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CONTENTS

PAGE

Articles:

The Abiel Abbot Journals, A Yankee Preacher in Charleston Society, 1818–1827, edited by John Hammond Moore....... 115

The Free Negro and the South Carolina Courts, 1790–1860, by Donald J. Senese 140

A Michigan Regiment in the Palmetto State, by George M. Blackburn 154

A Guide to the Commons House Journals of the South Carolina General Assembly, 1721–1775, by Charles E. Lee and Ruth S. Green 165

Reviews:

Bargar, *Lord Dartmouth and the American Revolution,* by J. Steven Watson 184

De Vorsey, *The Indian Boundary in the Southern Colonies, 1763–1775,* by William L. McDowell, Jr. 185

Hetherington, *Cavalier of Old South Carolina; William Gilmore Simms's Captain Porgy,* by Frank Durham................ 187

Curry, *James F. Byrnes,* by Raymond A. Moore.............. 188

Notes 191

Archives News 195

THE FREE NEGRO AND THE SOUTH CAROLINA COURTS, 1790-1860

By Donald J. Senese *

Free Negroes in antebellum South Carolina occupied a unique and dubious position in a society established for free whites and enslaved blacks. This class originated chiefly from masters' displaying their affection for their own mulatto children by freeing them or for their slaves by emancipating them as a reward for extraordinary fidelity and service, or by a slave's purchase of his own or his wife's freedom.[1] The number of the free Negroes remained small, never reaching two per cent of the total white and slave population of the state. The number of free Negroes and the percentage that they represented of the total state population during this period were as follows: 1,801 (.72%) in 1790; 3,185 (.92%) in 1800; 4,554 (1.10%) in 1810; 6,826 (1.36%) in 1820; 7,921 (1.36%) in 1830; 8,276 (1.39%) in 1840; and 8,960 (1.34%) in 1850. On the eve of the Civil War, in 1860, there were 9,914 free Negroes residing in South Carolina.[2]

The presence of the free Negro created an unusual legal problem. Ulrich Bonnell Phillips after studying slave labor in the Charleston area noted that a number of free Negroes "were gradually coming to acquire legal status as freemen, exempt from slavery regulations but in no wise recognized by the whites as their equal." [3] In an era when citizenship was only hazily defined, the free Negro could be considered a quasi-citizen at best. Despite various laws which regulated the free Negro, the task of ultimately determining his status in society fell to the courts of the state.

The judges of the South Carolina courts realized that the first duty of the law was to keep sound the society they served, and the decisions of these judicial bodies between 1790 and 1860 were representative of the truth of the Latin maxim, *Ratio est legis anima: mutata legis ratione*

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[1] David Duncan Wallace, *South Carolina: A Short History, 1520-1948,* Columbia, 1961, p. 442.

[2] "Registrar's report presented to the State House and Senate in November, 1860," cited in John Livingston Bradley, "Slave Manumission in South Carolina 1820-1860," unpublished master's thesis, University of South Carolina, 1964, p. 118.

[3] Ulrich Bonnell Phillips, "Slave Labor in the Charleston District," *Political Science Quarterly,* XXII (September 1907), 420.

months on John's Island, a lovely spot in the vicinity of this city. I feel grateful to a kind Providence for a call into a situation adapted to promote health and spirits, while it afforded me a little congenial occupation. The tokens of private friendship, on the island, have been of the most comforting and salutary nature; and I feel much pleasure in the hope that, through the blessing of God, these months of affliction and separation from my flock and family will not prove a blank in my life." [38]

A short time after these words were written Reverend Abbot journeyed to Savannah for a visit, returning to Charleston early in April. Then, in May 1819 he began an unusual overland trip northward in a sulky. Traveling alone, he toured leisurely through the Blue Ridge Mountains of North Carolina and Virginia en route to Massachusetts and home.

[38] Everett, *Sermons of the Late Rev. Abiel Abbot . . .*, p. xxvii.

(To be Continued)

mutatur et lex (Reason is the soul of law: the reason of law being changed the law is also changed). And South Carolina lawmakers were convinced that in order to keep their society sound they must tighten up the restrictions on the free Negro while assuming an aggressive defense of the institution of slavery; the courts also adopted a change in attitude toward the free Negro—from an attitude of sympathy to one of harshness.

The case of *The Guardian of Sally, a Negro* v. *Beaty*[4] decided in May 1792, represented the humanitarian spirit of this early period. A Negro slave, with the permission of her master, had used her free time to secure a job in a nearby town at which she worked after rendering the service required of her by her master. She saved up her wages from this additional employment until she was able to accumulate savings beyond what she owed her master for rent, and, using this reserve, she purchased a slave girl Sally and then set Sally free. The master of the slave, the defendant Beaty, never claimed Sally as his property and had even refused to pay taxes for her. When requested to deliver Sally as a free person, Beaty refused. Action in court was brought against him.[5]

The counsel for the defendant Beaty argued that the property of a slave went to the master of the slave. Not only did the master have title to the money his slave earned, but he also had title to whatever and whoever (e. g., Sally) his slave bought with this money. Although the defendant admitted that he had denied property in the girl Sally earlier, he added that he had done so only because he was ignorant of his right, but ignorance of this prerogative did not divest him of it.[6] The attorney for the defendant further maintained that a slave could not manumit another slave or do any other act against the best interest of the master without the consent of the master.[7]

The plea in defense of freedom for Sally was based on equity and justice rather than the common law. Noting that slavery was recognized in the state of South Carolina, the counsel for Sally pointed out that the claim of the master on the labor and services of a slave was not a life and death power over the slave as was possessed by Roman slaveholders. If the slave had paid the master what she owed him, the plain principles of justice must recognize the frugality and kindness of the slave in purchasing Sally and freeing her. Since this act was "so singular and extraordinary in itself, so disinterested in its nature, and so replete with kind-

[4] 1 Bay 260. All the state court decisions cited in this essay may be found in *South Carolina Reports.*

[5] *Ibid.*

[6] *Ibid.*, pp. 260-261.

[7] *Ibid.*, p. 261.

ness and benevolence," he stressed that in defeating the intention of the slave to free Sally, the court would be doing "violence to some of the best qualities of the human heart." [8]

Chief Justice John Rutledge in delivering the court's decision observed that, although the case was new, it did not take the court long to reach a decision. Since the slave had satisfied the service requirements of her master, Rutledge did not see how the master could be injured by the slave's purchase and subsequent freeing of Sally; in fact, he agreed with the counsel for Sally that the slave had performed a "singular and extraordinary act of benevolence." [9] The jury, without retiring from their box, returned a verdict in favor of freedom for Sally.[10]

The liberal spirit reflected in the above case soon failed with the opening of the nineteenth century. The new policy took the form of limiting the growth of the free Negro population by enacting laws against emancipation, regulations which were directly contrary to the humanitarian spirit of many slaveholders. Before 1800 there had been no fixed mode for emancipation since a master could manumit his slaves by deed, will, parole, or any other way he so desired.[11] Three major laws—those of 1800, 1820, and 1841—severely limited the right of the master to free his slaves. The law of 1800 required that a slave be of good character in order to be freed and that a deed be obtained before he was granted freedom.[12] The law of 1820 forbad manumission except by enactment of the state legislature.[13] The laws of 1800 and 1820 were reviewed by the courts in three major cases: *Linam* v. *Johnson*, *Frazier, et al.* v. *Frazier, Executor*, and *Miller* v. *Reigne*.

In the case of *Linam* v. *Johnson*, decided in January 1831, Judge David Johnson declared for the court that the act of 1800, which allowed any person to seize a slave who had not been manumitted according to the provisions of that act, had to be read with the act of 1820 [14] as part of one system since the latter act contained no repealing clause. Thus, if a slaveowner had manumitted a slave in violation of the law of 1820, the Negro emancipated would be liable for seizure as "a derelict, which,

[8] *Ibid.*, p. 262.

[9] *Ibid.*, pp. 262-263.

[10] *Ibid.*, p. 263.

[11] Helen Tunnicliff Catterall, *Judicial Cases Concerning American Slavery and the Negro*, Washington, 1929, II, 267.

[12] *Ibid.*, p. 268; see also *Acts of the General Assembly of the State of South Carolina, 1800*, pp. 355-357.

[13] See also *Acts and Resolutions of the General Assembly of the State of South Carolina, 1820*, p. 22.

[14] 2 Bailey 137.

according to the law of nature, any one might appropriate to his own use."[15]

A related case to the above was *Frazier, et al.* v. *Frazier, Executor,*[16] heard by the South Carolina Court of Appeals in May 1835. This judicial body examined the will of John Frazier, dated October 14, 1824, which provided that after the death of his wife it was his earnest wish and desire that "the whole of my negroes be set free by my executors, and the amount of money arising from the hire of said negroes be equally divided among the said negroes" in order that they might "with the assistance of the government go to St. Domingo to be colonized."[17] In rendering this decision, Judge John Belton O'Neall, reflecting that the spirit and not the letter of the act of 1820 must be considered, observed that the objective of this 1820 enactment was to prevent "a rapid increase of free negroes and mulattoes by emancipation," and, since the evil to be prevented was the increase of free Negroes within the state, the emancipation of slaves outside the state was no injury to South Carolina since free Negroes were prevented from entering its borders by laws of 1820 and 1823.[18] Setting slaves free within the state was contrary to state law; removing them from the states to areas where emancipation was lawful was allowable. Therefore, Judge O'Neall ordered the terms of the will of John Frazier to be carried out.[19] In the same year as the *Frazier* case, the humane spirit of the judiciary was reflected in the *Miller* v. *Reigne*[20] case, in which Judge O'Neall upheld the principle that when a Negro had been at large and acting as a free man for more than twenty years, a deed of manumission under the act of 1800 was presumed.[21]

As the bonds of Union became more strained and the free Negro was looked upon as more of a threat to the social system than a minority to be tolerated, the state legislature of South Carolina passed a comprehensive law in 1841 which further regulated and restricted the free Negro and, in effect, limited an increase in the free Negro population.[22] Probably recalling the ruling in the *Frazier* case, the new law voided all bequests, deeds, or trusts of slaves which provided that they would be

[15] *Ibid.*, pp. 140-141.

[16] 2 Hill (Equity) 304.

[17] *Ibid.*, p. 305.

[18] *Ibid.*, p. 314.

[19] *Ibid.*, pp. 317-318.

[20] 2 Hill 592.

[21] *Ibid.*

[22] *Statutes at Large,* 1841, XI, 168; see also Howell Meadoes Henry, *The Police Control of the Slave in South Carolina,* Emory, Virginia, 1914, p. 173.

removed from the state and emancipated; prohibited all gifts by which slaves, secretly or openly, would be freed; and nullified all bequests or trusts of slaves which allowed Negroes to act as free Negroes though still held nominally in slavery as well as barring any and all bequests of property being held in trust for slaves. The 1841 statute further required that any person attempting to administer or carry out the provisions of a will or document contrary to the law would be held financially responsible by the heirs or beneficiaries.[23] This restrictive legislation designed to curtail the growth of the free Negro population was challenged in two major court cases— *Gordon* v. *Blackman* and *Vinyard* v. *Passalaigue.*

The *Gordon* v. *Blackman*[24] decision of the South Carolina Court of Appeals in December 1844, was in sharp contrast to the liberality of the *Frazier* decision of 1835. Samuel McCorkle had died in 1839 leaving a will requesting that his slaves be kept in bondage until all debts and demands against him were paid off. After these liabilities were paid, the slaves by provision of the will could apply to the state legislature to obtain an act of emancipation. If they failed to obtain it, they were to be set free by sending them out of South Carolina to a non-slaveholding state or to one of the free colonies in Africa.[25] Before all the obligations of the deceased were discharged, the act of 1841 came into existence. The plaintiff in the litigation, the next of kin of Samuel McCorkle, charged that the executor of the estate, the defendant Elisha Blackman, had taken possession of the slaves "under the guise of nominal servitude [which] has allowed, and continues to allow, the slaves all the benefit and privileges of persons of color, while, by their labor, he accumulates large sums of money, which he holds in trust for them."[26] An account of the amount of money received by the defendant was demanded.[27]

Chancellor William Harper in judging the dispute determined that these slaves had no vested right to freedom since the act of emancipation had become unlawful by the time the executors were required to execute the will; the act of 1841, by prohibiting the sending of slaves out of the state to be emancipated, had voided the provisions of the will. Since the legislature had not emancipated them after the settlement of the

[23] John Belton O'Neall, *The Negro Law of South Carolina,* Columbia, 1848, pp. 11-12.

[24] 1 Richardson (Equity) 61.

[25] *Ibid.,* pp. 61-62.

[26] *Ibid.,* pp. 62-63.

[27] *Ibid.,* p. 63.

debts, and the executor could not by law do so, the Negroes were to remain as slaves within the state.[28]

A strict interpretation of the 1841 statute was evident again in the case of *Vinyard* v. *Passalaigue* decided in 1845.[29] John Vinyard was the executor of the 1822 will of Mrs. Peake, who gave to the plaintiff Vinyard her slaves qualifying that "they by no means to be considered in slavery."[30] Mary Anne, one of Mrs. Peake's slaves, had been allowed to go as a free woman between the years 1822 to 1842. She was considered a free woman by the community during these twenty years, and she had married the baker John Passalaigue and lived with her husband in a rented house for ten years. Vinyard and his friends had entered their abode and carried Mary Anne and her children to Vinyard's plantation whence, after a few days confinement, Mary Anne and her children escaped. Possession of these escapees was demanded in the resulting court action. The controversy involved two main issues: the effect of the act of 1820 which had provided emancipation of slaves only by the state legislature and the recognized presumption in the courts of the state that if a Negro had been permitted to go at large and considered free for twenty years, a jury could presume that the Negro was legally manumitted, entitling him to all the privileges of a free Negro in the state.[31]

Judge John S. Richardson of the Court of Appeals delivered the decision, a strict interpretation of the letter of the law submerging the humane instincts which had once dominated past policies of the court. Judge Richardson pinpointed the chief task of the tribunal: to decide whether Negroes acting as free persons of color for twenty years or more can be presumed emancipated and free.[32] Turning his attention to the laws of South Carolina on Negro slavery to gain historical perspective for his answer, he quoted the 1740 South Carolina law on slavery which stated that "it shall always be presumed that every negro, Indian, mulatto, and mestizo, is a slave unless the contrary can be made to appear." The burden of proof remained on the defendant. He further recalled that while the act of 1800 had prohibited any emancipation except after a strict personal examination of justices and freeholders, the act of 1820 extended this to prevent any emancipation except by enactment of the state legislature.[33]

[28] *Ibid.*, pp. 65-66.
[29] 2 Strobhart 536.
[30] *Ibid.*
[31] *Ibid.*, pp. 536-537.
[32] *Ibid.*, p. 541.
[33] *Ibid.*, p. 542.

Since this particular legal dispute had raised the question of a legal presumption of freedom, Judge Richardson examined the legal doctrine of presumption as applied to the facts in this case: nothing could be presumed against a law or laws already existing; the law of the state was an "express presumption" that "Africans are slaves;" and therefore, the law of South Carolina was clear in discouraging emancipation.[34] He added that the experience of all the states had led to the conclusion that the white Caucasian and the black African races could not live together on terms of equality because, whenever tried, it was inevitable that the "africans become, and do, as fully as in Charleston, constitute the contented menials, or other subordinate servants of white men."[35] More specifically, the acts of 1740 and 1820, the latter now considered an extension of the former, were based on the proposition that the two races, white and black, could not live together on terms of practical equality. If a presumption of emancipation as claimed in this case was sanctioned, it would run directly counter to the express presumption of the basic Negro law of South Carolina: that all Africans shall be presumed slaves until their emancipation be proved.[36] "The strict, settled, and undeniable policy of the state," declared Judge Richardson, "recognized emancipation only by a legislative act, the only means by which the legal ties between a master and a slave could be broken."[37]

A strong and vigorous voice protested this policy. The dissenter was Judge John Belton O'Neall who, having upheld the twenty year presumption in the case of *Miller* v. *Reigne*, viewed the key issue in the *Vinyard* case as raising the question "whether I was in error in ruling, that when a negro had enjoyed freedom for twenty years, since 1820, the jury might presume that she had been legally manumitted and set free by an Act of the Legislature."[38]

Judge O'Neall directly challenged Judge Richardson's doctrine on the operation of presumption in law in reference to free Negroes. Noting that the lapse of twenty years had been uniformly followed and recognized by the courts as time sufficient for the possession of lands and the enjoyment of an easement or right,[39] he stated that even in cases where the law was not favorable to the presumption invoked, courts in their decisions would either refuse to presume at all, require a greater length of time, or request some facts indicative of the presumption. He empha-

[34] *Ibid.*, pp. 542-543.
[35] *Ibid.*, p. 545.
[36] *Ibid.*
[37] *Ibid.*, p. 546.
[38] *Ibid.*
[39] *Ibid.*, p. 547.

sized that the law of 1740 as well as the statute of 1820 did not conflict with the presumption that a Negro was considered free if he had exercised freedom for twenty years; statutory restrictions did not prohibit presumptions from consideration in court cases.

Judge O'Neall ventured to ask the rhetorical questions: "What is there in the policy of the law of South Carolina to forbid emancipation, by an owner, of a faithful, honest, good slave? Have we anything to fear from such a liberal and humane course?"[40] Pointing out that not only was the law of 1820 evaded and opposed by public opinion, both inside and outside the state, he commented that the policy of that statute was so questionable that it should be repealed; he pleaded for the existence of a wise and prudent system of emancipation like that of 1800.[41] If South Carolina would return to the spirit of the American Revolution as reflected in the sympathetic decision of *The Guardian of Sally, A Negro* v. *Beaty*, this action would exhibit what always "belongs to Carolina—a love of mercy, of right, and hatred of that which is mean or oppressive." The distinguished jurist recalled that until "fanaticism and folly" had driven the state from that position, South Carolina had uniformly by law favored the emancipation by slave owners of their slaves "with such limitations and guards as rendered the free negro, not a dangerous, but a useful member of the community, however humble he might be;" the state should return to this former policy to demonstrate it had nothing to fear from occasional emancipation particularly since "the free negroes in South Carolina are far, very far, from being a class of people envied by our slaves. Generally, they are worst off in every respect." These free Negroes, obliged to throw themselves under the sheltering wing of benevolent white men, were not a danger: "instead of being fomenters of insubordination and rebellion among slaves, they pursue a directly contrary course."[42]

In reviewing the issues of the case, Judge O'Neall reaffirmed that it was unnecessary to dispute the proposition of whether a Negro who enjoyed freedom for twenty years could be presumed free since the courts had already ruled this to be so; he cited *Miller* v. *Reigne* which declared that twenty years of freedom before 1820 would create the presumption that a deed of emancipation conformable to the Act of 1800 had been executed while in another case, *State* v. *Hill*, it was determined that thirty-three years of freedom exercised by the Negro in question stood as sufficient evidence in place of the deed required by the statute

[40] *Ibid.*, p. 548.
[41] *Ibid.*, p. 547.
[42] *Ibid.*, p. 549.

of 1800.[43] Since the will in the *Vinyard* case had declared that Mary Anne and her children were "by no means to be considered in slavery" and that Mary Anne had been at large and free for twenty years, reason and authority would concur that Mary Anne and her children were presumed free.[44]

This was not Judge O'Neall's last official word on the subject; and in submitting a digest of South Carolina laws relating to Negroes to the state legislature in 1848, he again expressed his opposition to those enactments which restrained slaveowners from emancipating their slaves. Relying on his experience both as a man and a judge, he felt obliged to condemn the acts of 1820 and 1841, believing they "ought to be repealed and the Act of 1800 restored" since the latter was sufficient to preserve peace and order in the community. Where slavery was recognized, the Judge stressed, there should be a system established by which good slaves could be rewarded: by possessing the power of emancipation enforced with well regulated guards, the master could dispense the only reward both he and his slave could appreciate—freeing the slave from bondage. Urging that this power was needed to keep up the reputation of South Carolina for justice and mercy, he warned his fellow South Carolinians that "unjust laws, or unmerciful management of slaves, fall upon us, and our institution, with more withering effect than anything else."[45] This plea of Judge O'Neall fell upon an unresponsive state legislature.

Although it was almost impossible to free a slave after 1820, free Negroes continued to reside in South Carolina until the Civil War. There was always a question, however, of what rights these free Negroes had. They were not citizens; they did not stand on the basis of equality with the white citizens in the civil courts of the state. A number of court decisions attempted to define the rights of the free Negroes.

One of the most significant cases in defining the rights of the free Negro was the case heard by the South Carolina Court of Appeals in the Chester district in the spring term of 1832. The case of *State* v. *Harden*,[46] involving an assault and battery charge, went a long way to define the rights and privileges of the free Negro. A white man Charles Harden had unmercifully beaten a free Negro Tom Archer, who had been known as a free Negro for over ten years and thus the court hearing the case had no doubt of his freedom. Tom Archer did not appear

[43] *Ibid.*, pp. 549-550.

[44] *Ibid.*, p. 552.

[45] O'Neall, *op. cit.*, pp. 11-12.

[46] 2 Speers' (Law) 152.

in court but the testimony of white witnesses was sufficient to convict Harden of assault and battery in this lower court.

The attorneys of Harden appealed the decision to the South Carolina Court of Appeals basing their request, first, on the fact that the court should have quashed the indictment on the grounds that a Negro could not bring an action against a white man, and, secondly, on the fact that Tom Archer was not a free Negro since no deed of manumission was produced as evidence. If he were not free, there would have been even stronger reasons for quashing the indictment. The grounds of appeal made this a case which would cast more light on the dark areas of the exact rights of a free Negro in South Carolina.

Judge O'Neall in deciding the case summarized the two major issues involved in the appeal: an indictment for assault and battery is not legally effective when committed against a free Negro, and the evidence to establish the freedom of the Negro Tom Archer was insufficient. Considering the first objection, the Judge commented that a variety of circuit court decisions over the previous thirty years had settled the fact that a white man could be indicted for assault and battery on a free Negro and not only precedent but the principle of justice as well would sustain the indictment in this case. In defining the crime, Judge O'Neall analyzed the legal status of the free Negro in South Carolina society. An assault and battery was defined as "any touching of the person of an individual, in a rude or angry manner, without justification," and it was not necessary that the person who sustains it should be a citzen of the government since all natural persons who were entitled to protection could be victims of this crime.[47] Regarding the exact legal condition of the free Negro, Judge O'Neall observed that: "Free negroes, without any of the political rights which belong to a citizen, are still, to some extent, regarded by the law as possessing both natural and civil rights. The rights of life, liberty, and property, belong to them, and must be protected by the community in which they are suffered to live. They are regarded, in law, as persons capable of committing and receiving an injury; and for the one, they are entitled to redress."[48]

In holding that a free Negro could be a victim of assault and battery, the court recognized that legally he was entitled to the protection of his person; an unlawful violation of his person thus entitled him to damages as a civil injury. If the law refused to protect the free Negro from harm, he might turn to repel force by force and this would lead to a disruption in the peace of society. The court, however, was far from

[47] *Ibid.*, pp. 153-154.
[48] *Ibid.*, p. 154.

recognizing the free Negro on an equal plane with the free white man; Judge O'Neall added that free Negroes belonged to a "degraded caste of society," and were "in no respect, on a perfect equality with the white man," and should consider themselves as inferiors to whites in all relations in society. He justified his decision as one based on "the general conduct of the people of this State towards this class of our population" and thus it had become common law.[49]

Regarding the second grounds of objection (e.g., insufficient proof that Tom Archer was a free Negro), the Judge shed more light on the difficulties faced by the free Negro: by law "every negro is presumed to be a slave," the task of proving freedom resting solely upon the Negro claiming this right. The manner in which this freedom could be proved varied in different cases; for example, a Negro born or emancipated before 1800 would need no proof of manumission. Judge O'Neall added that if "a negro has been suffered to live in a community for years, as a free man, [this] would prima facie, establish the fact of freedom," this general reputation of freedom holding true unless proven otherwise. In the *Harden* case, the fact that Tom Archer was permitted to go at large and was considered a free Negro constituted sufficient proof of his freedom. In rejecting the plea of Harden for a new trial, the Court of Appeals had also effectively summed up the legal position of the free Negro in South Carolina." [50]

One very obvious and crucial right of citizenship denied the free Negro was the right to sit on juries and to testify as a witness in trials; two court cases illustrate the problem this created. *White* v. *Helmes* (1821)[51] involved the will of Daniel Leger, who, while ill, had dictated his will to Henry Verner, requesting that he (Leger) wished to leave his property to Jonathan Helmes. After Leger died, the will was brought to court; James White brought suit against Helmes in order to obtain the property of Leger.[52] In order to strengthen the claim of his client to the estate, the attorney of James White brought forth a free Negro as a witness in court. At the time the court had objected that "such testimony would be without precedent and against the policy of the state," [53] and in delivering the opinion of the court Justice Charles J. Colcock upheld the objection to the free Negro witness commenting that the court did not recognize the propriety of allowing free Negroes to testify in any

[49] *Ibid.*, p. 155.

[50] *Ibid.*, p. 156.

[51] 1 McCord 430.

[52] *Ibid.*, pp. 430-431.

[53] *Ibid.*, p. 434.

case where the rights of white persons were concerned except in cases of absolute and indispensable necessity. In viewing the South Carolina free Negroes, "the degraded state in which they are placed by the laws of the State, and the ignorance in which most of them are reared," Judge Colcock stressed that "it would be unreasonable as well as impolitic to lay it down as a general rule that they were competent witnesses."[54]

Ten years later the Court of Appeals in *Groning* v. *Devana*[55] decided that a free Negro was not a competent witness in any of the courts of the state even if the other party in the trial was a free Negro. This judicial tribunal also rejected as evidence any book entries made by free Negroes even though a white person would testify under oath to the validity of the handwriting of the free Negro.

Although it was accepted practice in the state that free Negroes could not be competent witnesses, South Carolina had no statute defining what exactly constituted a free Negro. The *State* v. *Cantey*[56] case, heard by the Court of Appeals in Columbia, South Carolina, in May 1835, reinforced the rule regarding witnesses as well as setting down some guidelines and standards for determining what criteria should be used in determining a free Negro according to the law. The case, which had originated in the Barnwell district over an indictment for larceny against Vincent Cantey, involved an objection that two of the principal witnesses for the prosecution were incompetent to testify at the trial because they were free Negroes.

The degree of color needed to constitute a free Negro was a difficult and perplexing question. The witnesses who were being challenged possessed one-sixteenth African blood, and although their father was white, their mother was descended from a third degree half-breed, who had married a white woman; their grandfather, their mother's father, was a child of this marriage, and despite having a dark complexion, he had been "recognized as a white man, received into society, and exercised political privileges as such." Even the mother of the witnesses had been treated as a white woman and her relatives, having the same racial background, had married into respectable families. The witnesses were of fair complexion, exhibited no distinctive marks of Negroes (e. g., the color of skin, hair, or facial features), and had been received in society and recognized as white men; one of them even served as a militia officer. After the jury had decided that the witnesses were not persons of color,

[54] *Ibid.*, pp. 435-436.

[55] 2 Bailey 192.

[56] 2 Hill 614.

they were sworn in and testified. At the end of the trial the defendant was found guilty as charged. On the motion for a new trial, the only question involved was "as to the correctness of this charge, and the competency of these witnesses." [57]

Judge William Harper of the Court of Appeals dismissed the motion for a new trial remarking that the statutes of South Carolina concerning free Negroes as well as the constitution of the state, which granted political privileges only to "free white men," did not give any definition nor fix a technical meaning to the term "free Negro;" the court had to resort to the ordinary and popular significant meaning of the term. Harper reflected that it would be absurd to say that a person who had no visible admixture of Negro blood and who was received in society as a white man was a free Negro due to some mixture of Negro blood, no matter how slight or remote, in his background or in the background of his ancestors. If so, the court would then be making law and not declaring it. Admitting that there was a lack of precision in the rule determining what admixture of blood would constitute a colored person, the jurist declared that this was properly a question for the jury to decide. Judge Harper reviewed some of the past guidelines which had been considered and followed in this regard; whether a person was a free Negro was to be determined not solely by a distinct and visible appearance but "by reputation, by his reception into society, and his having commonly exercised the privileges of a white man." Urging that time and prescription should be considered since the grandfather of the witnesses had acted as a white man and the witnesses in question had continued to do so, he reiterated that the question of whether the challenged witnesses were free Negroes or whites was a proper concern for the jury and the decision was one adhered to by the courts of the state.[58]

The free Negro received little aid from the courts of South Carolina in his battle for the rights of citizenship. The contention that the state legislature could determine the status, rights, and privileges of its own free Negro population received sanction by the United States Supreme Court in the famed *Scott* v. *Sanford*, or *Dred Scott*, decision which distinguished between state citizenship and national citizenship, the former being a matter of state determination while the latter clearly excluded free Negroes. Chief Justice Roger Taney in effect reaffirmed the assertion that South Carolina as a sovereign state had the power to regulate the rights, privileges, and duties of her Negro population, whether enslaved

[57] *Ibid.*, pp. 614-615.
[58] *Ibid.*, pp. 615-616.

or free.[59] Contradicting the view that the *Dred Scott* decision had declared that free Negroes could not be citizens of the United States, Attorney General Edward Bates stressed in an 1862 opinion that United States citizenship and state citizenship were identical concepts and that the free Negroes were United States citizens, birth in the United States being *prima facie* evidence of this condition.[60] The view of Bates was corroborated and that of the South Carolina courts between 1790 and 1860 rejected regarding the free Negro by the adoption of the Fourteenth Amendment to the Constitution in 1868 declaring that "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside," thus subordinating state citizenship to United States citizenship. The question of citizenship for all the Negroes in South Carolina, freed by the Thirteenth Amendment, was no longer a state question but one of national concern after 1868.

[59] 19 Howard 405. The question of Negro citizenship arose in connection with the defendant's plea of abatement, *e. g.*, Sanford's plea to abate the jurisdiction of the Federal District Court on the grounds that Dred Scott, a Negro, was not a citizen clothed with the right of access to Federal courts. Due to the manner in which the plea of abatement had been dealt with, a difference of opinion became evident on the technical question of whether it was rightly before the court on a writ of error. Although six of the justices (Chief Justice Taney, and Justices Catron, Daniel, Wayne, Grier, and Campbell) concurred in holding that a Negro could not be a citizen of the United States, only three of the six (Taney, Wayne, and Daniel) expressed the view after holding that the plea in abatement was properly before the court. James G. Randall and David Donald, *Civil War and Reconstruction*, Boston, 1961, p. 111, n. 10.

[60] *Official Opinions of the Attorney Generals of the United States*, ed. J. Hubley Ashton, Washington, 1868, X, 412, 388, 394.

A MICHIGAN REGIMENT IN THE PALMETTO STATE

By GEORGE M. BLACKBURN *

As the great fleet of Union ships approached the coast of South Carolina in November 1861, soldiers aboard the transports strained their eyes for their first glimpse of that fabled rebel state. One unit of that expedition, the Eighth Michigan Volunteer Infantry Regiment, was especially eager to strike a decisive blow against the "arch-traitors of the Union." Composed largely of men from the northern, frontier settlements of Michigan, these men were staunchly pro-Union, and many were staunchly anti-slavery. Certainly they sensed the obvious contrasts between their home and coastal South Carolina, a semi-tropical region, inhabited by wealthy plantation owners who were secessionists and slaveholders. It is no wonder that the Michigan frontiersmen were struck by the contrasts, recorded their impressions, and remembered their stay in South Carolina for the rest of their lives.[1]

These men enlisted in the Eighth Michigan during the summer of 1861. They were sworn into Federal service at Fort Wayne, Detroit, in September, transferred to Washington, D. C., in October, and then moved to Annapolis, Maryland, in November. There the Michigan regiment heard "with boyish glee" that they were assigned to General Thomas W. Sherman's expedition.[2] (By the end of the war this commander had acquired the dubious distinction of being known as the "other" General Sherman.[3])

Already General Ambrose Burnside had made a successful attack upon the North Carolina coast, and President Abraham Lincoln had

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[1] "Some of our men a healthy & strong type of farmer lads were not over clean about their persons." In the voyage from Annapolis to Port Royal the Eighth Michigan was billeted with the 79th New York, who came "mostly from the Bowry . . ., natty in dress and toilet, which caused our Regt to be branded as the dirty Michiganders . . . violent scrapes and a free for all were of daily occurence." Hatred between the two regiments was ended after heroic fighting at James Island, and the ties between the diverse units became "stronger than those of a bloody brotherhood." Arand Vanderveen, October 7, 1915, in records of the Michigan Loyal Legion, Historical Collections, the University of Michigan, pp. 7-8.

[2] Reminiscences of Oren Bumps, in records of the Michigan Loyal Legion, Historical Collections, the University of Michigan, p. 1. Hereafter cited as Bumps' Reminiscences.

[3] Bruce Catton, *This Hallowed Ground,* Garden City, New York, 1956, p. 85.