

At the Lectern

Three Steps to Stop Citing Slavery

Diane J. Kemker

I have been teaching wills and trusts for more than twenty years, and anti-discrimination law, including critical race theory, for nearly as long. Among the lessons learned from the current generation of critical race theory is that when we dig deeply into U.S. law and doctrine, we are likely to find connections to slavery of which we were formerly unaware. The contradictions and cruelties of slavery are imbricated into neutral-seeming doctrines apparently having nothing at all to do with slavery or race. As Justin Simard so compellingly argued in *Citing Slavery*, this is made worse when cases that *did* involve enslavement continue to be cited in ways that conceal that fact, and those cases are woven ever more deeply into the fabric of our law.¹ Imagine my surprise to learn that the wills and trusts doctrine of “insane delusion” is taught with such cases. What I describe here is how I intend to handle the issue going forward (at least until the next edition of the casebook, if I can prevail on its editor to alter the coverage slightly), which I hope can provide a model for others.

I found myself in this position—teaching a slavery case without knowing it—because I simply did not read every note case in the 800-plus-page casebook I use and have been using through multiple editions. Had it not been for the work of Justin Simard, I might well never have known that the 2007 Maryland case used to introduce the insane delusion doctrine, *Dougherty v. Rubinstein*,² itself cites *Townshend v. Townshend*, an 1848 case involving a testator whose “insane delusion” was that his Christian faith and the salvation of his soul required him to emancipate the more than fifty enslaved persons he owned.³

The 2017 version of Sitkoff and Dukeminier’s *Wills, Trusts and Estates*, its 10th edition, includes this excerpt from *Dougherty* to “explain the origins of the insane delusion doctrine:”⁴

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1. Justin Simard, *Citing Slavery*, 72 *STANFORD L. REV.* 79 (2020).
2. *Dougherty v. Rubenstein*, 914 A.2d 184 (Md. Ct. Spec. App. 2007).
3. 7 Gill 10 (Md. 1848).
4. ROBERT H. SITKOFF & JESSE DUKEMINIER, *WILLS, TRUSTS, AND ESTATES* 273 (2017).

The “insane delusion rule” of testamentary capacity came into being almost 200 years ago, as the invention of British jurists in *Dew v. Clark*, 162 Eng. Rep. 410 (Prerog. 1826). The rule was devised to cover a gap in the existing law, which held that “idiots and persons of non-sane memory” could not make wills, but accepted as valid the will of a testator “who know the natural objects of his or her bounty, the nature and extent of his or her property, and could make a ‘rational’ plan of disposition, but who nonetheless was as crazy as a March hare[.]” . . . Within a few years of the decision in *Dew v. Clark*, the insane delusion rule made its way into will contest cases in the United States.⁵

However, the unedited excerpt from the *Dougherty* opinion has a longer last sentence and includes a very revealing footnote. The last sentence continues, “. . . first appearing in the Maryland law of estates and trusts in *Townshend v. Townshend*, 7 Gill 10 (Md. 1848).²” The footnote reads

The *Townshend* case is a startling example of the changes in American society and law in the past 200 years. There, a testator slave-owner made a will in which he freed his slaves and bequeathed all of his property to them. When he died, his relatives brought a caveat proceeding, seeking to have the will set aside. The evidence disclosed, prophetically, that the testator had claimed to have spoken “face to face” with God, who directed him how to dispose of his property “for the safety of his soul” . . . The relatives argued that the testator was laboring under an insane delusion that God wanted him to free his slaves and give them his property, and that that delusion produced the will. A jury in the caveat proceeding found in favor of the caveators. The Court of Appeals reversed on evidentiary issues and remanded the matter for further proceedings.⁶

This specific problem—concealing the slavery dimension of *Townshend* and this aspect of the historic origins of the doctrine of “insane delusion”—is not unique to this casebook. The main case in Peter Wendel and Robert Popovich’s dedicated *California Wills and Trusts*⁷ is *In re Honigman’s Will*, 168 N.E.2d 676 (N.Y. 1960), a 1960 New York case in which the testator’s delusion was that his wife of forty years had suddenly become unfaithful to him. The first note following the case includes an excerpt from *Benjamin v. Woodring*, 303 A.2d 779 (Md. 1973).⁸ *Benjamin* is a Maryland case that itself cites *Townshend*, but again, the excerpt in the text stops immediately short of the “See also” cite to *Townshend*.⁹ For its model problem, the Wendel and Popovich casebook uses the facts of

5. *Id.*

6. *Dougherty v. Rubenstein*, 914 A.2d 184, 187 n.2 (Md. Ct. Spec. App. 2007). *Dougherty* relied on *Dew v. Clark* as the grounds for invalidating a will based on “partial insanity.” *Dew v. Clark* was cited with approval by a Pennsylvania court in 1839, *Boyd v. Eby*, 8 Watts 66, 71-2 (Pa. 1839); and in *dicta* by a New York court, *Stewart’s Executor v. Lisenard*, 26 Wend. 255 (Court for the Correction of Errors of New York) (1841). But research discloses no case invalidating a will on this basis before *Townshend v. Townshend* in 1848.

7. PETER T. WENDEL & ROBERT G. POPOVICH, CALIFORNIA WILLS AND TRUSTS 118, 121 (2017).

8. *Id.*

9. *Id.*

Dew v. Clark (a father with an irrational lifelong antipathy for his daughter) and cites to *Dougherty* with the parenthetical “(discussing *Dew v. Clark*, 162 Eng. Rep. 510 (Prerog. 1826) (this latter case is generally recognized as the first case to recognize the insane delusion doctrine)).”¹⁰ But *Townshend*, and the doctrine’s U.S. origins, are entirely occluded.

Part of what is so striking in the textbook treatment of this doctrine is how *close* the casebooks come to revealing its origins, only to fail, seemingly at the last moment, to do so. *Benjamin*, which cites *Townshend* but offers no information about it, is exactly the sort of case Simard has in mind when he criticizes “how typical citation practices ignore and obscure the brutality of that regime.”¹¹ *Dougherty* is better than *Benjamin* in that regard, but for the teacher, without the citation to *Townshend*, the connection is lost. When a casebook cites *Dougherty* and includes *Townshend* without the footnote, it erases what Judge Eyler has done, but at least it leaves a trail. Excerpting *Benjamin* or *Dougherty* in a casebook without including *Townshend* at all goes even further, almost to the point of concealment.

When we teach these cases without this context, we pass on to the next generation of lawyers the errors Simard argues compellingly that judges make in citing these cases: failing to take account of whether the end of slavery has abrogated the cases’ authority, or at least reduced their persuasiveness,¹² “demonstrat[ing] an interest in doctrinal history, while ignoring the broader context within which this doctrinal history developed,”¹³ “not only obscur[ing] the complicity of lawyers in slave commerce but also present[ing] a misleading portrait of the development of American law.”¹⁴ Teaching these cases is like “[c]iting such cases without commentary ignores the humanity of those subjected to legal subjugation and treats white supremacist judges as respected authorities.”¹⁵ While judicial opinions are not obligated to trace the development of any particular doctrine, this is precisely what is undertaken in a traditional casebook. The omission of the role of slavery is thus even more problematic in the context of legal education than in judicial citation. So, what to do?

Step 1: Read “Citing Slavery” (and/or consult the cases listed at the Citing Slavery Project) to find cases relevant to your courses

Justin Simard’s article “Citing Slavery” is easy to find and cites myriad cases and his ongoing work at the Citing Slavery Project, <https://www.citing-slavery.org>, cites many more, complete with jurisdictions, summaries, and case types.

10. *Id.* at 124.

11. Simard, *supra* note 1, at 106.

12. *Id.* at 82-3.

13. *Id.* at 83.

14. *Id.*

15. *Id.* at 84.

Step 2: Read those cases in their entirety

This may require digging deeper into the historical development of doctrines you teach than you may be accustomed to doing, but what you discover may surprise and enlighten you.

Step 3: Teach these doctrines (and cases) differently

There are many ways one might do this. Insane delusion can be taught without *Townshend*, which turns out not to be the first U.S. case to address it (although it might be first to use it to invalidate a will). *Duffield v. Morris' Executor*, an 1838 Delaware case,¹⁶ includes a much more thorough and useful definition of insane delusion.

Insane delusion consists in the belief of facts which no rational person would have believed. It may sometimes exist on one or two particular subjects, though generally it is accompanied by eccentricity, irritability, violence, suspicion, exaggeration, inconsistency, and other marks and symptoms which may lead to confirm the existence of delusion, and to establish its insane character. Instances of delusion on particular subjects, or partial insanity, are recorded, where the judgment and reasoning faculties were not only unimpaired on all other subjects, but where the monomaniac was in other respects remarkably acute and shrewd...[T]his doctrine of partial insanity is applicable to civil cases, if existing at the time of the act done; and will avail to defeat a will, the direct offspring of such partial insanity. But it has been held that a will cannot be set aside on the ground of monomania, unless there be the most decisive evidence, that at the time of making the will, the belief in the testator's mind amounted to insane delusion. And it was for the jury to say, whether this is a case of monomania; whether there was any topic or matter upon which the testator's mind was in a state of delusion, which, whenever this string was touched, produced symptoms and evidence of insanity which could not be mistaken.¹⁷

A second approach would be to retain existing materials but provide a more complete citation for *Townshend*. As of 2021, thanks to Simard's efforts,

For cases involving an enslaved person as a party, use the parenthetical "(enslaved party)." For cases involving an enslaved person as the subject of a property or other legal dispute but not named as a party to the suit, use the parenthetical "(enslaved person at issue)." For other cases involving enslaved persons, use an *adequately-descriptive* parenthetical.¹⁸

Townshend v. Townshend does not involve an enslaved party.¹⁹ The caveat proceeding (will challenge) was brought by Townshend's brother and nephew,

16. *Duffield v. Robeson*, 2 Del. 375 (2 Hart.) (1838).

17. *Id.* at 380-81.

18. *Rule 107.1(d)*, THE BLUEBOOK: A UNIFORM SYSTEM OF CITATION, TWENTY FIRST EDITION (2021).

19. On October 9, 1847, a number of the people enslaved by John Townshend began a suit for their freedom, which they prosecuted unsuccessfully through multiple appeals, ending in 1856, in parallel to the caveat proceeding against the will and related litigation. Townshend

two of his heirs, against the executors of his will (another nephew, Jeremiah Townshend, and John B. Brooke); the enslaved people he sought to manumit are not litigating on their own behalf in this suit (though they later do).²⁰ If the will is validated, they will be freed, and if it is not, they will remain enslaved and the property of William and the other heirs, so it would be possible to cite *Townshend* this way: *Townshend v. Townshend*, 7 Gill. 10 (Md. 1848) (enslaved persons at issue).²¹ Alternatively, the catch-all provision of Rule 10.7.1(d) could be used, calling for an “adequately descriptive parenthetical,” to wit, *Townshend v. Townshend*, 7 Gill 10 (Md. 1848) (anti-slavery beliefs held to be “insane delusion,” invalidating will). In the classroom context, this might be accomplished by providing a note to students in a syllabus or live in class, in the week that the section of the book that includes *Dougherty* is assigned, that *Dougherty* cites *Townshend* and sharing its facts and more complete citation.

Finally, for those who want to dive into this subject (as I plan to do), the best approach involves setting *Townshend* alongside another, older, case, the first in the United States to address whether a testamentary emancipation was the product of an insane delusion. *In re George Weir’s Will*, an 1840 Kentucky case, comes out the other way, on very similar facts (always a useful pedagogical exercise).²² Like Townshend, George Weir near the end of his life became profoundly concerned for the state of his soul, connected this to his ownership of enslaved people, and sought to emancipate them by will.²³ Weir, of Woodford County, Kentucky, was a wealthy man, whose estate included 500 acres of land worth \$30,000,²⁴ about twenty enslaved people,²⁵ “and a valuable personal estate.”²⁶ Weir “was actively engaged in agriculture, in manufacturing bagging, and in attending to a profitable mill on his farm,” until early 1839, when he fell into a deep depression following the illness of one of his children.²⁷

v. William Townshend, 7 Gill 10 (Md. 1848); *Townshend v. Brooke*, 9 Gill 90 (Md. 1850); *Townshend v. 9 Gill* 506 (Md. 1851); *Jerry v. Townshend*, 2 Md. 274 (Ct. App. 1852) (enslaved parties); *Jeremiah Townshend and others v. Samuel Townshend*, 5 Md. 287 (1853) (enslaved persons at issue); *Townshend v. Townshend*, 6 Md. 295 (1854); *Jerry v. Townshend*, 9 Md. 145 (1856) (enslaved parties).

20. *Jerry v. Townshend*, 9 Md. 145 (1856) (enslaved parties).
21. Simard, *supra* note 1, at 102, n.168 (“In *Wall*, the court considered whether an instrument facially labeled a deed and conveying enslaved persons and other property could be construed as a will. 30 Miss. at 91-92, 96.”).
22. *In re George Weir’s Will*, 39 Ky. (9 Dana) 434 (Ky. 1840).
23. *Id.* at 436.
24. This is about \$1 million today, although this conversion does not provide the context of relative wealth.
25. This would place Weir among the top twelve percent of slaveowners in Kentucky at this time., *Kentucky and the Question of Slavery*, KENTUCKY EDUC. TELEVISION, <http://www.usgennet.org/usa/ky/state/counties/pendleton/african/blackslavekyquestion.htm> (last visited October 6, 2022).
26. *In re George Weir’s Will*, 39 Ky. (9 Dana) 434, 436 (1840).
27. *Id.* As the court describes him, he “became melancholy, and afterwards continued to become apparently more and still more unconcerned about his family and estate . . . in a great degree,

Unlike John Townshend, George Weir did not attempt to leave the entirety of his estate to people he had formerly enslaved. His wife and children remained his principal beneficiaries, as they had been under a prior 1834 will.²⁸ However, his 1839 will, executed about six weeks before his death, gave clear instructions for the emancipation of the people he enslaved, and conditioned the devise to his wife and children on their cooperation with this plan. It provided as follows:

With respect to my negroes, I wish them to be hired out for, say two years from my decease, at the end of which time the proceeds of such hire shall be given or divided between them, and each and every one of them be set at liberty, and placed, or directed to be placed, in such situation as may be thought most advisable by my administrators. And I beg that my beloved wife will throw no hindrance in the way of such arrangement in respect to the negroes. . . There will be deducted out of my estate, means sufficient to pay debts incurred in liberating my negroes, and my heirs shall not be entitled to the provision made for them, unless they shall go security to Court for said negroes' good behavior.²⁹

According to Joseph Stiles (the attesting witness, Weir's neighbor, and, not incidentally, a Presbyterian pastor), in September of 1839, Weir "was in extreme mental agony, bordering on total despair and absorption on the subject of religion and his eternal destiny."³⁰ Not long before his death, George and his wife joined the Presbyterian church, a church which had long supported emancipation in Kentucky.³¹ Shortly after making his will, Weir

visited his brother James, near Lexington; told him that he had made his will, how he had made it, and why it had been so made. He also told him that he was in hopeless despair, and would certainly die in a short time; manifested much anxiety about the emancipation of his slaves, and conversed with him about the condition of his affairs and the value of his estate. . . .³²

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

It appears that he had expressed the opinion that those who emancipate their slaves and leave them in a slave State, thereby do an injury to the persons liberated, and great injustice to the resident white population; and it appears also, that, as late as August, 1839, he offered to buy a slave or slaves at auction in his neighborhood. But his brother James testified that he (George) had always been opposed in principle to slavery, and that he had, in the winter of 1838-39,

habitually passive, and inattentive to all worldly interests and relations, and . . . in a most deplorable condition of mental concentration and despondency, on the subject of religion." *Id.*

28. *Id.* at 442.

29. *Id.* at 435.

30. *Id.* at 436.

31. Victor B. Howard, *The Kentucky Presbyterians in 1849: Slavery and the Kentucky Constitution*, 73 REG. KY. HIST. SOC'Y 217 (1975).

32. *In re George Weir's Will*, 39 Ky. (9 Dana) at 437.

evinced to him, in a confidential conversation, that he considered it his duty not to die a slave holder. It seems, therefore, that, though he was willing to use slave labor and own slaves in a slave state, he was, in principle, an emancipator, and intended, when his capacity was unquestioned, to liberate his slaves at his death. And though he may have felt rightly as to the impolicy of letting loose, in the bosom of a slave community, a degraded cast of manumitted negroes, yet his will does not show that he had changed that sentiment, or had forgotten his duty on that subject, for he confided the disposition of his emancipated slaves to the discretion of his brother and Mr. Stiles, who knew his own feelings and opinions as to what would probably be the best disposition of them as to residence and society. In emancipating his slaves, therefore, we can not presume that he did otherwise than he had deliberately intended when his sanity was unquestionable.³³

As the court sums it up, “[c]onsidering him an emancipator, it would be difficult to conceive for him a juster or wiser will.”³⁴

Conclusion

As with many of the cases or doctrines premised upon slavery cases, the problematic origins of the doctrine of insane delusion need not negate its continuing vitality—or the necessity of teaching it. The teacher of wills and trusts, under time constraints and with many doctrines to cover, might understandably choose to avoid the slavery cases altogether, and could do so by substituting *Duffield* to introduce the topic. Alternatively, *Dougherty* could be used with its citation to *Townshend* including the footnote. *Townshend* could be set alongside *Weir*, to demonstrate the different attitudes shown by antebellum courts to testamentary manumission and the effect of changing attitudes on probate court judgments. But what wills and trusts professors can no longer do, in good conscience, is teach this doctrine by sidling up to *Townshend*, and wittingly or otherwise, almost, but not quite, citing slavery.

33. *Id.* at 445-46.

34. *Id.* at 442.