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RACE, SEX, AND LAW:

Miscegenation in Tennessee

By Roger D. Hardaway*

Miscegenation is "the intermarrying, cohabiting, or interbreeding of persons of different races." Statutes prohibiting the practice were in force for many years throughout the South as well as in other areas of the country. In 1931, for example, thirty states banned miscegenation in one form or another: fourteen states prohibited the intermarriage of Caucasians and "Mongolians" (Asians), four barred whites from marrying Native Americans, and all thirty outlawed marriages between whites and African Americans. In addition, a few states targeted marriages between races other than whites, but most were concerned only with attempting to control behavior that threatened the "purity" of the Caucasian race. Like most other Southern states, Tennessee banned interracial marriages from its beginning until the United States Supreme Court negated all miscegenation laws in 1967.[1]

The first move in a trend away from miscegenation laws occurred in 1948 when the California Supreme Court ruled that that state's law was unconstitutional. Legislatures in several states outside the South soon began repealing their statutes, action that was perhaps indicative of a growing public acceptance of a practice that could be prohibited but not ended. Also, as the civil rights movement became more organized and vocal, many legislators came to view miscegenation laws as archaic relics of a bygone era when the white majority felt compelled to control a black race they viewed as being inferior to and less moral than their own. Regardless of legislative motives in other parts of the country, however, Tennessee and other Southern states clung to their interracial marriage laws like they did to other anti-black statutes. When the United States Supreme Court made its 1967 ruling, sixteen states retained bans on miscegenation. These included the eleven states of the Confederacy plus Delaware, Kentucky, Missouri, West Virginia, and Oklahoma. Ironically, the only antebellum slave state to allow intermarriage at that time was Maryland, the jurisdiction that, in 1664, had enacted the first miscegenation statute in colonial America.[2]

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[1] *Ballentine's Law Dictionary* (Rochester, NY, 1969), 805; Homer H. Clark, Jr., *The Law of Domestic Relations in the United States* (St. Paul, 1968), 91; Chester G. Vernier, *American Family Laws* (Stanford University, CA, 1931), I: 204-209; and *Loving v. Commonwealth of Virginia*, 388 U.S. 1 (1967).

[2] *Perez v. Lippold*, 32 Cal. 2d 711 (1948); Clark, *The Law of Domestic Relations*, 91-94; Lerone Bennett, Jr., *Before the Mayflower: A History of Black America* (Chicago, 1969), 244-246, 271-272; and D[arrell] B. A[ddington], "Constitutional Law—Equal Protection—State Miscegenation Laws," *Tennessee Law Review* 34 (1967): 695.

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When the first westward-moving settlers crossed the mountains into what became the state of Tennessee, they were governed by North Carolina laws. This situation remained in effect until 1789 when the parent state ceded its western counties to the United States. During that time as well as that of the territorial period of the early 1790s and for several years after statehood,[3] Tennesseans lived under a 1741 North Carolina miscegenation statute that provided:

> If any white man or woman, being free, shall intermarry with an [American] Indian, negro, mustee, or mulatto[4] man or woman, or any person of mixed blood to the third generation, bond[5] or free, he shall by judgment of the county court, forfeit and pay the sum of fifty pounds to the use of the [local] parish [of the Church of England].[6]

The law also imposed a fifty-pound fine upon the minister, justice of the peace, or other person performing such an illegal marriage if he knew the racial makeup of the couple.[7] The 1741 North Carolina law was superseded in Tennessee in 1822. One change made by the new statute was to sanction Indian-white marriages; the only persons thereafter barred from marrying whites were African Americans, mustees, and mulattoes. While the law was silent as to the reason for the modification, at least two historical factors offer plausible explanations. First, Indians had been used as slaves in North Carolina when that colony's original prohibition against Indian-white marriages was enacted in 1715; this situation, however, did not exist in Tennessee in 1822. Second, Tennessee legislators may have reasoned like their Virginia counterparts did a century later when they approved marriages between

[3] Robert T. Shannon, editor and annotator, *The Constitution of the State of Tennessee* (Nashville, 1915), 520, note 11 to Article 11, Section 1: "By the provision in the constitution of 1796, . . . and by the cession act of North Carolina contained in Acts 1789, ch. 3, sec. 1, condition 8, all the laws in force in North Carolina at the time of the said cession act became effective in the ceded territory subsequently becoming the State of Tennessee, and what laws were in force in said territory at the time of the adoption of the constitution of 1796, became effective in Tennessee, except such as were inconsistent with the constitution."

[4] A mustee is an octoroon, a person of one-eighth black and seven-eighths white ancestry. A mulatto is a person half black and half white. Both terms, however, may be used to denote any person with mixed ancestry. This is obviously the meaning the Tennessee legislature had in mind when it used the words. "Mustee" was no doubt added to insure that people with less black heritage than one-half were excluded from marrying whites. See *Webster's New World Dictionary of American English* (New York, 1988), 891, 895.

[5] The word "bond" refers to slaves—those in bondage.

[6] Acts of North Carolina, 1741, chapter 1, section 13.

[7] Ibid., section 14.

whites and persons with some Indian blood. The Virginia legislature took this action, referred to by one historian as the "Pocahontas Exception," in 1924 because so many prominent "white" Virginians were part Indian. For some years preceding the 1822 Tennessee law, one of the principal routes west led from Virginia to Tennessee; many white Tennesseans in 1822 were transplanted Virginians who no doubt had or believed they had Indian ancestors.[8]

A second modification embodied in the 1822 statute was that thereafter violators would include not only those who had gone through a marriage ceremony but also couples who chose merely "to live, as man and wife" without attempting to marry. Thus, the new law punished miscegenous cohabitation and common law marriage in addition to formal interracial matrimony, which the statute decreed to be "null and void, to all intents and purposes." Moreover, the 1822 statute set the fine to be levied against those violating it at $500. Interestingly, however, the fine was not to be paid to the government but rather to the person bringing the charge against the guilty parties. The same fines and provisions for payment applied against the person knowingly performing an interracial marriage ceremony and the county clerk knowingly issuing the marriage license. These "bounty" stipulations were designed obviously to aid in the enforcement of the law by making it monetarily worthwhile for citizens to report their law-violating friends, neighbors, and relatives to the authorities. Finally, the law specified that those found violating it would, in addition to being subject to the $500 fines, be "liable to be indicted and punished at the discretion of the court." The manner and severity of that potential penalty is, however, not stated in the statute.[9]

The Tennessee Supreme Court examined the 1822 law in 1848 in the case of *State v. Brady* and concluded that the punishment provisions of it applied only to the white partner in an interracial relationship. Jesse Brady, a free mulatto, and Louisa Scott, who was white, were arrested for living together as husband and wife. Both were convicted after a trial. The supreme court decision notes that "judgment was pronounced upon the defendant Louisa Scott" by the trial judge but does not explain what that punishment was. The judge refused, however, to punish Brady, theorizing that a mulatto could not be properly convicted under the statute. The State of Tennessee appealed the trial judge's ruling as to Brady to the Tennessee Supreme Court.[10]

[8] Tennessee Acts of 1822, chapter 19, section 1; Sanford Winston, "Indian Slavery in the Carolina Region," *Journal of Negro History* 19 (1934): 438; Walter Wadlington, "The *Loving* Case: Virginia's Anti-Miscegenation Statute in Historical Perspective," *Virginia Law Review* 52 (1966): 1202-1203; Arrell Morgan Gibson, *The American Indian: Prehistory to the Present* (Lexington, MA, 1980), 238-239; and Ray Allen Billington and Martin Ridge, *Westward Expansion: A History of the American Frontier* (New York, 1982), 249, 319.

[9] Tennessee Acts of 1822, chapter 19. For a comment on cohabitation and living together "as man and wife," see note 44 below.

[10] 28 Tenn. 74 (1848).

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Justice Robert J. McKinney wrote the supreme court's opinion affirming the trial judge's decision. The charges against Brady were, therefore, dismissed. Noting that the 1822 statute contained "loose and careless phraseology," McKinney wrote for the court:

> We think it clear that the penalty and punishment in this statute do not apply to the negro, mulatto, or mustee[:] . . . the offence contemplated by the statute is obviously confined to . . . the white man or woman who 'shall presume to live with any negro, mustee, or mulatto man or woman as man and wife'; such white man or woman is alone regarded, and treated by the statute, as the 'offending party.'[11]

The court's members reasoned that to construe the statute differently would lead to "palpable absurdity" because if the Negro, mustee, or mulatto were required to pay the $500 fine this would apply also to slaves, who obviously did not have a way to raise that much money. "It cannot be supposed for a moment," McKinney wrote, "that the legislature had any such intention."[12]

Tennessee strengthened its prohibition against miscegenation in 1870 by adding a provision to its new constitution outlawing the already illegal practice and instructing the legislature to enact "appropriate" statutes to enforce the constitutional provision.[13] Why some Tennesseans believed that such drastic action was necessary reflects the uncertainty that existed in the state at that time as to the status of the recently emancipated slaves.

From 1865 to 1869 Tennessee was controlled by the so-called "radical" Republicans, led by the irrepressible Governor William G. "Parson" Brownlow. During his administration, the governor convinced the legislature to pass several laws expanding the rights of African Americans. These actions included giving black men the right to vote, hold office, sit on juries, and sue to enforce contracts. When "conservatives" regained control of the machinery of government in 1869, they immediately called for a constitutional convention to deal with, among other issues, the state's "Negro problem"; that is, they wanted to take away the rights that the radicals had granted to blacks.[14]

While the delegates to the 1870 constitutional convention disagreed among

[11] Ibid., 75.

[12] Ibid.

[13] Tennessee Constitution, Article XI, Section 14 (repealed, 1978).

[14] Robert E. Corlew, *Tennessee: A Short History* (Knoxville, 1981), 328-345; Alrutheus Ambush Taylor, *The Negro in Tennessee, 1865-1880* (Washington, 1941), 1-24, 56-57, 73-74, and 227-228; Paul H. Bergeron, Stephen V. Ash, and Jeanette Keith, *Tennesseans and Their History* (Knoxville, 1999), 178-179; and Lester C. Lamon, *Blacks in Tennessee, 1791-1970* (Knoxville, 1981), 46-47.

Members of the 1870 Tennessee Constitutional Convention included a provision in that document that prohibited intermarriage or cohabitation between whites and blacks. Courtesy of the Special Collections Library of the University of Tennessee, Knoxville.

themselves about several issues relating to the rights of African Americans, they were united in their belief that interracial marriage was not in Tennessee's public interest.[15] Thus they produced the following constitutional provision:

> *Intermarriage between whites and Negroes.*—The intermarriage of white persons with negroes, mulattos, or persons of mixed blood, descended from a negro to the third generation inclusive or their living together as man and wife in this State is prohibited.[16]

[15] *Journal of the Proceedings of the Convention of Delegates Elected by the People of Tennessee, To Amend, Revise, or Form and Make a New Constitution for the State* (Nashville, 1870), 32, 35, 116, 341. Interestingly, the new constitution preserved one basic right for black men—the right to vote. But most delegates believed that a poll tax, which the convention also approved, would curtail greatly the exercise of that right. All seventy-five delegates to the convention were white and almost all were conservatives. See Bergeron, Ash, and Keith, *Tennesseans and Their History*, 178-179; and Roger L. Hart, *Redeemers, Bourbons & Populists: Tennessee, 1870-1896* (Baton Rouge, 1975), 1-8.

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[18] *Journal of the House of Re*
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[19] Tennessee Acts of 1870,
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The new constitution was ratified by Tennessee voters in March 1870; the miscegenation ban remained a part of it until its repeal 108 years later.[17]

The Tennessee legislature wasted no time in complying with the new constitutional directive to enforce the miscegenation clause. Lawmakers approved a new statute by a combined vote in both houses of 72-3, and it went into effect in June 1870. The first section of the law defined the offense in language that parroted the constitutional provision almost word for word. The statute's second section outlined the penalty for those breaking it, providing:

> That the persons knowingly violating the provisions of the first section of this Act shall be deemed guilty of a felony, and upon conviction thereof shall undergo imprisonment in the penitentiary not less than one nor more than five years; and the Court may in the event of a conviction, on the recommendation of the Jury, substitute in lieu of imprisonment in the penitentiary, fine and imprisonment in the county jail.[18]

The new law differed in several respects from the statute it replaced. The most significant change wrought by the 1870 law was that it made miscegenation a felony which by definition is a crime punishable by at least one year in the penitentiary. All offenses less than felonies are misdemeanors; consequently, miscegenation in Tennessee prior to 1870 was merely a misdemeanor since no felony punishment was provided in either the 1741 or 1822 law. The harsher penalty enacted in 1870, like the constitutional amendment of the same year, reflected the anxiety white Tennesseans felt about controlling unwanted black behavior in the wake of emancipation and a period of radical Republican rule.[19]

The 1870 statute also included other changes in the crime of miscegenation in Tennessee. For one thing, it dropped the $500 bounty that was a part of the 1822 law. Moreover, it omitted the word "mustee" which was unnecessary because the phrase "persons of mixed blood, descended from a negro to the third generation inclusive," specified how much "Negro" blood a person had to have to be in violation of the law. Finally, the statute appeared to apply to all of those convicted under it—not just the white partners as the Tennessee Supreme Court had ruled in the

[17] Corlew, *Tennessee: A Short History*, 351; and "Certification of Election Returns for the Constitutional Ratification Referendum Election, March 7, 1978," provided to the author by the coordinator of elections, Tennessee State Department.

[18] *Journal of the House of Representatives of the State of Tennessee: 36th General Assembly* (Nashville, 1870), 385; *Senate Journal of the Adjourned Session of the Thirty-Sixth General Assembly of the State of Tennessee* (Nashville, 1871), 70; and Tennessee Acts of 1870, chapter 39. The vote on the bill was 54-2 in the House and 18-1 in the Senate.

[19] Tennessee Acts of 1870, chapter 39, section 2; and Henry Campbell Black, *Black's Law Dictionary* (St. Paul, 1968), 744, 1150.

Brady case. Trial judges now had the option either of sending violators to the penitentiary or of fining them and incarcerating them in the county jail. The legislature was evidently trying to prevent the black person involved in a prohibited relationship from relying on the inability-to-pay argument that the supreme court had mentioned in the *Brady* decision. Perhaps, too, the lawmakers were attempting to treat black offenders more harshly than white ones without saying so directly. The partner with money (most likely the white person) could be fined and put in the local jail while the partner without money (most likely the black person) could be sent to the state penitentiary.[20]

Tennessee's new miscegenation law was challenged in 1871 before the state's highest court in the case of *Lonas v. State*.[21] The defendant, identified in the court's opinion only as "Doc. Lonas," was black. He was convicted in the Knox County criminal court of living with, as husband and wife, Rebecca Teaster, who was white. Lonas was sentenced to two years and six months in prison. Upon appeal, the Tennessee supreme court affirmed the conviction. A large part of the decision of Justice John L. T. Sneed, writing for the court, was a defense of the states' rights doctrine. He reasoned that it was not the business of the federal government to interfere with the "internal polity" of a state to pass laws regulating marriage.[22]

Lonas attacked his conviction on the theory that the law prohibiting interracial marriage was unconstitutional in that it violated the Fourteenth Amendment of the U.S. Constitution. That amendment, he claimed, gave blacks the power to enforce civil contracts and entitled them to enjoy the same privileges and immunities as white citizens; but the Tennessee law denied him the right to make a contract that a white man could make—that is, the right to contract marriage with a white woman.[23]

Justice Sneed conceded that no state could make any law abridging the privileges and immunities of any U.S. citizen. He then listed several such privileges and immunities: citizens could pass through or reside in another state; they could own property there; they could not be subjected to higher taxes there than those imposed on citizens of that state; and they could seek justice in the courts of that state.[24] Then Sneed said:

> These are some of the privileges and immunities intended to be guaranteed to the citizen. . . . There are many others not herein enumerated, and upon which the [courts] will decide as the cases arise. . . . The right of intermarriage among the races is, in the

[20] Tennessee Acts of 1870, chapter 39.

[21] 50 Tenn. 287 (1871).

[22] Ibid., 300, 305, 312. The decision does not indicate what penalty, if any, the trial court assessed Teaster.

[23] Ibid., 288.

[24] Ibid., 306.

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[25] Ibid., 307.

[26] Ibid., 307-309.

[27] Ibid., 308.

[28] Ibid., 310-311.

[29] 50 Tenn. 266 (1871).

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Sneed further countered Lonas's contentions by declaring that although marriage is often referred to as a contract it is, instead, a status.[26] "Marriage is," Sneed noted, "a covenant between a man and a woman, in which they mutually promise cohabitation and a continual care to promote the comfort and happiness of each other."[27] Moreover, Sneed concluded, while each state has the obligation, through its police power, to pass those laws that are not prohibited by the U.S. Constitution and that will promote the general welfare of its citizens:

> We hold that such legislation is not, never has been, and never should be, prohibited to the States, in reference to the intermarriage of the races. . . . The laws of civilization demand that the races be kept apart in this country. The progress of either [race] does not depend upon an admixture of blood. . . . Any effort to intermerge the individuality of the races [would be] a calamity full of the saddest and gloomiest portent to the generations that are to come after us.[28]

Another 1871 Tennessee Supreme Court case construing the state's miscegenation statute is *Robeson v. State*.[29] Millie Robeson was white; her husband, James, was not. The Hamilton County court indicted them for violating the law, describing James Robeson—using the statutory language—as "being a negro, mulatto, or person of mixed blood to the third generation inclusive." That is all the information about him contained in the formal decision of the case.

The Robesons attacked the indictments as being defective because they did not charge, as required by section two of the act, that there was "knowledge by each of the status of the other." The supreme court, in an opinion by Justice Peter Turney, overturned the indictments because they were defectively drawn. The court did not, however, rule in the Robesons' favor. "The word 'knowingly,' used in [the statute], is not necessary to the indictment," Turney said, and ordered the Hamilton County court to reindict the offenders.[30] Thus the Tennessee Supreme Court interpreted the statute to eliminate knowledge as an element of the crime even though the legisla-

[25] Ibid., 307.

[26] Ibid., 307-309.

[27] Ibid., 308.

[28] Ibid., 310-311.

[29] 50 Tenn. 266 (1871).

[30] Ibid., 266-269. Turney served as governor of Tennessee from 1893 to 1897.

Peter Turney, later governor of Tennessee, ruled on two appeals of the state's miscegenation law when he was chief justice of the state supreme court. From J. S. Jones, *Biographical Album of Tennessee Governors* (Knoxville, 1903), courtesy of the Calvin M. McClung Historical Collection of the Knox County Public Library.

ture had obviously intended otherwise. Consequently, because of *Robeson v. State*, if two people married, both thinking that the other was white and one was later proved to have enough "black" blood to be within the statutory prohibition, both could be punished for violating the law.

The following year the Tennessee Supreme Court warded off another attack on the state's miscegenation law in the case of *State v. Bell*.[31] J. P. Bell was a white man who married "a woman of color" in Mississippi where such marriages were legal. The couple then moved to Tennessee where they continued to live as husband and wife. Mr. Bell was indicted under the miscegenation statute, but the Davidson County criminal court dismissed the case. The state appealed that decision.[32]

[31] 66 Tenn. 9 (1872).

[32] Ibid., 9. The case report does not say whether any punitive action was taken against Mrs. Bell. Mississippi's original miscegenation statute was repealed in 1870; the state did not again prohibit interracial marriages until 1880. See Code of Mississippi, 1880, section 1147; and Bennett, *Before the Mayflower*, 263.

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The supreme court's ruling was, as in the *Robeson* case, delivered by Justice Turney. He admitted, in the beginning, that a general rule of law holds "that a marriage good in the place where made . . . shall be good everywhere."[33] Nevertheless Turney, speaking for the court, declared that:

> Each State is sovereign, a government within, of, and for itself, with the inherent and reserved right to [make its own laws] for the good of its citizens, and cannot be subjected to the recognition of a fact or act contravening its public policy and against good morals, as lawful, because it was made or existed in a State having no prohibition against it.[34]

Moreover Turney noted, interracial marriages were "revolting . . . and unnatural."[35] Consequently, the supreme court reversed the judgment of the lower court and returned Bell to Davidson County authorities for trial.

The final reported decision dealing with Tennessee's miscegenation law is *Carter v. Montgomery*,[36] an 1875 chancery court case. Unlike the others, however, this was not a criminal matter but was concerned with the disposition of property. The disputed land had been owned by Myra Thomas, a white woman, when she married James M. Garrett. Garrett subsequently killed her during an argument. Thomas's heirs claimed that they were entitled to the property on the theory that her marriage to Garrett was void. Garrett, they alleged, was descended from a black person "to the third generation," making the marriage violative of the miscegenation statute. The defendants, Garrett's heirs, argued that the marriage was valid and that under contemporary law they were, therefore, allowed to inherit the property.[37]

To rule on the case, the court had to trace Garrett's ancestry. In so doing, it defined the phrase "to the third generation" which had been used in the 1741 North Carolina law, the 1822 Tennessee law, and the 1870 constitutional provision and statute. Chancellor William F. Cooper, speaking for the court, concluded that Garrett had one great-grandparent who was a "full black" and, consequently, "that James M. Garrett is in the third degree of mixed blood, and that the marriage between him and Myra was void."[38]

An examination of Garrett's ancestry is both interesting and informative. His

[33] *State v. Bell*, 10.

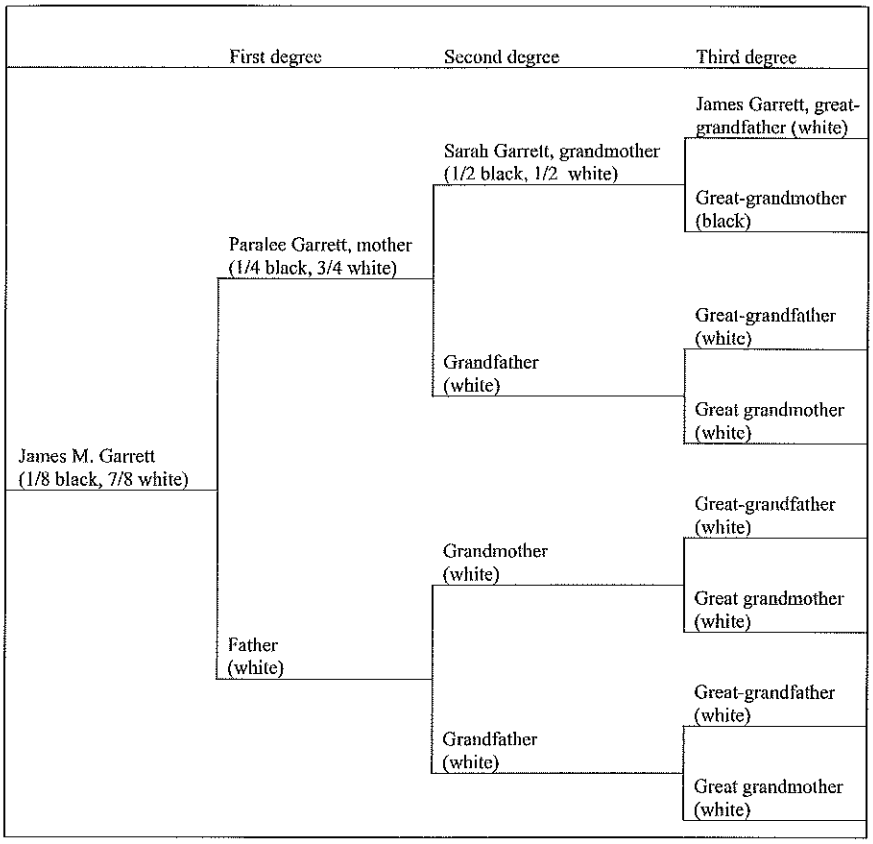
[34] Ibid., 10-11.

[35] Ibid., 11.

[36] 2 Cooper's Tenn. Ch. 216 (1875).

[37] Ibid., 216-220.

[38] Ibid., 226, 231.



James M. Garrett had one black great-grandparent. In 1875 the Tennessee Supreme Court ruled that Garrett was "of mixed blood exactly in the third degree." Courtesy of the author.

great-grandfather, James Garrett, was white. The elder Garrett had two children by a black slave woman who is not otherwise identified in the case report. One of these children was Sarah Garrett, who had several children by a white man, one of whom was a daughter named Paralee. Paralee Garrett had two children by a white man; one of these children was James M. Garrett.[39] Like everyone, Garrett was related to his parents in the first degree, his grandparents in the second degree, and his great-grandparents in the third degree. Therefore, the court ruled, having one black great-grandparent meant that Garrett was "of mixed blood exactly in the third degree."[40]

This decision points out the injustices that were inherent in trying to classify

[39] Ibid., 225-226.

[40] Ibid., 226.

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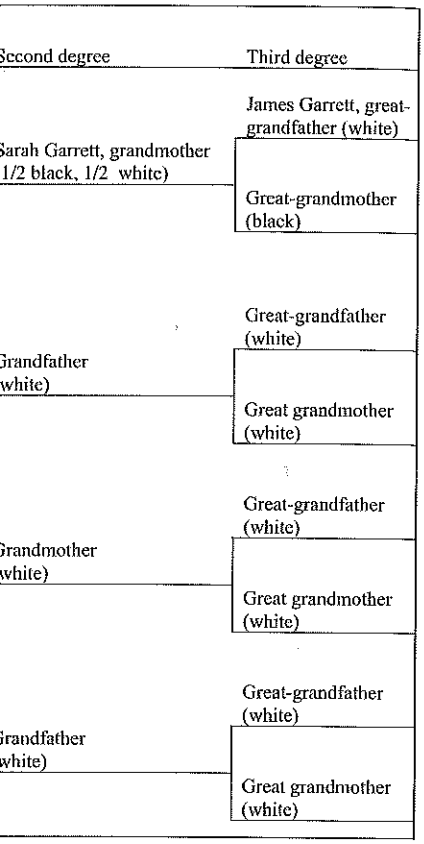
[42] Ibid., section 1041.

[43] Columbia City Code,



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legally Tennesseans of mixed blood. The statute, as clarified by *Carter v. Montgomery*, prevented Garrett, who was one-eighth black, from legally marrying a white woman. Yet, had he illegally fathered a child by a white woman that child would have had one-sixteenth black blood, been of mixed ancestry to the fourth degree, and been legally allowed to marry a white person. Likewise, Garrett could have legally married someone who, like himself, was one-eighth black and of mixed ancestry to the third degree. Children of such a marriage would have also been one-eighth black but they would have had no "pure black" great-grandparents. Rather, they would have been of mixed ancestry to the fourth degree and would have, therefore, been allowed to marry whites.

Tennessee's legal attack on miscegenation was not confined to the state's constitution and statutes. Several cities enacted local ordinances proscribing interracial sex outside the marital relationship and punishing miscegenous cohabitation—a practice already illegal under state law. These municipal prohibitions, of course, provided lesser penalties than the one-to-five-year prison sentences allowed under the state's statute. Nashville, for example, had an ordinance in 1901 making miscegenous sex a misdemeanor. If the parties were found "having illicit intercourse" the white person could be fined between $10 and $50 while the black person was subject to a fine of between $5 and $50.[41] This seems to reflect the reasoning of the *Brady* case that blacks might not be able to raise as much money as whites. The ordinance further provided that if an unmarried couple was found "cohabiting . . . as man and wife" the white partner could be fined between $20 and $50. No penalty was provided for the black person involved in the latter situation.[42] Perhaps the Nashville city councillors wanted only to punish the white partner under the theory—also enunciated in the *Brady* case—that his or her actions in cohabiting with a black person were somehow more offensive than those of the other party. Another possible result, however, would be that the black partner of a white person convicted and fined under the city ordinance would not be allowed to escape punishment but would, rather, be charged under the state statute with its much harsher penalty.

The ordinance that the city of Columbia passed in 1883 provided:

> That no white male or female shall live or cohabit as man and wife with any negro, mulatto or person of mixed blood descended from a negro, and shall upon conviction thereof be fined not less than ten nor more than fifty dollars.[43]

This ordinance, too, did not provide a penalty for the black person involved in unmarried cohabitation. But, unlike the Nashville law, it did not seek to regulate

[41] Ordinances of the City of Nashville, 1901, sections 1042 and 1043.

[42] Ibid., section 1041.

[43] Columbia City Code, 1934, chapter 1, section 66.

mere "illicit intercourse."[44]

Statutes, constitutions, and ordinances, however, can only outlaw behavior—they cannot prevent it. Thus, regardless of the wishes of Tennessee lawmakers, interracial sex and marriage continued to occur in the Volunteer State. In 1880 six people were incarcerated in Tennessee's penitentiary for violation of the state's miscegenation law. Between 1880 and 1900 approximately 50 people annually were arrested in Nashville for ignoring that city's ordinance. And a group of Memphis blacks in 1889 asked for a grand jury investigation of several white men in the city who allegedly had black mistresses. Such behavior had never been uncommon in Memphis—even among city fathers; the river city's first mayor, Marcus Winchester, married a black woman while in office and its second, Isaac Rawlings, lived with his black mistress.[45]

Miscegenation remained illegal in Tennessee until the U.S. Supreme Court's 1967 ruling.[46] Thereafter the state's restrictions on interracial sexual behavior were unenforceable. Nevertheless Tennesseans were reluctant to remove the interracial marriage bans from the state's constitution and statute books. The legislature refused to act on the matter until 1979, a year after a statewide referendum indicated to lawmakers that a majority of their constituents favored conforming Tennessee law to the Supreme Court's decision. Amazingly, that vote showed that almost 49 percent of the state's electorate favored maintaining a prohibition against miscegenation in the Tennessee constitution regardless of its legality. This resistance to a course of action mandated by the U.S. government undoubtedly reflected the reluctance of many white Tennesseans to accept racial equality as the law of the land.[47]

The first step toward performing the cosmetic surgery necessary to repeal the unconstitutional provisions came in 1977 when Tennessee held a constitutional con-

[44] The term "cohabiting as man and wife" is ambiguous. Married people, of course, cohabit as husband and wife; however, statutes using the phrase were usually intended by their authors to refer to unmarried people who were cohabiting as though they were married. Thus the 1822 Tennessee law punished interracial couples who "shall presume to live . . . as man and wife" and the 1870 miscegenation statute proscribed "living together as man and wife." Such language is usually considered to be synonymous with "cohabiting as man and wife." See, for example, *Dunn v. State*, 426 P.2d 993 (Alaska, 1967).

[45] Taylor, *The Negro in Tennessee*, 43; Robert B. Corlew, "The Negro in Tennessee, 1870-1900" (Ph.D. diss., University of Alabama, 1954), 186, citing Charles Clayton Gumm, "A Study of the Negro as a Criminal in Nashville, Tennessee," *Vanderbilt University Quarterly* 4 (1904): 101; Joseph H. Cartwright, *The Triumph of Jim Crow: Tennessee Race Relations in the 1880s* (Knoxville, 1976), 175; and Bennett, *Before the Mayflower*, 258-259. Rawlings's affair did not adversely affect his political career, but Winchester's marriage did; see Charles W. Crawford, *Yesterday's Memphis* (Miami, FL, 1976), 15.

[46] For a discussion of the Supreme Court's ruling in the *Loving* case as well as its prior relevant decisions, see Roger D. Hardaway, "A Case of Black and White: Removing Restrictions Against Interracial Marriages," in John W. Johnson, ed., *Historic U.S. Court Cases, 1690-1990: An Encyclopedia* (New York, 1992), 636-638.

[47] The idea that many white Tennesseans were unwilling to afford equality to African Americans and to accept an integrated society in the late twentieth century is discussed in Corlew, *Tennessee: A Short History*, 548-550; and Lamon, *Blacks in Tennessee*, 114-115. For a discussion of the changes in race rela-

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Joyce Prescott (left) and Herman McDaniels, Jr. (left center) are married on the courthouse steps in Nashville on July 21, 1967, the first such wedding to take place in Tennessee following the federal ruling striking down miscegenation laws. From UPI photofiles, courtesy of the Special Collections Department, University of Memphis Library.

vention. The initial action of the delegates was to pass—by a vote of 85 to 3—a resolution to remove the miscegenation article from the constitution. The enthusiasm of the delegates, however, was not matched by the state's voters who had to approve the convention's actions. In an election held on March 7, 1978, Tennessee voters ratified the repeal resolution by the narrow margin of 199,742 (51.02 percent) to 191,745 (48.98 percent). Nevertheless this was enough of a mandate to prompt the legislature to action. In an anticlimactic move, the Tennessee General Assembly voted unanimously during its 1979 session to repeal the state's statute. Governor Lamar Alexander signed the repeal measure on March 29, 1979, bringing the legal history of miscegenation in Tennessee to a quiet but overdue end.[48]

tions that occurred in Tennessee as a result of the civil rights movement, see Bergeron, Ash, and Keith, *Tennesseans and Their History*, 287-315.

[48] *The Commercial Appeal* (Memphis), "Delegates Vote To Lift Marriage Ban," August 9, 1977; "Certification of Election Returns for the Constitutional Ratification Referendum Election, March 7, 1978;" and letter from the office of legal services of the General Assembly of Tennessee to the author, April 10, 1979.