Did Slaves Have Free Will? *Luke, a Slave, v. Florida* and Crime at the Command of the Master

by Craig Buettinger

The mules had been shot. When the mules, regularly left to forage for themselves amid the Florida scrub, did not wander back to the Hernandez plantation, Adam, the driver charged with their care, went to look for them. He found the animals dead and dying along the road that connected the Hernandez and Dupont plantations, south of St. Augustine. A trail of blood led to Dupont's.

Luke, Abraham Dupont's head driver, had shot the mules. The animals had often invaded his garden. Luke had asked his master what to do about the problem mules, and Dupont told him to shoot them. For doing so, Luke was convicted by the St. Johns County circuit court of malicious destruction of property and sentenced to three months imprisonment. Luke's attorney, McQueen McIntosh, appealed to the Florida Supreme Court. When the Supreme Court met for the spring term 1853, McIntosh and John P. Sanderson, the circuit court solicitor who had prosecuted Luke,

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argued the issue of whether slaves, when commanded to commit a crime, had free will.[1]

The principle that some persons cannot be held responsible for their criminal acts is embedded in the common law and expressed in Sir William Blackstone's *Commentaries* (1765-1769). In his chapter, "Of the Persons Capable of Committing Crimes," Blackstone argued that in the making of a crime both will and act must be present, so in cases of "defects in will" there is no criminal responsibility although a criminal act has occurred. The *Commentaries* enumerate numerous conditions in which the requisite will is not present. Infancy, idiocy and lunacy, and drunkenness ("voluntarily contracted madness") are three such conditions because perpetrators lack adequate understanding of their actions. Deficiencies of the will also arise when a person "commits an unlawful act by *misfortune* or *chance,* and not by design," and when, by "*ignorance or mistake,*" a person, "intending to do a lawful act, does that which is unlawful."[2]

"A sixth species of defect of will" enumerated by Blackstone and elaborated at the greatest length "is that arising from *compulsion* and inevitable *necessity.*" One person forces another to commit a criminal act that the latter, left alone, would never do. In such situations, "the will is constrained." Concluded Blackstone, "As punishments are ... only inflicted for the abuse of that free will which God has given to man, it is highly just and equitable that a man should be excused for those acts which are done through unavoidable force and compulsion."[3]

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1. *Luke, a Slave, v. State,* 5 Fla. 186-187 (1853). For the preeminent work on slavery and the law, see Thomas D. Morris, *Southern Slavery and the Law 1619-1860* (Chapel Hill, N.C., 1996). On crime, courts, and slavery in antebellum Florida, see James M. Denham, *"A Rogue's Paradise": Crime and Punishment in Antebellum Florida, 1821-1861* (Tuscaloosa, Ala., 1997); Walter W. Manley II, E. Canter Brown Jr., and Eric W. Rise, *The Supreme Court of Florida and Its Predecessor Courts, 1821-1917* (Gainesville, Fla., 1997); Larry E. Rivers, *Slavery in Florida: Territorial Days to Emancipation* (Gainesville, Fla., 2000). However, beyond an occasional brief mention, no study has explored the Luke case or the issue of slaves commanded to commit crimes. An article that touches on these themes is Craig Buettinger, "Masters on Trial: The Enforcement of Laws against Self-Hire by Slaves in Jacksonville and Palatka, Florida," *Civil War History* 46 (June 2000): 91-106.
2. William Blackstone, *Commentaries on the Laws of England,* 2 vols. (Chicago, 1884), 2: book 4: 20-26.
3. Ibid., 2: 4: 26.

Blackstone examined legal subjection as a source of compulsion, focusing on the subordination of married women to their husbands that was so pronounced in the common law. "As to persons in private relations; the principal case, where constraint of a superior is allowed as an excuse for criminal misconduct, is with regard to the matrimonial subjection of the wife to her husband." Neither sons nor servants were to be excused for crimes committed at the "command or coercion" of parents or masters, but wives could use the compulsion defense. "And therefore if a woman commit theft, burglary or other civil offences against the laws of society, by the coercion of her husband; or even in his company, which the law constitutes a coercion; she is not guilty of any crime; being considered as acting by compulsion and not of her own will." Of the subjection of slaves to slaveholders, Blackstone made no mention, that relationship not existing in English common law.[4]

Luke's case raised the question whether the principle of a defective will extended to coerced slave criminals. Both Florida law and judicial opinions in other state courts supplied only uncertain answers and debate. In neighboring Georgia, the law was clear. The Georgia legislature took the step of extending the compulsion principle to slaves in its 1811 penal code. Florida, annexed to the United States in 1821, initially followed Georgia's lead, indeed copied Georgia's statute. However, all other slave states refused to take this step, and Florida ultimately reversed course and repealed this section of its penal code, falling silent on the matter. While Florida reworked its penal code, jurists across the South debated the larger issue whether the common law applied to slaves at all.

In 1811, Georgia legislators enacted a penal code that commenced with a section on "Persons Capable of Committing Crimes." Cribbing their exact wording from Blackstone, they declared all persons were liable for crimes except those "in whom a want or defect of will is manifest," itemizing infants, lunatics and idiots, criminals by misfortune or chance, criminals by ignorance or mistake, and criminals due to compulsion. Given the common-law subjection of wives, they ruled that a married woman who commits a crime (with treason, murder, manslaughter, and brothel-keeping in company with her husband being the exceptions) "shall not be considered guilty of said crime or crimes,

4. Ibid., 2: 4: 28.

but her husband, by whose coercion she is supposed to act, shall be, and is hereby declared, amenable to the laws for such act."[5]

Then, going beyond Blackstone, the legislators added a section pertaining to slaves and slaveholders. As wives could be compelled to crime, so could slaves.

> §8. *And be it further enacted,* that if any slave shall by command of his or her master, owner or employer, or person having charge of such slave, commit any crime or crimes, except felony, such slave is declared not guilty of such act, but such master, owner, employer or person having charge of such slave by whose command such crime or crimes may have been committed [is guilty].

Perhaps the reason the Georgia lawmakers even bothered to legislate on the issue of criminal capability was to introduce this novel point, absent from Blackstone and the common law, rare in Southern case law, but pertinent in a slaveholding society.[6]

In successive penal laws, the Georgia legislature elaborated on the coerced slave criminal. In 1816, a revised code still commenced with a division on "Persons Capable of Committing Crimes," now in expanded language. Section 11 of the revised code, on slaves compelled to crime by their masters, became more precise than Section 8 of the 1811 code. Previously, slaves, when compelled to act, were not excused for felonies. The new code expanded protection to all crimes not punishable by death. Only when ordered by their masters to such offenses as arson, rape, or murder did slaves have to say no. In 1811, compulsion of the slave came in the sole form of a "command." Now it could be "threats, command or coercion," duplicating the phrase this statute also applied to married women. The fate of the owner or person in authority who compelled the slave to crime was clarified: he or she would be prosecuted for the crime the slave had

5. The Georgia legislators eliminated one of Blackstone's defects of will: drunkenness. In the 1816 revision of the penal code, drunkenness reappeared as a defect of will, with a twist: an inebriate was innocent if another person plied him with drink for the purpose of perpetrating a crime. Crimes committed by mistake or ignorance were no longer protected after 1816; *Acts of the General Assembly of the State of Georgia, Passed at Milledgeville, at an Annual Session, in November and December, 1816* (Milledgeville, Ga., 1816), 144.
6. *Acts of the General Assembly of the State of Georgia, Passed at Milledgeville, at an Annual Session, in November and December, 1811* (Milledgeville. Ga., 1811), 27-28.

committed.[7] Further amendments to the penal code appeared in 1817, including a clarification to Section 11. The code now specified that coerced slaves were covered for crimes "which if committed by a free white person" were not punishable by death. Section 11 was now in its final form for the antebellum period. The section read:

> A slave committing a crime, which if committed by a free white person would not be punishable by this act with death, by the threats, command or coercion of his or her owner or any person exercising or assuming authority over such slave, shall not be found guilty, and it appearing from all the facts and circumstances of the case that the crime was committed by the threats, command and coercion of the owner or the person exercising or assuming authority over such slave, he or she, the said owner or person, shall be prosecuted for, and if found guilty of the crime, shall suffer the same punishment, as he or she, the said owner or other person, would have incurred, if he or she, or said other person, had actually committed the offence with which the slave is charged.[8]

In 1838, Georgia added Section 15 to "Persons Capable of Committing Crimes," again addressing the compulsion of slaves. The legislature passed "An Act ... to define and affix the punishment of a crime or misdemeanor committed by a slave, by the counsel, persuasion or procurement, or other means, of free white persons." As the title of the new law indicated, the legislature wished to extend criminal liability to those, other than owners or persons of authority, who led slaves to crime, not through "threats, command or coercion" but through smooth talk. As with masters, persuaders were to suffer the punishment specified for the crime as if they had done it by their own hand. In 1850, this section was amended to additionally specify bribery and force as means by which free white persons might get slaves to carry out their crimes. [9]

Georgia's step extending protection against compulsion to slaves by statute did not inspire the rest of the South to do the

7. *Acts of the General Assembly of the State of Georgia, Passed at Milledgeville, at an Annual Session, in November and December, 1816*, 144.
8. *Acts of the General Assembly of the State of Georgia, Passed at Milledgeville, at an Annual Session, in November and December, 1817* (Milledgeville, Ga., 1817), 93-94.

same. Indeed, most states in the South (and northern states as well) placed no division on "Persons Capable of Committing Crimes" in their penal codes, reasoning that "defect in will" was an established common law principle accessible through Blackstone, and that attempts at statutory itemization only complicated matters. Arkansas alone joined Georgia in establishing a division on "Persons Capable of Committing Crimes" in its code, copying Georgia's 1817 division in fact but omitting the section that pertained to slave crime at the command of the master.[10] In the Old South as a whole, conflating slaves with free citizens in their penal codes was a legal step lawmakers would not take.

Florida's legal position regarding defects of will at first followed Georgia, but ultimately aligned with the consensus, *contra* Georgia, that it was best not to specify who was capable of committing crimes. In 1824, Florida's territorial Council, repealing 1822 legislation, enacted a penal code modeled on Georgia's 1817 legislation. This "Act to Define Crimes and Misdemeanors and to Prescribe Punishments for the Same" commenced with eight sections on persons capable of committing crimes, merging several of Georgia's twelve sections. Georgia's Section 11 on slaves compelled to crime became, word for word, Florida's Section 8. The 1824 code was replaced in 1826 with an entirely new one that lacked the sections on defective will, but the 1824 code was reinstated in 1828 with minor alterations and Section 8 intact.[11]

Beyond Section 8, Florida's penal code did not address the issue of slavery. In the southern states, penal codes were primarily concerned with free white citizens and only minimally, if at all, with slaves. Lengthy slave codes, separate from the penal codes, were

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9. Thomas R. R. Cobb, *A Digest of the Statute Laws of the State of Georgia* (Athens, Ga., 1851), 780-81. In Georgia, no prosecution of a master for commanding a slave to crime came before the state supreme court, but two cases for procuring slaves for crimes did: *Berry v. State*, 10 Ga. 511 (1852) and *Grady v. State*, 11 Ga. 253 (1853).
10. William McK. Ball and Samuel C Roane, *Revised Statutes of the State of Arkansas* (Philadelphia, 1838), 236-38; E.H. English, *A Digest of the Statutes of Arkansas* (Little Rock, Ark., 1848), 319-20; Josiah Gould, *A Digest of the Statutes of Arkansas* (Little Rock, Ark., 1858). Interestingly, Illinois, the sole northern state to specify "Persons Capable of Committing Crimes" in its penal code, also copied the 1817 Georgia division, omitting the slave section; see *The Revised Code of Laws of Illinois* (Vandalia, Ill., 1827), 124-26..
11. *Acts of the Legislative Council of the Territory of Florida Passed at their Third Session, 1824* (Tallahassee, Fla., 1825), 206-208; *Acts of the Legislative Council of the Territory of Florida Passed at their Seventh Session, 1828* (Tallahassee, Fla., 1829), 48-50.

the principal laws governing the peculiar institution. Florida's slave code underwent continual rewrite and repeal in the early years, as did its penal code. In 1828, the Council consolidated existing slave laws into a single code that remained intact until the Civil War. The day after it passed the consolidated slave code, the Council passed the 1828 penal code. The distinction between a penal code and a slave code became a central issue in Luke's case.[12]

Florida's penal code did not retain its rule on slaves commanded to commit crimes. When the Legislative Council convened for its tenth session in 1832, revision of the 1828 penal code was a top priority. In addressing the Council, the Governor identified several desired changes, notably elimination of the eight sections of "excuses and justifications which may be offered by the defendant," on the grounds that these matters of common law did not have to be spelled out. The Council obliged, repealing the 1828 code and enacting a new one that did not cover "persons capable of committing crimes." The Council's 1828 introduction and 1832 elimination of the defective will law would hurt Luke's defense.[13]

In Southern high courts, cases comparable to *Luke v. State* were rare. In 1819, the South Carolina Supreme Court applied the principle of a defective will to slaves in *State v. Anone.* A slave, Polydore, and hired white clerks manned the Francis Anone's store. Anone told one white employee to buy corn illegally from slaves lacking tickets from their masters. (Lawmakers assumed the corn in these transactions was stolen.) The clerk refused to break the law, provoking Anone to snap that the clerk "was not fit to do business." But Polydore could not refuse. One man witnessed illegal purchases by Anone's slave, and a local overseer added to the case by giving corn to a bondsman and sending him into the store

12. On Florida's slave code, see Thelma Bates, "The Legal Status of the Negro In Florida," *Florida Historical Quarterly* 6 (January 1928): 159-81; Julia Floyd Smith, *Slavery and Plantation Growth in Antebellum Florida 1821-1860* (Gainesville, Fla., 1973), 101-21; Joseph Conan Thompson, "Toward a More Humane Oppression: Florida's Slave Codes, 1821-1861," *Florida Historical Quarterly* 71 (January 1993): 324-38. Unfortunately, these sources are inadequate and misleading regarding the slave legislation of the 1820s.

13. *Journal of the Proceedings of the Legislative Council at its Tenth Session* (1832), 10-11, 33, 57, 75, 109. The same session of the Council made several changes to the slave code explicitly in response to Nat Turner's Rebellion in Virginia. The legislators did not tie the change in the penal code explicitly to Turner, and all sections concerning defective will, not solely Section 8, were removed, but perhaps the Virginia rebel was a catalyst. Eliminating a provision for the defense for slave criminals must have made sense to the fearful lawmakers.

in a ploy to catch such trading. Anone was indicted. No one could testify to hearing Anone order Polydore to buy corn illegally, but Judge William Ellison instructed the jury that the evidence was sufficient to infer he had done so. Anone appealed the verdict on the grounds that the case required proof of an order to Polydore. The higher court, granting that the law was "well decided, both in South Carolina and abroad," that a master was not liable for the acts of his servants unless done on the master's authority, ruled that the evidence did indeed warrant the verdict against Anone. If the courts required perfect proof of a master's command to crime they would "legalize" crimes by masters through their slaves. The court upheld the conviction of the storekeeper, a slaveholder who had made his slave "the minister of his crime."[14]

Few courts heard cases on slaves commanded to commit crimes, but on many occasions Southern jurists considered whether the common law applied to slaves at all, producing sharp disagreement. Those who said it did wanted to give slaves some protection from cruel and murderous masters, ameliorating the harshness of slavery. Those who dismissed the idea of the law's applicability to the slaves ("twaddle" in the words of a Mississippi judge in 1859) argued that slaves were purely chattels and not beneficiaries of the common law, which derived from the English heritage of freedom. If harsh treatment were to be abridged, it should be done through specific statutes. In other words, separate slave codes alone would determine slaves' legal existence.[15] In Southern judicial opinion, like Florida law, there were no clear answers when Luke went to court.

We do not know much about Luke himself. When Dupont died in 1857, the probate court conducted an inventory of his slaves, 169 in all, describing their ages, skills, and family relationships, but Luke was not among them. The deed books of St. Johns

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14. *State v. Anone*, 2 Nott and M'Cord 27 (1819). See Helen T. Catterall, ed., *Judicial Cases concerning American Slavery and the Negro*, 5 vols. (1926-37; reprint, New York, 1968), 2: 313 for a synopsis of the case. The court also upheld the overseer's sting operation against the defense's claim that the overseer's act of giving the slave the corn and then watching him sell it was equivalent to giving the slave a ticket, making the purchase perfectly legal. McIntosh did not cite this case in defense of Luke. He was possibly unaware of it; more likely, the basis for the decision did not suit the argument he would make about slaves. In civil cases in Southern courts, the parallel issue of slaveholder liability for damages caused by slaves often arose. See Morris, *Southern Slavery and the Law*, 354-68.

County have no record of Dupont selling Luke, which would have generated a description. Luke's life, except for the day he shot the mules, is unknown.[16]

Although personal information about Luke is scarce, because he was the head driver on a very large plantation we can make some assumptions about him. He was probably over forty years of age, for planters wanted mature men in that position. He no doubt was not a new slave to the plantation but one who had grown up on it, and may well have been the son or kin of the previous head driver. Dupont employed a white overseer, but planters who did so still communicated directly and regularly with their drivers. Of all slaves on a plantation, drivers were the most accustomed to receiving and carrying out direct orders from the planter.[17] In Luke's trial, the fact that he was a driver greatly enhanced the claim of the defense that Luke had no option but to do as Dupont told him.

Joseph M. Hernandez no doubt tried to settle the matter with Dupont, slaveholder to slaveholder. The culture and law of the Old South looked to masters (and patrols) to handle matters of slave behavior, outside of the courts. Few cases of crimes by slaves ever made it beyond the disposition of the master or the patrol. Dupont, however, evidently would not punish Luke for acting as he was told. The two planters could not agree, and Luke became one of the rare slave defendants in the county circuit court. Luke's trial, along with that of Emanuel, accused in 1853 of assault with intent to kill, were the only two slave trials in St Johns County between 1845 and 1861.[18]

Rebuffed by Dupont, Hernandez must have complained to the local justice of the peace, commencing the case against Luke. When the circuit court for the Eastern District of Florida came to St. Johns County for its fall 1851 session, the justice of the peace,

15. Morris, *Southern Slavery and the Law*, 50-55.
16. Inventories Old 3, 206-11, St. Johns County Courthouse, St. Augustine, Fla. The inventory can also be found in the files of a subsequent suit against the executor of the estate: *Dupont v. Hemming*, 1860, St. Johns County Court Records, box 127, folder 13, St. Augustine Historical Society.
17. Robert S. Starobin, "Privileged Bondsmen and the Process of Acculturation: The Role of House Servants and Drivers as Seen in their Own Letters," *Journal of Social History* 5 (fall 1971), 46-70; Eugene Genovese, *Roll, Jordan, Roll: The World the Slaves Made* (New York, 1974), 365-88. For Dupont's white overseer, see Seventh Census of the United States, 1850, Population Schedule, St. Johns County, Fla., 427.
18. Genovese, *Roll, Jordan, Roll*, 40-41. For Emanuel's trial, see Circuit Court Minutes A, 139-40, St. Johns County Courthouse.

having gathered the facts, turned the matter over to prosecuting attorney John P. Sanderson who took it before the grand jury for a bill of indictment.[19] In Florida, like most slave states by the 1850s, slaves were tried in the same courts as free citizens. Florida did not have a local magistrates and freeholders court just for slaves. All slave crimes not handled informally by planters or patrols went to the circuit court.[20]

Guided by Sanderson, the grand jury chose the section of state law for Luke's indictment. Florida's 1828 slave code, "An Act Relating to Crimes and Misdemeanors Committed by Slaves, Free Negroes, and Mulattoes," enumerated many slave crimes, but killing animals was not one of them. Although Section 61 of the code did stipulate that should a slave or free person of color commit "any other crimes or misdemeanors against the laws of this Territory, it shall be lawful for the jury convicting him of same to punish him by such number of stripes as they may award, not exceeding one hundred," Sanderson and the grand jury indicted Luke under Section 59 of the 1832 penal code. This section criminalized wounding or killing an animal that was someone else's property with punishment of a fine up to $1000, whipping up to thirty-nine stripes, or imprisonment up to six months, at the discretion of the jury. The prosecution's decision to use the 1832 penal code instead of the 1828 slave code led to a key procedural issue in Luke's case.[21]

Under Section 57 of Florida's slave code, a slave accused of a crime was entitled to representation by counsel in the circuit court. Slaveholders were expected to employ counsel for their slaves, but when one failed to do so the court appointed a defense

19. Sanderson was born in Sunderland, Vermont, in 1816, graduated from Amherst, class of 1839, and read law with Harmon Canfield in Arlington, Vermont, before moving to Florida. Sanderson came to Fernandina in 1842 and married into a planter family in 1843. His wife was Mary Harrison, daughter of Robert Harrison of Amelia Island. Sanderson moved his practice to Alligator in the mid-1840s and to Jacksonville in the late 1840s. He became solicitor for the Eastern District in 1848; Robert S. Fletcher and Malcolm O. Young, *Amherst College: Biographical Record of the Graduates and Non-Graduates* (Amherst, Mass., 1927), 92.
20. Morris, *Southern Slavery and the Law*, 216. The only states that had lesser courts specifically for slaves were Virginia, South Carolina, and Louisiana.
21. John P. Duval, *A Compilation of the Public Acts of the Legislative Council of the Territory of Florida, Passed Prior to 1840* (Tallahassee, Fla., 1839), 123, 228; Leslie A. Thompson, *A Manual or Digest of the Statute Law of the State of Florida* (Boston, 1847), 506, 541.

attorney to be paid by the master.[22] To Dupont's mind, Luke was not guilty, not to mention, as head driver, indispensable to his plantation's operations, so Dupont hired McQueen McIntosh.[23]

Why did the state not indict Dupont rather than Luke, in keeping with the principle of compulsion? Hernandez, the officers of the court, and the public all may have seen Dupont as the real criminal in this case and wished that charges be brought against him rather than his slave. Sanderson may have been trying to do just that in indirect fashion. The deletion of Section 8 that occurred in the 1832 revision of the penal code shielded Dupont from prosecution. Rather than indict Luke through the slave code, Sanderson chose to do so through the penal code, which would punish Luke with a prison sentence and deprive Dupont of the services of his head driver. The penal code, moreover, would spare Luke the whip, the punishment provided by the slave code.

The circuit court met in St. Johns County on the first Monday in November 1851. The first action of the court was to convene a grand jury, which then retired to its room in the courthouse to consider criminal indictments. Luke's indictment and trial occurred two days later: Wednesday, November 5. Charged with maliciously wounding animals under the penal code, Luke pleaded not guilty. Sanderson and McIntosh made their arguments (not preserved from this stage of the trial), after which McIntosh asked Judge Thomas Douglas to instruct the jury that Luke, a slave acting under the control and direction of his master, could not be held responsible. Douglas declined. They jury found Luke guilty. The driver was sentenced to three months imprisonment in the St. Augustine jail.[24]

On Friday, McIntosh made a motion that Douglas overturn the verdict. Douglas ruled he had insufficient time left in the ses-

22. I have deduced that Dupont hired McIntosh. When the courts appointed attorneys in slave cases, the minutes say so, so no mention of this indicates hire by the master.

23. Born in Georgia in 1822, McIntosh had been educated at Franklin College (now the University of Georgia), class of 1843, and read law in Athens before moving to Jacksonville; Robert Manson Myers, ed., *Children of Pride* (New Haven, Conn., 1972), 1608. McIntosh probably read law with William L. Mitchell, the notable Athens attorney.

24. Circuit Court Minutes A, 119; *Luke, a Slave, v. State*, 5 Fla. 186 (1853). On Douglas, see *Autobiography of Thomas Douglas* (New York, 1856); Manley, Brown, and Rise, *Supreme Court of Florida*, 123-27.

sion to consider the motion fully and continued the case until the next term. To assure Luke's appearance at that time, four men pledged $1000 of their land and possessions, to be forfeited if Luke did not appear. Dupont was apparently behind the bonds.[25]

Illness afflicted Douglas and postponed reconvening of the court several times, until it met for a single day on August 23, 1852. It was a poorly-attended session, with most cases simply being continued. The matter of *State v. Luke* was one of the few addressed. Douglas ruled against McIntosh's motion to set aside the judgment; McIntosh announced he would appeal to the Florida Supreme Court.[26]

The killing of the mules raised another legal issue in addition to that of crime at the slaveholder's command, namely slave possession of firearms. Dupont clearly allowed Luke access to guns, and Hernandez apparently permitted Adam, his head driver, the same. Here again, inconsistencies in Florida law made it difficult for courts to prosecute slaveholders. Florida's 1828 slave code prohibited slaves from having guns except when they had a "special license" from their master. The law did not enjoin masters from permitting their slaves to have guns; only slaves who secreted arms on their own could get into trouble.[27] In 1840, the legislature got tougher on slaveholders. Permitting a slave to keep or use a firearm became a $50 offense. However, the 1847 official digest of Florida statutes listed both the 1828 and 1840 laws as in effect, despite the contradiction.[28] In 1851, Florida law on slave possession of guns could still be read to leave masters who licensed it within the law.

Luke's gun caused Dupont no legal troubles, but ironically on the same day the grand jury reported its indictment of Luke, it also

25. Circuit Court Minutes A, 122-23. The four men were James Pellicer, Archibald F. Gould, Peter C. Zylstra, and Godfrey Foster. Pellicer was a wealthy planter from Dupont's vicinity. Gould, Zylstra, and Foster of St. Augustine were young men, 25-41 years of age, with no real estate holdings in 1850. Dupont's wealth had to be behind their bonds in some way. Seventh Census of the United States, 1850, Population Schedule, St. Johns County, Fla., 396, 407, 427.
26. Circuit Court Minutes A, 125.
27. Duval, *Compilation*, 65, 125; Thompson, *Digest*, 541.
28. Thompson, *Digest*, 509. Upon statehood, the new General Assembly commissioned the digest, which a review committee wholeheartedly endorsed and the governor officially approved, ordering 1500 copies printed "for the use of the state."

considered a case against Hernandez for permitting his slave to possess firearms. However, the grand jury reported out "not a true bill" on the indictment of Hernandez. Perhaps at the last moment Hernandez produced a license for his slave. In its presentment at the end of the November 1851 term, the grand jury railed at the "crying wrong" of slave possession of weapons and the problems with the law, but nothing changed.[29]

The appeal of Luke's conviction, *Luke, a Slave, v. State,* occurred in March 1853 when the Supreme Court, which held one term in each of the state's four judicial districts, met in Jacksonville. Chief Justice Walker Anderson and Associate Justices Albert G. Semmes, and Leslie A. Thompson constituted the three-man court.[30]

In the appeal, McIntosh argued that the circuit court had committed two errors in the original trial. First, he challenged the state's use of the 1832 penal code in prosecuting the slave. The legislature clearly intended the code to apply exclusively to free persons, the defense counsel contended, because for every non-capital crime, with a single exception, the code prescribed a fine as a possible punishment. That the legislature meant to give juries discretion to impose fines on slaves "would be an absurdity." The instrument for all prosecutions of slave crimes had to be the 1828 slave code. The legislature created the two codes with racially separate applications in mind, McIntosh insisted. Furthermore, it made no sense to consider the 1832 law generally applicable to both free and slave because its sections on "bigamy, adultery, &c" were irrelevant to the slave condition. The bill of indictment against Luke was therefore defective.

The circuit court's second error, McIntosh argued, was the refusal of Judge Douglas to instruct the jury that Luke, told by Dupont to shoot the mules, lacked free will. Here McIntosh tried to throw out the bath water but still catch the baby, arguing that the common law did not apply to slaves but nevertheless the defective will principle did. He asserted that slaves did not fall under the common law, citing *Neal v. Farmer* (Georgia, 1851), the most forceful statement by a Southern court that slaves had no standing

29. Circuit Court Minutes A, 121; (St. Augustine) *Ancient City,* 15 November 1851.
30. For biographies of the three judges, see Manley, Brown, and Rise, *Supreme Court of Florida,* 140-48.

under the common law.[31] Slaves were chattels, McIntosh concluded, and as such had "no volition to disobey a master" any more than an animal did. Clearly McIntosh, like many other Southern jurists, envisioned a separate law for the governance of slaves, chattel property to whom the common law did not apply. To him the coercion defense was all the more compelling when based on such an approach to slavery. McIntosh's conclusion then fell into place. Luke "was incapable of committing the offense" because he was "acting at the instigation and under the control of his master." Luke acted with "an absence of will, without which there was no malice, the essence of the crime, and what must be proven."[32]

In response, Sanderson took up the issues in reverse order, addressing the no-free-will argument first. Devoting the bulk of his presentation to this issue, he began with the observation that no Southern court had ever made a decision or ruling on slaves acting criminally at the command of a master.[33] In the absence of precedents, the prosecutor sought analogies. "We must turn to those *private relations* which approximate the nearest to that which exists between master and slave," namely husband-wife, parent-child, and master-servant. Appealing to Blackstone, Sanderson argued that the law did not excuse children or servants who committed illegal acts on the command of a parent or master, although it did excuse wives under "matrimonial subjection of the wife to her husband." However, this applied only when the husband was present: if a wife acted in the absence of her husband she became responsible for the crime, even if the husband commanded it before absenting himself. In Luke's case, as Sanderson saw it, Dupont did not personally oversee the shooting of the mules, so Luke had no excuse. As a reasonable being, Luke, when out from under his master's personal supervision, could have exercised his judgment. By analogy to child, servant, or wife in the common law, Luke's will had no defect.

"The principles of common law are held to be applicable to the slave, not as a slave, but as a reasonable being," the prosecutor

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31. In *Neal v. Farmer*, 9 Ga. 555 (1851), the killing of a slave led to a suit for damages. When the defense argued there could be no damages because there had been no criminal conviction, the court ruled that killing a slave was not a felony requiring criminal proceedings because slaves were not protected by the common law; see Catterall, *Judicial Cases*, 3: 27-28; Morris, *Southern Slavery and the Law*, 53.
32. *Luke, a Slave, v. State*, 5 Fla. 187-88 (1853) for McIntosh's arguments.
33. In cases such as *Anone*, *Berry*, and *Grady*, the slave was not on trial.

claimed. "That the slave is a person" was manifest in the laws of Florida and other states. Matching cases with McIntosh, albeit older ones, Sanderson cited *State v. Reed* (North Carolina, 1823) and *Fields v. State* (Tennessee, 1829), rulings that granted slaves standing within the common law.[34] The common law applied to Luke and held him responsible for his actions.

Defending the use of the 1832 penal code in Luke's indictment and conviction, Sanderson simply stated that criminal statutes were generally applicable to slaves, except where specifically overridden by a slave statute. The 1828 slave code did not have a section on the malicious killing of animals, so the 1832 law covered that crime for both free and slave. Besides, Sanderson could point out, if the state intended slaves to have access to the compulsion defense, it would not have revised the 1828 penal code.[35]

The free-will issue struck the judges as extremely weighty—so much so that they declined to rule on it! As Justice Thompson explained, free will "presents one of the most interesting questions which can arise out of the institution of slavery." However, the justices just did not have enough time to give it the attention it deserved: "We pass over it without expressing or even intimating an opinion, ... in hope that if it is ever again presented for adjudication we may be enabled to give it that consideration and reflection which its interest and importance demand, and which the present limited term of the court here will not permit."[36]

The judges passed over the issue of free will but they overturned the verdict of the lower court on the other, more procedural issue. Slave defendants had to be indicted under the 1828 slave code not the 1832 penal code. Maintenance of the slave system required "that the superiority of the white or Caucasian race over the African Negro, should ever be demonstrated and preserved so far as the dictates of humanity allow—the degraded caste should be continually reminded

34. The Florida Report misspelled the former case as *State v. Rua.* In *State v. Reed,* 2 Hawks 454 (1823), and in *Fields v. State,* 1 Yerger 156 (1829), a conviction for killing a slave led to the defense objection that slaves were not recognized as persons by the common law. The courts ruled that slaves—in *Reed* as reasoning beings, in *Fields* as analogous to villeins (medieval serfs)—did have common law standing; see Catterall, *Judicial Cases,* 2: 44, 494; Morris, *Southern Slavery and the Law,* 50, 53-54, 174-75. Sanderson's reference for these cases was Jacob D. Wheeler, *A Practical Treatise on the Law of Slavery* (1837; reprint, New York, 1968).

35. *Luke, a Slave, v. State,* 5 Fla. 188-90 (1853) for Sanderson's arguments.

36. Ibid., 191.

of their inferior position, to keep them in a proper degree of subordination." Therefore, different and more degrading punishments in the slave code for crimes also punished in the penal code had "obvious propriety." In indicting Luke, Sanderson's use of Section 59 of the penal code instead of Section 61 of the slave code undermined the purpose of the slave code. Ironically, to uphold the slave code, the court kept Luke out of jail.[37]

In ducking the free-will issue, the court frustrated observers. "It is somewhat disappointing," the Jacksonville *Florida Republican* exclaimed, "that the Court abstained from ruling, in the case of Luke vs. the State, upon the interesting point of the extent to which a slave has volition in the commission of a crime at the order of his master." On this interesting point the newspaper sided with McIntosh, urging Florida to join other states in "relieving the slave of the guilt attaching to voluntary action." Had the court upheld the concept that slaves in Luke's position lacked free will, it "would have taught those whose sympathies run aleak that there is more plain-spoken justice for the negro in Uncle Sam's Courts than there is truth in Uncle Tom's Cabin."[38]

Reasons beyond the press of time surely contributed to the justices' failure to address the issue of defective will. Perhaps all three accepted the defective will defense, but disagreed whether the decision should be based on slaves having standing in the common law (the position taken by the South Carolina court in the *Anone* decision) or the slaves' status as mere chattel property, necessarily lacking free will (the position argued before them by McIntosh). Such a deadlock would have reflected the broader disagreement among Southern jurists regarding slavery and the common law.

Practical considerations in a slaveholding society also may have entered into the judges' conclusion not to rule on the issue. Either way the court ruling entailed a downside from the standpoint of maintaining the slave regime. Were slaves not permitted the defense of a defective will, evil-minded masters could make slaves commit crimes without the risk of punishment rebounding on them. Yet, if permitted the defense of a defective will, slaves could blame their misdeeds on their masters, creating issues that evidence might not resolve and seriously damaging the slaveholders' controls. Anderson, Semmes, and Thompson were therefore

37. Ibid., 195.
38. (Jacksonville) *Florida Republican*, 31 March 1853.

no doubt relieved that they could decide the case on the procedural issue and not have to resolve whether the principle of defects of will extended to slaves.

Several years after the decision in *Luke v. Florida*, Georgia jurist Thomas R.R. Cobb published his famous survey, *An Inquiry into the Law of Negro Slavery*, in which he claimed that legal protection for slaves compelled to commit crimes was a well-established principle among the slave states. Southern law, said Cobb, considered a slave committing a crime under the compulsion of a master "a mere passive instrument." This was a "perfect defence" in minor offenses of a slave and an extenuating circumstance in graver offenses. Cobb cited the Georgia statute and, incorrectly, a South Carolina statute. Clearly, for propaganda purposes he exaggerated the prevalence of this principle across the South.[39] As Luke's case reveals, it was not a well-established principle. If protection for slaves who were ordered to break the law was a fixed principle in Southern jurisprudence, Florida's Supreme Court could not find it in 1853.

In cases with slave defendants subsequent to *Luke*, the Florida high court affirmed that coerced confessions were inadmissible and that juries had to acquit when reasonable doubt was present.[40] Indeed, by the late antebellum years, Southern courts had widely adapted general principles of criminal law to suit the slave regime.[41] But Blackstone's defective will principle, raising issues of free will that were difficult to resolve and, in any case, handing accused slaves a means of blaming masters for their crimes, could not be readily made to "do the work of slavery."[42]

39. Thomas R.R. Cobb, *An Inquiry into the Law of Negro Slavery* (1858; reprint, Athens, Ga., 1999), 265-66.
40. In *Simon, a Slave, v. Florida*, 5 Fla. 285 (1853), a slave in custody, under threat from a mob, confessed to arson when told he would be protected while being held over for trial. In *Cato, a Slave, v. Florida*, 9 Fla. 163 (1860), a jury found a slave guilty of rape even though a witness quoted the victim as saying she was "almost willing to swear" the slave was her attacker. The Florida high court threw out the confession in the former case, the verdict in the latter.
41. Morris, *Southern Slavery and the Law*; for a critique see Walter Johnson, "Inconsistency, Contradiction, and Complete Confusion: The Everyday Life of the Law of Slavery," *Law and Social Inquiry* 22 (spring 1997): 405-33.
42. Apt phrase from Johnson, "Inconsistency, Contradiction, and Complete Confusion," 408. After Luke's case, McIntosh (d. 1862) went on to become a federal and then a Confederate judge. Sanderson (d. 1871) became president of the Florida and Gulf Coast Railroad, serving as a delegate to Florida's secession convention and briefly as a Confederate congressman. Luke disappeared from the historical record at the conclusion of the case.