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ARGUED AND ADJUDGED

IN THE

COURT OF APPEALS

OF

VIRGINIA.

BY DANIEL CALL.

IN SIX VOLUMES.

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TO WHICH, (THROUGH THE FIRST THREE VOLUMES,) BESIDES THE NOTES OF THE LATE JOSEPH TATE, ESQ., ARE ADDED COPIOUS REFERENCES TO STATUTES AND SUBSEQUENT ADJUDICATIONS ON THE SAME SUBJECTS.

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FLEMING *v.* BOLLING.

Monday, October 26th, 1801.

By a devise of the residue, the emblements growing on lands specifically devised to another, will pass.*

The testator devises that his Book shall be given up to A. and that he shall receive all the debts due, and pay all the testator owes: this is an appointment of A. to perform the office of executor,† but does not entitle him to the surplus of the debts due the testator,‡ nor does it discharge him from a debt, which he himself owed.§

Edward Bolling, by his last will, after disposing of sundry lands and slaves among his four brothers, Robert, Thomas, John and Archibald, and after giving several other legacies, among which was one of £100 to his sister Tazwell, devised as follows: "It is my will and desire that my *Book* be given up to my brother Robert Bolling, *and that he receive all the debts due to me, and pay all that I owe.* The rest of my estate, negroes, horses, clothes and every other part of my estate, not already given, I give to my brother Archibald for him and his heirs forever." The testator died in August, 1770; after whose death, the said Robert Bolling, claiming the executorship under the above recited clause relative to the book, made *probat* of the will, and acted as executor until his death. The said Robert Bolling died in 1775, leaving Fleming as his executor; against whom the said Archibald Bolling brought this suit, for an account of the testator's residuary estate.

The answer insists, that, by the devise relative to the book, the testator intended a gift to Robert of all his outstanding debts; and hopes the defendant will be allowed to prove it. That Robert was entitled to a debt due from himself to the testator; and also to the emblements growing, at the testator's death, on the plantation devised to the said Robert.

* So, a devisee of land *and its appurtenances,* does not take the crops growing when the testator died (in September); but they pass by the residuary clause. *Shelton's ex'rs.* v. *Shelton,* 1 Wash. 53.

† As to constructive appointments of executors, see Toll. Ex'or. 35, 2 Bl. Comm. 503, 3 Bac. Abr. 27.

‡ In *Shelton's ex'or.* v. *Shelton,* 1 Wash. 53, it was decided that under a will made in 1770, the *residuum* went to the executor, if the will did not give it otherwise.

But this was changed [says Judge PENDLETON, 1 Wash. 64. See also Coulter's opinion, 5 Rand. 98, and all three opinions in *Paup's Adm'r.* v. *Mingo,* 4 Leigh, 163,] by the Act of 1785; 1 R. C. of 1819, p. 382, § 29, Code of 1849, p. 524, § 10, disposing of any intestate estate among the next of kin. And still more conclusive, see Act of 1812, (1 R. C. of 1819, p. 83, § 5,) giving any property as to which one might die intestate, if he have no next of kin, to the Literary Fund.

§ The appointment of a debtor executor, shall in no case extinguish the debt, unless the will so direct. 1 R. C. of 1819, p. 389, § 57. Code of 1849, p. 543, § 13.

The Court of Chancery, being of opinion, that the devise of the *book* was not intended as a beneficial bequest of the outstanding debts to Robert; that his own debt was not extinguished, as the residuary claim manifested a different intention; that he was not entitled to the emblements growing on the lands devised him, which the act of Assembly [ch. 104, § 53, R. C. ed. 1819,] had rendered assets; and that the surplus of all these subjects, after paying the testator's debts and legacies, belonged to the plaintiff, decreed an account of the debts and emblements. From which decree, Fleming appealed to this Court.

WARDEN, for the appellant.

The decree of the Court of Chancery is erroneous. [76] For, the emblements, standing on the land at the testator's death, belonged to Robert. This was clearly the rule at common law; and the act of Assembly makes them assets for payment of debts only. For, the true meaning of the word *assets* is, a fund for payment of debts. *Terms le la ley*, Tit. Assets, p. 63, [*Kinaston* v. *Clark*,] 2 Atk. 206; [Anony.] Cro. Eliz. 61; [*Knevett* v. *Pool*, et al., Ibid,] 463. It is like the case of an estate *pur autre vie*, which, by the statute 29 Car. 2, is made assets; and yet it has been held, that it was not distributable among the next of kin. [*Oldham* v. *Pickering*,] 2 Salk. 464; [*Oldison* v. *Pickering*,] 3 Salk. 137.

Upon the same principle, then, as the act of Assembly in our case merely declares, that the crops shall be assets, they will be assets only for payment of debts, and will not be liable for payment of legacies, or subject to distribution.

Robert was entitled to all the outstanding debts by virtue of the devise of the book, &c., for he was chargeable with the debts, which might be more or less; and he had a right to receive all that the book would command, in order that he might be enabled to do it. Of course, he was not accountable to Archibald for his own debt; for, it belonged to himself, unless it was wanted for the payment of the testator's debts; which it was not; and therefore he was entitled to the benefit of it.

WICKHAM and RANDOLPH, contra.

The rule of the common law, as to emblements, is admitted; but the act of Assembly has wholly reversed it, and declares that they shall be assets; that is, personal estate, to every intent and purpose. The case, from Salk. of the estate *pur autre vie*, does not apply; because, in that case, the nature of

the property was not changed; but it was merely declared to be assets; and its qualities of realty remained the same as [77] before: so that it was not chattels. But, as none but chattels are distributable, it was properly decided, that the next of kin could not claim a distribution of the subject. Robert was created an executor by virtue of the devise of the book, &c., and therefore, he became a trustee of the surplus, which included his own debt, for the residuary legatee; because making him executor did not release the debt. *Brown* v. *Selwin*, Cas. Temp. Talb. 240; *Carey* v. *Goodinge*, 3 Bro. C. C. 110; Toller [on Ex. and Adm'rs.] 274, [350, 2nd Am. ed.] This is the stronger, because there is a residuary bequest of every thing, which destroys the presumption, that the testator intended the executor should be discharged from his own debt. It is therefore like a lapsed legacy, which sinks into the residuum, for the benefit of the residuary devisee, or the next of kin.

CALL, in reply.

The devise to Robert, was a devise of the beneficial interest in the testator's credits, subject to the payment of his debts. 1. Because he gives him his book; which expressly denotes property. For, directing the book to be given up to him, was substantially directing that he should take it to his own use. 2. Because he was to receive and pay the debts; which condition, as the debts were uncertain, and might exhaust the whole proceeds, is evidence of property. For, it is like a devise of lands, with a charge to pay the testator's debts; which has been constantly held to carry a fee. But, as in that case he is only liable to the value of the land, so, in this case, he is only liable to the amount of the money collected from the book. For, in fact, it is no more in equity, than charging the subject, and not the person, with payment of the debts. It is expressly like the case of an executor in general, who takes the estate subject to the payment of debts; but then he is only liable as far as the estate extends. In other words, the testator, as to this, has only declared what the law would have implied; but he prevents the ulterior application of it to the claims of legatees and distributees.

If Robert was executor, as they on the other side will have [78] it, then the appointment of him to be executor was a release of his own debt, unless it be wanting to pay the demands of the testator's creditors. This was the rule of the common law expressly. Swinb. 298, 299. At first it was considered as inflexible, and admitting of no qualification: but

this was a mistake, grounded upon technical arguments, which were soon found to be absurd; and therefore the notion has been long abandoned. For, it was very early decided, that it could not be supported against creditors. Swinb. ub. sup. But as to the legacies, the rule remained longer, and it was thought that the exception, even in favor of creditors, depended upon the liberality of Courts of Equity, who disregarded the technical conceit, relative to the suspense of the action; which for a long time was supposed to be the true ground why the debts due from executors were extinguished, by appointing them to the office. This, however, is a mistake; and the difference between debts and legacies, depends upon a different reason altogether: which I will endeavor to shew, by explaining the real principle.

It never was true, that the reason why the debt was extinguished, was, that the action was gone; but the actual ground is, that, as the executor is appointed universal representative of the personalty, it is, impliedly, a devise to him of his own debt. This will be evident from the following considerations. 1. Because the argument, that the action is suspended, has no meaning when applied to a creditor; for his action never was in suspense. Swinb. 299; Roll. Abr. 920, 921. [Holt, C. J. in *Wankford* v. *Wankford*,] Salk. 306. 2. Because, if two be jointly and severally bound, and the creditor makes one executor, this releases the debt as to both; and yet the action never was suspended as to him who was not executor. 3. Because, if the debtor administers, it does not release the debt; and yet the action is as much suspended, in that case, as if he were executor. Hence it was soon held, that the debt, even at law, was liable to creditors. For, the executor had it in his hands; and, therefore, might truly be said to have assets sufficient to satisfy the demand. But, as to legacies, the point was more uncertain for a long time. It was often [79] put upon parol testimony of the intent, instead of considering principles, a circumstance which necessarily led to uncertainty; and, therefore, it becomes important to consider the principle: which is evidently this, that the appointment of the debtor to be executor, does not operate as a release, but is an implied devise of the debt to himself. Salk. 306. Therefore, being a legacy, the legatee is entitled to as much favor as any other legatee; and consequently, is not to be deprived of the benefit of the devise, without a clear intent to that effect be manifested. So that, *prima facie*, the debt is given to the executor as a legatary, unless a contrary intention appears by express words, or necessary inference. But there are no such

express words here; and therefore, the question is, whether there be any necessary inference? It is said, that the residuary devise amounts to such an inference, and shews that the testator intended it should not be extinguished. But, in answer to this, it is to be observed, that the executor, having the law on his side, has no favor to ask of the Court; and therefore, any presumption, from that circumstance, is liable to be rebutted by others. Such as, 1. The extraordinary affection which the testator always manifested for his brother Robert. 2. The testator's credits being charged with the payment of his debts; which might have exhausted them. 3. The giving the book; which was a gift of its contents. 4. The residue being coupled with enumerated articles; which shews that the testator meant those of the same kind. 5. The devise of the residue to Archibald, being only what he had not before given: which did not include Robert's debt; because the devise of the book, which is supposed to have constituted him executor, was inserted before: and therefore, as according to the rule of law, it had been already given, it could not be included in the residuary devise; which could only be intended of things, not expressly, or impliedly, given before.

Hence, it appears, that if the case be considered upon principle and legal grounds, the appointment of Robert to [80] be executor extinguished the debt which he owed, and that it did not pass over to Archibald, by virtue of the residuary devise. Because, every presumption arising from that circumstance, is amply rebutted by others more powerful.

If, however, it be taken, that the debt is not released, but the action for it lost, which is provided against by a court of equity, still the same consequence will take place. No case, except those of *Brown* v. *Selwin*, and *Carey* v. *Goodinge*, is recollected to have said the contrary. But, with regard to the first, the Chancellor merely expresses his thoughts upon the question now before the Court without giving any decision. So, that it cannot be considered as an authority in this case. And with respect to the second, it is a loose note of a case which does not appear to have been laboriously argued, and probably depended on circumstances. Besides, it was only an interlocutory decree; and might have been afterwards changed at the final hearing. Therefore, that case also is not to be considered as an authority in the present. The passage from Toller is bottomed on it, however; and, of course, as the prop fails, the authority of that passage fails too. Besides it is observable, that Fonblanque, who is a most excellent commentator, says nothing about it, although he has occasion once to mention the

case of *Carey* v. *Goodinge:* which looks as if he did not consider it as settled.

If it be said, that here a particular estate is devised to the executor, which is inconsistent with the notion of his taking what is undevised; and, therefore, as his own debt is not particularly devised to him, it remained undisposed of, and consequently passed under the residuary devise to Archibald, I answer, that as, by the rule of law the appointment of an executor, is a bequest to him of his own debt, the further devise is unimportant, and does not affect the case. For, the rule mentioned by Lord Loughborough, [in *Hornsby* v. *Finch,*] 2 Ves. jun. 80, is universal, namely, "that for a legacy to take away the right of the executor, it is not sufficient simply [81] to say there is a legacy: but it must be so qualified, that the giving of it is inconsistent with the supposition that the executor is to take the whole." According to which doctrine, it is not sufficient for the appellee to say, that there was a devise to Robert of other things in particular, and that the residue was given to himself; but, he must shew the testator intended to overthrow the rule of law, and to give this debt to the residuary devisee. This, however, he cannot do; for, there is no inconsistency in Robert's retaining his debt, and Archibald's taking the residuary estate; of which there was amply enough to satisfy the words of the will. Therefore, Archibald is not entitled to this debt; but it is extinguished for the benefit of Robert's estate.

The devise of the lands to Robert carried the emblements growing at his death. As to which, the case cited from Salk. by Mr. Warden, expressly applies. For, the estate *pur autre vie*, and the emblements are exactly alike, as both equally partake of the realty; and both are declared assets: which declaration has no greater effect on the emblements than on the life-estate. Therefore, one is just as distributable as the other; being equally capable of division and distribution; for both may be sold, or separate interests given, in the subject itself, to the distributees. But, independent of this, the testator's meaning, to that effect, is collectable from the will. For, he devises plantations in the same manner to all his brothers; and, therefore, the fair presumption is, that he intended each should reap the emblements growing on his own; and not that the executor only should be accountable for his.

PENDLETON, President. The case is as follows: Edward Bolling, having by will devised lands and some slaves to [82] his four brothers, and made some other bequests, among

which is a legacy of £100 to his sister Sarah Tazwell, adds this clause: "It is my will and desire that my *book* be given up to my brother Robert Bolling, and that he receive all the debts due to me, and pay all that I owe. The rest of my estate, negroes, horses, clothes, and every other part of my estate, not already given, I give to my brother Archibald, for him and his heirs forever." The testator died in August, 1770, and probat of his will was granted to Robert, as appointed executor, by the above clause relative to the book: In which character he acted, until his death in 1775. The appellant being appointed executor of his will, this suit is brought by Archibald Bolling, to have an account of the executorship settled, and what shall appear due to him of the residuary estate, decreed. He particularly requires an account of the crops made, on the several plantations devised, the year the testator died; and whether he was entitled to such profits? or, whether they passed to the several devisees of the land? is the first question to be decided by the Court. It was truly said by the counsel, that by the common law of England, emblements upon lands devised, go with the lands; but, our act of Assembly has controlled that common law, by declaring that when the testator dies, at the season of the year in which Mr. Bolling died, they shall not so pass (I mean the growing crop;) but, that such crop shall be finished, and after easing the lands of the quit rents of that year, and the slaves of levies and clothing out of those crops, the surplus shall be assets in the hands of the executor, placing this devise upon the same ground as if it had been directed to take effect in December. But, we have had learned discussions upon the derivation and meaning of this term *assets;* and, from thence it was attempted to shew, that the executor was only to take it for the purpose of paying debts, if necessary; and as that necessity did not occur in the present case, the law did not [83] operate, but the surplus of those crops passed to the devisees of the land. This argument the Court thinks has no force, and that under the act, they are personal estate in the hands of the executor to every purpose of paying debts, subject to the disposition of the will, and, if there be none such, the question occurs, whether the executor shall take them as undisposed of, or they shall be distributed to the next of kin, as was fully settled by the Court, on mature deliberation, in the case of *Shelton* v. *Shelton,* 1 Wash. 53, 64. In that case, there was no disposition of the surplus, and the Court determined upon that will, and the English authorities, that the surplus belonged to the executors: a question, however,

which cannot arise in the present case; since the sweeping residuary clause passes every thing undisposed of to Archibald. Upon this point, therefore, the Court is of opinion, that the decree is right. The next question discussed was, whether Robert Bolling, under the devise respecting the *book*, was entitled to the surplus of the debts due to the testator, after paying his debts? Upon this point, the Court is of opinion, that no beneficial interest in the debts passed to Robert, but it was merely an appointment of him to perform the office of executor, to receive and pay debts. That use has been made of the words as constituting him executor; and, although, probably, his appointment ought to have been confined to that particular duty, yet, since he was admitted to the office generally, at his request, by the County Court, who had jurisdiction on the subject, and that sentence remains unreversed, the propriety of it is not now to be questioned; especially, as Robert acted under it, as giving him a general authority. That the testator intended to devise this surplus, cannot be inferred from the words of the will; and, although the answer says that the defendant hopes to prove that such was his intention, yet no proof to that purpose, if admissible, is brought forth. The words, "*the book be given up*," relate to the possession, [84] and not to the property in the book, so as to make it apply to the argument, that by giving the book all its benefits passed, like the case of a devise of a bond. Robert Bolling's power, under this devise, was merely that of an executor, giving him neither a right to the surplus of the debts, if there was any, nor subjecting him to the payment of more than he received. The decree, therefore, in this point is also right. The third question is, whether the debt due from Robert to the testator was extinguished by the appointment of Robert executor? There are no words in the devise to shew that this debt was not to be collected, or accounted for, although the same hand was to pay and receive, as well as all others; so that it depends upon the general rule. That the debt was extinguished at law, is indisputable; and, though Judges differ as to the reason on which the rule is founded, that seems immaterial; since we are to consider what is the equitable rule on the subject. Many cases were cited to favor the executor's interest; but they were generally on questions between the executor and next of kin, whether an *undisposed* of surplus should be distributed; and do not apply to this case, where the residuary clause prevents the existence of any such surplus. It seems to be settled in equity, partly in *Brown* v. *Selwin*, Cas. Temp. Talb. 240, and in *Carey* v. *Goodinge*, 3

Bro. C. C. 110, that the debt is not extinguished, but is to be accounted for as assets; subject to debts, and legacies, and distributable, except in cases where the executor is entitled to the surplus.* The appellee is a legatee, and the decree in his favor on this point also is right.

The other questions being only provisional, in case of a contrary decision of the second question, are, by the decision of that, rendered unimportant, since they will be regulated in the account of administration, which will shew what the residuary legatee is entitled to. Upon the whole, the decree of the Court of Chancery is affirmed.

[*See act Oct. 1785. c. 61, §67, 12 Stat. Larg. 151; c. 104, p. 389, §57, R. C. ed. 1819.]

JORDAN AND OTHERS *v.* MURRAY.

[85] *Saturday, November* 7, 1801.

Although, under the Act of 1758 * (requiring a gift of slaves to be by will or deed, unless the donee kept possession) evidence merely of a parol gift of slaves is not sufficient to prove title in the donee; yet it is admissible, when coupled with five years' possession in the donee, to prove *that possession* adverse, and so to bar one claiming under a subsequent devise from the donor.

Jordan and others, brought detinue against Murray for some slaves. Plea, *non detinet*, and the act of limitations. Issue. Upon the trial of the cause, the jury found a special verdict, which stated, that John Armstead, in 1763, made a *parol* gift of a slave, by the name of Nan, to William Russell, (father of the female plaintiffs,) who had married Sarah, the daughter of the said John Armstead, and mother of the plaintiffs: That, about the year 1765, the said Nan, who had been in the possession of the said William Russell from the date of the parol gift aforesaid, had issue, a daughter by the name of Moll: That, in 1769, the said John Armstead made his will, and thereby devised the said slave Moll, and her increase, to his said daughter Sarah, for her life, and at her death to be equally divided among her children *then living:* That after the death of the said John Armstead, and the recording of his will, John Murray, the testator of the defendant, purchased the said slave Moll, of the said William Russell, for a valuable

* See that act, 1 R. C. of 1819, p. 432, § 51, and Code of 1849, p. 500, § 1.