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Litigating Slavery's Reach: A Story of Race, Rights, and the Law During the California Gold Rush

Jason A. Gillmer

LITIGATING SLAVERY'S REACH: A STORY OF RACE, RIGHTS, AND THE LAW DURING THE CALIFORNIA GOLD RUSH

Jason A. Gillmer∗

In May 1852, Charles Perkins decided he wanted his slaves back. Born in Mississippi, Charles emigrated to California in 1849 during the height of the Gold Rush. When he came, like hundreds of others from Southern states, he also brought three enslaved men with him. Following California's admission to the Union as a free state, however, Charles purportedly freed the men and then returned home, alone. Then, a year later, Charles had a change of heart. Following the enactment of the California Fugitive Slave Act in 1852—which declared that slaves brought to California before it became a state were still slaves—Charles brought suit in a California court to reclaim what he considered to be his property. The resulting litigation animated the state and the country, as the parties debated the Act's constitutionality and the larger issue of whether slavery could exist on free soil. The answer, provided five years before Dred Scott, *firmly planted the West in the middle of the national debate over race, slavery, and the law.*

This Article is a narrative history of In re Perkins, *the case involving Charles Perkins and the three men he maintained were his slaves. It takes place during the Gold Rush and the immediate years that followed, and it has two primary goals. First, by centering a story about slavery in the Far West, it provides a critical lens through which we can explore how the ideological conflicts animating the North-South axis also extended horizontally to the Pacific Ocean, thereby bringing the West into the national discourse over slavery and the growing sectional crisis. Second, as a narrative history, this Article affords an opportunity to dig deep*

∗ John J. Hemmingson Professor of Civil Liberties, Gonzaga University School of Law. LL.M., Harvard Law School; J.D., American University, Washington College of Law; B.A., Carleton College. I am grateful for the generous feedback and comments on various drafts of this Article by several of my colleagues, including Ariela Gross, Daniel Sharfstein, Kimberly Welch, Ray Albin, Mary Pat Treuthart, Agnieszka McPeak, and Danielle Wingfield-Smith. I presented versions of this Article at the annual Law and Society Annual Conference (2019 and 2022), the annual SEALS Conference (2020), and the Stanford Grey Fellows Symposium (2021 and 2022). I would like to thank the commentators and the participants for helping to improve the Article with their insight and consideration.

into the main participants in the case and reconsider who we think are the makers and interpreters of the law. Drawing on local court records and personal papers, this Article is part of a larger story of how people of color and their allies shaped and reshaped the law in far more ways than previously imagined.

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INTRODUCTION

Around midnight on May 31, 1852, while sleeping in their tent in the gold mining region of Northern California, Carter Perkins, Robert Perkins, and Sandy Jones awoke to find themselves staring down the barrel of a gun.[1] It was a chaotic and frightening moment. Standing above them were the shadowy figures of several men. One said he was the sheriff, and another said he was the local constable.[2] The others appeared to be miners, each having followed the rush of primarily young, single men to the Sierra Nevada foothills after gold was discovered near Sutter's Mill four years before.[3] The charge the sheriff and the ragtag group of men leveled against the other three, however, was hardly typical of what one might hear in gold country. There was no allegation of stolen provisions or of mining another's claim. No one suggested that the other three had cheated in a card game or that one of them had danced the fandango with someone's female companion. Rather, the group accused Carter, Robert, and Sandy of being slaves, and informed them that their owner wanted them back.[4]

The men who sought to return Carter, Robert, and Sandy to slavery said they were acting under the authority of the California Fugitive Slave Act of 1852.[5] The legislature had passed the law a month before the sheriff and his posse pushed their way into the remote camp near the American River, following years of contentious debates over slaves and slavery in the expanding West. Two years earlier, California entered the Union as a free state.[6] But the express constitutional provision proclaiming that "neither slavery nor involuntary servitude" shall exist in the state[7] did little to quell the ambitions of Southerners

1. *The Fugitive Slaves Before the Court*, CAL. CHRISTIAN ADVOC., Aug. 5, 1852. Cornelius Cole, who represented Carter, Robert, and Sandy in their case before the California Supreme Court, later detailed the events surrounding the case in an unpublished and undated document. The document is cited throughout this Article, with the understanding that there are some gaps and errors in Cornelius's recollections, including focusing on just one of the three men and calling him "Andy." *See* Andy, Habeas Corpus Case 1–16 (n.d.), Box 29, Folder 2 "Bound Essays by Cornelius Cole," Cole Family Papers, Collection 217, Charles E. Young Research Library, Department of Special Collections, University of California, Los Angeles [hereinafter Cole Family Papers].

2. *The Fugitive Slaves Before the Court*, *supra* note 1.

3. *Id*.

4. *Id*.

5. Act of April 15, 1852, ch. 33, § 1, 1852 Cal. Stat. 67 (1852) [hereinafter California Fugitive Slave Act of 1852].

6. John F. Burns, *Taming the Elephant: An Introduction to California's Statehood and Constitutional Era*, *in* TAMING THE ELEPHANT: POLITICS, GOVERNMENT, AND LAW IN PIONEER CALIFORNIA 1, 9 (John F. Burns & Richard J. Orsi eds., 2003).

7. CAL. CONST. of 1849, art. I, § 18.

who sought to bring their slaves into the country to mine for gold, tend livestock, and extend their empire to the Pacific. With the California Fugitive Slave Act (the only one of its kind in the country), the slaveholding contingent and their Southern-born Democratic allies had finally secured a victory, ensuring that the slaves they brought into the region before statehood would remain slaves, and that the local government would assist in capturing any who thought differently.[8] But the Act also served a more fundamental purpose, signaling in the decade before the Civil War that persons of color could expect few differences in white attitudes towards race in the ever-expanding West. If Californians could not keep people of color out, at least they could limit their basic rights, denying freedom to some even in a free state.

Following the chaotic encounter in the cabin, the sheriff's posse hustled Carter, Robert, and Sandy into a wagon led by a team of mules the three men had purchased with their own earnings.[9] It was still the middle of the night; nonetheless, they took a "circuitous route" out of the mining settlement in an apparent effort to avoid encounters with any friends of the prisoners who might interfere.[10] By the time the sun rose over the mountains, the group was ten miles from camp and a day's journey from Sacramento, where B.D. Fry, a justice of the peace sympathetic to Southern values, sat ready.[11] In a summary hearing, Judge Fry found that Carter, Robert, and Sandy were the slaves of Charles Perkins, the cousin of one of the men who abducted them under cover of night, and declared them fugitives from labor.[12] His order set off a furious response in the Black community and among a handful of antislavery activists—including a young lawyer named Cornelius Cole—but it also sparked an equally strong reply from the supporters of slavery. By the time the California Supreme Court heard oral arguments later that summer, it was clear that the issues that were plaguing the rest of the country in the time before the Civil War were very much a part of the West, namely, what should we do when slavery ran headfirst into freedom?[13]

8. California Fugitive Slave Act of 1852, *supra* note 5, § 1.

9. *The Fugitive Slaves Before the Court*, *supra* note 1.

10. *Id.*

11. *See* Andy, Habeas Corpus Case 10 (n.d.), Box 29, Folder 2, Cole Family Papers, *supra* note 1 ("Justice Fry was a pronounced pro slavery man . . . .").

12. *The Fugitive Slaves Before the Court*, *supra* note 1.

13. *See In re* Perkins, 2 Cal. 424 (1852) (enslaved party).

The case of *In re Perkins* stands at an intriguing crossroads of race, rights, and law.[14] Set in the context of the California Gold Rush, it provides a unique opportunity to reflect on the role of slavery in California, both in the conversations happening at the national level and in the daily lives of people who came. The West, at least in the popular mind, has always factored prominently in the image of the self-made man. It was a place where rugged individualism and a can-do spirit triumphed over nature and adversity. Out there, in the cold riverbeds of the Sierra Nevada, persons from humble beginnings could stake a claim and make a decent living, regardless of family connections or prior successes. Under this version, under which the West takes on an almost mythical identity, there is little room for stories like *In re Perkins* and the realities of nineteenth-century American slavery. This was supposed to be a place for the hardworking and the free, not wealthy owners like Charles Perkins and the three men he enslaved.[15]

As cases like *In re Perkins* demonstrate, however, the story of the West in general and California in particular is far more complicated than popular mythology suggests. Not only were enslaved people present in the region—estimates range from 500 or 600 to as many as 1,500[16]—but even after slavery was outlawed under the Compromise of 1850, it continued to cause disruptions and controversy, both at

14. For an early and in-depth review of the *Perkins* case, see Ray R. Albin, *The Perkins Case: The Ordeal of Three Slaves in Gold Rush California*, 67 CAL. HIST. 215 (1988) [hereinafter Albin, *The Perkins Case*]; *see also* RAY R. ALBIN, WEALTH, LAND AND SLAVEHOLDING IN MISSISSIPPI: A PLANTER FAMILY'S LIFE OF PRIVILEGE, 1818–1913, at 151–83 (2013) [hereinafter ALBIN, WEALTH, LAND AND SLAVEHOLDING IN MISSISSIPPI] (expanding on his earlier work). For other notable discussions, see RUDOLPH M. LAPP, BLACKS IN GOLD RUSH CALIFORNIA 126–57 (1977); STACEY L. SMITH, FREEDOM'S FRONTIER: CALIFORNIA AND THE STRUGGLE OVER UNFREE LABOR, EMANCIPATION, AND RECONSTRUCTION 47–79 (2013) [hereinafter SMITH, FREEDOM'S FRONTIER]; Paul Finkelman, *The Law of Slavery and Freedom in California, 1848–1860*, 17 CAL. W. L. REV. 437, 454–57 (1981); Stacey L. Smith, *Remaking Slavery in a Free State: Masters and Slaves in Gold Rush California*, 80 PAC. HIST. REV. 28, 56–58 (2011) [hereinafter Smith, *Remaking Slavery in a Free State*].

15. This vision of the West as a place where persons could achieve economic freedom has roots in the free-soil movement. For a classic discussion of the era, see ERIC FONER, FREE SOIL, FREE LABOR, FREE MEN: THE IDEOLOGY OF THE REPUBLICAN PARTY BEFORE THE CIVIL WAR (1995).

16. *See* LAPP, *supra* note 14, at 65 (estimating that there were between 500 and 600 enslaved persons in California during the Gold Rush years); SMITH, FREEDOM'S FRONTIER, *supra* note 14, at 237–45 (identifying around 381 enslaved persons in the extant census records but acknowledging that there may be many more who were not counted); Finkelman, *supra* note 14, at 440 (stating that hundreds, perhaps thousands, of Southerners brought enslaved persons to California). Contemporaneous accounts suggest as many as 1,500. *See, e.g.*, Letter from James Pratt to Cornelius Cole 2 (June 3, 1852), Box 2, Folder "Various persons to Cornelius Cole 1851–1859" [hereinafter Folder "1851–1859 Letters"], Cole Family Papers, *supra* note 1 (there "are at least 1500 slaves in the state").

home and in the rest of the country. With thousands of people of color participating in the local economy and asserting their rights, many white Californians lashed out against African Americans with the same vigor as residents of the older states in the Union. And it was not just the enslaved; free people of color were neither wanted nor welcome. "No population that could be brought within the limits of our territory could be more repugnant to the feelings of the people, or injurious to the prosperity of the community, than free negroes," Morton McCarver of Kentucky announced during the California Constitutional Convention.[17] "They are idle in their habits, difficult to be governed by the laws, thriftless, and uneducated. It is a species of population that this country should be particularly guarded against."[18]

This Article recreates the story of *In re Perkins* to highlight the importance of slavery in California's history (even after it was outlawed) and to explore the experiences of those who suffered under it. To that end, this Article is part of a growing body of literature focused on the borderlands and the South's efforts at empire building. There was a time when the Western states and territories were left to the periphery of discussions about slavery and the Civil War, as scholars approached the growing sectional crisis and its aftermath along a North-South axis. Over the last decade and more, however, scholars have greatly expanded our understanding of the period by focusing our attention on those very places where Northerners and Southerners projected their hopes and dreams—places like Kansas, Texas, Mexico, New Mexico, California, and Cuba.[19] With a different orientation, it becomes clear that the battle over slavery and freedom was a national one, with the future of the country depending as much on the old battlegrounds in the North and South as the new ones to the West.[20]

17. J. ROSS BROWNE, REPORT OF THE DEBATES IN THE CONVENTION OF CALIFORNIA, ON THE FORMATION OF THE STATE CONSTITUTION, IN SEPTEMBER AND OCTOBER, 1849, at 137 (Ray A. Billington ed., Arno Press Inc. reprt. ed. 1973) (1850).

18. *Id.*

19. *See, e.g.*, ALICE L. BAUMGARTNER, SOUTH TO FREEDOM: RUNAWAY SLAVES TO MEXICO AND THE ROAD TO THE CIVIL WAR (2020); STEVEN HAHN, A NATION WITHOUT BORDERS: THE UNITED STATES AND ITS WORLD IN AN AGE OF CIVIL WARS, 1830–1910 (2016); MATTHEW KARP, THIS VAST SOUTHERN EMPIRE: SLAVEHOLDERS AT THE HELM OF AMERICAN FOREIGN POLICY (2016); MICHAEL A. MORRISON, SLAVERY AND THE AMERICAN WEST: THE ECLIPSE OF MANIFEST DESTINY AND THE COMING OF THE CIVIL WAR (1997); LEONARD L. RICHARDS, THE CALIFORNIA GOLD RUSH AND THE COMING OF THE CIVIL WAR (2007); SMITH, FREEDOM'S FRONTIER, *supra* note 14; KEVIN WAITE, WEST OF SLAVERY: THE SOUTHERN DREAM OF A TRANSCONTINENTAL EMPIRE (2021).

20. A similar reorientation to include the West has also shaped recent discussions of the Civil War and Reconstruction. *See, e.g.*, CIVIL WAR WESTS: TESTING THE LIMITS OF THE UNITED

Framed as such, this Article finds a comfortable home among the work of those Western historians who have been working to unravel the popular myth of the West as a land of rugged individualism and free (white) labor, casting it instead as a racially diverse place with multiple stories to tell.[21] But with the added perspective of a national spotlight, the Article becomes very much about bridging, as Stacey Smith has put it, "the chasm between the history of the American West and the history of American slavery."[22] Indeed, *In re Perkins* involved the same question that was being litigated in other parts of the country and would eventually be at play in *Dred Scott v. Sandford*, surely the most infamous and most controversial decision in Supreme Court history.[23] The fundamental question involved the status of an enslaved person brought freely onto free soil.[24] Foreshadowing the holding in

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STATES (W. Adam Arenson & Andrew R. Graybill eds., 2015); GREGORY P. DOWNS & KATE MASUR, THE WORLD THE CIVIL WAR MADE (Gregory P. Downs & Kate Masur eds., 2015); HEATHER COX RICHARDSON, WEST FROM APPOMATTOX: THE RECONSTRUCTION OF AMERICA AFTER THE CIVIL WAR (2007); EMPIRE AND LIBERTY: THE CIVIL WAR AND THE WEST (Virginia Scharff ed., 2015); DANIEL SHARFSTEIN, THUNDER IN THE MOUNTAINS: CHIEF JOSEPH, OLIVER OTIS HOWARD, AND THE NEZ PERCE WAR (2017); Stacey L. Smith, *Beyond North and South: Putting the West in the Civil War and Reconstruction*, 6 J. CIV. WAR ERA 566 (2016); Elliott West, *Reconstructing Race*, 34 W. HIST. Q. 1, 6 (2003).

21. For some of the pioneering work, see LAPP, *supra* note 14; W. SHERMAN SAVAGE, BLACKS IN THE WEST (1976); QUINTARD TAYLOR, IN SEARCH OF THE RACIAL FRONTIER: AFRICAN AMERICANS IN THE AMERICAN WEST, 1528–1990 (1998); Howard Lamar, *From Bondage to Contract: Ethnic Labor in the American West, 1600–1890*, *in* THE COUNTRYSIDE IN THE AGE OF CAPITALIST TRANSFORMATION: ESSAYS IN THE SOCIAL HISTORY OF RURAL AMERICA 293 (Steven Hahn and Jonathan Prude eds., 1985). For more recent work, see D. MICHAEL BOTTOMS, AN ARISTOCRACY OF COLOR: RACE AND RECONSTRUCTION IN CALIFORNIA AND THE WEST, 1850–1890 (2013); SHIRLEY ANN WILSON MOORE, SWEET FREEDOM'S PLAINS: AFRICAN AMERICANS ON THE OVERLAND TRAILS, 1841–1869 (2016); SUSAN LEE JOHNSON, ROARING CAMP: THE SOCIAL WORLD OF THE CALIFORNIA GOLD RUSH (2000); SMITH, FREEDOM'S FRONTIER, *supra* note 14; Michael F. Magliari, *Free State Slavery: Bound Indian Labor and Slave Trafficking in California's Sacramento Valley, 1850–1864*, 81 PAC. HIST. REV. 155 (2012). For early histories of African Americans in California, see DELILAH BEASLEY, THE NEGRO TRAIL BLAZERS OF CALIFORNIA (1919); Howard Bell, *Negroes in California, 1849–1859*, 28 PHYLON 151 (1967).

22. SMITH, FREEDOM'S FRONTIER, *supra* note 14, at 5.

23. Dred Scott v. Sandford, 60 U.S. (19 How.) 393, 450 (1857) (enslaved party), *superseded by constitutional amendment*, U.S. CONST. amend. XIV.

24. *See infra* notes 157–179 and accompanying text (discussing freedom suits based on residency). The scholarship on freedom suits has taken off in recent years. For some illuminating works, see KENNETH R. ASLAKSON, MAKING RACE IN THE COURTROOM: THE LEGAL CONSTRUCTION OF THREE RACES IN EARLY NEW ORLEANS (2014); ANDREW FEDE, ROADBLOCKS TO FREEDOM: SLAVERY AND MANUMISSION IN THE UNITED STATES SOUTH (2011); PAUL FINKELMAN, AN IMPERFECT UNION: SLAVERY, FEDERALISM, AND COMITY (2013); ALEJANDRO DE LA FUENTE & ARIELA J. GROSS, BECOMING FREE, BECOMING BLACK: RACE, FREEDOM, AND LAW IN CUBA, VIRGINIA, AND LOUISIANA (2020); KELLY M. KENNINGTON, IN THE SHADOW OF DRED SCOTT: ST. LOUIS FREEDOM SUITS AND THE LEGAL CULTURE OF SLAVERY IN ANTEBELLUM AMERICA (2017); JUDITH K. SCHAFER, BECOMING FREE, REMAINING FREE: MANUMISSION AND

Dred Scott by five years, the decision in *In re Perkins* left an indelible mark on constitutional jurisprudence and the extent of slavery's reach.

As much as this Article is about situating the West into the national discourse over slavery, however, it is also very much a local, on-the-ground narrative about slavery in California.[25] The Article does not begin with the Supreme Court's decision in *Dred Scott* or even the California Supreme Court's decision in *In re Perkins*. Rather, it ends there, with much of the work spent recreating the story from the bottom up, from the decision to go west, to life in the gold mines, to the actions in the lower court. Told from the perspective of the main characters in the case, the approach fosters a nuanced discussion of the issues playing out on the bigger stage.[26] Drawing on a host of primary sources—often found only by time-consuming trips to local courthouses, libraries, and museums—the purpose is to explore the experiences of real people, both Black and white, as institutions and racial attitudes expanded westward along with the people who came.

To that end, this Article taps into an emerging body of literature challenging us to rethink who counts as the makers and interpreters of the law.[27] Traditionally, the law has been viewed as akin to the whip. It was a tool of oppression to reinforce and support slaveholding interests and white racial attitudes. With the focus on lived experience, however, there is greater opportunity to consider how people of color participated in the laws that governed them. Scholars such as Emily Blanck, Laura Edwards, Ariela Gross, Martha Jones, Lea VanderVelde, Kimberly Welch, and others, including this author, have explored this idea through what some call African American "claims-

ENSLAVEMENT IN NEW ORLEANS, 1846–1862 (2003); LOREN SCHWENINGER, APPEALING FOR LIBERTY: FREEDOM SUITS IN THE SOUTH (2018); ANNE TWITTY, BEFORE DRED SCOTT: SLAVERY AND LEGAL CULTURE IN THE AMERICAN CONFLUENCE, 1787–1857 (2016); and LEA VANDERVELDE, REDEMPTION SONGS: SUING FOR FREEDOM BEFORE DRED SCOTT (2014). For my own work, see Jason A. Gillmer, *Suing for Freedom: Interracial Sex, Slave Law, and Racial Identity in the Post-Revolutionary and Antebellum South*, 82 N.C. L. REV. 535 (2004).

25. Though narratives—as opposed to more argument-driven analyses of multiple cases—are not frequently used in legal scholarship, they are quite common in historical literature. Narratives are also central to Critical Race Theory. *See* KHIARA M. BRIDGES, CRITICAL RACE THEORY: A PRIMER 58–73 (2018).

26. *See* MARTHA S. JONES, BIRTHRIGHT CITIZENS: A HISTORY OF RACE AND RIGHTS IN ANTEBELLUM AMERICA 12 (2018) ("The authority that a locally grounded study cedes in terms of breadth, it gains many times over in depth and complexity.").

27. *See* Alfred L. Brophy, *Slaves as Plaintiffs*, 115 MICH. L. REV. 895, 895 (2017) (reviewing recent trends in slavery scholarship).

making."[28] Drawing on the old court records and personal stories, these efforts have revealed how free persons of color and enslaved men and women shaped and reshaped the law far more than previously realized. Sometimes it was an act of resistance—refusing to abide by a law—but other times it meant going into court and asserting a right. Either way, Chief Justice Taney's infamous utterance that Black persons "had no rights which the white man was bound to respect" has come to feel more like the wishful thinking of a slaveholder rather than an on-the-ground reality.[29]

Part I introduces the Perkins family and discusses the environment in which Charles Perkins emigrated from Mississippi to California, bringing an enslaved man with him. As this part notes, it was an exciting time for the adventurous. Gold had just been discovered, and tens of thousands were journeying across the country and the world to claim their share. But it was also a time of political unrest, with California and its status as free or slave taking center stage in the growing sectional crisis. Viewed through the lens of Charles's emigration west, this part explores the efforts and legal arguments of proslavery Southerners to turn California into a slave state.

Part II then ventures into gold country. It sets out the reasons why so many in the mining districts were opposed to slavery, and then turns to the role enslaved persons played in undermining the institution, despite the efforts of slaveholders like Charles. Part III picks up with a brief discussion of California's admission to the Union under the Compromise of 1850, and then looks at Charles's decision to return home without his slaves in 1851. Shifting the focus back to the national scene, this part explores the trend in the so-called freedom-by-residence cases in other states and discusses how they may have shaped Charles's thinking.

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28. *See* EMILY BLANCK, TYRANNICIDE: FORGING AN AMERICAN LAW OF SLAVERY IN REVOLUTIONARY SOUTH CAROLINA AND MASSACHUSETTS (2014); LAURA F. EDWARDS, THE PEOPLE AND THEIR PEACE: LEGAL CULTURE AND THE TRANSFORMATION OF INEQUALITY IN THE POST-REVOLUTIONARY SOUTH (2009); ARIELA J. GROSS, WHAT BLOOD WON'T TELL: A HISTORY OF RACE IN AMERICA (2008); JASON A. GILLMER, SLAVERY AND FREEDOM IN TEXAS: STORIES FROM THE COURTROOM, 1821–1871 (2017); JONES, *supra* note 26; KIMBERLY M. WELCH, BLACK LITIGANTS IN THE ANTEBELLUM AMERICAN SOUTH (2018); VANDERVELDE, *supra* note 24; Laura F. Edwards, *Status Without Rights: African Americans and the Tangled History of Law and Governance in the Nineteenth-Century U.S. South*, 112 AM. HIST. REV. 365 (2007); Martha S. Jones, *Leave of Court: African American Claims-Making in the Era of* Dred Scott v. Sandford, *in* CONTESTED DEMOCRACY: FREEDOM, RACE, AND POWER IN AMERICAN HISTORY 54 (Manisha Sinha and Penny Von Eschen eds., 2007).

29. Dred Scott v. Sandford, 60 U.S. (19 How.) 393, 407 (1857) (enslaved party), *superseded by constitutional amendment*, U.S. CONST. amend. XIV.

Parts IV and V delve into the details of the case, from the passage of the California Fugitive Slave Act to the California Supreme Court's decision. A new character, in the form of the attorney who represents the three men in their effort to be free, is also introduced, along with the judges who decided the case at the various stages of litigation. Parts IV and V also develop a concurrent storyline about an emerging local Black community who helped draw attention to the case, to highlight some of the ways people of color shaped discussions about the law. Finally, the Article concludes with the aftermath of the case, highlighting the ripple effects it had on slavery and race relations in California and on the infamous *Dred Scott* decision.

I. SLAVERY AND THE GOLD RUSH: SOUTHERN EMIGRATION AND THE FORESHADOWING OF *DRED SCOTT*

A. "Almost everybody is going to California"

At the start of 1849, with only a slight flare for the dramatic, the *New York Herald* declared, "Almost everybody is going to California."[30] It was an exciting time for people such as Charles Perkins, the slaveholder who would sue to get his slaves back. Some 40,000 people had already booked passage out of one of the eastern seaboards following the discovery of gold on the South Fork of the American River the previous spring, and the mad rush was sure to continue.[31] "Companies are forming all over the Union, bound for the gold 'diggins' of California," proclaimed the Jackson *Mississippian*, a prominent newspaper from Charles's home state.[32] The *Free Trader* from nearby Natchez, too, noted that a delegation from the city was preparing to leave in the spring.[33]

For Charles, the California Gold Rush presented the chance of a lifetime, a coming-of-age experience filled with adventure and untold possibilities. In his early twenties, Charles was the eldest son of William and Jane (Stewart) Perkins, one of the wealthiest families in Bolivar County, on the border with Louisiana.[34] In 1850, their plantation

30. *The Rush to California: Incidents on the Rise*, N.Y. HERALD, Jan. 22, 1849.

31. RICHARDS, *supra* note 19, at 20. For a valuable primer on the Gold Rush, see MALCOLM J. ROHRBOUGH, DAYS OF GOLD: THE CALIFORNIA GOLD RUSH AND THE AMERICAN NATION (1997).

32. *Emigration to California*, MISSISSIPPIAN, Dec. 29, 1848.

33. *What Ho! For California*, MISS. FREE TRADER, Jan. 20, 1849.

34. U.S. CENSUS BUREAU, 1850 CENSUS, SCHEDULE 1—FREE INHABITANTS IN THE COUNTY OF BOLIVAR, STATE OF MISSISSIPPI, s.v. "William P. Perkins"; *see also* 2 BIOGRAPHICAL AND

was valued at $40,000 (close to $1.5 million in today's dollars) and was said to consist of some of the "most productive cotton land in the Yazoo delta."[35] The family also owned slaves—lots of them. In 1850, the census reported that they owned a jaw-dropping 166 people, making them the largest slaveholding family in the county.[36] By all measurements the number of people they enslaved was extraordinary, even in a state devoted to the cotton economy and large-scale agriculture. As a comparison, a decade later about half of the families in Mississippi owned slaves, but of those that did, half enslaved five or less.[37] In that same year, only 13 families in the county counted more than 100 people as property, and only 37 families in the entire state counted more than 200.[38]

Charles made the decision to go to California in the summer of 1849.[39] When he did, he also decided to bring one of the family's slaves. His name was Carter, and if the records can be trusted, Carter was eighteen or nineteen years old when they left.[40] It is not known why Charles picked Carter to accompany him. Perhaps it was his age—mining was thought to be a young man's game, standing in the

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HISTORICAL MEMOIRS OF MISSISSIPPI (The Reprint Co., Publishers 1978) (1891). Charles was born between 1825 and 1830. *See* U.S. CENSUS BUREAU, 1830 CENSUS, COUNTY OF WILKINSON, STATE OF MISSISSIPPI, s.v. "Wm P Perkins" (listing one white male child under the age of 5). His exact age is difficult to determine, however, because he does not appear in the 1850 census, where ages are listed. For general background on the Perkins family, see ALBIN, WEALTH, LAND AND SLAVEHOLDING IN MISSISSIPPI, *supra* note 14, at 1–118.

35. BIOGRAPHICAL AND HISTORICAL MEMOIRS OF MISSISSIPPI, *supra* note 34, at 586. For the value of his real estate, see U.S. CENSUS BUREAU, 1850 CENSUS, SCHEDULE 1—FREE INHABITANTS IN THE COUNTY OF BOLIVAR, STATE OF MISSISSIPPI (1850).

36. U.S. CENSUS BUREAU, 1850 CENSUS, SCHEDULE 2—SLAVE INHABITANTS IN THE COUNTY OF BOLIVAR, STATE OF MISSISSIPPI, s.v. "William Perkins" (listing 81 enslaved persons); *id.* s.v. "William Paquinette as agent for W.P. Perkins" (listing an additional 85 persons); *see also* ALBIN, WEALTH, LAND AND SLAVEHOLDING IN MISSISSIPPI, *supra* note 14, at 108–09 (noting that, with 166 slaves, William was the largest slaveholder in the county in 1850).

37. In 1860, there were 63,015 families in Mississippi. U.S. CENSUS BUREAU, STATISTICS OF THE UNITED STATES IN 1860, at 345 (1866). Of those, 30,943 owned slaves, or 49 percent. U.S. CENSUS BUREAU, AGRICULTURE OF THE UNITED STATES IN 1860, at 232 (1864) [hereinafter U.S. CENSUS: 1860. AGRICULTURE]. Moreover, of the 30,943 slaveholding families, 14,498 (or 47 percent) owned five or less enslaved persons. *Id.*

38. U.S. CENSUS: 1860. AGRICULTURE, *supra* note 37, at 232.

39. *See generally The Fugitive Slaves Before the Court*, *supra* note 1 (providing details of trip).

40. Carter's age is based on the 1852 census, where he appears under the name "Charles" Perkins next to his two companions, Robert Perkins and Sandy Jones. At the time, they were in custody in San Francisco awaiting the hearing before the California Supreme Court. STATE CENSUS, 1852, SCHEDULE 1—INHABITANTS IN THE COUNTY OF SAN FRANCISCO, STATE OF CALIFORNIA [hereinafter 1852 CALIFORNIA STATE CENSUS, SAN FRANCISCO], s.v. "Charles Perkins" (listing age in 1852 as 22). Carter's age in the census also matches his age in an article about the Perkins case. *See The Fugitive Slaves Before the Court*, *supra* note 1.

icy cold river with the sun beating down, sifting through dirt and mud all day. A person also needed to be strong and willing to work, and perhaps Carter had demonstrated both, toiling away in the cotton fields. Regardless, it is unlikely that Carter had much say in the decision. He had learned from a young age to pick his battles with whites carefully, especially those who claimed to hold ownership rights over him. He knew that Mississippi law, as well as the law of the plantation, permitted the Perkins family to exercise dominion and control over his body. He could be forced to work, be whipped for the slightest offense, or be sold to satisfy a family debt. Indeed, at some point in his life, he was apparently separated from his kin, either in Virginia where he was born, or in Tennessee where he lived for a time.[41] If Charles had decided that he wanted Carter to go, that was likely the end of the matter.

As a slaveholder, Charles's decision to bring Carter to California was not without risk. To be sure, prior to the discovery of gold, there were few outside President Polk's Democratic Party who thought the war with Mexico and the acquisition of a vast and arid wasteland was worth it. People openly wondered whether "California will ever become of any great importance in the history of the world, or advance to any conspicuous position, either agriculturally, commercially or politically."[42] The soil was simply "hopelessly sterile," and everything was "burned up from the want of rain."[43] The discovery of gold in the spring of 1848, however, put the country on notice that California would be the next battleground in the contest over one of the most important matters of the day. As things stood, following the acquisition of Texas in 1845, there were fifteen free states and fifteen slave states. With California's population growing, and talk of its admission looming, the delicate balance between North and South would be difficult to maintain.

41. *See* 1852 CALIFORNIA STATE CENSUS, SAN FRANCISCO, *supra* note 40, s.v. "Charles Perkins" (listing Carter's birthplace as Virginia). According to Albin, William Perkins acquired Carter from his brother Daniel upon the latter's death. ALBIN, WEALTH, LAND AND SLAVEHOLDING IN MISSISSIPPI, *supra* note 14, at 68, 131–32. Daniel had moved to Mississippi from Tennessee around 1830. *Id.* at 41–42.

42. *Oregon and California*, 1 DEBOW'S REV. 64, 65 (1846).

43. *Id.* at 66.

B. "The Southern man has the right to remove into California with his slaves"

For Southerners, concerns about California and the larger slavery question dated back several years before the Gold Rush, to 1846. At that time, a little-known Pennsylvania Democrat in the U.S. House of Representatives named David Wilmot sponsored an amendment to an appropriations bill requested by President Polk to facilitate a treaty with Mexico and to buy California. Known as the Wilmot Proviso, the amendment prohibited slavery in any territory obtained by virtue of the appropriation.[44] Southern slaveholders were livid. The proviso was designed to cut them out of the entire territory, stretching from Texas across New Mexico and Utah all the way to the Pacific. Making matters worse, in the minds of Southerners, was that Wilmot was no radical abolitionist; rather, he belonged to the same Democratic Party that they did. In a position that forecasted the growing sectional crisis, Wilmot was among a growing faction of Northern Democrats opposed to slavery because they wanted to create opportunities out west for white settlers. "I have no squeamish sensitiveness upon the subject of slavery," Wilmot announced from the floor of the House, "no morbid sympathy for the slave. I plead the cause and the rights of white freemen. I would preserve for free white labor a fair country, a rich inheritance, where the sons of toil, of my own race and own color, can live without disgrace which association with negro slavery brings upon free labor."[45] The measure passed the House but died in the equally divided Senate, where a new appropriations bill, without the proviso, was pushed through and became law.

Despite its defeat, the Wilmot Proviso unnerved Southern slaveholders and those sympathetic to their concerns. If Northern Democrats deserted their party and voted against slavery's expansion, the hard-fought balance in Congress would forever be destroyed, as the North steadily took control of the upper chamber and, with it, all decisions regarding slavery. It therefore was not enough to defeat the amendment; arguments would have to be made to demonstrate it was unconstitutional. The ardent proslavery senator John C. Calhoun of South Carolina took the lead. He maintained that the territories acquired by the United States were common property belonging to the states, and as such the federal government could not restrict who could

44. *See generally* MORRISON, *supra* note 19, at 41; RICHARDS, *supra* note 19, at 63–64.
45. CONG. GLOBE, 29th Cong., 2nd Sess. 317 (1846).

move there or, more important, what they could bring, without violating the right to property guaranteed by the Fifth Amendment's Due Process Clause. In fact, quite the contrary. "The Southern man has the right to remove into California with his slaves—he has the right to hold them as property in that territory; and so far from having the power to exclude him, it is the duty of Congress to protect him in this right."[46]

Calhoun's position was one with which most Southerners were familiar—and no doubt agreed—including Charles and his family. They were too well versed in the laws of slavery and the politics of the day to think otherwise. The Mississippi papers they read made regular reference to it. "Congress having no power over the institution of slavery, it can exercise no right of prohibiting the immigration of the citizens of the South with their slave property," the *Mississippian* intoned in the early days of the Gold Rush.[47] It became the official position of much of the South. Congress had no right to interfere with slavery in California. Instead, the question should be put to the people once there was a sufficient population to fairly address the question. "[W]e are clearly of the opinion that the subject of slavery in California should be left untouched, until a convention of delegates shall meet to form a State constitution," said the *Mississippian*.[48]

With the slavery question an open one, at least in the minds of Charles and his fellow Mississippians, proslavery advocates did their best to encourage Southern slaveholders to emigrate to California to ensure they had enough votes when the question was eventually put to the people. "The South should not be inactive at this great crisis," warned the *Mississippian*.[49] "We can have slavery in California, shall we only *will it*."[50] A much-discussed proposal came from Robert Howard of Georgia. He sought to organize a company of 500 young men who would each bring "at least one, and not more than four slaves" to California with the express purpose of ensuring it became a slave state, or at the least providing a large enough population that slave property would be protected.[51] A member of the Alabama

46. *The Gold Mines—Southern Proposition in Reference to the Slavery Question in California*, N.Y. HERALD, Apr. 21, 1849.

47. *Settlement of the Southern Question*, MISSISSIPPIAN, Dec. 7, 1849.

48. *Mr. Benton and California*, MISSISSIPPIAN, Apr. 6, 1849.

49. *Slavery in California*, MISSISSIPPIAN, Nov. 9, 1849.

50. *Id.*

51. *The Gold Mines—Southern Proposition in Reference to the Slavery Question in California*, *supra* note 46.

legislature proposed a similarly ambitious scheme. He urged the state to "purchase one hundred negro fellows, able and likely, without blemish, between the ages of 22 and 30 years, to be sent immediately to the gold mines in California."[52] The proceeds from the mines would be used to pay the debts of the state, and "the enterprise would be calculated to have an important influence politically in favor of the south."[53]

As they waged their campaign to encourage Southern slaveholders to emigrate to California, local leaders from Charles's home state did their best to highlight slavery's potential in the territory. "A portion of the work at the mines—the excavating, is hard and difficult, and must be accomplished by manual labor—hence the great necessity and advantage of the services of able bodied negroes," read a story in the *Mississippian*.[54] Indeed, whatever it may have thought about California and its barren landscape before, once the Gold Rush started, the *Mississippian* became convinced of the "profitable merits of slave labor."[55] "Every day only shows the productiveness of the country in minerals, and we believe that slave labor in mines can be worked to greater advantage than free labor," it said.[56] Notably, some slaveholders had experience using slave labor in the mines, having led a gold rush of sorts twenty years earlier in the hills of North Carolina.[57] With California came even greater opportunity, as the need for an enslaved population—at least according to the institution's ardent backers—would only continue to grow. As it stood, according to the *Mississippian*, slaves were in such high demand that an enterprising slaveholder might even bring extra slaves to the region and hire them out for $200 per month, or sell them for the outrageously high price of two or three thousand.[58]

As optimistic as Charles and his father might have been about their right to carry someone like Carter to California—and the profits they might accrue—the legal question was not without dissent, as even they knew. Even without Congressional action, an argument could be

52. *Slave Colonies in California*, DEMOCRATIC TEL. & TEX. REG., Dec. 6, 1849.
53. *Id.*
54. *Carrying Slaves to California*, MISSISSIPPIAN, Nov. 9, 1849.
55. *The Country of California Adapted to Slave Labor*, MISSISSIPPIAN, Oct. 26, 1849.
56. *Id.*
57. *See* Otis E. Young, *The Southern Gold Rush, 1828–1836*, 48 J. S. HIST. 373 (1982).
58. *The Country of California Adapted to Slave Labor*, *supra* note 55. The amounts were likely exaggerations. *See* Smith, *Remaking Slavery in a Free State*, *supra* note 14, at 39 (discussing slave hiring in California and the prices that went with it).

made that, since the land was acquired from Mexico, and Mexico prohibited slavery, slavery could not exist in the territory.[59] Before the year was out, the *Natchez Courier* reported on a California case reaching that exact conclusion. The case involved a lawsuit against a Black man, brought to California as a slave, for a sum of money due on a note. A question was raised about his ability to be sued, for if he was a slave, the suit would have to be brought against his owner. "The Alcalde held that the Mexican law prohibited slavery in California, that there was no law to the contrary, and ordered the writ to issue against the negro."[60]

Adding to the uncertainty, there were naysayers, such as Senator Thomas Hart Benton from Missouri, who simply thought that slavery could only exist through positive law. And where that *law* did not exist—like in California—*slavery* did not exist.[61] The argument flew in the face of the *Mississippian*'s position adopting Senator Calhoun's reasoning, but it was discussed enough that the paper felt compelled to publicly point out the "flimsy basis" on which the contention rested.[62] "By the express terms of the constitution, and by numerous laws and treaties of the United States, a right of property in our slaves is clearly admitted," the paper announced early on, in an argument often repeated.[63] As such, "[b]eing property, our constitutional right to introduce them into the territories of the United States, and to be protected while there is our ownership over them, cannot be questioned."[64]

The argument foreshadowed by almost a decade the U.S. Supreme Court's controversial holding in *Dred Scott v. Sandford*. In fact, far from articulating a novel take on the Due Process Clause, Chief Justice Taney simply adopted the position of Southern fire-eaters during the California controversy. At issue in *Dred Scott* was the Missouri Compromise, which barred slavery in the territories north of the 36° 30' parallel. In striking the law down, the Court in 1857 held that "an act of Congress which deprives a citizen of the United States of his . . .

59. *See* BAUMGARTNER, *supra* note 19, at 157 (citing two cases where California courts ruled that Mexico's laws prohibited slavery).

60. *Legal Decision*, NATCHEZ COURIER, Dec. 4, 1849.

61. The argument that slavery could only be supported by positive law can be traced back at least as far as the English case, *Somerset v. Stewart*. Somerset v. Stewart (1772) 98 Eng. Rep. 499, 501 (KB) ("[T]he air of England [is] too pure for slavery.").

62. *The Fallacy of the Position*, MISSISSIPPIAN, June 8, 1849.

63. *Wilmot Proviso*, MISSISSIPPIAN, Feb. 2, 1849.

64. *Id.*

property, merely because he . . . brought his property into a particular Territory of the United States, and who had committed no offence against the laws, could hardly be dignified with the name of due process of law."[65] Incorporating the position of John Calhoun and the *Mississippian* into his opinion, Taney made a point to note that slavery as an institution was protected by the Constitution. Article I, Section 9 guaranteed the uninterrupted right to engage in the slave trade for the first twenty years, and Article IV, Section 2, the so-called Fugitive Slave Clause, pledged the resources of the federal government to protect slavery in the future, should an enslaved person escape from their owner.[66] "And no word can be found in the Constitution which gives Congress a greater power over slave property, or which entitles property of that kind to less protection than property of any other description," the Court said.[67] "The only power conferred is the power coupled with the duty of guarding and protecting the owner in his rights."[68]

Charles, of course, had no way of knowing that the constitutional theories honed by Southerners during the California Gold Rush would eventually become the supreme law of the land. But he and other slaveholders had enough confidence in the argument that they decided it was worth the risk to emigrate with their slaves. They saw the potential for riches and thought slave labor was the best method to achieve it. "The adventurers from the south are pouring into California with slaves," the *Raymond Gazette* from Hinds County, Mississippi, enthused in the spring of 1849, in an article that may have helped convince Charles to bring Carter.[69] "A number of those who have gone from this town and neighborhood are thus situated; and we learn that one individual of Tensas, Louisiana, is about leaving for that country with twenty to thirty slaves."[70] If people such as Charles or his father had doubts, the *Mississippian* did its best to disabuse them of their notions. It cited several examples where slaveholders from the state had emigrated to California with their slaves. "Now let us remark," it

65. Dred Scott v. Sandford, 60 U.S. (19 How.) 393, 450 (1857) (enslaved party), *superseded by constitutional amendment*, U.S. CONST. amend. XIV.

66. *See id.* at 451–52.

67. *Id.* at 452.

68. *Id.*

69. *The California Territorial Bill*, RAYMOND GAZETTE, Mar. 16, 1849.

70. *Id.*

said with emphasis, "*not a single instance has occurred where the right to hold slaves has been questioned in California*."[71]

II. SLAVERY AND THE GOLD MINES: THE CALIFORNIA CONVENTION AND EVERYDAY LIFE IN THE DIGGINGS

A. "[G]old is where you find it"

Encouraged by local leaders, and with the support of his family, Charles left Mississippi for California in late spring or early summer of 1849, taking Carter with him.[72] Following a longer-than-expected trip on the Panama route (one of three ways to California), they arrived in San Francisco in early October.[73] Once there, they made their way up to the emerging town of Sacramento, where they outfitted themselves with the essential mining supplies—a large tin pan, a small hand pick, a stiff-bladed knife, and a handheld shovel.[74] In an effort to beat the rainy season by a month or two, they quickly left the city and climbed the long, steep hills covered in brown grasses and leafy oaks, until they reached an "obscure camp" in El Dorado County, not too far from the original discovery of gold at Sutter's Mill.[75]

With a bit of practice, Charles and Carter soon learned the secrets of the trade. Shoveling dirt into a pan, they submerged it into the water, rocked it back and forth to get a whirlpool effect, and then allowed the lighter dirt and sand to wash over the lip until only the heavier gold was left at the bottom. The gold they found was known as "scale" gold because of its resemblance to fish scales, having been pounded into that shape by the loose rocks in the water over centuries.[76] According

71. *Carrying Slaves to California*, *supra* note 54.

72. *See For California via Chagres*, NEW ORLEANS DAILY CRESCENT, June 28, 1849 (listing "Charles Perkins and servant" as passengers on board the brig *Octavia*, bound for Chagres, Panama); *see also The Fugitive Slaves Before the Court*, *supra* note 1 (providing brief background on trip); ALBIN, WEALTH, LAND AND SLAVEHOLDING IN MISSISSIPPI, *supra* note 14, at 119–26.

73. *The Fugitive Slaves Before the Court*, *supra* note 1. There were three primary routes to California at the start of the Gold Rush: around Cape Horn, across the country, and through Panama. ROHRBOUGH, *supra* note 31, at 55. There were regular delays in Panama during the summer of 1849 because the number of Argonauts arriving on the eastern port of Chagres far outpaced the number of ships leaving from the western port of Panama City for California. *See* RICHARDS, *supra* note 19, at 25–26.

74. Early Mining in California 20 (n.d.), Box 29, Folder 2, Cole Family Papers, *supra* note 1.

75. *See* Andy, Habeas Corpus Case 7 (n.d.), Box 29, Folder 2, Cole Family Papers, *supra* note 1 (stating that Charles had mined in an "obscure camp" in El Dorado County). According to Cole, the mining season in 1849 ended around the middle of December. CORNELIUS COLE, MEMOIRS OF CORNELIUS COLE 66 (1908).

76. Early Mining in California 18 (n.d.), Box 29, Folder 2, Cole Family Papers, *supra* note 1.

to Cornelius Cole, the lawyer who would eventually represent Carter in his suit to be free, it could be found just about anywhere, "in clay, in sand, in gravel, in loam, among rocks in the river and at the river's side, and away from the river where the water had once been."[77] In other words, as the old saying went, gold was "where you [found] it."[78]

The technique Charles and Carter employed was known as placer mining, and it fed the narrative that even those from humble origins could strike it rich. Not that the work was easy—to the contrary. Miners had to stand all day in a river that was ice cold from snowmelt, sifting through dirt and sand, while the California sun beat down mercilessly on their neck and shoulders. David Gardiner arrived in California from New York in the summer of 1849 and detailed his experience to family back home. "The labor attending our mining operations I can assure you was of the most laborious kind," he said.[79] "We had to move rock and stones and excavate through beds of slate rock by means of picks and crowbars in mud and water up to our knees."[80]

Life in the gold fields was not just physically exhausting. It was also so remote and sparsely settled that even the most hardy Argonauts could not help but miss some of the amenities from back home. Most everyone lived under a canvas tent, and there were no roads, no paths, "nor hardly so much as a trail anywhere."[81] Their diets were meager. People subsisted on "Chili flour, not of good quality, and rusty salt pork, the latter bearing evidence, both in color and odor, of having made at least one, and probably more than one, voyage around Cape Horn."[82] It was also so hot and dry during the summer, according to Gardiner, "that it is impossible to keep one's clothes clean and everyone is covered from head to foot with dust."[83]

Adding to the discomforts and disappointments, mining was also a lonely existence. Gold seekers regularly pined for news from back home, passing around old newspapers, chatting about old friends, and hoping that a letter would finally make its way to the mines. Gardiner

77. *Id.* at 19.

78. *Id.*

79. Letter from David L. Gardiner to Mother 2 (June 15, 1849), Box 1, Folder 1, David L. Gardiner Letters, BANC MSS 2006/127, Bancroft Library, University of California, Berkeley [hereinafter Gardiner Letters].

80. *Id.*

81. Lynching Case at Jackson 29–30 (n.d.), Box 29, Folder 2, Cole Family Papers, *supra* note 1.

82. COLE, *supra* note 75, at 62.

83. Letter from David L. Gardiner to Juliana Gardiner (Aug. 1, 1849), Box 1, Folder 2, Gardiner Letters, *supra* note 79.

was beside himself when a steamer finally brought several letters after a long delay. "They were a source of great pleasure and gratification to me as you may well imagine situated as I am alone in this far off region," he told his mother wistfully.[84] George Murrell, who also came in 1849, voiced another frequent complaint: the lack of women.[85] "There are but few ladies in California," he wrote despairingly to his mother.[86] "In fact, I seldom ever see one's face. I would give a good deal to see some of the fair daughters of old Ky. It would do me a *heap* of good."[87]

In such an environment, it was inevitable that conflicts would arise. Men drank and gambled and danced the fandango with Spanish-speaking companions, and fights seemed to erupt the more people engaged in each, which was a lot. "The gambling houses of San Francisco do a larger business in one day than those of New York do in a week," Gardiner proclaimed.[88] Stealing was also common, as were accusations of mining another's claim. But with little in the way of organized government or formal rules of law, miners were left to resolve their disputes in the type of fashion that made sense to a frontier community.[89] "Lawyers is [sic] not much required," one early resident proudly proclaimed, "as that great principal [sic] of democracy . . . settles all disputes in this community, and we have no coroner's inquests to make trouble, if a fellow happens to die of a suddent [sic]."[90]

B. "There were many slaves in various parts of the mines working with their masters"

Still, for many young men, the excitement of the adventure and the potential for success greatly outweighed the daily hardships. "My health is excellent, my hopes are high, & I am pushing things along," George Murrell told his mother, even after two disappointing years in

84. Letter from David L. Gardiner to Mother 1 (Aug. 23, 1849), Box 1, Folder 2, Gardiner Letters, *supra* note 79.

85. In 1850, there were 85,580 males and 7,017 females in California, a ratio of more than twelve males to every female. U.S. CENSUS BUREAU, CENSUS OF 1850: STATISTICS OF CALIFORNIA 969, tbl. I [hereinafter STATISTICS OF CALIFORNIA].

86. Letter from George Murrell to Elisabeth R. Murrell 2 (Oct. 15–17, 1849), George McKinley Murrell Correspondence Collection, MSSHM 36338-36403, Henry E. Huntington Library, San Marino, California [hereinafter Murrell Correspondence Collection].

87. *Id.*

88. Letter from David Gardiner to John Tyler 2 (Sept. 1849), Box 1, Folder 2, Gardiner Letters, *supra* note 79.

89. *See* ROHRBOUGH, *supra* note 31, at 218–20.

90. *California Correspondence*, DAILY ALTA CAL., July 19, 1849.

gold country.[91] In many respects, George and Charles Perkins were a lot alike. Not only did they come to California around the same time, they also tried their hand in mining camps near each other in El Dorado County. They were also from wealthy slaveholding families.[92] When George came, he brought an enslaved man named Rheubin. And much like Charles with Carter, he depended on Rheubin not only to cook and wash his clothes, but also to clamber down to the water and dig for gold. Working together—George with Rheubin and Charles with Carter—they could essentially double their output, taking whatever the enslaved men found and adding it to their own.

Census records reveal that Charles and George were not alone. In mining camps throughout the region, pockets of slaveholders with their slaves dug side-by-side.[93] In Mariposa County, for example, Abram Powell from Alabama mined with a Black man named Richard, listed in the census as his "servant" to avoid suspicion.[94] Thomas Thorn, a slaveholder from North Carolina, also settled there with ten of his Black "servants."[95] Nearer to Charles and George, in El Dorado County, William Marmaduke of Kentucky camped with an enslaved man named Bob, and later hired him out as cook.[96] Though never a majority, the presence of enslaved persons was definitely felt. "There were many slaves in various parts of the mines working with their masters," observed J.D. Borthwick, a Scot who spent three years in California.[97]

As both Charles and George would learn, however, most of the people who settled in the mines were opposed to slavery—as much as 90 percent, according to the early newspaper, the *Californian*.[98] The

91. Letter from George Murrell to Elisabeth R. Murrell 1 (July 22–23, 1851), Murrell Correspondence Collection, *supra* note 86.

92. For more on George Murrell and his family, see Albert S. Broussard, *Slavery in California Revisited: The Fate of a Kentucky Slave in Gold Rush California*, 29 PAC. HIST. 17 (1985); Jane Apostol, *"The Fickel Godess Evades Me" The Gold Rush Letters of a Kentucky Gentleman*, 79 REG. KY. HIST. SOC'Y 99 (1981).

93. A majority of slaveholders settled in the Southern Mines, which lay south of the San Jacinto River, including Mariposa County. *See* SMITH, FREEDOM'S FRONTIER, *supra* note 14, at 42 ("The Southern Mines lay closer to the end of the southern overland trail to the Pacific and became the destination of large numbers of slaveholders.").

94. U.S. CENSUS BUREAU, 1850 CENSUS, SCHEDULE 1—FREE INHABITANTS IN THE COUNTY OF MARIPOSA, STATE OF CALIFORNIA, s.v. "Abrom Powel."

95. *Id.* s.v. "Thos. Thorne."

96. Letter from William D. Marmaduke to Elmira 2 (Mar. 6, 1850), William D. Marmaduke Letters Collection, MS 1403, North Baker Research Library, California Historical Society, San Francisco, California.

97. J.D. BORTHWICK, THREE YEARS IN CALIFORNIA 164 (1857).

98. *Slavery in California*, CALIFORNIAN, Mar. 15, 1848.

reason had little to do with the rights of Black people; it was instead about preserving financial independence and reducing competition. "[N]ot one in ten cares a button for [slavery's] abolition, nor the Wilmot proviso either," wrote Walter Colton.[99] Colton was the alcalde of Monterey (the chief administrative and judicial officer of a town), and he explored the mining region in the summer of 1848 and got a firsthand look at the people who were there.[100] "[A]ll they look at is their own position; they must themselves swing the pick, and they wont [sic] swing it by the side of negro slaves."[101]

Indeed, for many white miners, slavery was a problem because of the threat it posed to the egalitarian promise of the West and their own democratic ideals.[102] Slave labor profited a few at the expense of the many, interfering with the dream of white Argonauts to find gold and turn their luck around. "Nowhere could there be less pretext for the introduction of slavery than in California," insisted the *California Star*, the *Californian*'s rival paper.[103] The *California Star* went so far as to suggest that a whopping 99 percent of the population was opposed to its introduction, outdoing its rival by 9 percent.[104] The institution, should it be allowed, "would make it disreputable for the white man to labor for his bread, and it would thus drive off to other homes the only class of emigrants California wishes to see; the sober and industrious middle class of society."[105]

The oft-told story of Thomas Jefferson Green illustrates in vivid detail how this view played out in daily life.[106] Green was a brigadier general in the Texas Revolution, and like many who fought for independence from Mexico, he had no doubt hoped that with enough grit and determination slavery would eventually be legalized in California, just like it was in Texas.[107] He arrived in the summer of 1849, settling

99. WALTER COLTON, THREE YEARS IN CALIFORNIA 374 (1850).

100. *Id.* at 17.

101. *Id.* at 374.

102. *See* FONER, *supra* note 15, at 301–17; EUGENE H. BERWANGER, THE FRONTIER AGAINST SLAVERY: WESTERN ANTI-NEGRO PREJUDICE AND THE SLAVERY EXTENSION CONTROVERSY 60–77 (2002).

103. *Shall We Have Slavery in California?*, CAL. STAR, Mar. 25, 1848.

104. *Id.*

105. *Id.*

106. For accounts of the incident on Rose's Bar, see BERWANGER, *supra* note 102, at 62–63; RICHARDS, *supra* note 19, at 58–59; SMITH, FREEDOM'S FRONTIER, *supra* note 14, at 47.

107. For a discussion of the role of slavery in the Texas War for Independence, see RANDOLPH B. CAMPBELL, AN EMPIRE FOR SLAVERY: THE PECULIAR INSTITUTION IN TEXAS, 1821–1865, at 35–49 (1989).

at Rose's Bar on the Yuba River with some fifteen slaves.[108] After he staked out claims under both his name and the names of his slaves, the white miners in the camp approached him and asked him to leave. When he refused, they convened a mass meeting and adopted a resolution that "no slaves or negroes should own claims or even work in the mines."[109] As Colton and others had witnessed, the miners looked upon Green's effort to monopolize the land and keep the profits to himself as an insult to democracy and their rights as free men. When they went to see Green again, this time armed with the resolution and perhaps more, they were more convincing. Green left the next day, taking his slaves with him.[110]

C. "Neither slavery nor involuntary servitude . . . shall ever be tolerated in this State"

The incident at Rose's Bar, combined with the early views expressed by the area's leaders, foreshadowed the upcoming events at the California Constitutional Convention. In September 1849, while Charles and Carter were somewhere on the Pacific en route to California, forty-eight delegates gathered in Monterey to draft a constitution for the purpose of seeking admission to the Union. The slavery question came up almost immediately. Since Southerners in the U.S. Congress, led by John Calhoun, had successfully kept the federal government from deciding the slavery question, the issue was now before the people. William Shannon represented the sprawling Sacramento district—which included the miners at Rose's Bar—and he introduced an amendment on September 10 banning the institution.[111] It read, "Neither slavery nor involuntary servitude, unless for the punishment of crimes, shall ever be tolerated in this State."[112] The other delegates from mining country lined up solidly behind it, and much like the resolution from Rose's Bar, the motion passed unanimously.[113]

Charles probably learned of the proposed ban when the draft of the constitution was circulated to the people for an up-or-down vote in

108. *See* Allen B. Sherman & Edwin A. Sherman, *Sherman Was There: The Recollections of Major Edwin A. Sherman*, 23 CAL. HIST. SOC'Y Q. 349, 351 (1944).

109. *Id.*

110. *Id.* at 351–52.

111. *Id.* at 352.

112. THE DEBATES IN THE CONVENTION OF CALIFORNIA, *supra* note 17, at 43 (testimony of Shannon).

113. *Id.* at 44.

mid-November.[114] It is not known whether Charles cast a ballot, but even if he did, it would not have mattered. Simply put, notwithstanding the efforts of proslavery Southerners to build an empire on the Pacific, not enough slaveholders had migrated to California to come close to countering the sentiments of the free labor population.[115]

It was something that William Gwin understood as well as anyone. Gwin was a slaveholder from Charles's home state of Mississippi who had his sights set on becoming California's first U.S. senator. Putting his own political interests ahead of the desires of his slaveholding countrymen, he voted to support the ban with unabashed praise for those who would decide his political fate.[116] "In her mines are to be found men of the highest intelligence and respectability performing daily labor," he reportedly said during campaign season, before going on to disparage the slaveholding class (even though it included himself), "and they do not wish to see the slaves of some wealthy planter or owner brought there, and put in competition with their labor, *side by side*. It is from the very fact that *labor is respectable*, that we wish to keep it so by excluding Slavery from our State."[117] Gwin's gamble worked. Slavery was banned, but he got his political office.[118]

Responsibility for California's official ban on slavery, however, does not rest solely with those with political influence or with voters in the mining districts. In ways that illustrate the role of Black people in shaping the law, credit also lies with the hundreds of enslaved men and women who were brought to California during the Gold Rush years. To be sure, even before California ratified its constitution and became a free state, enslaved men and women had been taking

114. The vote was held on Tuesday, November 13, 1849. For details about the election, see George Tennis, *California's First State Election, November 13, 1849*, 50 S. CAL. Q. 357, 371 (1968).

115. There were over 92,000 people in California in 1850. U.S. CENSUS TABLE I, *supra* note 85, at 969. Of that number, only a tiny fraction were slaveholders. *See* SMITH, FREEDOM'S FRONTIER, *supra* note 14, at 238–39 (documenting 104 total slaveholders in the state in 1850 based on census records, though acknowledging there were likely more).

116. For more on William Gwin and his political life and ambitions, see RICHARDS, *supra* note 19, at 73–74; Rachel St. John, *The Unpredictable America of William Gwin: Expansion, Secession, and the Unstable Borders of Nineteenth-Century North America*, 6 J. CIV. WAR ERA 56 (2016); Gerald Stanley, *Senator William Gwin: Moderate or Racist?*, 50 CAL. HIST. Q. 243 (1971).

117. *Objections to Admitting California*, PLACER TIMES, May 1, 1850.

118. RICHARDS, *supra* note 19, at 94. The vote to approve the constitution was hardly close, with 12,061 supporting it and only 811 opposed. Burns, *supra* note 6, at 9. The only county in the gold-mining region where a significant number voted against it was Mariposa County, where a number of slaveholders lived. RICHARDS, *supra* note 19, at 91.

advantage of the vast spaces and unsettled terrain to challenge their owners' claims over them.[119] They had brought with them decades of experience and knowledge, passed down for generations, on how to disrupt the institution.[120] They broke tools and feigned illness; they refused to work and ran away. James Phillips learned the hard way about the uncertain ground on which slavery stood. He took out an advertisement in the *Sacramento Daily Union* offering a $100 reward for the return of Samps.[121] Samps was "23 to 25 years old; a light mulatto; spare made; well favored; and about five feet ten or eleven inches high."[122] Phillips said that Samps was a slave in Alabama and that he had brought him here in 1849.[123] To Phillips's chagrin, in July 1851, Samps took advantage of the sparse population along the Mokelumne river and ran away, and by October he still had not been found.[124]

The lack of institutional support for slavery was something that Carter likely picked up on as soon as he and Charles first got to El Dorado County. As they made their way to their camp, it would have been hard not to notice that the social and legal structures that supported the institution in Mississippi were nowhere to be found. Bands of poor whites were not roaming the roads, demanding passes from persons of color. Overseers, atop horses, were not keeping a watchful eye over an all-Black workforce. Not that Charles would have embraced his new reality. Like most slaveholders, when he first arrived, he likely tried to replicate his mastery over Carter by trying to control the terms and conditions of Carter's existence. But the everyday life of the goldfields meant that Charles's grip over Carter was never as strong as it was back home.

Notably, the multiracial contingency that soon came to populate the goldfields had little incentive to assist slaveholders in maintaining their control. As Stacey Smith has detailed, many of them were already laboring in some sort of state of unfreedom, whether they were Indigenous peoples from the United States or whether they were from

119. For insightful discussions of how enslaved persons challenged the institution of slavery in California, especially in the mines, see SMITH, FREEDOM'S FRONTIER, *supra* note 14, at 50–57; LAPP, *supra* note 14, at 64–86, 126–57.

120. For a longer discussion of slave resistance in my own work, see GILLMER, *supra* note 28, at 53–88.

121. *$100 Reward*, DAILY UNION, Oct. 30, 1851.

122. *Id.*

123. *Id.*

124. *Id.*

Mexico, Chile, Peru, Hawaii, or China.[125] It was something enslaved men and women understood and used to their advantage. They quickly figured out ways to negotiate the terms of their enslavement, pushing for time off or perhaps a share of the profits. An enslaved man named Albert wrote to his owner Charles McDowell from the town of Jamestown in Tuolumne County, letting him know that he was staying a year longer than originally planned.[126] "I work hard and save my money as you know by what I send home," he wrote, stating that he was enclosing $400 as well as an extra $200 for his wife.[127]

Owners had reasons to accede to the demands of those they enslaved. Like Charles, slaveholders may have arrived in California convinced that they were benevolent paternalists, and that slavery was the best of all conditions for Blacks as well as whites.[128] But an enslaved person disappearing for a few days, or "accidentally" breaking a critical piece of mining equipment, tended to disabuse them of that notion. Without a legal or social structure to hold up the institution, they found themselves at the bargaining table, often agreeing to free a person in exchange for a sum of money or perhaps a year or two of service in the mines. I.B. Gilman of Tennessee, for example, signed a contract with his slave Thomas, declaring him "liberated and released . . . from further servitude or bondage" in exchange for $1,000.[129]

Once news of the California Constitution with its ban on slavery started filtering out into gold country at the start of 1850, enslaved men and women saw their hand considerably strengthened. What before might have been sporadic efforts to test the boundaries of slavery became more common and more pronounced. In February 1850, one purported owner was particularly distressed when the person he claimed as a slave was found "among the *free* negroes of the town, getting

125. *See generally* SMITH, FREEDOM'S FRONTIER, *supra* note 14, at 15–46.

126. Letter from Albert McDowell to Mr. Charles McDowell (May 13, 1855), Letters from Jamestown, Tuolumne County Collection, BANC MSS 93/59, Bancroft Library, University of California, Berkeley.

127. *Id.*

128. The slaveholder George Murrell from Kentucky, mentioned above, regularly closed out his letters back home with statements professing his love for family, "both white and black," and about Rheubin's love for his enslavers. *See, e.g.*, Letter from George Murrell to Samuel Murrell (May 9–12, 1849), Murrell Correspondence Collection, *supra* note 86 ("Give my love to mother & all the family both white and black. Rheubin also sends his."); Letter from George Murrell to Mary Ann Murrell (May 24–25, 1849), Murrell Correspondence Collection, *supra* note 86 ("Rheubin sends his love to all white & black.").

129. Bill of Sale between I.B. Gilman and Thomas Gilman (June 27, 1853), Box 353, Thomas Gilman Papers Collection, California History Room, California State Library, Sacramento, California.

drunk and doing as he pleased."[130] Determined to regain his authority, the white man grabbed a stick "to chastise him" and suddenly found himself flat on his back, after the Black man "flung [him] down."[131] The two were subsequently brought before the local alcalde, who ruled for the owner on the ground that "the provision of the Constitution excluding slavery did not apply to those who came here before its adoption."[132]

Other California slaveholders were not so fortunate. In May 1850, a Black man named Charles filed a writ of habeas corpus after he was arrested for fighting with Lindal Hayes, who claimed to own Charles.[133] Lindal had brought Charles with him when he came to California during the Gold Rush. At some point, Charles ran away, only to have Lindal hunt him down and confront him in the street. Defending himself with his knife, Charles did his best, but a third party stepped in and struck Charles over the head with a stick. On the question of his freedom, this time the judge sided with Charles, "maintaining that under the constitution of the State, and under the Mexican laws previously existing, [Lindal] had no right to detain him."[134]

III. SLAVERY AND FREEDOM: CALIFORNIA'S ADMISSION AND THE RETURN HOME

A. "I am making every effort in my power to increase my capital for the sole purpose of returning home"

Four months after the dispute between Lindal Hayes and Charles, on September 9, 1850, California was admitted to the Union as part of the Compromise of 1850.[135] It was called a compromise, but it was hardly that, at least according to most Southerners. In exchange for California, the North agreed, among other things, to let the people in the Utah and New Mexico territories decide for themselves whether to be free or slave (both would eventually vote to adopt slavery).[136] It

130. Letter to the Editor, DAILY ALTA CAL., Feb. 17, 1850.

131. *Id.*

132. *Id.*

133. *The Slave Case*, PLACER TIMES, May 27, 1850.

134. *Id.* For additional commentary on the case, see *Untitled*, SACRAMENTO TRANSCRIPT, June 1, 1850; *Untitled*, PLACER TIMES, June 3, 1850.

135. Burns, *supra* note 6, at 12.

136. For a detailed look at the development of slavery in New Mexico and Utah, see WAITE, *supra* note 19, at 123–48. For a larger discussion about the implications of the Compromise of 1850, see STEPHEN E. MAIZLISH, A STRIFE OF TONGUES: THE COMPROMISE OF 1850 AND THE IDEOLOGICAL FOUNDATIONS OF THE AMERICAN CIVIL WAR (2018).

also agreed to a much tougher Fugitive Slave Act.[137] Under the new version, citizens were compelled to assist in the capture of suspected runaways, and anyone who interfered was subject to fines and imprisonment.[138] In addition, federal commissioners, not potentially sympathetic state court judges, would preside over the proceedings, which the South made sure lacked even the most basic due process protections.[139] As if to ensure compliance, the commissioners were also paid more for returning persons to slavery than for finding they were free.[140] Still, notwithstanding these concessions, slaveholding Southerners, including most likely the Perkins family, thought the North got the better end of the deal. The new Fugitive Slave Act did nothing more than provide better protections for what the Constitution already provided, and the potential for two new slaveholding states in the middle of the desert paled in comparison to handing the North the free state of California and all its riches. "This is no compromise," fumed the *Mississippian*.[141] "It is an absolute and complete concession of a right."[142]

It is hard to know what role California's admission to the Union as a free state played in Charles's decisions. What we do know is that, by the spring of 1851, he was contemplating a return home.[143] Like most gold seekers, it was never Charles's intention to move permanently to California. He had come for the opportunity and the adventure—to "see the elephant"—and after a year-and-a-half he had apparently had enough. "Like every one here," David Gardiner explained to his mother, "I am making every effort in my power to increase my capital for the sole purpose of returning home."[144] The problem for many was that goldmining was not like anything people had romanticized it to be. If they had found gold in the amounts advertised,

137. For a comprehensive examination of the Fugitive Slave Act of 1850 and how it played out in various states, see R.J.M. BLACKETT, THE CAPTIVE'S QUEST FOR FREEDOM: FUGITIVE SLAVES, THE 1850 FUGITIVE SLAVE LAW, AND THE POLITICS OF SLAVERY (2018).

138. Act of Sept. 18, 1850, ch, 60, § 5, 9 Stat. 462 (1850) (repealed 1864) [hereinafter The Fugitive Slave Act of 1850] ("[A]ll good citizens are hereby commanded to aid and assist in the prompt and efficient execution of this law. . . .").

139. *Id.* §§ 1, 6.

140. *Id.* § 8.

141. *Compromise Bill*, MISSISSIPPIAN, June 7, 1850.

142. *Id.*

143. Albin points out that Charles's father had died in November 1850, which may have contributed to his decision to return home the following spring. ALBIN, WEALTH, LAND AND SLAVEHOLDING IN MISSISSIPPI, *supra* note 14, at 142–43.

144. Letter from David L. Gardiner to Juliana Gardiner (July 21, 1849), Box 1, Folder 2, Gardiner Letters, *supra* note 79.

perhaps their perspective would have been different. As it stood, according to Gardiner, "California is not by any means the place that it is cracked up to be . . . I can assure you that the stories you hear of persons making fortunes in a year or six months are 99 cases in 100 downright exaggerations and lies without the shadow of truth."[145]

Charles's time in the mines was not as disappointing as it was for others. For whatever reason—possibly the right combination of luck (by Charles) and effort (by Carter)—he reportedly enjoyed "great success" while he was there.[146] This success, in turn, paved the way for his cousin from Mississippi, Albert Green (A.G.) Perkins, and two of his neighbors, John and Stephen Kirk, to emigrate during the summer of 1850.[147] When they came, moreover, Albert and the Kirks brought five enslaved men with them, including at least two from the Perkins plantation at the apparent request of Charles.[148] One was Sandy Jones and the other was Robert Perkins, and both would eventually be involved, along with Carter, in the suit over their freedom. Sandy was between forty and sixty—various ages are listed in the records[149]—and Robert (also called Robbin) was in his early forties.[150] Both were blacksmiths and both were married, two qualities that Charles may

145. Letter from David L. Gardiner to Alexander Gardiner (July 31, 1850), Box 1, Folder 4, Gardiner Letters, *supra* note 79.

146. *See* Andy, Habeas Corpus Case 7 (n.d.), Box 29, Folder 2, Cole Family Papers, *supra* note 1.

147. For more on the parties' relationships, see ALBIN, WEALTH, LAND AND SLAVEHOLDING IN MISSISSIPPI, *supra* note 14, at 130–35. The group left in May. Departure Manifest of Slaves filed in the Port of New Orleans (May 10, 1850), s.v. "A.G. Perkins," "Jno. C. Kirk," and "S.J. Kirk," *in* NAT'L RECS. & ARCHIVES ADMIN., PUB. NO. M1895, SLAVE MANIFESTS OF COASTWISE VESSELS FILED AT NEW ORLEANS, LOUISIANA, 1807–1860 (2007) [hereinafter Departure Manifest of Slaves]. They arrived in San Francisco two months later, in August. 2 LOUIS J. RASMUSSEN, SAN FRANCISCO SHIP PASSENGER LISTS 19 (Clearfield Publishing Co. 2022) (1966) (listing the arrival of passengers "A.G. Perkins," "J.C. Kirby," and "S.C. Kirke" from Panama on August 19, 1850); *see also* Statement of Facts, Papers in Case California v. Perkins 1 (June 12, 1852) [hereinafter Statement of Facts, California v. Perkins], Box VII, Naglee Family Collection, BANC MSS C-B 796, Bancroft Library, University of California, Berkeley [hereinafter Naglee Family Collection] (noting that they arrived on August 19, 1851).

148. Departure Manifest of Slaves, *supra* note 147, s.v. "A.G. Perkins"; *id.* s.v. "John C. Kirk" (listing two slaves); *id.* s.v. "S.J. Kirk" (listing one slave).

149. *Id.* s.v. "S.J. Kirk"; 1852 CALIFORNIA STATE CENSUS, SAN FRANCISCO, *supra* note 40, s.v. "Sandy Jones." In his notes from his initial meeting with the three men, Cornelius Cole wrote that Sandy was born in 1793, making him about fifty-seven when he arrived in California. Statement of Facts, California v. Perkins, *supra* note 147, at 1.

150. Departure Manifest of Slaves, *supra* note 147, s.v. "Sandy Jones"; 1852 CALIFORNIA STATE CENSUS, SAN FRANCISCO, *supra* note 40, s.v. "Sandy Jones" (listing his age as 42); Statement of Facts, California v. Perkins, *supra* note 147, at 1 (listing his age as 44).

have insisted they have.[151] The former was a much-needed skill in mining country; the latter made it less likely that they would run away.

The members of the group settled near each other and worked in the mines for the season.[152] As he had before, Charles no doubt tried to reenact the rituals of slavery, but the routine was no longer convincing. Now that California was a free state, slaveholders like Charles had little recourse if the people they brought out as slaves attempted to exercise their freedom. The federal Fugitive Slave Clause did not help. In one case testing its limits, the court held it did not apply.[153] The case involved an enslaved man named Frank who ran away from his owner after they got to California.[154] Because Frank did not cross state lines from a slave state for a free one, the federal law was not implicated. Frank "did not escape from his master," the court said, "but was brought into this State by the master; consequently he does not come within the provisions of the [federal] fugitive slave law."[155]

B. "Times are not now as they were when the former decisions on this subject were made"

Cases like Frank's illustrated the difficult position in which Charles and other slaveholders found themselves. Once courts started finding in favor of freedom, Blacks brought as slaves simply had no incentive to play by the old rules of the slaveholding South. It made Charles's decision about whether to bring Carter, Robert, and Sandy back home to Mississippi with him a complicated one. As he prepared to leave, he may have asked them to return voluntarily. But if they refused—and they evidently did—his only choice was to try to force them to return against their will. It was surely something he contemplated. As a slaveholder from a prominent family, he was no doubt aware of what was happening in the courtrooms of the Southern states. If only he could get them back to Mississippi, the chances were high that his ownership rights would be respected.

It had not always been that way. Back in 1818, the Mississippi Supreme Court in *Harry v. Decker & Hopkins*[156] held that a slave

151. *See* 1852 CALIFORNIA STATE CENSUS, SAN FRANCISCO, *supra* note 40, s.v. "Robt Perkins" and "Sandy Jones," (listing each with the profession of blacksmith); Statement of Facts, California v. Perkins, *supra* note 147, at 1 (noting that they were both married).

152. Statement of Facts, California v. Perkins, *supra* note 147, at 1.

153. *County Court*, DAILY ALTA CAL., Apr. 2, 1851; *see* LAPP, *supra* note 14, at 138–39.

154. *A Slave Case*, DAILY ALTA CAL., Mar. 31, 1851.

155. *County Court*, DAILY ALTA CAL., Apr. 2, 1851.

156. Harry v. Decker, 1 Miss. (Walker) 36 (1818) (enslaved party).

brought to free territory automatically became free.[157] The case involved a man named John Decker, who brought three enslaved persons with him when he moved from Virginia to the Northwest Territory in what is now the state of Indiana, in 1784.[158] Three years later, under the Ordinance of 1787, Congress officially prohibited slavery in the territory.[159] Yet Decker remained in the area until July 1816, moving to Mississippi with his slaves only after the people of Indiana ratified their constitution—with its own ban on slavery.[160] Once in Mississippi, the three individuals sued for their freedom, asserting that the prohibition on slavery in the Northwest Ordinance of 1787, as well as the Indiana constitution, made them free.[161] In a decision remarkable for its antislavery tone, the Mississippi Supreme Court agreed. Noting that slavery was a product of positive law, the court said that slavery "is condemned by reason and the laws of nature. It exists and can only exist, through municipal regulations, and in matters of doubt, is it not an unquestioned rule, that courts must lean 'in favorem vitae et libertatis.'"[162]

The case was quickly followed in other jurisdictions, including the Upper South states of Kentucky,[163] Missouri,[164] and Virginia,[165] as well as Louisiana.[166] But it did not take long before those same courts slowly began to undermine the doctrine. The main issue came down to whether the person was traveling—or, in legal parlance, "sojourning"—through a free state or whether they had taken up residence.[167] It was only in the latter situation that a slave became free. The difference was on display in a couple of cases from Missouri, where several

157. *Id*. For important context for the case and the judge who decided it, see Andrew T. Fede, *Judging Against the Grain? Reading Mississippi Supreme Court Judge Joshua G. Clarke's Views on Slavery Law in Context*, 20 FCH ANNALS: J. FLA. CONF. HISTORIANS 11, 11–29 (2013).

158. *Harry*, 1 Miss. at 36. The Northwest Ordinance was part of the territorial expansion of the United States and governed land in what is now Ohio, Indiana, Illinois, Michigan, and Wisconsin. Denis P. Duffey, Note, *The Northwest Ordinance as a Constitutional Document*, 95 COLUM. L. REV. 929, 929 n.6 (1995).

159. *Harry*, 1 Miss. at 36, 42.

160. *Id*.

161. *Id.* at 36–37.

162. *Id.* at 42.

163. Rankin v. Lydia, 9 Ky. (2 A.K. Marsh.) 467, 479 (1820) (enslaved party).

164. Winny v. Whitesides, 1 Mo. 472, 475 (1824) (enslaved party). For an in-depth discussion of *Winny*, see VANDERVELDE, *supra* note 24, at 57–65.

165. Hunter v. Fulcher, 28 Va. (1 Leigh) 172, 172 (1829) (enslaved party).

166. Lunsford v. Coquillon, 2 Mart. (n.s.) 401, 404 (La. 1824) (enslaved party).

167. For an additional overview of the freedom-by-residence cases, see SCHWENINGER, *supra* note 24, at 142–69.

freedom suits arose. In *Julia v. McKinney*,[168] decided in 1833, the court found that an enslaved woman named Julia was entitled to her freedom where her owner brought her to Illinois and held her out as a slave for roughly one month.[169] Evidence that the owner subsequently hired her out to someone in Missouri, and eventually sold her there, did not defeat the claim.[170] She "went into Illinois with an avowed view to make that State her home," and thus could not be considered a "mere traveler."[171]

The court reached a similar conclusion in *Wilson v. Melvin* in 1837.[172] The defendant, Edmund Melvin, brought two slaves with him when he left Tennessee in the spring and came to Illinois, where his son lived.[173] Melvin stayed there through the fall, harvesting a crop of corn on rented ground.[174] He also hired his slaves out, both in Illinois and in Missouri.[175] Though he never unpacked his wagon—in an apparent effort to demonstrate that he did not intend to reside in Illinois—the court nonetheless found that he had introduced slavery into a free state, and thus forfeited his ownership rights.[176]

The doctrine of freedom-by-residence was based on the rule of comity. If the South expected the North to recognize the rights of slaveholders—by returning a fugitive slave, for example—the South also had to recognize that a slave voluntarily brought to free territory could not remain a slave. But as the country inched closer to the Civil War, Southern courts began to find fault with the doctrine and increasingly ruled in favor of slaveholders. In another case out of Missouri, the court in *La Grange v. Chouteau*[177] set the stage when it came up with the rule that it was not just the intent of the owner to take up residence in a free territory; he also had to intend to establish the residence of the enslaved person, as well.[178] Thus, the court rejected the claim of one person suing for his freedom notwithstanding that his owner lived in Illinois, because the enslaved man was hired out to work in a mine in Missouri and as a boat hand on the river, and spent

168. 3 Mo. 270, 273 (1833) (enslaved party).
169. *Id.* at 273.
170. *Id.* at 271.
171. *Id.* at 273.
172. 4 Mo. 592 (1837) (enslaved party).
173. *Id.* at 593–94.
174. *Id.* at 594.
175. *Id.*
176. *Id.* at 594, 599.
177. 2 Mo. 20 (1828) (enslaved party), *aff'd*, 29 U.S. 287 (1830).
178. *Id.* at 22.

little time in Illinois.[179] The court reaffirmed the rule in *Nat v. Ruddle*.[180] "It has often been decided in this court, that to entitle a slave to recover in an action of this kind, the slave must abide in the State of Illinois, by and with the consent, express or implied, of his owner, long enough to induce the jury to believe that the owner intended to make that country the place of the slave's residence."[181] In that case, it was not enough that witnesses had seen Nat in Illinois, working on Ruddle's farm.[182] According to the testimony, there was a dispute over whether he was there because Ruddle kept him or because he had run away from a hirer in Missouri.[183]

The trend was similar in other jurisdictions. After initially embracing the notion of freedom-by-residence, the Kentucky court followed Missouri's lead and held in *Graham v. Strader*[184] that an owner, who brought his slaves to Ohio on a temporary basis to perform as musicians, did not renounce his right and the slaves were not free.[185] "The passing of a slave from Kentucky to Ohio, no matter how often, and though with his owner's consent," the court said, "can furnish no ground for inferring a license to pass at his own will and alone."[186] Others began to look with favor on the notion, first announced in an English admiralty case, *The Slave, Grace*, that slave status could reattach once a person left a free state or territory and returned to a slave state.[187] Initially rejected in several court decisions, the so-called reattachment principle now found adherents even among the noted antislavery court in Massachusetts.[188] By 1846, in Louisiana, the legislature put an end to the rule of freedom-by-residence altogether, when it

179. *Id.*
180. 3 Mo. 400 (1834) (enslaved party).
181. *Id.* at 401.
182. *Id.* at 400–01.
183. *Id.* at 400.
184. 44 Ky. (5 B. Mon.) 173, 184 (1844) (enslaved persons at issue).
185. *Id.* at 184.
186. *Id.* at 177.
187. The Slave, Grace, 166 Eng. Rep. 179, 181 (enslaved party); The Slave, Grace (1827) 2 Hagg. Adm. 94, 100 (Eng.) (enslaved party).
188. For the initial rejection of the reattachment principle in southern courts, see, for example, Rankin v. Lydia, 9 Ky. (2 A.K. Marsh.) 467, 472 (1820) (enslaved party); Winny v. Whitesides, 1 Mo. 472, 476 (1824) (enslaved party). For the apparent acceptance by the Massachusetts court, see Commonwealth v. Aves, 35 Mass. (18 Pick.) 193, 208 (1836) (enslaved person at issue); *see also* JOSEPH STORY, COMMENTARIES ON THE CONFLICT OF LAWS 118, 155–67 (The Law Book Exch. 2d ed., 2d. prtg. 1841) (1834). In *Aves*, the Massachusetts court upheld the claim to freedom of an enslaved person in transit in the state, while simultaneously expressing skepticism that time in a free state would affect the person's status under "the law of his domicil." *Id.* at 208. For a discussion of the *Aves* case and its impact on northern courts, see FINKELMAN, *supra* note 24, at 101–25, 185.

adopted an act stating that "no slave shall be entitled to his or her freedom under the pretense that he or she has been, with or without consent of his or her owner, in a country where slavery does not exist, or in any of the States where slavery is prohibited."[189]

The case law and legislative efforts thus created a potential opening for slaveholders like Charles who wished to return home with their slaves. While California courts were proving unreceptive to the claims,[190] a Southern court might agree that a young man on a gold-mining adventure to California never intended to take up residence, and surely never meant for his slaves to do so. There were simply too many examples of adventures cut short, to go along with the stated determination of many to leave as soon as possible. The "population is not a permanent one," David Gardiner said, "as almost everyone talks of returning home as soon as they have made a little money."[191] And even if the year-and-a-half in California tested the boundaries of what legitimately could be considered a sojourn, the fact that Carter, Robert, and Sandy returned to Mississippi with him—voluntarily or not—might convince the court that their slave status reattached, the prior case of *Harry v. Decker & Hopkins* notwithstanding.

Such was the approach of the Missouri court. After gradually whittling away the doctrine over a thirty-year period, the court in the infamous *Dred Scott* case (called *Scott v. Emerson* while in state court) abandoned it altogether. "Times now are not as they were when the former decisions on this subject were made," the Missouri Supreme Court intoned in 1852, long before the U.S. Supreme Court would make its mark on the case.[192] Deriding the "humiliating spectacle" of Southern courts "confiscating the property of her own citizens by command of a foreign law," the court made clear that it had no intention of going to the North "to learn law, morality or religion on the subject" of slavery.[193]

For Charles, then, it was about calculated risks. Given the times, there was a strong chance that Mississippi would follow the lead of other Southern courts and narrowly read the freedom-by-residence cases, or perhaps overrule the doctrine entirely. (Indeed, it effectively

189. Act of July 4, 1846, No. 189, 1846 La. Acts 163.

190. *See supra* notes 153–155 and accompanying text.

191. Letter from David L. Gardiner to Juliana Gardiner (Aug. 23, 1849), Box 1, Folder 2, Gardiner Letters, *supra* note 79.

192. Scott v. Emerson, 15 Mo. 576, 586 (1852) (enslaved party).

193. *Id.* at 584, 587.

did so in 1859.)[194] The difficulty for Charles, of course, was that he was in California. Whatever he hoped the Mississippi courts might do, if given the chance, it was entirely academic unless he could get Carter, Robert, and Sandy back to Mississippi against their will. But as he knew well, it would not be easy to smuggle three men onto a ship, sail down to Panama, cross the Isthmus, and then board another ship for New Orleans, without interference. "Escape of a fugitive slave," O.R. Rozier openly complained on the pages of the *Daily Alta California*, after attempting just such a feat.[195] Evidently, Rozier's "slave *Stephen*, whom he had brought with him from Sonora, and was taking back to Arkansas, made his escape from the steamer Urilda while lying at the wharf, whether he had taken him to send him to San Francisco."[196] In a story that made news in Mississippi, an enslaved man named Sam also escaped when his owner put him on board a ship bound for New Orleans. According to the reports, in the early morning, "before the steamer left, he managed to escape to 'parts unknown.'"[197]

In the end, Charles decided to do what so many other slaveholders had done: he reached a bargain. Charles planned to leave at the beginning of May 1851.[198] If Carter, Robert, and Sandy would work through the season, until November 15, and turn over all their profits to his agent, he would free them.[199] These so-called emancipation agreements, worked out piecemeal in the early days of the Gold Rush, had become increasingly common following the Compromise of 1850.[200] Scholars have often puzzled over why slaveholders would commit to these agreements in writing. After all, enslaved persons technically had no ability to enter legally binding contracts, so why bother? But the fact that they exist at all has less to say about slaveholders than it does about slaves.

194. *See* Mitchell v. Wells, 37 Miss. 235, 249 (1859) (enslaved party) (finding that public policy forbids recognizing an enslaved person's freedom gained in another state).

195. *Escape of a Fugitive Slave*, DAILY ALTA CAL., Sept. 27, 1854.

196. *Id.*

197. *Slave Case*, MARYSVILLE HERALD, Jan. 10, 1851. The article was also republished in Mississippi. *Attempts to Defeat the Fugitive Slave Law Both in Massachusetts and California*, MISS. FREE TRADER, Feb. 22, 1851.

198. *See Passengers*, DAILY ALTA CAL., May 1, 1851 (listing C.S. Perkins on board the steamer *Union*, bound for Panama).

199. *The Fugitive Slaves Before the Court*, *supra* note 1.

200. For multiple examples, see BEASLEY, *supra* note 21, at 84–86; E.H. Taylor et al., *California Freedom Papers*, 3 J. NEGRO HIST. 45, 45–54 (1918).

Indeed, many of the records found in the old county courthouses reflect a legal culture in which free and enslaved Black persons were not just acted upon. To be sure, these documents exist (e.g., a bill of sale), but there were also a multitude of documents reflecting efforts of African Americans to use the legal system to express and pursue their goals. In the same way in which they filed writs of habeas corpus, people of color went down to the courthouse with signed documents in hand and asserted their rights. The contracts were the enslaved persons' freedom papers, so to speak, enforceable in a court of law. "Know all men that for and in consideration of the long & faithful services rendered to me by my negro slave Andrew," one of them read, "I, Will B Kyle . . . have resolved to emancipate and free the said Andrew from any claim or claims for service."[201] A similar document saved a woman named Lucy from re-enslavement.[202] After James Brown attempted to abduct her and take her back to Missouri, she produced the emancipation agreement Brown's father had given her, and "[s]he was accordingly discharged and allowed to go on her way rejoicing."[203] Cases like Lucy's were surely why Carter, Robert, and Sandy demanded that Charles memorialize their agreement, and grant them, "before his departure, a certificate of [their] freedom."[204] If given the chance, much like James Brown with Lucy, they knew he would re-enslave them without a second thought.

IV. SLAVERY AND THE CONSTITUTION: THE CALIFORNIA FUGITIVE SLAVE ACT AND THE MIDNIGHT RAID

A. "An Act Respecting Fugitives from Labor"

On the last day of May 1852, roughly one year after he left, Charles took steps to do exactly that. At the time, Carter, Robert, and Sandy were working their own claim near the town of Ophir, in an area known for "a 2-mile wide belt of quartz load," in newly formed Placer County, just above El Dorado County.[205] They had been there

201. Emancipation Agreement Between Andrew and W.B. Kyle 102 (Oct. 14, 1851), Indenture and Emancipation Papers Collection, Mss 2: I38, Department of Special Collections, University of Pacific [hereinafter Indenture and Emancipation Papers].

202. *Justices' Court*, PLACER HERALD, Apr. 16, 1853.

203. *Id.*

204. Andy, Habeas Corpus Case 8 (n.d.), Box 29, Folder 2, Cole Family Papers, *supra* note 1.

205. Frances Arruda & Lois Facha, Gold Hill 1 (1967) (unpublished manuscript for The Placer County Historical Society), Henry Sheldon Anable Journals Collection, BANC FILM 2078, Bancroft Library, University of California, Berkeley.

for over six months, ever since Charles's agent, per their agreement, had "told them to go, that they had been good fellows and their time was out."[206] They evidently were successful in their efforts, and quickly amassed "some hundreds, perhaps a thousand dollars in gold dust," according to Cornelius Cole, who would soon represent them.[207] Later reports likewise confirmed that, by the end of May 1852, they had some $426 in gold dust in the company purse, while Sandy had $230 and Robert had a little less than $200.[208] They had also, as the season advanced, purchased a four mule team, wagon, and harness worth near $700, with the intent "to follow teaming when the mine should become exhausted, or when the season changed."[209]

Their well-laid plans, however, came to an abrupt halt when Charles had the three arrested under California's new Fugitive Slave Act, enacted the previous month, in April 1852.[210] The Act was one of several bills on the subject of slavery and the rights of Black and Brown people that members of the state legislature had been trying to muscle through both houses of Congress ever since California became a state. A long-standing priority was to ban free people of color, first by amendment in the constitution and then by statute.[211] The effort was never successful. But as racial ideologies migrated west and steadily took hold, other attempts to deny Blacks basic citizenship rights sailed through the statehouse without major opposition. Key among them were prohibitions on the right to vote,[212] the ability to muster in the militia,[213] and the right to testify against a white person, whether in a criminal or civil case.[214] The legislature also banned

206. *The Fugitive Slaves Before the Court*, *supra* note 1.

207. Andy, Habeas Corpus Case 8 (n.d.), Box 29, Folder 2, Cole Family Papers, *supra* note 1.

208. *The Fugitive Slaves Before the Court*, *supra* note 1.

209. Andy, Habeas Corpus Case 8 (n.d.), Box 29, Folder 2, Cole Family Papers, *supra* note 1; *The Fugitive Slaves Before the Court*, *supra* note 1.

210. *See* California Fugitive Slave Act of 1852, *supra* note 5 (noting date of enactment).

211. Morton McCarver, a Kentucky Democrat, first moved to amend the constitution to include a ban on free Blacks, and when that was ruled out of order, he moved to require the legislature to adopt the ban at its first session. THE DEBATES IN THE CONVENTION OF CALIFORNIA, *supra* note 17, at 44, 48 (testimony of McCarver). The legislature subsequently considered bills to ban free Blacks in the next three legislative sessions, each time failing to pass both houses.

212. CAL. CONST. of 1849, art. II, § 10 (limiting right to vote to white males from the United States and white males from Mexico who elected to become citizens of the United States under the Treaty of Hidalgo).

213. An Act Concerning the Organization of the Militia, ch. 76, 1850 Cal. Stat. 190 (1850) (repealed 1855) (limiting militia to all free, able bodied, white male citizens).

214. An Act Concerning Crimes and Punishments, ch. 99, § 14, 1850 Cal. Stat. 229, 230–31 (repealed 1863) (concerning crimes and punishments and specifically who may be a witness in criminal cases); Act of Apr. 22, 1850, ch. 142, § 306, 1850 Cal. Stat. 428, 455 (repealed 1863)

marriages between Blacks and whites.[215] It was very much about creating a white utopia. "In God's name," Robert Semple thundered early on, in language that many embraced, "let us make California a place where free white men can live."[216] Other efforts to burden nonwhite people, including a tax on foreign miners, were also met with success.[217]

The California Fugitive Slave Act was part of this effort and demonstrated the grip Southern slaveholders and their sympathizers had on the California statehouse, despite the ban in the state constitution and the disruptions enslaved persons were causing to the institution on a daily basis. The party took their lead from William Gwin, the slaveholder from Mississippi who successfully positioned himself to become the state's first senator. Called the "Chivalry" party (or "Chivs" for short), they identified with the Southern wing of the Democratic party and prided themselves on their aristocratic sensibilities. They dominated state politics in the early 1850s, with every member elected having grown up in a slave state.[218] Peter Burnett, the state's first governor and a distant relative of Charles Perkins, identified with the party and was particularly known for his racist sentiments.[219] Before he came to California, he was the governor of Oregon, where he successfully campaigned to ban free Blacks from the territory. He would try to do the same when he came to California. In his first speech in front of the legislature, he conjured up feelings of dread when he warned that liberal attitudes towards free Blacks would bring "swarms of this population to our shores."[220]

The Chivalry party was very much determined to create a haven for slaveholders in California. Many of them, in fact, never gave up on the idea that California—or at least a portion of it—could become a slave state, even after it was admitted to the Union. The idea had been bandied about for years. "The plan is eminently feasible," the

(civil); *see also* California Practice Act, tit. XI, ch. I, § 394, 1851 Cal. Stat. 220 (1851) (amended 1860).

215. An Act Regulating Marriages, ch. 140, § 3, 1850 Cal. Stat. 424 (1850), *invalidated by* Perez v. Lippold, 32 Cal. 2d 711 (1948).

216. THE DEBATES IN THE CONVENTION OF CALIFORNIA, *supra* note 17, at 148 (testimony of Semple).

217. Foreign Miners' Tax Act of 1850, ch. 97, 1850 Cal. Stat. 221, 221–22 (repealed 1851).

218. Joseph R. Grodin, *The California Supreme Court and State Constitutional Rights: The Early Years*, 31 HASTINGS CONST. L.Q. 141, 146 (2004).

219. *See* ALBIN, WEALTH, LAND AND SLAVEHOLDING IN MISSISSIPPI, *supra* note 14, at 128 (detailing common lineage).

220. GOVERNOR'S MESSAGE, S. JOURNAL, 1849–1850 Leg., 1st Sess., at 38 (Cal. 1850).*'*

Mississippian beamed back in August 1850, in open defiance of the recent vote to ban the institution. The idea was to divide the state along the 36° 30' parallel under the terms of the Missouri Compromise. According to the *Mississippian*, there were already "several thousand slaves" in the state, and "the people of California south of the line of demarcation, are ardently opposed to the adoption of the so-called constitution of California."[221] Even after the state was admitted to the Union, slaveholders and their allies in the state legislature continued to promote the idea.[222] In the same legislative session in which the Fugitive Slave Act was adopted, the legislature considered a bill to hold a second constitutional convention for the purpose of dividing the state, along with a petition from James Gadsden (of Gadsden Treaty fame) and twenty-three others seeking permission to colonize a portion of California with a population of "not less than two thousand (2000) of their African domestics."[223]

Henry Crabb sponsored both the bill to hold a second constitutional convention and the Fugitive Slave Act.[224] Crabb was new to politics. He was a young man—only twenty-four—but the people of San Joaquin County in the Southern mines, where a good number of slaveholders settled, sent him to the assembly to represent their interests.[225] Originally from Tennessee, he had lived most recently in Mississippi, before coming to California.[226] He was said to have a "heavy investment in slaves," and his work in the legislature was a primary reason the *Mississippian* had "hope that the institution of African slavery may yet be established in the Pacific territories."[227]

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221. *The Contemplated Slave Colony in California*, MISSISSIPPIAN, Aug. 23, 1850.

222. *See generally* Ward M. McAfee, *California's House Divided*, 33 CIV. WAR HIST. 115, 119 (1987). For early interpretations of the division controversy, see William Henry Ellison, *The Movements for State Division in California, 1849–1860*, 17 SW. HIST. Q. 101 (1913); Rockwell D. Hunt, *History of the California State Division Controversy*, 13 HIST. SOC'Y SO. CAL. 37 (1924).

223. ASSEMB. JOURNAL, 1852 Leg., Reg. Sess., at 159 (Cal. 1852) (referencing memorial introduced by Peachy). For a copy of the petition, see Memorial from Southern States to the Senate and House of Representatives of the State of California 1 (Jan. 1852), Petitions to the Legislature, California State Archives, Sacramento, California. For a copy of an earlier but similar petition, see John C. Parish & James Gadsden, *A Project for a California Slave Colony in 1851*, 8 HUNTINGTON LIB. BULL. 171 (1935).

224. A similar fugitive slave bill introduced the previous year failed to pass the Senate. *See* SMITH, FREEDOM'S FRONTIER, *supra* note 14, at 67–69.

225. ASSEMB. JOURNAL,1852 Leg., Reg. Sess., at 4 (Cal. 1852) (listing Crabb among members).

226. STATE CENSUS, 1852, SCHEDULE 1–INHABITANTS IN THE COUNTY OF SAN JOAQUIN, STATE OF CALIFORNIA (1852), s.v. "Henry Crabb."

227. RICHARDS, *supra* note 19, at 127; *The Slavery Question in California*, MISSISSIPPIAN, Apr. 2, 1852.

At the start of the session, Crabb gave notice that he intended to introduce his bill.[228] It was officially dubbed, "An Act Respecting Fugitives from Labor, and Slaves brought to this State prior to her admission into the Union."[229] The bill, as originally drafted, contained four sections. In the first three, California in effect codified the federal Fugitive Slave Clause of 1850, pledging full cooperation and assistance to slaveholders if any of their bondspeople ran away from them and came to California. Section 1 set out the procedures for the return, which required little more than oral testimony or an affidavit "that the person so seized or arrested doth . . . owe service or labor to the person claiming him or her."[230] Section 2 made it a crime for any person to interfere with the recovery, including any "attempt to rescue such fugitive from the custody of such claimant."[231] Finally, section 3 set forth the duties and responsibilities of law enforcement to diligently carry out the law, with penalties for non-compliance.[232]

Notably, the first three sections did not add anything new; all of it was required under federal law. But that was obviously not the purpose. In a clear nod to the slaveholding contingent, the first three sections of Crabb's bill made clear that there was not any daylight between California's official position regarding enslaved persons escaping into free territory and that of the South. It was something the *Mississippian* picked up on in its reporting. This portion of the bill, it said with favor, was "important from the fact that it exhibits a feeling friendly to Southern institutions in the new State."[233]

It was the fourth section that was the most important—and devastating—from the perspective of the hundreds of enslaved persons brought to California during the first years of the Gold Rush. In it, the bill made clear that the antislavery clause in the state constitution would not apply retroactively, and that enslaved persons brought to California prior to its admission to the Union remained enslaved.[234] Pursuant to section 4, any person who refused to voluntarily return with their enslaver back to the enslaver's home state was deemed a "fugitive[] from labor," and "all the remedies, rights and provisions

228. ASSEMB. JOURNAL, 1852 Leg., Reg. Sess., at 71 (Cal. 1852).
229. California Fugitive Slave Act of 1852, *supra* note 5, at 67.
230. *Id.* § 1.
231. *Id.* § 2.
232. *Id.* § 3.
233. *The Slavery Question in California*, *supra* note 227.
234. California Fugitive Slave Act of 1852, *supra* note 5, § 4.

herein given to claimants of fugitives who escape from any other State into this State, are hereby given and conferred upon claimants of fugitives from labor within the meaning of this section."[235]

For slaveholders such as Charles, section 4 of Crabb's bill vindicated the position they had held all along. It adopted in no uncertain terms the position of the Southern fire-eaters—from John Calhoun to the *Mississippian* to, later, Chief Justice Taney in *Dred Scott*—that slaveholders had the absolute right to bring their slaves into federal territories, regardless of any pre-existing laws, and that the government had the constitutional obligation to protect them in the exercise of that right. "The passage of this section shows," said the *Mississippian*, "that the laws which existed in the territory previous to its acquisition shall not be held paramount to the constitution of the United States, which recognizes property in slaves."[236]

In addition, section 4 seemingly threw the state's weight behind the narrowing of the freedom-by-residence cases happening in the Southern courts and legislatures. Nothing was said in the bill about people such as Carter, Robert, and Sandy who were brought before the admission to the Union but who lived in the state after it became free. Under the statute, an enslaved person who arrived before September 9, 1850, remained a slave, even if their enslaver moved to California, mined for gold for months or years, built a home, purchased land, and became a resident of the state.[237] Under the law, once a slave, always a slave, even in the middle of a free state.

Crabb's bill, although it sailed through the assembly, was not without opponents.[238] The *Daily Alta California* took a strong stance against it. "Does not the Constitution say that slavery shall not be tolerated, and does not the section of Mr. C's bill actually and directly tolerate the institution?" it protested.[239] David Broderick, a hard-nosed free-soil senator originally from New York also tried to derail it.[240] When the votes came up short, he sought to weaken the law by pushing through a key amendment prohibiting enslavers from keeping their

235. *Id*.

236. *The Slavery Question in California*, *supra* note 227.

237. *See* California Fugitive Slave Act of 1852, *supra* note 5, § 4.

238. The Assembly voted in favor of the bill, 42–11. ASSEMB. JOURNAL, 1852 Leg., Reg. Sess., at 146–47 (Cal. 1852).

239. *Fugitive Slaves*, DAILY ALTA CAL., Feb. 8, 1852.

240. *Passage of the Fugitive Slave Bill*, DAILY ALTA CAL., Apr. 10, 1852. The procedural wrangling is detailed in the legislative record. *See* S. JOURNAL, 32d Cong., 2d Sess., at 97, 118, 179, 184, 191–92, 237, 252, 257–60, 262–64, 268–71, 274–77, 279–85, 295 (1852).

slaves in the state after reclaiming them.[241] Under a new section 5, they were given only enough time to recover their slaves and then they were expected to remove them.[242] The antislavery forces also successfully inserted a sunset provision of one year into the law—though it was later extended for two more years—in an effort to encourage enslavers to make timely claims.[243] Broderick's other motion to exclude from the law's reach all enslaved persons brought under contract to California prior to its admission, however, failed.[244] Southern sympathizers felt that enough concessions had been made. They called for a vote. Fourteen senators supported the law; nine voted against it.[245] The California Fugitive Slave Act—the only one of its kind in the entire country—became law on April 15, 1852.[246]

B. "[T]o use all lawful means"

The passage of the Fugitive Slave Act was an important milestone in the slavery debate in California. It was the first major victory for the proslavery movement and signaled the arrival of formal support for the institution. Southerners judged it as a predictor of good things to come. That spring, the *Nevada Journal* reported on a large group of North and South Carolina emigrants on their way to the state who had "their negroes with them, expecting to keep them as slaves on the Pacific."[247] Madison Walthall, a former member of the legislature with slaves in California, was similarly confident that California would yet adopt the institution.[248] "Slaves are there now, and most of the prominent men of the State are from the South," he explained to the *Columbus Democrat*, a newspaper from his home state of Mississippi.[249] "It will be a glorious day for the South," the *Mississippian* added, "if despite the machinations of her enemies, her institutions should yet be

241. California Fugitive Slave Act of 1852, *supra* note 5, § 5.

242. *See id.*

243. *Id.* § 4.

244. *See Fugitive Slaves*, *supra* note 239.

245. S. JOURNAL, 32d Cong., 3d Sess., at 284–85 (1852).

246. California Fugitive Slave Act of 1852, *supra* note 5.

247. *Untitled*, NEV. J., Mar. 4, 1852; *see also Emigration from North Carolina to California*, DAILY UNION, Mar. 4, 1852 ("It is said that a considerable emigration of slave owners, with their slaves, is going forward to California from North Carolina, who are versed in the business of gold digging.").

248. *See* Emancipation Agreement Between Edward and Martha and Elizabeth Walthall 179 (Oct. 10, 1854), Indenture and Emancipation Papers, *supra* note 201 (indicating the Walthall's brought an enslaved couple and their son from Mississippi to California, where they were expected to serve for a term of years).

249. *California Yet to Be a Slave State*, MISS. FREE TRADER, Apr. 26, 1851.

extended over that immense territory and a foothold secured for her on the shores of the Pacific."[250]

Within weeks of the law's passage, a slaveholder named Benjamin Lathrop put it to use. Lathrop had come out in 1849, bringing an enslaved man with him.[251] Like so many others, however, the man had escaped "some time since."[252] With the backing of the new law, Lathrop tracked his former slave down in Sacramento and brought him before Justice of the Peace B.D. Fry a "pronounced proslavery man" who would soon hear the case against Carter, Robert, and Sandy.[253] Fry held a hearing, and after Lathrop presented proof of ownership, Fry determined that the man was a fugitive under the new law and turned him back over to Lathrop. The *San Joaquin Republican*, where Henry Crabb was from, declared the entire process a success. "Every thing [sic] passed off with quiet and order—nothing like resistance being made to the due execution of the law."[254]

Two weeks later, on the first day of June, Charles's cousin Albert Perkins brought Carter, Robert, and Sandy before the same judge.[255] They had conducted their midnight raid on the last day of May after Charles filed an affidavit in a Mississippi court appointing Albert his attorney-in-fact, with instructions "to use all lawful means to recover possession of . . . Carter, Sandy and Robin [sic] from any person or persons in whose possession or employment said slaves may be."[256] Charles had likely learned of the law, if not from Albert, from the *Mississippian*. "Southern men who carried their slaves to the territory to reap the benefits to the purchase of which they contributed so largely, can, under this law, enjoy the privilege of removing their slaves from California," it crowed in early April.[257] In his affidavit, Charles further empowered Albert "upon his recovering possession of the above

250. *Slavery in California*, MISSISSIPPIAN, Jan. 14, 1853.

251. *Fugitive Slave Law*, SAN JOAQUIN REPUBLICAN, May 15, 1852.

252. *Id.*

253. *See* Andy, Habeas Corpus Case 10 (n.d.), Box 29, Folder 2, Cole Family Papers, *supra* note 1 ("pronounced proslavery man").

254. *Fugitive Slave Law*, *supra* note 251.

255. *The Fugitive Slaves Before the Court*, *supra* note 1.

256. Power of Attorney, C.S. Perkins to A.G. Perkins at 1, *In re* Perkins, 2 Cal. 424 (1852) (No. 322), Supreme and Appellate Court Records, California State Archives, Sacramento, California [hereinafter Court Documents].

257. *The Slavery Question in California*, *supra* note 227.

named slaves to place the same under the charge and custody of a safe and trustworthy person to be delivered to me in Mississippi."[258]

The hearing before Judge Fry lasted only minutes.[259] The Fugitive Slave Act made clear that "[i]n no trial or hearing under this act shall the testimony of such alleged fugitive be admitted in evidence," and Judge Fry took none.[260] As for their freedom papers, which Carter and his companions had demanded that Charles provide to them before his departure, they were gone. Evidently, the three men had never filed them in the Placer County courthouse, choosing instead to hold them close in case they were ever questioned by a local miner. It proved to be a fatal mistake. During the raid, a "burley [sic] m[a]n" and friend of Albert Perkins's named Hardin Scales took the papers and "burned [them] then and there before [their] eyes."[261] Adding to the insult, the men conducting the raid also took their gold and their wagon.[262] Six months ago, Carter, Robert, and Sandy had been free men, working their own claim. Now they faced the prospect of re-enslavement based on the *ex parte* testimony of an enslaver's agents. If he was concerned about the potential for injustice, Judge Fry did not show it. "In a perfunctory manner he granted the certificate of deportation."[263]

C. "I pray that God may give you wisdom, right words, boldness, success!"

On June 8, 1852, a week after Judge Fry signed the order condemning Carter, Robert, and Sandy back to slavery, the Reverend S.D. Simonds wrote to Cornelius Cole: "I hear you are engaged in the Habeas Corpus case in favor of the colored men. I pray that God may give you wisdom, right words, boldness, success!"[264] At the time, Cornelius was practicing law in Sacramento, having returned to his chosen profession after a season in the goldfields.[265] Originally from western New York, Cornelius had come out to California in July 1849, in one

258. Power of Attorney, C.S. Perkins to A.G. Perkins, *In re Perkins*, 2 Cal. 424 (1852), Court Documents, *supra* note 256.

259. Andy, Habeas Corpus Case 10 (n.d.), Box 29, Folder 2, Cole Family Papers, *supra* note 1.

260. Fugitive Slave Act of 1850, ch. 60, § 6, 9 Stat. 462 (1850) (repealed 1864).

261. *The Fugitive Slaves Before the Court*, *supra* note 1; Andy, Habeas Corpus Case 9 (n.d.), Box 29, Folder 2, Cole Family Papers, *supra* note 1.

262. Andy, Habeas Corpus Case 9 (n.d.), Box 29, Folder 2, Cole Family Papers, *supra* note 1.

263. *Id.* at 10; *see* Certificate of Justice Fry 1, *In re* Perkins, 2 Cal. 424 (J. P. Ct. June 2, 1852), Court Documents, *supra* note 256.

264. Letter from S.D. Simonds to Cornelius Cole 1 (June 8, 1852), Box 27, Folder 2, Cole Family Papers, *supra* note 1.

265. *See* COLE, *supra* note 75, at 72 (stating that he left the mines early in the spring of 1850).

of the first companies to complete the overland route.[266] Like most gold seekers, he was a young man when he came, aged twenty-six.[267] He had not been a lawyer for long—he earned his law license in 1848, the year before he arrived—but he studied under one of the best.[268] He read law under the tutelage of William Seward, the former governor of New York and future statesman in the Lincoln administration.[269]

Cornelius's law office was on K Street, across the street from the jail and next door to a store run by a "most kind-hearted man" and antislavery activist named Mark Hopkins.[270] Hopkins had been approached by members of the African American community shortly after Judge Fry issued his order condemning Carter and his companions to slavery.[271] The Black community in Sacramento was not very large—it numbered only a few hundred—but along with a similar-sized community in San Francisco, they had played a prominent and active role in fighting for the rights of people of color since the state's inception.[272] Following the passage of Crabb's bill, the group doubled down on its efforts and promised "to resist every attempt made to carry out the late fugitive slave law of this State."[273] True to their word, once they heard about the case against Carter, Robert, and Sandy, they went to Hopkins and asked for help finding an attorney.[274] Hopkins pointed to Cornelius, whose antislavery beliefs by this time were well known. "Under these circumstances it was quite natural that when a colored man fell into difficulty resort should be to me for assistance," Cornelius remarked.[275]

Cornelius never considered himself an abolitionist. Small wonder. "An abolitionist in the mind of not a few was a more odious

266. *See* Cornelius Cole 52 (n.d.), Box 29, Folder 2, Cole Family Papers, *supra* note 1 (stating that he was born in Lodi, New York); COLE, *supra* note 75, at 54, 57 (noting date of arrival and that, aside from a "few Mormon boys," they "were the first that year to make the trip quite across the country").

267. *See* Cornelius Cole 52 (n.d.), Box 29, Folder 2, Cole Family Papers, *supra* note 1 (listing birthdate as September 17, 1822).

268. COLE, *supra* note 75, at 3 (stating that he was admitted to the bar in May 1848).

269. *Id.*

270. Andy, Habeas Corpus Case 6–7 (n.d.), Box 29, Folder 2, Cole Family Papers, *supra* note 1.

271. *Id.* at 11.

272. There were 464 Blacks in San Francisco and 338 in Sacramento in 1852. By comparison, there were over 1,000 Blacks in the mining districts. STATISTICS OF CALIFORNIA, *supra* note 85, at 982, tbl. I.

273. *At a Meeting of the Colored Citizens*, DAILY ALTA CAL., Apr. 28, 1852.

274. Andy, Habeas Corpus Case 11 (n.d.), Box 29, Folder 2, Cole Family Papers, *supra* note 1.

275. *Id.* at 6.

character than the worst of criminals," he said.[276] But the fact that he spoke out against slavery, given all of its abuses, was more than enough for others to label him as one.[277] Driven by both politics and a "sentimental nature," Cornelius sought to curb the spread of slavery as well as the slave power.[278] He saw the corrupting influences of the institution on free labor and the rights of the common person, labeling the proslavery movement a pernicious "pro-money" one.[279] It was a passion that he carried with him as he began his own political career. Along with Mark Hopkins and Leland Stanford, he would help found the Republican Party in California in 1856.[280] Shortly thereafter, he would be elected to serve as the Sacramento District Attorney and then in the U.S. Congress, first in the House and later in the Senate. As a member of the House, alongside President Lincoln and his former mentor William Seward, he worked to pass the Thirteenth Amendment.[281] "It will be a lasting honor to any one [sic] who helps to kill slavery, the fruitful source of all our woes," he wrote at the time.[282]

Cornelius agreed to represent the three men.[283] As they were being held in the local jail, awaiting their removal, his first order of business was to seek a writ of habeas corpus in the district court in Sacramento.[284] He filed his petition with Judge Lewis Aldrich, who was known among the legal community as a "quiet-mannered gentleman."[285] But he was also a "proslavery man," and when he held a hearing on the petition on Monday and Tuesday, June 7–8, the latter sentiments prevailed.[286] The courtroom was packed, as Southern sympathizers had spent the last several days "nois[ing] about that [Cornelius] was interfering with the deportation of a slave."[287] Some,

276. *Id.*
277. *Id.*
278. COLE, *supra* note 75, at 93.
279. Slavery Is Either Right or Wrong 4 (1852), Box 27, Folder 2, Cole Family Papers, *supra* note 1.
280. COLE, *supra* note 75, at 112; *see generally* Gerald Stanley, *Slavery and the Origins of the Republican Party in California*, 60 S. CAL. Q. 1, 1 (1978).
281. COLE, *supra* note 75, at 122, 158, 219–20.
282. Letter from Cornelius Cole to Olive Cole 2 (Jan. 26, 1865), Box 6, Folder 1865, Cole Family Papers, *supra* note 1.
283. *See* Power of Attorney, R&C Perkins & Sandy Jones to Cornelius Cole 1 (June 5, 1852), Box 27, Folder 2, Cole Family Papers, *supra* note 1 (appointing Cornelius as "our true and lawful attorney").
284. Petition in Favor of Robert Perkins, Sandy Jones, and Carter Perkins 1–2 (June 5, 1852), Box 27, Folder 2, Cole Family Papers, *supra* note 1.
285. Andy, Habeas Corpus Case 11 (n.d.), Box 29, Folder 2, Cole Family Papers, *supra* note 1.
286. *Id.*
287. *Id.* at 11–12.

in fact, came to the hearing "well armed for a possible conflict," with one telling Cornelius "that he intended to make a personal matter of this with [him]."[288] Even Judge Aldrich was intimidated by the show of force, conducted as it was in true frontier fashion.[289] When Cornelius demanded that the judge address the lawlessness prevailing in the courtroom, Aldrich banged his gavel and "commanded peace but went no further."[290] He then summarily refused Cornelius's request to inquire into the merits of the case, and remanded Carter, Robert, and Sandy to the custody of the sheriff, to be given back to Albert Perkins.[291]

Following Judge Aldrich's decision, neither the three men nor the Black community gave up. They urged Cornelius to take the matter to the California Supreme Court and file another habeas petition in the hopes that the high court would address the constitutionality of the Fugitive Slave Act. Their determination paid off. The following week, Justice Alexander Wells granted the motion and set the hearing for July 5.[292] In the meantime, the Black community continued to dig through pockets and drawers to find money to pay for the cost of representation. Cornelius's services did not come cheap. Early on, his former law partner James Pratt advised him that the "sum of *one thousand dollars* is the least sum for which the constitutionality of the law can be properly tested before the Supreme Court."[293] By the middle of the month, the legal team had grown to include Pratt's firm of Brown, Pratt, and Tracy, drawing on the firm's expertise and connections with the San Francisco legal community, where the Supreme Court was located.[294] While the addition no doubt helped Cornelius strategize the

288. *Id.* at 12–13.

289. *Id.* at 13.

290. *Id.*

291. *Id.* at 13–14; *see* Habeas Corpus Order at 1–2, *In re* Perkins, 2 Cal. 424 (1852), Court Documents, *supra* note 256.

292. Warrant at 1–3, *In re* Perkins, 2 Cal. 424 (1852), Court Documents, *supra* note 256.

293. Letter from James Pratt to Cornelius Cole 2 (June 3, 1852), Box 2, Folder "1851–1859 Letters" Cole Family Papers, *supra* note 1.

294. *See* Letter from James Pratt to Cornelius Cole 1 (July 1, 1852), Box 2, Folder "1851–1859 Letters," Cole Family Papers, *supra* note 1 (noting that since Carter, Robert, and Sandy rejected other possible attorneys, "the result is that we [Brown, Pratt, and Tracy] *alone* are in the case"). Cornelius had been consulting with James Pratt since the beginning of the case, including as to whether the firm should join the legal team. *See* Letter from James Pratt to Cornelius Cole, *supra* note 16, at 2 ("I think we can do better justice in this office here to the negroes than *any other firm* in town.").

case,[295] it also led to a corresponding increase in legal fees.[296] The Black community's commitment, however, was unwavering. Despite some difficulty in raising the money, since the community had contributed to other freedom suits before this one, Reverend Simonds assured Cornelius that "all necessary help can be had here . . . . Push the case to the last point!"[297]

The community's response illustrates the shared determination to bring about change through the law. Indeed, the Black community understood, far more than contemporary scholars credit, that the law was designed not just to oppress; it was also the best if not the only way to assert their rights and the rights of enslaved persons like Carter and his companions. Their efforts can be seen further in the days following Judge Aldrich's order remanding the three men to the custody of Albert Perkins. During that period, the community got wind of a plan to take the men down to San Francisco and put them on board a steamship, in a bold effort to slip out of the state unnoticed before the Supreme Court could hear the case. They informed Cornelius, and he had Moses Jackson, a member of the community, file an affidavit with the Supreme Court detailing the scheme.[298] That same day, Justice Wells issued a warrant—not for the arrest of Albert and his partner-in-crime Hardin Scales—but for Carter, Robert, and Sandy, to hold them in custody for their own protection.[299] It proved prescient. Less than a week later, Albert and Hardin attempted to carry out their plan under cover of night. A community member keeping a close eye on the matter tipped off the local constable, however, and in the early morning hours, the police boarded the steamship *California* and took the three men into custody to await the hearing.[300]

295. *See* Affidavit for Writ of Certiorari, *In re* Perkins, 2 Cal. 424 (July 1, 1852), Court Documents, *supra* note 256. Cornelius also filed a petition for a writ of certiorari appealing Fry's original order on the ground that Fry lacked jurisdiction. *Id.*; Letter from James Pratt to Cornelius Cole 1 (June 24, 1852), Box 2, Folder "1851–1859 Letters," Cole Family Papers, *supra* note 1. The legal team was concerned—wrongly, it turns out—that the doctrine of *res judicata* would prevent the court from hearing the petition for habeas corpus. *Id.*

296. Letter from James Pratt to Cornelius Cole, *supra* note 293, at 2. In his letter to Cornelius discussing compensation, James Pratt suggested that the Black community raise "at least *five thousand dollars*" to cover the cost of litigation. *Id.*

297. Letter from S.D. Simonds to Cornelius Cole, *supra* note 264, at 1.

298. *See* Affidavits of Moses A. Jackson at 1–2, *In re* Perkins, 2 Cal. 424 (June 14, 1852), Court Documents, *supra* note 256.

299. Warrant at 1–3, *In re* Perkins, 2 Cal. 424 (1852), Court Documents, *supra* note 256.

300. *First Fugitive Slave Case in San Francisco*, S.F. HERALD, June 19, 1852. The 1852 census lists the three men in San Francisco, where they were imprisoned. 1852 CALIFORNIA STATE

V. SLAVERY AND THE SUPREME COURT: *IN RE PERKINS* AND THE TRIUMPH OF SLAVERY IN THE WEST

A. "This disgraceful law must sink into its merited oblivion"

The hearing before the California Supreme Court was delayed for almost a month, from July 5 until July 29.[301] Apparently, this was due to some confusion over how many justices needed to hear the petition, one or all three, and Chief Justice Hugh Murray was not in the city.[302] In the end, given the importance of the matter, the entire court decided to hear the case and reach the merits.[303] The extra month between the original date and the eventual hearing gave the legal team time to prepare its arguments. Throughout the time, Cornelius kept jotting down notes on random pieces of paper—cases, authorities—that showed a depth of understanding that would serve him well.[304] Apparently, the original plan was to have Harvey Brown speak first and set up the issues, perhaps because of his relationship with the justices and his reputation in the city.[305] At the last minute, however—"owing to the sudden indisposition of my distinguished & very able associate"—Cornelius took on that role.[306] With little time to spare, he wrote out his argument in a neat hand, in a document that spanned over ninety pages—part of a collection of his papers that is now housed in the

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CENSUS, SAN FRANCISCO, *supra* note 40, s.v. "Robt Perkins," "Sandy Jones," and "Charles Perkins."

301. S*ee The Fugitive Slave Case*, S.F. HERALD, July 29, 1852.

302. *See Fugitive Slaves*, S.F. PAC., July 9, 1852 (mentioning that the hearing was postponed "until a full bench should be present"); *see also The Fugitive Slave Case*, *supra* note 301 ("Judge Murray is now in the city, so that the case will be argued before a full Bench."). The confusion was the result of the Act of April 20, 1850, which provided that only one judge needed to hear a habeas petition, as it "is a mere chamber proceeding, a summary mode of determining whether a party be properly held in custody." *In re Perkins*, 2 Cal. at 430.

303. *See In re Perkins*, 2 Cal. at 430 (Murray, C.J.) (stating, in addressing the habeas question, "the questions in this are as various and delicate as they are important"); *id.* at 443 (Anderson, J.) ("It is desirable to dispose of [the case] exclusively, upon its legal merits.").

304. There are several unsigned and unfiled documents and legal briefs concerning the case among Cornelius's papers. For example, there is a document titled "Hab. Corp. Brief" with one page of cases and citations; an untitled document containing two pages of cases and citations on slavery and the constitution; a document titled "Constitutional Brief Fug. Sla. Law" with two pages of citations; a document titled "Constitutional Brief" with three pages of cases and citations; a document titled "Slave Case Robinson's Points;" and a document titled "Fugitive Slave Case" with arguments and citations. All are contained in Box 27, Folder 2, Cole Family Papers, *supra* note 1.

305. *See* Letter from James Pratt to Cornelius Cole, *supra* note 16, at 2 (stating Brown "has as much influence here [in San Francisco] as any man in the city with the judges of the court").

306. Untitled document containing legal arguments 3 (n.d.), Box 27, Folder 2, Cole Family Papers, *supra* note 1; *see also Fugitive Slave Trial*, CAL. CHRISTIAN ADVOC., Aug. 12, 1852 (stating that Cornelius "opened the case").

Charles E. Young Research Library at UCLA.[307] "It is more than likely," he planned to tell the Court, that "you will never be called upon to decide a question involving greater responsibility than attaches to the present."[308]

The hearing was held at the California Exchange Building on Kearney Street in San Francisco, where the nascent Supreme Court shared space on the first floor with the San Francisco City Council.[309] By now, the case had attracted significant attention in the community, with several of the local papers siding with the slaveholding interests, in a sign of how far the tide of freedom had shifted since the initial ban on slavery. "We regard any attempt to disturb this law as very senseless and mischievous," the *San Francisco Herald* maintained, "and the persons who have applied for this writ might have been much more usefully employed."[310] The *San Joaquin Republic*, where the bill's sponsor Henry Crabb was from, likewise believed "the law of the state to be constitutional, and that a refusal to make such provisions as the law contains would be unjust and oppressive."[311]

Taking the podium in the packed courtroom, Cornelius began his argument by reciting the by-then familiar notion from *Marbury v. Madison*[312] that it is the responsibility of the courts, not the legislature, "to say what the law is."[313] He then laid out several constitutional arguments against the Fugitive Slave Act. He started by arguing that the act was an *ex post facto* law in violation of Article I, Section 10 of the U.S. Constitution, the provision prohibiting punishing actions retroactively.[314] The argument was that the law punished Black people by making it a crime to refuse to return to slavery when before the act such action was not illegal, at least not in California.[315] He also claimed that the law impaired the contractual obligation of the state to

307. Additional records from the case can be found in the Naglee Family Collection, *supra* note 147, at the Bancroft Library at University of California, Berkeley.

308. Untitled document containing legal arguments 4 (n.d.), Box 27, Folder 2, Cole Family Papers, *supra* note 1.

309. Jake Dear and Levin, *Historic Sites of the California Supreme Court*, 4 CAL. SUP. CT. HIST. SOC'Y Y.B. 63, 66 (1998–99).

310. *Topics of the Day*, S.F. HERALD, June 19, 1852.

311. *The Fugitive Slave Bill*, SAN JOAQUIN REPUBLIC, June 23, 1852.

312. 5 U.S. 137 (1803).

313. Untitled document containing legal arguments 13 (n.d.), Box 27, Folder 2, Cole Family Papers, *supra* note 1.

314. *Id.* at 21–22.

315. *Id*. at 22–23.

secure every individual their liberty, in violation of the Contracts Clause.[316]

While both arguments may have struck some as credible, neither one was the best Cornelius had to offer. He had a stronger argument when he moved to the question of preemption, maintaining that the state Fugitive Slave Act conflicted with the federal Fugitive Slave Act of 1850. He argued essentially that a "state has no power to legislate upon the subject of fugitives from labor, for that power is in the national legislature alone."[317] Since Congress had effectively preempted the field, all state legislation upon the same subject was void. The argument must have struck some as particularly effective. It drew on the proslavery decision *Prigg v. Pennsylvania*,[318] where the Supreme Court struck down the "personal liberty" laws found in several free states because they interfered with the enforcement of the original Fugitive Slave Act of 1793.[319] The same doctrine applied here, according to Cornelius. "If it be true," he said, "that a state has no authority to legislate upon the subject at all, she of course cannot send back even a fugitive from labor, much less can she force to return a slave who has been brought within her borders by the free will & consent of his master."[320]

Building off the momentum from the preemption argument, Cornelius turned next to the antislavery provision in the state constitution, insisting that the California Fugitive Slave Act conflicted with both its terms and spirit. The constitution, he said with typical flare, "unloosed the shackles of the menial & severed the cord that bound him to his master."[321] Having done so, slavery could no longer exist in the state, and any enslaved person living in California became, ipso facto, free.[322] The legislature, moreover, could not override what the constitution clearly provided. To the contrary, "while that constitution exists," he said, "it is utterly impossible for any power within this state to replace those shackles, or unite again that cord."[323] To bolster the

316. *Id.* at 22–30.
317. *Id.* at 35.
318. Prigg v. Pennsylvania, 41 U.S. 539 (1842) (enslaved person at issue).
319. *See id.*; *see generally* Norman L. Rosenberg, *Personal Liberty Laws and Sectional Crisis: 1850–1861*, 17 CIV. WAR HIST. 25 (1971).
320. Untitled document containing legal arguments 45 (n.d.), Box 27, Folder 2, Cole Family Papers, *supra* note 1.
321. *Id.* at 65.
322. *Id.*
323. *Id.*

argument, Cornelius cited Lord Mansfield's decision in the famous *Somerset v. Stewart*[324] case, along with references to the rule from the freedom-by-residence cases that a slaveholder moving to a free state relinquishes his right to hold another. "The moment a slave . . . puts his foot on the soil of California he becomes a freeman," Cornelius maintained.[325] "The air of this country is not, for him, less pure than that of England."[326]

As he neared the end of his argument, which by now must have lasted two or more hours, Cornelius focused less on obscure constitutional arguments and more on appeals to better judgments. The law was not only contrary to "wisdom & justice"; public policy demanded that it be struck down.[327] The entire Compromise of 1850, including the admission of California and the new federal Fugitive Slave Act, was forged with an eye on preserving the Union. "The fires of Sectional jealously were put to sleep" when it passed, Cornelius pronounced, "and the good prayed & the just hoped that they might never be fanned to a flame again."[328] Yet that is precisely what the California legislature did when it enacted this law. "They have put the train to the magazine, and once more we are in danger."[329] But Cornelius, at least, had not lost hope. The legislature acted without authority; yet it was "within the power of this Court, even in their decision in this case, and on this glad day, to preserve the compromises, to allay sectional feeling, and probably save from destruction the noblest fabric of human government that ever graced the green Earth," he said in a flourish.[330] Gathering his papers to sit down, Cornelius circled back and concluded with his main point. "[T]he right of the man is triumphant, & this disgraceful law must sink into its merited oblivion."[331]

B. "This species of property is protected by the flag of the country, and the compromises of the Constitution"

On August 31, one month after oral arguments, the California Supreme Court met to start the new term. Before proceeding to new business, the Court announced that a decision in the *Perkins* case had been

324. 98 Eng. Rep. 499 (1772).
325. *Id.* at 49.
326. *Id.*
327. *Id.* at 83.
328. *Id.* at 86.
329. *Id.*
330. *Id.* 86–87.
331. *Id.* at 93.

reached.[332] It was troubling news. The concern among Cornelius and his legal team was that, of the three justices who participated in oral arguments, only two were sitting before them: Chief Justice Hugh Murray and Justice Alexander Anderson.[333] It turns out that Justice Alexander Wells, the third member and the one who had granted Cornelius's application for a writ, had been holding a temporary appointment that summer while Justice Solomon Heydenfelt, the permanent member of the Court, visited family.[334] Between the time of the hearing and now, Justice Wells's temporary appointment had expired, and he was no longer on the Court.[335] Perhaps sensing what was coming, one of the lawyers for the three men jumped up and demanded a rehearing in front of all the current members.[336] Chief Justice Murray overruled the motion, however, because both he and Justice Anderson were in agreement. Another opinion, even if a dissenting one, would not alter the result.[337]

Cornelius and the legal team knew they had faced strong headwinds when they argued their case back in July. Justice Anderson, who had been on the bench since April, was born and raised in Tennessee, and could be counted on as a reliable friend of the Chivalry party and its slaveholding interests.[338] Chief Justice Murray might have been a little harder to read. He was also from the South—he was born in Missouri—but he had lived in Illinois before coming to California in 1849.[339] The more remarkable fact about Murray was that he was only twenty-seven when the *Perkins* case was argued.[340] The youngest serving chief justice in California history, he was elevated to the position in April 1852 after first being appointed to the Court in October 1851.[341] He would go on to prove himself "a man with little

332. *Supreme Court*, S.F. HERALD, Aug. 31, 1852.

333. *Id.*

334. *Id.*

335. *Id.* Alexander Wells would be elected to the Court as a permanent member in November 1852. Edgar Whittlesey Camp, *Hugh C. Murray: California's Youngest Chief Justice*, 20 CAL. HIST. SOC'Y Q. 365, 366 (1941).

336. *Supreme Court*, *supra* note 332.

337. *Id.*

338. Charles J. McClain, *Pioneers on the Bench: The California Supreme Court*, 1849–1879, *in* CONSTITUTIONAL GOVERNANCE AND JUDICIAL POWER: THE HISTORY OF THE CALIFORNIA SUPREME COURT 1, 11 (Harry N. Scheiber ed., 2016); *see also Liberty Fallen in California!!*, LIBERATOR, Oct. 22, 1852 ("Judge Anderson comes from the State of Tennessee, and may be presumed to express the Southern understanding of the compact.").

339. Camp, *supra* note 335, at 365.

340. *See id.* (noting Chief Justice Murray was born on April 22, 1825).

341. *Id.* at 366–67.

imagination or humor."[342] Before he died of consumption in 1857, he would also establish himself as an unabashed racist. In addition to the *Perkins* case, he would write one of the Court's most infamous decisions extending the legislative ban on African American testimony to include the Chinese—"a race of people," he said, "whom nature has marked as inferior, and who are incapable of progress or intellectual development beyond a certain point . . . ."[343]

Chief Justice Murray read his opinion from the bench, followed by Justice Anderson. Murray began his decision by knocking down Cornelius's preemption argument—that the power to legislate on the subject of fugitive slaves belonged solely to Congress.[344] Reviewing *Prigg v. Pennsylvania* at length, Murray concluded that that there was a difference between the state's exercise of its police powers to "essentially promote and aid the interest of the owners"—such as it did here—and passing regulations that "interfere with, or obstruct the just rights of the owner to reclaim his slave."[345] Only the latter was preempted. The states had always been able "to arrest and restrain runaway slaves, and remove them from their borders," Murray reasoned, just as they had with "idlers, vagabonds and paupers."[346] California's Fugitive Slave Act did not interfere with federal law any more than these earlier efforts, as it was merely supportive or concurrent with the federal act.[347]

Murray then turned to the question of whether the California Fugitive Slave Act, and specifically section 4, violated the state constitution. He held that it did not. The intention of the law "was simply to place these persons in the category of fugitives from labour, for the purpose of extending the provisions of the law over them."[348] What it did not do, he said in direct response to Cornelius's argument, is change their status, turning free persons into slaves.[349] To the contrary, when people like Carter, Robert, and Sandy arrived they were enslaved, and the Fugitive Slave Act did nothing more than recognize this fact. This section, he said, "gives no claim to the owner, and vests

342. *Id.* at 369.
343. People v. Hall, 4 Cal. 399, 404–05 (1854).
344. *In re* Perkins, 2 Cal. 424, 430 (1852) (enslaved party).
345. *Id.* at 432.
346. *Id.* at 431–32.
347. *Id.* at 436.
348. *Id.* at 439.
349. *Id.* at 437.

him with no right except for the deportation of this class of inhabitants."[350]

In reaching this conclusion, Murray officially took sides in the debate over the status of slaves brought to California before it was admitted to the Union. Wrapping his arms around the argument of John Calhoun and the Southern fire-eaters, including the *Mississippian*, he held—in an apparent first for any court in the country—that the federal territories were common property belonging to all, and that slaveholders had just as much right to travel to them with their slave property as Northerners did when they brought their wagons and their mules.[351] As Murray explained it, Charles Perkins and other enslavers came to California under the belief that "this species of property" was "protected by the flag of the country, and the compromises of the Constitution."[352] Murray's opinion was thus remarkable in its scope. Five years before *Dred Scott*, the California Court constitutionalized what thus far had been only the arguments of slaveholders and their sympathizers—that enslaved persons were not people but property, and that the Due Process Clause of the Fifth Amendment protected the rights of enslavers to take their property into federal territory.[353]

Murray also made a point to say that, as he viewed the matter, the Court did not have the power to decide whether Carter, Robert, and Sandy were in fact free, notwithstanding Cornelius's point that the two years they had lived in California following its admission to the Union "unloosed [their] shackles."[354] Under the terms of the California Fugitive Slave Act, Murray said, the legislature simply committed them to their purported owner and made no provision for determining whether they were slave or free.[355] That decision, said Murray, was for the Mississippi courts, in what was little solace to the three men.[356] They had no interest in trying their right to freedom in a state that enslaved them, especially since the freedom-by-residence cases had for the last decade been breaking against them. But to Murray it was of no matter. "The right of these prisoners to their liberty is as safe in the hands of the Courts of the slaveholding States, as it possibly could be

350. *Id.* at 437.
351. *Id.* at 454–55.
352. *Id.* at 437–38.
353. *Id.* at 439–40.
354. *See supra* note 321 and accompanying text.
355. *In re Perkins*, 2 Cal. at 437.
356. *See id.* at 424.

here," he opined, after ominously agreeing with the ways in which Southern courts had narrowed the doctrine.[357] "If they are free, it will so be held; but if it should be otherwise, then this State will have the satisfaction of having performed its obligations to many of its citizens."[358]

In the spirit of other proslavery decisions, from *State v. Mann*[359] to *Dred Scott*, Murray insisted that his holding was merely following where the law took him, and that the Court had nothing to do with "the wisdom of the law, or the question of slavery."[360] But anyone who sat through the last hour while he read his opinion from the bench might be excused if they thought otherwise, especially since he went to great lengths to justify his decision to uphold the Fugitive Slave Act with deliberate appeals to the racial underpinnings of California's recent history. Slavery, he said, along with the increase in the free Black population, "has for some time past been a matter of serious consideration with the people of this State, in view of the pernicious consequences necessarily resulting from this class of inhabitants."[361] Better to let slaveholders purge the state of the presence of Black people under the Fugitive Slave Act than to let them stay in California and become free, as they would amount to nothing more than "festering sores upon the body politic."[362] The judgment of the Court, he concluded, was that the writ be dismissed and the three men remanded to the custody of the sheriff to be delivered to Charles Perkins's agent, "without delay or cost."[363]

C. "No temporary residence of a slave under a new local power creates freedom or works forfeiture"

Justice Anderson concurred in Murray's decision but took matters to new heights when he addressed the question about whether Carter, Robert, and Sandy were in fact free. As Murray did, he started his opinion by adopting the position of Calhoun and others that enslaved persons were not people; they were property, protected by the Constitution and the laws of the various states.[364] This meant that

357. *Id* at 438.
358. *Id.*
359. 13 N.C. 263 (1829) (enslaved person at issue).
360. *Id.* at 442.
361. *Id.* at 438.
362. *Id.* at 438.
363. *Id.* at 442.
364. *Id.* at 444 (Anderson, J., concurring).

slaveholders had the right to bring their property into federal territories, including California, and the government was not simply permitted—it was required—to protect them in that right.[365] It thus could not be said that the California Fugitive Slave Act was unconstitutional because it did nothing more than what the Due Process Clause demanded. But Anderson did not stop there. He went on to address the question left open by Murray's opinion about the status of Carter, Robert, and Sandy after California entered the Union. Here, like Murray, he reviewed at length the freedom-by-residence cases, but then came to a remarkable and far-reaching conclusion: a slave taken to a free state remained a slave, as long as the enslaver planned to return home at some undefined point in the future.[366]

Anderson's conclusion was based on an expansive reading of the former cases that had drawn a distinction between traveling, or sojourning, through a free state and taking up residence. In his view, nothing short of moving to a state with the intent to remain—in other words, permanent residence—freed an enslaved person brought to the state. There is not a "shade of difference," Anderson said, between "passage by a master and his slave through a free State" and taking up a temporary residence "with the intention to return."[367] The holding seemingly tracked the Missouri Supreme Court's recent decision in *Dred Scott* abandoning the doctrine of freedom-by-residence, and was no doubt a boon for slaveholders—not just those like Charles who came before California entered the Union, but also those on their way. It would be easy enough for any of them to insist that they did not intend to reside in California permanently, and that they intended to return to their home state at some date in the future. Even Cornelius had recognized the temporary status of those who came. "Not one out of ten thousand, then in California, thought seriously of making the Pacific Coast his continual abiding place," he said.[368] "All were mere sojourners and everybody habitually talked about going home."[369] Charles Perkins had lived in California for eighteen months, and Carter, Robert, and Sandy lived there an additional year. It mattered not. "I repeat the conclusion," Anderson said, "that no temporary

365. *Id.* at 454–55.
366. *Id.* at 444.
367. *Id.*
368. COLE, *supra* note 75, at 75.
369. *Id.*

residence of a slave under a new local power creates freedom or works forfeiture."[370]

Anderson seemed to relish his opportunity to publicly tongue-lash an antislavery activist like Cornelius, especially after the latter's nod to *Somerset v. Stewart* and his appeals to better judgments. There was nothing about California's air that made it too hard for a slave to breathe, according to Anderson. To the contrary, despite what most everyone thought a threadbare truth, the antislavery provision in the California Constitution did nothing for slaves residing in the state. As Anderson saw it, at the time the constitution was written, "[s]laves were known to be here, and it was well known that any act designed to emancipate them would have prevented the ratification of the Constitution by the people."[371] The antislavery provision was, in other words, inoperative and without effect in the absence of future legislative action.[372] It was a remarkable display of revisionist history, but it was one that was cheered by slaveholders across the state. As it stood, the only law on point was the Fugitive Slave Clause, and the clause made clear their slaves were still slaves.

As for Cornelius's other arguments, neither member of the Court felt compelled to spend much time refuting the claims that the California Fugitive Slave Act was an *ex post facto* law or that it interfered with the state's obligation of contracts. As Murray put it, the act did not make a crime out of previously noncriminal activity, and hence was not an *ex post facto* law; "[i]t simply provides for the deportation of slaves brought here before a certain period."[373] Anderson added, in what was the driving theme of his opinion, that enslaved persons were "not parties to the Constitution, and although 'persons,' they [were] property, and without immunities."[374] The constitutional ban on *ex post facto* laws thus simply did not apply. Nor did the act impair the state's obligation of contracts. "The State of California has certainly not entered into any contract with free negroes, fugitives, or slaves," Murray said, "which would prevent her, upon proper occasion, from removing all or any one of these classes from her borders."[375]

370. *In re* Perkins, 2 Cal. 424, 450 (1852) (enslaved party) (Anderson, J., concurring).
371. *Id.* at 456.
372. *Id.* at 455.
373. *Id.* at 440 (majority opinion).
374. *Id.* at 457 (Anderson, J., concurring).
375. *Id.* at 440 (majority opinion).

With that, the Court's most closely watched case of the decade, and one that would have repercussions for years to come, was brought to a close. The result was clear. Following hard fought battles dating back to the war with Mexico, and waged from coast to coast, slavery had triumphed in the West.

EPILOGUE

The various schemes to officially turn California—and later its southern half—into a slave state never succeeded. But the never-ending efforts to accomplish it, along with the passage of the California Fugitive Slave Act, illustrate the determination with which Southern slaveholders and their Chiv sympathizers sought to protect and develop slavery in the state, even after it was outlawed. To them, the decision in *In re Perkins* was not just correct, it was necessary to protect what they believed to be their constitutionally protected right to property. As the decision was announced, "[v]ery many of the bar were present," said the *San Francisco Herald*, "and reading of the Chief Justices' opinion, together with that of Judge Anderson which followed, was received with profound attention and seemingly with general satisfaction."[376]

The ruling meant that slaveholders, regardless of how long they had resided in California, were entitled to hold any enslaved person brought to the state prior to the adoption of the Constitution in September 1850 as a slave. The decision was so profound, in fact, that it was cited and relied on as authority by the lawyers in *Dred Scott*.[377] Discussing its potential impact on the infamous decision, the proslavery *DeBow's Review* hailed the *Perkins* opinion for its "thorough demonstration that negro slaves are property recognized under the Constitution, and entitled as property to the same protection as any other property whatever."[378] Going even further, in a chilling assessment that helped carve the path to the Civil War, it insisted that the *Perkins* opinion "shows clearly that the Constitution of the United States instantly converts all acquired territory into slave territory: that is, Southerners acquire thereby the very same right to carry and to hold

376. *Supreme Court*, *supra* note 332.

377. *Opinion of Judge Anderson, of the Supreme Court of California*, 23 DEBOW'S REV. 100, 100–01 (1857).

378. *Id.* at 100.

their slaves in such territory as Northerners do to carry and to hold their mules, horses, and merchandise."[379]

Indeed, the case's impact could be felt across the country, as multiple newspapers carried regular updates and reported on its final disposition.[380] "This was the first decision under the law in question," said the Washington D.C. *Daily National Intelligencer*, "and settles the question as to the legal right of the master to remove slaves brought into California before its admission as a State had been determined. There are many slaves now resident in that State liable to be removed under this law."[381] The *Mississippian* kept its hometown readers informed about the case, as did the *Hinds County Gazette*, especially since Charles Perkins, as both papers noted, was from the state.[382] Whether the papers came out in favor or against the decision, or merely noted its disposition, the result was quite clear to just about everyone: "The State is now perfectly open to slavery."[383]

There was evidently some talk of appealing the decision to the U.S. Supreme Court. Harvey Brown, one of the lawyers who assisted with the case at the California Supreme Court, wrote to Cornelius on the eve of the argument. "It is a matter of great doubt as to what the result will be," he said, "but if we fail here we must go with it to the Supreme Court of the U.S. without fail."[384] The reason they never appealed the decision is not known, but it potentially had to do with the cost of pursuing the appeal. Brown had made no secret of his expectation that he would be paid his typical fee. "The truth is Brown . . . is not willing to take hold of the dark side of these cases without a handsome fee being paid in advance," his partner James Pratt told Cornelius at one point.[385] There is nothing unusual or untoward about Brown's expectation. Lawyers, especially highly skilled ones, have always demanded high fees for their services. Cornelius, too, notwithstanding his strong opposition to slavery and his belief that the

379. *Id.*

380. *See, e.g.*, *Very Late from California*, N.Y. HERALD, July 17, 1852; *California News*, PHILA. N. AM. & U.S. GAZETTE, July 17, 1852; *A Slave Case*, WASH. D.C. DAILY NAT'L INTELLIGENCER, July 19, 1852; *California*, COLUMBUS DAILY OHIO STATESMAN, July 21, 1852.

381. *California Intelligence*, WASH. D.C. DAILY NAT'L INTEL., Oct. 6, 1852.

382. *See Untitled*, JACKSON MISSISSIPPIAN & ST. GAZETTE, Aug. 13, 1852; *Slavery Decision in California*, JACKSON MISSISSIPPIAN & ST. GAZETTE, Oct. 8, 1852; *From California*, HINDS CNTY. GAZETTE, Oct. 7, 1852.

383. *Liberty Fallen in California!*, *supra* note 338.

384. Letter from H.L. Brown to Cornelius Cole 1 (July 27, 1852), Box 2, Folder "1851–1859 Letters," Cole Family Papers, *supra* note 1.

385. Letter from James Pratt to Cornelius Cole, *supra* note 16, at 2.

California Fugitive Slave Act was unconstitutional, was far from a modern-day "cause" lawyer and most likely never considered appealing the case without adequate compensation.

In the months that followed, the case played out in predictable ways. Slaveholders and their sympathizers were emboldened. Robert Givens's father had asked him about bringing a slave named Patrick into the state. Robert wrote back in September 1852, shortly after the case was decided, and assured his father that he could do it, and "no one will put themselves to the trouble of investigating the matter."[386] Elizabeth Ware might as well have been back in the South. A month before the decision, in a brazen display of how confident slaveholders were of the result, she took out an advertisement in the *Sacramento Daily Union* offering a $100 reward for the return of an enslaved woman named Mary Hager, who had run away back in October 1850.[387]

The purported owner of Harriet Jordan was similarly confident that the courts and the public would protect his rights. Harriet had run off after marrying her husband, a free person of color.[388] Her purported owner tracked her down in San Francisco in September 1852 and had her arrested under the California Fugitive Slave Act.[389] The case was brought before a judge that had already heard two cases under the act in the month since the *Perkins* decision. As he did before, the judge found in favor of the slaveholder and remanded Harriet to the custody of her former owner.[390]

With control of the legislature solidly in the hands of the proslavery Chiv party, the California Fugitive Slave Act was also successfully extended for two additional years, through April 1855. During that time, a slaveholder from Arkansas named Tucker used it to his benefit, much like Charles Perkins did, when he tracked down Stephen Hill in the summer of 1854, a year or two after Tucker had moved back to Arkansas.[391] Hill protested that he had been given his freedom before Tucker had left, but the local court refused to credit the testimony

386. Letter from Robert Givens to Father 2 (Sept. 10, 1852), Robert R. Givens Letters to Family Collection, BANC MSS C-B 590 FILM, Bancroft Library, University of California, Berkeley.

387. *$100 Reward*, DAILY UNION, July 2, 1852.

388. *Fugitive Slave Case*, NEV. J., Mar. 4, 1852.

389. *Id.*

390. *Another Fugitive Slave Case*, DAILY ALTA CAL., Sept. 22, 1852.

391. *Arrest Under the Fugitive Slave Law of this State*, DAILY ALTA CAL., Aug. 21, 1854.

considering Tucker's assertion that he had not. Hill was turned over to Tucker and sent back to slavery.[392]

The result is less clear in a case involving George Mitchell, whom local authorities arrested in the spring of 1855 and charged with owing service to Jesse Cooper of Tennessee.[393] Mitchell had been brought to California in 1849, before the adoption of the Constitution, and shortly after made his escape.[394] Six years later, Cooper found him and sought to avail himself of the California Fugitive Slave Act. A crafty lawyer representing Mitchell was able to delay the case until after the law expired in April 1855, and then convinced the court to dismiss the case on the grounds that the law was no longer enforceable.[395] Cooper countered by applying for a warrant from a U.S. Commissioner to reclaim Mitchell under the federal Fugitive Slave Act, and there the paper trail ends.[396]

In ways that neither the California Supreme Court nor the pro-slavery contingent in the state likely predicted, however, the case also provided momentum to the members of an emerging Black community to coalesce around improving their lives and conditions. They would continue to help fund fugitive slave cases and secret away those who were being dragged back into slavery. In addition, starting in 1855, they would organize three statewide conventions, with the primary goal of overturning an 1851 law prohibiting persons of color from testifying in any case involving a white person.[397] As was true all over the South where such laws were standard, it led to a cascade of injustices, as whites assaulted and stole the property of persons of color with impunity. Petitions to repeal the ban ran into continued resistance from the legislature throughout the decade, as well as in the courts.

In fact, Cornelius Cole, now serving as the District Attorney in Sacramento, brought the issue all the way to the California Supreme Court in 1860.[398] In a case involving a white man accused of stealing

392. *Id.*; *see also The Sonora Slave Case*, ALTA CAL., Aug. 28, 1854; *The Fugitive Slave*, SACRAMENTO UNION, Aug. 30, 1854; *Fugitive Slave Case*, DAILY ALTA CAL., Aug. 30, 1854; *Fugitive Slave Case*, DAILY ALTA CAL., Sept. 2, 1854.

393. *The Slave Case*, SACRAMENTO DAILY UNION, Apr. 25, 1855.

394. *A Fugitive Slave Case*, DAILY ALTA CAL., Apr. 22, 1855.

395. *Id.*

396. *Id.*

397. *See generally* LAPP, *supra* note 14, at 210–38; James A. Fisher, *The Struggle for Negro Testimony in California, 1851–1863*, 51 S. CAL. Q. 313 (1969).

398. People v. Howard, 17 Cal. 63, 64 (1860).

a gold watch from a man of color, the accused claimed that the Black man could not testify that the property was taken from him.[399] Cornelius argued that the prohibition had led to an invitation to crime, and urged the court to overturn the ban. "It is possible, as suggested by the District Attorney, that instances may arise where, upon this construction, crime may go unpunished," the court acknowledged.[400] But, it said, in language harkening back to Chief Justice Murray's opinion in the *Perkins* case, "[i]f this be so, it is only matter for the consideration of the Legislature. With the policy, wisdom, or consequences of legislation, when constitutional, we have nothing to do."[401] Still, notwithstanding years of disappointments, Blacks in California were ultimately successful. In 1863, some nine years after the Court sentenced Carter, Robert, and Sandy to a lifetime of servitude, Blacks in California successfully convinced the legislature to recognize their voices and remove the ban on their testimony.[402]

As well, Blacks would continue to fight for freedom in the courts, on their own behalf and the behalf of others, with varying success. In 1857, two individuals brought suit for wages against William Gwin, the senator from the Chivalry Party, claiming that Gwin had wrongly enslaved them.[403] Notwithstanding their time providing labor for him, however, the court concluded that their complaint was defective, on the specious ground that "it does not aver that there was any contract between the parties, or any request by the defendant that the service should be performed."[404] The community had better success a few years later, after a man named Smith tried to track down an enslaved man named Turner that his father had brought to California in 1850.[405] Smith evidently found Turner and placed him in irons, with the intent to take him back to Missouri. After local residents stepped in to prevent the removal, Smith let him go.[406] As late as 1864, in what was perhaps the last fugitive slave case in the state, a Black man named Daniel Blue intervened on behalf of Adda, "a female colored child"

399. *Id.*
400. *Id.*
401. *Id.*
402. Act of Apr. 27, 1863, ch. 70, 1863 Cal. Stat. 69 (1863) (amending an Act entitled "an Act Concerning Crimes and Punishments," passed April 16, 1850). Notably, the law kept in place the ban on testimony by Indians and Chinese. *Id.*
403. *Suit for Wages of an Ex-Slave*, DAILY ALTA CAL., Dec. 20, 1857.
404. *Id*.
405. *Attempt to Kidnap*, SACRAMENTO UNION, Jan. 1861.
406. *Id.*

about twelve years old.[407] Adda's owner had brought the girl to California in the fall of 1863, where he held her out as a slave before selling her to a man named Gammon.[408] In open defiance of the law, Gammon continued to treat her as a slave, denying her necessary care and brutally beating her.[409] Blue sued, and Gammon was eventually forced to give her up.[410]

Perhaps the most well-known case, however, involved Archy Lee. In a story with as much drama as the *Perkins* case, the case of Archy Lee began when Charles Stovall from Mississippi traveled to California in the fall of 1857, bringing Archy with him.[411] Later that winter, in January 1858, Stovall—who was evidently concerned that Archy would flee—decided to send Archy back to Mississippi.[412] Archy subsequently escaped, only to be caught, arrested, and brought before Judge Robert Robinson to litigate the question of whether slavery could legally exist in a free state.[413] Judge Robinson held that it could not, but before Archy could enjoy his new status, Stovall arranged to have another warrant issued, this time by David Terry of the California Supreme Court.[414] That February, the Court held a hearing over the matter and quickly issued an opinion. It agreed with Judge Robinson, and held—in an apparent rejection of Justice Anderson's opinion in *In re Perkins*—that under the freedom-by-residence line of cases persons who came to California with the intention of living there could not own slaves.[415] But then, in an absurd twist, the court found that Archy could not benefit from its ruling, and he would remain a slave, because it was the first time the court had considered the matter and it would be unfair to Stovall to deprive him of his property.[416] Outraged, the Black community subsequently orchestrated another

407. Petition of Daniel Blue for Writ of Habeas Corpus 2, *In re* Adda, Nos. 756, 757, 758 (Probate Ct. Sacramento Cnty. Feb. 1864), Center for Sacramento History, Sacramento, California [hereinafter Petition of Daniel Blue]. For Daniel's race, see STATE CENSUS, 1852, SCHEDULE 1—INHABITANTS IN THE COUNTY OF SACRAMENTO, STATE OF CALIFORNIA, s.v. "Danl Blue."

408. Petition of Daniel Blue, *supra* note 407, at 2.

409. *Id.* at 3.

410. *See* Writ of Habeas Corpus, *In re* Adda, Nos. 756, 757, 758 (Probate Ct. Sacramento Cnty. Feb. 24, 1864), Center for Sacramento History, Sacramento, California.

411. *In re* Archy, 9 Cal. 147, 161 (1858) (enslaved party); *see generally* LAPP, *supra* note 14; William E. Franklin, *The Archy Case: The California Supreme Court Refuses to Free a Slave*, 32 PAC. HIST. REV. 137 (1963).

412. *In re Archy*, 9 Cal. at 161.

413. LAPP, *supra* note 14, at 148.

414. *Id.* at 148–49.

415. *In re Archy*, 9 Cal. at 171.

416. *Id.*

dramatic rescue on board the ship that was taking Archy to Panama, which led to another hearing and another victory for Archy.[417] But Stovall was ready once again, and in one last desperate strategy he had Archy arrested and brought before a U.S. Commissioner on the grounds that he was a fugitive under the federal Fugitive Slave Act of 1850.[418] The commissioner, however, ruled against Stovall, reasoning that Archy had not crossed state lines in his escape, and declared him, once and for all, free.[419]

As for Charles Perkins, he never returned to California after winning his case. He stayed in Mississippi with evident plans to follow in his father's footsteps as a cotton grandee. After marrying in 1853, however, he died in late 1855 or early 1856 of unknown causes.[420] As noted above, Cornelius Cole became a prominent member of the California Republican Party, serving in the U.S. House of Representatives from 1863–1865, and later in the Senate from 1867–1873.[421] He continued to speak out against slavery, casting important votes for the 13th, 14th, and 15th Amendments. Years later, when he reflected back on his representation of Carter, Robert, and Sandy, some of the details were lost—he focused on just one of them, and called him "Andy," for example. But he offered some potential good news in an otherwise tragic case. He had heard that "Andy" had escaped while crossing the Isthmus of Panama on the way back to Mississippi.[422] He "never gained any reliable information on the subject," however, and this author has not been able to independently verify the story.[423] But in what was an otherwise tragic case, for the individuals, the state, and the nation, one can always hope.

417. LAPP, *supra* note 14, at 149–51.

418. *Id.* at 151.

419. *Id.* at 152. For more on the aftermath of the case, see Stacey L. Smith, *Dred Scott on the Pacific: African Americans, Citizenship, and Subjecthood in the North American West*, 100 S. CAL. Q. 44 (2018).

420. ALBIN, WEALTH, LAND AND SLAVEHOLDING IN MISSISSIPPI, *supra* note 14, at 200.

421. *See generally Ex-Senator Cole Dies at 102 Years*, N.Y. TIMES, Nov. 4, 1924 (obituary).

422. Andy, Habeas Corpus Case (n.d.), Box 29, Folder 2, Cole Family Papers, *supra* note 1; *see also* LAPP, *supra* note 14, at 146 (stating that the three men escaped).

423. Andy, Habeas Corpus Case (n.d.), Box 29, Folder 2, Cole Family Papers, *supra* note 1.