REPORTS OF CASES

ARGUED AND ADJUDGED

IN THE

COURT OF APPEALS

OF

VIRGINIA.

BY DANIEL CALL.

IN SIX VOLUMES.

VOL. I.

THIRD EDITION.

TO WHICH, BESIDES THE NOTES OF THE LATE JOSEPH TATE, ESQ., ARE ADDED COPIOUS REFERENCES TO STATUTES AND SUBSEQUENT ADJUDICATIONS ON THE SAME SUBJECTS.

BY LUCIAN MINOR,

COUNSELLOR AT LAW.

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was a derivative purchaser under the devise to Theodrick, in the will of old Robert Munford mentioned in 1 in Wash. 97. A case, similar to the one stated in that of *Kennon* v. *M'Roberts and wife*, [1 Wash. 96,] was made for the opinion of the Court. The case had been referred by the District Court to the General Court, who certified in favor of M'Roberts and wife, and the District Court gave judgment for them agreeable to the certificate. From which judgment, Horde appealed to this Court.

PENDLETON, President, after stating the case, delivered the resolution of the Court to the following effect:

This case stands upon the same ground as that of *Kennon* v. *M'Roberts and wife.** The Court have revised and considered that decision; and, unanimously approve it. The judgment of the District Court must therefore be reversed, and judgment entered for Horde.

Judgment reversed.

*1 Wash. 96.

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[338] DUNN AND WIFE *v.* BRAY.

Friday, October 19, 1798.

Devise of slaves to W. and his heirs forever. But, if he die and leave no issue, *then* to C. This limitation to C. is good, and not too remote.*

In order to annex slaves to lands [under the act of Feb. 1727, 4 Hen. Sts. at Lar. 225,] it was necessary that co-extensive estates should be given in both.

This was an appeal from a decree of the High Court of Chancery, and the material question in the cause was, what

*Cases resembling and confirming this, are *Higginbotham* v. *Rucker*, 2 Call, 313; *Royall* v. *Eppes, adm'r*, 2 Mun. 479; *Timberlake et ux.* v. *Graves*, 6 Mun. 174; *Gresham* v. *Gresham et al.* 6 Mun. 187; *Cordle's adm'r* v. *Cordle's ex'or*, 6 Mun. 455; *Didlake* v. *Hooper*, Gilmer, 194.

Cases seemingly in conflict with the above are, *Williamson* v. *Ledbetter et al.* 2 Mun. 521; *Griffiths* v. *Thompson*, 1 Leigh, 321; *Deane, &c.* v. *Haneford et ux.* 9 Leigh, 253. All these cases, on both sides, related to personalty, and most of them to slaves. And the wills were all made before 1820. See the Act which took effect on the first day of that year, 1 R. C. of 1819, p. 369, §26; and Code of 1849, p. 501, §10; copied page 187 ante, in the note. That statute would have made the limitations over, in all those wills, valid, had they been made subsequently to it.

Three rather striking cases of land, where limitations over were held void because too remote, as being on indefinite failures of issue, are *Bells* v. *Gillespie*, 5 Rand. 273; *Broaddus and wife* v. *Turner*, 5 Rand. 308; and *Nowlin and wife* v. *Winfree*, 8 Gratt. 346. All were cases of wills made before 1819.

interest Winter Bray took in the slaves Peter and Dinah, under the following clauses of the will of Charles Bray deceased? Dated on the 24th of February, and admitted to record in the month of March, 1772:

"I give and bequeath unto my son William Bray all that tract of land lying on Piscataway old mill run (except what I hereafter devise to my son Charles) which I purchased of John Griggs' executors, to him and the heirs of his body lawfully begotten forever; also a negro man named Morie, to him and his heirs forever. But further, it is my express will, that in case my son William should die and leave no lawful issue, that then the land herein before devised to my said son William, I give to my son Winter Bray, to him and the heirs of his body lawfully begotten forever.

"I give and bequeath unto my son Winter Bray, one negro boy named Peter, and one negro wench named Dinah, and her increase, to him and his heirs forever. But in case my said son Winter should die, and leave no issue, then I give all the said negroes herein before devised to my said son Winter, to my son Charles and his heirs forever."

William Bray died before the year 1776.

Winter Bray died intestate, and without leaving any issue, after the year 1787.

The Court of Chancery decided, that the limitation over to Charles upon the death of Winter, without leaving issue, was good, and decreed accordingly.

From which decree, Dunn and his wife appealed to this Court. [339]

WARDEN, for the appellants.

Contended that the devise carried a clear estate-tail to Winter Bray. That it plainly did so with regard to the precedent devise of the lands. [*King* v. *Melling*,] 1 Vent. 230; [*Blackburn* v. *Edgley*,] 1 P. Wms. 605; [*Soulle* v. *Gerrard*,] Cro. Eliz. 525; [*Brown* v. *Jervas*,] Cro. Jac. 290; and, as the same words were used with regard to the slaves, he likewise intended an entail there too. That the slaves were annexed to the lands, and, therefore, by the act of 1776, Winter Bray became tenant in fee of the lands, and acquired the absolute property in the slaves. That there should have been a decree for an account of the personal estate; and therefore, the decree of the Court of Chancery was wrong upon both grounds.

CALL, for the appellees.

It was a clear executory devise to Charles after the death of Winter, without issue living at his death. The cases cited on

the other side were all cases of devises of lands, and not of personal estate; and, consequently, they do not apply. The word *leave*, ties up the other words, and confines them to issue in being at the time of the death of Winter. *Atkinson* v. *Hutchinson*, 3 P. Wms. 258; *Forth* v. *Chapman*, 1 P. Wms. 663. As to the idea of the slaves being annexed to the lands, there is no ground for it; but, admitting there was, it would not have any influence on the question. Because, if it were an estate-tail in its creation, yet by the very terms of the will, it was to cease on the event of Winter's dying without *leaving issue alive at the time of his death;* beyond which period it was not calculated to endure. Therefore, if they were annexed, they were annexed subject to the condition of the entail's ceasing on the happening of the event. As to the account, it was stated, that the suit was commenced within less than nine months from the testator's death; therefore, before the time of distribution mentioned in the act of Assembly: and, of course, before any cause of suit. Consequently, by analogy to the practice in Courts of Law, the bill was properly dis-
[340] missed by the Chancellor.

PENDLETON, President. Delivered the resolution of the Court, as follows:

The record is lengthy, made so by form, but the question is a short one; being what interest Winter Bray took in the slaves under the will of his father Charles Bray?

Before we enter upon the merits, we will dispatch two small objections made by the appellant's counsel. First, The bill claims partition of a tract of land between the plaintiff and the defendants James and Charles, and an account of the profits: The answer states, that they were always ready to make that partition; and, the decree of the County Court is, that the parties had made it, which was confirmed. The objection now is, that they ought to have decreed the profits till the partition; but, the Court over-rule the objection, presuming that the profits were given up or compensated for, on the compromise.

A second objection is founded upon a mistake in fact; for, the County Court, after dismissing the bill as to the slaves, decreed an account to be taken of the personal estate. Which part of the decree was suspended by an appeal to the High Court of Chancery; where the decree, as to the slaves, being confirmed, it was represented that the Chancellor had dismissed the bill, instead of remanding it to the County Court to have the other part of the decree carried into execution; whereas, the decree being an affirmance has the effect required.

We now come to the merits of the question between the parties, which depends upon the will of Charles Bray, the elder, dated February the 24th, 1772, wherein he makes this devise: "I give and bequeath unto my son Winter Bray, one negro boy named Peter and a negro wench named Dinah and her increase to him and his heirs forever; but, in case my said son Winter should die and leave no issue, *then* I give all the said negroes, herein before devised to my said son Winter, to my son Charles and to his heirs forever." If Winter took the absolute property in these slaves under that devise, then the appellants are entitled to one-third part of them, and the decrees are erroneous: but, if his interest was contingent, depending upon the event of his leaving issue at the time of his death, then the remainder over to Charles was a good one, and the decrees are right. [341]

It was argued by the appellant's counsel, that the slaves were annexed to lands, and entailed under the § 12 of the act of Assembly, passed in [Feb.] 1727, [c. 11, 4 Stat. Larg. 225,] respecting slaves; that Winter was seised and possessed of both at the time of the passing of the act of [Oct.] 1776, [c. 26, 9 Stat. Larg. 226,] which vested in him a fee simple in those devised to him, and put an end to Charles's remainder. He was right in his law, if the facts had brought the case within the act of Assembly.

The clause empowers a man by deed or will, wherein lands shall be conveyed in tail, to annex slaves thereto, and declare they shall descend together; which shall be effectual to effect that purpose; or, if he devises or conveys lands in tail, and in the same instrument disposes of slaves with the like limitations as the land, this shall amount to a declaration of his intention to annex them, and they shall pass together accordingly.

It was admitted, that here was no declaration to bring the case under the first branch, but it was said that it came under the second; since, although the limitations were not the same in terms, yet they had the same effect, both lands and slaves being devised in tail.

Without wasting time in a scrutiny of this argument, it happens, unfortunately for it, that no lands are devised to Winter at all, except in remainder upon the death of William without issue; to which remainder, though it took no effect afterwards upon the contingencies happening, there can be no pretence for annexing his own slaves, which he took immediately upon his father's death. Besides, if it were possible to connect them together, he held them under different limitations: That is to say, the lands to him and the [342]

heirs of his body, without any remainder over; the slaves to him and his heirs, and if he died and left no issue, remainder to Charles: very distinguishable in effect as well as in terms. This section of the act, therefore, being out of the question, the case depends upon the third section of the same act, which declares, that where slaves are the subject of a sale, gift, or devise, the absolute property shall be transferred in the same manner as a chattel, and that no remainder of a slave shall be limited otherwise than the remainder of a chattel personal may be limited, by the rules of the common law. By this clause, slaves are placed in the predicament of other chattels; and, we are to enquire whether, by the decisions in England, such a devise as the present, applied to personals, would vest the absolute property in the first devisee, or support the devise over to Charles?

If we were to trace this subject through the various cases in which it has been discussed, it would be tedious indeed, and, we presume, unnecessary. Some general principles, changing from time to time in the progress of the discussion, may be necessary to elucidate the ground of our decision. The original common law rule admitted of no division of interest in a chattel. A gift for an hour was a gift forever, as the expression is; and this founded on the transient, mutable nature of the subject. The first case recollected, in which this rule was combatted, is *Mathew Manning's* Case, reported by Lord Coke, [8 Co. 94,] which was a devise to one for life, with a remainder over. The Court had difficulty, but, at length, established the remainder, by transposing the devises; making it a devise of the property to the remainder-man, with a direction that the first taker should have the use for his life. The same thing was done afterwards, in *Lampet's* Case, reported by the same author, [10 Co. 46.] Both these cases were devises of terms for years, which were endeavored to be
[343] distinguished from mere personals, by the stability of the subject; and it was not till long afterwards, I believe about the time of the restoration, that such remainders were allowed in the case of mere personals; and were confined, at first, to instances where the *use* only was devised to the first taker. This distinction, however, was soon exploded; and a devise of a personal thing, for a limited time, was construed to be of the use only, and the remainder supported.*

We shall state the progress no further; and only observe, decisions favorable to remainders gradually increased, till it

[* See *Randall* et al. v. *Russell* et al., 3 Meriv. 194.]

came to the present rule, well known and established, that a limitation over upon a contingency, which must, at all events, happen at the end of a life, or lives in being, or a reasonable number of years, is a good one and will entitle the remainder-man. If it be more remote, it will be void, and the first devisee will take the absolute property.

It was said by the appellants' counsel, that where the first devisee takes an estate-tail, the remainder over is void; and this is true. Since, the remainder being to take effect upon a general failure of issue, which may not happen in a long course of time, the contingency is too remote to bring the case within the rule before laid down.

The counsel then read several cases to prove that if there be a devise of lands to one for life, or in fee, and, if he die without issue, remainder over, this would turn the first estate for life, or in fee, into an estate-tail in the first devisee, by implication, in order to favor the testator's intention of preferring the issue, who could not otherwise take, to the remainder-man, who was not to succeed until the issue failed.

But here is introduced the distinction between an express entail in the devise of a personal thing, such as to A. and the *heirs of his body, &c.*, and such a devise as, in the case of lands, would give an estate-tail by implication: Upon principle, the distinction seems clear; since the implication, made in the case of lands, to favor the intention, would be misapplied, if made use of to destroy that intention, in the [344] case of personals.

In the case of *Atkinson* v. *Hutcheson*, 3 P. Wms. 258, Lord Talbot fully illustrates the distinction between the devise of an express entail and one raised by implication; as well as the natural meaning of the words, *dying without issue.* That case came near to the present; because the limitation over was upon *any child's dying, without leaving any issue.* The case of *Forth* v. *Chapman,* cited in *this* case, is the very case before the Court; except that there it was devised to the first devisee for life, with remainder over, if he died *leaving no issue;* and here, the devise to Winter, is to him and his *heirs,* and if he *leave no issue,* remainder to Charles; which, it is conceived, makes no difference.

It is remarkable that, in that case, the same devise comprehended lands as well as chattels; and yet the lands were adjudged to be entailed, and the personals not: But, as to them, the remainder was supported, in order to favor the testator's intention; thereby clearly establishing the distinction, before laid down.

In *Pinbury* v. *Elkin*, 1 P. Wms. 563, the words *dying without issue* were less restrained, to the death of the devisee, than in the present case, yet the devise was so confined; and the Chancellor more familiarly illustrates that to be the natural meaning of the words *dying without issue*. He also relies on the word *then*, as aiding the construction: If she die without issue, *then*, that is, at her death, remainder over. The same word is used by the testator here: If he leaves no issue, *then* Charles is to take.

It need only be added, that in the present devise, the remainder over to Charles, (which was clearly intended to take effect upon the death of Winter, without *leaving issue living at the time of his death*, and not upon a general failure of issue,) is good as an executory devise within the rule; and that the decrees of both Courts are right.

[345]

Decree affirmed.

CABELL AND OTHERS *v.* HARDWICK.

Tuesday, October 23, 1798.

In debt upon an administration bond, if the declaration does not shew that the plaintiffs sue as Justices of the Court, it is a fatal variance, and the administration bond cannot be given in evidence.*

In such a case, the pleadings ought to state for whose benefit the suit is brought.

In debt upon an administration bond, the declaration was in the common form of a declaration for payment of money, without *styling the plaintiffs Justices, &c.* The plaintiffs assigned for breaches, that the administrator did not make any inventory of the estate, nor administer the same according to law, nor pay the legacies, and further, that he did not pay "the amount of a decree in favor of the legatees of the said Pearce Wade in said Court, and afterwards confirmed in the High Court of Chancery, for the quantity of tobacco, and in current

* Cases where variance was held immaterial, or not to exist, *Peter* v. *Cocke's ex'r.* 1 Wash. 257; *Mc Williams* v. *Willis*, 1 Wash. 199; *Evans* v. *Smith*, 1 Wash. 72; *Drummond* v. *Crutcher*, 2 Wash. 218; *Mc Williams* v. *Smith*, 1 Call, 123; *Porter* v. *Nekervis*, 4 Rand, 359. *Whitlock* v. *Ramsay's adm'x.*, 2 Mun. 510, *Macon* v. *Crump*, post, 575.

Cases where variance was held material: *Berkeley* v. *Cook*, 3 Call, 378; *Glascock's adm'r* v. *Dawson*, 1 Mun. 605; *Ming & Green* v. *Gwatkin*, 6 Rand. 551; *Watson's ex'rs.* v. *Lynch's heirs*, 4 Mun. 94; *McAlexander* v. *Montgomery*, 4 Leigh, 61; *Bennett's ex'r.* v. *Lloyd*, 6 Leigh, 316.