

# THE LONG ROAD TO *DRED SCOTT*: PERSONHOOD AND THE RULE OF LAW IN THE TRIAL COURT RECORDS OF ST. LOUIS SLAVE FREEDOM SUITS

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## I. THE SIGNIFICANCE OF SLAVE SUITS FOR FREEDOM

David Brion Davis, in his award-winning study of *The Problem of Slavery in the Age of Revolution 1770-1823*, explains the complexity of anti-slavery as a subject of academic examination:

“Antislavery” is a vague and flexible concept. It has been used to describe an organized social force; political activity aimed at eradicating the slave trade or slavery itself; a set of moral and philosophic convictions that might be held with varying intensities; or simply the theoretical belief that Negro slavery is a wasteful, expensive, and dangerous system of labor which tends to corrupt the morals of white Christians. The risk of homogenizing these meanings accompanies, at the other extreme, the risk of becoming distracted by an elaborate and artificial taxonomy. Any evaluation of antislavery thought or action must take account of specific social and historical contexts.<sup>1</sup>

This article examines one mechanism of antislavery, the “freedom suit” initiated by those who challenged the legality of their enslavement,<sup>2</sup> in one particular context, the Circuit Court of St. Louis County.<sup>3</sup> America’s “peculiar institution” of slavery was especially peculiar in St. Louis, where the confrontation of slavery and freedom heightened the importance of the rule of law as a fragile barrier against the explosive potential of the peculiar tensions of a border slave state. Between 1806 and 1857 the St. Louis Circuit Court heard more than 280 freedom suits, whose range of human experience reveals the complexity of a uniquely American struggle. This struggle, between those seeking freedom and those opposing it, reveals that the process that culminated in *Dred Scott*<sup>4</sup> was a long one, consisting of hundreds of trials that tested the concept of the rule of law in a bitterly divided community.

Though deemed lesser in our canon of legal history, and of statistically little significance for a Missouri slave population approaching 115,000 by the time the Scotts lost their final appeal,<sup>5</sup> these more mundane cases reveal dimensions of the antislavery struggle overlooked when research is limited to the examination of a sample of trials or to appellate cases alone. The rules and procedures of the law contained in the full archive of motions and depositions allow us insights not easily gained from a sample of trial case or appellate opinions. They make clear that although — and, equally, *because* — the law can operate as a closed system of rules, the ways that rules are applied and procedures are chosen reveal deliberate choices about morality, power, communal norms, and ideology. They thus expand our awareness to what John Noonan has studied as the law’s “many masks” and to the “persons in whose minds and in whose interaction the rules have lived — to the persons whose difficulties have occasioned the articulation of the rule, to the lawyers who have tried the case, to the judges who have decided it.”<sup>6</sup>

Culminating in the *Dred Scott* case in 1857, these suits to gain freedom in a slave society were nothing less than a demand for a fundamental reconception of American society to acknowledge the legal rights of all Americans regardless of color. As persons of color, Dred and Harriet Scott had little expectation of fully recognized equal rights under the laws of Missouri, and even less hope of anything close to social equality, but they were exercising their agency to claim the legal status of “person” and to escape the absolute powerlessness and legal death embodied by slavery.<sup>7</sup> Legal personhood may have been cruelly limited in the benefits it might confer, but the benefits that it did bring to the hundreds of petitioners seeking freedom before Dred and Harriet surely constituted a basic, if minimal, empowerment that drew them closer to the potential for the autonomy that constituted the meaning of the American Revolution. Ultimately, this autonomy — this *independence* — would be embodied in three amendments to the United States Constitution as part of a “Second American Revolution.” Suits for freedom remind us that the meaning of freedom is defined by its absence, and that the American historical experience demonstrates better than any other the observation made by Orlando Patterson “that freedom was generated from the experience of slavery.”<sup>8</sup> Like the first revolution, it has succeeded only partially, but also like the first its goals have kept pace with advancing norms of human equality and dignity based on legally recognized rights. The Scotts were seeking a freedom that would serve as the first and most basic component of a fundamental dignity before the law. Christopher Bracey’s useful foundational concept of “dignity” thus gives new meaning to what the Scotts were seeking: One way of understanding dignity, he writes, is

in personal or individualistic terms. Personal dignity operates at the level of the individual, and is perhaps best understood as a sense of perspective on self-worth. To have personal dignity is to appreciate oneself sufficiently that one would withstand pressures to lower one’s self esteem. A strong sense of perspective on self-worth often has the effect of revealing the spuriousness of assaults on dignity. Perspective on self-worth explains how African Americans emerged from slavery, Jim Crow, and the agonistic mid-twentieth century movement for civil rights with a sense of dignity intact. The same can be said for other historically marginalized racial and ethnic groups, such as Native Americans and Jews.<sup>9</sup>

Legal personhood and the minimal dignity it conferred may not have meant *equal* personhood, and the second-class status of Antebellum free persons of color may have mocked the “dignity” they sought; nevertheless, following Bracey we can argue that insofar as legal personhood afforded personal autonomy it “can be understood in instrumental terms: as providing a necessary precondition to economic inclusion and material empowerment.”<sup>10</sup> Conversely, its repudiation by Chief Justice Roger B. Taney’s decision threatened a reversal of Revolutionary ideals and thus gave urgency to Abraham Lincoln’s prediction that the loss of freedom for the slave meant, ultimately, the loss of freedom for all Americans. Despite his refusal to concede “social and political equality between the white and black races,” Lincoln insisted that “I have made it equally plain that I think the negro is included in the word ‘men’ used in the Declaration of Independence.”<sup>11</sup> Lincoln, repeatedly challenged to clarify his views in his campaign for the Senate against Stephen A. Douglas in 1858, thus could deny “social and political equality” while simultaneously and without any sense of contradiction conclude, “I believe the declara[tion] that ‘all men are created equal’ is the great fundamental principle upon which our free institutions rest.”<sup>12</sup> The Scotts’ case

was, and is, everyone's, and access to one's day in court remains a contested issue)<sup>13</sup>

The freedom suits thus presented many aspects to Antebellum Americans — most basically, one of hope for petitioners versus one of protected property rights for masters. They might arguably be seen, to be sure, as allowing the law to provide legitimacy for slavery by making a relatively insignificant concession to a statistically small number of successful petitioners — for providing, as Noonan explains, “masks [that] made bearable the institution of slavery.”<sup>14</sup> The English historian E.P. Thompson addresses this function of law as an instrument that “legitimized class power” and concedes that for many judges in eighteenth century England “justice was humbug.” Even so, he refuses to dismiss it “as a mere hypocrisy” or to “conclude from this that the rule of law itself was a humbug.”<sup>15</sup> We would do well to remind ourselves of the difference Thompson draws between “justice” and “the rule of law.” Our own disagreement over the role and the rule of law certainly continues a debate about it that divided men such as William Lloyd Garrison from Frederick Douglass,<sup>16</sup> and we must conclude with Thompson, “If the rhetoric was a mask, it was a mask which Gandhi and Nehru were to borrow, at the head of a million supporters.”<sup>17</sup>

The St. Louis Circuit Court Historical Records Project has produced an online database of digitized images of every surviving court document in the file of freedom suits)<sup>18</sup> The Missouri State Archives acquired these records in 1999 according to Administrative Rule #8 of the Missouri Supreme Court (1983) that all state court case files be offered to the Archives before destruction. The transfer of the St. Louis records that followed led to a cooperative collection and preservation effort by the Archives, the Circuit Clerk of the City of St. Louis, and Washington University in St. Louis.<sup>19</sup> The product is an archive of untapped potential for empirical, historical, and legal research and teaching. These trial records are now accessible through a website,<sup>20</sup> and they reveal a forum of intense legal confrontation and human conflict. Contained within them are legal strategies over factual proof and procedure, and embedded within are the dynamics of racial cooperation and conflict. When the suit of Dred and Harriet Scott reached the St. Louis Circuit Court in 1846, it was little different from many that had preceded it. Their claim to freedom rested on well established, settled law, represented in the hundreds of cases that preceded them there.

This article examines the potential for expanding our understanding of an era in American law that ended abruptly eleven years later in the Supreme Court of the United States. In the past three years at Washington University in St. Louis the circuit court “freedom suits” have served as the basis for interdisciplinary undergraduate research courses, serving as a database rich in provocative questions about law, justice, politics, history, and literature. Although scholars from many universities have used the database of freedom suits, it has already demonstrated its usefulness in the classroom: as a source for understanding a range of human struggles, for example, the records have served as one component of two projects for the St. Louis Public Schools since 2004<sup>21</sup> Examined closely in multidisciplinary undergraduate seminars at Washington University, they have provided a rich source for engaging questions across a broad spectrum of intellectual inquiry, revealing what appellate records and even narrative accounts of trials cannot: the actual legal behavior of judges, lawyers, jurors, litigants, and witnesses. Procedures might be written down and rules of law set Out in reported judicial opinions, but behind them loom the legal culture of norms and the latitude of practices of pleading that can be uncovered only by close attention to courtroom activity. Also revealed are the ethical problems created for judges and

attorneys participating in a system of which they had deeply conflicted opinions; the role of legal formalism; the actual latitude given to jurors in deciding matters that straddled the boundary between law and fact; and the articulation of the popular legal knowledge about the law's shadow that guided people's lives and which they tried to follow to keep themselves out of court. Altogether, they reveal, in a way impossible with appellate records alone and incomplete if limited to a small selection of preserved cases, the profound importance of the rule of law at a time of a deep "crisis of law and order"<sup>22</sup> in antebellum America. Witnesses who testified in support of freedom claims, as well as ordinary individuals who served on the juries that had to make factual determination of evidence material to the freedom of others learned and demonstrated a tradition going back centuries: that "law matters."<sup>23</sup>

These cases make it clear that the road to *Dred Scott* was a long one, whose decades of litigation made it a familiar one rutted with assumptions about law and the guarantees of the law, where procedural constraints and assurances provided a channel that kept the struggle within bounds. The struggle over freedom certainly gave shape to the law, but just as certainly the law provided a template for the struggle and dictated how it would be conducted. Embedded in the trial record of these hundreds of struggles is the search for the rule of law in the form of procedures that would satisfy one side or the other — or both — along a great divide. In these trials we find a search for secure institutional arrangements that "stabilized the protean nature of their society, restrained the potential for conflict in an environment that encouraged avarice, harmonized the diversity of opinions and influences fostered by a free society, and gave them a voice in determining their future."<sup>24</sup>

## II. THE ROAD TO *DRED SCOTT*: THE ST. LOUIS TRIAL COURT RECORD

The freedom suit did not arise in Missouri, but had its own history fashioned from the statutes and case law of the older slave societies of the eastern seaboard.<sup>25</sup> Procedurally, in fact, such suits had their origins in actions brought *in forma pauperis* under statutes made in Tudor times, which, a Virginia commentator commented in the nineteenth century, had by that time "in practical operation been confined to suits brought by persons of colour to recover their freedom."<sup>26</sup> The acquisition of the Louisiana Territory in 1803, however, produced new factual situations for the unstable and *ad hoc* rules of slave "law" and threatened to overwhelm existing compromises and solutions uneasily cobbled together. Such solutions were doomed to fail, ultimately, because they attempted to reconcile two sets of legal incompatibilities. One was the Constitutional tension between states' rights and the authority of the federal government, a struggle over jurisdiction and authority that had produced only a series of unsatisfactory compromises since 1787.<sup>27</sup> As the most significant element of that contest and the source of its most bitter division, the controversy over slavery shattered a federal system whose Constitution provided no way to reconcile the dispute short of disunion or war — what Abraham Lincoln meant by his fear that "A house divided against it self cannot stand."<sup>28</sup> Continuing, he explained, "I believe this government cannot endure permanently half *slave* and half *free*. I do not expect the Union to be *dissolved* — I do not expect the house to *fall* — but I do expect it will cease to be divided. It will become *all* one thing, or *all* the other."<sup>29</sup>

Though slave states borrowed from each others' statutes and sought precedent in the decisions of other slave state courts, no uniform "law" of slavery existed among those states where the institution was legal.<sup>30</sup> The continuing challenge to

slavery by its opponents, in fact, forced its supporters to make constant, locally specific adjustments to preserve a system whose “logic” consisted of little more than a thinly veiled defense of racial degradation.<sup>32</sup> Yet common to the “law” of slavery in its many forms was the second clash of mutually incompatible legal principles — that of the slave as person and that of the slave as property.<sup>32</sup> And it was here that the “freedom suit” posed such a challenge to the system, because it occupied an anomalous position between these two, blurring a distinction that many saw as essential to the maintenance of slavery. While suing, an enslaved person seeking to recover possessed certain attributes of personhood unacceptable within the stark bifurcation of status that slavery demanded.

Under a Virginia law of 1786, for example, if a slave suing for freedom was accused of a crime, he was “to be tried for any such crimes as a free man ought to be prosecuted and tried.”<sup>33</sup> By Missouri law in 1824, the petitioner was entitled to the protection of *habeas corpus* if restrained or assaulted by the defendant being sued. Placed in the employment of a third party, he (or, in fact, more commonly *she*) would earn wages to be held in escrow for award if the petition succeeded, and was entitled to damages.<sup>34</sup> This conferral of legal protection was the entering wedge of access to the status of freedom that slaveholders found intolerable, and which they sought to prevent. “Dorinda, a woman of color” who sued for her freedom in 1826, described Avingdon Phelps’s defying the court and “trying his best to keep me a slave.”<sup>35</sup> As she wrote to her attorney Hamilton Gamble, Phelps “has got me out of the country where I cannot do nothing for my self and he says that he will keep me out of your reach if possible.”<sup>36</sup> Though ordered by the court not to remove her from St. Louis County, “he forced me on to Clarksville [Pike County] where he has kept me ever sense.”<sup>37</sup> Challenging such a denial of protection that others believed undeniable, Abraham Lincoln argued against Stephen A. Douglas in 1858 that “there is no reason in the world why the negro is not entitled to all the natural rights enumerated in the Declaration of Independence, the right to life, liberty and the pursuit of happiness.”<sup>38</sup> Receiving loud applause, he continued,

I hold that he is as much entitled to these as the white man. I agree with Judge Douglas that he is not my equal in many respects... . But in the right to eat the bread, without leave of anybody else, which his own hand earns, *he is my equal and the equal of Judge Douglas, and the equal of every living man.*<sup>39</sup>

Like many Americans of his generation, Lincoln saw Missouri as central to the clash of slavery and freedom. That state’s application for admission to statehood in 1819 had caused a deep and alarming Constitutional crisis of federalism, and a generation later Lincoln saw in that state another particularly bitter contest, now over the rights of man. Eulogizing Henry Clay in 1852 he mocked a St. Louis newspaper for rejecting the Jeffersonian maxim that “All men are born free and equal.”<sup>40</sup> Just as national expansion into the territories of the West had precipitated the nation’s first great Constitutional crisis, that is, the movement of white population westward with slaves in tow now challenged the legal systems of the states through and to which enslaved Americans traveled. Such mobility brought them into jurisdictions where slavery was illegal and gave them claim to sue for freedom in numbers not seen before, under the principle that they had become free while on free soil, and that under the doctrine of comity that status attached to them even in a slave jurisdiction. The freedom suits thus confronted American law and politics with intractable Constitutional and political problems evaded since 1789, but they also embodied the forces of historical growth and national expansion that created new and unanticipated problems that defied past precedent.

The path of that growth was the emigrants' road taken to move slavery westward, and it ran directly to St. Louis, where the great contest now became one over "choice of law," commenced in the 1760s when a white who had owned a slave of Indian descent under French law tried to sell her after the cession of the territory to Spain, whose governor had outlawed Indian slavery.<sup>41</sup> The owner's petition to sell his slave prompted her to submit her own petition for freedom, but the case posed such difficulties and elicited so many defensive stratagems by the owner and his descendants that the matter remained unsettled with the purchase of Louisiana by the United States and continued to defy resolution for decades. After changes of venue, appeals, and reversals, the United States Supreme Court in 1838 denied jurisdiction and upheld the state Supreme Court decision of 1837 which left open the most pressing legal questions<sup>42</sup>

In 1821, the year Missouri was admitted as a slave state, sixteen enslaved persons used the courtroom to seek their freedom. Enslaved Africans had been trying since the 1600s, however, to find ways to challenge their enslavement at Westminster Hall. No such effort succeeded in bringing about the end of slavery, though many tried. Their efforts reached a momentary peak of optimism in the famous *Somerset* decision at King's Bench in London in 1772, whose holding was limited to prohibiting masters of slaves in England from forcibly removing them out of the realm.

Nevertheless, a "neo-Somerset" doctrine became an article of popular legal belief and spread across the Atlantic, instilling hope that setting foot in England brought liberation.<sup>43</sup> Such hope was groundless, of course, and was even further from likelihood in North America, where abolitionism lagged far behind its English counterpart. No frontal judicial attack on slavery was to succeed unless explicit constitutional language — or something close enough to give validity to such a doctrine — was brought to bear against it. Though Massachusetts Judge William Cushing is said to have declared in 1783 that slavery was incompatible with that state's constitutional guarantee that "every subject is entitled to liberty,"<sup>44</sup> other states refused to allow judicial interpretation to abolish slavery. The equality clause of the Virginia Constitution did not do so, wrote St. George Tucker, who in 1806 ended any such attempts

by a side wind to overturn the rights of property, and give freedom to those very people whom we have been compelled from imperious circumstances to remain, generally, in the same state of bondage that they were in at the revolution, in which they had no concern, agency or interest....<sup>45</sup>

Slavery thus remained legal where not expressly abolished, constitutionally protected at the state and federal level "till changed by an explicit and authentic act of the whole people."<sup>46</sup> But the courtroom provided an avenue of escape for individuals challenging the legality of their own enslavement. Judges might reflect on the struggle in their opinions,<sup>47</sup> but it is in the trial record that we see most fully the difficult and ambiguous relationship between law and morality. Only the trial record can illuminate the personal dimension of the freedom seekers and their allies, as well as the complexities of agency and compromise. Demanding one's day in court carried risks, as Dorinda had discovered. Other owners might retaliate with violence, an abrupt sale of such a troublemaker to the plantations downriver, or imprisonment until trial. Lucy Ann Delaney's alleged owner, David Mitchell, regarded legal process contemptuously and "refused to hear" the summons delivered to him. Refusing as well to post bond,<sup>48</sup> he must also have succeeded in deterring any other white St. Louisan from hiring her while her case awaited trial,

for she had to spend twenty months in the city jail during the long wait for her delayed trial. Mitchell had boasted, too, that no lawyer “would take up a d---- n--- -- case like that.”<sup>49</sup> In writing her autobiography four decades later, Delaney recalled her attorney Francis Murdock’s reply: “You need not think, Mr. Mitchell, because my client is colored that she has no rights, and can be cheated out of her freedom. She is just as free as you, and the Court will so decide it, as you will see.”<sup>50</sup> Lucy won her freedom.<sup>51</sup>

No matter what interpretive stamp is placed on the many tactics of the legal assault on slavery, any proper understanding of them will require examination of the complete database of trial court records. Unlike appellate records which have long been available in print,<sup>52</sup> the human context of these cases and the level of detail in these trial records expose the contradictions and ambivalences that David Brion Davis wrote about. American chattel slavery was unique in human history, and the legal struggle against it was conducted within the unique parameters of the Anglo-American legal tradition, a system made more complicated for historical analysis by its tradition of localism and the federal nature of the American legal system. If we agree with E. P. Thompson that “law is, perhaps more clearly than any other cultural or institutional artifact, by definition a part of a ‘superstructure’ adapting itself to the necessities of an infrastructure of productive forces and productive relations,”<sup>53</sup> the peculiar history and particular geography of St. Louis make it all the more necessary to give close attention to a docket of cases that is as close to complete as possible. The lawyers and judges who took the superstructure of legal institutions and created a legal system upon it were self-consciously acting as agents of a tradition of extending the Anglo-American notions of “law” — as controversial and contested as it might be in its details — into newly created jurisdictions.

When Congress separated the territory north of the future state of Louisiana and constituted it as a distinct jurisdiction in 1805, it drew in a wave of legal actors trained in Anglo-American law who saw their role as introducing a law that was superior to Spanish and French civil law and the informal practices that the colonists had used. They brought with them, writes Stuart Banner, “a way of thinking about law, and forms of resolving disputes, quite different from the accustomed thought and practice of the old inhabitants.”<sup>54</sup> Though one can discern clear and coherent patterns of an easy transfer in some areas of Missouri law,<sup>55</sup> the question of slavery was contested terrain in Missouri from the time of its acquisition by the United States. It attracted entrepreneurs who envisioned it as renewing and extending the declining fortunes of slavery in the older seaboard states as well as opponents of slavery who had rejected slavery and wished to keep the West free soil.<sup>56</sup> Though Missouri in 1819 had as many slaves as New York, the latter in 1817 had already begun the process of gradual emancipation while Missouri had been adding to the small slave population of slaves living there at the time of the Purchase.<sup>57</sup>

In 1819, the circumstances of Missouri’s request for admission to the Union signaled the beginning of a new and more ominous chapter in the history of slavery in the United States. Missouri’s application for statehood as a slave state, and the immediate opposition this aroused, prompted Jefferson’s metaphor of the “firebell in the night” for the Union. When New York Rep. James Tallmadge proposed to amend the enabling statute to bar slavery in Missouri and to free all slaves living there on their twenty-first birthday, only two Southern Congressmen voted for it and they had been born in free states. Once the dust had cleared on Missouri’s admission, it was clear that slavery had been further entrenched in the United States and that gradual emancipation, which had sustained the optimism of

antislavery forces, was hopeless. Defenders of slavery now had the upper hand; within a few years, discouragement about emancipation led to increasing episodes of violent resistance and prompted runaways and their sympathizers to expand their efforts and give loose structure to what would later be called the “Underground Railway.”<sup>58</sup>

Embedding slavery in the state constitution did not, however, protect it from challenge by a determined core of antislavery lawyers, journalists, and political activists. Looking back on his first years as a St. Louisan, the antislavery activist William Greenleaf Eliot was struck by the depths of feeling generated by this conflict. He observed that

[o]nly those who lived in the border States during that period from 1830 to 1860 can fully understand the complications and difficulties of the ‘irrepressible conflict,’ and how hard it was hilly to maintain one’s self- respect under the necessities of deliberate and cautious action; to speak plainly without giving such degree of offence would prevent one from speaking at all.<sup>59</sup>

The measure of such tensions and fears might explode into vicious shows of force by the slaveowning community and expose the fact that beneath any outward measure of personal autonomy or legal freedom there still lay a deep and widespread commitment to racial control by any means necessary. Recalling his life as a slave, William Wells Brown dispelled the notion that “slavery is thought by some to be mild in Missouri, when compared to the cotton, sugar, and rice growing states,” by explaining that “no part of our slaveholding country is more noted for the barbarity of its inhabitants than St. Louis.”<sup>60</sup>

As racial tensions increased nationwide in the 1830s, St. Louisans witnessed an especially gruesome example of the “barbarity” of pro-slavery reaction that Wells referred to. In 1836 Francis McIntosh, a free black steamboat steward from Pittsburgh, was burned alive by a mob in downtown St. Louis after killing a deputy sheriff attempting to arrest two black fellow crewmembers.<sup>61</sup> The episode divided the city, simultaneously rallying support for control of non-whites even as it outraged opponents of slavery and its racialized violence. While one newspaper described the episode as a regrettable but necessary warning “for impudent free negroes to be *cautious*,”<sup>62</sup> Elijah Lovejoy’s St. Louis *Observer* denounced the city’s inaction in preventing the lynching. “[T]he question lies between justice regularly administered or the wild vengeance of a mob,” a choice which left “but one side on which the patriot and Christian can rally; but one course for them to pursue.”<sup>63</sup> Following Judge Luke Lawless’ instructions that it must identify specific persons as responsible for seizing and setting fire to McIntosh, a St. Louis grand jury refused to indict anyone. Lovejoy’s denunciation of the outcome led to mob attacks on his press, which in turn generated warnings about a descent into mob rule and the end of the rule of law. Even those who did not share in Lovejoy’s denunciation of city inaction against the McIntosh mob assailed the city’s inaction against the mob that had damaged his press. Sharing in the punning that greeted the judge’s acts, the moderate *Missouri Republican* warned, “Cast down the safeguard of the press — let its freedom be dependent on a lawless banditti — let it merely echo the feelings of an excited multitude — and it no longer remains the palladium of constitutional liberty.”<sup>64</sup> The target of anti-abolitionist violence and threats of more, Lovejoy was soon forced to abandon St. Louis for what he hoped would be the safer soil of Illinois. It was not to be so, and he was murdered there by a mob.



As a transplant to St. Louis, Eliot had a keen sense of the passions simmering in a border state. St. Louis was a slave city with a river linking it to freedom, situated in a state bordered on the east, west, and north by free territory that tempted the enslaved and worried the slave-owner.<sup>65</sup> As an urban setting with a large population of free blacks, St. Louis attracted runaways from the state's plantation regions, but also attracted slave captors whose incentives endangered the freedom of vulnerable free blacks as well.<sup>66</sup> The Mississippi River, which might carry someone to freedom, also linked the city to the dreaded plantations of the lower delta. For enslaved and free blacks alike, the presence of the city's slave markets meant that their lives could be shattered by the force of kidnapping or sale. "The trader was all around, the slave pens at hand," recalled someone who lived his life as a slave under that shadow, "and we did not know what time any of us might be in it."<sup>67</sup> For St. Louisan Lucy Ann Delaney, the apparent amicability of her owners during her childhood ended abruptly when they responded to her assertiveness by preparing to sell her south.<sup>68</sup> The city's urban economy also provided its enslaved population a degree of daily autonomy not seen in more rural slave societies, especially when owners hired them out to other whites in the city or to work elsewhere.<sup>69</sup> St. Louis was a port frequented by steamboats from free cities, bringing with them free blacks like McIntosh, who mingled and clashed with whites, and whose contacts with a large free black population generated hostility among whites and hope among slaves.<sup>70</sup>

Proximity to freedom, therefore, sharpened the meaning of "unfreedom," and led those seeking freedom to be as ingenious as those opposing it. John Berry Meachum has been properly celebrated as "one of the truly great men of his time" for his efforts in purchasing and liberating slaves, much as he had purchased his own freedom and that of his father, wife, and children.<sup>71</sup> In arranging such purchases, Meachum was apparently one of many who did so in the region. The process involved purchasing slaves and then keeping them as indentured servants, apparently until they had worked off the cost of their purchase. In all likelihood, this arrangement was necessary for purchasers like Meachum to obtain the capital needed for the purchase. But the process did not always proceed without disagreement, and in 1835 "Judy, alias Julia Logan, a woman of color" serving her indenture, sued Meachum for her freedom. Again, it is the trial court record that brings such practices to light, revealing the extensive activities of Meachum and others. Although the reasons for the dispute remain unknown, they probably concerned the terms of how the conditions of the indenture were to be satisfied, and the trial court awarded her her freedom. What is significant, however, is that Meachum's attorney, Charles D. Drake, devised an ingenious appellate argument. Judy's attorney at trial had called as a witness "Louis Duncan, a man of color," who by law could testify in suits between blacks but not in any action involving a white.<sup>72</sup> Drake, in his motion for a new trial, explained that "previous to the time of the trial he did not know or suspect in the slightest degree that a person of color was to be introduced as a witness, and that when Lewis a man of color was brought up as a witness he was taken wholly by surprise."<sup>73</sup> He thus had been unable to produce the bill of sale from James Newton, a white man, to Meachum with the warranty of title that would make the case "substantially therefore between Judy and James Newton."<sup>74</sup> The trial court's admission of the testimony, however, was upheld on appeal.<sup>75</sup>

Meachum's efforts were exceptional, however, and more revealing of the ambiguities and compromises that legalized slavery demanded. Less ambiguous was the direct clash of slave and owner in the courtroom, where the law emboldened the enslaved to challenge it even as it threw its defenders more desperately onto the defensive. It was this confrontation that led Eliot to declare

that it was in states such as Missouri “that the first and hardest battles were fought, where the ground was prepared upon which the first great victories were won.”<sup>76</sup> The hopes of the enslaved deepened the insecurity of the enslaver, and both looked to the courts for support. The contest was sharpened in Missouri by factors unique to its contested terrain as well as by elements inherent in any legal system. The very first Missouri contest over illegal enslavement, it will be recalled, reflected both factors: the new Spanish governor of formerly-French Louisiana issued an order about owning Indians as slaves that had to be held in abeyance pending metropolitan approval, which never came. In the meantime, moreover, both enslaved Indians and their owners acted under mistaken ideas about what the announced but not ratified order meant. The popular understanding was that Governor Alejandro O’Reilly had freed all Indian slaves, when in fact he had only barred future purchases.<sup>77</sup>

### III. PROCEDURE AND SUBSTANCE IN THE TRIAL RECORD

The procedures for freedom petitions were set out in statutory form as early as 1807. It was with as much irony as aptness that when included in the 1818 alphabetical digest of territorial laws, the statute on “Freedom” was placed between “Fraudulent Conveyances” and “Gaming (See Vice and Immorality)” and “Gaol and Gaolers.”<sup>78</sup> The statute enacting the right to sue for freedom drew on the code of laws for the Louisiana Territory, which introduced common law methods in use elsewhere into the formerly civil law jurisdiction acquired from France, a process accelerated by the incoming wave of lawyers trained in the Anglo-American tradition. Amplified in 1824, the law specified that such actions

shall be in form, trespass, assault and battery, and false imprisonment, in the name of the petitioner, against the person holding him or her in slavery, or claiming him or her as a slave . . . [T]he plaintiff shall aver that before and after the time of the committing of the grievances he or she was and still is a free person, and that the defendant held and detained him or her and still holds and detains in slavery.

Behind the appellate record and the statutorily established procedure of the freedom suits, therefore, lies the reality of law in action, and the interpretive meaning given to the law by those seeking to use it for and against freedom. The basic legal principles of the freedom suit were clear and simple: “once free, always free.”<sup>79</sup> Petitioners claimed that they were free persons being held as slaves contrary to law. Their freedom need not show documentary proof but could be based on oral testimony or written depositions that demonstrated to the jury’s satisfaction that the petitioner had been manumitted by will or deed, had been born free, or had resided on free soil. For freedom suits in Missouri, this last plea dominated, based on residence to the east (in land barred to slavery by the Northwest Ordinance) or to the north (where the Missouri Compromise had banned slavery).<sup>80</sup> Petitioners thus elicited supporting testimony from far and wide, obtained by deposition from persons familiar with the facts, which were then submitted for jury evaluation.

Petitioners were allowed to sue as paupers and were assigned counsel, and were protected from being “subjected to any severity because of his or her application for freedom” or from being sold out of the jurisdiction: defendants might be required to post a recognizance bond for the petitioner’s appearance and good treatment. If the defendant refused to post bond, the sheriff was empowered to hire out the petitioner, whose accumulated wages he would hold pending the

outcome of the suit.<sup>81</sup> Successful petitioners were entitled to damages by the 1824 law, until the legislature expressly barred this as part of a steady attempt to roll back the progress it embodied.<sup>82</sup> Both parties were allowed considerable latitude in presenting evidence: by the law of 1824, “the plaintiff may give in evidence any special matter; and the defendant may plead as many pleas as he may think is necessary for his defence, or he may plead the general issue, and give special matters in evidence. . . .”<sup>83</sup> Moreover, in the petition for freedom “regard shall be had not only to the written evidence of his or her claim to freedom, but to such other proofs either at law or in equity, as the very right and justice of the case may require.”<sup>84</sup> The decision would turn on factual proof of residency on free soil, to be decided by a jury, a provision that opened the door to the courthouse to a procession of witnesses or their depositions. Because blacks were forbidden to testify in cases involving whites,<sup>85</sup> the rule brought to the court and to the historian a community of persons willing to join in a struggle for the freedom of others, as well as many determined to deny it. Their notions of the “rule of law” rests embedded in their testimony, awaiting our careful examination. The struggle behind these procedures, largely erased from history by the nature of the appellate process, where only material facts appear on the record, suggest an intensity inaccessible in the appellate record.

Even a database of almost three hundred surviving cases leaves many questions unanswered, including the most basic: How many enslaved persons of color sued for their freedom? Yet within that question lie clues to its own answer. The most careful survey to date, published in 1994 when many freedom suits remained uncollected and undiscovered, identified 209 separate petitions for freedom between 1806 and 1865.<sup>86</sup> Seventy-eight succeeded<sup>87</sup> and produced orders of freedom for ninety-eight persons, because the free status of a mother would apply to any children born after the date her freedom determined by the court. Yet those 209 petitions involved only 135 such familial groups. The reason for the discrepancy shows struggles behind the struggles: though a woman might win her own case for freedom, slave owners defending their property interest would traverse the fact of maternity, sometimes in ways insulting to the character of the mother, to deny the children their freedom. Many, like the mother of Lucy Ann Delaney, even avoided including their children in such suits, fearing reprisals or the weakening of their case if a jury became reluctant to return a verdict removing so much property from a losing slaveholder. A determined mother thus had to sue again — and, sometimes, sue yet again — as “next friend” to obtain freedom for her children.<sup>88</sup>

The principle that residence on free soil imparted freedom became a matter of greater judicial attention in the early republic as slaves accompanied their owners onto free soil. Slaveholders residing in east coast states might bring their slaves to free states in transit from coastal sailing vessels to ocean-going ships, or on vacations or visits. As “sojourners,” their slave status was not affected by the laws of the free state but was recognized under the principle of “comity,” defined in the classic study by Paul Finkelman as “the courtesy or consideration that one jurisdiction gives by enforcing the laws of another, granted out of respect and deference rather than obligation.”<sup>89</sup> As he points out, however, “[o]ne critical but long-overlooked aspect of the federal Union was the system of interstate comity that began to break down as early as the 1820s and was well on the road to self-destruction by the 1840s.”<sup>90</sup> Indeed, the principle came under direct attack, and in 1836 the Massachusetts Supreme Judicial Court refused to recognize it when a Louisiana woman brought Med, a young slave girl, with her to Boston in 1836 to escape the summer heat of New Orleans.<sup>91</sup> Repudiation of the principle, however, was a slippery slope toward a deep abyss of interstate hostility, and states were

loath to reject the principle. Wishing to halt the migration of slave owners who might exploit the principle to evade state prohibitions on slavery, free states might enact explicit “sojourner laws” to define exactly how long transients might remain with their slaves before they would be deemed residents subject to the ban. New York, a port of transfer for many slave owners traveling north, did so in 1817, for example, setting nine months as the limit.<sup>92</sup>

Migration westward, however, introduced new factual situations demanding new rules. Missouri, as a slave state beyond the Atlantic seaboard, illustrates the problem of how to acknowledge comity for slaveholders who had migrated with their slaves across a free state in their movement to a slave state. Travel might be interrupted by unforeseen problems — “inconvenience” such as illness or if “the weather was cold and stormy and the ice was running in the Mississippi so as to make it dangerous crossing”<sup>93</sup> — but also for opportunistic reasons of “convenience” such as the chance to earn extra money by hiring out a slave in a labor-short region, or during harvest.<sup>94</sup> A slave owner might also be uncertain about a final destination. Had such stops been only unavoidable interruptions that would have made them temporarily “in transit,” or had time on free soil been long enough to be considered “residence?” All of these factual contingencies created problems for the St. Louis Circuit Court at a time when the law was not yet settled — and would not be settled without a fight between pro- and antislavery settlers. It would be in the trial courts that the first round of this battle would be waged. The St. Louis court was not acting in a legal vacuum, of course, but case law on the status of slaves in transit or sojourning through free soil was new to the courts of the West.<sup>95</sup> In 1820 the Kentucky Court of Appeals had provided a precedent in the freedom suit of *Rankin v. Lydia, a pauper*.<sup>96</sup> Lydia was born into slavery in Kentucky in 1805, and brought with her mother when she was taken to Illinois (then, Indiana Territory) by their owner, John Warrick, in 1807. Warrick died in 1814, after which Lydia was sold and moved back to Kentucky after seven years’ residence in territory barred to slavery by the Northwest Ordinance. Her new owner appealed the trial court’s judgment freeing Lydia, but the high court affirmed by invoking comity. Denying the appellant’s claim “that there is no difference between the transient stay of a moment and a fixed residence in the country,” Justice Benjamin Mills stated, “There is a difference in fact, and a corresponding difference in law.”<sup>97</sup>

Mills’s simple assertion contained within it the difficulty that made the St. Louis freedom Suits a series of pitched battles of legal stratagems. There was, indeed, “a difference in fact, and a corresponding difference in law” between residency and sojourning, but no bright line existed to guide juries in their efforts to define a rule of law that would establish *the* rule of law on this contested terrain. Mills had been aware that too narrow a definition of sojourning would end any practical distinction and would produce no security for any slave owner bringing a slave onto free soil, however temporarily. Counsel for Lydia’s owner, in fact, had argued hypothetical facts that corresponded closely to the fact patterns that would soon appear in the Missouri cases:

That the slave which would be there [in the Indiana Territory] an hour would be as much under the influence of the [Northwest] ordinance as the one who resided ten years; that if **the** ordinance could give freedom at all, it could and would do it in a moment when the slave touched the enchanted shore, and that consequence would be, that the slave of the traveler who attended his master; the slave of the officer who marched in the late armies of the United States; those sent of errands to the

opposite shores; or attending their masters while removing beyond the Mississippi through the territory, would all have an equal right to freedom with Lydia; and that, by a decision in her favor, the right of such property would be much jeopardized.<sup>98</sup>

Missouri freedom suits did not have to await statehood or the slave status of the state as created by the Missouri Compromise. In a petition filed in 1818 “Winnie, a free black woman,” sued for her freedom from Phoebe Whitesides.<sup>99</sup> Though delayed, the case reached the St. Louis Circuit Court at its April term in 1821.<sup>100</sup> Those involved in *Winnie v. Whitesides*<sup>101</sup> were not unaware of the precedential importance of her petition, which used the unusual *appellation of* “free” to describe her. Indeed, her declaration and the depositions filed on her behalf all used the term “free” — a very unusual way to describe a black plaintiff. She is variously named, in a very unusual way, as “a free black woman,” “a free woman,” and “a free girl.” Whose act was this? We can not know: an examination of the handwriting on the manuscript petition can not be confidently matched to any one person. Winnie herself may have insisted on this legal “addition” as an assertion of her personhood, and it was probably abetted by the efforts of the court’s clerk, Archibald Gamble, whose brother Hamilton was one of the most active attorneys on behalf of petitioners for freedom)<sup>102</sup> But Winnie’s case was vigorously pursued by her own attorneys, one of whom, the twenty- year-old Henry S. Geyer, would later be among counsel arguing against Harriet and Dred Scott before the United States Supreme Court.

The bench and bar of Missouri was *not* only divided against itself on the matter of slavery, but it also included many whose positions were conflicted, complex, or merely opportunistic. Edward Bates, Hamilton Gamble’s brother-in- law and a moderate anti-slavery Quaker who finally argued Lucy Ann Delaney’s case and later served as Abraham Lincoln’s Attorney-General, was himself the owner of slaves and admitted it without shame (and probably with no little cunning) to the Delaney jury)<sup>103</sup> Lucy recalled his summing up to the jury:

Gentlemen of the jury, I am a slave-holder myself, but, thanks to the Almighty God. I am above the base principle of holding any a slave that has as good right *to* her freedom *as* this girl has been proven to have; she *was* free before she was born; her mother was free, but kidnapped in her youth, and sacrificed to the greed of negro traders, and no free woman can give birth to a slave child, as it is in direct violation of the laws of God and man!<sup>104</sup>

The motives of men such as Bates and Geyer may have been mixed, or may simply have reflected their sense of professional obligation to provide counsel regardless of their personal opinions; those of Lucy and Winnie were clear. What the appellation “free” powerfully suggests, in any event, is the importance of their acts of self-assertion involved in taking the step of demanding personhood, dignity, and freedom.<sup>105</sup>

Winnie based her claim on the three or four years she had spent with Phoebe and John Whitesides in Illinois (then, Indiana Territory, as it had been known when Lydia lived there) over two decades earlier)<sup>106</sup> John and Phoebe had taken Winnie with them from North Carolina, and had spent enough time in Illinois that their settlement became known as Whitesides Landing.<sup>107</sup> This length of time the jury found sufficient as proof of intent to establish residency there, and the trial court, affirmed by the Supreme Court on appeal, declared her free.<sup>108</sup> Citing the Northwest Ordinance, Judge George Tompkins held,

The sovereign power of the United States has declared that “neither slavery nor involuntary servitude shall exist there[”]; and this court thinks that the person who takes his slave into said territory, and by the length of his residence there indicates an intention of making that place his residence and that of his slave, and thereby induces a jury to believe that fact, does, by such residence, declare his slave to have become a free man. But it has been urged that by such a construction of the ordinance every person traveling through the territory, and taking along with him his slave, might thereby lose his property in his slave. We do not think the instructions of the Circuit Court can be, by any fair construction, strained so far; nor do we believe that any advocate for this portion of the species ever seriously calculated on the possibility of such a decision.<sup>109</sup>

Tompkins was acknowledging the right of slaveholders to move in transit with slaves through free territory, but he was also taking note of the way that many were trying to circumvent the law by claiming a transient presence in Illinois that would allow them to hold slaves for that time.

#### IV. TOWARD *DRED SCOTT*: PRECEDENT AND ITS CHALLENGE

It had not taken long for those wishing to exploit slavery in Illinois to learn that emigrant status offered a loophole. The Whitesides’ three or four years there may have been a flagrant abuse of the principle, but other cases were not as simple. Take, for example, Lydia’s owner’s lawyer and his parade of horrible hypotheticals concerning denials of property rights to those claiming transient status: among them was that of “the slave of the officer who marched in the late armies of the United States.” Just such a case arose in 1834 when “Rachel, a mulatto woman,” sued William Walker for her freedom.<sup>110</sup> Rachel had been purchased in St. Louis for an army officer, T. B. W. Stockton, stationed at Fort Snelling (at the time, Wisconsin Territory, where Dred Scott would be taken, also by an army officer) in 1830.<sup>111</sup> Stockton took Rachel to Washington, DC, in 1832, then to Fort Crawford, Michigan, for two years, where her son James Henry was born.<sup>112</sup> In 1834 Rachel found herself and James Henry sold and resold, finally “to one William Walker, who is a dealer in slaves and is about to take your petitioner and the child down the Mississippi River probably to New Orleans for sale.”<sup>113</sup>

Judge Luke Lawless of the Circuit Court (who would later instruct the McIntosh grand jury) followed the argument made by the Kentucky defendant against Lydia’s claim. According to Stockton’s deposition, “[d]uring all the time I owned her and her child I was an officer of the United States army, stationed at those different posts by order of the proper authority. Rachel was never employed otherwise than as my private servant and in immediate attendance upon my family.”<sup>114</sup>

Lawless instructed the St. Louis jury that such employment was a necessary incident to Stockton’s military duties:

The Court thereupon decided the law governing the case to be, that if said Stockton was an officer of the army of the United States while he held the plaintiff in slavery stationed in Fort Snelling and Fort Crawford by the proper authority; and if he employed the plaintiff during that time only in personal attendance on himself and family, that such residence of the

plaintiff at those places as has been proved, does not entitle her to her freedom.<sup>115</sup>

Lawless' instructions allowed the St. Louis jury to interpret the law that sanctioned the keeping of a slave "as my private servant and in immediate attendance on my family" as a necessity justifying an exception to the ban on slavery. Justice Matthias McGirk of the Missouri Supreme Court recognized the stratagem of arguing to the jury "to induce the belief of the fact that the service she performed was necessary or perhaps to establish the fact that the officer has a right to a family servant."<sup>116</sup> He rejected both assumptions as a legal definition of "necessary"; keeping a slave was only a "convenience," not a necessity, and "no law nor public authority required him [Stockton] to keep the person as a slave nor as a servant."<sup>117</sup>

Anti-slavery judges such as George Tompkins or Missouri Supreme Court Chief Justice Matthias McGirk thus had to shape the law in the face of stubborn popular belief regarding the meaning of the law, as well as confront the "ingenuity" of slave owners in circumventing the law. As he began his opinion in *Rachel*, McGirk commented that the court must:

proceed to lay down the law as we understand it. It may not be unprofitable to state again the principles on which this court has heretofore rested in the many decisions heretofore made in regard to this ordinance. It seems that the ingenuity of counsel and the interest of those disposed to deal in slave property, will never admit anything to be settled in regard to this question."<sup>118</sup>

Juries, especially when instructed by pro-slavery Circuit Court judges such as Lawless, were prone to afford slaveholders greater latitude in interpreting the law as to "necessity" or "convenience," just as the owners were skilled in alleging the factual grounds that a jury would accept to support such a claim. Behind the appellate record, therefore, lie an array of legalistic wrangling and efforts at that to establish a credible factual basis with which to accommodate doctrinal requirements. Lucinda Carrington, who took her slave Julia with her from North Carolina to Pike County, Illinois, in 1829, had hired out Julia for a month while there, though she publicly announced her status as a transient with intent to continue on to Missouri.<sup>119</sup> She and her son Joseph were well aware of the fine legal line they were treading, and in searching for work for Julia in Pike County they confronted people who knew that it might not be legal. One potential hirer, Henry Ross, when deposed stated that Joseph Carrington "told him he had a Black Girl he wanted to hire out if he could safely do it."<sup>120</sup> Ross "told him he would examine the law and would hire her if the law would justify' him."<sup>121</sup> Ross was skeptical, however, and "afterwards I became satisfied he would not safely do it."<sup>122</sup> After another Pike County resident — whether he had less qualms, less legal knowledge, or a differing interpretation of the law we do not know — did hire Julia, the Carringtons sent Julia to the town of Louisiana, Missouri, and hired her out there for a longer period.<sup>123</sup> They finally sold Julia to the defendant in St. Louis, but before doing so they brought her back to Illinois to recover from an illness<sup>124</sup>

Counsel for Carrington cited *Winnie* as precedent that "intent" and the brief length of stay on free soil controlled the matter. Trial Judge William Can agreed, and further instructed the jury that the hiring in Pike County was legally "not a hiring."<sup>125</sup> Because the case would turn on the facts, defendant's counsel mounted a robust attack on Julia's witnesses. Such defenses, which do not reveal themselves

in the appellate records, were a common feature of slaveholders' legal strategy in slave freedom suits, and Julia's attorney responded in kind by seeking to have the court not admit depositions taken for defendant.<sup>126</sup> The St. Louis trial jury found for Carrington, but Chief Justice Matthias McGirk overturned the judgment and remanded the case for trial in St. Louis.<sup>127</sup> McGirk had to address the vexing problem of the loophole of "intent," which was easily invoked by any slaveholder wishing to claim emigrant status. Having shared in that opinion, he had to explain it. "This Court decided that if the owner went there with his slave, with intent to make that place his permanent residence, and the residence of his slave, *and did in fact do so*, that the slave was by such residence free," he wrote; "but the Court did not decide that the slave was free by reason of the intent being declared."<sup>128</sup>

McGirk also had to confront the question of length of stay necessary to remain an emigrant. His answer did not settle the law, but though he left it open to factual determination by a jury, he did attempt to set out legal standards:

How long the character of emigrant or traveler through the State may last, cannot by any general rule be determined; but it seems that reason does require it should last so long as might be necessary, according to the common modes of traveling, to accomplish a transit through the State. If any accident should happen to the emigrant which in ordinary cases would make it reasonable and prudent for him to suspend his journey for a short time, we think he might do so without incurring a forfeiture, if he resumed his journey as soon as he safely could. Something more than the mere convenience or ease of the emigrant ought to intervene to save him from a forfeiture. Something of the nature of necessity should exist before he would or ought to be exempt from the forfeiture. If swollen streams of water which could not be crossed without danger should intervene, serious sickness of the family, broken wagons, and the like should exist, there would be good cause of delay so long as they exist, if the journey is resumed as soon as these impediments are removed, provided also due diligence is used to remove them.<sup>129</sup>

"In the case before us," he concluded, "the owner of the slave was not an emigrant . . . ."<sup>130</sup>

The best efforts of the appeals court could not stifle the ingenuity of slave owners, however, and less than two years later the St. Louis court was presented with facts that tested the rule as stated. Edmund Melvin had come to Illinois from Tennessee with his family and his two slaves, one of whom was Daniel Wilson.<sup>131</sup> Melvin learned that "he could not keep his slaves in Illinois for twelvemonths, and he went to Belleville, and ascertained that he could not; and after he found he could not keep them in Illinois, he took them to St. Louis."<sup>132</sup> For good measure to establish his transient status, Melvin did not unload the wagon in which he had brought his possessions, though he remained there from spring to fall 1834 and even was able to plant and harvest a crop.<sup>133</sup> He then hired Wilson to labor in St. Louis for short periods to satisfy what he believed was the law against introducing slavery into a free state<sup>134</sup>

The St. Louis trial judge instructed the jury in such a way as to recognize Melvin's facts as legally sufficient to prove transiency: if Melvin had restrained Wilson in slavery only in "that time during which the pl[ainti]ff's master was merely a



transient in the state of Illinois” and if Melvin “sojourned only a reasonable time with his children in this state [Illinois] and without any intention of domesticating himself therein,” they were to find for the defendant)

The jury did so. With Chief Justice Matthias McGirk in agreement, however, George Tompkins reversed the judgment and held that the trial court

instruction seems calculated to mislead a jury, and therefore wrong, because it assumes that the jury must find that this appellee was a domiciliated resident of the State of Illinois, and treated the plaintiff as his slave therein, before they can find for the plaintiff. The true rule being as before stated, that the jury should inquire whether the owner made any unnecessary delay in Illinois.<sup>136</sup>

He continued, “If they believed that the defendant did this, without any intention of domiciliating himself therein, they must have been very incredulous indeed.”<sup>137</sup>

Tompkins and McGirk worked to establish the rules of law for a rapidly expanding state, divided between supporters and opponents of slavery, that could form an acceptable foundation for the rule of law there. But McGirk retired in 1841, and Tompkins was forced by constitutional limit to retire at age 65 in 1845.<sup>138</sup> Not only had two of the staunchest proponents of freedom litigation left the bench, but by 1845 the freedom suits had been sharply modified by statute. Petitioners now had to post bond for any costs incurred in cases they lost, the wages they earned during the trial went to the sheriff, and they recovered no damages if successful. The rules of evidence were tightened, and, most significantly, the right of personhood guaranteed by the right to *habeas corpus* during trial was repealed.<sup>139</sup> The next year, Harriet and Dred Scott brought their suits for freedom to the St. Louis Circuit Court, and under the settled law of the precedent established by *Rachel v. Walker*.<sup>140</sup> The appeal by the Emerson family brought the dispute to the Missouri Supreme Court in 1852 after numerous delays, by which time an elected judiciary heard the case. The issue of comity, as established by decades of precedent, once again was raised, but as Justice William Scott held,

If it [comity] is a matter of discretion, that discretion must be controlled by circumstances. Times now are not as they were when the former decisions on this subject were made. Since then not only individuals, but States, have been possessed with a dark and fell spirit in relation to slavery, whose gratification is sought in the pursuit of measures, whose inevitable consequence must be the overthrow and destruction of our government. Under such circumstances it does not behoove the State of Missouri to show the least countenance to any measure which might gratify this spirit.<sup>141</sup>

Also elected to the bench was Hamilton Gamble, who had begun his career as a vigorous champion of freedom suits, though he had also defended slaveholder defendants. In 1852 his dissent from William Scott’s majority opinion invoked not only the substance of precedent upholding the Scotts’ claim but also the spirit that had supported them. His belief that black litigants were entitled to their day in court, even as slaves, was evident in his dissent:

In all ages, and in all countries in which slavery has existed, the slave has been regarded not merely as property, but also as a being capable of acquiring and holding certain rights by the act of the master. He could acquire and enforce his right to freedom in modes recognized by the law of the country in which he dwelt.<sup>142</sup>

Gamble was citing a long road of precedent, including that of Benjamin Mills's Kentucky opinion from 1820. In it Mills had written, "Free people of color in all the states are, it is believed, *quasi* citizens, or at least, denizens."<sup>143</sup> The present case offered no reason to abandon this principle or that of comity, and present circumstances must not be permitted to corrupt the rule of law. "There is with me, nothing in the law relating to slavery, which distinguishes it from the law on any other subject, or allows any more accommodation to the temporary public excitements which are gathered around it."<sup>144</sup> Justice Gamble, who had lived in Missouri since it was a territory and knew the explosive forces behind the slavery dispute, challenged Justice Scott on meaning of the new "spirit" abroad. Acknowledging the heated passions but seeing them as the product of both partisan positions, he warned,

That alienation of feeling and, finally, settled hostility will be produced by this course of conduct, is greatly to be apprehended. But, in the midst of all such excitement, it is proper that the judicial mind, calm and self-balanced, should adhere to principles established when there was no feeling to disturb the view of the legal questions upon which the rights of parties depend)<sup>145</sup>

His conclusion led him to remind Scott and the other newly elected pro-slavery justices that they were departing from a long road of settled law.

The cases here referred to are cases decided when the public mind was tranquil, and when the tribunals maintained in their decisions the principles which had always received the approbation of an enlightened public opinion. Times may have changed, public feeling may have changed, but principles have not and do not change; and, in my judgment, there can be no safe basis for judicial decisions but in those principles which are immutable.<sup>146</sup>

The long road to Dred Scott had come to an end; the road from Dred Scott loomed ominously ahead.

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<sup>1</sup> DAVID BRION DAVIS, *THE PROBLEM OF SLAVERY IN THE AGE OF REVOLUTION 1770-1823* 164 (Oxford University Press, 1999) (1975).

<sup>2</sup> “An Act to enable persons held in slavery, to sue for their freedom,” *Laws of Territory of Louisiana* (1807) 96-97, ch. 35. The statute was revised by the *Revised Laws of Missouri* (1825). 500, § 13, and again by the *Revised Laws of Missouri* (1835), 286, § 9.

<sup>3</sup> The state constitution of 1820 established circuit courts for each county, possessing civil and criminal jurisdiction, with appeal to the state supreme court. *Mo. CONST.* art. 5, § 6.7 (1820). Until 1875 the Circuit Court of St. Louis County included what is now the City of St. Louis and St. Louis County.

<sup>4</sup> *Dred Scott v. F. A. Sandford*, 60 U.S. 393 (1857).

<sup>5</sup> *United States Census*, Eighth Census (1860).

<sup>6</sup> JOHN T. NOONAN, JR., *PERSONS AND MASK OF THE LAW. CARDOZO, HOLMES, JEFFERSON, AND WYTHE AS MAKERS OF THE MASKS* 6 (Farrar, Straus and Giroux, 1976).

<sup>7</sup> *Dred Scott*, 60 U.S. at 393, commenced in St. Louis as *Dred Scott, a man of color v. Irene Emerson*, St. Louis Circuit Court Records (hereinafter, SLCCR), Nov. 1846, case #1; *Harriet Scott, a woman of color v. Emerson*, SLCCR, Nov. 1846, case #2. The Scotts initially filed separate petitions, but they were combined as sharing identical factual and legal issues in 1850. On the earliest phase of the case, see WALTER EHRLICH, *THEY HAVE NO RIGHTS. DRED SCOTT’S STRUGGLE FOR FREEDOM* 41-43 (Greenwood Press 1979).

<sup>8</sup> ORLANDO PATTERSON, *FREEDOM. VOLUME 1: FREEDOM IN THE MAKING OF WESTERN CULTURE* xii (BasicBooks 1991).

<sup>9</sup> Christopher A. Bracey, *Race Jurisprudence and the Supreme Court: Where Do We Go From Here? Dignity in Race Jurisprudence*, 7 U. PA. J. CONST. L. 669, 679 (2005).

<sup>10</sup> *Id.* at 676.

<sup>11</sup> Lincoln to James N. Brown, 18 October 1858, in *THE COLLECTED WORKS OF ABRAHAM LINCOLN* 3:327 (Roy P. Basler ed., 1953-1955).

<sup>12</sup> *Id.*

<sup>13</sup> See, e.g., Erwin Chemerinsky, *Velasquez and Beyond: Closing the Courthouse Doors to Civil Rights Litigants*, 5 U. PA. J. CONST. L. 537 (2003).

<sup>14</sup> NOONAN, *supra* note 5, at 59.

<sup>15</sup> Thompson weighs in on this debate in his *WHIGS AND HUNTERS. THE ORIGINS OF THE BLACK ACT* 258-69 (Pantheon 1975).

<sup>16</sup> On the Garrison-Douglass divide, see the brief summary, with relevant citations to their writings, in *WILLIAM LLOYD GARRISON AND THE FIGHT AGAINST SLAVERY* 40-45 (William E. Cain ed., 1994).

<sup>17</sup> THOMPSON, *supra* note 15, at 265-66.

<sup>18</sup> Available at <http://stlcourtrecords.wustl.edu/index.php> (last visited Aug. 22, 2006). These documents constitute only a small fraction of the more than four million items from the St. Louis courts in the period before 1875 that have been moved to the Archives. In that bulk are doubtless other freedom suits that have escaped attention, a fact that makes any accurate enumeration of a total universe of cases impossible. Numerous suits have been added to the database since its launch, the most recent a group of twenty in 2005.

<sup>19</sup> Initial financial support came from a “Save America’s Treasures” grant (#PT-20013-02, managed through the National Endowment for the Humanities), with additional funding by the Archives, the University, and corporate benefactors. In addition, the project has benefited from the contributed efforts of student interns from Washington University, the University of Missouri--St. Louis, and St. Louis University.

<sup>20</sup> <http://stlcourtrecords.wustl.edu>. (last visited Aug. 22, 2006).

<sup>21</sup> United States Department of Education “Teaching American History” grants #U2 I 5X030295 and #U1215X050137.

<sup>22</sup> I borrow this phrase from the suggestive article by Philip S. Paludan, *The American Civil War Considered as a Crisis in Law and Order*, 77 AM. HIST. REV. 10 13-34 (1972).

<sup>23</sup> On the shared Anglo-American ideal that “law matters” and that central to the rule of law were trial by jury and equality with one’s betters in the courtroom, see DAVID LEMMINGS, *INTRODUCTION TO DAVID LEMMINGS, THE BRITISH AND THEIR LAWS IN THE EIGHTEENTH CENTURY I*, 6 (Boydell Press 2005). Also useful in this

regard is the broader treatment in *How DOES LAW MATTER?* (Bryant G. Garth & Austin Sarat eds., 1998). Trial cases and the law of slavery more generally do not have a major place in legal education today, but some aspects have made their way into curriculum. *See, e.g.,* Jane E. Larson, “A House Divided”. *Using Dred Scott to Teach Conflict of Laws*, 27 U. TOL. L. REV. 577 (1996).

<sup>24</sup> Paludan, *supra* note 21, at 1014. The concept of the “rule of law” has a long history itself, but Paludan’s formulation serves well to historicize the problem within the particular pressures and contingencies of the Antebellum crisis over slavery, and his emphasis on institutions points us to procedure as being centrally *important*. For the long, broad view, *see* ANTHONY BABINGTON, *THE RULE OF LAW IN BRITAIN FROM THE ROMAN OCCUPATION TO THE PRESENT DAY: THE ONLY LIBERTY* (Barry Rose 1995).

<sup>25</sup> Harrison Trexter alludes to the origins of the basic laws of slavery in Virginia in *SLAVERY IN MISSOURI, 1804-1865 59-60* (The Johns Hopkins University Press 1914).

<sup>26</sup> CONWAY ROBINSON, *THE PRACTICE IN THE COURTS OF LAW AND EQUITY IN VIRGINIA* 2:424 (Richmond 1832).

<sup>27</sup> Among the vast literature on federalism and slavery, most useful as introduction are DAVID M. POTTER, *THE IMPENDING CRISIS 1848-1861* 1-17 (Harper Torchbooks 1976); WILLIAM W. FREEBLING, *THE ROAD TO DISUNION* (Oxford University Press 1990); and DON FEHRENBACHER, *THE DRED SCOTT CASE. ITS SIGNIFICANCE IN AMERICAN LAW AND POLITICS* (Oxford University Press 1978).

<sup>28</sup> Abraham Lincoln, at Springfield, Illinois, 16 June 1858, in *COLLECTED WORKS*, *supra* NOTE 11, 3:461..

<sup>29</sup> *Id.* On the inadequacy of Constitutional mechanisms to resolve the conflict, *see* MARK A. GRABER, *DRED SCOTT AND THE PROBLEM OF CONSTITUTIONAL EVIL* (Cambridge, 2006).

<sup>30</sup> Few treatises existed. Fehrenbacher notes the limitations of JACOB D. WHEELER, *A PRACTICAL TREATISE ON THE LAW OF SLAVERY* (1833), and THOMAS R. R. COBB, *AN INQUIRY INTO THE LAW OF NEGRO SLAVERY IN THE UNITED STATES OF AMERICA* (Philadelphia, 1858). *See* FEHRENBACHER, *supra* note 26.

<sup>31</sup> Carefully describing the varied state systems of slave law is THOMAS D. MORRIS, *SOUTHERN SLAVERY AND THE LAW, 1619-1860* (Chapel Hill, 1996).

<sup>32</sup> The classic study of this juxtaposition is MARK TUSHNET, *THE AMERICAN LAW OF SLAVERY. CONSIDERATIONS OF HUMANITY AND INTEREST* (Princeton University Press, 1981).

<sup>33</sup> WILLIAM WALLER HENING, *THE STATUTES AT LARGE; BEING A COLLECTION OF ALL THE LAWS OF VIRGINIA, FROM THE FIRST SESSION OF THE LEGISLATURE, IN THE YEAR 1619*. 13 vols. 1819-23. (Reprint ed., Charlottesville, 1969), *Laws of 1786*, ch. 58, 12: 345.

<sup>34</sup> “An Act to enable persons of color held in slavery to sue for freedom,” 1825 Mo. LAWS. 404. These provisions would, significantly, be overturned in later revisions. *See infra* text at notes 81, 139..

<sup>35</sup> Robert Moore, Jr., *A Ray of Hope, Extinguished: St. Louis Slave Suits for Freedom*, 14 GATEWAY HERITAGE 5 (1994).

<sup>36</sup> *Id.*

<sup>37</sup> “*Id.* Her suit, Dorinda, a woman of color, v. John Simonds, Jr., SLCCR, Mar. 1826, case #42, was brought against the man to whom Phelps had mortgaged her. Her suit was dismissed before Gamble received the letter.

<sup>38</sup> Abraham Lincoln, at Springfield, Illinois, 16 June 1858, in *THE COLLECTED WORKS OF ABRAHAM LINCOLN* 3:461 (Roy P. Basler ed., 1953-1955).

<sup>39</sup> *Id.*

<sup>40</sup> “Eulogy to Henry Clay,” 21 August 1858, in *COLLECTED WORKS*, 3:16. Lincoln and others could do so without the irony that is so apparent in the citation, since Jefferson had supported the admission of Missouri as a slave state. For Jefferson’s seemingly paradoxical reputation as an antislavery advocate, and his repudiation by hard-line slaveholders, *see* MERRILL D. PETERSON, *THE JEFFERSON IMAGE IN THE AMERICAN MIND* 162-209 (Oxford University Press 1960).

<sup>41</sup> William E. Foley, *Slave Freedom Suits Before Dred Scott The Case of Marie Jean Scypion’s Descendants*, 79 Mo. HIST. REV. 1-23 (1984), provides a clear narrative of the confusing twists of this case. For a general overview of the shifting jurisdictional issues, *see* JUDICIAL CASES CONCERNING SLAVERY AND THE NEGRO 5: 105-11 (Helen Tunncliffe Catterall ed., 1926-37).

<sup>42</sup> Pierre Chouteau, Sr. v. Marguerite, 12 Pet. 507 (1838), fully described by Foley, *supra*

note 41, at 20-23.

<sup>43</sup> Among the many hopeful misinterpretations of Lord Mansfield's decision in the United States, see the response published in the *Virginia Gazette*, 27 August 1772, cited by Jerome Nadelhaft, *The Somerset Case and Slavery: Myth, Reality, and Repercussions*, 51 J. NEGRO HIST., 193-208 (1966). On this case and its legacy, see WILLIAM E. WIECEK, *THE SOURCES OF ANTISLAVERY CONSTITUTIONALISM IN AMERICA, 1760-1848* (Cornell University Press 1977).

<sup>44</sup> *Commonwealth v. Jennison* (unreported, Mass. 1783).

<sup>45</sup> *Hudgins v. Wrights*, 1 He. & M. 134, 141 (1806).

<sup>46</sup> George Washington, "Farewell Address" (1796), cited in ANTISLAVERY RECONSIDERED. NEW PERSPECTIVES ON THE ABOLITIONISTS 223 (Lewis Perry & Michael Fellman eds., 1979).

<sup>47</sup> The most notably eloquent studies of this conflict are MARK TUSHNET, *THE AMERICAN LAW OF SLAVERY AND FREEDOM. CONSIDERATIONS OF HUMANITY AND INTEREST* (Princeton 1981) and ROBERT COVER, *JUSTICE ACCUSED. ANTISLAVERY AND THE JUDICIAL PROCESS* (New Have 1975).

<sup>48</sup> *Britton v. Mitchell*, SLCCR. Nov. 1844, case #18, 1,4.

<sup>49</sup> *Id.*

<sup>50</sup> LUCY A. DELANEY, *FROM THE DARKNESS COMETH THE LIGHT* 33-35 (Publishing House of J.T. Smith 1891).

<sup>51</sup> *Id.*

<sup>52</sup> Appeals reported in the *Missouri Reports* have been redacted in the fifth volume of *JUDICIAL CASES CONCERNING SLAVERY AND THE NEGRO* (Helen Tunnicliffe Catterall ed., 1926-37).

<sup>53</sup> THOMPSON, *supra* note 15.

<sup>54</sup> On the speed with which English law replaced that of the territory's two civil law jurisdictions (French and Spanish), see STUART BANNER, *LEGAL. SYSTEMS IN CONFLICT. PROPERTY AND SOVEREIGNTY IN MISSOURI, 1750-1860* 85-12 1 (University of Oklahoma Press 2000).

<sup>55</sup> As, for example, on credit and debt. See *id.* at 109-13.

<sup>56</sup> On the efforts of one such emigrant, Nathaniel Beverley Tucker, and his activities as judge and plantation entrepreneur in early Missouri. see PITILLIP HAMILTON, *THE MAKING AND UNMAKING OF A REVOLUTIONARY FAMILY. THE TUCKERS OF VIRGINIA 1752-1830* 185-89 (University of Virginia Press 2003).

<sup>57</sup> DAVID BRION DAVIS, *CHALLENGING THE BOUNDARIES OF SLAVERY* 40-41 (Harvard University Press 2003).

<sup>58</sup> FERRENBACHER, *supra* note 27, at 110-13.

<sup>59</sup> WILLIAM (3REENLEAF ELIOT, *THE STORY OF ARCHER ALEXANDER. FROM SLAVERY TO FREEDOM, MARCH 30, 1863* 6-7 (Cupples, Upham and Co. 1885).

<sup>60</sup> Wells is cited by THOMAS C. BUCHMANAN, *BLACK LIFE ON THE MISSISSIPPI. SLAVES, FREE BLACKS, AND THE WESTERN STEAMBOAT WORLD* 43-44 (University of North Carolina Press 2004).

<sup>61</sup> Janet S. Flermann, *The McIntosh Affair*, 26 Mo. HIST. SOC'Y BULLETIN, 130, 169-70 (citing *Missouri Argus*, May 6, 1836).

<sup>62</sup> *Id.*

<sup>63</sup> *Id.* at 133 (citing *St. Louis Observer*, May 6, 1836).

<sup>64</sup> *Id.* at 141 (citing *Missouri Republican*, July 23, 1836).

<sup>65</sup> To the east lay lands barred to slavery by the Northwest Ordinance; to the west lay unorganized territory north of latitude 36 degrees 30 minutes and thus closed to slavery by the Missouri Compromise until its repeal in 1850; to the north, the Iowa Territory was organized under *that* ban in 1838. To the south, Arkansas was admitted as a slave state in 1836. On the emergence of the slavery issue in the West, see FERRENBACHER, *supra* note 27, at 114-87.

<sup>66</sup> HARRIET C. FRAZIER, *RUNAWAY AND FREED MISSOURI SLAVES AND THOSE WHO HELPED THEM, 1763-1865* 87-105 (McFarland and Co. 2004).

<sup>67</sup> Lewis Hayden's recollection of a similar situation was included in Harriet Beecher Stowe's *A KEY TO "UNCLE TOM'S CABIN," PRESENTING THE ORIGINAL FACTS AND DOCUMENTS UPON WHICH THE STORY IS FOUNDED* 154-55 (John P. Jewett & Co. 1853). It is cited in Walter Johnson's remarkable study of the slave trade entitled *SOUL BY SOUL. LIFE INSIDE THE ANTEBELLUM SLAVE MARKET* 22 (Harvard University Press 1999).

<sup>68</sup> DELANEY, *supra* note 50, at 33-35. Lucy's case was brought as *Britton v. Mitchell*,

SLCCR, Nov. 1844, case #18. Her mother had sued and won her freedom in 1839 after a clash with her master. Wash v. Mahegan, SLCCR, Nov. 1839, case #167.

<sup>69</sup> Clement Eaton, *Slave Hiring in the Upper South: A Step Toward Freedom*, 46 Miss. VALLEY HIST. REV. 663-78 (1960); Peter Parish, *The Edges of Slavery in the Old South: Or, Do Exceptions Prove Rules?* 4 SLAVERY AND ABOLITION 106-25 (1982). For an example of how this emboldened one enslaved man, who worked at a distance from his owner, to pursue a freedom suit, see Ralph v. Duncan, SLCCR, Jul. 1833, case #99.

<sup>70</sup> BUCHANAN, *supra* note 60, at 43-44.

<sup>71</sup> N. Webster Moore, *John Berry Meachum (1789-1854): St. Louis Pioneer, Black Abolitionist, Educator, and Preacher*, 29 Mo. HIST. SOC'Y BULLETIN 96-103 (1973).

<sup>72</sup> 1835 Mo. LAWS. 624.

<sup>73</sup> Judy v. Meechum, SLCCR, March 1837, case #40, at 18.

<sup>74</sup> *Id.*

<sup>75</sup> Meechum v. Judy, 4 Mo. 361, 363 (1836). The appellate report addresses the matter of a black man's testimony, but unlike the motion for a new trial it does not provide Clark's explanation and his plea of surprise.

<sup>76</sup> ELIOT, *supra* note 59, at 7.

<sup>77</sup> FOLEY, *supra* note 41, at 3-6.

<sup>78</sup> A DIGEST OF THE LAWS OF MISSOURI TERRITORY 210-11 (Henry S. Geyer ed., Mo. Gazette 1818).

<sup>79</sup> The principle has a long lineage in English law, though it was rejected by Lord Stowell in his opinion in *The Slave Grace*, 2 Hogg Ad. 94 (1827) (as described in JUDICIAL CASES CONCERNING SLAVERY AND THE NEGRO, *supra* note 41, at 1:7). Nevertheless, the doctrine lived on in the United States and was cited by the United States Supreme Court in *Fenwick v. Chapman*, 34 U. S. 461, 468 (1835).

<sup>80</sup> Given the historical circumstances of the late settlement in land west of the state, and its remoteness from St. Louis, no claims to freedom were made in the St. Louis Circuit Court based on residency there.

<sup>81</sup> 1807 La. Acts 65-66; 1824 Mo. LAWS. 404-05. These provisions of the law continued in force in the 1845 Mo. LAWS. 53 1-34.

<sup>82</sup> See 1825 Mo. LAWS. 405; 1845 Mo. LAWS. 532, 533. The 1845 revision also omitted the broad evidentiary provisions of the 1824 law.

<sup>83</sup> 1825 Mo. LAWS. 405.

<sup>84</sup> *Id.*

<sup>85</sup> 1845 Mo. LAWS. 624.

<sup>86</sup> Robert Moore, Jr., *A Ray of Hope, Extinguished. St. Louis Slave Suits for Freedom*, GATEWAY HERITAGE 14 (Winter 1993-94). No figure for slave freedom suits is known for the nation as a whole, but the best calculation finds 670 appellate cases, of which 575 went to decision, with petitioners winning 57%. Marion J. Russell, *American Slave Discontent in Records of the High Courts*, 31 J. NEGRO HIST., 418-19 (1946).

<sup>87</sup> Moore, *supra* note 86, at 418-19 (Moore finds 110 decided in favor of the owner; in 21 cases the outcome is not clear).

<sup>88</sup> Lucy's mother Polly Wash sued only for her own freedom in Wash v. Mahegan, SLCCR, Nov. 1839, case #167. Five years later she sued for Lucy's freedom "as her next friend" in Britton v. Mitchell, SLCCR, Nov. 1844, case #18, when Lucy was sixteen. In her autobiography Lucy suggests that her mother was advised by counsel not to include her daughters Lucy and Nancy in the 1839 lawsuit. See DELANEY, *supra* note 50, at 35. Nancy already had escaped slavery, however, by running away to Canada on a trip to Niagara Falls with her owners. *Id.* at 16.

<sup>89</sup> PAUL FINKELMAN, AN IMPERFECT UNION. SLAVERY, FEDERALISM, AND COMITY 4, 11-12 (University of North Carolina Press 1981).

<sup>90</sup> *Id.*

<sup>91</sup> Commonwealth v. Ayes, 18 Mass. 1 Pick. 193 (1836).

<sup>92</sup> "An Act Relative to Slaves and Servants," 1817 N.Y. LAWS 140. The law, however, was repealed in 1841.

<sup>93</sup> Defendant made both pleas in Julia v. McKinney, SLCCR, Mar. 1831, case #66. The appellate record, Julia (a woman of color) v. McKinney, 3 Mo. 270, 271 (1833), notes the illness of the slave but not the inclement weather, which was presented in depositions filed with the trial court. Julia v. McKinney, SLCCR, Mar. 1831, case #66, at 97, 98.

<sup>94</sup> Wilson v. Melvin, SLCCR, Jul. 1835, case #10.

<sup>95</sup> A slave "in transit" continued an unbroken journey; a sojourner remained without a definite departure date, though presumably temporarily. For a description of these different

types of status, *see* FINKELMAN, *supra* note 88, at 9.

<sup>96</sup> 9 Ky. (I A.K. Marsh.) 467 (1820).

<sup>97</sup> *Id.* at 468.

<sup>98</sup> *Id.* at 476-77.

<sup>99</sup> *Winnie v. Whitesides*, SLCCR. Apr. 1821, case #190.

<sup>100</sup> *Id.*

<sup>101</sup> *Id.*

<sup>102</sup> *Id.* In 1818 and 1819 Hamilton Gamble took fourteen such suits, all but one for the plaintiff. On Hamilton Gamble's antislavery caseload, *see* BANNER, *supra* note 54, at 113. Catterall is mistaken in identifying Judge George Tompkins as the person behind this. Though an outspoken opponent of slavery, he was not on the trial court bench, only becoming a judge in 1824 when he was appointed to the Missouri Supreme Court.

<sup>103</sup> On Geyer, *see* W.V. N. BAY, REMINISCENCES OF THE BENCH AND BAR OF MISSOURI 143-52 (F.H. Thomas & Co. 1878); and FERRENBACHER, *supra* note 27, at 259. On Bates, *see* FEHRENBACIIER, *supra* note 27, at 564-65, and DELANEY, *supra* note 50, at 36-42.

<sup>104</sup> DELANEY, *supra* note 50, at 42.

<sup>105</sup> LONDON BARRETT, SELF-KNOWLEDGE, LAW, AND AFRICAN AMERICAN AUTOBIOGRAPHY: LUCY A. DELENEY'S 'FROM THE DARKNESS COMETH THE LIGHT,' IN THE CULTURE OF AUTOBIOGRAPHY. CONSTRUCTIONS OF SELF-REPRESENTATION 116-24 (Robert Falkenflik ed., Stanford University Press 1993).

<sup>106</sup> *Winnie v. Whitesides*, 1 Mo. 472(1824).

<sup>107</sup> *Id.*

<sup>108</sup> *Id.* at 472-73 (1824).

<sup>109</sup> *Id.* at 476.

<sup>110</sup> *Rachel v. Walker*, SLCCR, Nov. 1834, case #82.

<sup>111</sup> *Id.*

<sup>112</sup> *Id.*

<sup>113</sup> *Id.*

<sup>114</sup> *Id.*

<sup>115</sup> *Id.* at 17.

<sup>116</sup> *Rachael v. Walker*, 4 Mo. 350, 354 (1836).

<sup>117</sup> *Id.*

<sup>118</sup> *Id.* at 352.

<sup>119</sup> *Julia v. McKinney*, 3 Mo. 270 (1833).

<sup>120</sup> *Id.*

<sup>121</sup> *Id.*

<sup>122</sup> *Julia v. McKinney*, SLCCR, Mar 1831, case #66, 22.

<sup>123</sup> *Julia*, 3 Mo. at 271.

<sup>124</sup> *Id.*

<sup>125</sup> *Id.* at 5; *Julia*, 3 Mo. at 275.

<sup>126</sup> These depositions, and the motions to suppress them, fill over twenty pages of the case file. *Julia v. McKinney*, SLCCR, Mar. 1831, case #66, 37-61.

<sup>127</sup> *Julia*, 3 Mo. 270.

<sup>128</sup> *Id.* at 275. (Emphasis in original.)

<sup>129</sup> *Id.* at 273.

<sup>130</sup> *Id.*

<sup>131</sup> *Wilson v. Melvin*, SLCCR, Jul. 1835, case #10.

<sup>132</sup> *Id.* at 16.

<sup>133</sup> *Id.*

<sup>134</sup> *Id.*

<sup>135</sup> *Wilson v. Melvin*, 4 Mo. 592, 597-98 (1835). *Wilson v. Melvin*, SLCCR, Jul. 1835, case #10.

<sup>136</sup> *Wilson*, 4 Mo. at 597-98.

<sup>137</sup> *Id.*

<sup>138</sup> BAY, *supra* note 103, at 536 (McGirk), 31 (Tompkins).

<sup>139</sup> 1845 Mo. LAWS. 69 ("Freedom"), 75 ("Habeas Corpus").

<sup>140</sup> *Scott v. Emerson*, SLCCR, Nov. 1846, case #1; *Scott v. Emerson*, SLCCR, Nov. 1846, case #2. Their case has been skillfully described and analyzed in FEHRENBACHER, *supra* note 27, at 254-60; and in EHRLICH, THEY HAVE NO RIGHTS, *supra* note 7.

<sup>141</sup> *Scott v. Emerson*, 15 Mo. 576, 586 (1852).

<sup>142</sup> *Id.* at 587.

<sup>143</sup> *Lydia*, 21 Ky. at 591.

<sup>144</sup> *Id.* at 589.

<sup>145</sup> *Id.* at 591.

<sup>146</sup> *Id.* at 591-92.