mechanism for selling slaves in England. More importantly, as in *Butts*, there was really no judgment here, and the precedential value of *Smith v. Brown and Cooper* is therefore dubious. The case had come up to King's Bench on a motion in arrest of judgment. The Attorney General, intervening, raised a technicality concerning the hereditable status of slaves in Virginia that so muddled the contractual aspects of the case that, in the laconic observation of Salkeld, "nothing was done."

Holt and his colleagues returned to the subject a few years later in *Smith v. Gould*[23] and spoke even more ambivalently. Stating categorically that trover would not lie for a Negro because men could not be "the subject of property" (and explicitly stating *Butts v. Penny* was "not law"), the court nonetheless suggested a way for one claiming a slave to assert his title. Although trover *de gallico suo* would not work to assert title to a slave obtained through captivity in war, the writ of trespass with the declaration *per quod servitium amisit* or *quare captivum suum cepit* could do the same thing, and could also protect the title to a Negro acquired through purchase. Counsel, in wide-ranging arguments, had suggested that men might be "merchandize" like monkeys and that a Negro was not "*liber homo.*" The court's suggestion about trespass *quare captivum suum cepit* indirectly supported those ideas. It was also consistent with counsel's suggestion that, though slavery did not confer an unqualified or absolute property right, it conveyed a limited right "*ex instituto.*" That argument potentially could have accommodated much of slavery to the law of the realm, and all of it to the law of the colonies.

At this point in the development of ideas about the legitimacy of slavery, the scene of argument shifted from Westminster Hall to the refectory of Lincoln's Inn. One evening in 1729 over after-dinner wine, the members of the Inn solicited Attorney General Philip Yorke and Solicitor General Charles Talbot for their opinions on the effect of baptizing Negro slaves in the plantations. In this congenial setting, Yorke and Talbot delivered a joint opinion firmly and clearly asserting the following points:

1) a slave coming to Great Britain from the West Indies, with or without his master, was not liberated;
2) the master's property right in that slave in Great Britain was not "determined or varied;"

23. This case was twice reported: 2 Salk. 666, 91 Eng. Rep. 567 (K.B. 1705); 2 Ld. Raym. 1274, 92 Eng. Rep. 338 (K.B. 1706).

3) baptism did not liberate the slave or change his temporal condition; and
4) "the master may legally compel him to return again to the plantations."[24]

One of the opinion's authors, Yorke, enjoyed a high reputation for legal acumen, and it survived long enough to provoke Granville Sharp to his first great published effort on behalf of the slaves forty years later.

The Yorke-Talbot position could not, of course, have overruled a clear decision of King's Bench, had there been one; and the informal circumstances of its delivery made it something less than an impregnable bastion for the West India Interest.[25] Yorke, ennobled and elevated to the woolsack, tried to remedy that insufficiency in *Pearne v. Lisle,*[26] a decision he rendered as Hardwicke, Lord Chancellor. Grandly waving away all of Holt's handiwork (through a clearly insupportable construction of *Smith v. Brown and Cooper*[27]), Hardwicke resurrected *Butts v. Penny* and said that trover would lie for a Negro slave: "It is as much property as any other thing." In contrast to Holt's efforts to divorce villeinage and slavery, Hardwicke insisted that the law of the latter grew out of the former.

Unlike his opinion of twenty years earlier, however, *Pearne* exerted no influence as precedent. It was not presented to the world in a published report until the first edition of *Ambler* in 1790 (London and Dublin), and even then its weight was problematical given Ambler's poor reputation as a reporter.[28] Even assuming Hardwicke had actually uttered the words Ambler imputed to him, they were plainly dicta, quite unnecessary to the petition in the bill, which was for a *ne exeat regno.*

Thirteen years later, in *Shanley v. Harvey,*[29] Hardwicke's dicta were emphatically disapproved by his successor in Chancery, Lord

24. The joint opinion is quoted in full in Knight v. Wedderburn, 8 Fac. Dec. 5, Mor. 14545 (Scot. Ct. Sess. 1778).

25. Mansfield interjected during argument in *Somerset* that the opinion "was upon a petition in *Lincoln's Inn Hall*, after dinner; probably, therefore, might not, as he believes the contrary is not usual at that hour, be taken with much accuracy." Lofft at 8.

26. Ambl. 75, 27 Eng. Rep. 47 (Ch. 1749).

27. He construed *Smith v. Brown & Cooper* to be merely a construction of a defective averment, the statement there "*pro uno Aethiope vocat. NEGRO*" being insufficient to designate the "African" a slave. But Holt, if Salkeld's report is correct, went well beyond that, and not in dicta either.

28. J. WALLACE, THE REPORTERS ARRANGED AND CHARACTERIZED WITH INCIDENTAL REMARKS 513 (4th ed. 1882).

29. 2 Eden 125, 28 Eng. Rep. 844 (Ch. 1762).

Chancellor Henley (later Earl of Northington). Though Eden's statement of facts does not clarify how the status of the defendant (a black alleged to be a slave of a decedent) became an issue, Henley devoted the whole of his brief opinion to a sweeping declaration in favor of liberty: "As soon as a man sets foot on English ground he is free: a negro may maintain an action against his master for ill usage, and may have a *Habeas Corpus* if restrained of his liberty."[30] *Shanley* was no better known than *Pearne,* because the later and better known of Eden's two editions did not come out until 1827. Even with more publicity, these two Chancery decisions would have had the effect of cancelling each other out: though Hardwicke is esteemed as the greater equity judge, Henley had had the later say.

The highest courts of both common law and equity had spoken on both sides of, and all around, the legal issues of slavery, and their opinions, reported sometimes poorly and always long *post hoc,* were more a matter of oral tradition than of cold print. The judges and counsel had raised and occasionally canvassed many of the issues presented by the problem of incorporating ownership of man into a legal system which boasted that its greatest glory was being *in favorem libertatis;* but when Granville Sharp sought to raise, and Lord Mansfield to evade, the problem of slavery in England and the Empire, the issues were far from settled.

II

By 1770, some fourteen to fifteen thousand slaves resided in the British Isles. In addition, an unknown number of free blacks lived in the realm, numerous enough to create a special group of London beggars known derisively as "St. Giles' blackbirds."[31] Most were Africans or Creoles who had been brought to the metropolis, via the island or mainland colonies, as personal servants to West India planters. They had been visible throughout the eighteenth century, and by the 1770s they had attracted the attention of men who had previously been introduced to the antislavery cause through efforts to abolish the British slave trade. Thus crossed

30. *Id.* at 126, 28 Eng. Rep. at 844.

31. *See* J. Walvin, Black and White: The Negro and English Society 1555-1945 (1973), for a discussion of Negroes in England before 1770. *See generally* W. Sypher, Guinea's Captive Kings: British Anti-Slavery Literature of the XVIIIth Century 2 (1942), on the phrase "St. Giles' blackbirds." *See also* Walvin, *Black Slavery in England,* 7 J. Caribbean Hist. 68 (1973).

the paths of an obscure black, James Somerset, and Granville Sharp, the first great English abolitionist.

Sharp was an unusual person, even in eighteenth century England. A grandson of the Archbishop of York, but son of an impecunious archdeacon, Sharp was self-educated, having been employed first as an apprentice to a cloth merchant and later as a clerk in the Ordnance Department. He resigned the latter post in 1776 because he could not bring himself to make out orders for shipping munitions to the revolting colonies, whose cause he supported.[32] Sharp was a vigorous pamphleteer, who interested himself in a variety of humanitarian causes and eccentric crusades, but whose darling was antislavery, a cause in which he coupled his talents as propagandist and lay lawyer.

Sharp became involved in antislavery activism in 1767 through some litigation that resulted from his efforts to free a slave named Jonathan Strong.[33] Strong's master, David Lisle, brought countersuit against Sharp for detainer of the slave. Sharp urged his counsel to defend on the ground that no action could be brought for detainer because the master could not have a property right in a slave, but the attorney rejected this suggestion on the basis of the 1729 Yorke-Talbot opinion. Thus frustrated, Sharp determined to reexamine from scratch questions of slavery, personal liberty, and the right to habeas corpus in England. He was undeterred by the fact that he was a layman with no legal training who wanted to reach a result that had been spurned by two eminent lawyers of the preceding age.

Two years of research produced *A Representation of the Injustice . . . of Tolerating Slavery,*[34] in which Sharp condemned slavery as a "gross infringement of the common and natural rights of mankind," and as "plainly coutrary [*sic*] to the laws and constitution of this kingdom" because no laws "countenance[d]" it and others, according to his interpretation, made it actionable.[35] On this last point, Sharp prepared an essay in statutory construction

32. The beliefs which eventually led to this action are discussed in G. Sharp, A Declaration of the People's Natural Right to Share in the Legislature; Which is the Fundamental Principle of the British Constitution of State (1774). This constitutional treatise expresses ideas that had many affinities to antislavery theories Sharp was working out at the same time.

33. The story of the Strong litigation is told by Fisher, *Granville Sharp and Lord Mansfield,* 38 J. Negro Hist. 381 (1943).

34. G. Sharp, A Representation of the Injustice and Dangerous Tendency of Tolerating Slavery; or of Admitting the Least Claim of Private Property in the Persons of Men, in England (1769) [hereinafter cited as Sharp, Representation].

35. *Id.* at 40-41.