Litigating the Meaning of Emancipation: Reconstruction and Post Reconstruction Era Dilemmas of Freed People and Property

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Abstract:
This article explores how the southern courts managed the policy question of transferring property by bequest in the wake of the Civil War and emancipation. In the years when the infrastructure for Jim Crow was being assembled, many freedmen and freedwomen were able to gain access to property by bequest despite the system’s refusal to endorse broad based land reform. I argue, nonetheless, that these cases carried through a tradition of white patriarchal control of property, rather than heralding the uncertain dawn of a new era of racially egalitarian property rights.
The law of property, as it plays itself out in the context of transfers by bequest, provides continuity and intentionality in moments of rupture and final silence. The legal principles guiding the interpretation and administration of bequests create continuity and order and provide a last moment of agency to one who was once a rights-bearer and property owner. Realizing the desires of the testator, as much as possible, or delivering his property to those legally closest to him, are the touchstones of the law governing estates.

The intergenerational transfer of property through bequest is a good place to seek the meaning of citizenship and agency because disputes in this area reveal the boundaries of agency and full citizenship. The execution of a will is an agentive act that comes to fruition only after the agent is dead, but the designation of beneficiaries by will as takers reflects their structural agency and citizenship as well.

The legal transfer of property by bequest smoothes over and manages uncertainty and crisis, providing a system within which intent can be discerned or inferred from familial relationships. The law of estates rewards long-term contingency planners by enforcing their desires against a backdrop of limits based in public policy, rendering the disorderly and often unanticipated changes of death into an orderly system of legal rights and obligations.

But how would this system of providing for orderly management of the crisis of individual death respond to the unanticipated death of an entire regime? And how would the potential for transforming citizenship arising from the recreation of the state affect the intergenerational transfer of property?

This paper situates these questions in the context of wills cases in the post-Civil War era in the southern United States. In doing so, it interrogates the intersections of property and citizenship for white property holders and their black, mostly formerly enslaved, legatees. As appellate cases reviewed these questions on the state level, they had to confront tensions between white property owners’ desire to provide for faithful servants and interracial children on the one
hand and the individual states’ efforts to configure black citizenship on the other. What these cases show is that the transformation of the state wrought by war and national constitutional amendment did make a difference for black legatees. Bequests to blacks by whites challenged in court provided a site for working out the meaning of freedom and citizenship for blacks as well as a location for understanding the power of whites to devise their property freely. In many instances, despite the fact that white family members challenged bequests to former slaves, southern courts in the Reconstruction and early Jim Crow years upheld such bequests. These opinions provide a window into the process of recreating the legal order in the south and the elite power structure’s efforts to constitute race through the laws.

The rupture with the past was real and meaningful to the courts considering questions of succession and drove them to reconcile the testators’ intentions with the new state order. But the orderly process of transferring property was of great assistance in fitting black citizenship into the parameters of the new state. The history of interracial bequests in the post-Civil War era reveals the legal system’s efforts to regularize and accommodate the ruptured conditions to the system’s preference for the ordered dispensation of property according to the wishes of the white and male agents who most frequently controlled it.

By reviewing the appellate cases, their reasoning, and outcomes, we can understand more than simply the path of doctrinal change, though that path itself is worthy of study. These cases provide a way to see the kinds of conceptions of black citizenship that were in serious contention, those prevalent enough in politics and society to provide grounding for appellate litigation. Appellate cases, while they do not suggest in a representative way the prevalence of trials or legal controversies, are markers for the legal system of what questions were sufficiently unresolved to require intervention by the higher courts. Thus, temporal clusters of cases around a particular issue suggest its contingency, and in some cases, the high stakes that the system had in resolving it satisfactorily.

Most studies of the post-bellum legal system’s dealings with race have addressed the major federal controversies engendered by Congress’ civil rights legislation and the Fourteenth Amendment. Focusing on cases like the Slaughter-House Cases, Strauder, the Civil Rights Cases, and Plessy, this body of literature has revealed much about how contested black citizenship was, and how the Supreme Court moved toward a cabining of citizenship and a bifurcation of black rights into a narrow category of protected political rights and a broad
category of unprotected civil and social rights. This story is incomplete, however. The substantive work of building Jim Crow, while permitted by the federal government, took place on the state level. State-level litigation is thus a crucial place to look for emerging conceptions of black rights and the courts’ willingness to enforce them.

The paper reviews twenty-one cases decided in the state courts of the south between 1861 and 1896. These are all of the reported state cases that address bequests across the racial boundary between black and white. While not all southern states are represented, the cases came from Alabama, Georgia, Tennessee, Kentucky, Louisiana, South Carolina, and Virginia. They reveal a political order struggling to recreate itself and create continuity in property rights. They also reveal a political order that – at least tacitly – read property rights as political rights to which black citizens were entitled. The paper will cover four areas in which controversies arose: the problems of administering property law in wartime and the immediate aftermath, the problem of contingent emancipation, the challenged bequests to what I shall call the “humble and faithful servant,” and finally the problem of interracial familial bequests – challenges of bequests by white men to their black intimate partners or children. Strikingly, in all of these cases except the wartime ones, the black litigants fared well overall. They won their cases largely because of the system’s interest in attributing strong agency to the testator, a practice that reinforced white power but allowed individual blacks to benefit within certain parameters.

SLAVERY AND STATE POWER

The most common relationship that African Americans had with the law of wills during the antebellum years was, of course, as objects rather than as testators or legatees. The whole political economic point of chattel slavery was to define human beings as alienable, transferable property. This recognition, however, should stand alongside the insight that the state was intimately involved in defining the meaning and limits of slaves’ property-like aspects. While twentieth-century historians critical of slavery have discussed masters’ power over slaves, more recent attention has focused on the ways that the state mediated and defined these powers (Russell 1996). This mediation was particularly evident in the dispensation of slaves upon the

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1 I was not able to locate any cases addressing other types of interracial bequests. All of these cases involve controversies over whether property originally held by whites was to go into black hands.
death or financial ruin of their owners; recent estimates suggest that in South Carolina, judicial sales accounted for a majority of all the state’s slave sales in the forty years preceding the Civil War (Id. at 481).

Recent historians’ work shows that the ideology of race underlying slavery shifted over time, and as the sectional crisis intensified on the national level, the southern states treated blacks (both free and slave) with increasing rigidity (Bynum 1996, Morris 1996). The system of slavery, uncertainly established in the late 1600s, bolstered through the slave trade in the colonial era, and institutionalized as a constitutional phenomenon in 1789, continuously transformed itself subtly as the white elites governing the southern states adjusted it to contain their fears. Between the 1820s and 1840s, southern states legislated actively to underscore the meaning of race as a bifurcated classification of white and slave. Those who held property interests in human beings were told that they could not free their slaves without the legislature’s consent, that they could not teach slaves basic literacy, that they could not arm their slaves, and that they had to employ only other whites as slaves’ supervisors (Russell 1996: 490).

In addition to these provisions, some southern states took steps to limit the number of free blacks living within their borders. In Virginia, free blacks who left the state were barred from reentering in 1837 (Katz 1995: 947). All southern states required free blacks to keep their “free papers” with them at all times; failure to present them upon request could lead to a free person’s re-enslavement. By the eve of the Civil War, even harsher restrictions were in place, including provisions for re-enslaving any free black found guilty of a crime punishable by incarceration (Id.). The increasing stringency of state and private surveillance and harassment of free blacks led many to abandon the south for northern states or Canada. Further, by the 1840s and 1850s, even those manumissions grudgingly permitted by law required in legal or practical terms the manumitted slave’s departure for the north.

Despite these limits, free blacks were consistently permitted to hold property in the antebellum era. While few free blacks had the wherewithal to own substantial real property, no law prohibited them from doing so, and at least one careful study has shown that free blacks were able to purchase property on the same legal terms as whites, including the purchase of slaves (Id. at 966-67). Further, free blacks granted property by will or in trust could rely upon the appellate courts to uphold their claims under the law (Id.). While the number of black property-holders dropped precipitously as the sectional crisis intensified, many of the judges and
lawyers encountering cases after the war probably had some memory of and experience with independent blacks who owned land. Perhaps as importantly, both black and white litigants probably remembered this phenomenon, and perhaps remembered an instance in which the legal order had grudgingly allowed black property-owners to maintain or even enforce their rights.

This system provided the background framework against which the Civil War’s upheavals took place. Looking from the perspective of the south in 1864, war, defeat, and the national reconstitution were certain to bring significant legal change, but the scope of this change was unclear. Many southerners and northerners, however, readily assumed that the changes would leave most of the infrastructure of private law in place, with the obvious exception of the law of slavery. As state legislatures began the complicated work of recreating state governments in the former confederacy, they focused on reworking only what they thought was necessary, for the most part leaving to the common-law judicial process any necessary reconfigurations of private rights. This process is the subject of the study, and reveals how southern courts understood the meaning of emancipation through warfare and the new black citizenship.

**PRE-WAR WILLS AND THEIR DISPENSATION BEFORE 1866**

Five cases addressed interracial conflicts over property in the early 1860s. Three reached the appellate courts in 1861, and the remaining two were ruled upon in 1865. All three of the cases from 1861 were decided before shots were fired at Fort Sumter on April 12, but the cases arose from Alabama and Georgia, two of the seven states that formally seceded from the union before hostilities commenced. Two Alabama cases came down in January, followed by the incorporation of the Confederate States of America on February 9, 1861. Sometime around the date of Abraham Lincoln’s inauguration, the Supreme Court of Georgia released its ruling in *Sullivan v. Hugly*. Alabama’s high court ruled in 1865 in *Carter’s Heirs v. Carter’s Administrators* before the end of the war, but Georgia’s ruling in *Banks v. Banks* came in December, several months after the cessation of hostilities and Abraham Lincoln’s assassination.

These cases largely reflected attitudes common in the southern states prior to the war. The courts, with the exception of Georgia’s ruling in *Banks v. Banks*, behaved mostly as if the war was not going on (in 1861) or as if it had not happened (in 1865). The judges read broadly various rules that, in the laws of trusts and estates, could lead to the invalidation of bequests.
The two 1861 Alabama cases addressed thorny problems of manumission and primarily provide a helpful window into how this issue was addressed under the rules prevailing at the time of secession. In *Jack et al. v. Doran’s Executors*, Jack and several other slaves initiated a suit against James Doran’s executors and heirs-at-law. They filed their petition in 1858, suing for their freedom, as Doran had emancipated them by will, and for a tract of land (or its value) that Doran had willed to them “as the law obliges the owners of slaves to give security before they can set them free, so that they may not become a public charge” (*Jack v. Doran’s Executors*, 37 Ala. 265, 265 (1861)). Doran’s intentions were quite clear; he wished fourteen of his slaves to be free upon the death of his wife. Some of Doran’s executors, however, had transported the slaves to Tennessee and continued to hold them. Other executors apparently were in the midst of suing these executors for the recovery of the slaves. In order to settle the estate, the controversy over the slaves’ status had to be resolved, both because of their contingent value as part of the estate but more forcefully because of their colorable claim to real property.

The dispensation of the case was not as simple, however, as merely interpreting and enforcing the desires of the testator. Alabama, like many deep southern states, allowed emancipation only if the owner had petitioned the legislature and obtained special permission to free his or her slaves. Alabama also required (as noted above) that the owner provide enough resources to the freed slaves to ensure that they would not become burdens on the state.

Doran had attempted to do both of these things. In 1830, he had procured a legislative act authorizing him to emancipate his slaves, the order to take effect at his discretion. The legislature conditioned the emancipation upon his having “previously convey[ed] to the judge of the county court of said county . . . six hundred and forty acres of land . . . in trust forever” to maintain the freed slaves (Id.). In 1840, his will was formally admitted to probate. In this document he expressed his desire that the slaves be freed upon the death of his wife and leaving directly to the slaves the tract of land. But in 1851, when Linny Doran died, the executors neither freed the slaves nor attempted to convey Doran’s land to them. On what legal grounds did they seek to evade what the will clearly ordered them to do?

The formal problem, which the Supreme Court recognized as a bar both to the slaves’ inheritance of the land and to their freedom, was that a required condition precedent had not been fulfilled. In the law of wills, the failure of a condition precedent causes the bequest upon which the condition is placed to fail. While the legislature had indeed authorized Doran to free his
slaves, the legislators had mandated that he first convey the tract of land to the county court of Jackson County. The court recognized that his attempt to devise the land to the slaves was probably an attempt to comply with the legislative requirement. But in addition to not fulfilling this requirement in its exact terms, the court complained, “the will, having been attested by only two witnesses, was not so executed to pass real estate” (Id. at 267). This failure of the will rendered the attempted transfer of land invalid, and the failure to transfer the land effectively led to the failure of the condition precedent. Thus, ruled the court, “the bequest of freedom must . . . be treated just as if these special acts of the legislature had never existed.” And without the legislative act, no simple desire on the part of an owner could effect emancipation for a slave (Id.). The record does not reveal what happened to Jack and his fellow slaves, but presumably they were left to the further vicissitudes of the legal system’s efforts to resolve the dispute among the white executors.

John T. Creswell, a white Alabaman, executed his will in 1856 and died shortly afterward. In his will, he included a clause providing for the freedom of four slaves, instructing his executor to arrange for their transport either to a non-slaveholding state or to Liberia. He also ordered his executor to pay all the costs associated with their transport and to “furnish each of them such an outfit, out of my estate, as, in the judgment of my executor, will render them comfortable” (Creswell’s Executor v. Walker, 37 Ala. 229, 229 (1861)). He did not desire, however, to force emancipation upon them: he also provided that any who wished to remain in slavery should go to his sister, who was instructed to “will and bequeath said slaves . . . to such person or persons as she may believe will treat them with kindness and humanity” (Id.). The slaves, Tom, Dublin, Ann, and Maria, made their wishes for emancipation clear to the executor, who reserved the necessary funds from the settlement of the estate to provide for them. He then filed a bill expressing his readiness to execute Creswell’s wishes with respect to Tom, Dublin, Ann, and Maria. Creswell’s white legatees responded and challenged the reservation of this portion of the estate for the benefit of Creswell’s slaves (Id.).

For the court, the fundamental questions of the validity of the bequest of freedom and the establishment of a trust to assist the slaves in making the transition to freedom were interwoven. At the core was a theoretical problem: slaves did not have the legal capacity to elect between freedom and slavery (Id. at 231). The fulfillment of the conditions of the trust depended upon the ability of the slaves to choose. As the court understood it, the question was “Can a master,
by his will, clothe his slaves with the irrevocable power of determining and changing, by an uncontrollable act of their will, their own civil status?” The problem here was not simply that slaves could not exercise this kind of agency. It was also that the master did not have the authority “to confer upon slaves the legal right to acquire for themselves . . . benefits and privileges inconsistent with the condition of slavery” (Id. at 233). To add insult to injury, the exercise of this agency by the slaves would, in the court’s view, take away others’ property rights – the residual white heirs.

By attempting to give his slaves the freedom to choose instead of mandating their absolute freedom, Creswell had overstepped the boundaries of his individual authority. Only a being with recognized civil and legal status could make the kind of choice that he had attempted to offer to his slaves. In placing this choice before his slaves, he had attempted to usurp the state’s fundamental authority to define who could hold civil rights and engage in civil acts. Creswell’s will thus constituted an illegitimate “effort on the part of the testator to impart to slaves rights which belong exclusively to freemen – thus placing them in that middle state between absolute freedom and absolute slavery, which our law, upon grounds of paramount public policy, refuses to recognize as legally possible” (Id. at 235-36).

What then of Creswell’s attempt to provide for his slaves, if they could not choose between freedom and slavery? The court first considered whether the trust was dependent upon the slaves’ choice of freedom, but determined that the real contingency upon which it rested was the slaves’ election of the place to which they wished to be removed. (Giving the slaves the benefit of the doubt, the court read the trust as perfected even without the slaves’ expression of an affirmative choice of emancipation.) The executor’s capacity to put the trust into effect depended upon the slaves’ deciding either to go to Liberia or a free state. And here the same problem of slaves’ lack of capacity to exercise legal choice thwarted the testator’s intentions. Had Creswell merely directed that his slaves be transported to Liberia, the court implied, they would then have been free and the executor would have been able to implement the trust on their behalf. However, his very attempt to allow his slaves to choose their destination ironically defeated their fundamental agency by rendering the trust incapable of execution.

The high court in Georgia confronted a different issue. In the process of determining the proper distribution of an estate, an allegation of interracial adultery threw into confusion the determination of the appropriate and legitimate heirs. Amos and Caroline Hugly, a married
white couple, had a son named Franklin. When Amos died, his will divided his estate in half between Caroline and his son Franklin. Caroline then died, and finally Franklin Hugly died. Upon Franklin Hugly’s death, Spencer Sullivan was appointed his administrator. Instead of simply seeking Franklin’s heirs, he sought to distribute the estate among the brothers and sisters of Caroline Hugly. Franklin Hugly’s next of kin and heirs-at-law demanded an accounting and a distribution of ten-fourteenths of the estate to them (*Sullivan v. Hugly*, 32 Ga. 316 (1861)). In response to Franklin Hugly’s heirs’ righteous indignation that his property had not passed to them, Sullivan responded “that the said Franklin Hugly was the adulterine bastard child of Caroline, the wife of Amos Hugly, and was a half-breed of the African race, and by reason thereof incapable of taking or holding by bequest or otherwise, estate. . . under the laws of this State” (Id. at 316).

Much of the controversy centered around the question of whether Franklin Hugly’s race, and therefore his illegitimate descent, had been adequately proven. At the trial, among the witnesses for Caroline Hugly’s surviving siblings were a midwife and doctor who claimed that their medical expertise enabled them to identify Franklin as half-black (Id. at 320-321). Despite this testimony, Caroline Hugly’s siblings had a difficult legal task – the law incorporated a strong presumption of legitimacy for children born within wedlock, and the jury, having seen the evidence, had ruled that Franklin was a legitimate child (Id. at 320). Upon reviewing the evidence, the court concluded that “the most that the evidence could amount to is to raise a doubt,” but raising a doubt was plainly insufficient to overturn the presumption of legitimacy (Id. at 324-25). The jury’s finding that Franklin Hugly was the legitimate child of Amos and Caroline Hugly would stand, and Franklin Hugly’s heirs-at-law stood to inherit his share of his legal father’s holdings.

The Civil War ended formally on April 9, 1865, when Robert E. Lee surrendered to Ulysses Grant at the Appomattox Courthouse in Virginia. Nonetheless, the handwriting was on the wall by the time Alabama’s high court considered the proper dispensation of Claiborne Carter’s estate. Carter, who had written his will in 1853 and died in 1861, expressed as his “true intent . . . to give all my property for the liberty and freedom of the said negroes, so that they may enjoy the same as far as the law of the land will allow, and good conscience, honesty and

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2 As a side note, the primary property of the estate appeared to be a number of slaves, whose combined value as property and for hire was more than $15,000 (Id.).

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right will protect” (Carter’s Heirs v. Carter’s Administrators, 39 Ala. 579, 579 (1865)). The real, if not legal, legatees were seven slaves, six of whom were siblings and one a niece, all descended from a slave named Ellen. Carter either knew or had a lawyer who knew that he could not simply give his estate outright to slaves, even if he attempted to free them, so instead, he willed all of his real and personal property to the children of a white man, Robert D. James, who was instructed to act in the slaves’ interest by giving them their freedom “as far as the laws of the state will permit” (Id.). If James failed to act for the slaves, the estate was to revert to Carter’s intestate heirs (Id.).

When Carter died, James and the other administrators collected the estate’s assets, counting the slaves in that category, and attempted to divide them and distribute them to the three white heirs named in the will. The intestate heirs objected on the ground that the testamentary provision mandating emancipation was void and illegal, therefore rendering the will itself void and causing the estate to revert to them (Id.). Their challenge was successful, as the court was readily persuaded that, even though Carter had attempted to hedge his bets by including the phrase “as far as the laws of the state will permit,” this reservation was insufficient to protect against the principle of illegal conditions precedent. Because the bequest could only take effect if the slaves were freed or granted significant liberty to enjoy the profits of their labor, and state law prohibited both of these alternatives, the will would fail (Id. at 584). The reasoning and tone were fairly consistent with the 1861 Alabama cases; the court was unwilling to entertain seriously much room for flexibility, even when confronted with a very clear wish by the testator.

Tennessee’s high court, reconstituted after the end of the war, saw a similar issue very differently. The plaintiffs in Banks v. Banks were slaves who had been freed by a general proclamation of emancipation adopted by the Tennessee legislature in February; they initiated their action based on the wills of Anna and Mary Banks in March of 1865 (at the time of the suit, Anna had been dead for six years and Mary about two years) (Banks v. Banks, 42 Tenn. 546 (1865)). The Banks sisters executed their wills in 1858 and in the wills expressed their moral opposition to slavery. Upon the death of the last sister, they desired that their family slaves should be freed, their estate gathered together and sold, and the proceeds be given to the former slaves upon their departure for Liberia (Id. at 550). They made one reservation to the complete dispensation of their estate for this purpose: they instructed their administrator to hold back up to $1000 to purchase and free a slave named Squire whom they had hired frequently and who “has
been faithful to us” (Id. at 554). Squire was to be presented with $50 and also provided with sufficient resources to go to Liberia.

The sisters’ heirs at law objected first on the ground that, as slaves when the sisters’ wills had been executed and then probated, the complainants could not take property. As a backup position, they argued that the former slaves’ departure to Liberia was a condition precedent for their being permitted to take the estate. In this case, contrasting with earlier rulings in deep southern states, the court did not adopt a rigid stance in interpreting the rules regarding conditions precedent. Instead, it hewed to another common principle in the law of wills: the idea that “the intention of the testatrix shall always prevail, if it can be carried out by the Courts without conflicting with the laws or the land” (Id.). And for the court, the testators’ intentions helped the former slaves’ case.

The court did look to the law in force when the wills were executed and explained that manumission was only permissible if the manumitter provided for the transport of the freed slaves to Liberia. This fact, however, worked in favor of the Banks sisters’ former slaves, since the court recognized that the sisters only mandated their slaves’ transport to Liberia because the law required them to do so (Id. at 552). As the court understood the wills, the order to arrange for transport to Liberia was no longer necessary, as Tennessee’s emancipation of the slaves had rendered them free persons of color with the concurrent right to remain in the state as citizens. The sisters, in the court’s view, “intended to emancipate their respective slaves, and that said slaves should have their respective property” (Id. at 553). Since the law no longer barred them from remaining in Tennessee, the sisters’ wills would not be interpreted to require them to leave. They could stay in the state and take their shares under the will.3

These cases demonstrated the range of possibilities for courts confronting bequests across racial lines as the system faced the process of reconstitution after the Civil War. Precedents looked in both directions, and two sets of arguments could conceivably resonate. Against black litigants was the principle that the law in effect at the time when a will was executed or when a testator died was quite significant. Linked to this was the rigid application of the rule of conditions precedent: if a condition precedent was not met or for some reason could

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3 Further, Squire had been freed by Tennessee’s general emancipative legislative act. What then of the up to $1000 reserved to procure his freedom? The court ruled that, while Squire was entitled to the $50 specifically willed to him after his freedom was purchased, the $1000 was only intended for procuring his freedom, which the state had done with no cost to the Banks’ estate. The money reverted to the emancipated slaves who had belonged to the Banks sisters (Id. at 555-56).
not be met, an otherwise legal bequest could be invalidated. Working for black litigants was the principle that a court adjudicating a will should try to put into effect the testator’s legitimate desires. In this reading, if the testator burdened black heirs with problematic conditions relating to the laws of slavery, these conditions could simply be stripped away and the testator’s substantive desires implemented.

The courts’ choices in these cases to come would set a tone for the substantive conditions of emancipation. The concept that free blacks could inherit property if the testator framed the will within all of the rules was well established, but courts had principles at their disposal to make it easier or harder for such bequests to take effect. Some cases, however, required courts to do more than simply interpret rules regarding the appropriate implementation of a will or specific bequest. The judges had to confront the meaning of the political and legal ruptures of military defeat, emancipation, and reconstitution.

EMANCIPATION AND THE REQUIREMENT TO GO TO LIBERIA

With this ambivalent background in place, the reconstituted courts had to address cases arising from pre-war wills. These cases were difficult in part because the wills themselves were written before secession and did not anticipate the major changes in the political and social order. In some cases, the primary testator had died before the outbreak of war or when the war was in progress. Courts had to figure out what this meant for the heirs of white property holders, and in the late 1860s, the courts that were doing so came at these questions from the standpoint of accepting and trying to implement in reasonable terms the federal government’s emancipation of the slaves and their elevation to citizenship.

Between 1867 and 1872, Kentucky’s high court considered a single case, but Georgia encountered three and Tennessee resolved five. In all of these cases, complex questions about emancipation and its meaning, either by attempted private action on the part of a slave’s owner or by the federal government, loomed large. Many of the cases showed courts willing to exercise their authority in equity creatively to grant real and personal property to former slaves and to render these blacks members of the community of the south. Ambiguities continued, however, and the courts had to develop a coherent, if implicit, narrative about the sources of black agency
and its connection to citizenship that skirted established slave law about blacks’ fundamental lack of civic status.

Kentuckian Lucy Fine granted freedom to her slaves by will and instructed her brother to take them to Ohio and manumit them upon her death. She further provided that her residence should be sold and its proceeds distributed to the freed slaves (*Monohon v. Caroline*, 65 Ky. 410 (1867)). Kentucky, as a border state, had a different and weaker investment in slavery than the deep southern states. Nonetheless, slavery in Kentucky did not meet its legal end until the ratification of the Thirteenth Amendment in 1865. While the state did not invoke the harsh controls of Alabama, nor did it require the transport of slaves to Liberia to effect their emancipation, it nonetheless had barred slaves from inheriting property. The intestate heirs contesting Fine’s distribution of her estate to her freed slaves grounded their claim in this principle.

The court dealt with this objection relatively quickly. Fine had clearly intended to free her slaves, and had left her property to them as free blacks, not as slaves. Although she had apparently died before the Thirteenth Amendment freed her slaves, “several of these slaves were entitled, immediately after her death, to perfect their freedom, and having done so, they were as capable of receiving and holding property . . . as other persons.” (Id. at 413). The court saw nothing radical or even terribly noteworthy in what it was doing and cited pre-war precedents addressing the capacity of owners to free their slaves and then devise property to them as free blacks as if the upheaval of the previous five years had never happened.

Tennessee, picking up on the thread begun in the *Banks* case (in which the Banks sisters had successfully left their estate primarily to their slaves in 1865), ruled on two cases in 1869, two in 1870, and one in 1871. All of these cases involved bequests to individuals who were slaves at the time that the wills were written, and some implicated the same provision of Tennessee’s law that was at issue in *Banks*. Unlike the court in Kentucky, the judges in Tennessee appeared to perceive these questions as problematic and requiring significant thought and analysis.

In December of 1869, the Supreme Court of Tennessee considered *Armstrong v. Pearre* (47 Tenn. 171 (1869)). The case was old, having first reached the courts in 1848 after the death of testator Joshua Pearre. Pearre had sought to provide his slaves, upon their reaching the age of 25, with the option of going to Liberia to live in freedom. He was apparently interested
primarily in benefiting his young slaves. He provided for the sale of all of his estate, including all slaves over 25, but wanted the younger slaves to be hired out until 1853 to build up a fund to provide for them to be sent abroad. The problem, apparently, had been the pitiful value of his estate, especially when the young slaves were removed from the financial bottom line.

When the case was first litigated in the 1850s, the slaves had duly been asked to express their preferences and indicated their willingness to go to Liberia. Nevertheless, the administrator continued to hire them out to pay off the various bequests under Pearre’s will, and the evidence showed that they were hired out annually until 1861, eventually amassing a fund from their hiring of more than $3000.

The court quickly recognized that this was a gross misinterpretation of Pearre’s will. Pearre had intended for his slaves to work for a few years to accumulate enough money to finance their emancipation on the terms of Tennessee’s then-prevailing statute. Instead, they had continued to serve as slaves for hire for eight years beyond the point at which his will had anticipated their freedom. The court simply stated, “this fund clearly belongs to those for whose benefit it was intended and by whose labor it has been created” – the individuals who had been Pearre’s young slaves (Id. at 178). Despite Pearre’s widow’s complaint that she had not received her full share of the estate, the court was able to see that the administrator’s handling of the case constituted a backward interpretation of Pearre’s desires – he had intended the slaves’ work to move them toward their own freedom, but instead the administrators had merely used the slaves to fulfill Pearre’s other (contingent) obligations.

The next two cases, Milly v. Harrison and Lynch v. Burts, also implicated the state’s prewar requirement of transport to Liberia, but addressed this more centrally. In Milly v. Harrison, the testator established a fund for his slaves (the fund arising from their having been hired out) and ordered them freed and transported to Liberia after his death (Milly v. Harrison, 47 Tenn. 191 (1869)). In considering this situation, Tennessee’s court recognized the broader political implications of recent events:

When slavery was abolished, and the whole tenor and policy of the law in regard to emancipated slaves laws changed, and under the laws and Constitution of this state and of the United States, all men were invested with equal rights as to residence and property, the reason of these limitations wholly failed. There was no longer any reason why the negroes should go to Liberia to receive the benefit of the testator’s bounty.
Under this logic, the court declined the invitation to send the beneficiaries to Liberia merely to grant them their legacy. Instead, the court simply handed it to them on the principle that they could live their lives as free rights-bearers in the United States (in fact, in Tennessee if they wished to stay).

Likewise, George Squibb had mandated that his slave, Jennie Burts, should be set free, furnished with a legacy of $500, and sent to Liberia or “some other suitable place” upon the death of his wife (Lynch v. Burts, 48 Tenn. 600 (1870)). Squibb’s will was executed in 1852, and he died some time before the outbreak of the Civil War. In the case before the Supreme Court of Tennessee, the executor sought instructions for the disposal of the $500, claiming that Burts had taken advantage of the “public events of the late civil war” to abandon her mistress and therefore that she was not entitled to the money (Id. at 600).

Burts’ response was that she had left Squibb’s widow in response to the widow’s direct command that she depart. More substantively, she argued that, even though she had not received her freedom in the way that Squibb had envisioned, she was nonetheless free and entitled to the legacy. The court had to decide what Squibb had intended in providing for her freedom, but mandating it after the death of his wife.

The court ruled that the real point of this provision in Squibb’s will was to free Jennie Burts, not to provide his widow with a servant until her death (Id. at 605). Further, despite the fact that he had contemplated this money’s expenditure to help Burts get to Liberia and establish herself there, the court read language in his will mandating that the money inure to the benefit of Jennie as a broad intent that she receive it, regardless of how it was to be used.

While the ruling and reasoning was encouraging for freed people in Tennessee, the striking element of the case was the court’s statement that the war and its repercussions had fundamentally altered civil relations. Emancipation, the opinion explained, had “forever abrogated and destroyed” any property rights in other human beings, and after emancipation, Burts’ former mistress had no right to enjoy Burts’ services. Burt was free to operate as a citizen on contractual terms, obviating her former relationship of status with her erstwhile white owner (Id. at 605-06).

Thus far, Tennessee had consistently ruled in favor of black litigants and legatees, granting them substantial property and money in disputes with white heirs or intestate

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4 In legal terms, Squibb bequeathed to his wife a life estate in Burts.
successors. A case from 1870, however, brought in the alternative model of rigid interpretation of formal rules governing the validity of bequests. In Cochreham v. Kirkpatrick, William Smith attempted to free his slave Eliza by will and give her an effective life estate on a piece of land that he willed to his son (48 Tenn. 327 (1870)).

Smith’s bequest, according to the high court, fell in the category of bequests that would not be enforced because they violated the state’s public policies at the time they were written. Had Smith wished to free Eliza, he should have remembered the framework of state statutes that established the parameters for emancipation. In particular, Eliza had to emigrate from Tennessee and Smith should have remembered the state’s strong encouragement to slaveholders to send their freed slaves to Liberia. Because Eliza’s privilege of living on the land disposed of by will was void, the bequest failed and Eliza was entitled to nothing (Id.).

If Smith’s straightforward attempt to free his slave led to the failure of his bequest, a more ambiguous legacy fared better the following year. In Young v. Cavitt, Jacob Young had made a special provision for three of his slaves. Apparently realizing that he could not free them without sending them away from Tennessee, he attempted to will them the capacity to choose their masters, and to opt to be resold for the same price to a different master if they were dissatisfied with the first master. Upon Young’s demise in 1858, the administrator of the will did not inform the three about this provision, but simply hired them out annually from 1859 through 1863. By 1864, however, they had learned of their former master’s attempt to provide for them and selected their master for the year, who tendered a dollar to the administrator, which he refused (Young v. Cavitt, 54 Tenn. 18, 20 (1871)).

In 1866, the former slaves sought more formal redress from the courts, suing the administrator for the proceeds of their hiring between 1859 and 1863, a claim that they pressed in different form in 1868 as well. The administrator responded that the provision granting them nominal freedom was itself unenforceable, and the court resolved the issue by conducting an inquiry into Young’s intent in placing the provision in his will. Young, the court found, had been very troubled by the law’s insistence that he send the slaves out of the country, claiming that they “had made all that was there” and consulted with his attorney to find a way to arrange things so that they might remain slaves “but really be free, as the poor fellows did not want to be sent off” (Id. at 25).
The court found that the executor had indeed had the duty to inform the slaves of this clause in Young’s will, and basically understood their status as almost that of free blacks from 1859 on. Strikingly the court accused the executor of depriving them of their rights, and found that, as rights bearers, they were entitled to the proceeds of their hiring. The fund was substantial, amounting to several thousand dollars by the time the case reached Tennessee’s high court in 1871 (Id. at 27-28). The court’s willingness to give legal effect to Young’s effort to free his slaves without freeing them depended in substantial part upon the court’s acknowledgement that an intermediate status characterized as “inchoate freedom” was legally cognizable.

The litigation in Tennessee thus revealed a willingness on the part of the court to recognize the fundamental rupture in the law, yet a simultaneous need to sustain inquiries into the extent to which testators had complied with the laws in force at the time they had written their wills. To the extent that an overarching principle can be derived from these cases, the best candidate is the principle that the courts would interpret creatively and generously bequests of freedom and property to former slaves if their masters had played by the rules existing at the time that the bequests were drafted. This rule selectively enhanced the agency of white property holders, but underlined the authority of the state to establish outer parameters for this agency.

A similar debate took place in Georgia, which considered three cases, two in 1869 and one in 1872. Georgia, of course, had a somewhat different immediate history, reflecting its significantly more repressive stance toward blacks prior to the Civil War. But like Tennessee, Georgia required that masters seeking to manumit their slaves had to remove them from Georgia, sending them either to a free state or to Liberia.

Green v. Anderson, decided in 1869, involved the interpretation of a will drafted prior to the Civil War. Augustus Anderson died in 1853, leaving instructions that John, an adolescent slave, be sent to a free state, emancipated, supported through his schooling and vocational training, and granted three thousand dollars upon reaching the age of twenty-one (Green v. Anderson, 38 GA. 655 (1869)). He also mandated that John’s mother Louisa should be given the option in 1875 of going free as well and departing for a free state. She was to have two thousand dollars if she chose freedom, but if not, she was given the authority to select her owner (Id. at 660). Upon Anderson’s death, these provisions were ignored, and both John and Louisa remained in slavery. John achieved freedom through war, and Louisa did not live to see freedom.
The court considered the provision in the will regarding John to be a legitimate trust, as it was carefully crafted to avoid violating any of the then-existing laws (Id. at 661). A court of equity was charged to enforce the trust immediately. The case had broader implications, however. The court noted that its reasoning could be taken as opening the door to a flood of generalized complaints about white exploitation of blacks and appropriation of blacks’ wages during slavery. The court hastened to dispel this concern, explaining that freed people could only enforce those laws that were in effect at the time that contracts, wills, or other documents were executed (Id.). Nonetheless, in this case the court directed executor Moses Green to produce the funds that Augustus Anderson had intended John Anderson to have upon reaching adulthood.

Anderson’s executor Green was not finished. In 1872, litigation over Augustus Anderson’s estate again reached Georgia’s Supreme Court. Green lodged thirty-seven objections and ultimately persuaded a judge to order a new trial, but the Georgia Supreme Court reversed this order. In particular, the high court noted that Green’s plea that the war had substantially destroyed the value of the estate was of no avail. The opinion noted acidly, “We do not think $5,000 with interest thereon from November, 1854, an unreasonable price for twelve years of slavery, a deprivation of education, and [the withholding of] three thousand dollars in cash” (Anderson v. Green, 46 Ga. 361, 383 (1872)). It also pointed out that the estate had been solvent and worth more than $200,000 when Green gained control of it; Green would not now be permitted to avoid personal liability simply because the estate had become insolvent long after he should have fulfilled his obligations under the trust (Id. at 385).

With these principles established in Anderson I in place regarding manumission, the Georgia high court could deal with the next case relatively quickly in the winter of 1869. Owen Thomas, like Anderson, had provided for the freedom of his slaves and their children in the will that he executed in 1852. They were to be conveyed either to Liberia or to a free state, and Thomas wished his entire estate, save a substantial executors’ fee and the settlement of a debt, should be liquidated and dispersed among them. Thomas’ white intestate heirs objected on the ground that Georgia had passed a statute in 1859 barring manumission by will; they claimed that this legislative act formally revoked Thomas’ will with respect to the manumission of his slaves and all that flowed from it (Redd v. Hargroves, 40 Ga. 18, 23 (1869)). Since Thomas had not republished his will prior to his death and had not rewritten it to take into account the slaves’
political emancipation, the white heirs-at-law sought a ruling that he had died intestate with respect to the portion of his estate set aside for his slaves.

The court clarified that a subsequent legislative act could not itself work a revocation of a will, and adopted a common-sense interpretation of the conjunction between Thomas’ intentions and the tumultuous events of the early 1860s. “The testator in this case clearly intended to manumit his slaves, and to bequeath property to them as freemen . . . ; but before his death the laws which prohibited them from enjoying their freedom here became obsolete; in other words, freedom came to them instead of their having to seek it under the provisions of the testator’s will” (Id. at 25). Effectively ignoring Georgia’s ratcheting up the standards for bequeathing property across racial lines immediately prior to the Civil War, the court read the political and constitutional earthquake of war as a simple fulfillment of one of the terms of Thomas’ will. They reasoned further that the main points of the will were the freeing of the slaves and the granting of the bulk of Thomas’ estate to them; therefore the provision requiring them to leave Georgia was mere makeweight in light of the freed people’s capacity to enjoy their property (Id. at 25-26).

These cases had to be encouraging for black litigants, as blacks slated to take under wills were being treated well by the courts. The timing of these cases, however, calls into question any broad conclusion that the south would move quickly to instate black rights. All took place during Reconstruction. The judicial bench was being staffed in most counties by individuals from outside or by individuals who had remained at least marginally loyal to the Union during the Civil War (Kolchin 1972, Foner 1988). While the image of the scalawag and carpetbagger regime still resonate,5 we should recognize that those on the bench and in the government were by no means radical egalitarians driven by an interest in absolute equality. Nonetheless, white southern citizens likely expected a different way of thinking through these issues in legal terms once they had retaken the bench for conservative, Democratic elites. These expectations would be borne out quickly with respect to key issues like segregation, but not so much with respect to judges trying to figure out the best way to dispense justice when dealing with bequests of property across racial lines.

5 The terms “carpetbagger” and “scalawag,” still part of our discourse, came into use by southerners in the post-war era.
With these conceptual issues beginning to settle out, the courts across the south turned to managing bequests across racial lines in the specific factual contexts in which they arose. Four cases involved bequests to former slaves in the interest of rewarding their faithful service, and three addressed bequests to interracial descendants of white men. While the judicial system did not note it formally, these final two sets of cases took place in a substantially changed political climate than the previous rulings. Reconstruction had ended formally in 1876, although the first major changes in institutional personnel (mostly involving the reinstallation of racially conservative white elites who had held some authority before the war) took place earlier in the 1870s in some locations. In any event, black litigants in these cases faced a different judicial climate. As historians Barbara Welke and Grace Elizabeth Hale have shown, this did not mean that the judicial climate toward blacks immediately turned hostile (Hale 1998, Welke 2001). Welke’s work on the development of laws regarding segregation in transportation shows particularly that the courts of the late 1870s and 1880s gradually implemented and legitimated segregation over a period of years. Nonetheless, the black litigants in these cases may have been significantly less confident in their ability to gain positive rulings from the courts. As it turned out, for the most part they need not have worried.

The first set of cases were scattered geographically, coming from the Atlantic seaboard (South Carolina), the border states (Kentucky and Tennessee), and the deep south (Georgia). Three were bunched between 1879 and 1883, with the fourth and last coming down from the highest court in Virginia in 1896 (the same year that the US Supreme Court ruled in *Plessy v. Ferguson*). These differences would have been enough in many doctrinal areas to produce major divergences in the way that the state courts approached the cases, but these cases all did significant work in framing freed blacks as ordinary litigants, with one significant exception.

The Kentucky case of *Garrison v. Garrison* was notable for the matter-of-fact way that the court treated the black litigants. The testator, Matthew Garrison, had died during the Civil War and left a will devising freedom to two of his slaves and their four children. These six slaves, upon their manumission, were also to receive all of his real and personal property (*Garrison v. Garrison*, 10 Ky. Op. 43, 44 (1878)). The dispute in the case, in contrast to all of the cases previously discussed, was between the black legatees. Ignoring earlier controversies
about the legitimacy of simultaneous bequests of manumission and property, the court simply applied the standard rules to determine the effect of the sale of some real property mentioned in the will upon the legatees’ rights (Id. at 45).

The state of South Carolina, however, went against the growing consensus that prewar statutes should not be read as a bar to the treatment of free blacks as ordinary litigants. Nancy Blair, a white woman, included in her will a clause effectively attempting to place $2000 in trust for “providing clothing, sugar, coffee, and such other necessaries and articles as [the white effective trustees] may deem proper for the comfort of the negroes Isaac, Jacob, Adeline, and such other of my negroes that may be alive at my death” (*Craig v. Beatty*, 11 S.C. 375, 376 (1879)). Blair or her legal advisor must have known that this bequest was of questionable legal status, for the will specified that the funds set aside for this purpose should revert to her primary white legatees if the bequest failed.

South Carolina had enacted a law in 1841 barring direct bequests to slaves as well as the establishment of trusts with slave beneficiaries. While the free blacks who would have benefited under this provision argued that it fell under an earlier act mandating that slave owners provide for the basic support of their slaves, the court instead read it as an attempt to establish a trust prohibited by law at the time of its creation and its purported execution (Blair had died in 1860) (Id. at 376-77). As in the Kentucky case, the South Carolina high court framed what it was doing as the ordinary application of law. The judges opined that “nothing is more familiar” than the settled principle that an attempt to create a trust that fails causes the funds to revert to the estate and not to the purported beneficiary of the failed trust (Id. at 380). But in this case, the court could deny the free black beneficiaries through the ordinary and race-neutral application of law.

The outcome of the ordinary operation of law was happier for Lucy Freeman, a black housekeeper for Tennessee justice of the peace L.E. Stanley. This case was the first instance in postwar Tennessee in which an appellate-level controversy over an interracial bequest did not involve a legacy written for the benefit of a slave. Freeman’s claim rested upon a diary in which Stanley had made several entries in the months preceding his death. She argued that this diary
constituted a valid holographic will and that she was entitled to a sum of money, some livestock, and a life estate in her servant’s quarters (Reagan v. Stanley, 79 Tenn. 316, 318-19 (1883)). (Her claim was adjudicated along with that of a white claimant who also stood to inherit if a valid holographic will were found.) Stanley’s justification for his desire that Freeman have these items was his belief that “old aunt Lucy Freeman,” as he called her, “is honest, and has protected my interest more than any one else has ever done” (Id. at 318). A later entry indicated that he had decided to leave his diary with Freeman, confident that she would place it in the appropriate people’s hands after his death.

The court, clearly accepting the framing of Lucy Freeman as a long-term, devoted, humble servant, upheld the trial judge’s finding that the journal constituted a valid holographic will. Reviewing extensive case law on the subject of holographic wills, the court considered the nature of the writings, the circumstances in which they were produced, and the evidence that Stanley had written all of the entries. Throughout this routine inquiry, Freeman played an unproblematic supporting role, and was found to be entitled to her modest inheritance under these principles (Id. at 322-25). For Freeman, her custodianship of the journal was not suspicious and remained unquestioned, because she fit the stereotype of the faithful servant so well, and the regularization of law incorporated her identity as a legitimate beneficiary.

Finally, in 1896 Virginia heard a case involving the will of a man who had died forty years previously. In two codicils to his will, Philip Jones attempted to manumit his slave Bob, enable him to choose to go either to Ohio or Liberia at the expense of his estate, and to give him an annuity of $50 annually for life (Jones ’ Administrators v. Jones ’ Administrators, 92 Va. 590, 592 (1896)). Philip Jones established the annuity because, as he explained, Bob Jones had become infirm and Philip Jones worried that he would be incapable of supporting himself. In a separate controversy over the estate in the late 1870s, an accounting to the court revealed the existence of the annuity in Jones’ will, and Bob Jones filed a petition claiming the annuity. When Bob Jones died in 1890, his administrator renewed the claim to the annuity, arguing that Jones’ estate should receive the accumulated funds to which Jones had been entitled at least since becoming a free man in 1865 (Id.).

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6 A holographic will is an expression of testamentary intent proven to be in the holographic testator’s handwriting and treated by the court as a valid will. The standards for interpreting a piece of writing as a holographic will tend to be fairly high.

7 The sweep of time encompassed by the case incorporates both Dred Scott, issued in 1857, and Plessy, which came down in the same year as Jones’ Administrator v. Jones’ Administrator.
The court read the central question as whether the will had made Bob Jones a free man. If the will had legally established his emancipation, even though he was not effectively free until 1865, he could take the annuity under it. If the will had not been a properly framed attempt at emancipation, the annuity would fail, as Virginia law had barred slaves from taking legacies or other property by will (Id. at 592). The key to understanding what the will had attempted to do was in the wording of the first and third codicils to the will, both of which addressed Bob Jones’ situation. The first codicil expressed an intent to liberate Jones, but provided for an alternative arrangement if Jones did not wish to be emancipated. The third codicil, crucially for the court, stated “I have given him his freedom, and, whether he accepts it or not, I give him this annuity” (Id. at 593). The court ruled that these codicils, read together, provided clear evidence of an unqualified intent to liberate Bob Jones. The court brushed aside adverse precedent raising problems when a bequester had attempted to enable a slave to choose freedom or slavery, claiming that these rulings were old and had been called into question. Interestingly, the court made no reference to the enormous political and social upheavals that had called these rulings into question in more than legal terms (Id. at 594). Ultimately, the court ruled that Bob Jones’ estate was entitled to the annuity accrued over the years since the end of the Civil War. While Bob Jones’ children were barred from lodging an independent claim against the successors to Philip Jones’ administrators, they would ultimately receive the accrued annuity as their father’s heirs (Id. at 599).

Blacks thus largely continued to be successful litigants in the post-Reconstruction era in these types of cases. They were seeing the states gradually clamp down on the scope of their citizenship, differentiating between political and civil rights (e.g., Woodward 19xx). This differentiation was then used to scale back on the implications of emancipation as the states promoted the idea that the Reconstruction Amendments had only required the equal extension of political rights. As this idea gained traction and the category of political rights narrowed, blacks found themselves with increasingly impoverished forms of citizenship (e.g., Foner 19xx).

 Nonetheless, the core right to make contracts persisted, and although this right was not mentioned in these cases, perhaps it formed an understood backdrop to the continued reinforcement of property and inheritance rights for black citizens. In these cases, blacks mostly appeared as straightforward and relatively unproblematic litigants. Their rights were implied in the context of their devoted service to their white former owners or (in the case of old aunt Lucy
Freeman) employers. Under these circumstances, the courts largely awarded them property willed to them without worrying that it would give them grounds to leverage more citizenship rights.

**INTERRACIAL RELATIONSHIPS AND DOUBLY ILLEGITIMATE CHILDREN**

The final, and perhaps the most socially controversial, set of circumstances were those in which the interracial children of white men claimed estates or portions of them on the basis of the paternal relationship. Louisiana, Georgia, and Virginia all considered cases in this category between 1876 and 1892. These cases all came before courts that were simultaneously enforcing criminal bans on miscegenation. The courts were, by 1876, no longer under any control by northern interests; the south was once again in control of its political and legal destiny and was in the process of establishing the initial policies that would become Jim Crow by the turn of the century.

A major effort in this process was the growth of a regime designed to repress interracial relationships, even if they did not result in children. While the Fourteenth Amendment initially raised significant legal questions about the status of criminal prohibitions on miscegenation, the southern state courts (like some of their northern counterparts), worked to quell these arguments. By 1882, two significant and extensive opinions – *State v. Green* in Alabama and *State v. Gibson* had addressed the legitimacy of anti-miscegenation.

One might expect that these judges would use any opportunity to rule against black legatees in these circumstances. The black children or intimate partners of white men were significantly more transgressive figures than the previously discussed old or infirm retainers who had remained with their former masters or new bosses and served them faithfully. The cases demonstrate, however, that the courts did not respond by finding reasons to invalidate such bequests. Rather, they granted significant agency to white men to dispense with their property as they saw fit.

Milton Taylor left a tangled legal mess upon his death in 1870 in Ohio. First, there was a conflict over who would serve as his administrator, and an administrator was appointed in Ohio. Then, his wife, who had remarried subsequent to his death, claimed his entire estate and was ordered to take it, with Taylor’s own will being ignored. After this order was entered, two
individuals, Phoebe Duncanson and John James Taylor, claimed to be Milton Taylor’s children and to be entitled to two thirds of the estate. A Kentucky attorney entered the litigation in 1872, having been appointed as the estate’s representative by the probate court of Mason County in Kentucky; this individual sought the reversal of the order granting the estate to Taylor’s alleged children and wife. Louisiana weighed in and attempted to settle the matter, but an appellate court reversed its efforts, and upon remand, evidence emerged that the children’s mother was actually a black concubine who had been Taylor’s slave. His children admitted that they were “three-fourths white and one-fourth colored, as acknowledged in 1869 by their father, Milton Taylor” (*Succession of Milton Taylor*, 28 La. Ann 367, 368-69 (1876)).

The appellate judge who originally ruled in the case was quite disturbed by the situation. He was satisfied, given the evidence, that Taylor’s children had committed fraud by withholding from judicial authorities their racial heritage. In his view, their illegitimacy was problematic enough, but their descent from a slave rendered them “incapable of inheriting from their father” (Id. at 370). Upon rehearing, however, and without much explanation, the high court reversed itself and ruled that the original ruling putting Taylor’s children in partial possession of his estate had included all of the proper parties and that the children had not deliberately and secretly concealed their race (Id. at 372). Judge Wyly, who had written the first appellate decision, dissented bitterly, framing the conflict as one between “illegitimate colored children” on the one hand and a disinterested administrator. He dismissed Taylor’s recognition of them as his children in his will, since this mode of establishing paternity did not comport with the established rules requiring a sworn statement before a notary public (Id. at 374-75). Nonetheless, the majority sided with the children and granted them a substantial portion of the estate.

Georgia dealt with a case in 1883 in which the white intestate heirs attempted to mobilize racialized stereotypes of black women to overturn the will of a white man, David Dickson. Dickson had left the bulk of his estate to his purported interracial daughter and her sons. To complicate matters, the daughter, Amanda Dickson, had allegedly borne her children to a close friend of David Dickson’s, one Charles Eubanks, who predeceased David Dickson. While David Dixon made no specific bequest to Amanda Dickson’s mother Julia, the white intestate heirs claimed that she and Amanda Dickson had procured the terms of the will through the exercise of undue influence against David Dickson (*Smith v. Dubose*, 78 Ga. 413, 426-27 (1887)). They
also argued that the will was void as contrary to the public policy of the state, which frowned upon interracial relationships and criminalized miscegenation (Id. at 429).

The Georgia court dismissed each objection carefully. Despite the state’s strong policy against miscegenation, the court emphasized that both blacks and whites enjoyed citizenship rights under the fourteenth amendment. The policy against miscegenation was itself a reflection of racial equality for the court, since by its terms, whites and blacks were punished equally under it (Id. at 432-33). Thus, “whatever rights and privileges belong to a white concubine, or to a bastard white woman and her children, under the laws of Georgia, belong also to a colored woman and her children” (Id. at 434). One of the key rights of citizenship, continued the court, was the right to hold property, and the case law in Georgia had consistently upheld both the property owner’s right to will his property to his illegitimate children and the illegitimate children’s right to inherit property willed to them (Id. at 441).

On the question of undue influence, the court saw no systematic evidence that Dickson’s will had been overborne by Amanda and Julia. The white heirs suggested that the two women had deceived Dickson as to Amanda’s paternity and as to the paternity of Amanda’s children. The court, however, saw no problems in the way that the trial court judge had explained the rules regarding undue influence and fraud. Nor did the court see reversible problems in the evidence that had led the jury to conclude that Dickson had been acting freely and had not been defrauded (Id. at 442-43). The mere fact that Dickson had willed his estate to a mixed-race woman and her children was an insufficient basis on which to invalidate his control over his property, regardless of how that fact was framed as problematic.

The final case came out of Virginia in 1892. Like Smith v. Dubose, Thomas’ Administrator v. Lewis involved a white father’s desire to pass his property to his interracial daughter, and like Smith, the Lewis court upheld this desire (Thomas’ Administrator v. Lewis, 89 Va. 1 (1892)). Rather than a bequest in a will, the case involved a gift causa mortis, or a gift presented at a moment when the donator anticipated his or her imminent death. Nonetheless, the structure of the inquiry was similar to the Georgia case.

Of particular interest to the court was the relationship between William Thomas and his acknowledged but illegitimate daughter Bettie Thomas Lewis. The estate in question was quite

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8 This reasoning mirrored the US Supreme Court’s ruling in Pace v. Alabama, also issued in 1883, upholding Alabama’s criminal prohibition on miscegenation.
significant, amounting to more than $200,000; Thomas was a successful businessman who had never married and never prepared a formal will. His private life, according to the drippingly sentimental description of the court, had revolved around his two beloved daughters, one of whom had died after the Civil War without bearing children. Bettie, the court explained, had lived with him most of her life and cared for him in a childlike and instinctual way (Id. at 390-92). As the court described Thomas’ feelings toward his daughter:

The avowed and constant object of Mr. Thomas’ life, labor, and love was solicitude and provision for his daughter Bettie; and . . . there is not one scintilla of proof . . . that, through all the years of his life, and in all the references he ever made to his intended disposition of his property, he ever had in his heart or mind a purpose to provide . . . for any other than his cherished child; to whom he was bound by the strongest ties of nature and affection; to whom he owed the undivided obligation of a father. [Id. at 392.]

For her part, Bettie reciprocated within a gendered and raced frame: her whole life, explained the court, from her birth until his death, “was an unvarying demonstration of dutiful devotion and filial confidence and affection” (Id.). Far from cleverly plotting to seize his property, Bettie Thomas, according to a white male witness, had “repos[ed] in child-like confidence and disinterested trust in the love of her father,” brushing aside the anxious efforts of his white colleagues to persuade them to formalize his plans.

The court described Thomas’ deathbed scene in lavish detail, emphasizing his earnest efforts to communicate his desire to transfer his property to his daughter and her complete unworldliness and inexperience in acting positively to secure the gift for herself (Id. at 393-94). Bettie Thomas’ female companion, as well as two white male witnesses, corroborated the basic events. The court’s detailed description served two significant purposes: one was to demonstrate the effective meeting of all of the elements of a valid gift causa mortis, but the other was to establish an acceptable narrative of paternal domination and childlike feminine subordination sufficient to enable an adult black woman to take an estate valued at more than $200,000 in 1892 dollars.9 The particular legal problem for the court was that, ordinarily, a simple physical transfer of a bank book would not be sufficient to demonstrate an intent to give the funds in the account as a gift to the transferee, and a substantial chunk of the estate was wrapped up in a bank account. Nonetheless, by narrating and endorsing the evidence tending to show that, regardless of the legal niceties, Thomas’ intent was to pass his worldly goods on to his daughter, the court

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9 This would convert into roughly 4.3 million dollars in 2005.
finessed the issue, resulting in a victory for Bettie Thomas despite the absence of a formal written will (Id.).

These three cases, while dispersed over time and space, are suggestive, particularly when considered against a larger backdrop of cases considering interracial bequests based upon romantic intimacy and its fruits. The casual reader might be heartened by the outcomes, finding evidence that the legal system insisted upon the orderly dispensation of property as a device trumping the emerging system of white supremacy. Nonetheless, the posture of the blacks who received the property should not be ignored. All of these successful devisees and beneficiaries were children or infantilized adults, and it was probably not accidental that the hardest political case – the 1892 challenge to Bettie Thomas’ taking of a substantial estate – involved the most aggressive efforts by the appellate system to frame the black beneficiary as lacking in agency and guile.

AGENCY, PROPERTY, AND THE OPERATION OF THE LAW IN TIMES OF TURMOIL

These cases spanned a range of locations, time, and personal circumstances, but all addressed fundamental questions about property and its dispensation across racial boundaries in a time when these boundaries themselves and their meaning were being actively renegotiated. Despite the fact that the years between 1865 and 1896 saw the active creation of much of the infrastructure of white supremacy, these cases did not, by and large, demonstrate a move toward a regime of increasing repressiveness toward blacks. What they did demonstrate was a serious effort on the part of the legal system to surmount the radical rupture of the Civil War, to tame it and transform it into a mere minor disruption that would not fundamentally rework the framework of the law of wills.

The cases fall into three distinct periods: the war cases, the cases of the years immediately following the war, and the post-Reconstruction cases. The war years saw the courts take on a posture of hostility and suspicion, but the Reconstruction courts tried to rework this. The five cases adjudicated during the war mostly turned on the harsh principles designed to encourage blacks to leave. During Reconstruction, the courts ruled on cases much more

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10 See, e.g., Novkov, Racial Constructions, chapter six. This chapter discusses interracial bequests in Alabama in the early twentieth century, addressing three cases in which the black intimate partner or interracial children of a white man were able to take property by will or deed.
liberally, looking substantially to the testators’ intentions. The outcomes of the Reconstruction cases make sense in terms of the stated aims of Reconstruction officials to ensure access to all of the legal rights of citizenship for freed people. The state courts, like all state institutions, were touched by the north’s efforts to remake the south. Yet we should remember that the state courts’ judicial personnel during Reconstruction generally did not fit the stereotype constructed by southern historians in the early twentieth century of outsiders brought in from the north to enforce a radical agenda of mass civic equalization. The judges who invalidated testators’ requirements that their former slaves travel to Liberia to gain their inheritances but still granted substantial property to these former slaves were more likely fairly elite whites from those states who had opposed the war.

The biggest surprise, perhaps, is the efforts of the post-Reconstruction courts to enforce black claims for property. In these cases, courts staffed by judges whom one would consider conservatives largely supported inheritance rights for freed blacks. The leniency of these cases poses questions for historical analyses like those of Barbara Welke, Pamela Brandwein or Grace Elizabeth Hale. The work of these scholars and other new historians of the late nineteenth century south would lead us to predict gradual motion toward increased repression and the gradual narrowing of the scope of rights for black citizens. It is also important to note that the image of totalizing repression and broad white supremacy implemented in the post-Reconstruction probably owes more to southern historians’ efforts to reconceive this era in the early twentieth century than to the existence of a fully repressive regime in the 1880s and 1890s (Brandwein 1999). Nonetheless, while blacks had come close to achieving something like full citizenship during Reconstruction, white southern Democratic elites worked to consolidate their power and entrench it over the course of the 1880s and 1890s, and racial division was a crucial rallying tool for this project. Interestingly, the wills cases appeared not to be part of this project.

The resolution to this paradox, however, may lie in property and its peculiar nature rather than in any faultiness of broader historical accounts like those of Welke and Hale. Political theory has traditionally seen property as almost pre-political and foundational. In particular, the law of wills constituted an effort to make the transfer of property simple and straightforward upon the death of that property’s owner. The reinforcement of this process did not necessarily have to address questions of black agency. In fact, in some instances, it was probably easier for the system if potential black agents were left as mere symbols or stereotypes. The emerging
system of white supremacy could be built and endure even with some individual blacks defeating white attempts to take and hold property that had originally been in white hands. What was needed for these outcomes was a strong sense on the part of the courts that white and mostly male desires to control the dispensation of property should be respected and enforced. The ordinary operation of law and the system’s interest in maintaining long-standing precedents in favor of discerning and implementing the testator’s intentions generated a stable ground that the courts saw no need to disturb in adjudicating cases implicating racial conflict.
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Strauder v. West Virginia, 100 U.S. 303 (1879)
Pace v. Alabama, 106 U.S. 583 (1883)
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Thomas’ Administrator v. Lewis, 89 Va. 1 (1892)

Secondary Sources


