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## WHEN ANALOGY FAILS: THE COMMON LAW & *STATE v. MANN*\*

JOHN V. ORTH\*\*

*Judge Thomas Ruffin's decision in State v. Mann is notorious for its holding that no law restricts a slave owner's power to chastise a slave: "The power of the master must be absolute to render the submission of the slave perfect." Yet, the reasoning supporting this holding—that the common law recognized no relationship analogous to the condition of slavery—is actually a curious tribute to the common law's tradition of freedom. In England, where the common law began, the same absence of analogy formed the basis for the decision in Somerset's Case in favor of freedom for a slave.*

The characteristic form of legal reasoning in the common law is reasoning by analogy.<sup>1</sup> When a common law court is called upon to resolve a dispute to which no immediately obvious rule is applicable, the judge searches legal memory for a similar dispute that has already been resolved. The basic pattern of legal reasoning has consequently been described as a three-step process: first, a similar case is located; second, the rule established in that case is identified; third, the rule is applied to resolve the present dispute.<sup>2</sup>

When, in the early decades of the nineteenth century, North Carolina judges confronted novel issues involving the treatment of slaves, they sought to resolve the disputes by the time-hallowed method of analogical reasoning. For example, in *State v. Hale*,<sup>3</sup>

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1. Cf. STEVEN J. BURTON, AN INTRODUCTION TO LAW & LEGAL REASONING 25 (1995) ("Legal reasoning takes two principal forms: One is analogical, the other is deductive."). Deductive reasoning is particularly appropriate when reasoning from a statute. See C. K. ALLEN, LAW IN THE MAKING 161 (7th ed. 1964).

2. EDWARD H. LEVI, AN INTRODUCTION TO LEGAL REASONING 1–2 (1949).

3. 9 N.C. (2 Hawks) 582 (1823).

decided in 1823, superior court Judge Joseph J. Daniel<sup>4</sup> presided over a case in which the defendant was charged with criminal assault on another man's slave.<sup>5</sup> Although the jury found that the defendant had in fact struck the slave, superior court Judge Daniel ruled as a matter of law that assault on a slave was not a criminal offense and dismissed the case. The decision apparently rested on the ground that slaves were the property of their owners, and therefore, the proper legal remedy for assault on a slave was a civil suit by the owner, not a criminal prosecution by the State.<sup>6</sup> The State appealed this ruling to the North Carolina Supreme Court, which reversed the trial court and remanded for a new trial.

Chief Justice John Louis Taylor<sup>7</sup> explained the result on appeal by invoking traditional common law methods.<sup>8</sup> "As there is no positive law decisive of the question a solution of it must be deduced from general principles, from reasonings founded on the common law, adapted to the existing condition and circumstances of our society, and indicating that result which is best adapted to general expedience."<sup>9</sup> Assault is a crime as well as a tort, Taylor reasoned; considered in this light, the status of the victim is not material. Therefore, he concluded, there is "as much reason for making such offen[s]es indictable as if a white man had been the victim."<sup>10</sup> In other words, an assault on a slave is essentially the same as an assault on a free person.

Since the status of the victim did not preclude the prosecution, the proper issue at trial should have been whether the defendant had

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4. Joseph J. Daniel (1783–1848) served as a superior court judge from 1816 until 1833 when he resigned to serve on the state supreme court. NORTH CAROLINA GOVERNMENT 1585–1979: A NARRATIVE AND STATISTICAL HISTORY 360–61 (John L. Cheney, Jr. ed., 1981) [hereinafter NORTH CAROLINA GOVERNMENT].

5. *Hale*, 9 N.C. (2 Hawks) at 582. The indictment seems to have charged an "assault and battery," but the report speaks interchangeably of "assault" and "battery." *Id.* The victim is not named in the report. *Id.*

6. *Id.*

7. John Louis Taylor (1769–1829) became the first chief justice of the newly constituted state supreme court in 1819 and served until his death in 1829 when he was succeeded by Leonard Henderson. NORTH CAROLINA GOVERNMENT, *supra* note 4, at 360–61.

8. There was no opinion of the court. As such, Justice John Hall agreed with Chief Justice Taylor in a brief opinion, and Justice Leonard Henderson concurred without opinion.

9. *Hale*, 9 N.C. (2 Hawks) at 582. Although "positive law" has a particular meaning in the jurisprudence of John Austin, the influential founder of analytical jurisprudence, Taylor used it in the general sense of "enacted law." See BLACK'S LAW DICTIONARY 1200 (Deluxe 8th ed. 2004).

10. *Hale*, 9 N.C. (2 Hawks) at 584.

any legal defense. Since there was no legal relationship between the defendant and the victim other than the basic relationship incident to the social order, the availability of a defense depended on whether the victim had provoked the assault.<sup>11</sup> State law recognized that some forms of provocation would justify an assault.<sup>12</sup> On this issue, the difference in the status of the victim did matter: “many circumstances which would not constitute a legal provocation for a battery committed by one white man on another would justify it if committed on a slave, provided the battery were [sic] not excessive.”<sup>13</sup> In other words, although a slave and a white victim were sufficiently similar to sustain an indictment for an assault on either, they were significantly different when the issue was one of provocation. A “white man” would have to tolerate some forms of provocation from another white man that would justify assault on a slave.

When six years later Judge Daniel decided *State v. Mann*,<sup>14</sup> which also concerned an alleged assault on a slave, he held that the indictment was maintainable, perhaps remembering Chief Justice Taylor’s holding in the prior case.<sup>15</sup> Because the defendant, John Mann, had hired the slave from her owner, Judge Daniel reasoned that he had “only a special property in the slave”<sup>16</sup> and was, therefore, more like a stranger than an owner. The case, then, was essentially the same as *State v. Hale*. The proper issue for the jury was whether there had been provocation, and if so, whether the force used had been “excessive.”<sup>17</sup> Finding that the slave had committed “some small offen[s]e”<sup>18</sup> for which the defendant had attempted to chastise

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11. See generally JEREMY HORDER, PROVOCATION AND RESPONSIBILITY 30 (1992) (listing four categories that constituted legally adequate provocation).

12. In criminal law, provocation includes acts or words by one person that affects another person’s reason and self-control, causing the other to commit a crime impulsively. “Adequate provocation can reduce a criminal charge, as from murder to manslaughter.” BLACK’S LAW DICTIONARY, *supra* note 9, at 1262.

13. *Hale*, 9 N.C. (2 Hawks) at 586. Taylor had earlier said something similar: “[T]he homicide of a slave may be extenuated by acts, which would not produce a legal provocation if done by a white person.” *State v. Tackett*, 8 N.C. (1 Hawks) 210, 217 (1820), *overruled by State v. Watson*, 287 N.C. 147, 287 S.E.2d 85 (1975).

14. 13 N.C. (2 Dev.) 263 (1829). In this Article, quotations from *State v. Mann* are from Devereux’s Law Reports. The case is reprinted without the summary of the Attorney General’s argument and with minor changes at 13 N.C. 263 (1829). As in *State v. Hale*, the indictment charged an “assault and battery,” but again the report uses the words interchangeably. *Mann*, 13 N.C. (2 Dev.) at 263. The victim is identified as “Lydia, the slave of one Elizabeth Jones.” *Id.*

15. *Hale*, 9 N.C. (2 Hawks) at 584.

16. *Mann*, 13 N.C. (2 Dev.) at 263.

17. *Hale*, 9 N.C. (2 Hawks) at 586.

18. *Mann*, 13 N.C. (2 Dev.) at 263.

her and that the defendant had injured the slave by firing a pistol at her when she began to run away, the jury returned a verdict of guilty.

The defendant appealed his conviction to the North Carolina Supreme Court, where the State, through Attorney General Romulus Saunders,<sup>19</sup> argued in support of the superior court's verdict. Saunders contended that "no difference existed between this case and that of . . . *State v. Hall*."<sup>20</sup> The proper issue was therefore, as Judge Daniel had ruled, whether the defendant had used excessive force, and the jury verdict was supported by the evidence because "the weapon used was one calculated to produce death."<sup>21</sup> Citing the American edition of an influential English legal treatise, *Russell on Crimes*,<sup>22</sup> Saunders "assimilated the relation between a master and a slave, to those existing between parents and children, masters and apprentices, and tutors and scholars"<sup>23</sup>—relationships in which only the use of reasonable force could be justified.

But this time, in an opinion for the court written by newly appointed Justice Thomas Ruffin,<sup>24</sup> the supreme court reversed the conviction and entered judgment for the defendant. Judge Daniel had been wrong again! His analogy failed. "The Judge below . . . put [the case] on the ground, that the Defendant had but a special property" interest in the slave,<sup>25</sup> but Ruffin pointed out that under the laws of North Carolina "the hirer and possessor of a slave, in relation to both rights and duties, is, for the time being, the owner."<sup>26</sup> One who hired a slave was, therefore, more like an owner than a stranger. Although Ruffin did not cite authorities, the general law of lessor-

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19. Romulus Saunders (1791–1867) was Attorney General from 1828 to 1834. NORTH CAROLINA GOVERNMENT, *supra* note 4, at 182.

20. *Mann*, 13 N.C. (2 Dev.) at 263.

21. *Id.*

22. WILLIAM OLDNALL RUSSELL, A TREATISE ON CRIMES & MISDEMEANORS 866 (1st Am. ed. 1824). Sir William Holdsworth describes Russell's treatise as a "classic." 13 WILLIAM HOLDSWORTH, A HISTORY OF ENGLISH LAW 437 (3d ed. 1952). It was first published in England under the title *A Treatise on Felonies & Misdemeanors* in 1819. *Id.* at 464. Russell's influential work has maintained its position as a leading treatise on criminal law and reached a Twelfth English edition in 1964. BIOGRAPHICAL DICTIONARY OF THE COMMON LAW 456–57 (A.W.B. Simpson ed., 1984).

23. *Mann*, 13 N.C. (2 Dev.) at 263–64.

24. Thomas Ruffin (1787–1870) served as a superior court judge (1816–18; 1825–28), state supreme court reporter (1820–21), and president of the state bank (1828–29) before he was elected to the North Carolina Supreme Court in 1829. In 1833 he became chief justice, a post he held until 1852. 5 DICTIONARY OF NORTH CAROLINA BIOGRAPHY 266–67 (William S. Powell ed., 1994).

25. *Mann*, 13 N.C. (2 Dev.) at 264–65.

26. *Id.* at 265.

lessee and of bailor-bailee certainly supported his point.<sup>27</sup> In both cases, the possessor (whether lessee or bailee) has many of the rights of an outright owner and is, as Ruffin said, the owner “for the time being.”<sup>28</sup>

But this only shifted the question to that of the legal rights of slave owners with respect to assaults on their own slaves. The treatise cited by Attorney General Saunders catalogued the cases in which “force used against . . . another may be justified.”<sup>29</sup>

[I]f an officer having a warrant against one who will not suffer himself to be arrested, beat or wound him, in the attempt to take him; or if a parent, in a reasonable manner, chastise his child; or a master his servant, being actually in his service at the time; or a schoolmaster his scholar; or a gaoler his prisoner; or if one confine a friend who is mad, and bind and beat him, [et]c. in such a manner as is proper in such circumstances; or if a man force a sword from one who offers to kill another therewith; or if a man gently lay his hands upon another, and thereby stay him from inciting a dog against a third person; no assault or battery will be committed by such acts.<sup>30</sup>

The list is not meant to be exhaustive but rather illustrative in the common law manner. A later case similar to any of those listed should be decided the same way. The question in *State v. Mann*, then, resolved itself into the question of whether the master-slave relation was like any of these; if so, only reasonable force could be used.

Ruffin explained the supreme court’s decision in an opinion written throughout in the antiphonal style of like-and-unlike, from the stately introduction to the chilling conclusion. The first line—“[a] Judge cannot but lament, when such cases as the present are brought into judgment”—was soon followed by its contradiction: “[i]t is useless however, to complain . . . [a]nd it is criminal in a Court to avoid any responsibility which the laws impose.”<sup>31</sup> Ruffin conceded that “[u]pon the face of the indictment, the case is the same as the *State v. Hall* [sic]” and reaffirmed the decision in that case: “No fault

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27. See 1 AMERICAN LAW OF PROPERTY 267 (A. James Casner ed., 1952) (“[T]he tenant is a purchaser of an estate in land.”). The principal forms of conveyance at common law were feoffment, lease, grant, and mortgage. 3 AMERICAN LAW OF PROPERTY 215 (A. James Casner ed., 1952). A bailee can maintain an action for possession (replevin) or damages (trover). RAY ANDREWS BROWN, THE LAW OF PERSONAL PROPERTY 390–91 (2d ed. 1955).

28. *Mann*, 13 N.C. (2 Dev.) at 265.

29. RUSSELL, *supra* note 22, at 867.

30. *Id.* at 867–68.

31. *Mann*, 13 N.C. (2 Dev.) at 264.

is found with the rule then adopted; nor would be, if it were now open." Once again, this was quickly contradicted: "But it is not open . . . ; the evidence makes this a different case."<sup>32</sup>

Observing that Judge Daniel had based his ruling on the fact that the defendant had only hired the slave and did not own her outright, Ruffin paused over the technicality that the indictment charged the defendant with assaulting a slave belonging to someone else.<sup>33</sup> "This opinion would, perhaps dispose of this particular case," because the indictment did not charge the defendant with assaulting a slave who belonged (at least temporarily) to himself. Yet, Ruffin disdained to rest the decision on that technicality. Instead, he chose to answer now the question that would inevitably follow: what was the extent of the criminal liability of a slave owner for an assault on his own slave? "But upon the general question, whether the owner is answerable *criminaliter*, for a battery upon his own slave . . . , the Court entertains but little doubt."<sup>34</sup>

Reaching the heart of the matter, Ruffin addressed the analogies supplied in support of the judgment below by Attorney General Saunders. Slavery had "indeed been assimilated at the bar to the other domestic relations; and arguments drawn from the well-established principles which confer and restrain the authority of the parent over the child, the tutor over the pupil, the master over the apprentice, have been pressed on us."<sup>35</sup> Whether these social relations were similar or different was the key step in Ruffin's legal reasoning. "There is no likeness between the cases," he concluded. "They are in opposition to each other, and there is an impassable gulf between them."<sup>36</sup> Ruffin explained that the object of the institution of slavery is "the profit of the master, his security and the public safety; the subject, one doomed in his own person and his posterity, to live without knowledge and without the capacity to make anything his own, and to toil that another may reap . . . ."<sup>37</sup> The slave is therefore

32. *Id.*

33. *Id.* at 265 ("[T]he indictment, which charges a battery upon the slave of Elizabeth Jones, is not supported by proof of a battery upon [d]efendant's own slave; since different justifications may be applicable to the two cases.").

34. *Id.* *Criminaliter* means simply "criminally." BLACK'S LAW DICTIONARY, *supra* note 9, at 402. It is contrasted with *civiliter*, which means "civilly." *Id.* at 263.

35. *Mann*, 13 N.C. (2 Dev.) at 265.

36. *Id.* Ruffin was of the same opinion twenty years later. See *State v. Cæsar*, 31 N.C. (9 Ired.) 391, 415 (1849) (Ruffin, C.J., dissenting) ("The dissimilarity in the condition of slaves from anything known at the common law cannot be denied; and, therefore, as it appears to me, the rules upon this, as upon all other kinds of intercourse between white men and slaves, must vary from those applied by the common law . . .").

37. *Mann*, 13 N.C. (2 Dev.) at 266.

unlike the child, pupil, or apprentice who with the passage of time enjoys the fruits of her own labor.<sup>38</sup>

If there is no similarity between the master-slave relation and those other domestic relations, or indeed between the master-slave relation and any other human relation known to the common law, then analogy fails and the game of like and unlike is over. When the common law method fails, the common law itself fails. Because there is no analogy, there is no law. Without a legal rule to restrain the force that may be applied by the master to the slave, the relation of master and slave is essentially lawless, as Ruffin candidly admitted: “The power of the master must be absolute to render the submission of the slave perfect.”<sup>39</sup> The common law, however, had never recognized any relation conferring on one person absolute power over another.<sup>40</sup> Indeed, although Ruffin did not mention it, the only instance when absolute power had been known to the common law was the medieval condition of outlawry, but then one was literally outside the law.<sup>41</sup>

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38. Thirty years later, as part of the Reconstruction program to abolish slavery, the North Carolina Constitution of 1868 headed the state’s Declaration of Rights with the ringing words: “We hold it to be self-evident that all men are created equal; that they are endowed by their Creator with certain inalienable rights; that among these are life, liberty, *the enjoyment of the fruits of their own labor*, and the pursuit of happiness.” N.C. CONST. of 1868, art. I, § 1 (emphasis added). The current state constitution carries forward the same language, changing only “all men are created equal” to “all persons are created equal”—a change introduced into the 1868 Constitution by amendment in 1946. N.C. CONST. art. I, § 1; see JOHN V. ORTH, *THE NORTH CAROLINA STATE CONSTITUTION: A REFERENCE GUIDE* 38–39 (1993).

39. *Mann*, 13 N.C. (2 Dev.) at 266.

40. Indeed in *State v. Hale*, Chief Justice Taylor had observed in dictum that “[t]he common law has often been called into efficient operation for the punishment of . . . needless and wanton barbarity exercised even by masters upon their slaves.” 9 N.C. (2 Hawks) 582, 585 (1823).

41. Sir William Blackstone described outlawry in his eighteenth-century *Commentaries on the Laws of England*:

Anciently an outlawed felon was said to have *caput lupinum*, and might be knocked on the head like a wolf, by any one that should meet him; because having renounced all law, he was to be dealt with as in a state of nature, when everyone that should find him might slay him: yet now, to avoid such inhumanity, it is holden that no man is intitled [sic] to kill him wantonly and willfully; but in so doing is guilty of murder, unless it happens in the endeavour to apprehend him.

WILLIAM BLACKSTONE, 4 *COMMENTARIES* \*314–15. Even kings were under the law, as Sir Edward Coke famously reminded King James I: “[N]on . . . *sub homine, sed sub Deo et lege!*” (“Not under man, but under God and the law!”). *Prohibitions del Roy*, 12 Co. Rep. 64, 65, 77 Eng. Rep. 1342, 1343 (quoting from a medieval Latin treatise attributed to Henry de Bracton); see 2 BRACTON ON THE LAWS AND CUSTOMS OF ENGLAND 33 (Samuel E. Thorne ed., 1968).



Ruffin concluded his opinion with a further series of oppositions:

I most freely confess my sense of the harshness of this proposition . . . . But in the actual condition of things it must be so.

That there may be particular instances of cruelty and deliberate barbarity, where, in conscience, the law might properly interfere, is most probable . . . . But we cannot look at the matter in that light.

. . . .

I repeat that I would gladly have avoided this ungrateful question. But being brought to it, the Court is compelled to declare, that . . . it will be the imperative duty of the Judges to recognize the full dominion of the owner over the slave . . . .<sup>42</sup>

Ruffin's conclusion that the common law provided no analogy for the master-slave relation found ironic support in a celebrated English case that Ruffin almost certainly knew but did not cite: *Somerset's Case* from 1772.<sup>43</sup> In that case, James Somerset, a slave who had been brought by his owner from Virginia to England and who was about to be shipped to Jamaica for sale, petitioned for a writ of habeas corpus from the Court of King's Bench to try the legality of his confinement.<sup>44</sup> The reply by the ship's captain who was holding Somerset recited that the latter was a slave under the laws of Virginia and Jamaica,<sup>45</sup> but the court ordered his release, holding that slavery was unknown to the law of England.<sup>46</sup>

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42. *Mann*, 13 N.C. (2 Dev.) at 266-68. Ruffin did eventually encounter a case in which he held that a master had acted with such "cruelty and deliberate barbarity" to a slave that the master was criminally liable. *State v. Hoover*, 20 N.C. 500, 503 (1839) (noting that the torture and murder of a pregnant slave does "not belong to a state of civilization").

43. *Somerset v. Stewart*, Lofft 1, 98 Eng. Rep. 499 (K.B. 1772). Mansfield's decision, reprinted from Lofft, and expanded reports of the arguments of counsel are given in 20 HOWELL'S STATE TRIALS 1 (1814), where the name of the plaintiff is spelled Sommersett; in consequence, the case is often referred to as *Sommersett's Case*. See, e.g., OXFORD COMPANION TO LAW 1156 (1980).

44. *Somerset's Case*, Lofft at 18, 98 Eng. Rep. at 510.

45. The return is summarized by Lord Mansfield in *Somerset's Case*.

46. *Somerset's Case*, Lofft at 18, 98 Eng. Rep. at 510.

Explaining the result, Chief Justice Lord Mansfield<sup>47</sup> recognized that slavery existed in various parts of the British Empire and conceded that contracts for the sale of overseas slaves had been recognized as valid in England, but found that there was no “positive law,” that is, no statute, confirming the existence of slavery in England.<sup>48</sup> So an answer to the question of its legality had to be sought in the common law. True to the common law method, Mansfield searched for an analogy and—like Ruffin—searched in vain. The medieval status of villainage had been largely abolished a century earlier, and therefore provided no current analogue.<sup>49</sup> And no claim was asserted based on a contract of labor.<sup>50</sup> Without an

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47. Although English judges customarily delivered their opinions *seriatim* (in a series, one after the other), Mansfield sometimes managed to speak for all the judges of the Court of King’s Bench, a forerunner of the American practice of the opinion of the court delivered by one judge. See JOHN V. ORTH, *The Secret Sources of Judicial Power, in HOW MANY JUDGES DOES IT TAKE TO MAKE A SUPREME COURT? AND OTHER ESSAYS ON LAW AND THE CONSTITUTION* 23, 34–37 (2006).

48. *Somerset’s Case*, Lofft at 19, 98 Eng. Rep. at 510 (“The state of slavery is of such a nature, that it is incapable of being introduced on any reasons, moral or political; but only positive law, which preserves its force long after the reasons, occasions, and time itself from whence it was created, is erased from memory: it’s so odious, that nothing can be suffered to support it, but positive law.”). Mansfield used “positive law” in the same sense as North Carolina Chief Justice Taylor used it later in *State v. Hale*, 9 N.C. (2 Hawks) 582, 582–83 (1823), to mean statute law, and implicitly contrasted it with the common law which adapts itself to “reasons, occasions, and time.” Perhaps he had in mind the common law maxim, *Cessante ratione legis, cessat ipsa lex* (“when the reason of the law ceases, so does the law itself”). See EDWARD COKE, *THE FIRST PART OF THE INSTITUTES OF THE LAWS OF ENGLAND* 70b (19th ed. 1853); see also, HERBERT BROOM, *A SELECTION OF LEGAL MAXIMS* 159–63 (8th Am. ed. 1882) (illustrating applications of the maxim). The need to provide “positive law” to preserve the status of slavery in states of the United States that did not otherwise recognize it may explain the inclusion of the Fugitive Slave Clause in the Federal Constitution. U.S. CONST. art. IV, § 2, cl. 3 (“No Person held to Service or Labour in one State, under the Laws thereof, escaping into another, shall, in Consequence of any Law or Regulation therein, be discharged from such Service or Labour . . .”).

49. There were two types of villainage (also spelled villeinage), a form of serfdom superior to slavery. See WILLIAM BLACKSTONE, *2 COMMENTARIES* \*92–93. Villainage regardant to a manor had been abolished by the Statute of Tenures, 12 Car. 2, c. 24 (1660). Villainage in gross might still have been recognized on confession in open court, but that was not recited in the return to the writ. *Somerset’s Case*, Lofft at 17, 98 Eng. Rep. at 509.

50. Mansfield noted that:

There is a case in Hobart . . . where a man had contracted to go as a mariner: but the now case will not come within that decision. Mr. Stewart advances no claim on contract; he rests his whole demand on a right to the negro as a slave, and mentions the purpose of detainure to be the sending of him over to be sold in Jamaica.”

*Somerset’s Case*, Lofft at 18, 98 Eng. Rep. at 510. The case referenced by Mansfield, which mentions the situation of the mariner only in dictum, is *Coventry v. Woodhall*, Hob. 134, 80 Eng. Rep. 284 (K.B. 1618) (“And generally no man can force his apprentice to go

analogous case, the common law provided no law to justify Somerset's confinement.

Like Ruffin in *State v. Mann*, Mansfield in *Somerset's Case* insisted upon the impartiality of the law: "Compassion will not, on the one hand, nor inconvenience on the other, be to decide[,] but the law . . ."<sup>51</sup> Informed of the consequences of a decision in favor of Somerset—allegedly making possible the freeing of 13,000 or 14,000 slaves presently in England—Mansfield famously declared: "If the parties will have judgment, fiat justitia, ruat coelum, let justice be done whatever be the consequences."<sup>52</sup> Unlike *State v. Mann*, where the absence of law meant the absence of legal restraint on the masters' powers over their slaves, in *Somerset's Case* the absence of law meant the absence of any legal basis for holding a person as a slave.

While Ruffin disdained to rest his decision on a technical defect in the indictment, Mansfield seized on a technical distinction in *Somerset's Case*. Mansfield acknowledged that "about fifty years" earlier Sir Philip Yorke and Lord Chief Justice Talbot—whom Mansfield respectfully described as "two of the greatest men of their own or any times"<sup>53</sup>—had given their opinion that there was "no ground in law" for the claim that "if a negro came over [to England], or became a Christian, he was emancipated."<sup>54</sup> However, Mansfield dismissed it as irrelevant because "on a return to a habeas corpus[,] the only question before us is, whether the cause on the return is sufficient?"<sup>55</sup> Somerset, in other words, was not required to prove that he was entitled to be free; rather, the one detaining him was required to justify the detention.

Furthermore, while Mansfield acknowledged that Parliament had the power to recognize the condition of slavery in England,<sup>56</sup>

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out of the kingdom, except it be so expressly agreed, or that the nature of his apprenticeship doth import it, as if he be bound apprentice to a merchant-adventurer, or a sailor, or the like."). In *State v. Mann*, Ruffin agreed that slavery found no analogue in apprenticeship. 13 N.C. (2 Dev.) 263, 266 (1829).

51. *Somerset's Case*, Lofft at 17, 98 Eng. Rep. at 509.

52. *Id.* The Latin maxim is more literally translated: "Let justice be done, though the heavens fall." The consequences of Mansfield's decision were not quite so dramatic. See Ruth Paley, *After Somerset: Mansfield, Slavery, and the Law in England, 1772-1830*, in LAW, CRIME & ENGLISH SOCIETY 1660-1830, at 165, 165 (Norma Landau ed., 2002).

53. *Somerset's Case*, Lofft at 17, 98 Eng. Rep. at 509.

54. *Id.* at 18, 98 Eng. Rep. at 510.

55. *Id.* at 19, 98 Eng. Rep. at 510.

56. *Id.* at 18, 98 Eng. Rep. at 509 ("An application to Parliament, if the merchants think the question of great commercial concern, is the best, and perhaps the only method for settling the point for the future.").

Ruffin took the condition for granted and rather feebly suggested that the North Carolina General Assembly could provide rules to restrain slave owners' power over their slaves, if the present lawless condition proved unsatisfactory. But, he concluded, "the Court is compelled to declare, that . . . until it shall seem fit to the legislature to interpose express enactments to the contrary, it will be the imperative duty of the Judges to recognize the full dominion of the owner over the slave."<sup>57</sup>

Without an analogous human relation to inform North Carolina's criminal law concerning the treatment of slaves, Ruffin was left with only the property analogy. "With the liability of the hirer to the general owner for an injury permanently impairing the value of the slave no rule now laid down is intended to interfere. That is left upon the general doctrine of bailment."<sup>58</sup> In other words, while the master-slave relation was unlike any other human relation known to the common law, it could be analogized to the non-human condition of ownership.<sup>59</sup> A slave was like personal property, subject to lease or bailment—in this case, bailment for hire—and the bailee was obligated under the general law of bailment to return the bailed property to the bailor at the end of the hiring in undamaged condition.<sup>60</sup>

It is difficult to say anything good about *State v. Mann*, except perhaps to acknowledge the dignified prose in which the brutal decision is announced. But it does at least reflect honorably on the common law that in a history extending back more than six hundred years it could provide no analogy for the relation of a master to a slave. Because the common law method assumes that every case can be decided by likening it to some other, the failure to find any similar

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57. *State v. Mann*, 13 N.C. (2 Dev.) at 268.

58. *Id.* at 264; see *Jones v. Glass*, 35 N.C. (13 Ired.) 305 (1852) (Ruffin, C.J.) (holding the hirer of a slave liable in damages for abuse of the slave).

59. Actually, property ownership is a relation among persons, but it is a relation among persons with respect to something that can be owned, in this case a relation among "white persons" with respect to slaves. See Morris R. Cohen, *Property and Sovereignty*, 13 CORNELL L. Q. 8, 12 (1927) ("[A] property right is a relation not between an owner and a thing, but between the owner and other individuals in reference to things.").

60. RAY ANDREW BROWN, *THE LAW OF PERSONAL PROPERTY* § 81, at 319 (2d ed. 1955). It is unclear why Ruffin analogizes the hiring of a slave to a bailment rather than to a lease, although it proved prophetic. See THOMAS D. MORRIS, *SOUTHERN SLAVERY AND THE LAW, 1619–1860*, at 132 (1996) ("Prior to the 1830s Southern judges searched for possible common analogies that would cover the legal issues in cases of slave hires. From the 1830s forward nearly all Southern courts treated them as a species of the law of bailment . . .").

case results in no-law. But whereas no-law meant freedom for Somerset, it meant a reign of terror for North Carolina slaves.