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# ALMOST CITING SLAVERY: *TOWNSHEND V. TOWNSHEND* IN WILLS & TRUSTS CASEBOOKS

Diane Kemker\*

Among the lessons we have learned from the current generation of Critical Race Theory is that when we dig deeply into U.S. law, we are likely to find connections to slavery of which we were unaware. The contradictions and cruelties of slavery are imbricated into neutral-seeming doctrines apparently having nothing at all to do with slavery or race. As Justin Simard so compellingly argued in *Citing Slavery*, this is made worse when cases that *did* involve enslavement continue to be cited in ways that conceal that fact and weave them ever more deeply into the fabric of our law.<sup>1</sup> Uncovering and examining these connections is essential to coming to a full understanding of the myriad ways in which accommodating the institution of slavery was a necessity in every part of antebellum law, and reliance on it a commonplace, producing legal apologetics whose results are with us still. Whether rules and doctrines that came into being this way can or should survive when their roots are pulled up and examined is an open question that may need to be addressed one law or doctrine at a time.

One doctrine due for such reexamination is the wills and trusts doctrine called “insane delusion.” A gift or even an entire will that is the product of an “insane delusion” is invalid.<sup>2</sup> Although there is no single clear and consistent definition of

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<sup>1</sup> See generally Justin Simard, *Citing Slavery*, 72 STAN. L. REV. 79 (2020).

<sup>2</sup> RESTATEMENT (THIRD) OF PROPERTY (WILLS & DON. TRANS.) § 8.1, cmt. s (AM. L. INST. 2003) (“*Insane delusion*. An insane delusion is a belief that is so against the evidence and reason that it must be the product of derangement. A belief resulting from a process of reasoning from existing facts is not an insane delusion, even though the reasoning is imperfect or the conclusion illogical. Mere eccentricity does not constitute an insane delusion. A person who suffers from an insane delusion is not necessarily deprived of capacity to make a donative transfer. A particular donative transfer is invalid, however, to the extent that it was the product of an insane delusion.”).

“insane delusion,” it requires at least a false belief, held by the testator despite contrary evidence.<sup>3</sup> A testamentary gift resulting from such a belief is invalid even if the will as a whole can be probated, and even if the testator has testamentary capacity more generally, meaning, the mental capacity required for the making of a valid will. Insane delusion can be thought of as a unique form of partial incapacity, negating only the disposition produced by it but not the will itself.<sup>4</sup>

It is probably safe to say that most U.S. lawyers, including wills and trusts lawyers and law professors, do not know that the first U.S. case to invalidate a will based on the insane delusion doctrine involved a testator seeking to emancipate enslaved persons and devise property to them. The case is *Townshend v. Townshend*, 7 Gill. 10 (Md. 1848), an antebellum Maryland case. Testator John Townshend’s attempt to free between fifty and seventy enslaved people and leave all of his property to them was successfully challenged by his heirs (William Townshend et al.) as the product of an “insane delusion”;<sup>5</sup> namely, Townshend’s religious belief that the salvation of his soul depended upon freeing these enslaved people.<sup>6</sup> In other words, the first time a court used “insane delusion” to invalidate a will in the United States, it did so by finding that Christian abolitionism, the belief that slavery was sinful, evil and wrong, was not just an eccentric view in slaveholding Maryland, but a form of *insanity* which invalidated a will. But if most lawyers do not know that, perhaps that is because the most widely-used casebook on the subject does not mention it.

The 2016 version of Sitkoff and Dukeminier’s *Wills, Trusts, and Estates*, its tenth edition, does acknowledge that the “insane delusion” doctrine was first recognized in Maryland.<sup>7</sup> It does so by quoting a 2007 Maryland case, *Dougherty v.*

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<sup>3</sup> *Id.*

<sup>4</sup> In some circumstances, if the insane delusion is the basis of the entire testamentary plan, striking that gift has the effect of rendering the testator intestate, meaning that the laws of intestate succession will govern the distribution of the estate. *Id.* Nevertheless, conceptually insane delusion is distinct from lack of testamentary capacity. Thomas E. Simmons, *Testamentary Incapacity, Undue Influence, and Insane Delusions*, 60 S.D. L. REV. 175, 192–93 (2015).

<sup>5</sup> *Townshend v. Townshend*, 7 Gill. 10, 32–33 (Md. 1848).

<sup>6</sup> *Id.* at 10.

<sup>7</sup> ROBERT H. SITKOFF & JESSE DUKEMINIER, *WILLS, TRUSTS, AND ESTATES* 273 (10th ed. 2016) [hereinafter *WILLS, TRUSTS, AND ESTATES* 10th ed.]. Prior editions treat it similarly. However, the eleventh edition, published in 2021, does not mention *Townshend* or *Dougherty* at all. The first case presented in the eleventh edition is *In re Strittmater’s Estate*, 53 A.2d 205 (N.J. 1947), discussed *infra* pp. 7–8. ROBERT H. SITKOFF & JESSE DUKEMINIER, *WILLS, TRUSTS, AND ESTATES* 282 (11th ed. 2021) [hereinafter *WILLS, TRUSTS, AND ESTATES* 11th ed.]. There is a brief mention of *In re Honigman’s Will*,

*Rubenstein*, which “explain[s] the origins of the insane delusion doctrine.”<sup>8</sup> The excerpt from *Dougherty* in the casebook reads as follows:

The “insane delusion rule” of testamentary capacity came into being almost 200 years ago, as the invention of British jurists in *Dew v. Clark*, 162 Eng. Rep. 410 (Prerog. 1826). The rule was devised to cover a gap in the existing law, which held that “idiots and persons of non-sane memory” could not make wills, but accepted as valid the will of a testator “who know the natural objects of his or her bounty, the nature and extent of his or her property, and could make a ‘rational’ plan of disposition, but who nonetheless was as crazy as a March hare[.]” . . . Within a few years of the decision in *Dew v. Clark*, the insane delusion rule made its way into will contest cases in the United States.<sup>9</sup>

Excerpted this way, the Maryland court seems to show some undue modesty about the place of Maryland in the reception of the doctrine, or even to positively obscure it. But that is because the casebook excerpt severs the crucial link to *Townshend v. Townshend*. In the actual, unedited *Dougherty* opinion, that last sentence continues and includes an explanatory footnote: “Within a few years of the decision in *Dew v. Clark*, the insane delusion rule made its way into will contest cases in the United States, first appearing in the Maryland law of estates and trusts in *Townshend v. Townshend*, 7 Gill. 10 (1848).”<sup>10</sup> The *Dougherty* court’s footnote two in turns reads as follows:

The *Townshend* case is a startling example of the changes in American society and law in the past 200 years. There, a testator slave-owner made a will in which he freed his slaves and bequeathed all of his property to them. When he died, his relatives brought a caveat proceeding, seeking to have the will set aside. The evidence disclosed, prophetically, that the testator had claimed to have spoken “face to face” with God, who directed him how to dispose of his property “for the safety of his soul.” See *Townshend, supra*, 7 Gill. at 15. The relatives argued that the testator was laboring under an insane delusion that God wanted him to free his

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168 N.E.2d 676 (N.Y. 1960) in the eleventh edition, discussed *infra* p. 4. WILLS, TRUSTS, AND ESTATES 11th ed., *supra*, at 289.

<sup>8</sup> WILLS, TRUSTS, AND ESTATES 10th ed., *supra* note 7, at 273 (citing *Dougherty v. Rubenstein*, 914 A.2d 184 (Md. Ct. Spec. App. 2007)).

<sup>9</sup> *Dougherty*, 914 A.2d at 186.

<sup>10</sup> *Id.* at 187.

slaves and give them his property, and that that delusion produced the will. A jury in the caveat proceeding found in favor of the caveators. The Court of Appeals reversed on evidentiary issues and remanded the matter for further proceedings.<sup>11</sup>

While “startling” is not the word I would use to describe the moral bankruptcy and greed of the disappointed Townshend heirs, at least a fuller excerpt from *Dougherty*, one that does not literally end mid-sentence, would enable the reader to follow that trail to *Townshend* and understand how this doctrine entered U.S. law.

This specific problem—concealing the slavery dimension of *Townshend* and this aspect of the historic origins of the doctrine of “insane delusion”—is not unique to this casebook. Peter Wendel and Robert Popovich’s state-focused *California Wills and Trusts* casebook also covers insane delusion by using primarily non-California cases without mentioning the doctrine’s U.S. origins in *Townshend*.<sup>12</sup> The main case in *California Wills and Trusts* is *In re Honigman’s Will*, 168 N.E.2d 676 (N.Y. 1960), a 1960 New York case in which the testator’s delusion was that his wife of forty years had suddenly become unfaithful to him.<sup>13</sup> The first note following the case includes an excerpt from *Benjamin v. Woodring*, 268 Md. 593 (1973).<sup>14</sup> *Benjamin* is a Maryland case that itself cites *Townshend*, but the excerpt in the casebook stops immediately short of the “see also” cite to *Townshend* that is contained in the very next sentence of the original opinion.<sup>15</sup> For its model problem, the California casebook uses the facts of *Dew v. Clark* (a father with an irrational lifelong antipathy for his daughter) and cites to *Dougherty* with the parenthetical “(discussing *Dew v. Clark*, 162 Eng. Rep. 510 (Prerog. 1826) (this latter case is generally recognized as the first case to recognize the insane delusion doctrine)).”<sup>16</sup> But *Townshend* and the doctrine’s U.S. origins are entirely occluded.

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<sup>11</sup> *Id.* at 274 n.2. As providing a ground for invalidating a will based on “partial insanity,” *Dew v. Clark* was cited with approval by a Pennsylvania court in 1839, *Boyd v. Eby*, 8 Watts 66, 71–72 (Pa. 1839); and in *dicta* by a New York court, *Stewart’s Executor v. Lisenard*, 26 Wend. 255 (N.Y. 1841). But research discloses no case actually invalidating a will on this basis before *Townshend v. Townshend*.

<sup>12</sup> PETER T. WENDEL & ROBERT G. POPOVICH, *CALIFORNIA WILLS AND TRUSTS* 118–25 (2017).

<sup>13</sup> *In re Honigman’s Will*, 168 N.E.2d 676 (N.Y. 1960), as reprinted in WENDEL & POPOVICH, *supra* note 12, at 118–21.

<sup>14</sup> WENDEL & POPOVICH, *supra* note 12, at 121.

<sup>15</sup> *Id.*

<sup>16</sup> *Id.* at 124.

Part of what is so striking in the textbook treatment of this doctrine is how *close* the casebooks come to revealing its origins, only to fail, seemingly at the last moment, to do so. *Benjamin*, which cites *Townshend* but offers no information about it, is exactly the sort of case Simard has in mind when he criticizes “how typical citation practices ignore and obscure the brutality of that regime.”<sup>17</sup> *Dougherty* is better than *Benjamin* in that regard, and despite its insufficiencies, Simard actually identifies the *Dougherty* footnote as one of the *better* examples of a court addressing a case involving slavery, which he treats as “evidence that judges can recognize and attempt to address the harms inherent in citing slave cases if they so choose.”<sup>18</sup> But even a case like *Dougherty* is “rare, and [these cases] do not provide a coherent framework for determining when slave citation provides bad law versus when it provides good law, whose ‘pall’ or ‘startling’ context must be addressed.”<sup>19</sup>

Simard’s primary focus is on the citation of slave cases in judicial opinions and the continuing effect of those cases on the development of the common law.<sup>20</sup> This is certainly true of *Townshend*, which has been cited in other cases nearly eighty times with sixty of them after the ratification of the Thirteenth Amendment and the end of slavery.<sup>21</sup> For instance, a 1979 Maryland case, *State v. Conn*, cited a 1904 Maryland case, *Watts v. State*, for “The *Watts* Rule,” a relatively uncontroversial proposition of evidence law.<sup>22</sup> *Watts* in turn relied on *Townshend*, without any information about its substantive content:

Ever since the case of *Townshend v. Townshend*, 7 Gill. 10 (1848), it has been settled law in this State, in cases where mental sanity is in issue, that a non-expert witness may give his opinion in evidence, in connection with his personal observation of the facts upon which it is founded, and as derived from them.<sup>23</sup>

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<sup>17</sup> Simard, *supra* note 1, at 106.

<sup>18</sup> *Id.* at 115.

<sup>19</sup> *Id.*

<sup>20</sup> *Id.* at 81–85.

<sup>21</sup> U.S. CONST. amend. XII; *see, e.g.*, *Jones v. Collins*, 51 A. 398, 399 (Md. 1902); *Higgins v. Carlton*, 28 Md. 115, 127 (1868); *Baldwin v. State*, 174 A.2d 57, 60 (Md. 1961); *Thompson v. Smith*, 103 F.2d 936, 942 (D.C. Cir. 1939).

<sup>22</sup> *State v. Conn*, 408 A.2d 700, 702 (Md. 1979) (citing *Watts v. State*, 57 A. 542 (Md. 1904)).

<sup>23</sup> *Id.*

It is thus to the credit of Judge Deborah Eyer, who wrote the opinion in *Dougherty*, that there is some acknowledgement of what *Townshend* was actually about. But another layer of problems is introduced when slavery cases are cited in casebooks and used to teach law students important doctrines—without disclosing this connection—like excerpting *Dougherty* in a casebook without explaining *Townshend*. When a casebook cites *Dougherty* and includes *Townshend* without the footnote, it erases what Judge Eyer has done. But excerpting *Benjamin* or *Dougherty* in a casebook without including *Townshend* at all goes even further, and seems to put casebook editors Sitkoff, Wendel, and Popovich in the position of actually concealing it.<sup>24</sup>

Simard argues compellingly that judges citing these cases as “good law” err in failing to take account of whether the end of slavery has abrogated the cases’ authority, or at least reduced their persuasiveness.<sup>25</sup> He points out that “[j]udges who cite slave cases demonstrate an interest in doctrinal history, while ignoring the broader context within which this doctrinal history developed,”<sup>26</sup> which “not only obscures the complicity of lawyers in slave commerce but also presents a misleading portrait of the development of American law.”<sup>27</sup> In addition, “[c]iting such cases without commentary ignores the humanity of those subjected to legal subjugation and treats white supremacist judges as respected authorities.”<sup>28</sup> All of this applies perhaps even more emphatically to the editors and authors of casebooks on American law, and the law professors (and thus law students) who rely on them. While judges are not obligated to trace the development of any particular doctrine in their opinions, this is precisely what is undertaken in a traditional casebook. The omission of the role of slavery is thus even more problematic in the context of legal education than it is in judicial citations.

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<sup>24</sup> This is not to imply that this is intentional. The author has contacted Robert Sitkoff about this issue and has proposed changes to the twelfth edition which are currently under consideration. E-mail from author to Robert Sitkoff, Austin Wakeman Scott Professor of L., John L. Gray Professor of L., Harv. L. Sch. (Aug. 14, 2022, 11:12 AM) (on file with author); E-mail from author to Robert Sitkoff, Austin Wakeman Scott Professor of L., John L. Gray Professor of L., Harv. L. Sch. (Aug. 16, 2022, 2:18 PM) (on file with author); E-mail from Robert Sitkoff to author (Aug. 18, 2022, 8:46 AM) (on file with author).

<sup>25</sup> Simard, *supra* note 1, at 82–83.

<sup>26</sup> *Id.* at 83.

<sup>27</sup> *Id.*

<sup>28</sup> *Id.* at 84.

It is especially frustrating with respect to this doctrine specifically (and some related bases for will challenges, such as undue influence), which casebook editors have long recognized can have a political dimension. The leading insane delusion case in the Sitkoff book (and prior editions edited by Jesse Dukeminier) is *In re Strittmater's Estate*, a case in which the will of a single woman, Louisa Strittmater, who left her estate to the National Women's Party, was challenged on the basis of her "insane delusions" about men.<sup>29</sup> The Note following *Strittmater* in the Sitkoff casebook asks, "To what extent are findings of incapacity and insane delusion based on social constructions of what is normal? If *Strittmater* were to be decided today, would it come out the same way?"<sup>30</sup> Similarly, Wendel and Popovich ask, "[i]s Louisa suffering from an insane delusion—or is she just a feminist ahead of her time, and the court cannot accept her political views?"<sup>31</sup> An unmarried feminist in 1940s America is hardly more radical than a Christian abolitionist a century earlier; *Townshend* would lend itself perfectly to this approach in teaching. If *Townshend* is presented stripped of that context, that teaching opportunity is lost.

Alternatively, it is possible to teach the insane delusion doctrine and avoid the issue of slavery entirely,<sup>32</sup> even in taking a historical approach. *Townshend v. Townshend* is not the first U.S. case to address insane delusion in the context of will-making. That would be *Duffield v. Morris' Executor*, an 1838 Delaware case.<sup>33</sup> In *Duffield*, the court set out a careful and thorough description of insane delusion, although the jury ultimately declined to apply it to the will of Dr. Morris, which was executed a day before his death by suicide:

Insane delusion consists in the belief of facts which no rational person would have believed. It may sometimes exist on one or two particular subjects, though generally it is accompanied by eccentricity, irritability, violence, suspicion, exaggeration, inconsistency, and other marks and symptoms which may lead to confirm the existence of delusion, and to establish its insane character. Instances of delusion on particular subjects, or partial insanity, are recorded, where the judgment and reasoning faculties were not only unimpaired on all other subjects,

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<sup>29</sup> *In re Strittmater's Estate*, 53 A.2d 205 (N.J. 1947), excerpted in WILLS, TRUSTS, AND ESTATES 10th ed., *supra* note 7, at 274.

<sup>30</sup> WILLS, TRUSTS, AND ESTATES 10th ed., *supra* note 7, at 276; *see also* WILLS, TRUSTS, AND ESTATES 11th ed., *supra* note 7.

<sup>31</sup> WENDEL & POPOVICH, *supra* note 12, at 125.

<sup>32</sup> In effect, this is the approach of the current edition of the Sitkoff casebook, although it does not appear to be the motivation for its excision from that edition. E-mail from Robert Sitkoff to author, *supra* note 24.

<sup>33</sup> *Duffield v. Robeson*, 2 Del. 375 (Super. Ct. 1838).



but where the monomaniac was in other respects remarkably acute and shrewd. . . . [T]his doctrine of partial insanity is applicable to civil cases, if existing at the time of the act done; and will avail to defeat a will, the direct offspring of such partial insanity. But it has been held that a will cannot be set aside on the ground of monomania, unless there be the most decisive evidence, that at the time of making the will, the belief in the testator's mind amounted to insane delusion. And it was for the jury to say, whether this is a case of monomania; whether there was any topic or matter upon which the testator's mind was in a state of delusion, which, whenever this string was touched, produced symptoms and evidence of insanity which could not be mistaken. . . . This was the great question for the jury to try, whether Doctor Morris was the subject of such insane delusions, fancying things which did not exist and could not exist, and which no reasonable mind could believe to exist; did this delusion continue up to the time of making his will, without intermission at that time, and to such an extent as to exclude thought, judgment and reflection; to deprive him of the power of rational conversation on the matter he was about; and of that kind of knowledge that would enable him to apprehend in his own mind that he was making a will, and the objects and purposes of such an act. If he had this knowledge, memory and judgment, it is what the law means by a sound disposing mind and memory, which is sufficient to make the will valid, whatever may have been the state of the testator's mind before or after.<sup>34</sup>

A more robust approach would consist of setting *Townshend* alongside *In re George Weir's Will*, an 1840 Kentucky case that is the first case in the United States to address whether a testamentary emancipation was the product of an insane delusion.<sup>35</sup> Like *Townshend*, near the end of his life, George Weir became profoundly concerned for the state of his soul, connected this to his ownership of enslaved people, and sought to emancipate them by will.<sup>36</sup> Weir, of Woodford County, Kentucky, was a wealthy man, whose estate included 500 acres of land

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<sup>34</sup> *Id.* at 380–81.

<sup>35</sup> *In re Weir's Will*, 39 Ky. 434 (1840).

<sup>36</sup> *Id.* at 436.

worth \$30,000,<sup>37</sup> about twenty enslaved people,<sup>38</sup> “and a valuable personal estate.”<sup>39</sup> Weir “was actively engaged in agriculture, in manufacturing bagging, and in attending to a profitable mill on his farm,” until early 1839, when he fell into a deep depression following the illness of one of his children.<sup>40</sup>

Unlike John Townshend, George Weir did not attempt to leave the entirety of his estate to people he had formerly enslaved. His wife and children remained his principal beneficiaries, as they had been under a prior 1834 will.<sup>41</sup> However, his 1839 will, executed about six weeks before his death, gave clear instructions for the emancipation of the people he enslaved and conditioned the devise to his wife and children on their cooperation with this plan.<sup>42</sup> It provided as follows:

With respect to my negroes, I wish them to be hired out for, say two years from my decease, at the end of which time the proceeds of such hire shall be given or divided between them, and each and every one of them be set at liberty, and placed, or directed to be placed, in such situation as may be thought most advisable by my administrators. And I beg that my beloved wife will throw no hindrance in the way of such arrangement in respect to the negroes. . . . There will be deducted out of my estate, means sufficient to pay debts incurred in liberating my negroes, and my heirs shall not be entitled to the provision made for them, unless they shall go security to Court for said negroes’ good behavior.<sup>43</sup>

According to Joseph Stiles (the attesting witness, Weir’s neighbor, and, not incidentally, a Presbyterian pastor), in September of 1839, Weir “was in extreme mental agony, bordering on total despair and absorption on the subject of religion

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<sup>37</sup> This is about \$1,000,000 today, although this conversion does not provide the context of relative wealth.

<sup>38</sup> This would place Weir among the top 12% of slaveowners in Kentucky at this time. Kentucky Educational Television, *Kentucky and the Question of Slavery*, MEMORY LANE, <http://www.usgennet.org/usa/ky/state/counties/pendleton/african/blackslavekyquestion.htm> [https://perma.cc/A5M6-QJ9U] (last visited Oct. 6, 2022).

<sup>39</sup> *In re Weir’s Will*, 39 Ky. at 435, 442.

<sup>40</sup> *Id.* at 435. As the court describes him, he “became melancholy, and afterwards continued to become apparently more and still more unconcerned about his family and estate . . . in a great degree, habitually passive, and inattentive to all worldly interests and relations, and . . . in a most deplorable condition of mental concentration and despondency, on the subject of religion.” *Id.* at 436.

<sup>41</sup> *Id.* at 442.

<sup>42</sup> *Id.* at 435.

<sup>43</sup> *Id.*

and his eternal destiny.”<sup>44</sup> Not long before his death, George and his wife joined the Presbyterian church,<sup>45</sup> which had long supported emancipation in Kentucky.<sup>46</sup> Shortly after making his will, Weir visited his brother James near Lexington, where he told James that he made a will, how he made it, and why it had been so made.<sup>47</sup> He also told James “that he was in hopeless despair and would certainly die in a short time, manifested much anxiety about the emancipation of his slaves, and conversed with him about the condition of his affairs and the value of his estate.”<sup>48</sup>

The Court of Appeals, in reviewing the will as a whole, together with other documents created by Weir at the same time (reciting with great accuracy a variety of outstanding debts), concluded that, “[t]he will is such an [sic] one as every just and enlightened mind would concur in approving as about the best a man, standing in his relations, and being in principle an emancipator, could have made.”<sup>49</sup>

The court carefully reviewed the evidence related to George Weir’s conduct and views about slavery:

It appears that he had expressed the opinion that those who emancipate their slaves and leave them in a slave State, thereby do an injury to the persons liberated, and great injustice to the resident white population; and it appears also, that, as late as August, 1839, he offered to buy a slave or slaves at auction in his neighborhood. But his brother James testified that he (George) had always been opposed in principle to slavery, and that he had, in the winter of 1838–39, evinced to him, in a confidential conversation, that he considered it his duty not to die a slave holder. It seems, therefore, that, though he was willing to use slave labor and own slaves in a slave state, he was, in principle, an emancipator, and intended, when his capacity was unquestioned, to liberate his slaves at his death. And though he may have felt rightly as to the impolicy of letting loose, in the bosom of a slave

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<sup>44</sup> *Id.* at 436.

<sup>45</sup> *Id.*

<sup>46</sup> See Victor B. Howard, *The Kentucky Presbyterians in 1849: Slavery and the Kentucky Constitution*, 73 REG. KY. HIST. SOC’Y 217 (1975).

<sup>47</sup> *In re Weir’s Will*, 39 Ky. at 437.

<sup>48</sup> *Id.*

<sup>49</sup> *Id.* at 441. The court was equally nonjudgmental about Weir’s provision for his nonmarital child (and namesake): “It was certainly his duty to make some provision for at least the maintenance and education of George Carrol, whom he recognized as his natural son and whose mother had died shortly after his birth. And he could not have been excused had he failed to make any retribution to the aged grandmother who had nursed and reared that child.” *Id.*

community, a degraded cast[e] of manumitted negroes, yet his will does not show that he had changed that sentiment, or had forgotten his duty on that subject, for he confided the disposition of his emancipated slaves to the discretion of his brother and Mr. Stiles, who knew his own feelings and opinions as to what would probably be the best disposition of them as to residence and society.

In emancipating his slaves, therefore, we can not presume that he did otherwise than he had deliberately intended when his sanity was unquestionable.<sup>50</sup>

As the court sums it up, “[c]onsidering him an emancipator, it would be difficult to conceive for him a juster or wiser will.”<sup>51</sup> Reversing the county court,<sup>52</sup> the Court of Appeals concluded, “whatever may be the effect of the emancipation of his slaves, as he had a right to liberate them, it is the province of this Court to pronounce the law, and establish his will.”<sup>53</sup>

Still another way to handle *Townshend* is through appropriate citation. As of 2021, thanks to Simard’s efforts:

Bluebook Rule 10.7.1(d) now covers slave cases. For cases involving an enslaved person as a party, use the parenthetical “(enslaved party).” For cases involving an enslaved person as the subject of a property or other legal dispute but not named as a party to the suit, use the parenthetical “(enslaved person at issue).” For other cases involving enslaved persons, use an adequately-descriptive parenthetical.

- *Dred Scott v. Sanford*, 60 U.S. (19 How.) 393 (1857) (enslaved party), *superseded by constitutional amendment*, U.S. Const. amend. XIV.
- *Wall v. Wall*, 30 Miss. 91 (1855) (enslaved person at issue).<sup>54</sup>

*Townshend v. Townshend* does not involve an enslaved party in the most immediate way.<sup>55</sup> The will challenge (known as a caveat proceeding) was brought

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<sup>50</sup> *Id.* at 445–46.

<sup>51</sup> *Id.* at 442.

<sup>52</sup> *Id.* at 447.

<sup>53</sup> *Id.* at 446.

<sup>54</sup> THE BLUEBOOK: A UNIFORM SYSTEM OF CITATION R. 10.7.1(D), at 154 (Columbia L. Rev. Ass’n et al. eds., 21st ed. 2020).

<sup>55</sup> On October 9, 1847, a number of the people enslaved by John Townshend began a suit for their freedom, which they prosecuted unsuccessfully through multiple appeals, ending in 1856, in parallel to the caveat proceeding against the will and related litigation. See *Townshend v. Townshend*, 7 Gill. 10 (Md. 1848); *Townshend v. Brooke*, 9 Gill. 90 (Md. 1850); *Townshend v. Townshend*, 9 Gill. 506 (Md. 1851); *Jerry v.*

by Townshend's brother and nephew, two of his heirs, against the executors of his will (another nephew Jeremiah Townshend and John B. Brooke); the enslaved people he sought to manumit are not litigating on their own behalf in this proceeding.<sup>56</sup> Nor are they directly "at issue," although if the will is validated they will be freed, and if it is not, they will remain enslaved and the property of William and the other heirs. So, it would be possible to follow the example of *Wall v. Wall*, as analyzed by Simard, and cite *Townshend* this way: *Townshend v. Townshend*, 7 Gill. 10 (1848) (enslaved persons at issue).<sup>57</sup> Alternatively, the catch-all provision of Rule 10.7.1(d) could be used, calling for an "adequately descriptive parenthetical," and cite it this way: *Townshend v. Townshend*, 7 Gill. 10 (1848) (anti-slavery beliefs held to be "insane delusion" invalidating will).

As with many of the cases or doctrines premised upon slavery cases, the problematic origins of the doctrine of insane delusion need not negate its continuing vitality. The early cases do not rest solely, or even largely, upon testators' beliefs about slavery or desire to emancipate enslaved people at the testator's death. Equally common are delusions about family members, whose omission from the will of an otherwise-competent testator is likely to provoke a challenge. The author/editor of a casebook, under space constraints and with many doctrines to cover, might understandably choose to avoid the slavery cases altogether, if possible, and could easily do so by using *Duffield* to introduce the topic. Alternatively, *Dougherty* could be used with its citation to *Townshend* including the footnote. *Townshend* could be set alongside *Weir*, to demonstrate the different attitudes shown by antebellum courts to testamentary manumission and the effect of changing attitudes on probate court judgments. But what casebooks editors surely ought *not* to do is sidle up to *Townshend*, and almost, but not quite, cite slavery.

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Townshend, 2 Md. 274 (1852) (enslaved parties); *Townshend v. Townshend*, 5 Md. 287 (1853) (enslaved persons at issue); *Townshend v. Townshend*, 6 Md. 295 (1854); *Jerry v. Townshend*, 9 Md. 145 (1856) (enslaved parties).

<sup>56</sup> See *Townshend*, 9 Md. at 145.

<sup>57</sup> Simard, *supra* note 1, at 106 n.168 ("In *Wall*, the court considered whether an instrument facially labeled a deed and conveying enslaved persons and other property could be construed as a will.").