arranged their affairs in an economically logical way, listing their most valuable chattel property together when they made specific or general bequests of their residual estate.[140]

That the decision to group slaves with livestock was dictated by a perception of their comparable economic value is reinforced by the wills of tradesmen and mechanics. These testators typically grouped slaves not with cattle, as was the case for planter testators, but with their most valuable possessions – their tools. For example, William Linthwaite devised his wife "the use of" his "Negro Man named Lister and of all my shop Tools and other Instruments of my Trade" until his son came of age, at which point he would inherit "the said Negro Man Shop Tools & Instruments of Trade."[141] Hannah Gale, likely a blacksmith's widow, left her husband's tools to her daughters. They were to be "Equally Divided . . . Share and Share alike with the Negroes not herein mentioned."[142] The grouping of tools with slaves in these wills suggests that practicality more than ideology determined the ordering of personal property. Colonists associated slaves

[136] Crowley, "The Importance of Kinship," 565.
[137] Will of Dunkan MacGregor, February 15, 1726/7, Secretary of State Recorded Instruments; Will books Vol. LL 1737–1747 S 213027, 15, SCDAH.
[138] Will of Duncan McQueen, February 12, 1736, Secretary of State Recorded Instruments, Will books Vol. LL 1737–1747 S 213027, 22–24, SCDAH.
[139] Will of Peter Gurry, March 1, 1736/7, Secretary of State Recorded Instruments, Will books Vol. LL 1737–1747 S 213027, 43–45, SCDAH.
[140] Morgan, *Laboring Women*, 69.
[141] Will of William Linthwaite, April 8, 1739, Secretary of State Recorded Instruments, Will books Vol. LL 1737–1747 S 213027, 264–267, SCDAH.
[142] Will of Hannah Gale, November 25, 1735, Secretary of State Recorded Instruments; Will books Vol. LL 1737–1747 S 213027, 357–363, SCDAH.

with livestock not in the service of a broader psychological process that allowed them to ignore the humanity of slaves, but in order to rank their chattel property according to value and transfer it to the next generation. The legal process of handing down enslaved people as property focused practical attention on the ways in which slaves functioned to advance family wealth and diverted it from the ways in which people who were enslaved behaved like human beings.

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

In South Carolina, "pure" chattel slavery provided colonists with substantial flexibility in managing their slaves. This suited their needs as particularly active participants in a dynamic Atlantic economy, while also allowing them to accumulate and bring into production new and sometimes far-flung plantation acreage. Free from the restraints of entail, primogeniture, and dower claims to slaves, South Carolina colonists could move slaves to outlying plantations, sell them without encumbrances, and devise them to whomsoever they chose. While providing this flexibility, chattel slavery also created legal and economic incentives for colonists to group slaves with livestock. When John Phillips crossed out "Negro woman slave" and substituted this phrase with "iron gray horse," he did so in the context of a plantation society that had codified chattel slavery in a way that would have been recognized as legally binding by Britons across the

globe. In a province where an enslaved person was legally identical to a horse or a cow, it is not surprising that colonists grouped slaves together with livestock in transactional documents or that a lawyer like Phillips would adapt English legal forms and procedures previously used to litigate over slaves to litigate over animals.

The decision to group slaves with livestock was in many ways a practical one, driven by the utility of doing so in the eyes of the law more than to address any qualms about the morality of holding property in human beings or to shore up legal distinctions between white and Black colonists. From the colony's beginning, these distinctions were readily evident; the degraded status of enslaved people in South Carolina did not require further explication. Rather, animal analogies were a natural outgrowth of a type of reasoning by analogy that was endemic of English common law thinking, one that required litigants, lawyers, and judges to constantly make comparisons between like and like.[143] If slaves were like livestock as a legal matter, then it followed that they should be grouped together in legal documents and indeed that the same documents used to litigate over animals could be used to litigate over human property. Viewed as a form of legal instrumentalism, a means by which slave owners categorized enslaved people as property in order to maximize their value, likening slaves to animals was a morally neutral act from the perspective of slave owners.[144]

If analogizing slaves to livestock was a morally neutral act from a slave owner's perspective, however, it had distinctly negative and long-lasting consequences for enslaved people. In the aggregate, livestock analogies generated in the colonial period reinforced and replicated stereotypes that inscribed animalistic qualities upon Black bodies. These stereotypes eventually were given the imprimatur of science, fueling the development of scientific racism in the late eighteenth and early nineteenth centuries and creating a "systematic way of institutionalizing" the dehumanization of slaves.[145] Ultimately, the institutionalized dehumanization of Black people became a justification not only for

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

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

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

enslavement per se, but also for day-to-day slave-trading practices that destroyed countless Black families. Through the workings of the internal slave trade and in the "epitome of bestialization," the slave auction, white slave owners drew upon a discourse of dehumanization as they expanded Westward and as they defended slavery from ever-louder critiques.[146]

As a practical matter, the codification of "pure" chattel slavery in the Negro Act of 1740 had invidious repercussions that extended far beyond the colony's borders. South Carolina's colonial slave regime, in fact, set a precedent for slave law in the Deep South as territories in the new United States engaged in their own project of legal borrowing. Just as mainland American colonies drew upon West Indian legal models in formulating a statutory law of slavery, so too did new Deep South slave societies look to South Carolina's slave law as an exemplar. Moving "from the eastern seaboard to the territories of Alabama, Mississippi, Arkansas, and Louisiana," planters "rapidly adopted" South Carolina's slave code "either in whole or in part." Indeed, South Carolina's slave law eventually became "the slave law of virtually all the newly formed territories."[147] This mass exportation included not only the colony's severe criminal and policing provisions, but also the codification of the "chattel principle" that suffused American life in the nineteenth century.

[146] *Ibid.*, 11.

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