forms of the common law, with little guidance from Parliament or the Privy Council: Did slavery have an adequate foundation in the indigenous law of England? If not, had it been interjected into the English legal order through colony slave laws? What were the status and rights of West Indian slaves and masters coming to the metropolis? Could the slave claim any rights under English law? Was a contract for the sale of a slave enforceable in English courts?

If pre-1772 English precedents on slavery were not in hopeless disagreement on these questions,[7] they did at least suggest several different directions in which the law of slavery might evolve. For example, the earliest reported judicial determination on slavery (as opposed to decisions concerning villeinage, which fill the Plea Rolls and the Yearbooks[8]) seemingly accommodated the peculiar character of property in slaves to the familiar forms of English law. In *Butts v. Penny*,[9] the plaintiff brought an action in trover for one hundred Negroes taken by the defendant. Trover, a form of action in common law pleading that would lie for recovery of damages for the wrongful taking and detainer of specific chattels, required plaintiffs to have a property right in the chattels.[10] The decision in *Butts* turned on this question. The justices of King's Bench held that there might be property rights in slaves sufficient to maintain trover. The court also suggested two theories of the origins of slavery that might accommodate it to English law: Negroes were "infidels";[11] and, more importantly, they were "usually being bought and sold among Merchants, as Merchandise . . . ."[12]

7. Fiddes, *Lord Mansfield and the Sommersett Case*, 50 L.Q. Rev. 499 (1934), argues that they were.

8. For a discussion of the legal system of villeinage, see P. Vinogradoff, Villainage [*sic*] in England: Essays in English Mediaeval History, at chs. i-iv (1892). The pre-Elizabethan poor laws contained a short-lived experiment with domestic slavery for vagabonds. 1 Edw. 6, c. 3 (1547), *repealed by* 3 & 4 Edw. 6, c. 16 (1551); *see* Davies, *Slavery and Protector Somerset: The Vagrancy Act of 1547*, 19 Econ. Hist. Rev., 2d ser. 533-49 (1966) (I am grateful to Professor Stanley Engerman for calling this article to my attention). One unreported sixteenth century precedent, *Carturight's Case* (1569), was said to have held that "England was too pure an Air for Slaves to breath in." *Quoted from* 2 J. Rushworth, Historical Collections 468, *reprinted in* 1 H. Catterall, Judicial Cases Concerning American Slavery and the Negro 9 (1926).

9. 2 Lev. 201, 83 Eng. Rep. 518 (K.B. 1677). I am indebted to my colleague Professor William F. Fratcher of the Law School, University of Missouri-Columbia, for assistance in dating cases prior to the mid-eighteenth century and for other valuable assistance.

10. 1 J. Chitty, Pleading 148 (8th Am. ed., J. Dunlap ed. 1840).

11. This point was reiterated and extended in *Gelly v. Clevr*, an unreported 1693 decision quoted in the report of Chamberlain v. Harvey, 1 Ld. Raym. 146, 91 Eng. Rep. 994 (K.B. 1697). *Gelly* stated not only that a man may have property in Negroes because they are "heathens" but also that a court will take judicial notice of that status.

12. 2 Lev. 201, 83 Eng. Rep. 518 (K.B. 1677).

It is significant that Mansfield, the great exponent of the law merchant in the following century, chose not to recognize this particular custom of the merchants as a legitimating foundation for slavery. Perhaps his reason was that *Butts v. Penny* was a shaky precedent.[13] The judgment for the plaintiff was *nisi causa*, that is, no judgment at all. In effect, the court held the case over at the request of the Attorney General, who wanted to intervene. No record exists of a subsequent final judgment in the case, so in reality it had no precedential value; but this did not prevent later courts from citing it. Further complicating its status was a problem common to all seventeenth-century decisions, the informal character of the reporting. This problem was not resolved by reliable, quasi-stenographic reporting until the nineteenth century.

Butts v. Penny and the other pre-*Somerset* cases also demonstrate the truth of the old legal adage that the development of substantive law emerges from the interstices of adjective law. The result in many of the early cases turned, technically, on issues of common law pleading. In *Butts*, where the question was whether trover was the appropriate form of action for recovery of a group of Negro slaves, counsel ingeniously used that issue to canvass the substantive question of whether it was possible to hold property in man. Likewise, amid seemingly irrelevant quibbles about the quiddities of writs like trespass *per quod servitium amisit* and declarations *pro gallico suo*, later cases built up a substantive law that was to determine whether one man could call another man his thing. Or, as Serjeant Glynn put it in his *Somerset* argument, "upon what Principle is it—can a Man become a Dog for another Man[?]"[14]

King's Bench was again drawn into the legal controversy over slavery in *Chamberlain v. Harvey*.[15] Chief Justice Sir John Holt rejected the doctrine of *Butts*, stating flatly that neither trover nor an ordinary action in trespass would lie for the taking of a slave. He suggested that the master's proper remedy was trespass *per quod servitium amisit*, an old declaration claiming loss of the services of a servant. The distinction was more than technical. Trover

13. It was so regarded by English judges and lawyers between *Butts* and *Somerset*. *See* Smith v. Gould, 2 Ld. Raym. 1274, 92 Eng. Rep. 338 (K.B. 1706); Chamberline v. Harvey, 5 Mod. 186, 87 Eng. Rep. 598 (K.B. 1697).

14. Quoted in a transcript of oral argument in Granville Sharp Transcripts, New-York Historical Society, New York City, New York [hereinafter cited as *Sharp Trans.* NYHS].

15. Three reports of this case exist: Carthew 396, 90 Eng. Rep. 830; 5 Mod. 186, 87 Eng. Rep. 598 (*sub nom.* Chamberline v. Harvey); 1 Ld. Raym. 146, 91 Eng. Rep. 994 (K.B. 1697). Pleadings and special verdict are in 92 Eng. Rep. 603, under the alternate spelling. I adopt the report of Holt's decision from 1 Ld. Raym. and the report of arguments of counsel from 5 Mod. because they are respectively the fuller accounts.

would treat the slave as a chattel, a thing so utterly unfree that it was vendible; trespass *per quod servitium amisit* would liken the slave to a bound or apprenticed laborer, "a slavish servant," a human being whose freedom was restricted but not annihilated.

The facts underlying this case, together with the arguments of counsel,[16] give the case a greater historic significance than its holding alone might suggest. The slave in question had been owned originally in Barbados, where a slave was legally a part of real estate, rather than a chattel. He had been brought to England and baptized there. Counsel seized on these circumstances to explore the law of slavery and to begin unraveling the implications of the imperial relation. In that sense, *Chamberlain v. Harvey* was a direct predecessor of *Somerset.*

Plaintiff's counsel first contended that "though the word 'slave' has but a very harsh sound in a free and christian country," it could nonetheless exist there, legitimated by a quasi-contract under which the master derived "power" over the slave in return for providing him with food and clothing.[17] As his argument progressed, it illustrated two common features of the slavery cases. First, he attempted to derive an English law of slavery from the old law of villeinage. (Though villeinage was extinct by the late seventeenth century, lawyers on both sides of any question relating to slavery frequently drew upon precedents or analogies from the legal incidents of this feudal institution.) The peculiar feature of Barbadian law making a slave realty, counsel insisted, made a Barbadian slave the legal equivalent of a villein regardant (a villein attached to the manor, as opposed to a villein in gross, who was attached to the person of his lord). A villein regardant had to be formally manumitted (freed) by his lord, and this slave had not been. Any manumission here would have to be implied or constructive, either from the slave's having been brought to England or having been baptized.

Second, counsel explored contemporary policy considerations that buttressed the outdated technicalities of his arguments. Such considerations, which lurked just under the surface of all the slavery cases, often emerged frankly, as they did here when plaintiff's counsel claimed that baptism should not work an automatic manumission because "it would very much endanger the trade of the plantations, which cannot be carried on without the help and labour of these slaves."

16. The facts and arguments are reported at length at 5 Mod. 182 (K.B. 1697).

17. For a later example of the justification of slavery on grounds of implied contract, see 2 E. Long, The History of Jamaica 393-94 (1774).

Opposing counsel took higher ground in several points of his argument. First, he insisted that slavery was contrary to "the law of nature." Though this fact did not illegitimate it per se, he continued, the traditional thrust of the common law was in favor of liberty, and presumptions about personal status had to run in favor of freedom.[18] Thus, slavery could exist only by "the constitution of nations." Defense counsel also argued that in England one could not have absolute property in another man, "because by Magna Charta, and the laws of England, no man can have such a property over another." Finally, he contended that the law making this particular individual a slave was merely *lex loci,* whose force dissolved when the slave was removed from the jurisdiction or when the slave was baptized, at which point the slave "should thereby acquire the privileges and immunities enjoyed by those of the same religion, and be intitled to the laws of England." Striking though this line of argument was, it was in no way reflected in the constricted opinion of Chief Justice Holt.

Shortly thereafter, Holt handed down two more opinions adverse to the establishment of slavery in England. In *Smith v. Brown and Cooper,*[19] Holt took up the issue of the status of a slave coming to England and announced that "as soon as a negro comes into England, he becomes free; one may be a villein in England, but not a slave."[20] He was seconded by his colleague Justice Powell, who said "the law took no notice of a negro," an ambiguous statement that in context seemed to mean that English law did not recognize slavery based on race alone. Holt's decision is sometimes read to have abolished slavery in England,[21] or to have laid down an interpretation of metropolitan law with which colonial slave law was inconsistent.[22] Both interpretations impose on this case a weight of authority it cannot bear. For one thing, it was hardly a ringing antislavery declaration; in dialogue with counsel, Holt was at pains to suggest a procedural mode by which the claimant in this action of indebitatus assumpsit might recover the value of the slave sold. The effect of this qualification was to preserve a legal

18. This notion, as it related to slavery, had crystallized by the fifteenth century in J. Fortescue, De Laudibus Legum Angliae (S. Chrimes transl. 1942): "Servitude was introduced by men for vicious purposes. But freedom was instilled in human nature by God. . . . The laws of England favour liberty in every case." *Id.* at 105.

19. 2 Salk. 666, 91 Eng. Rep. 566 (K.B. 1701). The case is also reported at Holt K.B. 495, 90 Eng. Rep. 1172 (K.B. 1701).

20. 2 Salk. at 666, 91 Eng. Rep. at 566; Holt K.B. at 495, 90 Eng. Rep. at 1172.

21. Fratcher, *Sovereign Immunity in Probate Proceedings,* 31 Mo. L. Rev. 127, 139 (1966).

22. A. Sutherland, Constitutionalism in America: Origin and Evolution of its Fundamental Ideas 129 (1965).