Creating a Common Law of Slavery for England and its New World Empire

Holly Brewer
University of Maryland

Prepared for presentation at the Legal History Colloquium
NYU Law School
February 2018

Please ask permission to quote or cite

In 1667 the Royal African Company went bankrupt.¹ It did so despite extensive royal patronage and connections—it its governor and main shareholders all belonged to the royal family. It did so despite having monopoly power to import slaves to the English colonies, free use of the ships of the royal navy, free access to royal forts off the African coast, and royal incentives in the colonies to purchase the slaves they imported. Indeed, it did so despite the king’s encouragement of slave codes and local debt collection processes in each colony that tried to favor the “Royal Adventurers.” One might be tempted to proclaim that the Royal African Company’s failure shows the weaknesses of royal policy and indeed of mercantilism itself. But in fact the problem that caused the bankruptcy was identified and resolved by one further, and major, royal effort: to make the Royal African Company financially viable. The Stuarts made the buying and selling of slaves fully legal and enforceable across the empire. When Charles II’s Parliament failed to pass an imperial slave code with such provisions, he turned to the courts. Charles II’s judges—really his in that they held their seats “during his pleasure”—presided over a series of rulings that made slavery legal in England itself, as well as its empire. These judges held that people could be property if they were aliens and that their status could be hereditary. These rulings brought the phalanx of English property law to support slavery.²

Common law is a precedent based-system often characterized as conservative. local, and relatively unchanging and as a safeguard of liberty, going back to England’s Magna Charta which in some ways framed it. But in the seventeenth century the common law became an instrument—the best the Stuarts had—to legitimate slavery.

The Civil Law of Spain/Portugal/France/Holland was complex on questions of slavery and people as property, but followed Roman law from Justinian and papal decrees. Such codes lay behind Royal proclamations and then details negotiated on the
ground in various e.g. Spanish dominions: legal ideas and practices allowed the enslaving of infidels during the time of their “strangeness from Christianity.” Still slavery was complex in the Spanish empire. There were many ways in which—the souls and rights of the enslaved—were legally recognized in for example seventeenth century Spanish Peru, especially the canon law courts, as Michele McKinley has recently shown.

The Common law of England was of course in some ways drawing on the older Roman and civil legacy, and continued to be effected by it during the seventeenth century. Bracton—the fount of the common law in the thirteenth century, was deeply influenced by Roman law, and it shaped English common law of villenage or feudalism as it was transcribed in his and later books such as Littleton’s fifteenth century treatise and Edward Coke’s transcription, translation and gloss upon Littleton in his *Institutes of the Laws of England* in 1628, the most important legal text of the seventeenth century across the empire, and by then the core of the printed common law. But as a precedent-based system it was in some ways harder to shape with simple royal decrees—England had a Parliament that had some voice in official laws for England itself and the empire. What I offer today is the strange but compelling story of how after 1660 the stuart kings—who supported slavery strongly—used the judges of England’s common law courts to legitimate it, to approximate via the courts the powers of their peers in other nations and other empires. England’s high common law courts became an instrument of royal policy and absolutism, so much so that after the revolution against James II in 1688, the convention parliament purged and punished all twelve high court justices of the four common law courts and decreed that all decisions from his reign were void, never to be cited as precedent.

Nevertheless many of the decisions about slavery from Charles II’s reign had a profound impact on slavery not only in England itself but across the empire, in the process creating a system where people could be more completely property under the common law than under the civil law of other empires. After the Glorious Revolution, a series of new court cases undercut the common law of slavery. But these cases were later overturned in turn. In the midst of increasing common law uncertainty Parliament stepped in in 1732 to legislate a differential slave policy for the colonies: in the colonies—people could be simple property and recoverable like “goods” for debts. This was a crucial step in marking colonial slave law distinct from that of England: there at least the principle that people were goods was secure, now via parliamentary law. The Somerset case for England in 1772 marked a definitive effort to overturn the common law of slavery in England itself. However in England’s former colonies in North America, the precedents set by England’s high court in 1677 still created and enforced
legal ownership under the common law long after the American Revolution-- in early
nineteenth century southern courts.

American slavery did not emerge “beyond the line” of English justice, as
Richard Dunn argued for Barbados, but within it. While colonial legislatures could and
did make some separate codes, those codes could not be “repugnant” to English law
and especially in royal colonies, had to be approved by royal governors with strict
instructions from king, privy council, and other government oversight bodies such as
the Council on Jamaica (in the 1660s) the Council on Foreign Plantations and later the
Board of Trade. All colonial laws were accountable to English justice, as were their
court decisions as shown by many scholars (e.g. Mary Sarah Bilder, Daniel Hulsebosch,
Linda Sturtz have shown in appeals of colonial common law cases to the Privy Council
on other issues in other colonies). Colonial cases could also be appealed directly to
English chancery and common law courts.3

Most scholars who have written about the law of slavery in England have
focused on a famous case from the next century, Somerset’s case of 1772, which freed
a man, James Somerset, brought to England from Virginia by his master. It challenged
slavery not only in England itself but across the British Empire. While historians
recognize that Somerset represented some change in practice, they have searched for
consistency in earlier rulings, following the logic of the winning argument in the
Somerset case itself as well as a general tendency to see England’s common law as
unchanging. As a consequence, the current consensus is that English common law was
somewhat confused, but that some coerced servitude was legal in England before
1772, and certainly in its empire, where English law on slavery did not reach. England’s
“free society” tolerated slavery only because it was far away and across the ocean.
Occasionally the historiography goes back as far as the seventeenth or even sixteenth
centuries, to cite obscure cases that one might see as providing a precedent for slavery,
or even to the medieval period, when a kind of slavery was clearly legal in England
itself.4 But mostly the effort has been to see slavery disappearing during the late
medieval period, and a consistent policy for England of tolerating slavery in the
colonies but not at home. The effort to see consistency—whether in an England that
was free or colonies that permitted slavery—a pattern framed beautifully by the
famous Somerset case of 1772, has obscured the vibrant debate within the English
judicial system over the legality of slavery in England and its empire over more than a
century. Not only did the common law on slavery change profoundly during the
seventeenth century: the common law was an instrument of policy.

While the capture of people to become slaves could be simple piracy, a situation
enforced by the sword and brute force, but not law, piracy was highly unstable for day
to day life; to function over months and years slavery needed legitimacy. Before 1677,
England’s colonies legitimated elements of slavery but were limited to following and manipulating feudal law or master/servant law, both of which had a variety of protections for the villein or servant. Legal enforcement of ownership was crucial, but these earlier legal models had sharp limits on ownership.

Only after the high court cases from the 1670s and 1680s did English law provide the structure of regulation of markets that made slavery—as it existed in eighteenth and nineteenth century America—possible. Charles and James II’s judges legitimated slavery in both England and its colonies via the same kind of arguments that they used to justify the king’s divine right to rule. Hereditary slavery and hereditary monarchy were logically connected in the pulpit and implicitly in court cases. So too were the legal principles of the divine right to rule and the idea that heathens and infidels had no rights—they could not be subjects, were aliens, & were outside the protection of any laws. The judges combined these rationales into a kind of twisted feudalism that made people into property. English judges thereby rationalized a labor system highly compatible with early capitalism, indeed they created a kind of extreme capitalism, where even people were things. By the early nineteenth century the institution of chattel slavery in the Southern United States had largely lost sight of its ideological connection to absolutism. But that is where it was born in the seventeenth century.

While Charles I had promoted bound labor in his empire with royal proclamations in Virginia which gave land to masters for importing servants, and with proprietary grants such as that to the Earl of Carlisle for the Caribbean that promoted similar policies, it was only after the Restoration that his sons Charles II and James, Duke of York promoted African bound labor systematically. Between 1660 and 1689 Charles II and James presided over the dramatic expansion of slavery in their empire, an expansion that they promoted via the Royal African Company which dated to October of 1660), the Navy and war (with the Dutch to obtain forts off the African Coast), imperial policies that encouraged bound labor, and the appointment and promotion of officials at home and in the colonies who reflected their views.

Charles II and James II also appointed judges—who swore new oaths that they held their offices only at the *bene placito*, the “good pleasure” of the King (an expression widely associated with absolutism)—who created via the bench the beginnings of a coherent slave code in England that allowed a fuller ownership of human beings and protected such ownership in the courts. In doing so, these judges followed partly feudal precedents, but also cases from the early seventeenth century that had allowed the ownership of animals. They cited these cases as a basis for roughly imitating the laws and practices of the Spanish and Portuguese empires in the Americas whereby,
they argued, “the subjects of infidel princes” should be legally considered “goods” or “merchandise.”

Before 1660 in England, slavery was not any more part of the legal system; indeed while the principle that one man could own another still existed in the law books, as it had underlaid the medieval order of Lords and Villeins (feudalism), it was not then in use. Those old laws allowed villeins some rights (in courts, for example) and did not allow sale. As a consequence, one question that plagued Charles and James as well as many colonists, as they vigorously supported the African slave trade in the 1660s and 1670s, and as the taxes from Sugar and Tobacco produced by bound laborers flowed in; how does one make perpetual and hereditary servitude legal, especially in England itself, with its entrenched system of laws? Forced labor for a period of years as a punishment for a crime could be justified—it had been practiced even by Cromwell. Kidnapping poor children from the streets of London and Bristol, to serve the owners of the large land grants that he was handing out, could be rationalized. Children and underemployed adults—“vagrants”—could be bound to labor for a term of years with arguments that it was for their own good, a kind of twisted apprenticeship.5

The English colonies in the New World, especially Barbados and Virginia, were already buying and selling human beings in the period before 1670, not only Africans, but English and Irish, and trying to legally enforce it, but such enforcement was problematic. The system of indentured servitude that brought servants from England and Ireland, some willingly, others not, had twisted apprenticeship and labor norms to introduce the principle of sale; this distinguished indentured servitude in the new world from apprenticeship and labor contracts in the old. The idea was simply that the servant for the new world bound himself to the ship owner, and then the ship owner transferred that ownership by sale once in Virginia or Barbados. Those sentenced for crimes were sold by the king to shipowners with a contract stating they could be transferred. Children under 16, and generally between the ages of 8 and 16, could be sold using England’s apprenticeship laws as a cover; these laws allowed children to be forced into apprenticeships for terms of years (not exceeding age 24) in order to learn a trade. So the sale of both Christian subjects, and non-Christians had been happening for a while in the English colonies, and it would continue to happen. But these contracts still fit roughly within apprenticeship norms, which limited the terms of service by law, and arguably the treatment of such servants, as well as their resale, depending on the colony and the period. Also, the forced removal of servants was increasingly becoming an issue in England, where kidnapping was widespread in the seventeenth century. Even though in Virginia and Barbados, for example, children who came without contracts, and so with no indication that they had consented to

Brewer, Creating a Common Law of Slavery for the Empire pg. 5
labor, were sold for terms of years depending on their adjudged age, it was not clear that they could then be resold.⁶

But how could hereditary and lifetime chattel slavery, similar to what the Spanish and Portuguese were creating in their empires, be legally legitimated? How could people be easily bought and sold if they were not covered by apprenticeship law and had not signed a contract? How could ownership be protected? How could courts force the return of people to prior owners when neither side had an enforceable deed? In Barbados, for example, between 1635 and 1675, they fudged the issue in two ways: when privateers arrived with stolen “negroes” they sold them for goods exchanged on the spot in what was called by early modern conveyancing manuals a market-day exchange, without creating the need for contracts that could not be enforced. Then their owners claimed them as feudal tenants or villeins who were attached to the land. Existing contracts for sales of people in early Barbados, which date from the 1640s, were not for people themselves, but for estates with people attached. Thus it is that one sees ¼ or ½ an estate of say 100 acres sold with various servants (serving for a term of years) and other servants, “negroes” and Indians (serving for life) attached. Baptism, right from the beginning, seems to have shifted the status of “negroes” lifetime or hereditary servants to term servants. The logic seems to have been subjects had different laws than aliens, and the reintroduction of villenage could apply only to aliens. It followed a logic that subjects—those who could swear an oath of allegiance to the king—were entitled to the rights of Englishman, a provision in Barbados’ early Charter.⁷

When Charles II was restored to his throne in 1660 he made immediate efforts to support slavery and also to regularize and systematize policies towards the status of servants and slaves. Charles II held meetings to set up a regular slave trade beginning in October of 1660, and then set up a committee to oversee Colonial policy, with some 48 members, in December of 1660, with instructions to regularize laws in all colonies, including those with respect to servants (including "negro servants"). Colonial laws had to accord with English law. Colonies were not permitted to make laws “repugnant” to those of England, a point that was quite simply an obsession of Charles II's imperial authorities. Making sure that the colonies followed English law was a major concern of Charles II's Council on Foreign plantations during the 1660s; failure to do so could lead to the revocation of a colony’s charter of governance (as in the case of Massachusetts Bay in 1684) and to more personal political repercussions.⁸

While Barbados’ cobbled-together claims of ownership adhered roughly to English feudal or labor law, they had many problems, most particularly related to the initial sale. It was one thing for a privateer to exchange a cargo of “negroes” or

Brewer, Creating a Common Law of Slavery for the Empire pg. 6
“Indians” for whatever cotton or tobacco or sugar was available when such human cargo had been literally stolen from nearby Spanish or Portuguese ships or plantations. It involved little investment on the part of privateers. It was quite another when that human cargo was purchased and shipped from Africa, as did the Royal African Company, which involved a significant investment. What could the captains of Company ships arriving with valuable and highly perishable cargoes of men and women and children do when planters did not have sufficient goods to exchange for them? If they accepted notes of hand they were literally not legally enforceable, as such notes accorded neither with feudal law nor master/servant law. How could a buyer in Barbados who failed to pay be prosecuted and the human cargo be recovered? One early experiment the RAC tried was to designate local “factors” on the island, who would help to sell such sensitive cargoes over time. But this made only a superficial impression on the deeper problem. Despite a legion of efforts between 1662 and 1674 by the King’s governors to encourage legislation that made the entire estate of anyone who could not pay any debt of any kind (including for human cargo), the efforts largely failed. Such draconian solutions were unworkable and pointed to a hopelessly inadequate system of financing slavery and ensuring ownership. Failure to collect paper debts, unofficial contracts over the sale of people that could not be legally enforced, is what led to the Royal African Company’s bankruptcy in 1667.

Parliament made two attempts to introduce slavery in England and its empire, both of which would have solved the problem of the legality of sale by defining non-Christians (who were by definition not English subjects) as legally enslavable. The first proposed law, which is undated but originated in the House of Commons in the 1660s, sought to transfer Spanish slave law wholesale to England and its colonies. It declared that “Negroes & Infidells” who are “daily brought unto the severall English plantations,” even if baptized, “shall & may Continue bond men & bond womoen unto [their masters] during their Naturall lives, according to the order and practice of other Christian Governments” such as the Spanish and Portuguese.

In 1674 a member of the House of Lords tried to legalize slavery in England and its empire by adding a clause to a bill on masters and servants that had started in the House of Commons. The (anonymous) Lord suggested a clause defining in “what Manner, and upon what terms, Slaves, either Blacks or any other Foreigners, not being Christians may be used in England.” The key elements of both proposals were that “foreigners” or non-“Christians” could be “used” as “slaves,” in both England and the colonies.

Such proposals were a kind of echo of divine right: king’s had a divine right to rule their subjects; Christians had a divine right to rule “foreigners, not being
Christians.” Such a law would have automatically enabled other laws throughout the empire because it would have changed the scope of what was "repugnant" (or not) to English law. But this second law, too, failed to be ratified by both houses. Charles II could issue a proclamation limiting trade with Africa to the royal African Company and enforcing their monopoly, as he did in 1674. But creating legal slavery in the empire required something more.\(^{10}\)

In 1672 James, Duke of York, as the Royal African Company’s governor, issued a proclamation that was printed and widely circulated in the colonies and at home that tried to solve the problem by a cumbersome process that fit within existing law. Any planter who wanted a “negro servant” had to pre-pay on the Royal Exchange in London for any servants they wanted from Africa; it set prices and stated that the Royal African Company might import a few extras, but would not from then on import any “negro servant” unless the buyers had pre-paid.\(^ {11}\) The consequences of such pre-payment was a very slow trade; such a system was onerous—with huge delays of time and very slow flows of capital. Without credit, and given the price of slaves, it is pretty clear that many planters could not afford to buy them: certainly the lack of credit and the high prices are a crucial part of the explanation for why slavery did not “take off” in the Chesapeake during the 1660s and early 1670s.\(^ {12}\)

The Royal African Company delivered few slaves to Barbados in 1673-1675, as a consequence of this requirement for prepayment which arose from the RAC’s inability to enforce contracts over the sale of people. (It should be noted that such a proposal protected the RAC’s investments, but left the planters wildly exposed, as the problems with enforcing contracts still existed; now they would be the ones who could not enforce claims). James Duke of York’s proclamation therefore did nothing to solve the underlying problem. That required an entirely new legal precedent.

Without the ability to get legislation about slavery through Parliament, therefore, Charles II turned to the power of the bench. Charles had limited power over the high court in 1674, which was then led by Sir Matthew Hale. The problem was of some duration and of Charles’s own making. Charles II had originally promoted Hale, one of the few moderate judges left over from Cromwell’s Protectorate, and had appointed him on terms such that to dismiss him, he had to impeach him. He appointed Hale using a writ that allowed Hale to serve during “good behavior,” which meant that to in order to remove Hale from the bench, it had to be proven in a court of law that Hale had legally acted badly: to remove Hale he had to be impeached, as is the case for all modern Supreme court judges in the United States and is the case for high court judges in England since the Settlement act of 1701.\(^ {13}\)

And on the question of slavery, Hale was difficult. First, Hale never presided over a case that recognized slavery as legal in England or its empire, on any terms.
Second, and remarkably, Hale published a treatise on the origins of man, within which he argued that all have a common parentage (even in America) and that everyone, including “heathens,” have some of God’s essence.\textsuperscript{14} Although a philosophic work, it was discussed broadly—perhaps because of his thoughtful contemplations on the origins of American Indians—that read in a remarkably modern way. Morgan Godwyn, at that time a minister in Barbados, who had been gone from England for 15 years, knew about Hale’s arguments and used them only three years later to argue against to justifications of slavery he heard in Barbados. Hale was thus advocating an inclusive perspective in broad debates about the status of infidels; by implication, they were not excluded from God’s (and the law’s) protection.\textsuperscript{15}

But after Hale resigned in February 1676 (shortly before he died), Charles appointed a new Chief Justice who would accede more readily to his wishes. Meanwhile, Charles II had emerged, in the view of many Whigs, as a tyrant. While many of them, including Shaftesbury and Locke (Shaftesbury’s secretary) had cooperated to varying degrees with Charles II for more than a decade—even with the Royal African Company—in 1675 all cooperation evaporated. In that year Charles II tried to impose a new oath on all members of Parliament, one by which all members were to swear not only that they would never raise arms against the King or his heirs under any circumstances, but that they would never openly criticize him.

A pamphlet that Locke and Shaftesbury jointly wrote—but published anonymously—quoted extensively from the April and May 1675 debate over the Test Act in the House of Lords and accused Charles II of attempting to exercise absolute power. In the wake of its publication, as charges of treason for simply publishing it hung in the air, Locke fled to France “for his health” (and indeed his lungs were not so good, but his flight was sudden and lasted for several years); Shaftesbury, a peer of the realm, at first seemed above prosecution on such a charge. Certainly, in order to make headway, Charles II needed some judges on his side.\textsuperscript{16}

After Chief Justice Hale’s death, then, in 1676, Charles acted carefully. He chose a new justice with a reputation for supporting arbitrary power, and he made sure that even he had to swear a very different oath as Chief Justice. Charles’s new justice, Sir Richard Rainsford, had himself ruled in a King’s Bench case of 1671 that a town clerk in Stratford upon Avon could be removed without cause since the town charter allowed him to be hired “durante beneplacito” or “during good pleasure.” Thus the Mayor could remove him, that is, fire him, “without cause” or “without a crime.”\textsuperscript{17} In a move that was controversial even then, Rainsford agreed to take his own oath as Chief Justice only “durante beneplacito” at the pleasure of the King; Charles II could dismiss him without cause and thus his status and place rested simply and easily in Charles II’s palm.\textsuperscript{18}
Rainsford had a history of supporting the royal side, indeed, throughout the protectorate (he had then lost a position as deputy recorder in Northampton to a supporter of Cromwell’s despite being elected to it in 1653). In addition to his multiple (and widely-reported) condemnations of Quakers to hard labor for ten years in Barbados (for the crime of attending religious gatherings with more than 4 people), he was an outspoken opponent of freedom of the press, and sought to revoke land purchases and confiscations that had been made under Cromwell. He had, as it were, all the right party credentials. (cite)

After becoming Chief Justice in April 1676, Rainsford presided over judgments very different from Hale’s. In June of 1676, after some members of the House of Lords issued a warrant to imprison Shaftesbury in the Tower of London for publishing the proceedings mentioned above (critical of Charles II), Rainsford refused Shaftesbury *habeas corpus*. Thus—almost certainly on Charles II's instructions or with his approval, Shaftesbury was imprisoned for more than a year in the Tower. Indeed this moment defined the emergence of the Whig party and solidified opposition to Charles II. Charles II released Shaftesbury only after he spent more than a year in prison and apologized.¹⁹

Rainsford’s other crucial judgment—now almost forgotten, and when it is discussed, cited for reasons that do not recognize its significance—made slavery legal in England itself as well as in its empire. The sequence of events is complex, and speak to the multiple dimensions of imperial intervention in slavery and the slave trade. The case apparently started in Barbados, and was part of a broader effort, strongly pushed by both Charles II and his brother James (his “royal highness” in most of the correspondence) to protect the trade and give it a sound financial and legal footing.

In addition to the efforts with Parliament, Charles II’s instructions to his new governor of Barbados in 1673 encouraged in strong language both the protection of the Royal African Company and the slave trade, as well as better collection of debts from that trade, instructions reiterated to Atkins in many letters from the king and his privy council (and council on foreign plantations) over the next several years. Jonathan Atkins, the new Governor, was one of James, Duke of York’s protégé’s from the early 1650s, when Atkins had served under James in the French King’s cavalry during the Stuarts’ exile. Atkins internalized these messages, promising to create better credit networks and put slavery on a stronger financial footing.²⁰ But not until February of 1677, with a new assembly, was he able to finally sign a law securing property in slaves by designating them as simple property subject to actions of trespass (especially *detinue*). Indeed it is clear that there was more than a little *quid pro quo* going on; Atkins supported Barbadian planters’ petition to the Royal African Company to bring more slaves to the island in 1676; in exchange they agreed to establish a firmer
basis for claiming and reclaiming “slaves” as property, a shift that worked to the advantage of the RAC, but also helped to support a slave system generally.

But simply passing such a law was problematic; as I have discussed the slave code that Barbados was developing rested in many ways on an older common law of master/servant and also villenage (as in the 1668 Barbados law that made slaves into “real property” like land but also like villeins). But since the latter did not allow sale and indeed because it was often difficult to establish who could actually claim ownership of another person (if no contract existed), ownership was murky. Even if “Christians” could claim non-Christians as “slaves,” which Christians had such a right? Atkins new Barbados law that allowed people to be claimed as property using writs of trespass (which included detinue and its sister trover, discussed more below) was a distinct variance from the older common law and indeed English law generally. All laws passed in the colonies needed the assent of the King and privy council to be ratified, and could not be repugnant to English law, as was reiterated repeatedly in letters from the King and his Council. But this law was repugnant to English law. There was no precedent for using the torts that protected the ownership of simple property to apply to people.

The solution was to make Atkin’s Barbadian law (supported by the King and his brother from the beginning) also English law—and to do it via the courts. Just as Atkin’s law reached England, in May of 1677, the King’s Bench accepted a case that extended the reach of the common law to allow and enforce the sale of people: Butts v. Penny. In the published reports, the disputants are mentioned only by their last names, “Butts” and “Penny.” After deep digging I found that "Thomas Butts" was a long time naval officer who had received a pension for his service off the African coast during the second Dutch war (in 1665-6) and who served in the third Dutch war off the African coast in a ship called the Dover Dogger. The same ship, at the end of the war in 1675, was then put directly into service with the Royal African Company. (We should not be surprised, as James, Duke of York headed both the Navy and the RAC). After several months spent off Guinea, the ship brought a load of 82 slaves (of which some 7 died) to Barbados, where they were sold. The Dover Dogger arrived in London in July of 1676 after 28 months at sea. In late 1677, after the case was resolved, Charles II rewarded Thomas Butts for his "services" by granting him possession of the ship.

The fluidity here—Butts was part Naval officer, part employee of the Royal African Company—yet the plaintiff in this case on his own—though really for the Royal African Company—raises fundamental questions about how we think about institutions in the early modern period. Given that James, Duke of York, was both the Admiral of the Navy and the Governor of the Royal African Company we should perhaps not be surprised that his employees changed hats so readily, or that one hat melded so easily...
into another. But perhaps even more interesting was the apparent reluctance to have this case performed in the courts in the name of Royal African Company itself, in this moment of great political controversy when opposition to Charles II was increasing so dramatically. It appears that Charles II rewarded Butts for playing—quietly—such a politically delicate and controversial role.

The slaves from the *Dover Dogger* are almost certainly the slaves in question in the case, but only some of them. The actual number appears at first especially confusing, as the case was reported by two separate observers who give contradictory information; one claimed it involved 100 slaves, the other ten “and a half.” The “half” seems an error, but it is instead the giveaway that it was the actual number, because according to the Spanish Assiento calculations about slave imports in “piezas de Indias” or “pieces,” children and the elderly (or the sick) were to be measured as only part of an able-bodied slave. So they were counted as a full “pieza” or 1/2 or 3/4, in contemporary trades with Spain. During the 1660's and 1670s, the Royal African Company was supplying the Spanish Assiento through Jamaica and Barbados. The report that contained the "½" was also published while the author was still alive to proofread, and, in handwriting, when a printer was transcribing a written notation, a cursive ½, as then written, could appear as a 0 (to a printer probably as confused by the half as you were). So the actual number of "negroes" involved was between 11 and 21.

Crucial points about the case set a legal precedent that would be cited frequently in the following decades. Such Kings Bench cases had large audiences. Observers took notes that circulated then in manuscript and conversation. Such notes were sometimes published, as were these by Common pleas’ Judge Creswell Levinz.

Trover for 100 [10 ½] negroes, and upon [pleading not responsible by the defendant, Penny] it was found by special verdict, that the negroes were infidels, and the *subjects of an infidel prince*, and are usually bought and sold in America as merchandise, by the custom of merchants, and that the plaintiff bought these, and was in possession of them until the defendant took them. And Thompson [Penny’s lawyer] argued, there could be no property in the person of a man sufficient to maintain trover, and cited Co. Lit. 116. That no property could be in villains but by compact or conquest. But the Court held, that negroes being usually bought and sold among merchants, as merchandise, and also being infidels, there might be a property in them sufficient to maintain trover, and gave judgment for the plaintiff.

The details of this judgment open a world of legal reasoning that we have lost, but that reveal the origins of American slavery.
The legal reference is to Coke’s first volume of the *Institutes*, to his section on the status of villeins (serfs) and feudal lords, and to a discussion of whether their “Lord” really could own them, and buy and sell them. Coke translated a passage from the fifteenth century treatise of Littleton about the obligations of villeins for their lords, and the nature of their status: villeins held land “At the will of the lord” in return for which they had to do “Villein service; as to carry and recarry the Dung of his Lord out of the City, of out of his Lord’s Manor, unto the Land of his Lord, and to spread the same upon the Land.” (The image of taking the Lord’s dung out of the castle and spreading it on the fields provokes a laugh; however it was serious business to spread fertilizer). Coke then commented that “in ancient time,” as Bracton (who was influenced by Roman law) wrote it in the thirteenth century “the Condition of Villeins from freedom unto Bondage . . . grew by Constitution of Nations,” not by the law of nature. “He that was taken in Battel should remain Bond to his Taker for ever, and he to do with him, and all that should come of him, his Will and Pleasure, as with his Beast, or any other Chattel, to give, or to sell, or to kill.”

Thompson, Penny’s lawyer, invoked this passage from Coke to argue that Penny should not be liable for having taken the villeins, or "subjects of an infidel prince" on the grounds that the Lord did not have sufficient property “in the person of a man,” to maintain an action for damages; the rights of a Lord over his villein were limited by nature. One man could not own another, “but by compact or conquest” according to the ancient law. As Levinz summarized Penny’s argument: “there could be no property in the person of a man.” Several men named Penny resided in Barbados during this period and it is strange to realize that Penny was likely arguing against the principle of property in people—as a plantation owner—trying to forestall recovery of a debt against him.

Rainsford and the rest of King’s bench dismissed Thompson/Penny’s defense, to create an entirely new common law precedent on ownership of people. Butts could own 10 ½ "negroes" and recover them via basic writs that protected simple property on the grounds that Africans were “bought and sold in America as merchandise.” Because they were “the subjects of an infidel prince,” people could be held as property like hawks or dogs that one had trained to hunt, the cases they cited as precedents. They could cite no cases involving humans. Their reference to “the custom of merchants” is especially obfuscating, given that the main English merchants in the new world to transact such business were actually employees of the King’s company, as was Butts himself, employees of the same King at whose pleasure (or not) Chief Justice Rainsford held his appointment.

In other words—the “custom of merchants” was Spanish and Portuguese law and through them that of the Dutch, and was part of the Assiento trade with Spain, in which Charles II’s African Company had been engaged since 1662 (through Jamaica
Somehow 10 ½ of them (11 or more people) of those Butts had sold in Barbados were not being paid for, and he was seeking damages on behalf of the Royal African Company.

The other report on *Butts*, by Joseph Keble, was similar, but had a slightly different emphasis. “Special verdict in trover of 10 negroes and a half find them usually bought and sold in India, and if this were sufficient property, or conversion, was the question.” Again the question of whether “negroes” could be property was the main issue in this decision. They had no precedent to cite that “negroes” could be considered such property, other than this vague reference to merchants’ customs in either “America” or “India” (the terms were then interchangeable in that America was also called the “Indies” or the “West Indies”). The report then discussed the same point that Thompson had raised, from Coke’s Institutes, with the same page citation: “that here could be no property in the plaintiff more than in villains; but per Curiam [by the vote of the majority of the judges], they are by usage tanquam bona [just like a good], and go to administrator until they become Christians; and thereby they are enfranchised.” The court then was arguing that Butts could own the “negroes” and that they could be property because they were not Christian and thus not subjects and could be traded as “a good.” While the claim that conversion might enfranchise them is an important subsidiary issue in the case in one report, the innovation in the case was its ruling that people from Africa—or any other subjects of so-called “infidel princes” could be easily and consistently claimed and recovered as property. The court awarded Butts the costs for his claim of loss of property, which the writ of *trover* allowed, when someone had converted your property to their use.28

The main import of the court’s decision—the defining impact and legacy—was that “negroes” could be “property”—like a dog or hawk—and somewhat like a villein, but without the element of being tied to the land, a protection against sale that Coke had granted in his interpretation of feudal law in 1628. *Butts v. Penny* was a pivotal case that would be often cited over the next century; whether cited or not, its logic infiltrated English law, such that lower court decisions, such as at Common Pleas, concurred that infidels could be enslaved and used and traded as simple property.29 Many of these cases were not published, but can be glimpsed in references in other cases that were. So in the Court of Chancery just a few years after *Butts*, Mr. Sargeant Maynard “recovered a debt contracted against the executor of an owner of a plantation in Barbadoes” by means of a writ of “trover” and obtained judgment for “the fourth part of a negro” or 1/4 of his/her value.30 In this case can be glimpsed how crucial this equation to property was to justifying and protecting the enslavement of people.

The writ used here, *trover*, was a kind of trespass or “wrong,” what we would call a tort. In this period, most civil actions (and even criminal ones) required the use of a
writ to be valid. *Trover* was a writ to recover the value of property from someone who finds or takes another’s goods and converts them to his own use. So to even be used successfully, as it was in this case, requires the definition that the court ended up specifying, that a person could be “bona,” that is Latin for a “good,” or a possession. The rule established here, that made people into “goods” applied to other torts such as *detinue* which was even more useful for this purpose. The advantage of *detinue* over *trover* was that while both sought recompense for goods that someone else had taken, *detinue* allowed the recovery of the “good” itself (the “slave,” in these cases) as well as damages, while “trover” allowed only the recovery of the value of the good. Applying these writs to humans was a major innovation in the Common Law that substantially increased the powers of lords and masters.

If Butts—or the Royal African Company–could not recover their “property” and receive damages for them having been detained by “Penny” then the ability of any merchants involved in the slave trade, including the RAC, to carry on their trade and enforce their property claims was difficult. Although the perpetual ownership of “infidels” or “blacks” was implicit earlier, in letters from Charles II in 1661 to colonies such as Virginia and Barbados, and in the very involvement of the royal family in the slave trade, it was still uncertain. What this case accomplished was to make the kidnapping and sale and resale of Africans, in particular, legally legitimate and enforceable in the English empire. Without regulation of contracts, and the formal definition of people as a property subject to those contracts and regulations, slavery could not be legitimized and was an act of brute force. The question of whether people could be considered simple legal property was therefore a huge issue.

*Butts v. Penny* quickly had an impact on how slaves were financed in the colonies. During the late 1670s, the Royal African Company began to issue credit to planters to buy slaves on mortgages for terms of 3, 6, 9, or 12 months; as a consequence debts owed to them by planters surged to £120,000 in 1680 and then to £170,000 in 1690; the Royal African Company also became more effective at recovering both its debts as well as enslaved property. Between 1677 and 1689 the Royal African Company trade grew exponentially, such that their ships brought more than 100,000 souls from Africa to the New World during that decade alone.31
The evidence that judges were an extension of royal power during this period is extensive. Under Charles II and his brother James II, who came to the throne in 1685, no chief justice held his seat for more than two years. As Edward Foss noted in his biography of the *Judges of England*, the second half of Charles II’s reign was exceptionally turbulent. "No hesitation was exhibited in removing those judges who were deemed too honest and conscientious, and in raising others to the judgment-seat who were cringing candidates for popular applause or courtly favour, and who were likely to prove supple instruments for the ruling powers.” Foss continued: “A direct proof of the attempt to render the judges subservient to the [Charles II’s] court is to be seen” in the use of the words “durante bene placito,” in judiciary appointments in the latter part of Charles II’s reign and throughout that of James II. Foss’s ascerbic comments in his normally hagiographic history of the lives of the Justices in England are pointed.

While we tend to see the judiciary as somehow above politics, in this era, especially from 1670 to 1689, when judges were sworn with such conditional oaths, justices had to be acutely attuned to their King’s wishes in order to keep their posts. To understand this point, imagine for a moment what it would mean in the modern United States if the president could dismiss supreme court judges on his whim, even in the middle of the night before a judgment he did not like was to be delivered and appoint them without bothering with the approval of the senate. So Creswell Levinz, one of the lawyers who reported the *Butts* case, had been a judge on the Court of Common Pleas between 1681 and 1686, when James II dismissed him suddenly and without explanation. When asked in 1689 by the convention parliament why James II had removed him, he responded: “I thought my discharge was because I would not give judgment on the soldier who deserted his colours, and for being against the dispensing power.” If so, Levinz lost his post because he refused to support James II's standing army and refused to allow James II to ignore (to "dispense with," parliamentary laws.) Charles II even reached across to Barbados to order the suspension of judges who ruled contrary to his wishes, as he did in 1676 to suspend...
William Sharpe, Chief Justice of the main court at Bridgetown. Indeed, Foss's condemnation of the corruption of justice during this period seems deserved.

Marvell, the poet and Whig critic of Charles II in 1677, was even more pointed than Foss in his criticism of how such a practice had corrupted the bench: “Alas the Wisdom and Probyt of the Law went off for the most part with good Sir Matthew Hales, and Justice is made mere property. This poisonous Arrow strikes to the very heart of Government.” Marvell believed that there was a Jesuit conspiracy to make England into an absolutist dictatorship. “What French Counsell” he wrote, referring to Louis XIV, the King who argued for his absolute power, and who was a strong supporter, monetarily and otherwise, of Charles II and James II. “What standing Forces, what Parliamentary Bribes, what National Oaths, and all the other Machinations of wicked men have not yet been able to effect, may be more compendiously Acted by twelve Judges in Scarlet.” For publishing such words (anonymously), Charles II's judges heavily fined the printer and threw him into the tower of London (without habeus corpus). Marvell died suddenly shortly thereafter.

What some regarded as corruption, however, to others was simply regulating slavery by judicial fiat. It was Charles II's only choice if he wished to create a legal basis for slavery. As we have seen, earlier efforts to pass parliamentary laws had failed. The 1674 attempt to define “in what manner, and upon what terms, slaves, either blacks or any other foreigners, may be used in England” had failed and split with the Whig leaders of Parliament, led by Lord Shaftesbury. Shortly after the bill was introduced, Charles II dissolved Parliament for other reasons, and the new Parliament he called the next year were less cooperative than the earlier Cavalier Parliament, whose members had held their seats since the Restoration. This was a time, of course, when the King could call and dismiss parliaments at his pleasure; but at least in the case of parliamentary members, unlike judges, he could not choose the members.

When James II became King in 1685, he kept his post as Governor of the Royal African Company and remained involved in its business, actively protecting it and promoting it on many fronts. Two years after James II’s coronation, the King’s bench, accepted its next major slavery case. By this time, between Charles II and James II, the justices on the bench had been repeatedly removed and replaced with ever more loyal justices, to the extent that in the most famous case (the 1686 case of Godden vs. Hales, in which the judges held that the king could “dispense” with parliamentary laws and was therefore above the laws, James II asked the chief justice to do an informal poll of the judges in a tavern the night before the decision was rendered. After that poll, James II dismissed four judges who disagreed with him in the middle of the night. When the judges cited their “precedents” for their ruling in Godden v. Hales that the
king was above the law, which they would normally be to earlier case law or major legal treatises, they cited nothing but “the king’s will.”

Sir Thomas Grantham’s case hinged on the opening left open in the Butts case and indeed in the larger justifications of slavery in the Atlantic world, which implied that “the subject of an infidel prince” who converted to Christianity could claim the right of a subject and was no longer outside the protection of the law (and therefore could no longer be claimed as property). The resounding verdict in Grantham’s case was that such a person was not freed, was still property, and had to be returned to his master. The details of this case are fascinating; the connections outward from this case reveal the scope of what Charles II and James II were trying to foster in their empire, and how it fit with their perception of the order of their Kingdom. It also reveals something about those who were benefitting from such an order, and how their legal stance and arguments developed, and why they believed themselves justified in enslaving others.

Sir Thomas Grantham, like Thomas Butts, was a naval officer, who (also like Butts) by the time the case emerged had been an officer for more than a decade; both reported to James, Duke of York, who by 1687, the date of Grantham's case, was now king. Grantham’s suit was over his ownership of an unusual man, indeed, very unusual. He was a man with whom Grantham had made a contract for a term of years in the Indies, when as an Admiral of the British fleet, he had helped the British recapture Bombay in 1684. Named “John Newmoone alias Shackshoone” he was “an Indian of unusual shape, having a Child growing out of his side” as Grantham wrote in a runaway ad that he placed two years later in the London Gazette. His bizarre birth defect (he must have partially fused with a twin in utero) meant that he was described (repeatedly) both in the case and outside of it, as a “monster.” He was particularly valuable to Grantham, because Grantham displayed him at fairs and markets—for money. The court case described his appearance and use to Grantham almost scientifically. Grantham “bought a monster in the Indies, which was a man of that country, who had the perfect shape of a child growing out of his breast as an excrecency, all but the head. This man he brought hither, and exposed to the sight of the people for a profit.”

Sometime in 1686, however, someone decided to help Newmoone; teaching him Christianity, helping him to be baptized, and finally, helping to protect him from his master by “detaining” him, on the grounds that he was now free. As the report of the case summarized: “The Indian turned Christian and was baptized, and was detained from his master.”

In response, Grantham sued for recovery of Newmoone in February 1687 in the Court of Common Pleas (a case that was then moved to the King’s Bench).
Although his argument was similar to that in Butts—he argued that Newmoone was unjustly detained by another, he used a different writ—“de homine replegiando”. It is a writ from the old feudal law, that had been used by Lords to recover their villeins. A powerful writ, it allowed Grantham to imprison the person who detained Newmoone via *a capias in witherum*, which did not allow bail (!) until that person restored Newmoone to him (or a judge permitted it). Grantham sought both the return of Newmoone and damages for his lost labor and the costs of the suit. Although one contemporary account -- in the Greenwich or merchant marine press--noted that Newmoone had negotiated a contract with Grantham to come to England and work for him for only 6 months (and that he would then be allowed to return to India) that contract was not mentioned in the suit itself. If such a contract did exist, it makes the suit itself that much more shocking; Grantham put it aside on purpose, to claim what English law after 1677 would allow, which was to hold Newmoone as a slave. Did he negotiate the contract itself in bad faith? Did the court even care? It appears not.\(^{41}\)

The court returned Newmoone to Grantham. Fourteen months later, Newmoone tried to run away, and Grantham placed an ad for his return in the *London Gazette*, offering 5 pounds reward.

The verdict stated simply: “*hominem replegiando* lies for a baptized infidel detained from his master.” The suit had two consequences: it justified slavery in England of men from elsewhere who were not Christian—either in the east or west Indies and from Africa—but laid down that once ownership was established, then the laws and customs of villenage could be invoked to protect the master’s property claim even after the initial justification for owning them had disappeared. It thereby both closed the legal opening left in Butts at the same time as it created new legal avenues for strengthening ownership.

Grantham, who brought the suit, became an early owner of slaves in England, no doubt as a consequence of his many adventures as an Admiral in the British Navy and particularly his actions in Virginia and India. As early as 1672, he was helping the Virginians to build forts and was routinely the Admiral in charge of the naval convoy that led the fleet of ships that brought Virginia tobacco to England and English goods to Virginia; in that capacity he too became a tobacco merchant. In 1676-7, as the admiral protecting the convoy, he was the first British military authority on the scene of Bacon’s rebellion. With his troops and threats that more than a thousand additional troops were on the way to suppress the rebellion (personally selected by James, Duke of York), he managed to persuade the rebels to surrender. He urged them to “quietly lay down your Arms; lest by persisting in this open Hostility, you force them at last to be sheath’d in your own Bowels.”\(^{42}\) His grisly threat (and promises of freedom for the bound laborers, including English, Irish and Africans, who had fought for Bacon, led
to their surrender (a promise of freedom that Governor Berkeley did not keep). By such means he negotiated the surrender of several garrisons that were manned by Bacon’s followers, for which Charles II rewarded him with 200 pounds.\textsuperscript{43} William Sherwood, one of his majesty’s commissioners who arrived to investigate with a full regiment, reported from the James River in Virginia that Grantham had been “infinitely serviceable in reducing the country from ruin,” or, to use modern language, in suppressing the rebellion. His actions also upheld slavery and indentured servitude.\textsuperscript{44}

Between 1677 and 1686, Grantham had many adventures as a naval officer, fighting off Algerian pirates who threatened the Virginia tobacco trade (for which he was knighted and thus became “Sir Thomas”) and finally, as Commander of the Fleet in Bombay in November of 1684, helping the British retain control of India, where he helped to suppress a mutiny (again by negotiation). Newmoone probably came from India with Grantham when he returned to England in early 1685; certainly Newmoone was displayed before James II and his wife Mary of Modena sometime before August of 1685 when an engraving was made of him, describing him simply as “the monster from the Indies.” (See figure).

Grantham was one of many who benefited from the patronage of the Stuarts but also from the set of ideas about hierarchy and slavery that they were promoting. He owned others besides “newmoone” as well, as is clear from runaway ads he posted in London newspapers.\textsuperscript{45} So too were the judges who ruled in his favor. Indeed, Andrew Marvell’s claim that "justice is made mere property" has a strange compelling resonance; to create the law they wanted, Charles II and James II had to own the system of justice, not only to control the discourse of right, but also on some level to own the justices themselves. Ownership of a sort it still was, as contemporaries responded by even crafting a term such as "creature" to discuss someone who "belonged" to someone else in the sense that they were under their influence politically and financially.

While ideas about hierarchy and divine right were much older than Charles and James II’s reigns, they emerged in a stronger form between 1660 and 1688. These two kings made efforts to institutionalize and legitimate them via the courts and other institutional structures.

The Stuarts’ claims to right would be overturned by revolution, which no doubt captured men like Grantham by surprise. Although he accepted a post as “One of His Majesty’s most Honourable Privy-chamber” to William III, he held no important positions in its wake.\textsuperscript{46} Histories such as Grantham’s illustrate the compromises that William and Mary made at first, after that Revolution, as they struggled to obtain the loyalty of their people. However they also reveal the power shift.

The Revolution initiated substantial changes, such as in who wore the red robes of the high court of King’s Bench. The Convention Parliament that assembled in
January of 1689 took upon itself the task of fining and imprisoning all the judges of the common law courts. The twelve high judges of the King’s bench, Common Pleas, Exchequer, and Chancery were each fined 500 pounds, exempted from the general pardon that William and Mary had promised, and prevented from holding any future office by the Convention Parliament. Normally, common law judges were reappointed at the start of a new king’s term, as they were when James II succeeded his brother. They did so because they saw the high court as the source of the practical absolutism of James II.

The judges’ decision in the case Godden [or Godwyn] v. Hales in 1686 was studied by the Convention Parliament as the prima facie evidence of how James II’s aspirations to absolutism had corrupted the bench. It gripped the attention of the Convention Parliament. Beginning on January 25, they demanded the full records of the case, and then proceeded to pore over it and debate their course. The Convention Parliament decided that all the judges who had participated in the decision that had said, essentially, that the King could ignore all laws, had to be punished, even the one (out of the 12) who had disagreed with the verdict.

The new high judges of the common law courts were chosen by William and Mary’s Privy Council, each of whom brought a list of their recommendations, all topped by Sir John Holt. He had made his name in several respects: for being unwilling to admit the King’s dispensing power in a crucial case involving the city of London, and perhaps most importantly, for his arguments in the Convention Parliament about the grounds upon which William and Mary should be declared King and Queen: they should not be merely regents, ruling during a period of James II’s insanity, as it were; they should be proclaimed King and Queen on the grounds that James II had “abdicated” the throne—and not only by his flight after his military defeat. He argued that “government is under a trust, and a deliberate violation of that trust is an express renunciation of it, although not by formal deed. How can a man in reason or sense more strongly express a renunciation of that trust than by subverting it, his actions declaring more strongly than any words spoken or written could do that he utterly renounces it?” He contended that James II’s absolutism was a violation of the trust placed in him to lead, and that any King of England had sharply limited powers.

Holt was thus enunciating the more radical position, that when a King became a tyrant, the people had a right to rise up against him and choose another. They were arguments that such a King, who was “an advocate for slavery,” could be justifiably overthrown, as Locke stated in the preface to his Two Treatises of Government, published in 1689 to justify that revolution. While not everyone went so far, these were the arguments of many Whigs, and William and Mary’s firmest adherents. Initially, they did
not hold all, or even most of the power in William and Mary’s reign. But after Mary’s death in 1694, and after an attempt by Tories to assassinate William in February 1696, the balance shifted clearly to them, to a group whom contemporaries called the “Whig Junto” in particular. It was after 1696 that the full impact of the revolutionary ideology began to be felt, particularly as it related to real slavery, and not only in England, but also in its empire.

While the Glorious Revolution (and Holt himself) did challenge absolutism from the beginning, William and Mary did not challenge, at least at first, the enslavement of "infidels" in the same way. Such slavery was clearly a subsidiary issue, one that did not compel the same alliances as the broader one. Indeed Holt was one of those presented with an immediate problem involving the Royal African Company’s trade in African slaves with the Spanish. During the 1680s, Charles II’s and his brother James’s royal African Company had been building an extensive trade with the Spanish, supplying them with slaves, via resale in Jamaica. The trades were facilitated by a Spanish factor, through most of the 1680s a man named St. Jago del Castillo. Although such a trade technically violated the Navigation Acts, those acts had clearly been waived in this case by the Stuarts (another example, by the way, of their dispensing with Parliamentary laws).

In 1689, however, the slave trade through Jamaica with Spain provoked a crisis; new authorities in the islands were clearly bent on enforcing the Navigation Acts’ rules against trade with other countries, which threatened both the Royal African Company’s profitable business and the Spanish supplies of new African slaves. In the words of the Spanish Ambassador “The [Spanish] person in charge of the negotiations respecting the introduction of negroes into America is ready to start for Jamaica, but he cannot start nor fulfil his duty without previous solution of the existing differences as to the purchase of negroes in the British dominions, and their free transport in his own vessels to the dominions of Spain.”

Note here the diplomacy; the Royal African Company is not mentioned; it seems as though he is trying to buy “negroes” already there (not newly imported people) from British colonies and take them elsewhere. The Spanish Ambassador continued: “I beg therefore to remind you of the matters already brought before you, and since they cannot be settled as soon as could be wished, I would ask the King at least to permit the practice which has already existed more than twenty years to continue for the time until these difficulties are decided, and that he will give orders to the Governor of Jamaica and of the other Colonies not to trouble St. Jago del Castillo nor his dependents in the execution of their duty.” William, sitting with his Privy Council, referred the matter to Sir John Holt and the other judges of King’s Bench for their advice.
Holt and the other new justices on the Kings Bench challenged the practice of twenty years and the ability of Spanish ships to take Africans out of Jamaica, challenging the principles of Butts even when it came to the trade with Spain. They did not agree that “negroes are merchandise.” While the judges allowed that “It is not against law for ships in distress to enter Colonial harbors to replenish and refit” that did not include slaves. As Roger Morrice a whig politician wrote in his diary for December 1689, following the report of the contretemps between the judges and their new monarchs, William and Mary ignored their judges due to the promise of the Spanish gold from the trade: “Judices [The Judges] About the Close of the last month [November 17] the Crown sent for all the Judges and craved their Opinions. Question: Whether the King by Law might authorize the Spaniard to buy and sell, and make Merchandize of Negroes’ in his Dominions beyond Seas, as in Jamaica &c Some of the Judges seemed to thinke it was unchristian and impious, but they were unanimous in their opinion, that though it had been done by former Kings, yet our Law did not Countenance it nor warrant it &c. The Attorney Generall and Solliciter had before delivered their opinions to the same purpose. Notwithstanding the Court has given out such Commission to the Spaniard, and Printed it in this Gazette. Nota, Some thinke it had been rather better if it had been done without Consulting the case.” The sly note from Morrice no doubt reflected William III’s chagrin that he had referred the case only to ignore their advice.

This was the only such case on slavery heard (or advised) by the high court during the early years of William’s reign, but at least one other heard in the Court of Common Pleas, agreed with Butts. In Gelly v. Cleves The Court of Common Pleas, headed by Sir George Treby, a whig, ruled simply, that “trover will lie for a Negro boy; for they are heathens, and therefore a man may have property in them, and that the court without averment made will take notice that they are heathens.” This case heard in a the lower court of Common Pleas, followed very clearly the precedent set in Butts v. Penny almost 20 years before in the Kings’ Bench; indeed, as a lower court, that is what they were supposed to do. Other cases such as this no doubt existed; however they were not reported, as most cases in lower courts were not. Such was the state of the common law in 1694.

However by 1696 the King himself had changed his mind about taking a stand against the principle that a person could be property: The King’s bench, led by Sir John Holt and in the presence of King William himself, presided over a case that reversed Butts. (The records state that the King was there. It is possible that was a formality of wording, but if so it is not repeated in other reports. It really does appear that William was in the court himself to accept the case). Whether or not he was
actually there, it is clear that the new case had his sanction. On October 26, 1696, the King’s Bench meeting at the Guildhall in London, accepted a civil suit over a slave from Barbados. Willoughby Chamberlayne, a prominent Barbadian, who had recently been Speaker of their Assembly and was in London seeking to become governor, sought to recover a slave from a London resident named Robert Harvey. Chamberlayne’s mother had brought the enslaved man from Barbados as her dower (in whom she had only a life estate), about ten years before. That former slave was now working for Harvey. Willoughby claimed that Harvey had taken away his slave worth 100 pounds and then “kept possession of him.” Harvey responded that he had hired the man for wages of 6 pounds a year—so that he was an employee (no slave). We do not know the name of the man they argued over; by Willoughby’s lawyer, he was always called a “negro slave.” By Harvey’s lawyer, he was called a “man.” The fact that he was never named reveals his individual irrelevance. What was at stake was a principle: could one man own another?

Harvey, who had employed the man whom Willoughby claimed to own, begged for a jury. A week later, on November 3, Sir John Holt, the Chief Justice, impaneled a jury, granting them three weeks to assemble their evidence (as jurors did then). On November 24, the twelve men reassembled to deliver their verdict. Even the calling of a jury before the high court was an unusual act; so too was the presence of a King, and even the hearing of it in the high court, for a case that could have been heard in a lower court such as Common pleas, just as Gelly vs. Cleve had been two years before. The very fact of accepting the case, and granting a jury, indicate the courts’ intention to reverse the earlier rulings.

The case was reported in at least three places and summarized in two more; so in five total reports, which reveals the unusual attention it garnered. Not only did many lawyers and judges take notes on Chamberlayne, but those notes were circulated, commented upon, summarized and digested. Many thought this was an important case in its own time. Indeed, the first reports are of an extraordinary length, repeating in detail the arguments as well as the evidence.

The jury rendered the following summary of the evidence. The jury “say upon their oath, that one Edward Chamberline, long before the within-written time when &c. was seised of a certain plantation in the island of Barbados in the West Indies, in parts beyond the seas in his demesne as of fee, and of certain negro slaves, being slaves belonging and appertaining to the same plantation; and the aforesaid negro slave, long before the within-written time when & c. was born of negro parents, slaves belonging and appertaining to the same plantation; and that long before the . . .[1668 act that made slaves into real estate, a law passed to ensure that ] the heirs and widow who claim dower may not have bare lands without negroes to manure [fertilize] the same.”
By the law “all negro slaves . . . shall be held, taken and adjudged, to be estates real, and not chattels” except that slaves do not have to pass by deed, as do lands. The language of this passage shows that Chamberlayne and his lawyer, and indeed the Barbadian legislature, by making slaves “real estate” were trying to claim that slaves were villeins, and that property could thus be established in them on that basis. Note several crucial clauses “long before the within written time” as in almost forever, and the claim that their role was to “manure” or fertilize the lands—exactly the main tasks that villeins were supposed to perform according to Coke.

One slave descended to Mary, the widow of Edward Chamberlayne, as her dower share, with the reversion (which means after she died, he would inherit, as she had a life estate, as was normal with dower) to William Chamberlayne, whose heir in turn was Willoughby Chamberlayne. Meanwhile, Mary married John Witham, and they both moved to England in 1684. Between 1684 and 1695, the “said negro slave” was baptized. Witham also “put the said negro slave out of his service” after which he (the former slave) took various jobs. Sometime before September of 1695, Willoughby tried to reclaim his supposed slave, and Harvey had refused to relinquish him, instead rehiring him for wages of 6 pounds a year.

For their verdict, the jury offered only confusion: they confessed themselves “wholly ignorant” whether Harvey should be fined, and sought guidance from the court. The justices of the King’s bench, led by Holt, posed the following queries in response. 1) Upon the jury’s finding, was “any legal property vested in the plaintiff”? 2) If Chamberlayne did have such property, didn’t bringing the man to England void it (and constitute a “manumission” as the status of villeins was only in relation to the land they occupied)? 3) Does an action of trespass lie for a “Man of the price of one hundred pounds.”? Their use of the word Man, which in the report was in italics, indicates the direction of their thought.

In response to these queries, the lawyers for both sides mounted vigorous rationalizations of their positions. Godfrey Woodward, lawyer for Chamberlayne, argued forcibly for feudal and Roman precedents for Lords owning villeins or slaves. He claimed that “The power which naturally arises to the lord over such bondmen or slaves, is by reason of his supplying them with food and raiment during their lives, as a recompense for their labour: such is the usage of the island of Barbados.” He continued that “this negro was born of negro parents there. Now the children of such parents are slaves as well as they. So it was amongst the Romans; where both parents were aliens, the children were so too.” His arguments here are a window into how the early justifications of slavery invoked Roman laws about who is an alien versus who is a subject or citizen, to deny rights to those who are aliens, indeed that was also the origin of the passages from Bracton that Coke had quoted in his Institutes. The passage
here speaks to broader patterns of thought that uncover why the baptism of “aliens” would be so troublesome, as such baptism could make aliens into subjects with rights.

Woodward then argued that such slaves were nothing more than villeins, “regardant to a manor,” and thus were completely in accord with ancient English law, by “which the lord had so absolute a property.” He finished this section with a flourish, claiming that Butts v. Penny had shown “that trover will lie for a negro.” If trover lies for slaves, then people can be property, and all of England’s complex property law can be used to protect that ownership.

For Woodward, the only potential flaw in his case was this man’s conversion to Christianity. So that “the chief question [of the whole case] then is, whether baptism without the privity of the lord will amount to a manumission?” He answered that that a villein could not be manumitted from a Lord’s power without the Lord’s consent “but where the Lord is an actor.” Indeed, “what the villein does without the consent of the lord, cannot acquire a manumission.” He closed his case with what he no doubt expected to be the clinching argument, one of practicality due to the changed political climate and ideology of the new monarch: “If baptism be accounted a manumission, it would very much endanger the trade of the plantations, which cannot be carried on without the help and labour of these slaves.”

Robert Stone, the lawyer for Harvey, then rose before the justices in red robes. He utterly rejected Woodward’s careful logic. “It is against the law of nature for one man to be a slave to another.” While he admitted that there might be some cases where a man would bind himself to another, or be taken as a prisoner in war, and because he owes his life to the man who saved him, offer service in return, “no such thing is found in this verdict.” The Law of nature, he finished, does not justify slavery, but only the constitutions of nations (man’s law). These laws do not accord with England’s law. “Our laws are called libertates Angliae, because they make men free; and therefore even in the time of villenage [feudalism] here, the lord had not such an absolute property over his slave.” Stone then listed the rights that even villeins bore, to challenge their masters in court, etc.

However he refused to grant that slavery in Barbados was feudalism. “This cannot be a villein regardant to the plantation, for then the plaintiff and his ancestors must be seised of this negro and his ancestors time out of the memory of man, which could not be, because Barbadoes was acquired to the English within time of memory.” Of course, Stone was right; he was puncturing the balloon of words that Woodward had created (with the help of the jury) in the original account that “long before the within-written time when & c. was born of negro parents” whose families had always been bound to that plantation. He furthermore claimed that the Magna Charta prevented one man having “absolute or general property” in another. Even if
Chamberlayne had such a right to own another in Barbados as a lord over a villein (a right he had just demolished) then coming to England voided that right because villeins belong only to parcels of land, and once they are removed, the obligation vanishes.

Last, but not least, the “being baptised according to the rite of the Church, he is thereby made a Christian, and Christianity is inconsistent with slavery.” He justified this with complex arguments that also went back to the medieval period that dwelt on the limits of lords powers over villeins who wanted to become monks or travel to holy places. To cap off his argument, he offered a flourish towards an argument that though profoundly different, was probably as powerful as the one that Woodward had offered in his closing remarks; it was a discussion of norms among the Turks. The Turks, as recently as 1683, had stormed the Christian west at the gates of Vienna, enslaving Christians as they went. But even they “do not make slaves of those of their own religion.” If a slave converts to the muslim faith, they would free him. Stone ridiculed Woodward’s claims with one last twist: “If this be a custom allowed amongst infidels, then baptism in a Christian nation, as this is, should be immediate enfranchisement to them, and they should thereby acquire the privileges and immunities enjoyed by those of the same religion, and be intitled to the laws of England.” Stone therefore argued that a baptized person of African descent should be able to claim the rights of any other English subject.

The judges agreed with Stone and denied Chamberlayne’s claims absolutely. Chamberlayne was left with the costs of the case. He had no slave, no money for damages, no validation of the claim that slaves could be property. The judges verdict was that “no action of trespass would lie for the taking away a man generally” and thus that writs to protect simple property (trover and detinue) could not apply to human beings. Though they admitted that in some cases, a master could bring a special action for the loss of his apprentice’s labor when there was a contract via a writ “per quod servitium amisit” it was a narrow writ and it did not apply in this case. As the first report on this case stated clearly: “by the laws of England one man cannot have an absolute property in the person of another man.”

It was a verdict that echoed far beyond the walls of London’s guildhall, a verdict that made plantation owners in Barbados shiver. For the Holt decisions left a gaping hole in the legal structure of slavery and the slave trade across the empire. The legal reverses in London had a direct and immediate effect on the ground, in terms of the ability to finance slave purchases. In 1697, the year after Chamberline, the Royal African company returned to the policies of pre-1677 to demand immediate or pre-payment for African slaves, refusing to issue credit unless the company’s factor in the colony were willing to issue his personal credit. As a consequence they returned to a barter or
market system almost completely (of immediate payment). Indeed, not until 1710, and really 1713, did the royal African company and the new separate traders allowed by the 1698 act once again begin to issue long term contracts.60

After Chamberlayne, the Barbadian law that allowed people to be treated as simple property was no longer valid. When the Barbados’ legislature sought to reenact their earlier *detinue* law of 1677, the “Act to revise and continue the Act to secure peaceable possession of slaves, and to punish the clandestine *detinue* of them,” to reestablish “secure peaceable possession” of those they claimed as slaves, the Board of Trade under William II refused to ratify it. It was overturned twice by William III’s Board of Trade in 1700-1702. In 1702, when the assembly passed it a third time, the Governor and Council in Barbados rejected it on the grounds that it was “against H.M. [His Majesty’s, King William’s] Instructions” since any law that was rejected twice by the Board could not be considered.61 The Council in Barbados also overturned some local cases in Barbados involving *detinue* or *trover* for slaves between and 1701 and 1708, which shows how routinely they were confronting these questions. So “Error brought by Thomas Walker, to reverse a judgment given against him on an action of *detinue* brought by Charles Wilson, senior, in H.M. [His Majesty’s] Court of Common Pleas held for the precincts of Christ Church before [judge] Richard Elliot, for a negro woman and her three female children. Judgment reversed.”62 Richard Elliot had previously been a member of the Assembly for Christ Church (in 1689).63

The law reports of these cases circulated widely, and appeared in the libraries of judges in Virginia in the early eighteenth century; Robert “King” Carter, who was on the high court in Virginia from 1699 until his death in 1733, owned all of the English case reports that were published, including those by Keble, Levinz, and many others. Judges in the colonies, especially on the high courts, learned much of what law they knew from such printed sources, including as well treatises such as Coke’s *Institutes* and Dalton’s *Country Justice*. The elite also often sent their sons to learn at the inns of court, which took notes on King’s Bench cases in particular, and circulated them, and some members of the Council in Virginia had training at the inns of Court before they migrated, such as Edmund Jenings, who came to Virginia in 1680.64

Holt presided over two more cases in which masters tried to invoke English property laws to regain men (or the payments for men) whom they claimed as slaves. In these cases he partially stepped back from the verdict in *Chamberline v. Harvey*. The first, *Smith v. Brown and Cooper*, involved an attempt to collect a debt of 20 pounds for the sale of a slave in London in 1701. Although Chief Justice Holt invalidated the debt claim, he did, according to one report offer some unofficial advice about how that claim might have been made valid. He noted to Smith that “you should have averred in the declaration, that the sale of the negro was in Virginia, and by the laws of that
country negroes are saleable; for the laws of England do not extend to Virginia, being a conquered country their law is what the King pleases, and we cannot take notice of their law but as set forth: therefore he ordered the plaintiff should amend and alter his declaration, that the defendant was indebted to him so much, for a negro sold here at London, but that the said negro, at the time of the sale, was in Virginia; and that negroes by the laws and statutes of Virginia may be sold as chattels.” But then the Attorney General came in, and stated that they would need to see the original deed that showed that Smith had inherited the slave, without which he could not claim the debt.65

While Smith v. Brown and Cooper offered an opening for using ‘loss of services” as a potential form of recompense in some situations, it was a very narrow option. But to maintain such an action, one had to prove that one had a right to another’s labor via a signed contract or a deed. Then the claimant they could get monetary damages in some cases, but not ownership.

If Holt's unofficial advice had been the verdict (it was not) Smith v. Brown and Cooper, would have narrowed the application of Chamberlayne—to England itself. The verdict itself was only that trover (and writs of trespass generally) did not apply for people. Holt's supposed advice, if it became an official ruling, would have been a major concession because it held that the court of Kings Bench—and the Common law itself—had a limited reach. In some sense it was legally accurate, in that cases could not be appealed from Virginia to the Kings’ Bench, but instead to the Privy Council and the King. (The process was made much easier after reforms in 1699, just passed.) It would also have stepped back from a reckoning with the radical implications of Chamberlayne.66 In practice, since the review process for colonial laws and court decisions went through William III's new Board of Trade and his Privy Council, which would and generally adhere to the common law, it seems a bizarre comment for Holt to have made. Indeed, it is a comment that stretches back to the high court decision during the reign of James II, involving the East India Company's powers over their territories as granted to them by the king, as a result of which they could ignore common law and exercise absolute power. Holt was an advocate in 1685 for the East India Company and James II, and it is possible that he was still flirting with these kinds of arguments. However it seems bizarre that after the Glorious Revolution, when he had rejected so much of the rest of absolutist arguments, that he would suggest the King had absolute power in Virginia. Certainly if he did express such thoughts in 1701 unofficially, he repudiated them in 1706.

Smith v. Gould, Holt's last and most influential case involving slavery, returned closely to the verdict in Chamberline, limiting the ability to sell slaves, or to make a claim to sell slaves, even in the colonies. They rebuffed an argument that “a
negro was a chattel by the law of the plantations, and therefore *trover* would lie for him.” Instead they returned to a simple and broad argument that “*Trover* does not lie for a negro” because “the common law takes no notice of negroes being different from other men.” The court continued that “by the common law no man can have a property in another” (the ruling in *Chamberlayne*). While they allowed that a limited property can be held in a villein, the only legal action allowed is the writ *per quod servitiuum amisol* (loss of services), a writ that does not allow recovery of the person and is for a broken contract. The court, speaking in a per curium decision, then said clearly and firmly, that *Butts v. Penny* was not law. So a man who had lost goods and “a negro” could receive damages only for the goods. The “negro” was a man, and a man could not be stolen, and was not replaceable with money. “Men may be the owners, and therefore cannot be the subject of property.” Peter King, John Locke’s protégé and later Lord Chancellor, took elaborate notes on this case, emphasizing and underlining many of the points that are quoted in the reports above in his notebook. Many years later, it was this precedent, this case, these words—long ignored—that would support the freeing of James Somerset.

What is crucial about these slavery cases under Holt is that they maintain, generally, that one person cannot own another and that torts such as *trover* will not lie for someone claimed as a slave. In none of the three cases did the claimant of the slave recover any money or the ownership of the supposed slave in question. The opening that in the colonies—there was a different law—as determined by the King—was a big one, and yet also reflected a complicated reality. Given Holt and the other judges’ opinion in the Spanish case in 1689, it seems disingenuous, as the King’s Bench had once been invited to advise, and perhaps could do so again. It is clear overall that neither William nor Holt sought to enforce the full implications of the verdicts in these Kings Bench cases in the colonies. Still, they left their mark, and a legacy of uncertainty, even in the colonies.

After Holt left the bench in 1710, colonists and those involved in the slave trade tried to fill the hole that Holt’s ruling’s had left, first with decisions and rulings in chancery, and most of all by reinvigorating *Butts* and the claims that slaves could be legally claimed as simple property. There is no question that in England itself, Holt and the high court had taken great strides to overturn the law of the Stuarts that had made slavery legal in England itself. In doing so they made slavery problematic everywhere.

So after Holt’s death, his cases began to be ignored and superseded. A Common Pleas case from 1721, for example, cited the *Butts* (1677) and *Gelly* (1694)
precedents, which had upheld trover for negroes, and misrepresented the Holt decisions. It stated simply: “Trover lies for muscheats [musk cats], monkies, parrots, for they are merchandise . . . And for negroes, for the same reason.” Upon the pleading of plantation owners and merchants in the colonies about the uncertainty created by the Holt rulings, justices in Chancery in 1729 issued guidelines that reified the main point established by Butts—that people could be property. The two justices in this case, one of them the future Lord Hardwicke, went on to uphold these guidelines in case rulings, such as that in *Pearne v. Lisle* in 1749. Meanwhile later reports of Butts appeared, such as that by Richard Freeman in 1742, which reported its decision unproblematically. The 1732 Parliamentary law that established the ownership of slaves as property enshrined the Yorke-Talbot opinion of 1729, and was perhaps the most crucial step in this process of legitimizing the principle that people can be owned as property, and considered simply in that light.  

The conflicting decisions made slave ownership in the colonies less secure as reversals of decisions could occur on the basis of these cases. Judges in colonial courts were constantly citing and quoting from published common law decisions, and colonial legislatures framed their laws around the common law; to do otherwise was to risk their very charters (it was on the basis that the Massachusetts and other colonies had passed laws that violated the common law that their charters had been confiscated in the 1680s). Colonial laws repugnant to the common law were likely to be vetoed by the Board of Trade, Privy Council and King. Likewise such violations could be appealed to the Privy Council in individual cases, and routinely were over the course of the eighteenth century.  

When Barbados (in 1668) and Virginia (in 1705) passed laws that turned slaves into real property—so that their status was more like that of villeins in England they were rationalize their new systems with a much older (and safe) common law. In both cases, I think, they were reacting to the uncertainty of the common and parliamentary law coming out of the empire. At the same time, they were limiting their potential ability to buy and sell enslaved people. Such slaves could be—and were—entailed in both colonies, which proved problematic in the case of debt, in particular, and limited sale. While in Virginia in 1727, they modified the laws to permit entailed slaves to be sold to satisfy debts (and for that purpose to be considered “chattels” it still limited their flexibility, as their effort to repeal the law that slaves could be entailed and held as real property in 1749 (an effort vetoed by George II) reveals most poignantly.  

Still, by the mid-1730s, Virginia cases establishing slave ownership—when those slaves were not entailed—invoked the writs of *trover* and *detinue* almost exclusively. They thereby were still following *Butts v. Penny* of 1677, as reaffirmed by Parliamentary Act in 1732.  

Brewer, Creating a Common Law of Slavery for the Empire pg. 31
people could be property (including indentured servants), contracts for the sale of slaves evolved into longer terms, became more formal, and became more strictly enforced.  

The Virginia and Barbados examples are windows into how these English decisions and imperial policies affected and reshaped the imperial order. Likewise many of the cases discussed in this paper, including both Butts & Chamberlayne, appear in Thomas Jefferson’s legal commonplace book from the 1760s and 1770s; probably many other students of the law were copying out and annotating the English case law on these questions, trying to decide on the legitimacy and power of legal arguments, and the nature of the status of persons that the English common law could justify.

In the early nineteenth century, Jacob Wheeler’s “Practical Treatise” on American slave law cited many cases that used detinue in particular as by far the common procedure to establish ownership. Still even in 1837, American law drew on different legal principles within the common and civil law. Like the writs of detinue and trover, the writ de homine replegiando continued to be used in England and the American South for almost 200 years to recover slaves, though it was less common. From the master's perspective, de homine replegiando was dangerous, as it could be legally inverted to establish the rights of the so-called slave, as case law shows. It turned out—as apparently slaves and sympathetic lawyers figured out—that those who owned slaves could be imprisoned by this writ—and that the capias in witheram, which still did not allow bail, could imprison “real masters.” So as a South Carolina court pointed out in 1852 “... under the proceeding chosen in the present case, an absolute slave might be at large, on bail, and his master in custody.” The general replacement of writs of trespass (trover, detinue) for writs that had feudal origins (de homine replegiando, habeus corpus) shows how much power masters gained from that transition that began in 1677. They gained a much more absolute ownership in other people.

The definition of people as simple, absolute property in terms of establishing and protecting ownership meant that the whole panoply of property law that was being strengthened in Britain during this period could be applied to regulate slavery; slaves could thereby be bought and sold, recovered, and the loss of their labor could result in damages to the master.

Crucial to the ruling in Somerset—that James Somerset could not be recaptured by his owner in England in 1772 even though he claimed him as a slave—was the absolute erasure of Butts v. Penny as a precedent in England. Hargrave, Somerset’s attorney, claimed to have examined the century old roll (records) in Butts and that “no judgment was ever given” properly in the case. Therefore he argued, and Justice Mansfield of the King’s Bench agreed, that Butts could never again be cited as a
precedent in the English Common law; this was a crucial point in reports of the case, a point modern historians have overlooked because we have not understood that Butts ever was precedent. This was a much stronger intervention than Holt’s attempts in the earlier cases to reverse Butts and to claim it was simply “not law.” Erasing cases in a precedent based system is extremely difficult, but Hargrave and Mansfield accomplished it, at least for England.

Still, Mansfield tried to limit the reach of his interpretation to England, neatly separating this question of ownership of people to the colonies alone, following the 1732 law. The real question, Mansfield held, was “whether any dominion, authority or coercion can be exercised in this country, on a slave according to the American laws.” So rather than seeing this as an imperial question, which it had been so clearly in 1677, slavery had become a question of only local laws, laws enabled by earlier court decisions and by Parliamentary act in 1732 that allowed both servants and slaves in the colonies to be held as simple property. While the path there had been opened by the informal comment in 1701 by Brown v. Gould, in 1772 the rift was made into a chasm; from henceforth, slave law was interpreted as being set locally, despite this vast repository of law that had been brought to bear imperially, to define and protect the property rights of slaveowners, and to define slaves as property. All this history was conceptually erased in 1772. That erasure has powerfully shaped our own historiography.

The system of slavery that developed in the American colonies was actively encouraged by the imperial policy by Charles II and his brother James, acting partly through the bench, the “twelve judges in scarlet.” The rulings from the bench legitimated enslaving non-christians and claiming them as property on the grounds that as non-christians they were outside the protection of the common law, which protected only subjects. Holt’s and William III’s challenge to the norms created by Rainsford and 11 other judges and Charles II in 1677—came after 20 years of precedents had made a deep impact, an impact that proved persistent, powerful, and difficult to untangle. Still, if judges who shared Holt’s sentiments had continued to be appointed to the high court—that slavery would not have been protected by the imperial laws of property in the same way, which would have made its growth in the empire much more problematic and uncertain. Meanwhile parallel attempts to undercut the local laws regulating slavery in the empire, that originated in William III’s new Board of Trade, also founded in 1696, were having their own impact.

A final comment is in order. We all know the actual outcome; we know how African slavery developed in Barbados and Virginia and in the empire. Our eyes look for the continuity, the source of what came later. And yet the hesitations are equally important. Even in the Butts case, the defense argued that one man could not own
another and especially could not sell another, an argument that was repeated in many of these later cases even in the seventeenth century including the *Chamberlayne* case, with its powerful verdict. Although we know the outcome, the shape of “American slavery” was not pre-determined. Choices created the realities that emerged. In all these cases, while one side claimed "negroes" as slaves, the alleged slaves had protectors, protectors who baptized them (in hopes it would help them obtain freedom), funded them, helped their cases to come before the high court, and paid lawyers who argued on their behalf against basic principles of slavery and sale. These cases display--especially in this context where power was so intertwined with slavery--the shape of the debate over fundamental questions of justice and morality during this period, one during which we have assumed that no one questioned principles of enslavement. But of course they did. That is a crucial explanation for why slavery and servitude itself evolved differently in different colonies and in England itself and over time. How else can one explain the extremely different slaveowning patterns in Maryland vs. Delaware, for example, in the mid-eighteenth century (roughly 35% versus 5% of the population enslaved)?

In the final analysis, this chapter shows how critical it was to create a common law of slavery in the British empire, one that would cover the transport and sale of slaves between colonies, regulate trade, and establish basic principles that made their status hereditary (like villeins) but also turned people into "goods." Fundamental choices that set a precedent that endured for two centuries between 1660 and 1860 were shaped by visions of a political order that idealized and manipulated an ancient feudal and Roman past. They turned into newer principles of absolute monarchy, absolute power, and absolute property, principles that were challenged but then later affirmed in the empire as they assumed new forms in the contest over principles of hierarchy and equality that engulfed most of the mainland colonies during the American Revolution. Slavery became, according to some Southern legal commentators in “a fragment of feudalism floating in the bosom of the nineteenth century” and so its hereditary elements were. But it was more than that. The “feudalism” of the Stuarts was never straight—it was hierarchical but it also blended newer ideas of property that we associate with early capitalism. The legal institution of slavery in the early nineteenth century retained these hierarchies but also these legal contradictions, offering a counterpoint to the revolutionary practices of equality. Despite the tension within these different precedents, the complex web of legal legitimacy that the Stuarts helped to create by manipulating the law subordinated all members of society. These principles could be especially powerful against those who could be designated aliens, who could not claim the status of subjects and could be seen as outside the protection of the law.
Brewer, Creating a Common Law of Slavery for the Empire pg. 35
Elliott Russo gave a paper that explained how we undercount the number of servants in early eighteenth century Maryland, because wills did not try to convey indentured servants, but did convey slaves. Her point about undercounting reveals at the same time how fundamental the issue of who could be bought (and sold) and resold was. What was at stake was the nature of the property ownership and the boundedness of the labor obligation. Russo, “The Chesapeake’s Invisible People?: Labor Resources of Small Planters in Early Eighteenth Century Maryland and Virginia.”

See Governor Hawley’s 1636 decree in council that all “negroes and Indians” would from then on serve for life if they arrived without contracts. Also see Barbados’s original charter.

Note that this term Sir Richard Rainsford, one of the Barons of the Exchequer was made justice of this court by patent, during good pleasure
dur’ beneplacito” [during good-pleasure].

Another source that could be mentioned is Locke’s Letters, which show his later: “The Royal Companies business  . . . hast almost undone me for I
cannot recover the said debts.”

Royal African Company’s factor in Barbados in 1667, Reid tried in vain to collect debts, with little success even four years later: “The Royal Companies business . . . hast almost undone me for I having come in on a parcel of old and bad debts have almost lost that credit I had from them because I cannot recover the said debts.”

At that point, they were still called the “Royal Adventurers into Africa,” which existed between 1660-1672. Indeed part of the reason that they reformed under a new name in 1672 was in order to consolidate their debts and refinance. In addition to Price, “Credit in the Slave Trade,” see Zook, Royal Adventurers and David W. Galenson, “Economic Aspects of the Growth of Slavery in the Seventeenth-Century Chesapeake,” in Solow, ed., Slavery and the Rise of the Atlantic System, 265-292, esp. 266-269.

Charles II decided at the Restoration to keep 9 out of 15 judges in the Exchequer and the King's Bench in office. These nine, appointed under Cromwell, were men recognized as moderates; all of them had been appointed by patents that allowed them to keep their positions during their good behavior. Likewise he kept many of the judges in the court of Common Pleas, of whom Hale was one. Hale, in particular, had helped to defend Charles II’s father, Charles I, early in the Civil Wars. So in 1660, Charles II put Hale in charge of the Exchequer, and promoted him to chief Justice of the high court of King’s Bench in 1671. Foss, Judges, 9 . . . And a variety of other sources...


For Godwin’s discussion of Hale’s ideas, see his Negro’s and Indian’s Advocate (London, 1680), p. ...
20 Atkins was a close confidant of James, Duke of York and had been since he had served under him in France in the 1650s in the French army. See Webb’s article on James II’s servants, p. 60. As Atkins wrote to the king: “The complaint of not paying debts in Barbadoes, proceeds from hence. There are five Courts Palatine, having distinct jurisdictions, the island being divided into five cantons or shares, severally depending on the several jurisdictions are courts, so that what is condemned in one court cannot be executed in another jurisdiction, and it frequently falls out that a planter who has lands in two jurisdictions, when one comes to make distress, withdraws his goods and negroes into the jurisdiction where he is not condemned, defrauding thereby his creditors. The Judges have neither stipends nor fees, and if they get anything it is by favouring the party condemned; they make their own clerks; and the marshals or bailiffs, who are made by the Provost Marshal, for money give notice to the debtor when they will distrain; who makes over his estate beforehand, and purchases some small piece of land in Scotland (as they call it) [the North part of the island, very windy and not as fertile], which is appraised at some small value, with which the creditor must be content. Conceives the expedient is to reduce it to two courts in the two chief places of the island, to take away all particular jurisdiction, and that laws be executed every where alike; all officers to be appointed and sworn and security taken, and that for misdemeanour they be displaced by the Governor and Council. [My italics] These divisions were suitable enough at the beginning of the plantations, but much greater trade requires laws for better support of credit, which is much impaired by not paying their debts. . . . The King’s commands will be needful that they be brought to an account.” Sir Jonathan Atkins for additions to his Commission and Instructions Date: [? Dec 1673] The National Archives Catalogue Reference: CO 1/30, No. 90 Calendar Reference: Item 1183, Vol 7 (1669-1674), p.540.

21 Barbados, “Transcript Acts”, p. ; also see Hall etc. collection of Barbados Acts for later versions.

22 “An Act for Securing the possession of Negroes and Slaves.” February 1677, Barbados “Transcript Acts” vol. 1, 1650-1682” ms. in possession of the Barbados Historical society, p. 436-438. “Whereas the Possession of the Lands in this Island hath been well Secured by the act against Clandestine Entries, that the possession of Negroes and Slaves may be secured in Like Manner, Be it enacted and Ordained by his Excellency Sir Jonathan Atkins Knight Captain Generall and Chiefe Governor of this and other the Carabee Islands the Councell and Assembly of this Island and by the authority of the same; That noe person after publication of this act take or detain any Negroe or Slave which hath bin in the possession of another within this island for the space of three moneths together without due course of law upon any pretence whatsoever, upon payne of forfeiting Twenty pounds of Muscovado Sugar to the party grieved for every day that hee shall detaine each Negroe or Slave. . . . That in all Suits for detinue of any (p. 437) Slave or Slaves the Defendant being lawfully Summoned by a Writt or Warrant under the hand and Scale of the Judge . . . And in case Such Detainor or detainors shall refuse or Neglect to appeare at the said first court lawfull summons being proved, the Court shall give Judgment by nihil dicit [nothing to say], and execution forthwith to Issue as aforesaid.” (signed by assembly, council and governor 20th Feb 1676/7).

Examination of Dalton’s Countrey Justice (1618), for example, under the topics of “detinue” and “trover,” the two most important writs of trespass (what we would today call torts) discuss them only as applying to simple property, such as jewels, silver, curtains. A search of English Reports before 1677 reveals the same thing.

23 See e.g. Colin Palmer, Human Cargos: The British Slave Trade to Spanish America, 1700-1739 (Chicago, University of Illinois Press, 1981), 102, who gives an example of how new slaves were counted on a ship that arrived in Buenos Aires in 1725. Newly arrived Africans could be counted as £2/3, 3/4 or as 1 pieza.

24 2. Lev. 201, in 83 Eng. Rep. 518. Creswell Levinz’s Reports of Cases heard by the King’s Bench was published first in 1702, with the approval of the then sitting justices of the King’s Bench, including Holt, as is printed verso to the title page. Levinz died the year before (1701). This report seems very reliable except for the number 100; it is likely that the typesetter working from Levinz’s notes was unsure what to make of the 10 ½ in the original notation (it is very strange if you don’t know how the Assiento contracts for Spain worked!); ½ as it was written then, in cursive ink, could look like an 0.


26 See census of Barbados for . . . (and thank Mitch Fraas!).

27 On the Royal African Company’s involvement in trading with the Spanish Assiento, which was a primary purpose of the company, and its sometimes illegal character, not enough has been done. The records of this trade run the through Board of Trade records on Jamaica (at the British National Archives and on the Colonial Papers database. Cite 1680s sources, esp. Also see the slave trade database, which records the many thousands of slaves the RAC was importing into Jamaica (and Barbados) and Davies now somewhat dated book on the RAC. Abigail Swingen has a dissertation on the

Brewer, Creating a Common Law of Slavery for the Empire pg. 37
RAC, partly during this period. Officially, the RAC and the Dutch East India Company shared the Assiento Contract between 1662 and 1669; the trade clearly continued after that date.

28 3 Keble 785, 84 Eng. Rep. 1011. The original version of this report was published in 1685, (maybe even earlier as it appears there is a printed notation to p. 35 on the side), so Joseph Keble’s is the more reliable source. Keble was a lawyer and reporter (the main reporter on the courts) who attended the King’s bench regularly from 1661 through 1685, when his voluminous reports were published. Born in 1632 (the same year as Locke) his father was a KB judge who supported Parliament but lost favor with Cromwell in 1654. See “Joseph Keble” in DNB. Note that the scanned version of these reports on EEBO has contemporary underlining and notes on the case, with a cross reference to Levinz report, and the following passages underlined: “sold in India” and “untill they become Christians . . . thereby they are Infranchised.” That notation indicates that contemporary lawyers—at least one but probably others—were paying attention to these parts of this case (and paying attention to this case in general, as the other cases on these pages have no interlining).

29 It is relatively rare for this case to be mentioned in the modern historiography, and when it is the part that is usually emphasized is from the one report that mentions that conversions might enfranchise. At least one modern critic did note that the main point of this case was to establish property rights in slaves, though he did not realize that this case marked a turning point. See William M. Wiecek, “Lord Mansfield and the Legitimacy of Slavery in the Anglo-American World” University of Chicago Law Review 42 (1974), 86-146, esp. 89.

30 See Noel versus Robinson, 1 Vern 453, 23 Eng. Rep. 580, heard 30th April, 1687 before the Lord Chancellor (...), which discussed Maynard’s case as a precedent.

31 Price, “Credit in the Plantation economies,” 300-301, Davies…It should be noted that Price does not explain why these changes are happening; he merely chronicles them. On the general question of credit and colonial property law (including property in slaves) see Claire Priest, “Creating an American Property Law” Harvard Law Review120 (2006), esp. 420.

32 Foss, Judges, 9; 3-4.

33 DNB, “Creswell Levinz” citing Cockett, Parl. hist., 5,313. On the other hand, Levinz was viewed with suspicion by many whigs because he had been involved in the prosecution of Lord Russell and in the attempt to suppress petitioning in 1679.

34 The King to Governor Sir J. Atkins May 18, 1677  CO 389/4, p. 153 Calendar Reference: Item 255, Vol 10 (1677-1680), p.90. “To remove William Sharpe, Chief Judge of the Bridge Court in Barbadoes, from his said office and supply his room by some other person qualified by his integrity and sufficiency for said employment according to his instructions in such cases.”


36 Paley, Malcolmson, and Hunter, “Parliament and Slavery, 1660-c. 1710, pp. 257-58, and also document one, pp. 260-61, which is the “Tanner ms.” from Bodl. MS Tanner, fols 52-3.

37 Cite the original case reports.

38 This description comes from an advertisement that Grantham placed in the London Gazette of April 9, 1688 (issue 2337) for Newmoore. Newmoore’s name was not given in the trial, though his description was.


40 It is noted in the formal report as heard in “B.R.” which means “Banco Regis” or King’s Bench. However it was apparently moved up from the Court of Common Pleas; note that the man Grantham brought suit against was “bailed by the court of common pleas” and also that a popular report of this case (see below, from Greenwich Hospital Newsletter) stated that it was being heard by the Common Pleas.

41 This account was published in the Greenwich Hospital Newsletter, number 55, (Feb 1687) which reported news related to the Admiralty; no doubt rumors about this case were reported because of Grantham’s rank in the Admiralty. The Greenwich Hospital Newsletter is reprinted in the Calendar of State Papers, Domestic, James II, (London: HMSO, 1964) 2:359. “On Thursday at the Common Pleas was a trial between the monster (a man that hath a child growing out of his side) and Sir Thomas Grantham upon a writ de bonam et replegiando. Sir Thomas had contracted with him to come over from the Indies for six months and then to return, but has kept him like a slave longer and got a great deal of money by showing him; so he prays to be relieved according to law. The judges (it being a novel case, though the man has been christened since he came here) will consult all their brethren about it and have since ordered him to be bailed.”

Brewer, Creating a Common Law of Slavery for the Empire pg. 38
results of the case were not recorded in the Greenwich Hospital Newsletter during the next month; certainly the actual outcome did not accord with the optimism of this entry. Indeed, given that the official case records that the master (Grantham) brought suit against the supposed slave (Newmoone), the newsletter writer had the initiator of action confused (Newmoone did not seek relief from the court).


43 “Thomas Grantham” in DNB. Also see Grantham, Memorable Actions, and below.

44 Sherwood to Secretary Sir Joseph Williamson, March 29, 1677, British National Archives CO 1/39, no. 54, in Calendar of State Papers, Colonial 10:43 (item 111).

45 Grantham, Memorable Actions, 54.

46 Grantham, Memorable Actions, 54.

47 Hevinghurst, “Twelve Judges in Scarlet . . .” Law Quarterly Review


49 See the Convention Parliament proceedings from January 25-27, 1689 “Ordered that the Officers of the Court of King’s Bench do immediately attend this House, with the Records of the Judgment in the Case of Godwyn and Hales, and of the Information prosecuted against the Seven Bishops” (p. 344) Also see Gray, Commons Debates, proceedings for May and June of 1689 . . . William and Mary appointed Sir John Holt as Chief Justice on May 4, 1689 (along with three others on the same day, Sir William Dolben, Sir William Gregory, and Gyles Eyres, esq.) The Life of the Right Honourable Sir John Holt, Knight, . . . (London, J. Worrall, 1764), 5.


51 Lives of the Justices, 3:12-13. Note that on “Sir John Holt” in the DNB, Paul Halliday claims that Holt “defies easy labeling as a Whig or a Tory” and that sometimes Holt sided with the James II’s side in KB cases from the 1680s, especially the East India Company case. However Holt took the opposite side in many cases, indeed in many politically sensitive ones, providing counsel to Lord Russell, for example, who was convicted of treason in the Rye House Plot. I would argue that Holt threw in his lot wholly with the Whigs after his dramatic denial of James II’s dispensing power in 1686, when he was recorder of London, after which James II requested his resignation (it was another post held durante bienplacito). See Lives 3:12.

52 Locke, preface, Two Treatises.

53 On this trade with Spain via Jamaica in the restoration period, see Calendar of State papers, also Greg O’Malley’s recent book.

54 Many original references here, almost all to Colonial State Papers!!! One person at least objected in writing: Arthur Moore, whose “objections” were annexed to Castillo’s memorial, but which have not been reproduced.


56 Roger Morrice’s entering Book, ed., Mark Goldie et al., Vol. 5, P. 308 (Dec. 1689). There is another case called the Nightengale case that involves a ship going to Africa with trade goods, but it is not directly about slavery. The Nightengale case of 1689:-- protects the provisions and ammunition and the ship itself of a ship trading to the coast of Africa and holds that the admiralty court that Charles II had set up is illegal. It restores goods. Challenges monopoly power of RAC. But says nothing about slavery. Give full cite. Case discussed briefly by Will Pettigrew, but it does not do what he says, which is declare that slaves are merchandize. It is a ship on its way to Africa, not from it.

57 Ld. Raymond 1: 147.

58 On Willoughby, see the Colonial State Papers (cite fully). Willoughby is a fascinating character; during James II’s reign he converted to Catholicism, for which he was briefly imprisoned after the Glorious Revolution by the then governor, before reconverting to the Anglican Church.

59 On the practice of juries serving as witnesses and collecting evidence, see Mitnick, “From Neighbor-witness to Judge of Proofs” in ...
60 Price, “Credit in the Slave Trade” esp. 304-306. One can imagine my surprise when I realized that the sharp shifts in the extension of credit for the purchase of slaves occurring in the colonies corresponded exactly with the legal cases I had already discovered and discussed at length.

61 “Bill to continue an Act to secure the peaceable possession of negroes and other slaves to the inhabitants, and to prevent and punish the clandestine and illegal detinue of them, sent up, was read three times, passed, and received H.E. consent.” (LATER REJECTED) Minutes of Council in Assembly of Barbados Date: Jan 21, 1701. The National Archives Catalogue Reference: CO 31/6, pp. 389, 391. Minutes of Council in Assembly of Barbados Date: Feb 24, 1702. The National Archives Catalogue Reference: CO 31/6, pp. 167-170. Calendar Reference: Item 144, Vol 20 (1702), p.100-101. However it should be noted that the law did appear in the collection of Barbados laws published in 1704, so either it did pass afterward, or the publisher had an out of date copy of the laws, or someone, at that point, wanted the repeal ignored. It is not clear what affect this had on practice over the eighteenth century; such an exploration would require detailed examination of Barbados court decisions on the county and/or general court level. Did such records survive? Minutes of Council in Assembly of Barbados Date: Aug 5, 1701 The National Archives Catalogue Reference: CO 31/6, pp. 14-16.Calendar Reference: Item 1160, Vol 19 (1701), p.732.

62 CO 31/4, pp. 111, 112.

63 All of the English reports that contain these cases were owned by Robert “King” Carter at his death in 1733, who was from 1699 a member of the Council which was also the high court (General Court) in Virginia. See the inventory of his estate, which is published in VMHB (finish cite). Also see the appendix to my book, By Birth or Consent, on which treatises were required by law to be available in early Virginia, for example, and which circulated most frequently in libraries. See Mary Sarah Bilder, Transatlantic Constitution, and Daniel Huslebosch,…..Also see, for example, Price, “Credit in the Slave Trade” esp. 304-306. One can imagine my surprise when I realized that the sharp shifts in the extension of credit for the purchase of slaves occurring in the colonies corresponded exactly with the legal cases I had already discovered and discussed at length.

64 All of the English reports that contain these cases were owned by Robert “King” Carter at his death in 1733, who was from 1699 a member of the Council which was also the high court (General Court) in Virginia. See the inventory of his estate, which is published in VMHB (finish cite). Also see the appendix to my book, By Birth or Consent, on which treatises were required by law to be available in early Virginia, for example, and which circulated most frequently in libraries. Check Jenings too.

65 I combined the two reports of the case, one of which had more details on some of Holt’s comments, the other more details on others. See 2 Salkeld, 665 and Holt, KB, 494.

66 On the ability to appeal to the Privy Council, see my article on Locke and legal reform in Virginia during this period, and also books by Hulsebosch and Mary Bilder, which show how that process worked in New York and Rhode Island. Also see …who traces some cases that were appealed to the Privy Council from Virginia in the eighteenth century. In these cases, the Privy Council made decisions that referenced recent common law decisions.

67 In his “Lord Mansfield and the Legitimacy of Slavery in the Anglo-American World” Wieck read this case somewhat differently, arguing that the judges must have agreed with some of the plaintiff’s arguments that men “might be ‘merchandize’ like monkeys.” In fact the citation that the plaintiffs made—“that negroes” could also be merchandize, is to the Butts v. Penny case in 2 Lev. 201, 3 Keb. 785. The court in fact explicitly denied that case and the logic. Directly after the plaintiff’s argument where these words were summarized appears the phrase: “Sed Curia contra” (meaning the court says the opposite): The court then made some very narrow comments about villainage being possibly permitted, of which the trespass captium suum cepit is one possibility. However they firmly denied the legitimacy of Butts. As the other report concluded: “The Court denied the opinion in the case of Butts and Penny.” Although one report of the case mentioned debate among the judges as to whether an ancient feudal writ might be used in a narrow way to claim that a “negro” belonged might be used in a narrow way to claim that a “negro” belonged to someone, the court was clearly undecided on the issue. “The Court seemed to think that in a writ of trespass quare captivum suum cepit, the plaintiff might give in evidence that the party was his negro, and he bought him.” This was at the most a lukewarm endorsement of some level of ownership. The writ in question was even then rare; it was almost never used, as a search of English Reports shows.

68 Pickering vers. Appleby in Common Pleas (1721) [Michaelmas term, 7 George II] 1 Comyns 354, 92 Eng. Rep. 1108. The text of the case cites Butts as its main precedent. Also see particularly footnote 1 “Holt Chief Justice declared, in the case of Chamerlain v. Harrey, 1 Raym. 147, that trover would not lie for a negro, and denied the authority of Butts v Penny, 2 Lev. 201. It was adjudged however in the common Please in the case of Gelly v. Cleve, that trover would lie for negroes, upon the ground of their being heathens, and that therforetherefore a man might have property in them.” Freeman, Reports of Cases in Law and Equity: from 1670-1706 (London, Henry Lintot, 1742), 452. Note that Freeman’s original report contained no citations or discussion, but that later editions, such as that included in the online version of English Reports (1 Freeman 452, 89 Eng. Rep. 338), contain a long note that calls the original Keble report “curious” (perhaps because of the mention of 10 ½ slaves) and claims that Hargrave, Somersett’s attorney, had examined the roll (records) in Butts and that “no judgment was ever given” in the case, citing 20 How. State Tri. p. 52. The efforts to discredit different common law cases over time are fascinating and illuminate the supple role of precedent. For the 1749 chancery case, see Pearne v. Lisle, Ambler, 76.

69 See Mary Sarah Bilder, Transatlantic Constitution, and Daniel Huslebosch, …..Also see, for example,

For cases which the General Court (the high court) in Virginia heard, see, for example, Abbot vs. Abbot, which involved “trover for several negroes” and was decided for the defendant, which was heard in October, 1729, and upon which Sir John Randolph took notes (R-21). Likewise see Marston vs. Parrish heard in April 1730, on a writ of detinue involving several “Negroes.” This case, as others, cited other detinue cases (involving property other than slaves) published in English reports unproblematically. Also Jones v. Langborn, “detinue for negroes,” R109. Also see in Barradall’s reports, Andrew Giles & Mary his Wife & Mary Mallicote, pltz which was a detinue case involving slaves in B 71. Most of all, see Palmer v. Word heard in October 1737, which illustrates how pervasive such detinue cases involving slaves were; the General Court only heard the appeals. All of these cases are in R. T. Barton, ed., Virginia Colonial Decisions: The Reports by Sir John Randolph and by Edward Barradall of Decisions of The General Court of Virginia 1728-1741 (Boston, MA, Boston Book Company, 1909), 2 vols, 1: R21, R35, R109, B71, B 289. The records of the General Court of Virginia burned in 1865; these reports are nearly all that exist from the general court of Virginia during the Colonial period. Priest, “Creating an American Property Law” has a good discussion of the 1732 “debt recovery” act.


This is according to David Konig, who is studying Jefferson’s legal common place book.


Wheeler, A Practical Treatise on the Law of Slavery (New York and New Orleans, 1837), e.g. 53, 63.

One of my favorite things about Christopher Tomlin's Freedom Bound: Law, Labor, and Civic Identity in English America, 1580-1865 (Cambridge, 2010) is how subtly he traces how norms of servitude and slavery developed in different colonies and states over time. The finer points of the law really mattered. I would emphasize that they were interconnected too, with the politics of those in power on the ground, as well with the judicial options created (and foreclosed) by England itself.