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Their Slavery Was Her Freedom: Racism and the Beginning of the End of Coverture

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Their Slavery Was Her Freedom: Racism and the Beginning of the End of Coverture

*Diane Klein**

I.	INTRODUCTION	106
II.	SLAVEOCRACY, COVERTURE, AND GIFTS AND TRUSTS OF ENSLAVED PEOPLE.....	109
A.	<i>A Note on Terminology: “Plantocracy” or “Slaveocracy”?</i>	110
B.	<i>Coverture and Creditors’ Rights</i>	112
C.	<i>Gifts and Trusts of Enslaved People</i>	113
D.	<i>The U.S. Supreme Court Validates Premarital Trusts of Enslaved People</i>	114
III.	MISSISSIPPI AND AMERICA’S FIRST MARRIED WOMEN’S PROPERTY ACT	116
A.	<i>Fisher v. Allen, 3 Miss. (2 Howard) 611 (Miss. 1837)</i>	116
B.	<i>Mississippi’s Act for the Protection and Preservation of the Rights of Married Women</i>	119
IV.	LESSONS STILL UNLEARNED: MEMORIALIZING SUFFRAGE	122

I. INTRODUCTION

There is a received narrative about women’s rights, and especially the quest for women’s formal legal equality in the United States (U.S.), that focuses primarily on the emergence of economic and political rights for women, especially wives. It begins with resistance to coverture and carries us through the Married Women’s Property Acts, suffrage, the Nineteenth Amendment, and beyond.

* Professor of Law, University of La Verne College of Law (2004–2020). Both the title and the idea for this Article are drawn from Stephanie Jones-Rogers’ book, *They Were Her Property*. See STEPHANIE E. JONES-ROGERS, *THEY WERE HER PROPERTY: WHITE WOMEN AS SLAVE OWNERS IN THE AMERICAN SOUTH* (2019). An earlier version of this Article was presented at the Women in Legal Education Section event at the 2020 Association of American Law Schools annual meeting, and I would like to thank Prof. Rona Kaufman, organizer, and Professors Nan Hunter, Leslie Jacobs, and Danaya Wright, sister panelists, for their presentations, and all the attendees at that event for their feedback.

There is also a now-familiar critique of that narrative, one that points out that the situation and experiences of American women of color, especially enslaved and formerly enslaved women of African descent, are frequently omitted from what is ostensibly feminist or “women’s” history. Often, these women’s experience is completely ignored; when included, it is frequently marginalized, just as (white) women’s experience was formerly left out of history itself.¹

The critique rightly reveals *exclusion*, and thus demands *inclusion*. Where generalizations about (unmodified) “women” do not apply to or include women of color, where (especially) celebratory and progressivist narratives about the improvement of “women’s” legal condition in America are not borne out by the lived experiences of non-white/BIPOC² women, history must be revised. This essential critique challenges us to think about how priorities have been and should be set in feminist movements and in historical accounts of those movements.

But this critique does not always go far enough. Nineteenth century legal feminism, nominally aimed at the expansion of women’s rights in the U.S., not only reflected but also actively furthered racism and white supremacy. Nineteenth century legal arrangements, including coverture, may have disfavored free white women vis-à-vis their white husbands, brothers, fathers, and sons—but the dismantling of coverture in the antebellum period only put more distance between Black and white women. The Married Women’s Property Acts and the early women’s suffrage laws, twin pillars of what is sometimes called “first wave” feminism, did not simply ignore or overlook the concerns of non-white women (generally without making that explicit). In the name of all women, these movements largely advanced the rights of free white women at the expense of Black women. But that is *not* how the story is typically told.

Consider how the most recent edition of the most widely used Property law textbook in the U.S. begins its description of the Married Women’s Property Acts: “Beginning with Mississippi in 1839,

1. There is a similar important critique made from the LGBTQ perspective, related to the exclusion of non-heterosexual women, which is beyond the scope of this Article. See Nan D. Hunter, *In Search of Equality for Women: From Suffrage to Civil Rights*, 59 DUQ. L. REV. 125 (2021).

2. This acronym stands for Black, Indigenous, and People of Color, and has been in use since about 2013. It is intended to reflect the various experiences and identities of non-white people. Because this Article includes discussion of both Black and Indigenous people, it is appropriate to employ it. See Sandra E. Garcia, *Where Did BIPOC Come From?*, N.Y. TIMES (June 17, 2020), <https://www.nytimes.com/article/what-is-bipoc.html>.

all common law property states had, by the end of the nineteenth century, enacted Married Women's Property Acts."³

Wait, what? *Mississippi? In 1839?* Though the authors glide right past it, the attentive reader is certain to ask herself how *that* happened. Antebellum Mississippi is hardly known as a bastion of progressive legal reform. But Mississippi was the first state to do this? Not Massachusetts, the home of Yankee individualism? Or the frontier territory of Wyoming, the first state where women had the right to vote?⁴ No, it was Mississippi.

The casebook (which has five male authors, none of them BIPOC) continues:

[t]hese statutes removed the disabilities of coverture and gave a married woman, like a single woman, control over all her property. Such property was her separate property, immune from her husband's debts. The wife also gained control of all her earnings outside the home.

The Married Women's Property Acts, prompted by a desire to protect a wife's property from her husband's creditors, as well as to grant her legal autonomy, did not give the wife full equality. Husband and wife were expected to play complementary roles. The husband, employed outside the home, remained head of the family and owed his wife a duty of support; his wife, mistress of the household and in charge of rearing the children, owed him domestic services. Although the wife was given control over her property, it was unlikely that—as an unpaid homemaker—she would have much of that commodity.⁵

3. JESSE DUKEMINIER ET AL., PROPERTY 385 (8th ed. 2014). The second Concise Edition of the same casebook omits to mention Mississippi, but says this:

In the 1800s, most common law property states enacted Married Women's Property Acts. These statutes gave a married woman, like a single woman, control over all her property The wife also gained control of all her earnings outside the home.

The Married Women's Property Acts did not give the wife full equality. The husband remained head of the family; the wife, although given control over her property, was unlikely, as an unpaid homemaker, to have much property.

JESSE DUKEMINIER ET AL., PROPERTY: CONCISE EDITION 268 (2d ed. 2017).

4. *Wyoming Legislators Write the First State Constitution to Grant Women the Vote*, HIST., <https://www.history.com/this-day-in-history/wyoming-legislators-write-the-first-state-constitution-to-grant-women-the-vote#:~:text=On%20September%2030%2C%201889%2C%20the,its%20female%20citizens%20to%20vote> (Sept. 28, 2020).

5. DUKEMINIER ET AL., PROPERTY, *supra* note 3, at 385. The second Concise Edition of the same casebook says this:

[i]n the 1800s, most common law property states enacted Married Women's Property Acts. These statutes gave a married woman, like a single woman, control over all her property The wife also gained control of all her earnings outside the home.

What that deracinated discussion completely neglects to mention is that the “property” Mississippi wives first won the right to control was property in enslaved human beings—especially fertile women of African descent. The value of enslaved labor and the offspring of enslaved people frequently made them the most attractive assets in the marital estate of an otherwise impecunious debtor—and the most fiercely defended by his propertied slave-owning wife. The nineteenth century scenario was more “Gone with the Wind”⁶ than “The Adventures of Ozzie and Harriet.”⁷ The women who lived and died in slavery would never be wives, because they were legally prohibited from marrying.⁸ Nor did they have control over their property or earnings, despite their single status—not because they were 1950s-style “unpaid homemakers” (though they were surely that, as well), but because they were lifelong hereditary slaves.

Whether coverture was respected, avoided, or dismantled, enslaved Black women were exploited. Under coverture, the protection of free white married women’s property in human beings was occasionally accomplished through creative trust arrangements. The first American Married Women’s Property Act was born from a desire to simplify that situation and improve it—but only for the free white married women it protected, not for the enslaved Black women under their ownership and control. Like so much of American law, the origin story of the Married Women’s Property Acts comes complete with a racist original sin.

II. SLAVEOCRACY, COVERTURE, AND GIFTS AND TRUSTS OF ENSLAVED PEOPLE

Antebellum property dispositions and estate plans in the American South reflected a political economy and regime of ownership that was both gendered and raced. Those aspects of marital property law encompassed by the doctrine called “coverture” radically

The Married Women’s Property Acts did not give the wife full equality. The husband remained head of the family; the wife, although given control over her property, was unlikely, as an unpaid homemaker, to have much property.

DUKEMINIER ET AL., PROPERTY: CONCISE EDITION, *supra* note 3, at 268.

6. The 1939 film *Gone with The Wind*, based on Margaret Mitchell’s book of the same name, is the (inflation-adjusted) highest-grossing film of all time. It is set in Civil War-era Georgia. Jennifer Schuessler, *The Long Battle Over ‘Gone with The Wind’*, N.Y. TIMES, <https://www.nytimes.com/2020/06/14/movies/gone-with-the-wind-battle.html> (June 15, 2020).

7. *The Adventures of Ozzie and Harriet*, Wikipedia, https://en.wikipedia.org/wiki/The_Adventures_of_Ozzie_and_Harriet (Oct. 22, 2020, 1:51 PM).

8. Darlene C. Goring, *The History of Slave Marriage in the United States*, 39 J. MARSHALL L. REV. 299, 335–36 nn.192–95 (2006).

disempowered women upon and during marriage. Astute planners employed traditional Anglo-American common-law devices, especially trusts known as “marriage settlements,” to protect marriage-eligible women in this unique legal context, where other women and men, especially fertile enslaved Black women, were a crucial component of the wealth of the wealthiest families. As historian Jennifer Morgan expresses it, “slaveowners supplemented the present value of enslaved persons with the speculative value of a woman’s reproductive potential”⁹ Early on, gifts of enslaved people to free women (daughters, wives, widows, and wives-to-be) were structured to avoid some of the undesirable consequences of coverture. Later came a more straightforward assertion of the free married woman’s property rights—including rights in other human beings.

A. *A Note on Terminology: “Plantocracy” or “Slaveocracy”?*

There is no single, widely accepted term for the racialized political and economic arrangement that prevailed in the antebellum Southern states of the U.S., whose distinctive feature was the large plantation with an enslaved labor force. Although the plantation is paradigmatic of the “old South,” it was hardly typical: nearly three-quarters of Southern white people had no property in enslaved people at all, and only about twelve percent of slaveholders enslaved more than twenty individuals.¹⁰ Wealth was extremely concentrated: more than ninety percent of all agricultural wealth was owned by slaveholders.¹¹ Two terms in use since the mid-nineteenth century to describe this are “plantocracy” and “slaveocracy.”

“Plantocracy” was first used in print in 1846 and occasionally thereafter, to mean “[a] dominant class or caste consisting of planters.”¹² It has been used by many leading American historians,¹³ including C. Vann Woodward in the mid-twentieth century,¹⁴ and has the benefit of sharing the etymological structure of “democracy,”

9. JENNIFER L. MORGAN, *LABORING WOMEN: REPRODUCTION AND GENDER IN NEW WORLD SLAVERY* 91 (Daniel K. Richter & Kathleen M. Brown eds., 2004).

10. Adrienne D. Davis, *The Private Law of Race and Sex: An Antebellum Perspective*, 51 *STAN. L. REV.* 221, 224 n.6 (1999) (citing ELIZABETH FOX-GENOVESE, *WITHIN THE PLANTATION HOUSEHOLD: BLACK AND WHITE WOMEN OF THE OLD SOUTH* 86 (1988); KENNETH M. STAMPP, *THE PECULIAR INSTITUTION: SLAVERY IN THE ANTE-BELLUM SOUTH* 27 (1956)).

11. PETER KOLCHIN, *AMERICAN SLAVERY: 1619–1877*, at 180 (1993).

12. 11 *Plantocracy*, *OXFORD ENG. DICTIONARY* (2d ed. 1989); see also *Plantocracy*, *MERRIAM-WEBSTER*, <https://www.merriam-webster.com/dictionary/plantocracy> (last visited Oct. 29, 2020).

13. See Davis, *supra* note 10, at 224 n.6.

14. Kimberlé Williams Crenshaw, *Race, Reform, and Retrenchment: Transformation and Legitimation in Antidiscrimination Law*, 101 *HARV. L. REV.* 1331, 1374 (1988) (citing C. VANN WOODWARD, *THE STRANGE CAREER OF JIM CROW* (1958)).

“aristocracy,” and similar terms, in identifying the ruling class in the word itself. As Adrienne Davis explained in her 1999 article, *The Private Law of Race and Sex: An Antebellum Perspective*, the term “describe[s] the southern political economy in which the mode of production, slavery, structured social and economic relationships.”¹⁵ It also builds in the idea that a plantation economy, in which the profitable cultivation of crops effectively requires a bound labor force, encourages distinctive political arrangements.¹⁶ However, the term itself omits any mention of slavery, and has generally been used more often to describe the West Indies than the U.S.¹⁷

“Slaveocracy” (with the occasional variant spelling “slavocracy”), defined as “[t]he domination of slave-holders; slave-holders collectively as a dominant or powerful class,”¹⁸ not only mentions slavery but was used from the beginning by abolitionists in the U.S. context.¹⁹ The term is also a few years older than “plantocracy.”²⁰ It was used by Hermann von Holst in his magisterial 1879 *Constitutional and Political History of the United States*, and has been used in the law reviews for more than one hundred years.²¹ Most recently, in 2019, constitutional scholar Paul Gowder described Frederick Douglass as knowing “that the slaveocracy would not follow the Constitution, at least not until they were forced to do so at

15. See Davis, *supra* note 10, at 224 n.6.

16. See, e.g., EDWARD E. BAPTIST, *THE HALF HAS NEVER BEEN TOLD: SLAVERY AND THE MAKING OF AMERICAN CAPITALISM* (2016); SVEN BECKERT, *EMPIRE OF COTTON: A GLOBAL HISTORY* (2014).

17. BECKERT, *supra* note 16; see also *Plantocracy*, LEXICO, <https://www.lexico.com/en/definition/plantocracy> (last visited July 19, 2020). See, e.g., Eleanor Marie Lawrence Brown, *On Black South Africans, Black Americans, and Black West Indians: Some Thoughts on We Want What's Ours*, 114 MICH. L. REV. 1037, 1057 (2016) (West Indies); Eleanor Marie Lawrence Brown, *How the U.S. Selected for a Black British Bourgeoisie*, 27 GEO. IMMIGR. L.J. 311, 337 (2013) (West Indies); Giselle Reid, *The Legacy of Colonialism: A Hindrance to Self-Determination*, 10 TOURO INT'L L. REV. 277, 284–85 (2000) (Jamaica).

18. 15 *Slaveocracy*, OXFORD ENG. DICTIONARY (2d ed. 2001) [hereinafter OED XV] (noting pedantically that the word is formed “with erroneous application” because of its structure).

19. *Id.* at 670 (“slavocracy”); “Slaveocracy” redirects to “slavocracy.” *Id.* at 688 (citing to an 1840 Illinois newspaper that stated hopefully, “The reign of the slaveocracy is hastening to a close”; an 1842 letter that referred to “Slaveocrats in Georgia”; and an 1848 *New York Express* article which was “[a]n exhortation to curb the slaveocracy”).

20. *Id.* at 670.

21. Lindsay Rogers, *Federal Interference with the Freedom of the Press*, 23 YALE L.J. 559, 559 n.2 (1914) (citing generally 2 H. VON HOLST, *THE CONSTITUTIONAL AND POLITICAL HISTORY OF THE UNITED STATES* (John J. Lalor trans., 1888), where the term appears more than sixty times); see also Max Lerner, *Constitution and Court as Symbols*, 46 YALE L.J. 1290, 1301 (1937) (Roger Taney, John C. Calhoun, and Thomas Benton are described as taking “the localist-slaveocracy side” of a debate about the role and meaning of the U.S. Constitution).

gunpoint.”²² Based on its more precise descriptiveness and its comparable provenance, “slaveocracy” will be used here, though the significance of a plantation economy must also be kept in mind.

B. *Coverture and Creditors’ Rights*

“Coverture” is the name given to the legal dimensions of the marriage relationship in the common law, especially for the wife, and more specifically, “the subordinating effects” of marriage on her “personhood and property.”²³ “Coverture held, most basically, that a husband’s legal identity covered that of the woman he married.”²⁴ This gave the husband tremendously broad powers over the property and economic activity of his wife, in life and death: the married woman could neither enter into contracts nor make a will.²⁵ Any real property she owned at marriage was placed entirely under his control and management;²⁶ personal property became his outright.²⁷ This institution was shockingly durable: although the world changed a great deal between the high Middle Ages and the Victorian era, in England, “[t]he main consequences of coverture at common law changed little from at least the twelfth century until the latter decades of the nineteenth century.”²⁸ To the extent that the American common law of marriage relied on British law—which it did, well into the nineteenth century—the situation in the U.S. was similar, although there was some variation between states (especially community property states), and protection for American wives’ property rights arrived somewhat sooner.²⁹

More specifically, coverture, in its American form, had some specific consequences for creditors’ rights. Property a woman owned premaritally became reachable by her husband’s creditors once they were married.³⁰ At common law, property inherited by a wife during the marriage also “could be seized and sold on execution by the creditors of the husband.”³¹ On occasion, an equity court would

22. Paul Gowder, *Reconstituting We the People: Frederick Douglass and Jürgen Habermas in Conversation*, 114 NW. U. L. Rev. 335, 400 (2019).

23. MARRIED WOMEN AND THE LAW: COVERTURE IN ENGLAND AND THE COMMON LAW WORLD 6 (Tim Stretton & Krista J. Kesselring eds., 2013).

24. *Id.* at 7.

25. *Id.* at 8.

26. *Id.*

27. *Id.*

28. *Id.* at 7.

29. LYNN DENNIS WARDLE ET AL., *FAMILY AND SUCCESSION LAW IN THE USA* (4th ed. 2018).

30. *E.C. Parks, & Co. v. Cushman*, 9 Vt. 320, 325 (Vt. 1837).

31. *Starr v. Hamilton*, 22 F. Cas. 1107, 1109 (D. Or. 1867) (No. 13,314) (citations omitted); see also *Brown v. His Creditors*, 17 La. Ann. 113 (La. 1865).

deviate from the strictest application of these principles, and make some provision for a wife and her children from an inheritance, as against the husband's creditors. For example, a Kentucky court did so in 1827, in *Elliott v. Waring*.³² But these were exceptions that proved the rule.

C. *Gifts and Trusts of Enslaved People*

Because of the way a plantation economy operates, the land is made valuable only when coupled with bound labor; crops like sugar, rice, and cotton could not profitably be grown without it.³³ As historian Jennifer Morgan explained, "ownership of land meant nothing without workers to cultivate it."³⁴ This fact, coupled with coverture, presented a planning challenge for the antebellum *paterfamilias*, who wished to provide appropriately both for sons, who could manage an estate, and for daughters, who, after marriage, could not—and might be subjected to the vagaries of a financially irresponsible or unlucky spouse.

For those with enough property to carry it out, the solution was to divide the property between the son(s), who received land and enslaved persons to work it, outright; and the daughter(s), who received enslaved people, whether outright or in trust, ideally including fertile enslaved women of childbearing age.³⁵ These enslaved people should not be thought of simply as unpaid domestic labor for her and her household: maids, cooks, or future wet nurses or nannies. They and their progeny, prospective and actual, were valued like livestock: to be sold if needed, rented out for profit, and capable of reproducing and creating greater wealth.³⁶ Even for those with less property, gifts of fertile enslaved women were especially significant. As Morgan puts it, "[o]nly through a black woman's body could a struggling slaveowner construct munificent bequests to family and friends."³⁷ Both lifetime and testamentary gifts followed this pattern—daughters endowed on birthdays, holidays, and,

32. 21 Ky. (5 T.B. Mon.) 338, 341 (Ky. 1827).

33. See WOODWARD, *supra* note 14, cited in Crenshaw, *supra* note 14, at 1374; see also MORGAN, *supra* note 9, at 168.

34. MORGAN, *supra* note 9, at 71.

35. *Id.* ("Land was customarily divided between sons, with the eldest receiving the land on which the family home stood. If the estate was large enough, both sons and daughters would receive slaves."); *id.* at 97–98 (describing the estate plans of Robert Gretton, Miles Braithwaite, and Phillip Lovell); *id.* at 101 (describing the estate plan of Arthur Hall); *id.* at 102 (describing the estate plan of James Goodbe).

36. Diane J. Klein, *Emancipation Un-Locke'd: Partus Sequitur Ventrem, Self-Ownership, and "No Middle State" in Maria v. Surbaugh*, 20 U. MD. L.J. RACE, RELIGION, GENDER & CLASS 73, 80–82 (2020).

37. MORGAN, *supra* note 9, at 92.

especially, at marriage, with human property, often in trust for their benefit.

An example of such a plan was the one used by Richard Harris of “Carolina,”³⁸ who died in 1711 (a year before the colony was divided into North Carolina and South Carolina).³⁹ His moderately-sized estate included land, eight enslaved people, and some thirty head of cattle.⁴⁰ His eldest son received the land, the house, and two enslaved people (“Pompey, Catharina, and ‘her increase”).⁴¹ His daughter, Anne, received “one slave boy named Jack and a slave girl [sic] named Flora and her increase and ten cows and calves and their increase.”⁴² His other daughters received similar bequests.⁴³ Here, in Colonial America, the propertied testator has made a conventional plan. The primogenitary impulse is expressed by leaving the land (including the plantation house) to a son, generally the eldest son, together with an enslaved workforce necessary to make it valuable; and by endowing a daughter or daughters with enslaved people, especially enslaved women of childbearing age and potential, persons whose slavery was, quite literally, her freedom.

D. The U.S. Supreme Court Validates Premarital Trusts of Enslaved People

Richard Harris’s 1711 plan, and others like it, gave enslaved people to daughters outright.⁴⁴ Should Anne Harris marry, her husband would control that property, and his creditors might seize it. As time went by, planning became more sophisticated. As historian Walter Edgar described the situation in South Carolina, “[t]he families of wealthy women sometimes resorted to marriage settlements to protect the property and interests of their womenfolk from unscrupulous spouses.”⁴⁵ Under one type of settlement, “a bride and her male relatives established a trust that was administered in her interests by male kinfolk” (as trustees).⁴⁶ “So numerous did these marriage settlements become that the secretary of the province had to create a separate record group for them.”⁴⁷

38. *Id.* at 91.

39. Robert J. Cain, *Carolinas, Separation of*, ENCYC. OF N.C. (William S. Powell ed., 2006), <https://www.ncpedia.org/carolinas-separation>.

40. MORGAN, *supra* note 9, at 91.

41. *Id.*

42. *Id.*

43. *Id.*

44. *Id.*

45. WALTER EDGAR, *SOUTH CAROLINA: A HISTORY 168* (1998).

46. *Id.*

47. *Id.*

In 1809, in *Pierce v. Turner*, the U.S. Supreme Court validated such a trust of enslaved people for the benefit of a married woman against the claims of her husband's creditors, notwithstanding a defect in recordation.⁴⁸

Before her marriage, Rebecca Kenner of Virginia owned both land and enslaved people.⁴⁹ On February 14, 1798, she and her fiancé Charles Turner entered into an early version of a “prenup”: she conveyed her property into a trust, for the benefit of the two of them for their joint lives, then to the survivor for life, and then to her (not his or their) heirs.⁵⁰ As a result, Charles would never have more than a life estate in the property. Both of them executed the conveyance.⁵¹ They married within the next few weeks.⁵² However, the deed was never fully executed and recorded during his lifetime, as Virginia law required.⁵³ They lived in Alexandria until “the autumn of 1801, when they removed into the county of Northumberland,” where the land was located.⁵⁴ He died in December of 1802,⁵⁵ and was declared intestate in February 1803.⁵⁶ In the autumn of that year the widowed Rebecca returned to Alexandria, bringing enslaved people with her.⁵⁷ The entirety of Turner's estate, worth \$4,631.72, was distributed to his creditors—but some debt remained.⁵⁸ As the court expressed it, “Turner died insolvent, unless the said slaves are charged with his debts.”⁵⁹ Are they to be so charged? The U.S. Supreme Court said no, even while acknowledging, “[t]hat creditors of the husband, or purchasers from him, may be injured by the construction . . . but it is not for this tribunal to afford them relief.”⁶⁰

Naturally, in the years following *Pierce*, such marriage settlements became even more common.⁶¹ The effect was at least a

48. 9 U.S. (5 Cranch) 154, 164 (1809).

49. *Id.* at 165.

50. *Id.* at 164–65.

51. *Id.* at 154.

52. *Id.* at 155.

53. *Id.*

54. *Id.*

55. *Id.*

56. *Id.* at 156.

57. *Id.*

58. *Id.*

59. *Id.*

60. *Id.* at 167.

61. *See, e.g.*, *Ward v. Amory*, 29 F. Cas. 162 (C.C.D. Mass. 1853) (No. 17,146) (instructing trustees to create a trust for daughters during coverture); *Mitchell v. Moore*, 57 Va. (16 Gratt.) 275, 275 (Va. 1861) (creating a trust of engaged woman's property with her brother as trustee); *Land v. Jeffries*, 26 Va. (5 Rand.) 211, 211 (1827) (validating a trust created just a few minutes before the marriage).

limited avoidance of coverture for women like Rebecca—but not, of course, any benefit to the enslaved persons.

III. MISSISSIPPI AND AMERICA'S FIRST MARRIED WOMEN'S PROPERTY ACT

The ongoing attempt to protect the property, and especially the enslaved human property, of free married women leads directly to the case that gave rise to the first Married Women's Property Act in the U.S. Notably, the married woman in question, despite being descended from three British grandparents, was an indigenous Chickasaw woman in the eyes of both the tribe and Mississippi law, and Chickasaw marriage law turns out to be central to the case.

A. *Fisher v. Allen*, 3 Miss. (2 Howard) 611 (Miss. 1837)

James Allen, the debtor in *Fisher v. Allen*, was married to a woman named Elizabeth (“Betsy”) Love.⁶² Although she is not a party, the case cannot be properly understood without knowing who she is. Although of predominantly European descent, Elizabeth Love's family tree had deep roots in the Chickasaw nation. Her mother, Sally Colbert, was the child of James Logan Colbert, a Scottish trader who first settled in Alabama in 1729.⁶³ Logan, thrice married, fathered eight children, of whom Sally was one.⁶⁴ Elizabeth's father, Thomas Love, was “a British Loyalist who fled to the Chickasaw Nation after Britain's defeat in the American [Revolution]”⁶⁵ Although Chickasaw-U.S. relations were normalized in the Treaty of Hopewell in 1786,⁶⁶ the Chickasaw had allied with the British during the Revolutionary War.⁶⁷ When Love married Sally, he joined this leading mixed-heritage Chickasaw family.⁶⁸ Thomas and Sally had ten children, one of whom was Elizabeth Love, born around 1790.⁶⁹ Thus, although Elizabeth had just one Chickasaw grandparent (Sally's mother), she and her siblings, like

62. *Fisher v. Allen*, 3 Miss. (2 Howard) 611 (Miss. 1837). See also Robert Gilmer, *Chickasaws, Tribal Laws, and the Mississippi Married Women's Property Act of 1839*, 68 J. MISS. HIST. 131, 132–33 (2006).

63. Phillip Knecht, *The Chickasaw Cession*, HILL COUNTRY HIST., <https://hillcountryhistory.org/chickasawcession/> (last visited Oct. 30, 2020).

64. Gilmer, *supra* note 62, at 138.

65. *Id.* at 132.

66. Treaty of Hopewell, Choctaw-U.S., Jan. 3, 1786, 7 Stat. 21.

67. Knecht, *supra* note 63.

68. Gilmer, *supra* note 62, at 138.

69. Photograph of the Grave of Elizabeth “Betsy” Love Allen, in FIND A GRAVE (Aug. 6, 2009), <https://www.findagrave.com/memorial/40350133/elizabeth-allen>. Note that her gravestone mistakenly identifies her as the wife of “John” Allen.

her mother and her maternal aunts and uncles, were all members of the Chickasaw tribe, which used matrilineal descent for purposes of tribal membership.⁷⁰

The Colbert and Love families were prominent in the Chickasaw Nation and in Chickasaw-U.S. relations for decades prior to this case. At least one historian has argued that the Colberts effectively took over the Chickasaw Nation, politically and economically, early in the nineteenth century.⁷¹ Although that may overstate matters, they were surely a leading family, and they were plantation slaveholders.⁷² They remained important for decades: George Colbert and Benjamin Love were part of the Chickasaw delegation that signed the 1834 supplemental treaty to the Treaty of Pontotoc Creek, which resulted in the “near total removal of Chickasaw Indians west of the Mississippi River and the loss of the Chickasaw homelands.”⁷³

Betsy Love and James Allen lived on Chickasaw Nation land that was included in Monroe County, Mississippi,⁷⁴ and they were married there.⁷⁵ Betsy Love was a wealthy woman. In 1829, she gave away twenty-five enslaved people to her ten children.⁷⁶ Only a handful of Chickasaw tribal members received more than she did when their land was sold in 1836 as part of the removal process, and when she died the next year, her estate included twelve enslaved people.⁷⁷ In the 1829 distribution, Betsy’s younger daughter Susan received an enslaved boy, Toney.⁷⁸

The suit that would become *Fisher v. Allen* has its origins in a dubious land deal made by Allen. Long before the case was filed, Allen agreed to sell a tract of land on the Duck River in the Appalachian Mountains (Tennessee) to Alexander Malcolm.⁷⁹ The price was five thousand pounds of North Carolina currency—there was not yet a national currency.⁸⁰ Malcolm paid, but Allen never deeded the land to him.⁸¹ Allen vigorously opposed government efforts in the 1820s to reach a land deal with the Chickasaw in Mississippi

70. Gilmer, *supra* note 62, at 131; *Fisher v. Allen*, 3 Miss. (2 Howard) 611, 615 (Miss. 1837).

71. *See generally* ARRELL M. GIBSON, *THE CHICKASAWS* (1971).

72. *Id.* at 99, 150.

73. Knecht, *supra* note 63.

74. *Fisher*, 3 Miss. (2 Howard) at 612.

75. *Id.*

76. *Id.* at 615; Gilmer, *supra* note 62, at 142.

77. Gilmer, *supra* note 62, at 142.

78. *Fisher*, 3 Miss. (2 Howard) at 613–15.

79. Gilmer, *supra* note 62, at 132.

80. *A History of American Currency*, AM. NUMISMATIC SOC’Y (2016), <http://numismatic.org/a-history-of-american-currency/>.

81. Gilmer, *supra* note 62, at 132.

because it would potentially make him liable to suit.⁸² While Allen resided in Chickasaw territory, however, Malcolm had no remedy against him—until 1830, when Mississippi law changed.⁸³ Malcolm promptly sued, and Allen hired attorney John Fisher to represent him.⁸⁴ Allen promised to pay Fisher \$200—and did not.⁸⁵ *Fisher v. Allen* is a suit for attorney's fees.⁸⁶

In Fisher's suit against Allen, in May 1831, Fisher initially prevailed (Allen did not appear), and was awarded \$208.08 (plus \$23.24 in costs).⁸⁷ Fisher sought to force the sale of Toney to satisfy the debt.⁸⁸ The \$650 bond posted by Susan's brother George, and her great-uncle James Colbert (Sally's brother), shows that Toney's value considerably exceeded what Allen owed Fisher.⁸⁹ Susan (a minor, represented by her "next friend," her older brother, George) argued, ultimately successfully, that Toney had been her mother Betsy's separate property; that Betsy had given Toney to Susan; and that Toney was therefore unreachable for Allen's debt to Fisher.⁹⁰ Benjamin Love was one of the witnesses who testified, most likely about Chickasaw law and marital property.⁹¹

As some commentators have noted, the Mississippi court rightly saw this as a choice of law case. While Mississippi law made the property of a Mississippi wife available to her husband's creditors, Chickasaw tribal law and custom did not—it permitted married women to own and transfer their premarital property and gave no right in it to their husbands upon marriage.⁹² The transfer to Susan took place in 1829, Mississippi law (including marriage law) was not "extended over the Indians" until January 1830, and that law is not retroactive.⁹³ The 1830 law specifically validated marriages "entered into by virtue of any custom or usage" of the Chickasaw,⁹⁴ together with applicable marital property laws.⁹⁵ Susan "wins,"

82. *Id.* at 140.

83. *Id.* at 132–33.

84. *Id.* at 133.

85. *Id.*

86. *Id.*

87. *Id.* at 134.

88. *Id.*

89. Robert Gilmer, Chickasaws, Tribal Laws, and the Mississippi Married Women's Property Act (Nov. 21, 2003) (senior thesis, University of North Carolina at Asheville) (on file with author).

90. *Fisher v. Allen*, 3 Miss. (2 Howard) 611, 614 (Miss. 1837).

91. Gilmer, *supra* note 62, at 134.

92. *Fisher*, 3 Miss. (2 Howard) at 615.

93. *Id.*

94. *Id.* at 613.

95. *Id.* at 613–14.

Fisher loses, Allen never pays his debt—and Toney remains enslaved.

Are we then to see tribal law as more enlightened than common law, simply because it respects the rights of married women as property owners, with no regard for the “property” in question?⁹⁶ The Chickasaw law deferred to here, no less than American law at the time, permitted hereditary chattel slavery of persons of African descent, the transfer and sale of these persons, and their treatment as assets.⁹⁷ Any moral superiority Chickasaw law might enjoy over Mississippi law with respect to the rights of free wives must surely be tempered by a clear-eyed assessment of its complicity and defense of slavery. Both served the slaveocracy.

B. Mississippi’s Act for the Protection and Preservation of the Rights of Married Women

In the aftermath of this case, the Mississippi legislature changed the law. In a nutshell, as historian Robert Gilmer explains:

Mississippi lawmakers, like Senator T.B.J. Hadley, hurt by the Panic of 1837, saw an opportunity to protect their own interests by using part of the Chickasaw tribal law found in the *Fisher v. Allen* decision and applying it to all married women in Mississippi by the passage of the Married Women’s Property Act of 1839.⁹⁸

The law that took effect on February 15, 1839, called “An Act for the Protection and Preservation of the Rights of Married Women,” consisted of five short sections, four of which explicitly address property in enslaved people.⁹⁹ It is worth quoting nearly in its entirety, which makes its emphasis on enslaved human property quite apparent:

96. See, e.g., 1 J.F.H. CLAIBORNE, MISSISSIPPI, AS A PROVINCE, TERRITORY AND STATE, WITH BIOGRAPHICAL NOTICES OF EMINENT CITIZENS 475 (1880) (“It is singular that an uncivilized tribe of Indians in the interior of Mississippi, in this respect, have anticipated the action of more enlightened communities, in a reform of the common law, now acknowledged to be not only just and proper, but in strict conformity to the highest principles of equity.”); Gilmer, *supra* note 62; *The Chickasaw Who Changed the Law*, in UNCONQUERED AND UNCONQUERABLE: PART I OF MISSISSIPPI’S INDIANS 64 (Aug. 18, 2016) https://is-suu.com/meekschool/docs/chickasawnation_1_2016_web/64.

97. Nor is this an isolated incident. See BARBARA KRAUTHAMER, BLACK SLAVES, INDIAN MASTERS: SLAVERY, EMANCIPATION, AND CITIZENSHIP IN THE NATIVE AMERICAN SOUTH (2013).

98. Gilmer, *supra* note 62, at 148.

99. A failed proposed amendment also addressed enslaved people specifically, requiring their registration as an anti-fraud measure. *Id.* at 136.

§1. *Of what Wife may be Separately Possessed.* Any married woman may become seized or possessed of any property, real or personal, by direct bequest, demise, gift, purchase, or distribution, in her own name and as of her own property: *Provided*, The same does not come from her husband after coverture.

§2. *To Hold Slaves Possessed at Marriage.* Hereafter when any woman possessed of a property in slaves, shall marry, her property in such slaves and their natural increase shall continue to her, notwithstanding her coverture: and she shall have, hold, and possess the same as her separate property, exempt from any liability for the debts or contracts of the husband.

§3. *May take Slaves by Conveyance, Gift, &c.* When any woman, during coverture, shall become entitled to, or possessed of, slaves by conveyance, gift, inheritance, distribution, or otherwise, such slaves, together with their natural increase, shall inure and belong to the wife, in like manner as is above provided as to slaves which she may possess at the time of the marriage.

§4. *Husband's Control; Suit by Him and Her; Descent of Slaves.* The control and management of all such slaves, the direction of their labor, and the receipt of the productions thereof, shall remain to the husband agreeably to the laws heretofore in force. All suits to recover the property or possession of such slaves, shall be prosecuted or defended, as the case may be, in the joint names of the husband and wife. In case of the death of the wife, such slaves descend and go to the children of her and her said husband, jointly begotten; and in case there shall be no child born of the wife during such her coverture, then such slaves shall descend and go to the husband and to his heirs

§5. *Sale of her Property by Joint Deed.* The slaves owned by a femme covert under the provisions of this act, may be sold by the joint deed of the husband and wife, executed, proved, and recorded, agreeably to the laws now in force, in regard to the conveyance of real estate of femme coverts [sic], and not otherwise¹⁰⁰

100. A. HUTCHINSON, CODE OF MISSISSIPPI: BEING AN ANALYTICAL COMPILATION OF THE PUBLIC AND GENERAL STATUTES OF THE TERRITORY AND STATE, WITH TABULAR REFERENCES TO THE LOCAL AND PRIVATE ACTS, FROM 1798 TO 1848 (1848). An Act for the Protection and

The connection between *Fisher v. Allen* and the subsequent passage of the Act is widely noted.¹⁰¹ Neither the case nor the Act can be understood in isolation from the history of Mississippi in the 1830s, and specifically, of the State's relationship with the Chickasaw Nation.¹⁰² The Act coincided with the removal of indigenous people from Chickasaw land and facilitated it. "Chickasaw matrilineal customs dictated that women were the primary landholders within the Chickasaw Nation, and because of this tradition, Mississippians needed them to be able to consent to sell their lands on their own, without first receiving permission from a male relative or tribal leader."¹⁰³

The Act was introduced by Senator Thomas B.J. Hadley,¹⁰⁴ and some scholars have focused on the activities of Piety Smith Hadley, his wife, in insuring its passage.¹⁰⁵ But Mrs. Hadley was not just a legislator's wife who ran a boardinghouse in Jackson, Mississippi.¹⁰⁶ She was also the beneficiary of a testamentary trust including enslaved people, and no doubt eager to protect her property in light of her husband Thomas's financial difficulties.¹⁰⁷ Those who opposed the Act were acutely aware of the risks to creditors and the opportunity for fraud.¹⁰⁸ But they did not prevail.

Like many legal reforms, it was overdetermined. But whether Mississippi's "Act for the Protection and Preservation of the Rights of Married Women" is credited primarily to the influence of the acquisitive, ambitious mixed-indigenous Love-Colbert family, or to the connivance of Piety Hadley and her husband, what cannot be denied is that the primary beneficiaries of the law were free married women whose property consisted largely of enslaved Black women and the enslaved people born to them. We cannot and should not accept any version of legal history that omits to mention

Preservation of the Rights and Property of Married Women, ch. 46, 1838–1839 Miss. Laws 72 (current version at MISS. CODE ANN. § 93-3-1).

101. Judith T. Younger, *Marital Regimes: A Story of Compromise and Demoralization, Together with Criticism and Suggestions for Reform*, 67 CORNELL L. REV. 45, 60–61 (1981).

102. Max Grivno, *Antebellum Mississippi*, MISS. HIST. NOW (July 2015), <http://www.mshistorynow.mdah.ms.gov/articles/395/antebellum-mississippi>.

103. Gilmer, *supra* note 89.

104. Gilmer, *supra* note 62, at 136.

105. Elizabeth Gaspar Brown, *Husband and Wife: Memorandum on the Mississippi Women's Law of 1839*, 42 MICH. L. REV. 1110, 1113 (1944); Sandra Moncrief, *The Mississippi Married Women's Property Act of 1839*, HANCOCK CNTY. HIST. SOC'Y., <http://www.hancockcountyhistoricalsociety.com/vignettes/the-mississippi-married-womens-property-act-of-1839/> (last visited Oct. 31, 2020).

106. Brown, *supra* note 105, at 1113; Moncrief, *supra* note 105.

107. Brown, *supra* note 105, at 1113; Moncrief, *supra* note 105.

108. Gilmer, *supra* note 62, at 146.

this,¹⁰⁹ and instead celebrates the case or the Act that followed as an uncomplicated victory for “women’s” rights.

IV. LESSONS STILL UNLEARNED: MEMORIALIZING SUFFRAGE

Unlike the story of *Fisher v. Allen* and the Mississippi Act, the story of racism in the women’s suffrage movement has frequently and compellingly been told.¹¹⁰ The history of the women’s suffrage movement included explicit racism on the part of leaders of the movement and in the appeals made for it.¹¹¹ The Nineteenth Amendment was passed at the very same time as the “Red Summer” of race massacres in the U.S.,¹¹² and that is no coincidence: both can be seen as assertions of white supremacy. Black women, though not explicitly excluded from the coverage of the Nineteenth Amendment, were subjected to the same violent voter suppression as Black men. This is widely known. And yet, when the time came to memorialize women’s suffrage for its centennial year, the very same mistakes of exclusion and subordination recurred.

In all of New York City, just five of 150 statues are of real women.¹¹³ None of the twenty-three statues of historical figures in Central Park, the third most visited tourist attraction in the world,¹¹⁴ honors a real woman.¹¹⁵ An all-volunteer group calling

109. See, e.g., Bernie Jones, *Revisiting the Married Women’s Property Acts: Recapturing Protection in the Face of Equality*, 22 AM. U. J. GENDER SOC. POL’Y & L. 91 (2013) (describing the history of the Married Women’s Property Act without mentioning Mississippi, slavery, or *Fisher v. Allen*).

110. See, e.g., ANGELA Y. DAVIS, WOMEN, RACE & CLASS 70–86 (1981); FAYE E. DUDDEN, FIGHTING CHANCE: THE STRUGGLE OVER WOMAN SUFFRAGE AND BLACK SUFFRAGE IN RECONSTRUCTION AMERICA 3 (2011); ELLEN CAROL DUBOIS, FEMINISM AND SUFFRAGE: THE EMERGENCE OF AN INDEPENDENT WOMEN’S MOVEMENT IN AMERICA 1848–1869, at 95–96, 100, 110 (1978); THE ELIZABETH CADY STANTON–SUSAN B. ANTHONY READER: CORRESPONDENCE, WRITING, SPEECHES 120 (Ellen Carol DuBois ed., 1981). See generally LAURA E. FREE, SUFFRAGE RECONSTRUCTED: GENDER, RACE, AND VOTING RIGHTS IN THE CIVIL WAR ERA (2020); LORI D. GINZBERG, ELIZABETH CADY STANTON: AN AMERICAN LIFE (2009); ROSALYN TERBORGH-PENN, AFRICAN AMERICAN WOMEN IN THE STRUGGLE FOR THE VOTE, 1850–1920 (1998).

111. See sources cited *supra* note 111.

112. Richard Wormser, *Red Summer: 1919*, PBS, https://www.thirteen.org/wnet/jimcrow/stories_events_red.html (last visited Oct. 31, 2020).

113. Sofia Quaglia, *The U.S. Has Fewer Than 400 Statues of Women—But That’s Changing*, QUARTZ (Oct. 23, 2019), <https://qz.com/1732974/new-york-citys-central-park-will-get-its-first-statue-of-women/>.

114. *Central Park Is Third Most Visited Tourist Attraction in the World*, CENTRALPARK.COM, <https://www.centralpark.com/news/central-park-third-visited-tourist-attraction-world/#:~:text=Central%20Park%20came%20in%20third,receives%2039.2%20million%20visitors%20annually> (last visited Oct. 31, 2020).

115. Jeanne Gutierrez & Nicole Mahoney, “Breaking the Bronze Ceiling”: The Elizabeth Cady Stanton and Susan B. Anthony Woman Suffrage Movement Monument, N.Y. HIST. SOC’Y MUSEUM & LIBR.: WOMEN CTR. (July 24, 2018),

itself “Monumental Women” was founded in 2014, with the goal of erecting a monument to women’s suffrage in Central Park in time for the 2020 centennial of the ratification of the Nineteenth Amendment.¹¹⁶ After years of fundraising and a design contest, their memorial to founding suffragettes Elizabeth Cady Stanton, Susan B. Anthony, and Sojourner Truth, paid for by donations from, among others, the Girl Scouts of Greater New York,¹¹⁷ was unveiled on August 26, 2020.¹¹⁸

But what has already been completely scrubbed from Monumental Women’s website is that their initial proposal included Stanton and Anthony, alone—Stanton, who said about Black male suffrage, “it becomes a serious question whether we had better stand aside and [let] ‘Sambo’ walk into the kingdom first,”¹¹⁹ and Anthony, who once said of the Fifteenth Amendment, “[I will] cut off [this] right arm [of mine] before [I will] ever work for or demand the ballot for the Negro and not the woman.”¹²⁰ The group’s legal name is the Elizabeth Cady Stanton and Susan B. Anthony Statue Fund, Inc.¹²¹ Nor does the site’s page mention that the original commission was for a monument to those two women only (it was not the winning sculptor Meredith Bergmann’s choice).¹²² Once unveiled, the original design encountered resistance, from Gloria Steinem and others,¹²³ resulting in its redesign and the inclusion of Sojourner Truth.¹²⁴ “Ain’t I a Woman?,” indeed.¹²⁵

<http://womenatthecenter.nyhistory.org/breaking-the-bronze-ceiling/>; see also MONUMENTAL WOMEN, monumentalwomen.org (last visited Nov. 12, 2020).

116. MONUMENTAL WOMEN, *supra* note 115.

117. *Finalists for Central Park Women’s Suffrage Monument Unveiled*, GIRL SCOUTS OF GREATER N.Y. (Mar. 19, 2018), https://www.girlscoutsnyc.org/en/our-council/about-gsgny/news/2018/finalists_for_centra.html.

118. Karen Matthews & Ted Shaffrey, *Central Park Monument Honors Women’s Rights Pioneers*, AP NEWS (Aug. 26, 2020), <https://apnews.com/article/ab166fb617d1d73e0930f0e6f2a9af78>.

119. DAVIS, *supra* note 110, at 70.

120. KAREN BERGER MORELLO, *THE INVISIBLE BAR: THE WOMAN LAWYER IN AMERICA: 1638 TO PRESENT* 143 (1986).

121. MONUMENTAL WOMEN, *supra* note 115.

122. Gutierrez & Mahoney, *supra* note 115.

123. Ginia Bellafante, *Is a Planned Monument to Women’s Rights Racist?*, N.Y. TIMES (Jan. 17, 2019), <https://www.nytimes.com/2019/01/17/nyregion/is-a-planned-monument-to-womens-rights-racist.html>.

124. Valentina Di Liscia, *Monument to Susan B. Anthony, Elizabeth Cady Stanton, and Sojourner Truth Unveiled in Central Park*, HYPERALLERGIC (Aug. 27, 2020), <https://hyperallergic.com/584676/monument-to-susan-b-anthony-elizabeth-cady-stanton-and-sojourner-truth-unveiled-in-central-park/>.

125. *Sojourner Truth: Ain’t I a Woman?*, U.S. NAT’L PARK SERV., <https://www.nps.gov/articles/sojourner-truth.htm> (Nov. 17, 2017).

Whatever the benefits and limitations of bronze statues in Central Park as a way to memorialize women's history,¹²⁶ one cannot help but wonder how, in the current decade, in New York City, a monument to women's suffrage was designed and approved with no thought about whether it uncritically memorialized and thus perpetuated a white supremacist narrative about the struggle to win the franchise for women. This is white supremacy as an intellectual disease, slaveocracy as epistemology, shaping what we know, allow ourselves to know, and hold ourselves responsible for knowing or failing to know. It clearly continues to ail us.

From where we are now, we cannot change some of the shameful aspects of early legal feminism in America, which must be understood predominantly as an attempt to elevate and improve the position of free white women, married or single, to that enjoyed by their free white brothers, fathers, husbands, and sons. These efforts were not just radically insufficient and under-inclusive. They actively perpetuated the subordination of enslaved and formerly enslaved Black women. Whether from blindness, malice, or greed, whichever aspects of slaveocracy and white supremacy were activated, they cannot be expunged from our past. What we can and must do, however, is tell the fuller truth about that past now.

126. Diane Klein, *When Flesh and Blood Meet Bronze and Marble*, MEDIUM (July 6, 2020), <https://medium.com/@dianeklein/when-flesh-and-blood-meet-bronze-and-marble-47f05cee1292>.