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Lawyers and Slaves: A Remarkable Case of Representation for the Antebellum South

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Lawyers and Slaves: A Remarkable Case of Representation from the Antebellum South

JASON A. GILLMER*

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INTRODUCTION

In the spring of 1857, Mark M. Potter of Galveston, Texas, approached a friend and fellow attorney, William Pitt Ballinger, and asked him to help represent a new client in an intriguing case. At issue was the validity of the will of David Webster, an unusual man of uncommon wealth. David was a Northerner by birth and a ship’s carpenter by trade, but he had made a considerable fortune speculating in land and other ventures, first in Florida and later in Texas. In fact, by the time he died, he owned several town lots in Galveston and over 5,000 acres of land in various counties in other parts of Texas. He also owned several slaves, firmly establishing him as one of the island’s more prominent residents. What made the case intriguing, however, had less to do with the accomplishments of David’s life than what he did in death, for in his will he emancipated a female slave and left her all of his property. Her name—and the attorneys’ new client—was

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Betsy Webster.¹

This essay unravels the fascinating story of Betsy's journey from slavery to freedom, together with the attorneys who helped her get there. The subject is admittedly unusual. Legal historians of the era rarely stop to ponder the implications of a local matter such as this one, focusing instead on the far reaching implications of appellate decisions and legislative enactments. To that end, the history of the law of slavery has largely become a study of the lawmakers, with students of the subject interrogating the documents to understand how the ruling elite viewed race and slavery, and how they sought to implement and reinforce the slave system.²

This essay follows a different path. Drawing on a single local study, it recasts the debate from what the lawmakers sought to accomplish in their legal rules to how regular people experienced the law. The implications are significant. Not only does the approach give us access into workings of everyday life, but it also serves to illustrate how the law was both shaped and reshaped at the local level long after it had been settled by judges and legislators. Southerners may have drawn the lines of race and slavery ever more clear the closer we got to the Civil War, restricting manumission and clamping down on the opportunities for interracial fraternization. But their efforts meant little when, in 1857, Betsy Webster contacted Potter and Ballinger and showed them David's will. More to the point—the laws helped little when the relevant players had to answer the most important questions of the day: should David's wishes be respected, and should Betsy be free? Viewed this way, it is easy to see how the law was never simply something imposed from above. Instead, through the complaints they filed and the verdicts they rendered, ordinary men and women, blacks as well as whites, became active agents in the laws that governed them.

Lawyers of course play a special role in these courtroom dramas. After all, lawyers, then and now, are called upon because they possess a special skill: lawyers, not clients, develop litigation strategies, draft

1. Transcript of Trial to Supreme Court at 164-72, *Webster v. Heard*, No. 3088 (Tex. Dist. Ct. Galveston Cty., Fall Term 1868) (collection of Texas State Library and Archives Commission) (on file with author) (testimony of W.P. Ballinger) (discussing involvement in case), 38-40 (copy of the will), 46-51 (copy of the inventory).

2. For critical essays on the methods of legal historians of slavery, see Ariela Gross, *Beyond Black and White: Cultural Approaches to Race and Slavery*, 101 COLUM. L. REV. 640 (2001); Walter Johnson, *Inconsistency, Contradiction, and Complete Confusion: The Everyday Life of the Law of Slavery*, 22 LAW & SOC. INQUIRY 405 (1997).

interrogatories, decide what evidence to present, and make the arguments to the court and the jury. Yet, for as much as the stories of slave litigants have been ignored, the stories of the lawyers who represented them have been all but forgotten.³ As such, this essay seeks to recover this history, and in the process it hopes to illuminate a world in which local experience and intimate matters upend some of our fundamental assumptions about race, law, and life during slavery times.

I. “[A] CONNECTION ... OF THE MOST INTIMATE CHARACTER”

By the time David Webster died in 1856, Betsy was close to 60 years old.⁴ She was born in Mississippi sometime in the 1790s, but other details of her life are vague and hard to come by.⁵ We know nothing about her parents, for example, nor do we know anything about her early life. We can speculate that she was born on a farm, as that would have been common for many. As a young girl, she probably was involved in general housekeeping chores, including washing and perhaps assisting with meals. As she got older and stronger, she may have been sent to work in the fields. Cotton would have been the most likely crop she harvested. The cotton gin was invented around the time Betsy was born, and with it came an explosion in cotton production. Mississippi, together with the other states in the Deep South, was ideally suited for growing the new cash crop. As a result, its population would grow exponentially in the coming years, as more and more people fled the tired lands of Virginia and the Carolinas in search of opportunity and a better life.

David Webster was one of the many who migrated South during this period. Like Betsy, he was born in the 1790s.⁶ He was from the

3. There are exceptions, generally for famous lawyers who represent slaves in famous cases. *See, e.g.*, EARL M. MALTZ, *SLAVERY AND THE SUPREME COURT, 1825-1861*, 61-65 (2009) (discussing the role of John Quincy Adams, who represented the Africans in *United States v. Amistad* before the Supreme Court).

4. *See* Transcript of Trial, *supra* note 1, at 229 (testimony of Mary Hopkins) (estimating that Betsy “was well on to 55 or 60 years old” at the time of David’s death).

5. *See* BUREAU OF THE CENSUS, U.S. DEP’T OF COMMERCE, *NINTH CENSUS OF THE UNITED STATES 1870, FREESTONE AND GALVESTON COUNTIES, microformed on The Nat’l Archives, Microcopy No. 593, Roll 1586* (Nat’l Archives Microfilm Publ’n) (listing Betsy Webster’s age as 76 and her birthplace as Mississippi).

6. *See* Transcript of Trial, *supra* note 1, at 233 (testimony of Thomas Duval) (stating that he last saw David in Galveston in 1852 or 1853 and that he thought him

Northeast—some thought Vermont or Maine—but he decided to strike out on his own in his teenage years, arriving in Mobile, Alabama when he was about eighteen.⁷ At the time, Mobile was a growing port city, nestled on the banks of the Mobile River as it emptied into the Gulf. Young David was apparently intrigued by the constant activity of the water, and it was here that he likely honed his skills as a ship’s carpenter.

Working on the docks, David likely encountered an eclectic mix of people and passengers, along with cotton, sugar, spices and other items for sale both here and away. Here, too, David would have witnessed slaves and slavery on display. Whether David experienced any shock or dismay at the sight of human beings shackled together and treated like cattle is not known. However, whatever feelings he may have felt initially, he evidently reached a general acceptance the longer he remained in Mobile. Slavery, after all, was an institution that was not just legal but also strongly encouraged in the developing economy of the Deep South. Someone needed to clear the fields and tend to crops, and whites, drawing on medical professionals and leading theorists like Thomas Jefferson, conveniently concluded that people of African descent were constitutionally better suited to toil in the heat and humidity.⁸ It was only a matter of time, too, before whites convinced themselves that slavery benefited not only whites but blacks as well. Under attack from the abolitionists, Southern whites lashed back that slavery was the best of all social conditions, confident that slaves were better off than the free labor population of the North.

Perhaps it should come as no surprise, then, that David would come to view the acquisition of slaves as something to be desired. In fact, before he would leave the city, he would buy Betsy.⁹ We do not know anything about the conditions of the sale, but David’s purchase

“as much as fifty-five” years old); *id.* at 237 (testimony of Marcia Paschal) (guessing that David was thirty-seven or thirty-eight in 1830).

7. *See id.* at 237-38 (testimony of Marcia Paschal) (stating that she thought “he came from Maine or Vermont” and that “he could not have been over 18 years of age” when he came to Mobile); *id.* at 230 (testimony of Mary Hopkins) (saying that David was from “Vermont or Maine or some other New England state”).

8. *See* THOMAS JEFFERSON, NOTES ON THE STATE OF VIRGINIA 150 (1853) (asserting that there were differences in the physical characteristics of the races, including that blacks have less hair, “secrete less by the kidnies [sic], and more by the glands,” and were “more tolerant of heat”).

9. *See* Transcript of Trial, *supra* note 1, at 233 (testimony of Thomas Duval) (explaining that he had known David in Florida and that, “ever since [his] first acquaintance with Mr. Webster, he owned a negro woman named Betsy”).

coincides with his growing interest in increasing both his wealth and prestige. In fact, as his time in Mobile stretched into a decade, David apparently grew restless with the limited opportunities available to those who worked on the docks. Therefore, before the 1820's ended, David moved 250 miles east to the budding town of Apalachicola, Florida in apparent hopes that a new location would bring a new fortune.¹⁰

In his new home, David became what all remembered him for—a land and business speculator who invested, for the most part, very wisely.¹¹ His decision to seek fortune here was not uncommon; those who came to this part of Florida did so because its location seemed to ensure a promising future. Ideally located on the Gulf of Mexico, the area appeared destined to become the main shipping port for a broad swath of the cotton district, stretching from western Georgia to eastern Alabama.¹² Eventually making his way 30 miles northwest to St. Joseph, David soon found himself deeply involved in the economic development of the town. There, he was one of 12 men on the Board of Directors of the Lake Wimico & St. Joseph Canal and Railroad Company.¹³ By 1840, he had firmly established himself as one of the more important men in the community. In that year, he was listed in the census as the owner of a remarkable 84 slaves, a telling sign of just how far he had come.¹⁴

Notably, throughout David's journey, Betsy maintained an

10. See BUREAU OF THE CENSUS, U.S. DEP'T OF COMMERCE, FIFTH CENSUS OF THE UNITED STATES 1830, POPULATION SCHEDULES, TERRITORY OF FLORIDA 186, *microformed on The Nat'l Archives*, Microcopy No. 19, Roll 15 (Nat'l Archives Microfilm Publ'n). The exact year he arrived is not known. Cf. Transcript of Trial, *supra* note 1, at 238 (testimony of Marcia Paschal) (estimating that David left Mobile in 1824 or 1825) *with id.* at 234 (testimony of Thomas Duval) (estimating that David moved to Apalachicola by the year 1829 or 1830).

11. See Transcript of Trial, *supra* note 1, at 230 (testimony of Mary Hopkins) (stating that "the business he followed was speculating loaning money and trading"); *id.* at 233 (testimony of Thomas Duval) (stating that David "lived by trading and speculating in various ways, loaning out his money").

12. James Owen Knauss, *St. Joseph, An Episode of the Economic and Political History of Florida, Part I*, in THE Q. PERIODICAL OF THE FLA. HIST. SOC. 177, 179 (1927).

13. LOUISE M. PORTER, THE CHRONOLOGICAL HISTORY OF THE LIVES OF ST. JOSEPH 25 (Great American Pub. Co.) (1975).

14. BUREAU OF THE CENSUS, U.S. DEP'T OF COMMERCE, SIXTH CENSUS OF THE UNITED STATES 1840, POPULATION SCHEDULES, TERRITORY OF FLORIDA, *microformed on The Nat'l Archives*, Microcopy No. 704, Roll 36 (Nat'l Archives Microfilm Publ'n).

important and unique position among his slaves. In fact, in the suit over David's will, neighbors from Florida remembered Betsy by name—a revealing fact itself—but more importantly, they all seemed certain that the relationship between David and Betsy was much more substantial than the laws or the governing ideologies allowed. From those neighbors, we learn that David had never married a white woman, and as far as they knew, he had never courted anyone either.¹⁵ Instead, Betsy was his one companion. One neighbor said, “the connection between them was for a great number of years of the most intimate character.”¹⁶ Another talked about how Betsy cared for David and contributed to his well-being.¹⁷ Considering the nature of their relationship, it should come as little surprise that Betsy was also involved in the household affairs. Mary Hopkins lived next to David for 20 years and she credited Betsy with “making much of [David's] property if not [being] the origin of it.”¹⁸ Another neighbor remembered that Betsy “was in the habit of keeping his money & valuables.”¹⁹

In the middle of the 1840s, David “lost heavily ... with the St. Joseph speculation” and was forced to sell a sizeable amount of his investments, including all of his slaves, except Betsy.²⁰ Soon after, in 1846, David moved with Betsy to Galveston, Texas. The decision to move there made sense. Like the other places where David had lived, Galveston was an important city on the water, occupying one of the best commercial locations on the Gulf.²¹ It was also a town that prided itself on its fineries and cosmopolitan tastes, and perhaps David, who was now over 50, appreciated the worldly outlook of its residents. Land was also cheap in Texas, and for a speculator, cheap lands created the potential for profits. On that score, again, David would

15. See Transcript of Trial, *supra* note 1, at 231 (testimony of Mary Hopkins) (stating that David “never spoke at all of having been married at any time”); *id.* at 244 (testimony of Martha Hardin) (“Webster was a single man and had no wife or children at the time of making and executing [his] will.”).

16. Letter from Robert Meyers to Messrs. Potter & Ballinger (Sept. 23, 1858), in William Pitt Ballinger Papers, at 1 (collection of Briscoe Center for American History at University of Texas) (on file with author).

17. Transcript of Trial, *supra* note 1, at 237 (testimony of Marcia Paschal).

18. *Id.* at 230 (testimony of Mary Hopkins).

19. Letter from Robert Meyers to Messrs. Potter & Ballinger (Sept. 23, 1858), *supra* note 16, at 1.

20. Transcript of Trial, *supra* note 1, at 236 (testimony of Marcia Paschal).

21. See EARL WESLEY FORNELL, *THE GALVESTON ERA: THE TEXAS CRESCENT ON THE EVE OF SECESSION* 4 (1st ed.1961).

eventually do quite well. Indeed, by the time of his death, David owned over 5,000 acres of land in various parts of mainland Texas. He owned two separate tracts of 640 acres each on the Bosque River, 640 acres on the Trinity River near Houston, 320 acres on the Cow Bayou in Fall County, one-third of a league (1,476 acres) on the Paluxy River in Erath County, and one-third of a league on Blue Creek in Wharton County.²²

In addition to these holdings, David owned several town lots in Galveston. These were scattered across the city. He owned seven lots between 28th and 29th Streets, fronting Avenue I. A dozen blocks east, he owned twelve lots between 15th and 16th Streets, some facing Avenue I and others facing Avenue H. He also owned part of a lot two blocks off the harbor on Galveston Bay, fronting Strand Avenue between the corners of Bath and 24th.²³ The record indicates that his home was on one of the lots between 15th and 16th Streets on Avenue I.²⁴ He apparently held the other land as investment property, collecting rent on some and holding the rest for a future sale.

Thus, in life, David proved to be an extraordinary person. His wealth and business sense set him aside from most, and in his interests and desires he also chartered his own course. Upon his death, the inventory of his estate revealed a considerable amount about his life. Among some of the usual furnishings were a few luxuries like a rug, and the separate dining room indicated that he liked to entertain.²⁵ He enjoyed wine and kept a bookcase full of books, though he was not given much credit for being a reader.²⁶ He played the guitar and the lute, and he also had a telescope which he likely used at one time to help navigate a ship by the stars.²⁷ But his bedroom probably said as much about him as anything. In it was a single bed, which he and Betsy evidently shared.²⁸

22. Transcript of Trial, *supra* note 1, at 46-47 (inventory).

23. *Id.*

24. *Id.* at 212 (Martha Greenwood petition).

25. *Id.* at 48-51 (inventory).

26. *See id.* at 234 (testimony of Thomas Duval) (“He was rather an illiterate man, but could read and write.”); *id.* at 238 (testimony of Marcia Paschal) (stating that “he was an illiterate man but could read and write easily and read the newspaper often and took much interest in that sort of reading”).

27. *Id.* at 48-51 (inventory).

28. *See id.* at 49.

II. “IT IS A GREAT CASE!”

David’s death in 1856 was marked with little fanfare. A one-sentence obituary can be found in the Galveston, Texas Weekly: “Died ... On the 8th Inst. [of May], David Webster of this city, formerly a citizen of Florida.”²⁹ What started as routine, however, quickly became a topic of much local interest and excitement. For in his will, David made clear his intention to “manumit, emancipate and set free [his] negro woman, Betsy, and declare her to be entirely liberated from slavery, and entitled to all the rights and privileges of a free person with which it is in [his] power to vest in her.”³⁰ He thereafter bequeathed to her “all the real and personal and mixed estate” belonging to him, minus some land in the country and a few sundry items given to others, together “with all the rents, profits, emoluments and debts accruing to the same.”³¹ Notably, and perhaps critically, David did not give the property to Betsy outright; instead, he created a trust, to be administered by Mrs. E.J. Hardin with directions to “dispos[e] of said property at the pleasure and request of said Betsy.”³² Mrs. Hardin, who now lived in Georgia, had been a friend and neighbor of David’s when he lived in Florida.³³

For the people of Galveston, David’s will undoubtedly created two troubling questions. The first had to do with the nature and extent of his relationship with Betsy. In this respect, antebellum Texans were no different from their counterparts in the rest of the South. To them, interracial relationships were abhorrent, especially when conducted in the open or without due regard for the understood rules of Southern etiquette.³⁴ Interracial relationships upset the social order by visibly calling into question the assigned place for both blacks and whites. As a result, some pretended they rarely occurred; others dismissed them as actions of the dissolute. But by freeing Betsy and leaving all of his property to her, David forced the question of whether one of their own

29. GALVESTON WKLY., May 13, 1856, at 2.

30. Transcript of Trial, *supra* note 1, at 38-40 (will).

31. *Id.*

32. *Id.*

33. *Id.* at 139-40 (testimony of Martha Hardin).

34. The Texas legislature banned interracial marriages in its first statutory code, and periodically reaffirmed the prohibitions. See Act to legalise certain Marriages; to provide for the celebration of Marriages and for other purposes, § 9, reprinted in 1 H.P.N. GAMMEL, THE LAWS OF TEXAS, 1822-1897, at 1087, 1294 (1898); see also Unlawful Marriage, Chap. 121, pt. 1, title 12, chap. 1 (1898), in 4 GAMMEL, at 873, 1036.

could actually care deeply for a woman of color, and perhaps even regard her as his wife.³⁵

The second, equally important question had to do with whether the people of Galveston were prepared to let Betsy Webster, a black woman, live among them as free. Since declaring independence from Mexico in the 1830s, Texans had been more determined than most to rid themselves of the pesky problem of free blacks.³⁶ In the minds of many, free people of color undermined the very rationale for slavery. Their mere existence served as a constant reminder that they were competent and capable, challenging contemporary assumptions that blacks were in need of the caring hand of a white master. Worse than that, free people of color posed a practical threat of the first order, as white Texans fretted over whether they might plant the seeds of rebellion or discontent into the minds of slaves. Hence, at their first opportunity, Texans established new laws which criminalized blackness and freedom, eventually banishing all free people of color from the entire state. The only exception was for those who were in Texas before the War for Independence, or who had express permission from Congress to stay.³⁷

But for Betsy, of course, these concerns were of little moment. What mattered to her was that she be allowed to live out the remainder of her years in her home, said to be constructed “of comfort and taste—a white cottage embowered amid flowers and orange trees.”³⁸ In fact, Betsy reportedly said on numerous occasions that she had no desire to leave; she even professed that she would rather remain in Galveston as a slave than leave as free.³⁹ As her attorney would later put it, “[a]ll her affections clung to this island home, where she had lived with her former master, sustaining, perhaps, relations to him not sanctioned by law, but sanctified by all the sentiments of her nature.”⁴⁰

Armed with the will, she therefore contacted L.A. Thompson, a

35. See generally Jason A. Gillmer, *Base Wretches and Black Wenches: A Story of Sex and Race, Violence and Compassion, During Slavery Times*, 59 ALA. L. REV. 1501 (2008).

36. Act approved Dec. 12, 1840, 5th Cong., R.S. 1841 Repub. Tex. Laws 85, reprinted in 2 GAMMEL, *supra* note 34, at 549.

37. See generally Jason A. Gillmer, *Shades of Gray: The Life and Times of a Free Family of Color in Antebellum Texas*, 29 J. OF LAW & INEQUALITY 101 (2011).

38. Webster v. Heard, 32 Tex. 685, 707 (1870).

39. See, e.g., Transcript of Trial, *supra* note 1, at 167 (testimony of W.P. Ballinger).

40. Webster, 32 Tex. at 707.

local attorney who had known David from Florida.⁴¹ Thompson filed the will with the county court on May 15, 1856 and had Philip Tucker declared an administrator.⁴² Within days, Henry Martin and Francis Whiting replaced Tucker as administrators because David and Tucker “were not on friendly terms” and David “had a great dislike [of] said Tucker and would not willingly have allowed his estate to have been placed in his hands.”⁴³ As for Thompson, it was clear that his legal relationship with Betsy would not last. Thompson frankly admitted that he thought that the devise of the property to Betsy “was utterly void.”⁴⁴ Plus, he thought Betsy “was very annoying,” perhaps because she showed some self-determination and did not play the role of the humble and obedient servant.⁴⁵ She “did not follow my directions,” he said, and thus he later declined to represent her even when she “offered to pay [him] as much as [he] would ask,” showing him “gold pieces in a handkerchief” to show her good faith.⁴⁶

After the will was admitted to probate, the clock started running for creditors to file claims against the estate as well as for interested parties to contest its terms. With so much at stake, it did not take long before Martha Greenwood, David’s purported long-lost cousin from New York, filed such a suit in April 1857 challenging the will.⁴⁷ Martha maintained in her filings that the will was invalid for several technical reasons—having to do with witnesses and signatures. She also asserted two substantive challenges. The first was that David was not of sound mind when he made the will. Though little details were offered, Martha was presumably relying at least in part on a common argument made whenever a white man left property to a slave or free woman of color—the very decision to leave his property to her rather than his white relatives is proof that he was suffering from a defect of the mind. The second substantive ground for declaring the will invalid was that it was the result of collusion or fraud between the administrators who sought to control David’s property through Betsy. This argument had more credence, because underlying it was the argument that David could not free Betsy in the state without violating

41. Transcript of Trial, *supra* note 1, at 264 (testimony of L.A. Thompson).

42. *Id.* at 36-37 (Petition for Probate of Will).

43. *Id.* at 38.

44. *Id.* at 264 (testimony of L.A. Thompson).

45. *Id.*

46. *Id.*

47. *Id.* at 21-22 (Petition of Martha Greenwood).

public policy. Instead, he had to provide for a trustee who would take her to Ohio, New York, or some other free territory and manumit her there. Since David did not do this, Betsy was not entitled to her freedom and neither she nor her administrators could rightfully claim the property as their own. Thus, Martha maintained that, because she was the sole surviving heir, she was entitled to the entire estate, including Betsy.

Betsy was not deterred by either the filing of the suit or Thomson's refusal to help her, however, and soon after went to a man named Mark M. Potter and asked if he would be interested in handling her case. The decision was notable because Potter, who practiced law with his brother Henry, was one of the most established attorneys in the city of Galveston. In his mid-thirties, Potter was born in Connecticut but had made his way to Galveston by the mid-1840s.⁴⁸ Like many of his station, Potter had ambition for political office. He would first be elected to the Texas House in 1847 during the Second Legislature,⁴⁹ and a few years later, he became a State Senator, where he served during most of the 1850s while maintaining his practice.⁵⁰

How Betsy, an enslaved woman of color in her sixties, came to contact a man of such prestige is unknown. But it seems almost certain that it was because David had known Potter before he died. Property tax records indicate that they lived close to one another.⁵¹ Just as important, their wealth and social standing meant that they would have both belonged to an elite group of the local aristocracy. Galveston, like many Southern cities, was a town in which the leading residents kept "a rather closed circle, bound together by a custom of visiting and entertaining each other in the many fine houses set amidst the splendid oleanders and gardens in their small but wealthy city."⁵² Betsy undoubtedly knew of Potter from his connection with David, and perhaps Potter quietly understood the significance of her relationship

48. Potter appears in the first federal census after Texas joined the Union. *See* BUREAU OF THE CENSUS, U.S. DEP'T OF COMMERCE, SEVENTH CENSUS OF THE UNITED STATES 1850, POPULATION SCHEDULES FREE INHABITANTS, GALVESTON CTY, TEX., at 78.

49. 1 THE TEXAS SENATE: REPUBLIC TO CIVIL WAR, 1830-1861, 244 (Patsy McDonald Spa ed. 1990).

50. *Id.*

51. *See* ASSESSOR AND COLLECTOR OF GALVESTON COUNTY, ASSESSMENT OF PROPERTY RENDERED BY CITIZENS THEREOF AND SITUATION THEREIN 19, 26 (1850) (indicating that Potter owned several lots on block 207, near Webster's property).

52. FORNELL, *supra* note 21, at 88.

with the same man.

In any event, Potter agreed to take the case. Before long, however, he contacted William Pitt Ballinger and asked for his assistance with the case.⁵³ Betsy could not have hoped for a better legal team. Ballinger, perhaps even more Potter, was one of the leading lawyers in the city, if not the state. He had come to Galveston in 1843 from Kentucky to study law under his uncle, James Love. He soon developed an expertise in Texas realty law with the well-established firm of Jones & Butler. In 1850, he was appointed United States District Attorney for Eastern Texas, a position he held for four years. In 1854, he returned to private practice, this time forming his own firm with his brother-in-law, Tom Jack. Over the years, the firm of Ballinger & Jack did extraordinarily well, earning Ballinger the reputation of being one of Texas's premier lawyers. Among other notable cases, he represented the owners of the Port of Galveston before the Texas Supreme Court in 1858, and by the 1880s he had become one of the top railroad attorneys in the country. His skills and political connections brought him high honors. In 1874, he was appointed to the Texas Supreme Court, but declined for personal reasons. Three years later, he was on the short list to become the next justice of the United States Supreme Court, before he voluntarily withdrew his name from consideration.⁵⁴

Ballinger later testified that he did not know Betsy before the case.⁵⁵ But, like Potter, it seems likely that he would have known David. After all, Ballinger owned a large estate down the street from David, at the corner of Avenue O and 29th Street, and as members of Galveston's leading citizenry their paths likely crossed on occasion.⁵⁶ As Ballinger learned more about the case, he surely came to realize that the relationship between David and Betsy had been an intimate one. The record does not disclose whether this bothered him or if he

53. Transcript of Trial, *supra* note 1, at 166 (testimony of W.P. Ballinger).

54. See JOHN ANTHONY MORETTA, WILLIAM PITT BALLINGER: TEXAS LAWYER, SOUTHERN STATESMAN, 1825-1888, 1-9 (2000).

55. Transcript of Trial, *supra* note 1, at 165 (testimony of W.P. Ballinger).

56. See ASSESSOR AND COLLECTOR OF GALVESTON COUNTY, ASSESSMENT OF PROPERTY RENDERED BY CITIZENS THEREOF AND SITUATION THEREIN (1855) (indicating that Ballinger owned property worth \$2250 on block 442, close to Webster); see also MORETTA *supra* note 54, at 99 (picturing Ballinger's home on Avenue O, which he built in 1858); see also ASSESSOR AND COLLECTOR OF GALVESTON COUNTY, ASSESSMENT OF PROPERTY RENDERED BY CITIZENS THEREOF AND SITUATION THEREIN (1860) (valuing home at \$12,000).

felt less of David. To the contrary, Ballinger's first mention of Betsy's case in his extensive diaries and papers is one of excitement: "Potter told me today he wanted me to unite with him to defend the suit brought against Webster's will – to which I acceded – no contract yet – It is a GREAT CASE!"⁵⁷ Potter's reasons for asking Ballinger to be his co-counsel are never disclosed. But it is safe to assume that Potter understood the thorny legal issues surrounding the case, and bringing on Ballinger—one of the preeminent trial lawyers—meant that they had a fighting chance. As Ballinger would humbly put it, "my employment had reference mainly to the defence [sic] of the suit, and to the legal questions involved in the will"⁵⁸

Before moving forward with the case, however, Ballinger and Potter needed to solidify their relationship with Betsy in a contract. For an outside observer, the idea itself may have seemed problematic—and indeed became an issue in subsequent litigation. After all, until the will was legally recognized, Betsy was a slave, and slaves were not able to enter into binding contracts. Additionally, aside from some miscellaneous coins, Betsy's only wealth was the very property tied up in the dispute over the will. Betsy thus proposed to Potter and Ballinger what she thought a reasonable arrangement: she promised to pay them half the value of the estate if they successfully represented her.⁵⁹

These were indeed generous terms—the estate was inventoried at near \$21,000⁶⁰—but her offer also stands as a fair reflection of how she viewed her case. Betsy had always been a resourceful woman. One witness described her as a "sensible" person who knew about her "property as well as any white person could."⁶¹ With such an observant mind—"close and particular"⁶²—she surely understood that, as a black woman and a slave, her situation was precarious. Nonetheless, she felt strongly that she was entitled to her freedom and all the rights that accompanied it, and "she was determined to prove that in court."⁶³

Ballinger and Potter, however, turned down her offer. In a remarkable move that defies modern understandings of the era,

57. Diary of William Pitt Ballinger in William Pitt Ballinger Papers (May 2, 1857) (collection of Briscoe Center for American History at University of Texas) (on file with author).

58. Transcript of Trial, *supra* note 1, at 166 (testimony of W.P. Ballinger).

59. *Id.* at 165.

60. *Id.* at 51 (inventory, appraisal, and list of claims).

61. *Id.* at 157 (testimony of Oscar Parish).

62. *Id.*

63. MORETTA, *supra* note 54, at 115.

Ballinger and Potter told Betsy that half of her estate was too much. Instead, they explained that a typical contingency fee arrangement was one-third of the recovery, and that is all they would accept from her.⁶⁴

III. “HER RIGHT WAS FIXED AND PERFECT”

Ballinger and Potter’s decision to take a smaller fee—let alone to take the case at all—is all the more notable when we consider what was at stake. This was not merely a dispute over a will. This was a case that called into question the entire ideology of the antebellum South. Not only did the case expose a long-term relationship between a white man and a black woman. But it also risked upsetting the social order by allowing a black woman to live among them both as free and as a considerable property owner. Ballinger’s uncle and mentor, James Love, was concerned when he learned of Ballinger’s involvement in the case. He warned his nephew that many residents would react “most strongly against your defending of a negress.” He went on:

Many of your friends & associates will believe you have betrayed your Southern principles & that you are no longer to be considered sound on the subject of slavery. You will be accused of all manner of wrongdoing & your honour and integrity as a gentleman will be assailed.⁶⁵

Ballinger was acutely aware of the difficulties posed by the case, both in terms of its merits and its social implications. “[I]t was almost the general professional opinion that she was not entitled to her freedom or property,” he would later recall, and “to maintain the contrary, required one to face the prejudices of this entire community.”⁶⁶

Yet neither Ballinger nor Potter considered withdrawing from the case; to the contrary, as Ballinger put it, they “took an active and zealous interest in it.”⁶⁷ Martha was represented in her suit by Allen & Hale, a firm Ballinger considered “of the first respectability and ability,” and accordingly he and Potter defended the case “in that

64. Transcript of Trial, *supra* note 1, at 165 (testimony of W.P. Ballinger); *see also id.* at 135 (contract).

65. MORETTA, *supra* note 54, at 115.

66. Webster, 32 Tex. at 706.

67. Transcript of Trial, *supra* note 1, at 166 (testimony of W.P. Ballinger).

view.”⁶⁸ From the surviving records, it is apparent that they took Martha’s first substantive claim that David was not of sound mind seriously. Accordingly, they marshaled several letters from individuals who knew David and could testify that he had always intended to free Betsy and leave her all of his property. H.R. Taylor was a boarder in David’s home when he lived in Apalachicola. He said that, from what he knew of David and Betsy, he would “have been surprised if [David] had pursued any other course toward his servant Betsy than that adopted by him” in the will.⁶⁹ Taylor went on to say that he could not, “for a moment[,] doubt that if [David] had had any anticipation of the difficulties in regard to the settlement and disposition of his estate, according to his wishes, he would have taken such legal measures as would have at once put a stop to them.”⁷⁰ Robert Meyers, who knew David from 1834 until he left for Galveston in 1846, had a similar impression. He “always supposed as did all the neighborhood that in case of [David’s] death, the negro woman, Betsy, would be set free and get his property.”⁷¹ Meyers may have been more honest than most; he frankly admitted that Betsy and David had always been “intimate.”⁷² But he apparently spoke for the neighborhood when he said: “had [David] not have set her free at his death giving her also most of his property, it would have been to [him] [c]onclusive [e]vidence that his mind was unsound and weakened at the time of making his will.”⁷³

Others who saw David in the days before his death thought that he was lucid and fully capable of disposing of his property. Nancy Thomson said he was “perfectly sane.”⁷⁴ Another said he had known David since 1822 or 1823 and when he saw him on his sick bed he “conversed with him . . . and thought him sane.”⁷⁵ Betsy personally

68. *Id.* at 169.

69. Letter from H.R. Taylor to J.G. Ryan, *in* William Pitt Ballinger Papers, at 1-2 (Sept. 23, 1858) (collection of Briscoe Center for American History at University of Texas) (on file with author).

70. *Id.* at 2.

71. Letter from Robert Meyers to Messrs. Potter & Ballinger (Sept. 23, 1858), *supra* note 16, at 1.

72. *Id.*

73. *Id.* at 1-2.

74. Letter from Nancy L. Thomson to Mr. M.M. Potter, *in* William Pitt Ballinger Papers, at 1 (Apr. 24, 1857) (collection of Briscoe Center for American History at University of Texas) (on file with author).

75. Letter from [name illegible] of Henry County, Alabama to unnamed recipient, *in* William Pitt Ballinger Papers, at 1 (May 13, 1857) (collection of Briscoe Center for American History at University of Texas) (on file with author).

contacted another witness and asked him if he “thought that Mr. Webster [was] in his proper [s]enses or not when [he] had [s]een him.”⁷⁶ This witness—his signature is illegible—responded in a letter to Potter that he was “perfectly [s]atisfied that he was as much as ever he had been since [the witness had] known him.”⁷⁷

It may have been true, as H.R. Taylor remarked in a sly reference to David’s close relationship to Betsy, that “Mr. Webster was a man possessing much eccentricity of character.”⁷⁸ But eccentricity is not the same thing as insanity, and Ballinger and Potter were quite right in assuming that courts were loath to interfere with personal decisions about how to dispose of one’s property absent clear proof of a mental defect. State supreme courts in several jurisdictions, including Texas, had even upheld this right when, like here, a white man had freed a slave woman or the child he had with her and left her all his property. By marshaling the testimony that they did, Ballinger and Potter had effectively refuted Martha’s first substantive claim.

The second claim was the harder one to overcome. The Texas Supreme Court had held, in *Purvis v. Sherrod* a few years earlier, that the policy of the state was to forbid owners from freeing their slaves within the territorial jurisdiction of Texas. That case involved an owner who manumitted three slaves in his will, including a woman, her son, and the testator’s own son.⁷⁹ His stated wish was that the three of them “be settled near” his sister in Texas.⁸⁰ But he also provided that, if the state of Texas or any of his relations objected to their freedom on these conditions, his sister would have “full power to send them to a free [s]tate, or to Liberia, as she and the three negroes may agree.”⁸¹ After disappointed relations challenged the will, the Texas Supreme Court agreed with the plaintiffs on the general principle that Texas law prohibited emancipation within the state.

In reaching this conclusion, the Court acknowledged that the Constitution of 1845, adopted after Texas became a state, did not clearly prohibit “the natural right of the owner to dispose of his [slave]

76. Letter from [name illegible] to Mr. Potter, in *William Pitt Ballinger Papers*, at 1 (Apr. 24, 1857) (collection of Briscoe Center for American History at University of Texas) (on file with author).

77. *Id.*

78. Letter from H.R. Taylor to J.G. Ryan, *supra* note 69, at 1.

79. *Purvis v. Sherrod*, 12 Tex. 140, 141 (1854).

80. *Id.*

81. *Id.*

property as he pleased.”⁸² However, it also concluded that the framers of the 1845 Constitution surely had the previous Constitution of the Republic—adopted a decade earlier—in mind when they ratified this one. Under the Constitution of the Republic, no slaveholder was “allowed to emancipate his or her slave or slaves without the consent of Congress, unless he shall send his or her slave or slaves without the limits of the Republic.”⁸³ It was this language that created the difficulty. The Court in *Purvis* reasoned that, although this “organic law was superseded by the Constitution of [1845],” it nonetheless should be “referred to, not only to show the true meaning of the [1845] Constitution ... but also the policy of the restrictions on emancipation.”⁸⁴ Having so held, the Court nonetheless upheld the grant of freedom in *Purvis* as consistent with both the law and policy of the state because it contemplated that the manumission would take place outside of Texas. “[A] bequest of freedom,” the Court said, “not to take effect until the slave is removed beyond the territorial limits of such [s]tate, is nevertheless a valid bequest.”⁸⁵

Ballinger thought *Purvis* had been wrongly decided, and he made clear that he was prepared to take Betsy’s case up to the Supreme Court to press his position. His argument was premised on the notion that the Court “went too far in giving effect to the former Constitution.”⁸⁶ In his view, when the people of Texas ratified the Constitution of 1845, the provision under the Constitution of the Republic prohibiting owners from freeing their slaves in the state absent Congressional permission should have been “entirely obliterated.”⁸⁷ Ballinger accepted that “[t]he question as to the policy of the [s]tate with respect to permitting free negroes to remain in the [s]tate or compel them to leave it” was a good one.⁸⁸ But it “was an entirely different and subsequent question” than the one at issue here.⁸⁹ As it stood, under the Constitution of 1845, there was “no law of the [s]tate to prevent the owner from emancipating his slaves.”⁹⁰ Betsy was thus entitled to her freedom, as the will was valid.

82. *Id.* at 165.

83. *Id.* at 166.

84. *Id.*

85. *Id.* at 171.

86. Transcript of Trial, *supra* note 1, at 168 (testimony of W.P. Ballinger).

87. *Id.*

88. *Id.*

89. *Id.*

90. *Id.*

However, even if he failed to convince the Court to reverse itself, he believed that he could nonetheless distinguish Betsy's case from Purvis. His argument relied on the fine line between a valid devise of freedom and an invalid will. According to Ballinger, Purvis required that, for a valid devise of freedom, owners had to provide "for the extradition of the slave from the [s]tate," and a will which did not contain such a provision would not be upheld.⁹¹ But if the will contained such a provision, "it vested the right to freedom" and the "question of removal became a question between the court and the trustee, or a question for the [s]tate to enforce its policy of removal."⁹² Ballinger illustrated his point through a persuasive hypothetical:

Suppose David Webster had manumitted Betsy and willed to Mrs. Hardin \$1000 to remove her to Ohio? Suppose the administrators had paid over to Mrs. Hardin the \$1000, to carry out this will; but instead of removing her to Ohio, Mrs. Hardin had pocketed the money, and left Betsy penniless and shiftless on our streets. Would any court have said that on this ground she continued, or again became a slave? No court ever did, or could have said so. Her status of slavery ceased by the will, her title to her freedom was perfect. The question of her extradition would have been one for the [s]tate.⁹³

Thus, Ballinger's argument rested on the assumption that, like the will at issue in Purvis, David's will contained a provision providing for Betsy's extradition.

On that question, he believed it did. The will, he said, was "consistent with her removal," and as such Betsy's "right was fixed and perfect."⁹⁴ Ballinger's position was not without support. Although the will did not include a specific provision for extradition, it did contain the catch-all phrase that the trustee be "herein empowered to carry out the true intent of this will."⁹⁵ Ballinger thought this sufficient. "Here was a devise of freedom to Betsy," he said, "and of ample property and powers to her trustee to consummate it in accordance with

91. Webster, 32 Tex. at 700; *see also* Hunt v. White, 24 Tex. 643 (1860) (finding that will purporting to free slaves was invalid because it did not expressly provide for the manumissions to take place outside of the State).

92. Webster, 32 Tex. at 700.

93. *Id.*

94. *Id.*

95. Transcript of Trial, *supra* note 1, at 39 (will).

law.”⁹⁶ It may be true that Betsy had not left Texas, but “her removal was considered with this will and would be ordered ... whenever the question arose.”⁹⁷ It became “a condition subsequent, not precedent.”⁹⁸

Neither issue came before the Texas Supreme Court, however, because Ballinger and Potter defended against Martha’s suit on yet another ground, which was as brilliant as it was simple: they challenged Martha’s fundamental assertion that she was David’s cousin. Establishing family ties often poses little difficulty for a plaintiff today; but in the first part of the nineteenth century births and marriages were not always recorded, and when they were the records were often lost or destroyed. Proof in this case thus fell on witnesses, and on that, Ballinger and Potter once again called on those who knew David best. H.R. Taylor, the boarder who lived in David’s home in Apalachicola, stated that he “never heard [David] say anything relating to family connections [sic], and [he was] not aware that there was anyone claiming any relationship to him.”⁹⁹ Robert Meyers, David’s friend from St. Joseph’s, agreed. He said that he “never heard him say that he had any relations.”¹⁰⁰ John Ryan was also from Apalachicola and he had known David since 1831. He said he had “no recollection of [David] mentioning any relative of his [that was] living.”¹⁰¹

Other friends and associates of David testified to the same. Mary Hopkins had known David for twenty years; he lived next to her brother-in-law, Dr. William Price, in St. Joseph’s.¹⁰² She could not recall if he ever told her the name of his parents.¹⁰³ She also raised questions over whether he had ever lived in New York—she thought he was from Vermont or Maine.¹⁰⁴ But she testified that David had informed her “that he had no near relatives living.”¹⁰⁵ Thomas Duval had known David in both Florida and Texas.¹⁰⁶ According to Thomas,

96. Webster, 32 Tex. at 700-01.

97. Transcript of Trial, *supra* note 1, at 169 (testimony of W.P. Ballinger).

98. Webster, 32 Tex. at 700.

99. Letter from H.R. Taylor to J.G. Ryan, *supra* note 69, at 1.

100. Letter from Robert Meyers to Messrs. Potter & Ballinger, *supra* note 16, at 1.

101. Letter from John Ryan to Messrs. Potter & Ballinger, in William Pitt Ballinger Papers, at 1 (Sept. 23, 1858) (collection of Briscoe Center for American History at University of Texas) (on file with author).

102. Transcript of Trial, *supra* note 1, at 229 (testimony of Mary Hopkins).

103. *Id.* at 231.

104. *Id.* at 230-31.

105. *Id.* at 229.

106. *Id.* at 232 (testimony of Thomas Duval).

David “had no relations living that he knew of.”¹⁰⁷ Thomas’ sister and the wife of Dr. Price, Marcia Paschal, knew David “intimately”—he visited them weekly in their home, if not daily.¹⁰⁸ Marcia testified that David informed her “that he did not know of his having a relative living in the world.”¹⁰⁹ Even worse for Martha, Marcia said that “on one occasion he said that if he had knowledge of having relations he would leave them nothing—not one cent.”¹¹⁰

Faced with mounting evidence disproving heirship, Martha’s attorneys wrote a letter to Martha and requested a continuance from the court so that Martha could reply with “the names and residences of her witnesses together with an abstract of what she could prove”¹¹¹ Whether the letter never reached her, as her attorneys suggested, or whether she simply decided not to pursue the action any longer, is not disclosed.¹¹² Regardless, the district court denied the continuance, and on July 3, 1858, dismissed Martha’s case.¹¹³

IV. “A VERY INDUSTRIOUS CAREFUL SENSIBLE PERSON”

Ballinger later testified that he and Potter “were greatly relieved when the suit was dismissed.”¹¹⁴ To put it mildly, the “questions were difficult and doubtful,” and a “strong opinion existed that the will was not valid”¹¹⁵ Yet, following the dismissal, there was no one else to contest its terms, and the probate court subsequently enforced it to the letter.

Ballinger credited Potter with handling most of the details in the probate court. There were the standard controversies with the administrators, with some hints that they may have tried to cheat Betsy out of some of her property, but Potter “held them to strict account.”¹¹⁶ During August of 1858, shortly after the dismissal of Martha’s case, the administrators presented their final tally to the court. In addition to

107. *Id.*

108. *Id.* at 235, 236 (testimony of Marcia Paschal).

109. *Id.* at 236.

110. *Id.*

111. *Id.* at 240 (Aff. of Pet’r for Continuance).

112. *See id.* at 241 (stating belief that “said letters must have been lost or miscarried and never came to the hands of the Pif”).

113. *Id.* at 263 (Final Dismissing of Suit Greenwood v. Martin & Whiting).

114. *Id.* at 169 (testimony of W.P. Ballinger).

115. *Id.* at 165.

116. *Id.* at 166.

the usual expenses, the administrators asked for reimbursement for the upkeep of David's slaves. Not counting Betsy and a family willed to John Ryan, David had died owning four slaves—Washington, Mary, her child Jim, and Harry.¹¹⁷ Notably, these were part of David's personal estate, and under the terms of the will they would revert to Betsy. Perhaps to avoid the thorny issue of a free person of color owning slaves, the administrators, with the permission of the court, sold Mary and Jim for the sum of \$1200.¹¹⁸ They attempted to sell Harry as well; however, their efforts were unsuccessful. Apparently Harry, despite being only eleven years old, displayed a spirited disposition that potential owners found troubling—he “frequently ran away ... without reason or assignable cause.”¹¹⁹ During the final accounting, Harry therefore appeared as a line in the cash account, bringing over \$100 for a period of hire.¹²⁰ Washington also appeared in the final accounting with a list of his expenses and wages, suggesting that he practiced a trade and worked in a shop or for another.¹²¹ Whether his special skills explain why they never tried to sell him is unknown. But both he and Harry would become part of Betsy's property in the final decree.¹²²

Martha Greenwood's lawyers made a last-ditch effort to stop the distribution of the estate,¹²³ but the court showed little interest in hearing from them. The attorneys ultimately withdrew their objections after they failed to present any new evidence.¹²⁴ In the final decree, issued during the November term in 1858, Martin B. Hardin, under the terms of the will, received the bulk of David's real property on the mainland of Texas, including property on the Paluxy River, the Bosque River, the Trinity River, and the Cow Bayou in Fall County.¹²⁵ David's land in Wharton County, which was never mentioned in the will, was

117. *See id.* at 39 (will) (granting Ryan “the negro, John wife and family conditioned that the said Ryan shall pay the remainder of the amount due on the purchase of said negroes”); *id.* at 48 (inventory and appraisement and list of claims).

118. *Id.* at 68 (Final Act and Petition for discharge by Admrs).

119. Transcript of Trial, *supra* note 1, at 54 (petition for order of sale of negro Harry)

120. *Id.* at 73 (final accounting).

121. *Id.* at 72.

122. *Id.* at 87 (decree of court).

123. *Id.* at 78-79 (opposition).

124. *Id.* at 86 (decree of court).

125. *Id.*

put up for sale to cover the cost of administration.¹²⁶ Apart from that, the court awarded Betsy what was promised to her by David. This included all of his real estate in Galveston, together with the “houses, household furniture, effects and appurtenances,” as well as “all the rents, profits, and emoluments and debts accruing to the same.”¹²⁷ In addition, she inherited his choses in action and “all the other notes and accounts due and owing.”¹²⁸ Finally, in a remarkable summation, the court awarded her all the residual “personal property of every kind and description, which were owned by said Webster in the city of Galveston at the time of his death.”¹²⁹

The court records are too formal to include any personal reactions to the probate court’s final decree. But the response must have been noteworthy. Betsy had not only received her freedom but also gained a substantial estate worth thousands of dollars. Free people of color, it must be remembered, were never very numerous in Texas—the census records of 1850 and 1860 counted only a few hundred in the entire state. Of those, moreover, most would have been members of the working poor.¹³⁰ Yet here was Betsy, an ex-slave approaching 70 years of age, who was suddenly catapulted into the propertied class.

Betsy’s new and unusual status was not lost on her. But she had always been a “very industrious careful sensible person,”¹³¹ and she was determined to play an active role in managing her own affairs. A revealing instance took place soon after David’s death. In June of 1856, Mrs. Hardin, the trustee of Betsy’s property, arrived in Galveston to attend to the will. Betsy, however, “was very anxious to get rid of her.”¹³² As Betsy explained to Oscar Parish, the clerk of the court, she was concerned that “she would have to support Mrs. Hardin and her family if she stayed here and she did not intend to do it.”¹³³ Indeed, Betsy had every intention “to ‘boss’ herself,” and therefore took it

126. *Id.* at 77-78 (order of sale of land).

127. *Id.* at 87 (decree of court).

128. *Id.* at 87-88.

129. *Id.* at 88.

130. The federal census counted 397 free people of color in Texas in 1850. CENSUS OFFICE, U.S. DEP’T OF THE INTERIOR, THE SEVENTH CENSUS OF THE UNITED STATES: 1850 TABLE 1 (1853). By 1860, the number of free people of color dropped to 355. CENSUS OFFICE, U.S. DEP’T OF THE INTERIOR, POPULATIONS OF THE UNITED STATES IN 1860; COMPILED FROM THE ORIGINAL RETURNS OF THE EIGHTH CENSUS TABLE 2 (1864).

131. Transcript of Trial, *supra* note 1, at 161 (testimony of John Jones).

132. *Id.* at 155 (testimony of Oscar Parish).

133. *Id.* at 155-56.

upon herself to not only encourage Mrs. Hardin to go back to Georgia but also learn everything she could about her case.¹³⁴ As Parish put it, she came to his office “a great deal,” prompting him to think that Betsy “knew all about Webster’s estate and her own finances and property as well as any white person could.”¹³⁵

Still, even after the settlement of the estate, Ballinger and Potter continued to fret about the implications. Their concerns were not without justification. Soon after the final distribution, Colonel Malcolm Graham, the state Attorney General, was seen in the Galveston County courthouse rummaging through the files. Despite the order of the probate court, he “spoke of proceedings for [Betsy’s] property and enslavement on behalf of the [s]tate.”¹³⁶ Apparently, he never pursued the matter. But this did not stop Potter and Ballinger from continuing to raise with Betsy the possibility of moving out of the state for her own security.¹³⁷ She “positively refused to leave Galveston,” however, causing Potter to contemplate petitioning Congress for “a legislative act in her favor” to settle the matter once and for all.¹³⁸

In the meantime, Betsy smartly took steps to lessen the impact of her presence in the community. Oscar Parish, the courthouse clerk, recalled that soon after the close of administration, Betsy, acting on the advice of Potter, sold “the greater part if not all of her real estate” in Galveston to various buyers.¹³⁹ She received valuable consideration for the conveyances—\$400 from Dietrich Wilhelm, \$1,100 from John Danagh, \$1,750 from Jacob Kichoe, and \$2,800 from John Corbett for the various lots.¹⁴⁰ She also entered into a separate deed with John Corbett purporting to transfer her interest in her homestead for \$4,500.¹⁴¹ The sale never took place, as it was set up merely to deflect attention away from her. “[T]he deed was only given,” explained Parish, “in order that Corbett should hold the property for her

134. *Id.* at 156.

135. *Id.* at 157.

136. *Id.* at 158.

137. *See id.* at 159 (describing discussions with Betsy and Potter about leaving).

138. *Id.* at 168 (testimony of W.P. Ballinger); *see also id.* at 161 (testimony of John Jones) (stating that he had “heard talk about efforts for a legislative act for her benefit and think I heard this from Mr. Potter”).

139. *Id.* at 156 (testimony of Oscar Parish); *see id.* at 172 (testimony of W.P. Ballinger).

140. *See id.* at 276-80, 283-87, 287-91, 295-98 (Exhibits A, C, D, F to Plaintiff’s Exceptions).

141. *Id.* at 280-83 (Exhibit B to Plaintiff’s Exceptions).

benefit.”¹⁴² Betsy and Corbett subsequently had a falling out—the reasons are not disclosed—causing Betsy to make a similar arrangement with Parish.¹⁴³ He held the property in his name until after the War, when he re-conveyed the lots back to her.¹⁴⁴

Notably, Betsy appears to have entered into these transactions and conveyances freely and on her own accord, expressing “no complaints about any of the property ever conveyed away.”¹⁴⁵ With \$6,000 in gold buried somewhere in her yard, it is no wonder why.¹⁴⁶ More to the point, Betsy’s decisions reflect a woman of incredible intelligence and self-awareness. She may have been illiterate;¹⁴⁷ but she understood better than anyone that her presence created a troubling anomaly in the psyche of the antebellum South. She therefore created the necessary space for herself, remaining close to those who treated her well and living with the expected caution of someone in her position. Her abilities to negotiate the lines of race and slavery would pay off on more than one occasion. In one such instance in 1863, soon after the battle of Galveston, General John Magruder of the confederate forces issued an order “that all free negroes should be removed from the Island.”¹⁴⁸ The captain in charge of enforcing the order found only three, one of whom was Betsy.¹⁴⁹ The provost marshal came to her defense, however, telling the captain “that she was a quiet peaceable inoffensive person and very useful in case of yellow fever.”¹⁵⁰ The captain conveyed this assessment to General Magruder, “and the order was not enforced against her.”¹⁵¹ Succinctly stated by another, “Betsy has held her freedom and property like any other free person, without interference from any person so far as I know.”¹⁵²

142. *Id.* at 157 (testimony of Oscar Parish).

143. *Id.*; *see also id.* at 291-94 (Exhibit E to Plaintiff’s Exceptions).

144. *Id.* at 157 (testimony of Oscar Parish).

145. *Id.*

146. *Id.* at 158.

147. *Id.* at 159.

148. *Id.* at 160 (testimony of Granger).

149. *Id.*

150. *Id.*

151. *Id.*

152. *Id.* at 154-55 (testimony of A.H. Cleveland).

CONCLUSION: “HER CHAMPION AND HER FRIEND”

The final matter of Betsy’s paying her attorneys fees was uneventful at the time but became an issue of much controversy following the Civil War, providing a fitting end to a notable case. Just after the final decree, on January 6, 1859, Ballinger and Potter visited Betsy’s home to settle the fee.¹⁵³ John Corbett and another man, “acting as her friends,” were present as well.¹⁵⁴ The group discussed the value of Betsy’s estate under the will, estimating it to be \$21,000, and agreed under the terms of the contract that Ballinger and Potter were entitled to one-third, or \$7,000.¹⁵⁵ As payment, Betsy assigned them a debt owed to the estate worth \$3,700, seven lots on a block in Galveston with an estimated value of \$3,150, and \$150 in cash.¹⁵⁶ Shortly after, Potter and Ballinger negotiated a sale of the lots to Dr. Thomas Heard. Betsy, in conjunction with her trustee, Mrs. Hardin, then conveyed the property to Heard for the negotiated amount.

Seven years later, in February of 1866, Betsy curiously filed suit attempting to annul the deed.¹⁵⁷ Although Dr. Heard was the only named defendant, the case rested on the argument that Potter and Ballinger had colluded with him to fraudulently deprive Betsy of her property. Betsy, who was now close to 80 and up to this point had never questioned the integrity of the deed, was represented by Jesse Stancel of the undistinguished firm of Stancel & Stancel. The original petition minced few words. The payment of attorney fees and subsequent sale of the property, her new attorney said, was “a base fraud and forgery, perpetrated against plaintiff by certain parties in conjunction with defendant, for the purpose of fraudulently swindling plaintiff out of her just, lawful and equitable rights and property.”¹⁵⁸

In making the case, Betsy’s new attorney relied on legal arguments that were in direct opposition to Betsy’s interests at the time Ballinger and Potter represented her. Citing *Purvis v. Sherrod*, the very case Ballinger labored to challenge and distinguish, Stancel insisted that Betsy had never been lawfully freed under the terms of the will

153. *Id.* at 170 (testimony of W.P. Ballinger).

154. *Id.*

155. *Id.*

156. *Id.*; see also Diary of William Pitt Ballinger, in William Pitt Ballinger Papers (Jan. 6, 1859) (collection of Texas Briscoe Center for American History) (on file with author).

157. Transcript of Trial, *supra* note 1, at 1 (petition).

158. *Id.* at 3.

because she had never been “removed beyond the limits of the [s]tate.”¹⁵⁹ As such, she remained a slave, and at best “had only an equitable interest” in the estate.¹⁶⁰ Conveniently, with the Civil War over, Stancel argued that Betsy was now free and entitled to everything promised to her in the will. But any transactions that took place prior to this point, including the one at issue, were null and void, as Betsy was a slave and “was incapable of contracting or giving her assent to any contract whatever.”¹⁶¹

Betsy’s motivation for filing the suit was never disclosed. However, arguments presented by her counsel suggest that he may not have had her best interests in mind. Stancel referred to her as “an ignorant negro,” for example, who—in stark contrast to everything that had been said about her before—“could not know anything about the value of property.”¹⁶² The suit did not fare well in the courts; the trial court dismissed the suit for lack of merit and the Texas Supreme Court upheld the decision on appeal. In its opinion, the Supreme Court made clear it was not impressed with the arguments of Stancel & Stancel. As it saw the matter, “a court of competent jurisdiction decreed the will valid, and thereby decreed Betsy a free woman.”¹⁶³ For counsel to now suggest otherwise, after Betsy had lived for seven years as free in the quiet enjoyment of her home, was disingenuous and a misapplication of the law. The Court stated:

[A]s the judgment or decree of this court has never been set aside, reversed or appealed from, but remains and ever has been in full force, virtue, and effect, it thereby follows that from and after the time that this judgment or decree took effect, Betsy was a free woman.¹⁶⁴

As such, the Court concluded that Betsy in 1859 “was just as free to make a contract conveying her property . . . as she was on the day she instituted this suit.”¹⁶⁵ The Court then upheld the dismissal of the suit.

Notwithstanding the inglorious end of *Webster v. Heard*, its dismissal offers a final opportunity to consider the legal relationship

159. *Webster*, 32 Tex. at 689.

160. *Id.*

161. *Id.* at 708-09.

162. *Id.* at 695.

163. *Id.* at 710.

164. *Id.* at 710-11.

165. *Id.* at 711.

between Betsy and her original lawyers, Ballinger and Potter. In light of their tireless efforts litigating the will and attending to its probate, it might be tempting to cast the two as antislavery advocates, as individuals who took on Betsy's case because they hoped to change the laws, if not the attitudes, on racial slavery. Records from outside the case, however, reveal that, to the contrary, Potter and Ballinger were very much invested in the status quo. Like most men of property and wealth, both were slaveholders.¹⁶⁶ In fact, Ballinger wrote on several occasions about purchasing slaves in his diary with no moral compunction.¹⁶⁷ To be sure, Ballinger was a Unionist, and he spoke out against secession on the eve of the Civil War. But his position had nothing to do with his attitudes toward blacks or slavery. Far from being an enlightened figure on matters of race, he thought slavery was "elevating" to the African race and "far better for the slave" than freedom.¹⁶⁸ As a result, his anti-secessionist stance should be seen as a reflection of his strong adherence to the law, as he did not believe that Texas or any other state had the legal authority to secede.¹⁶⁹

It is also easy to dismiss the two attorneys as hired guns, as lawyers who took a case and developed their legal positions because their client was paying them. To do so, however, would greatly underestimate the context of their representation. Ballinger and Potter did more than take on an unpopular cause; by representing a slave seeking freedom and property on the eve of the Civil War they were upending if not challenging the very ideas and values upon which their society was based. There is no doubt that, under their contingency fee agreement, Potter and Ballinger stood to profit handsomely were they to prevail. But to think they would risk permanent damage to their

166. See Manuscript Census Returns, Schedule 2.—Slave Inhabitants, Galveston Cty., Tex., in BUREAU OF THE CENSUS, U.S. DEP'T OF COMMERCE, POPULATION SCHEDULES OF THE SEVENTH CENSUS OF THE UNITED STATES (1850) (listing Ballinger as the owner of 7 slaves and Potter as the owner of 10 slaves); see also Census Returns, Schedule 2.—Slave Inhabitants, Galveston Cty., Tex., in BUREAU OF THE CENSUS, U.S. DEP'T OF COMMERCE, POPULATION SCHEDULES OF THE EIGHTH CENSUS OF THE UNITED STATES, 9 (1860) (listing Ballinger as the owner of 6 slaves); see *id.* at 12 (listing Potter as the owner of 10 slaves).

167. See, e.g., Diary of William Pitt Ballinger, in William Pitt Ballinger Papers (Jan. 13, 1860, Jan. 19, 1860, Jan. 24, 1860, Jan. 25, 1860, Jan. 28, 1860, Aug. 11, 1860, Aug. 12, 1860).

168. *Id.* (Jan. 21, 1860).

169. See *id.* "The Last of 1860" (speaking of "secession as revolution" and how sectional majorities should "be sought peacefully & within the Union & that the disruption of the Union without such efforts is treason to humanity").

public reputations, or worse, endangering their lives for a fee—even a sizable one—overlooks what mattered most to Southern men of this era. Of far more importance than dollars and cents were their reputations in the community. Honor and integrity—these were the principles by which Potter and Ballinger lived, and with careers both notable and successful, neither would have taken the case for economic reasons alone.¹⁷⁰

Instead, Potter and Ballinger likely took the case because of something much simpler—they genuinely believed that, under the law, Betsy was entitled to her freedom and the property, as articulated in David’s will. As Ballinger put it, Potter was interested in the case from the outset because he “believed [the will] ought to be sustained,”¹⁷¹ and Ballinger apparently felt the same way. Indeed, all their efforts seemed to flow from this basic view, and help account for the “strict and close attention” they gave “to her rights.”¹⁷² Several people acknowledged Potter’s “great interest” in her case, and some even remarked on the “zeal” with which he represented her.¹⁷³ Such descriptions are not the ones that would normally come to mind when thinking of this era. After all, in the vein of traditional legal history, men associated with the laws of slavery are almost uniformly the oppressors, devising ways to further the institution by denying the rights of the enslaved. But when we recast the inquiry away from the halls of the legislatures and the high courts, and examine how these laws played out on the local level, we find a surprising degree of flexibility and fluidity built into the bright lines of race and slavery.

Put differently, we might fairly conclude that Potter and Ballinger advocated as hard as they did on Betsy’s behalf, not because of ideological or economic reasons, but because Betsy was a neighbor and a companion. She was “an industrious inoffensive person,”¹⁷⁴ who “bore the very best character.”¹⁷⁵ Representing her did not require Potter and Ballinger to waver in their support for slavery, if only because they were confident that the institution was the best of all

170. See, e.g., BERTRAM WYATT-BROWN, *SOUTHERN HONOR: ETHICS AND BEHAVIOR IN THE OLD SOUTH* (1982) (describing antebellum moral standards in southern white society).

171. Transcript of Trial, *supra* note 1, at 165 (testimony of W.P. Ballinger).

172. *Id.* at 158 (testimony of Oscar Parish).

173. See *id.* at 154 (testimony of A.H. Cleveland); *id.* at 158 (testimony of Oscar Parish); *id.* at 161 (testimony of John Jones).

174. *Id.* at 154 (testimony of A.H. Cleveland).

175. *Id.* at 160 (testimony of Balderdice).

social conditions. But abstract notions about the proper place for blacks and whites do not always play out consistently in everyday life, and Potter and Ballinger likely saw Betsy as an individual, entitled to what belonged to her under the law. For her part, Betsy “always expressed the most exalted opinion of Mr. Potter,”¹⁷⁶ and no one ever “heard her make a complaint of him or any of her attorneys or their dealings towards her.”¹⁷⁷ Summed up with these simple words, Potter was “her champion and her friend.”¹⁷⁸

176. *Id.*

177. *Id.* at 158 (testimony of Oscar Parish)

178. Webster, 32 Tex. at 708.

