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Slaves in the Family: Testamentary Freedom and Interracial Deviance

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ABSTRACT

This Article addresses the deviance of interracial sexuality acknowledged in testamentary documents. The language of wills calls into question the authority of probate and family law by forcing issues of deviance into the public realm. Will dramas, settled in or out of court, publicly unearth insecurities about family. Many objections to the stated intent of the testator generate from social prejudices toward certain kinds of interpersonal relationships: nonmarital, homosexual, and/or interracial. When pitted against an issue of a moral or social transgression, testamentary intent often fails. In order for these attacks on testamentary validity to succeed, they must be situated within an existing juridical framework that supports and adheres to the hegemony of denial that refuses to legitimate the wishes of the testator. Disinherited white relatives of white testators regularly challenged wills disposing a majority of an estate to paramours and children of African descent. In the nineteenth century, testators who eschewed traditional devises to spouses, relatives, and institutions in favor of mistresses, slaves, or both often incited will contests of testamentary incapacity, undue influence, or fraud. This Article is a case study of *In Re Remley*, an antebellum will contest between disinherited white collateral heirs and the intended black and mulatto devisees. It retains timeless value in its demonstration of the incompatibility of testamentary freedom and social deviance. I conclude that subjective conceptions of kinship, in particular those unpopular relationships that defy social norms, prevent the idea of testamentary freedom from reaching diverse articulations of family.

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Introduction

Death is a tragedy, but its aftermath can be a drama. In testamentary documents, decedents leave a record of posthumous wishes regarding the distribution of their estate. Such procedures nowhere approach anything legally extraordinary or exceptional—the vast majority of wills exist as unremarkable death documents of little interest to anyone but family members and acquaintances. Still, private conflicts often evince larger issues than the mere distribution of property.[1] They can reflect normative ideas about the proper recognition of family and societal limitations on kinship.[2] Will dramas, settled in or out of court, bring unstated concerns and insecurities to the forefront, forcing a legal articulation of objections to the nontraditional distribution.[3] When pitted against an issue

* Assistant Professor of Law, Syracuse University. I would like to thank Don Herzog and Anita Allen for their thorough comments, and to various faculty colloquia and conferences at The American Society for Legal History, New York Law School, Seton Hall University, and the Syracuse University College of Law Junior Faculty Forum. Special thank you to Rachel Godsil and Annette Gordon-Reed for their elegant insight.

[1] For a through discussion of lawsuits over dispositions considered "unjust" or "unnatural," see Susanna L. Blumenthal, *The Deviance of the Will: Policing the Bounds of Testamentary Freedom in Nineteenth Century America*, 119 HARV. L. REV. 960 (2006).

[2] Modern courts have strayed from basing family court decisions, namely custody battles, on private biases. *See,* Palmore v. Sidoti, 466 U.S. 429, 433 (1984) (ruling that private biases and the possible injury they might inflict are impermissible considerations for removal of a white child from the custody of its natural mother who remarried a man of a different race).

[3] *See generally,* Adrienne Davis, *The Private Law of Race and Sex: An Antebellum Perspective,* 51 STAN. L. REV. 221 (1999). *See also,* Mary Frances Berry, Mary Frances Berry, *Judging Morality: Sexual Behavior and Legal Consequences in the Late Nineteenth-Century South,* 78 J. OF AMER. HIST. 835-56 (1991), Eva Saks, *Representing Miscegenation Law*, 8:2 Raritan, Fall 1998, 39-69.

of a moral or social transgression[4], testamentary intent often fails.[5] In order for these attacks on testamentary validity to succeed, they must be situated within an existing juridical framework that supports and adheres to the hegemony of denial that refuses to legitimate the wishes of the testator.

Testamentary intent may enunciate a testator's subjective interpretation of family, yet these subjective expectations of distribution may confound a more restrictive statutory scheme that is less permissive in its views of the parameters of kinship.[6] Balancing the state's interest in the efficient distribution of property with the testator's legal interest in bequeathing reveals an underexamined aspect of governmental regulation of diverse expressions of family.[7] In most cases, wills pass quickly though probate because few challenges to the specific devises exist to slow and lengthen the probate process. Few legal barriers exist that prevent a civil spouse and their children from being considered as legitimate family members. It is the rarer and more diverse conceptions of family that must overcome a presumption of illegitimacy, even when the words of the testamentary document clearly indicate the familial role played by the disenfranchised.[8]

Legal attempts to recognize the validity of a nontraditional family propel diverse conceptions of interpersonal relationships from margin to center. Social norms of acceptable and plausible relationships have traditionally thwarted a decedent's attempt to

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[4] *See,* Susannah Blumenthal, *The Deviance of the Will: Policing the Bounds of Testamentary Freedom in Nineteenth-Century America*, 119 HARV. L. REV. 959, 960 (2006).
[5] *See generally*, Melanie Leslie, *The Myth of Testamentary Freedom*, 38 ARIZ. L. REV. 235 (1996).
[6] *Id.* at 238 (discussing courts' commitment to seeing that testators uphold a duty to family.)
[7] Diverse expressions of family—unmarried heterosexual couples and also homosexual couples—find that their expressions of commitment fail to receive the same easy protections of the heteronormative nuclear family. For an excellent article exploring these restrictions on family, see Laura Rosenbury, *Two Ways to End a Marriage: Divorce or Death,* 2005 UTAH L. REV. 1227 (2005).
[8] See Leslie at 236 (refuting the "oft-repeated axiom that testamentary freedom is the polestar of wills law").

circumvent well-established distribution schemes of probate law.[9] Spouses may not disinherit each other, and in some states, marital children have stronger claims upon an estate than nonmarital children.[10] Additionally, adopted children have the same testamentary rights as biological children.[11] Testators who want to disinherit their current spouse, restrict their nonmarital children, or differentiate between adoptive and biological children stand upon shallow legal ground, even under the ideology of testamentary freedom. Equity, as defined by the state, intervenes to recalibrate the inefficient and unfair distribution of estates.

Estate reformation according to principles of equity works in two ways. While it is often true in will disputes that two sides exists to every story, state supported restrictions that rein in testamentary freedom may tautologically disadvantage those recognitions of family relationships that conflict with state public policy.[12] On one hand, statutory schemes protect vulnerable family members from predictable patterns of disinheritance that disfavor neglected spouses[13] and nonmarital, nonbiological children.[14] Securing the inheritance interests of these frequently marginalized constituencies institutes a norm of familial equality in estate succession by curtailing the actions of testators who actively or constructively disinherit closely related family members. On the other hand, these same statutory schemes remain underinclusive, as they may not provide

[9] *Id.* Ralph Brashier offers a comprehensive examination of diverse families and the problems they face with inheritance. *See*, R. Brashier, INHERITANCE LAW AND THE EVOLVING FAMILY (2004).
[10] *Id.* at 12.
[11] *See,* Susan Gary, *Adapting Intestacy Laws to Changing Families,* 18 LAW & INEQ. J. 1 (2000); Jan E. Rein, *Relatives by Blood, Adoption, and Association: Who Should Get What and Why?,* 37 VAND. L. REV. 711 (1984);
[12] See *supra* note 9.
[13] The Uniform Probate Code allows for spouses who were left out of a premarital will to recover the same amount as an intestate share, with some exceptions. UPC §2-301. Additionally, all spouses displeased with their share in a will may opt for an elective share, depending on the length of the marriage. UPC §2-202.
[14] Trimble v. Gordon, 430 U.S. 762 (1977) (declaring unconstitutional an Illinois statute prohibiting a nonmarital child from inheriting from its biological father).

legal protection for those infinitely diverse articulations of family and association that exist beyond the comprehension and acceptance of the law.[15]

But the idea of the "changing American family" has perpetually been in flux, and the only constant aspect has been the law's recognition of a limited version of it.[16] Marriage has long stood as the unifying characteristic of family, yet this venerable institution has been subject to state control.[17] It has prevented people of the same sex[18] from legal consolidation of their interests, as well as interracial couples,[19] related people,[20] minors,[21] and slaves.[22] Couples who fit the state's conception of appropriate prospective spouses receive state protection of their relationship and of their property.[23] For those relationships existing outside of this realm of approval, securing these same rights proved a remarkably difficult process. Concomitant with regulation of marriage is the regulation of property transmission, and stringent controls on who can get married necessarily dictates, in turn, who may inherit.[24]

The language of wills calls into question the authority of probate and family law by forcing issues of deviance into the public realm.[25] This Article addresses the deviance

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[15] See *supra* note 9.
[16] *See,* ANITA BERNSTEIN, MARRIAGE PROPOSALS: QUESTIONING A LEGAL STATUS (2005).
[17] *See,* Davis *supra* note 3 at fn15. *See also,* Milton Regan, Jr., ALONE TOGETHER: LAW AND THE MEANINGS OF MARRIAGE (1999).
[18] David Chambers, *What If: The Legal Consequences of Marriage and the Legal Needs of lesbian and Gay Male Couples,* 95 Mich. L. Rev. 447 (1996).
[19] Loving v. Virginia, 388 US 1 (1967) (holding unconstitutional a state statue prohibiting interracial marriages). Despite the Supreme Court's 1967 ruling, Alabama formally held on to antimiscegenation law until the year 2000. Kevin Johnson, *Taking The "Garbage" Out in Tulia, Texas: The Taboo on Black-White Romance and Racial Profiling in the "War on Drugs",* 2007 Wis. L. Rev. 283, 300 (2007).
[20] Singh v. Singh, 213 Conn. 637 (1990) (voiding a marriage between a half-uncle and a half-niece).
[21] Moe V. Dinkins 533 F.Supp 623 (1982). See also, Lynn Wardle, *Rethinking Marital Age Restrictions*, 21 J. FAM. L. 1 (1983).
[22] *See,* Davis, *supra* note 3 at fn 9. Cheryl I. Harris, *Finding Sojourner's Truth: Race, Gender, and the Institution of Property*, 18 CARDOZO L. REV. 309, 330-31 (1996) (summarizing effects of enslavement on inheritance).
[23] *See,* Brashier, *supra* note 9.
[24] *See generally*, Cheryl Harris, *Whiteness as Property*, 106 HARV. L. REV. 1709 (1993).
[25] Blumenthal at 966.

of interracial sexuality acknowledged in testamentary documents. In addition to the administrators, the will announces to others the sincerity of the testator's interracial wishes, and it formally acknowledges an interpretation of "family" not frequently and willingly admitted as legitimate. Disinherited white relatives of white testators regularly challenged wills disposing a majority of an estate to paramours and children of African descent.[26] In the nineteenth century, testators who eschewed traditional devises to spouses, relatives, and institutions in favor of mistresses, slaves, or both often incited will contests of testamentary incapacity, undue influence, or fraud.[27] When social and legal practices denied the existence and possibility of mixed race,[28] the act of memorializing an interracial connection in a legal document confounds this nonexistence. In the eyes of the state, probating an interracial will that requests an acknowledgement of forbidden love[29] and its fruits threatens not only the authority of the law, but it also would permit legal equality among blacks and whites. Interracial marriage brings with it interracial property.

This specific case, *In re Remley*[30], concerns the familiar antebellum taboo: what Mary Boykin Chesnut called the "monstrous system" of miscegenation and slavery. This case demonstrates the influence of racial privilege on the viability of testamentary freedom. First, in 1861, a scheming relative accused her "white" and recently widowed

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[26] See Jason Gillmer, 82 N.C.L. Rev. 535, 597. See also, Bernie Jones, *Righteous Fathers," "Vulnerable Old Men," and "Degraded Creatures": Southern Justices on Miscegenation in the Antebellum Will Contest*, 40 TULSA L. REV. 699 (2005)

[27] Blumenthal at 964.

[28] Kevin Noble Maillard, *The Multiracial Ephiphany*, (forthcoming FORD. L. REV. 2008) (on file with author)

[29] *Id.*

[30] These materials are located in the South Carolina Historical Society, where they previously sat unread in the records of a nineteenth-century Charleston law firm, Rutledge and Young. I found no reference to the Remley family in historical surveys or scholarly articles. Essentially, their existence fettered away with the passage of time. Their name does exist, however, in the title of a local neighborhood, Remley's Point, which had once served as a Freedmen's settlement, athletic complex, and now a site for luxury residential development.

cousin, Mary Remley, of being a black slave. If the cousin succeeded in her claim, Mary and her children, as slaves, could not legally stand as beneficiaries of her deceased husband's will, thus enabling the cousin to inherit as the legitimate next of kin. With their late father's will at stake, the children successfully proved their untainted claim to whiteness, which cleared any racial impediments to their inheritance.

Years later, these same children would revisit the interracial issue again upon the death of their brother, Paul Durbin Remley, of Charleston, South Carolina. In his will, he disinherited his sisters in favor of his black slave mistress, Philis, and their two children, Charles and Cecile.[31] His collateral heirs challenged the will on grounds of insane delusion, arguing that the gunshot wound that precipitated his death rendered him incapable of writing a valid will.[32] Although the Civil War and emancipation predated Durbin's will, the sisters succeeded in characterizing Philis as the object of property rather than its recipient. To them and to the courts, Philis was not an heir, but evidence of the postwar devaluation of Durbin's estate.[33] Former slaves failed to meet the social and legal requirements for "family."

This historical approach to wills law demonstrates a legal antecedent for contemporary lawmakers, scholars, and students contemplating the evolution of the American family.[34] *Remley* tests the elasticity of testamentary freedom. Using race as a proxy to determine appropriate family relationships amongst the Remleys separates legal reality from practical reality. While the law allowed whites to shield family property

[31] From the time Durbin wrote the will until its execution, the black beneficiaries had been emancipated by proclamation. *See* Paul Durbin Remley Will *infra* note 105.
[32] *Infra* note 69.
[33] *Id.*
[34] Maillard, *supra* note 28. Diverse families have always existed in the United States, yet law has prevented them from becoming legitimate forms of interpersonal expression, and in turn, more publicly acknowledged. Law affects collective memory so that our vision of the past accedes to a vision of legal possibilities and prohibitions.

from the testamentary interests of potential black heirs, this tells a very different story from the lived experiences of the people whose very existences challenged the boundaries of race—and impacted the decisions of the testator. Legal narratives painted a picture of a white family untainted by intimate connections with persons of color, thus limiting the number of people who could call themselves legitimate members of the family. Social reality, however, reveals a complexity of interpersonal and interracial relationships not explained in rigid laws.[35]

Even though the time and place of *In re Remley* appears remote from our own, it retains timeless value in its demonstration of the incompatibility of testamentary freedom and social deviance. Devises left to unorthodox heirs face additional levels of scrutiny even in the face of plain language indicating intent of inheritance.[36] Section One discusses South Carolina's unique racial climate, providing a political background for the case study which follows in Section Two. Here, I introduce the case of Mary Remley, a white widow accused of being a black slave. In the challenge to this claim, which threatened her children's inheritance of their father's will, race is employed as a deterrent to free inheritance. The last Section looks at the younger Remley son's bequest to a black slave and their two children. In this conflict, race shifts from a disqualifier to an indicator of the limits of family when his sisters contested the will. Finally, I conclude that subjective conceptions of kinship, in particular those unpopular relationships that

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[35] Mary Boykin Chesnut's diary reveals the conflict between public oblivion and private knowledge of the interracial sexuality of the slave system:

> God forgive us, but ours is a monstrous system and wrong and iniquity....Like the patriarchs of old our men live all in one house with their wives and their concubines, and the mulattoes one sees in every family exactly resemble the white children - and every lady tells you who is the father of all the mulatto children in everybody's household, but those in her own she seems to think drop from the clouds…

Davis, *supra* note 3 fn 286.

[36] *See* Leslie, *supra* note 5.

defy social norms, prevent the idea of testamentary freedom from reaching diverse articulations of family.

II. Miscegenation in South Carolina

B. Legal Pliancy of Race in South Carolina

Miscegenation existed as a given fact in each of the slave states. In his comprehensive study on American mulattoes, Joel Williamson comments, if Freud was only generally correct, "it is safe to assume that the lines of lust in the old South ran continually and in all directions."[37] Slavemasters, as possessors of people as property, usurped these claims to fulfill their libidinous desires. The concubinage of black women by white men formed the majority of interracial relations, although unions between black men and white women were not unknown.[38] A northern traveler in South Carolina commented, "The enjoyment of a Negro or mulatto woman is spoken of as quite a common thing; no reluctance, delicacy, or shame is made about the matter."[39] The forgiving climate for race mixing hinged on an explanation of miscegenation as a safe harbor for the wanton desires of red-blooded white men free to "Imbibe the Blackness of the Charmer's Skin," as noted in an 18th century Charleston periodical.[40]

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[37] JOEL WILLIAMSON, NEW PEOPLE: MULATTOES AND MISCEGENATION IN THE UNITED STATES 41 (New York, 1980).

[38] Although this aspect of miscegenation deserves mention, it goes beyond the scope of this project. For a comprehensive examination of this nexus of race and gender, see MARTHA HODES, WHITE WOMEN, BLACK MEN, *infra* note 102. I am primarily concerned with the darkening of wealth, that is, mulatto inheritance from white kin, which concerns the transfer of property from white men to mixed race offspring. *See also* ROBERT J. SICKELS, RACE, MARRIAGE, AND LAW 16-19 (Albuquerque 1972) (explaining sexual stereotypes of black men and white women).

[39] WINTHROP JORDAN, WHITE OVER BLACK: AMERICAN ATTITUDES TOWARD THE NEGRO, 1550-1812 145 (Chapel Hill, 1968).

[40] *Quoted in* CHARLESTON S-C GAZETTE, March 11, 1732, in Jordan, *supra* note 39 at 146.

The rituals of bedroom integration faced no formal obstructions to extending the temporary physical relation into a significant romantic liaison. Surely, feelings of love and attraction developed as undocumented relationships between mistress and master,[41] but other interracial couples formalized their connection by law. Unlike other states, South Carolina did not prohibit interracial marriage until after the Civil War and in Charleston occasional marriages occurred between persons of color and well-regarded whites. The state suspended the prohibition in 1868, only to reenact it in 1879.[42] Although *Loving v. Virginia*[43] rendered all antimiscegenation laws unconstitutional, the state retained the law in its books until 1999.[44]

Perhaps this liberality extended from powerful white judges who vehemently opposed a concrete definition of racial boundaries. In South Carolina's high court, Justice William Harper[45] set a notorious precedent that influenced his successors' rulings on racial classification. Ruling on two cases in 1831 that set a legal precedent for the fluidity of the color line, Harper eschewed the common southern practice of fractional

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[41] Interracial relations between free white men and enslaved black women generate a host of reactions addressing the nature and/or possibility of consent. Many scholars would argue that slave status precludes any form of consent and a loving relationship, thus making all liaisons between free men and slave women rape. Others may view the relationships as mutually beneficial, with black women acceding to these relationships in search of better futures for themselves and their children. Analyzing the consensual possibilities of these relationships goes beyond the scope of this article, but I do believe it would be overinclusive and anachronistic to forestall a possibility of mutual interracial attraction. *See,* Davis, *supra* note 3 at n10 (citing Eugene Genovese's analysis of master-slave relationships beginning as exploitation and turning into love).

[42] *See* RANDALL KENNEDY, INTERRACIAL INTIMACIES: SEX, MARRIAGE, IDENTITY, AND ADOPTION 75-6 (New York, 2003); PETER WALLENSTEIN, TELL THE COURT I LOVE MY WIFE: RACE, MARRIAGE, AND LAW—AN AMERICAN HISTORY 103-4 (2002).

[43] 388 U.S. 1 (1967).

[44] S.C. Const. Ann. Art. III, 33 (2003)

[45] Other scholars have discussed Harper's curious defenses of slavery and also miscegenation. *See,* Daniel Sharfstein, *Crossing The Color Line: Racial Migration And The One-Drop Rule*, 1600-1860, 91 MINN. L. REV. 592, 628 (2007) (nothing that Harper's "jurisprudence fostered a permeable color line, [but he] lectur[ed] extensively in favor of slavery"); Mitchell Crusto, *Blackness As Property: Sex, Race, Status, And Wealth*, 1 STAN. J. CIV. R & CIV. LIB 51, 84 (2005) (characterizing Harper as turning interracial sex "into a virtue"); Robert Westley, *First-Time Encounters: "Passing" Revisited And Demystification As A Critical Practice*, 18 YALE LAW AND POLICY REV., 297, 318 (2000) (describing Harper's rejection of the visual paradigm of race).

genealogy for an interpretive approach to racial designation. In his appellate decisions on *State v. Davis* and *State v. Hanna*, he wrote that,

> There is considerable difficulty in laying down an exact rule on this subject, and it may not perhaps be necessary to do so. There is no legal definition of the term [mulatto]. The popular definition in this State, by which we must be governed, seems to be vague, signifying, generally, a person of mixed white, or European, and Negro descent, in whatever proportions the blood may be mixed. The distinctions which have obtained in the French and Spanish American colonies, and in our sister State of Louisiana, in relation to persons of mixed European and Negro blood, have not been admitted in this state.[46]

Setting a widely-cited precedent, Justice Harper denounced a legal definition of race.[47] This stance toward Negro law in the state classified many persons as white when other slave states would classify them as mulatto. This vague interpretation primarily relied on physical appearance[48] instead of descent, recognizing that "every admixture of African blood with the European, or white, is not to be referred to the degraded class."[49]

It is important to note that hypodescent[50], or the "one drop rule," claims no place in South Carolina's antebellum legal history. The existence of a single African ancestor in a person's genealogy did not always classify one in the lower caste. Lawmakers were keenly aware of miscegenation's extent, and they probably knew that the relentless hunt for black ancestry could have destroyed the reputation of many white persons. Perhaps these lawmakers realized that the establishment of the one-drop rule could have struck

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[46] 8 S.C. Eq. 559 (Bail. Eq.) (1831).
[47] See Westley, supra note 45 at 318.
[48] Appearance has been adjudicated in other contexts to be an unreliable characteristic of race. See Rich, *infra* note 50.
[49] *Id*.
[50] *See,* Kevin Noble Maillard, *The Pocahontas Exception: The Exemption of American Indian Ancestry from Racial Purity Law* 12 MICH J RACE & L 351, 354, (2007) (analyzing different applications of the one-drop rule to Native Americans and African-Americans); Rachel Moran, Loving and the Legacy of Unintended Consequences, 2007 WISC. L. REV. 239, 244; Camille Gear Rich, *Performing Racial And Ethnic Identity: Discrimination By Proxy And The Future Of Title Vii*, 79 NYU L. REV. 1134, 1150 (2004); Taunya Lovell Banks, *Colorism: A Darker Shade of Pale*, 47 UCLA L. REV. 1705, 1731 (2000); Donald Braman, *Of Race and Immutability* 46 UCLA L. REV. 1375, 1397 (1999).

close to home, and possibly create a "very cruel and mischievous" situation.[51] To ward off potential destructions of racial reputation, judges remained silent on genealogical exactions.

B. Race as a Factor of Reputation, not Ancestry

Justice Harper's insistence on the fluidity of whiteness relied on the recollection of the past of claimants and their peers in the determination of race. Even with proof of African ancestry, South Carolina courts still declared some persons as white.[52] In *State v. Cantey* in 1835,[53] objectors challenged the legitimacy of two white-appearing witnesses to testify in an indictment for larceny. Nonwhite persons were not allowed to serve as witnesses or jurors, and worried defendants sometimes attempted to paint key witnesses as racially questionable in order to block their incriminating testimony. The witnesses in *Cantey*, as brothers, had a white father, and their mother was a "descendent in the third degree of a half breed who had a white wife."[54] An extraordinary history of white acceptance had run long in their family. Interestingly enough, their maternal grandfather, described as a dark-skinned man, held the reputation of a white man, and one of their relatives of the same "admixture" married into a wealthy white family and ran for the state legislature. The court found the witnesses as one-sixteenth black, in opposition to their reputation in the community as white. Seeing that remote African ancestry did not

[51] JAMES HUGO JOHNSTON, RACE RELATIONS IN VIRGINIA AND MISCEGENATION IN THE SOUTH 205 (Kingsport, 1970).
[52] Reputation and race in the antebellum south were often interdependent, allowing people with African ancestry to be legally considered white. See generally Marie-Amelie George, The Modern Mulatto: *A Comparative Analysis of the Social and Legal Positions of Mulattoes in the Antebellum South and the Intersex in Contemporary America*, 15 COL. J. GENDER & L. 665 (2006); Trina Jones, *Shades of Brown: The Law of Skin Color,* 49 DUKE L.J. 1487 (2000).
[53] 11 S.C. Eq. 614 (2 Hill Eq.) (1835).
[54] *Id.*

disturb their reputation as white, Justice Harper dismissed the case, apologizing for the "unnecessary violence" to the gentlemen.

Even though the evidence proved the witnesses' African descent, the court secured their reputations as white citizens. Harper disregarded the existence of African ancestry as the sole determinant for membership in a race group. Describing a person with no visible mixture of black blood, he remarked "it would be an absurdity in terms to say that such an one is, in the popular sense of the word, a person of color."[55] With this logic, Harper argued for reputation rather than ancestry, and he insisted that one's establishment within the white caste secured that classification.

> The condition of the individual is not to be determined solely by the distinct and visible mixture of negro blood, but by reputation, by his reception into society, and his having commonly exercised the privileges of a white man. But his admission to these privileges, regulated by the public opinion of the community in which he lives, will very much depend on his own character and conduct; and it may be well and proper that a man of worth, honesty, industry, and respectability, should have the rank of a white man, while a vagabond of the same degree of blood should be confined to the inferior caste.[56]

This interpretation granted the visibly black grandfather of the witnesses the legal status as white, because he exerted the privileges of free white citizens. Thus was the beginning of a social definition of race, determined by racial alliances and public opinion instead of being handed down at birth.

Another case in St. Paul's Parish illustrates the legal negations of race, reputation, and memory. In *Johnson v. Brown* (1842), a tax collector attempted to collect a capitation tax from two fair-skinned brothers, Thomas and Henry Johnson, as mulattoes. In antebellum times, the state kept track of and profited from the free Negro population

[55] *Id.* at 615.
[56] *Id.*

by taxing each person.[57] The brothers objected, declaring themselves free white men, and they allowed themselves to be inspected by the jury. The court reporter remarked, "On inspection, I thought Thomas and John very passable white men. Thomas, particularly, had light or sandy hair, and a sunburnt complexion. John was a darker man, black hair, and a skin of a darker shade than his brother."[58] The court also called in witnesses who testified that the community sometimes regarded the men as colored, other times as not. They did possess voting rights, but in one instance, an acquaintance extracted their ballots from the voting box and scratched their names off the list of registered voters. The jury did not inspect the brothers' family, rationalizing that "color…was a deceptive test."[59] Finding that classifying the Johnson brothers as black would represent "bad policy," the jury "very properly" classified them as white.[60]

These cases raise a question of the link between genetics and memory. Considering that judges like Harper allowed reputation to trump ancestry, the legal act of determining race depended heavily on the factfinder's interpretation of the defendant's reputation as white. It appears that in each of these cases, the defendants all possess a detectable quantity of African blood. The court opinions make no secret of this knowledge, although they do mention that the defendants carefully selected their guests, witnesses, and relatives to appear in the courtroom. Suspiciously dark relatives remained at large. Despite the existence of black ancestry, the courts entirely dispensed with black blood as the sole determinant of racial membership. In this rejection of genetics, the

[57] Free blacks paid hefty tax dollars to maintain their freedom. These burdens became so expensive for some families that they were sold at auction to earn the required sum. *See* MARIA WIKRAMANAYAKE, A WORLD IN SHADOW: THE FREE BLACK IN ANTEBELLUM SOUTH CAROLINA 67 (Columbia, SC 1973).
[58] 17 S.C. Eq. 269 (Speers Eq.) (1843).
[59] *Id.*
[60] *Id.*

court not only sets a new standard for race, but it also refuses to settle upon a steadfast bar for blackness and ancestral minimums.[61]

Reputation cases, infrequent in number, left race to the mercy of the judge's gavel or to the approval of the community. Harper shared the intellectual opinion of Judge Frost, who in *White v. Tax Collector* (1846), argued that a strict adherence to a legal definition of white and black did not provide a reliable measurement of citizenship. Judge Frost, in his rulings, accounted for "honesty, sobriety, and industry, and the qualities that unite in a respectable character" in perceiving whiteness.[62] Like his counterpart, Frost refused to establish a doctrine of racial determination, insisting that it "be decided by public opinion, expressed in the verdict of a jury."[63] This stance entertains community estimations of race by taking personal identity from the jurisdiction of the individual and auctioning it off in the courts. The way that others remembered or perceived a person, not what the person thought of him/herself, became the legal standard for racial classification.

But courts did not completely dispense with genealogical evidence. In some cases, reputation could not supplant ancestry. Martha White, an educated teacher married to a white man, exercised the same "good character and correct deportment" as a white woman, and enjoyed the accompanying rights and privileges.[64] Yet, Martha's appearance, which Judge Frost described as "obviously a colored person," precluded her free assimilation, which he would have approved had she lacked the telltale features of taint. This example demonstrates the whimsical nature of classification: Mrs. White is

[61] *See, supra* note 45.
[62] 24 S.C. Eq. 138 (3 Rich. Eq.) (1846).
[63] *Id.*
[64] *Id.*

"colored," but her children were "white; she married, lived, and socialized as white, and held this reputation in her community."[65] Yet, the court, showing its mercurial nature, still classified her, but not her children, as mulatto.[66]

II. Using Race as a Deterrent

The story of the Remley family is remarkable because it illustrates how external pressures simultaneously threaten and bolster their status as a family. Depending on the angle, law acts both to exclude and include, and the ability to utilize law to their best advantage turns on their secure claim to whiteness. The common link of blood that tied the Remleys—black, white, or possibly mulatto—to each other did not automatically enable a fluid and free conception of family. For those who were able to claim the legal privileges of whiteness, they employed law to restrict the economic benefits of family membership to exclude those who could not.

Paul Remley, a free white man, died in Charleston in November of 1860.[67] He left his wife, Mary Remley, a farm in Pennsylvania consisting of "19.5 acres of poor land but healthy with two small storm houses on it, no farm buildings, one old shed."[68] He appointed his son, Paul Durbin Remley ("Durbin") as administrator of the estate, and the younger Remley assumed charge on December 1, 1860.[69] Widowed, Mrs. Remley assumed possession of the farm from November 29 until her death three years later. In the following summer of 1861, Durbin filed for a grant of administration of his father's

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[65] *Id.*
[66] Her children were classified as white. See, Angela Onwuachi-Willig, *A Beautiful Lie, Exploring Rhinelander v. Rhinelander as a Formative Lesson on Race, Identity, Marriage, and Family*, 95 Cal. L. Rev. 2393, 2443 (2007).
[67] Account of Paul Remley's Estate in Pennsylvania, Paul Remley Estate Case Records, 0308.02 (R) 01, South Carolina Historical Association (hereinafter "RCSCHS")
[68] *Id.*
[69] Letter from William Hubbell (Aug 8, 1866) (RCSCHS) (hereinafter "W. HUBBELL, AUG. 8").

will. In this capacity, he was expected to share the profits of the estate with his siblings: Elizabeth Hubbell (née Remley) and Emma Remley. At this time, the siblings were dispersed along the eastern seaboard, with Durbin residing in Charleston and the sisters in Pennsylvania.

C. The Accusation of Mary Shrine

A conflict arose when Durbin applied for the grant on June 3, 1861—the same day that a challenger questioned his legitimacy as an administrator. Mary Shrine, claiming to be his second cousin, filed a complaint in a Charleston Court of Ordinary alleging herself to be a legitimate next of kin.[70] Durbin and his sisters, she alleged, were rendered ineligible due to the status of their mother. Mrs. Shrine filed an affidavit which argued that "the supposed widow of Paul Remley is a colored person" and that "she was purchased by said Paul Remley as a slave."[71] Due to this social incapacity, she attempted to position herself as having not only a superior claim on the estate, but the only legitimate entitlement to distribution. If she proved Mary Remley as a slave, then her grown children would follow her diminished status; Paul, Elizabeth, and Emma would immediately become slaves, and ineligible to stand as legal heirs.[72]

[70] In the matter of Estate Paul Remley Dec'd (18 June 1861) (RCSCHS).
[71] *Id.*
[72] A number of fictional books appealed to this white fear—of sudden and unexpected relegation to slavery. In his meticulous book on mulatto imagery in Victorian fiction, ROBERT MENCKE, MULATTOES AND RACE MIXTURE 198 (1979) explains, "what threat could be more dire than that of the blood of the inferior races of the world secretly slipping into that of the mighty civilizing race of Anglo-Saxons?" Examples of such books are REBECCA HARDING DAVIS, WAITING FOR THE VERDICT (1867); ALBION TOURGEE, PACTOLUS PRIME (1890); WILLIAM DEAN HOWELLS, AN IMPERATIVE DUTY (1892); .

Mary Shrine based her argument on South Carolina's 1841 *Act to Prevent the Emancipation of Slaves*.[73] This Act prohibited testamentary emancipations, and it also voided all bequests to slaves. Section IV reads, "That every devise or bequest, to a slave or slaves, or to any person, upon a trust or confidence, secret or expressed, for the benefit of any slave or slaves, shall be null and void."[74] Even if the Remleys had considered themselves free white persons, the possibility of a hidden condition of their mother threatened their ability to inherit their father's estate. Legal definitions of children's status throughout the South followed Roman law by declaring *partus sequitur ventrem*—that children followed the condition of the mother.[75] It must be pointed out, however, that race did not serve as a constant determinant of status. For children with parents of different races, the mother could be black or mulatto and pass her free status to her child. Likewise, children of black or mulatto slave fathers and free white women, while very few in number, retained free status, despite their father's condition. These distinctions mattered, as this would not only come to court as a race versus reputation case, but a legal determination of one's basic rights.

The accusation of diminished legal and racial status, however farfetched, generated a flurry of representations of Remley family history. The competing claims to the status of Mary Remley, who offered no voice in the available correspondence, demonstrate a flurry of legal panic in the race to reassert the primacy of whiteness and freedom. If the Remley children followed the condition of their mother, not only would

[73] *Act to Prevent the Emancipation of Slaves, and for Other Purposes* (1841), quoted in Jolliffee v. Fanning & Phillips, 31 S.C. Eq. (10 Rich.Eq.) 186, 190 (1856); *See also* Davis, *supra* note 3 at 251.
[74] *Id.*
[75] Wikramanayake, *supra* note 57.

they lose testamentary and legal standing, but also their public reputations as free white persons.

In an effort to bolster their legitimacy, the Remleys offered testimony from "respectable" white persons to verify their freedom and race. These narrative contributions necessarily referred to the past, offering a subjective view of Mary Remley's standing in the community. These acts of remembering had legal and practical relevance, but they also reasserted the Remley family as white, privileged citizens. In reconstructing their racial identity by means of community opinion, the family followed a well-established precedent. Whether these claims were made public outside the protection of the court remains unknown, but the singular assertion and multiple refutations as documented in the legal records commemorate a type of juridical discussion of sexual and racial privacy that was routinely relegated beyond the scope of public discourse.

The Remley "defendants," like any party in litigation, selectively remembered advantageous facts and omitted pejorative ones. Soon after the supposed cousin filed the accusatory affidavit in the Court of Ordinary, the Remley party called upon Sam Wagner, a free white man and a churchgoing citizen of Charleston, to verify Mrs. Remley's whiteness. As a member of Bethel Methodist Church, Mr. Wagner testified that Mr. and Mrs. Remley were "always recognized as white persons in the use of all the privileges of the Church"[76] He continues by attesting to their status as "acceptable members" and active "Class Leaders." Unmentioned in this written testimony are references to miscegenation or slavery. Mr. Wagner's narrative limits itself to public interpretations of racial identity. As expected, he makes no mention of Mrs. Remley's questionable

[76] Affidavit of Sam Wagner (June 27, 1861) (RCSCHS).

origins, focusing instead on Mr. Remley's secure status as a free white man and Mrs. Remley's white father. Additionally, he remains silent on the Church's significant black and mulatto members, who at that time constituted the majority of Charleston's black Methodists, approximately 6,000 in number.[77]

Characterizing the allegation as a "question of Pedigree and legitimacy,"[78] the Court of Ordinary postponed the decision of grant in order to accommodate the contestant Mrs. Shrine by allocating one week for her to provide corroborating testimony. When she failed to prove the slavery claim, the Court found Durbin legally competent to administer his father's estate. In the absence of supporting evidence from Mrs. Shrine regarding the truth of her accusation, Wagner's sole opposing affidavit proved sufficient to defeat the objection to Durbin's grant of administration. The Court qualified this ruling, however, by distinguishing legitimacy for administration from legitimacy for distribution. Noting that the possible truth of Shrine's claim would not greatly affect the pending grant, the Court added "altho it may become so in a progress of settlement of assets of said Estate."[79]

Legally, the Court's finding voided the issue, but the family continued to discuss the "great annoyance and mortification."[80] In correspondence and memoranda, Elizabeth Hubbell continued to refute the claims of race and slavery, writing from Philadelphia to her brother Durbin "a very long epistle" chronicling their family's history of respectability and whiteness.[81] Mrs. Hubbell's pride prevents her from explicitly

[77] EDWARD LILLY ED., HISTORIC CHURCHES OF CHARLESTON 43-44 (Charleston, 1966).
[78] In Court of Ordinary (June 29, 1861) (RCSCHS).
[79] *Id.*
[80] Letter from Elizabeth Hubbell to Paul D. Remley (July 7, 1861) (RCSCHS) (hereinafter "E. HUBBELL LETTER").
[81] *Id.*

addressing the assault to her family's racial identity, telling her brother that "the astonishment the thing has occasioned may be better imagined than described."[82] To her knowledge, their father was "not the man to lower himself by such a degrading act as is alleged."[83] She viewed these charges as a "conspiracy" organized by "low people" who unjustifiably wanted to deprive the Remley children of their inheritance. In desperation, Hubbell expressed her conviction that the "whole thing [was] gotten up by some of [Durbin's] enemies," notwithstanding the "[un]intelligent" Mrs. Shrine whose "Mother was subject to some sort of fits."[84]

D. Remembering Racial Security

Elizabeth Hubbell takes an adversarial stance in her letters, which makes these documents a source of critical interpretation. It could be true that writing letters served as an outlet for her racial frustrations, but they also advocate a biased conception of her family's racial identity. Hubbell draws on interactions her mother had with other whites to suggest that Mrs. Remley could not have been anything other than white. Looking backward to the past for explanation, she draws upon unquestioned relationships to justify her own self-identity and that of her mother. Similar to the reconstructions of history invoked by Chesnutt's Aunt Polly and Faulkner's Miss Rosa, she becomes the architect of her family's history by realigning the past to justify her present needs. In the same way that the fictional characters recite the past as they wish to see it, they believe the stories they sow themselves so that alternative conceptions become fallacious invasions on their racial freedom and status. Elizabeth's manner of imposing meaning

[82] *Id.*
[83] *Id.*
[84] *Id.*

upon the past makes it her own, rather than Mrs. Shrine's, whom she insists has no tenable claim on her family's racial standing. Even if Hubbell's labor of remembering finds ground in unstable sources, she appropriates a verisimilitude to her past that may be at odds with historical truths.[85]

Three primary examples of lived whiteness form her grounds for remembering her family as white. First, she recalls that her mother was registered at the multiracial Bethel Methodist Church in Charleston as a "free white person," a demonstrative fact which she interprets as conclusive proof. "[H]ad there been any doubt of the fact," she writes, "I imagine her name *could* not have been *entered there*."[86] Her reliance on the church's record of its members does not account for the possibility of errors in representation, similar to simple and learned mistakes of census takers.[87] Second, her mother's wedding to her father at Bethel serves as proof of their supposedly irreproachable whiteness. She maintains that her mother's bridesmaids were "ladies of respectability" who would not be "intimate with a person of doubtful pretensions." Elizabeth blindly accepts a tautology of race and reputation that equates "respectability" with whiteness and freedom and "doubtful pretensions" with blackness and slavery. Her logic assumes an if/then calculation that makes reputation a barometer of racial identity: "If she had been purchased and held as a slave all these things could not have been."[88] Here, she constructs her own memory according to permissible instances of monoracial

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[85] *See generally* W. FITZHUGH BRUNDAGE ED., WHERE THESE MEMORIES GROW: HISTORY, MEMORY AND SOUTHERN IDENTITY 5 (Chapel Hill, 2000).
[86] E. HUBBELL LETTER, *supra* note 80.
[87] Oftentimes, census takers and other keepers of official records make erroneous estimates of a person's race, thus recording some African-Americans of fair complexion as "white." In sole reliance upon these subjective measures of record-keeping for posterity, genealogists, historians, and other scholars may draw fatuous conclusions that have substantial effects on contemporary interpretations of racial identity. For an insightful interpretation of this problem, see Kennedy, *supra* note 42 at 1-12 (chronicling the events of *Green v. City of New Orleans*).
[88] E. HUBBELL LETTER, *supra* note 80.

interaction, thus negatively gleaning identity from interpretations of what things were not. Lastly, she turns to her mother's parentage and upbringing, noting that her mother's mother was an orphan, "brought up by strangers." Her mother's father, of Jacksonboro, South Carolina, "was of a respectable family, scarcely likely to intermarry with a low person."[89] Because Hubbell could not rely upon antimiscegenation law to prove that her parents' marriage was not illegal or interracial (i.e. that her parents were both white), she had no other options outside of reputation and respectability to demonstrate that her mother was not a black slave.

Elizabeth Hubbell's husband William rushed to his wife's defense by composing a memorandum to his attorney that traced the ancestry of his wife's mother.[90] He too employed an equation of race and reputation to dismiss Shrine's claims. Polite white persons marry and consort with persons like themselves. Mrs. Remley married a decent white man, and kept company with proper white Charlestonians. Therefore, Mrs. Remley must be white. He fortifies this logic with genealogical information about her parents Thomas and Leah Whitley, offering additional evidence to his wife's rendition. Thomas Whitley, he argues, came from an English family of "respectable noble descent," which he attests to be listed in *Burke's Peerage of Landed Gentry*.[91] Leah, on the other hand, he portrays as a daughter of a fallen soldier of the Revolutionary War and a woman of unknown origins. Remarkably, he does not question any deeper meaning or possibility of

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[89] *Id.*

[90] William Hubbell, Memorandum for James B. Campbell Esq. In the Matter of the Estate of Paul Remley, Deceased, on behalf of his widow Mary Remley & Children, written in 1861, but not sent "on account of hostilities preventing." (document not shared until November 9, 1886) (RCSCHS) (hereinafter "W. HUBBELL MEMO").

[91] First published in 1826, *Burke's Landed Gentry* is "an invaluable historical record for those appearing within it, their wider families, and genealogical researchers worldwide." *Burke's*, also known for its multiple editions of *Peerage and Baronetage*, painstakingly details the ancestry of the "great families" of Britain, including place and date of birth, education, achievements, and other biographical notations. *See generally* BURKE'S GENEALOGICAL AND HERALDIC HISTORY OF THE LANDED GENTRY (L.G. Pine ed. 1952).

"unknown." Still, this liaison of high and low, noble and plebian produced "an exemplary moral and Christian woman" who with her husband, operated a well-known grocery store in Charleston.

Although Elizabeth and William's accounts of Remley family history fervently denounce what they judge as "hatred, slander, perjury and conspiracy," their reconstructions of the past do not exactly mirror each other. William's discussion of Thomas and Leah Whitley extols their mercantile skills and civic respectability. He also emphasizes Thomas Whitley's English family as "not of common or feudal descent."[92] His flattering rendition sharply contrasts with Elizabeth's, which, in the letter to Durbin, confesses "of course our Grandparents were poor."[93] She paints a darker picture of her forebears, relaying tales of a bankrupt and "intemperate" husband who had lost everything during the Revolutionary War. His wife, who carried their grocery business during his bouts of depression, left him, joining her son in Massachusetts, who she had previously sent away "to keep him out of the way of bad example."[94] These different interpretations demonstrate the effect of audience awareness in persuasive correspondence. Although renditions of historical memory do not have to make narrative concessions in order to maintain credibility, Elizabeth's letter to her brother assumed a candid tone, revealing potentially shameful family intimacies. She did not intend for it to be used in a court of law—rather she vented her personal frustrations into a written narrative that memorializes her shock, pain, and disbelief in the fragility of her racial identity. She risks less in this private note by telling her brother of the full circle of their family history. Her double-sided rendition actually makes her arguments more

[92] W. HUBBELL MEMO, *supra* note 90.
[93] E. HUBBELL LETTER, *supra* note 80.
[94] *Id.*

believable, as the full inclusion of all stories, proud and less proud, indicates the unlikelihood of consciously selective historical memory. The dialectic of Elizabeth's flattering and unfavorable recitations lend authenticity to her claims, but they do not unquestionably clear the Remleys from the taint of blackness.

William's one-sided letters and memorandum memorialize his contrivance of the family past. His renditions appear to have juridical utility, as he supplies the attorney to which the letter is directed with possible arguments for dismissing Shrine's allegations. Short on emotion, he turns instead to outcome-oriented methods of attack. Like Mr. Carteret in Chesnutt's *Marrow*, the husband eagerly seeks to establish a whitewashed past. In this way of bantering about the subject, William Hubbell consciously constructs the past in a manner that creates a desired outcome. He presents the intermediary facts (according to his memory) that carry the story from start to finish. In examining his renditions, we realize a prime example of contrived historical memory. As an in-law rather than a descendant, William could not have been present at any of the events that he discusses. He also is unfamiliar with many of the parties in these stories, yet he assumes a narrative authority in representing a family history as an unquestionable, irreproachable fact.

Mr. Hubbell's rendition offers a radically different explanation for Mrs. Remley's alleged status. Although he has never met the accuser or her informant, Mary Mitchell, he surmises that Mitchell's accusation, which she conveyed to Shrine, who conveyed it to the Court, derives from spite, jealousy, or hate. He claims that Leah Whitley, before her marriage to Thomas, jilted Joseph Mitchell, who in turn married Mary Mitchell, the

informant.[95] Embittered by a prolonged two years of rejection, Mitchell maliciously told others that Leah was a "colored slave." Presumably, William has no personal knowledge of these events, seeing that Mrs. Shrine was previously unknown to him. However, his knowledge suffices to align the past with a respectable script of Southern racial purity and social status that discards the incursive and unfounded greed of "ignorant low people."[96]

Aligning history with contemporary claims necessitates an active remembering of the past. Both Elizabeth and her husband William created lively renditions of the Remley past in order protect their testamentary legitimacy. It seems that Mrs. Shrine's claim never penetrated the veil of believability for either the Court or the Remleys, but her farfetched claim provides an illuminating script to analyze the use of race as an qualifier of standing for inheritance. These personal manipulations of history demonstrate how silence and embellishment characterize the labor of historical remembrance.

III. Race and the Limits of Family

At the same time that Elizabeth's panicked letter recorded her fear of the threat of miscegenation, her brother Paul Remley maintained a mixed race family of his own in Charleston. Elizabeth's and William's separate letters did not allude to this fact, which generates two possibilities. First, the Hubbells, due to geographical separation from the younger Paul, could simply have remained unaware of his miscegenous liaison. From the tone expressed in her letter, she did not couch or soften her views of interracial sex, which she described as "degrading" and "low." If she did hold concerns about her

[95] W. HUBBELL, AUG. 8, *supra* note 69.
[96] *Id.*

brother's feelings, perhaps she would not have expressed such untrammeled hostility toward a type of relationship which her own brother supported. From another view, her enmity toward Shrine and her accusations could precisely cut at Durbin's family. In finding a subject to channel her frustrations and convictions, she demonstrates her disapproval of miscegenation to her brother without explicit mention of his own transgressions. Most likely, this latter interpretation is correct, as later correspondence proves Elizabeth's knowledge.

Apparently, Durbin lived a quiet life as a wealthy planter in the Carolina Lowcountry. Few, if any, texts of state history record his name as a prominent figure in Southern politics, agricultural affairs, or Charleston society. At the time he applied to administer his father's will in 1861, he lived on a plantation known as Remley's Point in the Charleston District. On this 305 acre plot situated in Christ Church Parish at the junction of the Cooper and Wando Rivers,[97] Paul D. Remley lived with his slave Philis and their two children (Appendix 2). Durbin also owned a brick house and lot on Society Street in downtown Charleston, which was a common practice for wealthy planters in the Carolina Lowcountry.[98] These two properties, along with other uninhabited town lots,[99] demonstrate his economic comfort. State records show that he bought and sold slaves fairly regularly.[100]

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[97] Historical Overview of the 4th Avenue Tract, Remleys Point. (on file with the Avery Research Center for African American Culture, College of Charleston).

[98] *See generally* EUGENE GENOVESE, ROLL, JORDAN, ROLL: THE WORLD THE SLAVES MADE 427 (New York, 1976) (discussing Charleston's development as a cosmopolitan center for the plantation aristocracy).

[99] *See* Plan Showing 16 Town Lots On Anson, Society, East Bay And Wentworth Streets, Surveyed By Charles Parker, Series L10005, Reel 0001, Plat 00493 (on file with South Carolina Dept. of Archives and History).

[100] *See* George Henry to Paul Remley, Bill of Sale For a Slave Named Amey, Series S213003, Vol. 005D, p. 0001 (Sept 9, 1820) (on file with the South Carolina Dept. of Archives and History); Paul Remley To Thomas Buller King of St. Simons Island, Ga., Bill of Sale For a Slave Named Limehouse, by Trade a

No official bill of purchase exists for the slave Philis, but census records loosely provide an understanding of who she was. In 1861, she would have been approximately 18 years old, the mother of a seven-year old son Charles, and pregnant with her daughter Cecile.[101] The 1870 census lists both her and Cecile as "black" rather than "mulatto," so we may assume that Philis and her daughter were of sufficiently dark complexion as to lead the census taker to classify them as of unmixed blood. This declaration contrasts with her private life, where she lived at Remley's Point. As the slave mistress of Paul D. Remley, she tacitly assumed the role of wife and paramour, as he remained unmarried throughout his life. As the mother of his only two children, Philis claimed a distinct role at Remley's Point. Nominally a slave but almost a wife, she assumed an ambiguous role of partner and servant not unknown to women of color in the antebellum South.[102]

Interracial sex and cohabitation existed in the antebellum South within unspoken codes of behavior. Durbin could maintain Philis and their children at his plantation with impunity because her slave status eviscerated any claim of legitimacy on their sexual relationship. Even though South Carolina law allowed for interracial marriage, it applied to free blacks only, thus preventing the legal legitimization of miscegenous relationships between master and slave. Slavery precluded any legally recognized relationships, thus

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Bricklayer, Series S213003, Vol. 005K, p. 00314 (Nov. 17, 1830) (on file with the South Carolina Dept. of Archives and History)

[101] The 1870 federal census lists Philis, black, as 27 years old, and Cecile, black, as seven. However, litigation documents in 1866 verify Cecile being five years old. These records would also make her a mother at age 12. (on file with the Charleston County Public Library, South Carolina History and Genealogy Section).

[102] The question of emotion and intimacy in interracial relations in the South, particularly between white men and black slave women, has received great attention in many disciplines, with no agreement on how to characterize them. I certainly do not intend to address that contentious issue, seeing that it goes beyond the scope of this project. Other scholars, however, offer meticulous historical studies. *See generally* JOSHUA ROTHMAN, NOTORIOUS IN THE NEIGHBORHOOD: SEX AND FAMILIES ACROSS THE COLOR LINE IN VIRGINIA, 1787-1861 (Chapel Hill, 2003); F. JAMES DAVIS, WHO IS BLACK: ONE NATION'S DEFINITION (Pennsylvania State University, 2001); MARTHA HODES, WHITE WOMEN, BLACK MEN: ILLICIT SEX IN THE NINETEENTH-CENTURY SOUTH (New Haven, 1999); GENOVESE, supra note 98.

securing the sexual freedom of white men. Furthermore, Durbin and Philis did not challenge what Adrienne Davis has termed the Southern "sexual economy"[103] by flaunting their relationship in public, according to the available records.

D. Durbin's Death

Yet Durbin would show his appreciation for this relationship upon his death. He died on December 25, 1863 while hunting, which Philis describes in a letter as "the discharge of his Gun by shooting marsh hens in company with Major Bolks and John Antley the ball entered his lungs of which he survived 13 days after being shot[.]"[104] In his will, he provided for his slave-widow and their children an annuity of $500 per year, to be paid from the sales of his property both real and personal (See Appendix 3).[105] He also bequeathed "his Negroes," meaning Philis, Charles, and Cecile, to a friend "to have the labor and services of the said slaves and their issue for and during his natural life."[106] Durbin did not intend to relegate his family to a state of abject slavery, but to place them "under the control of kind and indulgent owners, who will, whenever the law permits manumit and make them free."[107]

South Carolina courts frequently tried such issues. In *Fable & Franks v. Brown*, a white man established a trust in his will for his two "illegitimate coloured children by a female slave."[108] The plaintiffs, claiming to be the next of kin of the testator, objected to the will, claiming that such bequests to slaves were invalid. On appeal, the court

[103] Davis, *supra* note 3 at 228.
[104] Letter from Philis to Elizabeth Hubbell (June 1, 1865) (RCSCHS).
[105] Paul D. Remley Will, Remley's Point Collection, available at Avery Research Center for African American History and Culture, College of Charleston.
[106] *Id.*
[107] *Id.*
[108] *Fable & Franks v. Brown*, 10 S.C. Eq. (1 Hill Eq.) 378, 379 (1835).

approved the bequest on its face, upholding the testator's wishes. As a caveat, however, the court compared the man's will to the freedom of providing posthumous support for a favorite pet or object, saying, "Die and endow, a college or a cat."[109] Even though the court validated the will, the property reverted to the state, because slaves, as property, could not inherit.

Durbin's scheme differs, however, because of timing, thus allowing circumvention of the legal prohibition on slave bequests and manumissions. He did not leave his property to his slave family directly, but to an administrator to carry out his wishes. In this testamentary trust, his family would receive the interest resulting from the state of his personal property that he could not leave to them directly because they were slaves.[110] Additionally, he did not manumit the slaves in his will, but he allowed for its possibility in the future, but at the time of probate, this issue was moot. Had the will been executed while Phillis and the children remained slaves, the court may have followed *Fable*.

Durbin's semantics of slavery in his will deserves further scrutiny. Although Philis argues that she and her children had been emancipated by the time he wrote his will, he nevertheless referred to them as though they were slaves. Had he left them property directly, he would have placed their interests in jeopardy considering that the 1841 prohibition on slave bequests had yet to be overturned.[111] Additionally, he did not

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[109] *Id.* at 397.
[110] *See supra* note 73.
[111] The clause reads,

> Be it enacted, by the Senate and House of Representatives, now met and sitting in General Assembly, and by the authority of the same, That any bequest, deed of trust, or conveyance, intended to take effect after the death of the owner, whereby the removal of any slave or slaves, without the limits of this State, is secured or intended, with a view to the emancipation of such slave or slaves, shall be utterly void and of no effect, to the extent of such provision; and every such slave so bequeathed, or otherwise settled or conveyed, shall become assets in the hands of

free them in the will, but he expressed the hope that their new owners would manumit them "whenever the law permits."[112] Although the Emancipation Proclamation affected many states, it did not necessarily free all slaves in South Carolina, and all slaves, regardless of residence, were freed by the 13th Amendment in 1865. In referring to them as slaves, Durbin captures a memory of them as favored and faithful servants instead of beloved and deserving family members. In this move, he formally maintains distance between himself and Philis, thus underscoring a Southern code of racial propriety.

Durbin's goodwill toward his black family makes a strong statement as to his parental allegiances. Although he does not acknowledge his children as his blood, his testamentary wishes clearly state his economic concerns for his family, and he memorializes his intimacy with Philis in a legal document that leaves little room for alternative explanations. He expressed a desire to sell his property "to be appropriated for the use, clothing and comfort in sickness and health" for her and the children.[113] In this document, he rejects the interests of his collateral white heirs, which he noticeably refrains from mentioning until the end of the will. In this devise, he leaves his residual estate to his mother Mary Remley, and upon her death to his sister Emma. In no place in the will does he mention his sister Elizabeth Hubbell.

The Remley case stands apart from other interracial inheritance cases because of the prevalent influence of the Civil War. Durbin's will remained untouched for three years after his death, which coincides with the war's end. Presumably, hostilities

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any executor or administrator, and be subject to the payment of debts, or to distribution amongst the distributees or next of kin, or to escheat, as though no such will or other conveyance had been made.
See supra note 73

[112] Paul D. Remley Will, *supra* note 105.
[113] *Id.*

between the Union and the Confederacy deterred not only the rapid administration of wills, but also communications between North and South. Correspondence amongst multiregional families such as the Remleys dissipated to such an extent that years passed without hearing news from relatives in distant places. This case is no exception, and postwar letters circulated amongst the family demonstrate delayed notifications of salient events. In the period between Durbin's death and the subsequent litigation, the transformations of war raise this standard yet mildly transgressive postmortem distribution to a juridical exercise of reconstructing the past.

The end of the Civil War left the Hubbells and the Remleys in remarkably different epistemological standpoints. In Philadelphia, Elizabeth R. Hubbell and her husband persisted in their objection to Mrs. Shrine's attack on their race and freedom. William Hubbell retained the rebuttal letter he wrote in 1861, in sight of securing his wife's share in the elder Remley's will, which was distributed at that time. A subsequent note attached to Hubbell's letter verifies that it was "not sent on account of hostilities proceeding."[114] During this same period, Mrs. Mary Remley died intestate—news which did not reach Charleston until after the war. On April 12 and May 20, 1865—soon after General Robert. E. Lee's surrender at Appomattox—the sisters Emma and Elizabeth wrote their brother in Charleston to inform him of their mother's death in 1863. Equally heartbreaking events in Charleston would add to the family's wartime losses.

Correspondence from Charleston completes the cycle of belated information about uncommunicated family episodes. As proxy for Durbin, Philis responds to the sisters on June 1, 1865, with her own tragic news of Durbin's death. In this response, she conveys a sense of loneliness, despair, and depression. On both sides of the envelope, in

[114] W. HUBBELL MEMO, *supra* note 90.

Philadelphia and Charleston, initial and remembered reactions to family members' deaths illustrate subjective representations of the past that spark a frenzy of responses. Most notably, each of these death notices did not intend to stir up controversy—rather, they aimed to inform the reader of a family loss and to inaugurate a forum for mutual sympathy and mourning. In turn, these letters initiated legal battles.

Philis's letter sparks a chain of events that leads to the eventual dispute over inheritance. In this correspondence, she conveys an intimacy with Durbin that alludes to mutual intimacy. A full two years after his death, she recalls:

> My Dear Mistress the morning of which he died was Christmas on that Morning he Called me to wash him saying that he felt so much better and said that he did not think that his mother was alive and was Desirous of seeing his sisters also he said on the Morning that Christmas Morning was a Mourning Day to the Family which after he called on me to give Him the Bible to read of which I did & said that he was thankful to God for his Mercies towards Him to spare his life to see that happy Morning[.][115]

This candid vignette shows intimacy between Durbin and Philis that she relays without hesitation to his two white sisters. The act of bathing him and listening to his deathbed declarations may indeed be translated as quotidian duties of a servant, but the close and private nature of this interaction reveals a mutual inclination toward familiarity and comfort that goes beyond master and slave. Furthermore, epistolary formalities of that time may have led her to express disingenuous courtesy in her writing. However, the remarkable social and racial asymmetry of Phillis and the white sisters gives way to a confidence in the former black slave's writing that seems to empower her straightforward communication. Philis nevertheless remains deferential and observant in her writing by repeatedly referring to Durbin as "My Dear Master," but she also conveys her attachment to him by eventually admitting "you do not know how it destroyed me" and that "I truly

[115] Letter from Philis, *supra* note 104.

Miss him."[116] At the close of her letter, she pleads for the sisters to return to Charleston "to relieve [her] Distressing mind" and to "find a Friend." The exercise of recalling her beloved's death renewed the pain she once felt, as she laments, "I would say more but by heart ache me to think of the past or look at the present."[117]

Philis's closing sentiments portend a conflict of interests that are intensified and complicated by the aftermath of the Civil War. In thinking about the past, she recalls Durbin not only as the father of her two children, but also as a protector and provider. His death tragically marked the end of that security, and also the promised beginning of her freedom. At the time of Durbin's death, President Lincoln had issued the Emancipation Proclamation, which declared that "all persons held as slaves…shall be then, thenceforward, and forever free[.]"[118] This decree most likely did not change Philis's slave status, as South Carolina remained a rebellious state that resisted actual emancipation until the physical arrival of Union troops.[119] The possibility of the exceptional change in her status would have entangled Durbin's will in a problematic archaism—he made provisions for slave succession after emancipation and these promises found no political or legal grounding. The will also constructed a trust for Philis and the children, which under the 1841 law, prohibited bequests to slaves. Possibly freed, but indicated as slaves in the will, Durbin's legacy to Philis, Charles, and Cecile, as a post-emancipation testament, made itself vulnerable to attack.

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[116] *Id.*
[117] *Id.*
[118] ABRAHAM LINCOLN, Emancipation Proclamation (January 1, 1863) in 6 COLLECTED WORKS OF ABRAHAM LINCOLN 28-31 (Roy P. Basler ed., 1953).
[119] LARRY KOGER, BLACK SLAVEOWNERS: FREE BLACK SLAVEMASTERS IN SOUTH CAROLINA, 1790-1860 190 (1985).

E. Contesting Durbin's Will

One may object that Philis's communication survives as an example of polite letter writing, but such gentility must not be confused with genuine affection, in light of the sister's eventual realization of her relationship with Durbin. Generally, interracial relationships and the children they produced did not lead slave women to actively seek the friendship of their master's sisters. From the sentiments indicated in the correspondence between Philis and the sisters, no ill will existed that invoked a conflict over the legitimacy of the interracial liaison. The tone of Philis's letter indicates warm familiarity with Elizabeth and Emma, and the white sisters did not resort to legal strategy to actively deny miscegenation in the interests of excluding Durbin's black family. Overt interracial denial did not emerge as a primary objection to the will, although it was contained in the subtext. In this contest, the sisters objected to the will on three primary grounds: 1) that testamentary transfers to slaves were invalid; 2) that Durbin appropriated his father's estate for his own use and enjoyment; and 3) that the postwar devaluation of Durbin's estate deprived them of any interest in his property.

These charges are further complicated by Durbin's failure to include his sister Elizabeth in his will. In objection to this exclusion, counsel for the Hubbells contended that the will intended to spite Elizabeth and her mother by "putting the Negroes over" their interests.[120] Available documents do not record any preliminary disputes between Durbin and Elizabeth, but it is evident that sometime between her 1861 letter and his 1863 death, something influenced him to exclude her from his will. Still, he was "Desirous of seeing his sisters" at the time of his death, as Philis wrote to Elizabeth in her

[120] Unsigned memo to Messrs. Ledyard and Boulon (Nov 9, 1866) (RCSCHS).

letter. She, along with her sister and her mother, comprised the limited circle of his legitimate next of kin.

Durbin's will serves as intriguing memoranda of a socially averted yet physically manifested chapter of slaveholding society. Yet this case turns that silence on its head. *In re Remley* does not stand alone by any means—other cases in South Carolina exemplify the not uncommon practice of miscegenation and concomitant testamentary expressions of compassion.[121] The sheer frequency of inheritance, tax, and criminal litigation that ensued in southern antebellum courts regarding interracial issues demonstrates the existence of a "problem" that could not be avoided. Furthermore, these cases attest to the law's ability to entertain objections to formal recognitions of mixed race. In examining these legal documents, a contradictory pattern emerges. Southern propriety and racial etiquette championed the nonexistence of mixed race, yet particular laws commemorated the existence and persistence of a supposedly nonexistent phenomenon. The transfer of property and wealth from white to black memorializes the testator's preference to designate these goods in the interests of his mixed race family. This deliberate act of prioritizing the economic interests of his black family invites a public postmortem discussion of miscegenation that in his lifetime, remained purely private. In this act, he calls upon law to investigate, affirm, and sustain the legitimacy of his subjective articulation of family.

[121] *See also Somers v. Smyth*. 2 S.C. Eq. (2 Des. Eq.) 214 (1803); *Miller v. Mitchell*, 8 S.C. Eq. (Bail. Eq.) 428 (1831); *Fable and Franks v. Brown*, 10 S.C. Eq. (1 Hill Eq.) 290 (1835); *Farr v. Thompson*, 25 S.C. Eq. (4 Rich.Eq.) 37 (1839); *Carmile v. Carmile* 16 S.C. Eq. (McMul. Eq.) 635 (1842); *Monk v. Pinckney*, 30 S.C. Eq. (9 Rich.Eq.) 279 (1857); *Dougherty v. Executors of Doughtery*, 21 S.C. Eq. (2 Strob. Eq.) 63 (1848); *Ford, Escheator v. Dangerfield*, 29 S.C. Eq. (8 Rich.Eq.) 95 (1856); *Jolliffe v. Fanning & Phillips*, 31 S.C.Eq. (10 Rich.Eq.) 186 (1856).

1. The Slavery Claim

The intention to establish a trust for Philis and the children immediately drew the attention of the Hubbells, who viewed them not as eligible parties for a testamentary transfer, but as bonded persons precluded from exercising legal and economic interests.[122] A bill of complaint opposing Philis's interest described the bequest as "contrary to Equity and good conscience."[123] This rebuttal draws upon a conception of the past that eternally equates blackness with slavery. Even though Durbin wrote his will after Lincoln's emancipation of Philis and the children, common sense would dictate that the Hubbells' slavery claim found no legitimate ground. Still, Elizabeth and her husband persisted to contest Durbin's intent to provide for and support his chosen family; they saw not a family but a gang of slaves that threatened their free and racialized interest in his estate.

In their re-creation of the past, the Hubbells necessarily draw upon the twin factors of distance and time. By establishing a story based on past facts, the final narrative, augmented by the transformative elements of physical and temporal proximity, does not necessarily represent the absolute truth. It is important to realize that the parties had not seen each other since before the Civil War, and they lived in different regions of the country. For the white Hubbells of Philadelphia to contemplate the black Remleys of Charleston, they must traverse years of separation, and miles in distance. Being removed from the South, the Hubbells' memory of antebellum Charleston perhaps drew from their own experiences of seeing Philis and her children as slaves and of enslaved blacks in general. Moreover, the effects of the war could have hardened their previous conceptions

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[123] Ziba B. Oakes Bill of Complaint (Nov. 9, 1866) (RCSCHS).

of their homeland, and the act of revisiting these images exacerbates and intensifies those previous convictions.

Their focus on the slave status of Philis and her children demonstrates the Hubbells' racially motivated objections, and they rely on race privilege as a persuasive method for denying the validity of the will. They do not deny the existence of the miscegenous relationship, as their correspondence demonstrates this knowledge. Because they did not directly attack Philis and her children's racial status as impediments to inheritance, the slavery argument displaces this expected rebuttal by fixating on their former lives as slaves. Presumably, the Hubbells realized the weakness of this objection to the will, seeing that its postwar execution and contestation dates made the slavery issue almost moot. Only under Confederate law could this claim have succeeded.

Philis readily responded to this fatuous claim by asserting her rights gained as a free woman. In her answer to the Hubbells' complaint, she insisted upon the validity of the will, emphasizing its creation after her manumission. Arguing for its possible validity under the regime of slavery, she emphasized that "having been actually emancipated and made free before the distribution of the estate of Paul D. Remley such bequest should be held good and valid."[124] On the strength of this claim, she succeeded in establishing her ability to inherit property.

2. Whether Durbin's "Appropriation" was Proper

Competing conceptions of the past reemerge in the interpretation of "property" of the elder Paul Remley's estate. As stated above, the Hubbells maintained that Philis and

[124] Separate answer of Philis a freed woman, South Carolina District Court, In Equity (Dec. 28, 1866) (RCSCHS).

her children were ineligible to inherit as slaves, but they expanded this argument by also asserting that the slaves existed as part of the elder Remley's estate. In this line of thought, their father's death entitled them to a share in the slave property, which they argued that Durbin "appropriated them to his own use and purposes."[125] They expected Durbin, once appointed as administrator of the estate, to convert the father's personal property into money and divide the proceeds equally amongst the heirs. Of this personal property, which William Hubbell estimated at $36,000, Elizabeth, Emma, and Durbin would each receive $12,000.[126]

In the interest of securing a share in Durbin's estate, the Hubbells appropriated the meaning of chattel slavery. Here, they did not view Philis as a long-term acquaintance or fellow heir, but as merchandise which Durbin mishandled in the administration of his father's estate. Philis shifts from an article of property to an obstruction of right, one that displaces their expectation to inheritance. In other words, Durbin's enumeration of Philis as a beneficiary rather than a parcel reduces the total value of the money they argued belonged to them.

> He says they are <u>his</u> slaves and then dispenses of their services as his own property to another person, exclusive of the other heirs—"expressis imicis alterias exclusis." If they as he says are taken as his and dispenses of by <u>him as his</u> then he excludes the other heirs and they can claim for value received by him.[127]

Philis, they believed, was not exclusively Durbin's. Even though he called them "my negroes Philis and her children,"[128] the Hubbells claimed they were theirs as well. This

[125] W. HUBBELL LETTER, *supra* note 69 .
[126] Hubbell catalogues the personal property as: "about 30 negroes value $25 K and personal property on the farm: value $4K; Cotton $2K. He cut wood also which he had no right to do, a thousand or more cords: value $3K; Insurance stock $2K. [TOTAL] $36K." *Id.*
[127] *Id.*
[128] Paul D. Remley Will, *supra* note 105.

way of remembering the past, although legally motivated, aims to diminish the status of Philis as a rightful beneficiary. Even by invoking her monetary value, they cannot reasonably relegate her to slave status, but they can insist on recovering this money to aggrandize a greater share than Durbin had allotted. Thus, in describing Philis as an object of property rather than its recipient, the white collateral heirs seek financial security through a shrewd manipulation of the past.

3. The Devaluation of Durbin's Estate

The value of Durbin's estate directly relates to the outcome of the Civil War. He wrote his will after the war began, taking into account the then-current value of his property. At that time, he considered his estate valuable enough to yield $500 a year for the comfort and clothing of Philis and her children. Alternatively, he authorized his trustee James Gray to pay them the amount in full "if in his judgment he shall deem it judicious and proper."[129] This estimate of his finances and holdings predated the fall of the Confederacy and the collapse of its economy. Durbin remained aware of the possible effects of the war, as he directed his executors to invest his money conservatively to safeguard his postmortem worth throughout the war. He entrusted them to invest in "safe Securities, or real estate…until the declaration of peace between these Confederate States and the United States[.]"[130]

Durbin's antebellum legacy to his black family, which would not take effect until after the war, makes an intriguing study of the influences of history on memory. At once, the document encompasses three modes of temporality: past, present, and future, each

[129] *Id.*
[130] *Id.*

intervening to construct, commemorate, and sustain a posterity of interracial wealth marked by the mercurial economy of the embattled South. When he wrote his will he remembered his property as he could only imagine—the economic upheaval of the agrarian based political system which supplied his wealth superseded his testamentary objectives. As much as he tried to secure his property for Philis, he could not accurately account for the devaluation of his estate that would swallow his secondary bequests to his mother Mary and sister Emma. From his standpoint, the subversive act of enriching the economic lives of his black kin would transcend his death. In his own act of remembering and securing the past, he could not contemplate an unforeseen and unprecedented future.

The Civil War's effect on property values generated additional testimonies. His executor, Optimus Hughes, submitted an answer to the Equity Court that described the conditions of the estate in the aftermath of the Civil War. Returning to Charleston after serving in the Confederate Army, Hughes found his papers and accounts destroyed. He recalled the poor economic climate, saying that "everybody was oppressed with anxiety and great poverty scarcely knowing what to do to obtain food for their families."[131]

The disinherited Hubbells argued that the legacy to Philis and her children deprived them of their fair share in distribution. Objecting to the "fallacy of [Durbin's] expectations," they were not "willing to bear all the losses and give her the full measure of the legacy."[132] Here lies a problem of ademption as a result of interstate conflict. In an 1866 memorandum to their attorneys, the Hubbells contended:

> But as to Durbin's will it was made with the view that there would be no loss in the Estate—but under the Southern Confederacy would be valuable and that

[131] Separate answer of Optimus Hughes (Dec. 24, 1866) (RCSCHS).
[132] W. HUBBELL LETTER, *supra* note 69.

> he could afford to give her $500 a year on 8,000 or so absolutely out of his share—and have much left.[133]

Their primary objection to Durbin's will focuses not only on the devaluation, then, but also his misappropriation of property to which they felt entitled. While the two sisters had moved north to Pennsylvania, Durbin remained in South Carolina, inhabiting the valuable plantation at Remley's Point and the other properties in Charleston. They believed that even if Durbin's will did not make them primary beneficiaries, they deserved a share in their father's estate, which they believed Durbin had hoarded for himself. If his executors sold this property to provide for Philis, she would take "their" property.

F. Testamentary Freedom and the Interpretation of the Past

The performative aspect of will disputes surfaces in the courts, where competing conceptions of the past come forth. Three parties offer different versions of what the testator intended to bequeath to the heirs: First, the deceased party offers a written document as evidence of his intentions. In this testamentary language, he outlines desired plans for the estate after his death in the presence of witnesses that can attest to its veracity. Durbin, with three witnesses and an equal number of executors, constructed a plan to support his companion and their children beyond his death. Second, the named beneficiary offers a similar conception of the past, and she persists in proving the will as legal and valid. Philis insisted that Durbin, as the head of her household, earnestly intended for her entitlement to his estate. As an explicitly listed distributee, she offers the

[133] Unsigned memo to Messrs. Ledyard and Boulon, *supra* note 120.

will itself as proof of his unquestionable design.[134] Lastly, the objectors to the will submit an alternative version of the true intention of the will, and they envision a radically different plan of distribution, which they argue as the appropriate version. According to each of these parties, their version of the past stands as correct.

But in litigation, multiple versions of the same story always exist. Without this conflict, the issue would become moot; unequal and unpleasant distributions would not occur, everyone would agree, and all would accede to a singular account of history. Obviously, that is not the case here, where creative construction works to promote the subjective interest of any claimant. These multifarious renditions approach Faulknerian proportions in their radically selective interpretations of what happened. The divisive and tumultuous factor of race institutes an additional narrative convention in recreating the past and viewing the family, and interracial conflicts aptly illustrate this interpretive diversity. As argued by Paul Antze and Michael Lambek, these interpretive conventions greatly influence the types of actors and events that receive attention, and also the kinds of evidence accepted as testaments to the past.[135] In interracial inheritance disputes, objectors to miscegenous testamentary bequests appeal to abstract notions of racial boundaries in order to deny the existence of mixed race. Often times, South Carolina courts observed the testator's wishes.[136]

In the Remley case, the collateral heirs indeed objected to the interracial will, as they appealed to the Equity Court to "cut the Negroes out entirely."[137] They recognized that Durbin's bequest to his black family was "sufficient to take up the whole of his

[134] Separate Answer of Philis, *supra* note 124.
[135] PAUL ANTZE AND MICHAEL LAMBEK EDS., TENSE PAST xviii (London 1996).
[136] *See generally supra* note 121.
[137] W. HUBBELL LETTER, *supra* note 69.

interest in his father's Estate and that there [was] nothing left for any other party."[138] By excluding his mistress and children, the sisters attempted to erase the recorded legacy that entitled former slaves, then current kin, to a share in Durbin's estate. William Hubbell wrote a letter advising his attorneys to "attack…the validity of the will itself" and to absorb all of Durbin's interest to "[leave] nothing for it to take effect upon."[139] Their objections to the will, in addition to procuring additional wealth for themselves, stem from their displeasure with Durbin's tenuous relationship with his white family. They complained that Durbin "never wrote to them, nor sent anything during the Rebellion" and that "he never sent them a dollar."[140] Additionally, "he did not even send his Mother money to pay his Father's funeral expenses."[141]

These letters of objection reveal a desire to reinvent a familial history devoid of the taint of miscegenation. Hubbell writes that they wish to "undo what has been done," explicitly rejecting the past that Durbin had memorialized in his will.[142] In denying the testator's death wishes, the collateral heirs recreate history in their own image, championing themselves as the legally and racially eligible distributees. Despite the fact that Durbin's wishes were recorded on paper and ratified by witnesses, the white tentative heirs retell a story of Durbin's ill health, arguing that his disabled condition from the gun wound led him to write an invalid will. Only "with a load of shot and wad in his lungs," they argue, could they rationalize Durbin's wishes to spite his family for a gaggle of

[138] Ziba Oakes Bill of Complaint, *supra* note 123.
[139] W. HUBBELL LETTER, *supra* note 69.
[140] *Id.*
[141] W. HUBBELL LETTER, *supra* note 69.
[142] *Id.*

slaves.[143] According to this line of thought, respectable white persons would not reasonably relinquish their property and wealth to bastards and Negroes.

Although the white collateral heirs' depiction of Durbin's infirmity and irresponsibility garnered sympathy from the Equity Court, they did not wholly attempt to derail Philis from her proper inheritance. But this nominal inclusion must not be confused with accepting her as a legitimate distributee. They recognized Philis not as part of Durbin's family, but as a servant to their father who deserved compensation "in consideration of her attention…in his sickness at the Point two or three years before his death."[144] Seeing themselves as the primary heirs rather than Philis and her children, the white heirs agreed to allot $2,000 "for her comfort, when she as things proceed proves worthy of it." [145] In stark contrast to Durbin's testamentary intent, Philis received a pittance while Elizabeth took the majority of his estate. The Equity Court Master approved this consolation scheme, recommending that "it be accepted as advantageous to [Philis]."[146]

Conclusion

The conflict that instigated *In re Remley* escaped traditional legal methods of resolution. The complex nature of the case required special attention that the courts of the common law could not adequately provide. Due to the radical changes in the South's political, economic, and legal climate caused by the Civil War, pertinent law that directly

[143] *Id.*
[144] *Id.*
[145] In the end, Philis bore the brunt of Durbin's original will. Out of the $2,000 allotted to her, all debts and legal fees were deducted, and half of this amount was given to Optimus Hughes, the administrator. Thus, Philis received money, but she was required to pay the costs generated from the white heirs' objections. Order (August 12, 1867) (RCSCHS).
[146] Remley Case Masters Report (July 5, 1867) (RCSCHS).

and fairly addressed the postwar administration of an antebellum interracial will did not exist. Moreover, probate of the will, so soon after the war, yet four years after the testator's death, lingered in the postwar instability of South Carolina's legal system. Ademption of Durbin's estate hinged on whether or not Philis and the children could be considered a loss of "property" and also a misappropriation of the elder Remley's estate. Yet, no slave system existed at the time of probate to fund the estate. Thus, South Carolina's Equity Court heard the case because it did not fit into existing rules of law, administering a ruling with a heightened sensitivity to the individual interests of the parties.[147] This courtly invocation of empathy viewed the disinheritance of white heirs (in favor of black ones) as a viable application for equitable principles.

In re Remley, which spans both antebellum and postwar regimes, forces an examination of public secrets being legally recognized. As Austin Sarat argues, "memory may be attached, or attach itself, to law and be preserved in and through law."[148] This method of constructing the past in relation to the juridical structures particular to a place and time works to legitimate and authorize an historical account of possibilities and improbabilities. This is a surprising result from a contemporary viewpoint. To imagine that a former slave's right to inheritance decreased after the Civil War confounds a modern understanding of historical memory. It is far easier to imagine Philis's chances of inheritance as secure after the war, but it is more difficult to interpret her diminishing rights after the domestic conflict that presumably attempted to enable them. Furthermore, to examine her shrinking interest in Durbin's estate in light of his

[147] *See* Barry Miller, *Sua Sponte Appellate Rulings: When Courts Deprive Litigants of an Opportunity to Be Heard*, 39 SAN DIEGO L. REV. 1253, 1263 (2002).
[148] Austin Sarat & Thomas R. Kearns, *Writing History and Registering Memory in Legal Decisions and Legal Practices: An Introduction*, *in* History, Memory, and the Law (Austin Sarat & Thomas R. Kearns eds., 1999) at 12.

testamentary wishes presents a peculiar definition of "equity." While this translates to an overt assertion of racial supremacy in objection to clear testamentary intent, it also demonstrates a shrewd manipulation of legal definitions of family. The Hubbells portray his effort as a wanton death desire of a country planter "with a load of shot and wad in his lungs."[149]

The claim of incapacity allows the collateral heirs to make legal sense of Durbin's unconventional assertion of a multiracial family in the antebellum and postwar South.[150] Yet, Durbin did not marry Philis, even though Philis was technically not a slave and state law permitted interracial marriages at the time of his death. Had he married her, his siblings would not have had legal grounds to contest the will, and the combination of her free status and her spousal protection would have enabled her to inherit without restriction. Yet, South Carolina law enabled the white heirs to succeed in their will challenge because the legal system upheld the restricted notion of a white, legitimate, recognized family—which did not include Philis and the children.

State law resisted the probate of Durbin's will as he intended. His testamentary objective was clear—he wanted to provide for Philis and the children, and leave his sister with nothing. The competing conceptions of family—his black one and his white one—find different treatments in South Carolina courts. Even though he made provisions for Philis's "use, clothing and comfort," his testamentary maneuvering could not overcome the legal privilege accorded to free whites. His collateral heirs were able to capitalize

[149] Unsigned memo to Messrs. Ledyard and Boulon, *supra* note 120.

[150] Contrary to amnesiatic legal histories, extralegal miscegenation did occur in the antebellum South, but whites carefully distinguished between *knowledge* and *acknowledgement*, with the former concerning gossip, and the latter concerning recognition. This crucial distinction illuminates the Southern dialectic of miscegenation: publicly, it affronts the race-based slavery regime, while privately, it provides pleasure and reinforces dominance. CHARLES FRANK ROBINSON II, DANGEROUS LIAISONS: SEX AND LOVE IN THE SEGREGATED SOUTH 13-14 (2003).

upon the law's favoring of free persons as a way of denying any recognition of Philis as a family member. Moreover, the massive transformations stemming from the Civil War changed the composition of Durbin's estate. The Civil War, the Emancipation Proclamation, and the weakening of the southern plantocracy undermined Philis's claim to her share of Durbin's property. He neither lived to see the economic devaluation of his property nor the legal wranglings that weakened his own family's testamentary interests. He did not foresee that law would force his posthumous gifts toward the family that he wished to ignore. These influences, in addition to the challenges presented by the Hubbells, precluded Philis, the rightful heir, from obtaining the legacy that Durbin had established to recognize his mixed-race family.

The story of the Remleys effectively demonstrates the legal parameters of the Southern white family. First, Mary Shrine could have jeopardized the Remely's ability to inherit from their father's estate if they were found to have African ancestry. Mrs. Shrine could have limited the definition of legitimate family to those persons who could prove themselves white. Secondly, Durbin's collateral heirs relied upon the racial privilege afford them by law to deny Philis of a monetary legacy that would recognize and perhaps legitimate her own family. The likelihood of their surprise at the relationship between Durbin and Philis is low. Yet, the fictional barricade that facilitated white denial in the face of blatant knowledge acted to deny people of color from taking part in the benefits accorded to legally recognized family members.[151] Not limited to finances alone, law's role in maintaining the silence of interracial intimacy creates a social belief of the

[151] Edward Ball describes similar reluctances in his own family to recognize black kin descended from slaves once owned and sired by his family in South Carolina. See generally, Edward Ball, *Slaves in the Family*. Ballantine Books, 1998; *The Sweet Hell Inside.* Harper Collins, 2001

improbability of amalgamated families. Basing the legitimacy of heirship and the absence of marriage on race rather than blood or testamentary choice underscores the narrative privilege that white collateral heirs could hold over relatives (white) who wanted to protect "other" relatives (of color). In this way, the larger legal system supported the testamentary larceny in blatant contradiction to explicit legal language recognizing, promoting, and memorializing intimate connections between black and white. In the case of the Remleys, Durbin's "family" did not exist as a reality in a legal regime that defined intimacy in terms of black and white, with nothing in between.