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IN THE

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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.

BY LUCIAN MINOR,

COUNSELLOR AT LAW.

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PLEASANTS *v.* PLEASANTS.

November Term, 1798.—*Monday, May* 6, 1799.

The doctrine of perpetuities and executory limitations considered.*

[It is unusual to adjudge profits to a person held in slavery, on recovering his liberty.†]

This was an appeal from a decree of the High Court of Chancery, in a suit brought by Robert Pleasants, son and heir of John Pleasants deceased, against Charles Logan, Samuel Pleasants, junior, Isaac Pleasants and Jane his wife, Thomas Pleasants, junior, and Margaret his wife, Elizabeth Pleasants, Robert Langley and Elizabeth his wife, Margaret Langley, Elizabeth Langley the younger, and Anne May. The bill states, that the said John Pleasants by his last will devised as follows: "My further desire is, respecting my poor slaves, all of them as I shall die possessed with, shall be free if they chuse it when they arrive at the age of thirty years, and the laws of the land will admit them to be set free, without their being transported out of the country. I say all my slaves now born or hereafter to be born, whilst their mothers are in the service of me or my heirs, to be free at the age of thirty years as above mentioned, to be adjudged of by my trustees
[320] their age." That the said John Pleasants, in a subsequent part of his will, devised to the plaintiff eight of the said slaves upon the same condition, that he should allow them to be free if the laws of the land would admit of it. That the testator then devised to his grand-son Samuel Pleasants, one third part of his slaves not otherwise disposed of, on the same conditions on which he devised the said eight slaves to the plaintiff. That the testator devised to his daughter Elizabeth Langley, the use of all the slaves conveyed to him by Robert Langley, and also the slaves sold by the said Robert Langley to John Hunt or Samuel Gordon, during the term of her natural life, and after her death, to her children, upon the same limitations and conditions relative to their freedom, as are mentioned in the other bequest. That the said testator then devised to his son Jonathan Pleasants, when he should attain the age of twenty-one, one third part of all the

[* See the celebrated case of *Thellusson* v. *Woodford*, 4 Ves. jun. 227–344, 11 Ves. jun. 112–151.]

† Negroes recovering freedom by suit *in forma pauperis*, cannot in any case recover profits or damages. *Paup's adm'r* v. *Mingo and others*, 4 Leigh, 163. Acc. *Henry and others* v. *Bollar, &c.*, 7 Leigh, 19.

slaves not otherwise disposed of by that will, including his mother's jointure negroes; and those given to her father, to be reckoned as part of the share, or third part of the said Jonathan Pleasants in the share of the said slaves. That the testator devised to his grand-daughter Jane Pleasants, a negro girl named Jenny, upon condition, in addition to the general condition first mentioned, respecting the freedom of the said slaves, that she the said Jane, as one of the children of her deceased father John Pleasants, should release all claim to any dividend in a co-partnership mentioned in the said will. That he devise l four slaves to his daughter Mary Pleasants; to his grand-daughter, a negro woman named Pender, and her children; and to Elizabeth Pleasants, wife of Joseph Pleasants, a mulatto woman named Tabb, and her child Syphax. That the said testator then devised as follows: "*Item*, I give and bequeath unto my son Thomas Pleasants, the remaining third part of my negroes, before directed to be equally divided between my grand-son Samuel Pleasants and son Jonathan, with the same proviso and limitations respecting their freedom as is before mentioned and intended towards the whole by this will given or devised." That the several devisees became possessed under the will aforesaid, and the said Jonathan Pleasants in the year 1777, by his last will, made the following devise: "And first believing that all mankind have [321] an undoubted right to freedom and commisserating the situation of the negroes which by law I am invested with the property of, and being willing and desirous that they may in a good degree partake of and enjoy that inestimable blessing, do order and direct, as the most likely means to fit them for freedom, that they be instructed to read, at least the young ones as they come of suitable age, and that each individual of them that now are or may hereafter arrive to the age of thirty years may enjoy the full benefit of their labor in a manner the most likely to answer the intention of relieving from bondage. And whenever the laws of the country will admit absolute freedom to them, it is my will and desire that all the slaves I am now possessed of, together with their increase, shall immediately on their coming to the age of thirty years as aforesaid become free, or at least such as will accept thereof, or that my trustees hereafter to be named, or a majority or the successors of them may think so fitted for freedom, as that the enjoyment thereof will conduce to their happiness, which I desire they may enjoy in as full and ample a manner as if they had never been in bondage, and on these express conditions and no other do I make the following bequests of them." That the testator then

proceeds to dispose of his slaves among the following persons, to-wit: Mary Pleasants, Anne Langley, Elizabeth Langley, Mary Langley, Jane Pleasants, David Woodson, Anne Woodson, Joseph Pleasants, Samuel Pleasants, and the plaintiff; again expressing in almost every particular devise, the same positive condition in favor of their freedom. That the said Anne Langley hath intermarried with May, Margaret Langley with Teasdale, Anne Woodson with Pope, and Mary Pleasants with Logan. That the plaintiff is heir at law and executor [322] of the said John Pleasants, deceased, as well as executor of the said Jonathan Pleasants; and in those characters, in the year 17 , applied to the Legislature for the manumission of the said slaves; but the Legislature were of opinion, that it belonged to the Judiciary. That the plaintiff hath been much embarrassed as to the mode of bringing the question before the Courts, as the slaves could not sue at common law: 1. On account of their not being capable of being manumitted, but upon the terms mentioned in the act of Assembly. 2. As they claimed their freedom in the nature of a legacy. That the devises to the defendants were only on condition that they would emancipate them when they arrived at a certain age, and the laws would permit it. Of course, that they have no title to them; but either the plaintiff is entitled, for a breach of the condition, or as executor, on whom the legal estate vested to perform the will. That there are no debts due from the said John and Jonathan Pleasants, now unsatisfied. That the plaintiff hath applied to the defendants to emancipate the said slaves; but they refuse. Therefore, the bill prays, that the slaves may be delivered up to the plaintiff, to be holden in trust for the purposes of the wills of the said John and Jonathan Pleasants; that the Court would direct the manner of their manumission; and for general relief.

The defendant Mary Logan demurred to the jurisdiction; and by answer says, that her late husband died indebted to several persons.

Isaac Pleasants also demurred to the jurisdiction; and by answer says, that the increase of slaves devised to the said Jane, are under thirty years of age.

Samuel Pleasants likewise demurred, for want of jurisdiction; and, by way of answer states, that some of those in his possession are under thirty years of age.

Elizabeth Pleasants says, that Tabb and her increase [323] were given to the defendant by the said John Pleasants in his life-time, as by his letter will appear. And that the will of John Pleasants doth not operate to give freedom to the other slaves.

The defendant Teasdale, denies his responsibility to the plaintiff, either as heir or executor. By amended answer he says, that T. Atkinson has, by virtue of a mortgage, recovered part of those held by the defendant, and the defendant hath since paid him a valuable consideration for them.

A suit was afterwards brought by Ned, one of the slaves, *in forma pauperis*, against Elizabeth Pleasants, widow of Joseph Pleasants, setting forth the clauses of the will of Joseph Pleasants, stating the act of Assembly authorising the manumission of slaves, and that the plaintiff is now upwards of thirty years of age; and hath so demeaned himself as to shew that freedom would be conducive to his happiness. The bill, therefore, prays the Court to decree the defendant to release him from slavery.

The Court of Chancery over-ruled the demurrers, and declared itself of opinion, that, in equity, of the slaves, on whose behalf the suit was instituted, they who were thirty years old, or older, in the year 1782, when the act authorising manumission was enacted, [May, c. 21, 11 Stat. Larg. 39,] were, at that time, entitled. They who, born before the testator's death, were not thirty years old at the time of the decree, would, when they should attain the same age, be entitled to freedom, and that they who had been born since the statute was enacted, were at their birth entitled to freedom: That the plaintiff Robert Pleasants, heir and executor as aforesaid, was the proper party to vindicate that freedom. It, therefore, referred it to a commissioner, to ascertain their ages, and to take an account of their profits since their respective rights to freedom accrued. From which decree, the defendants appealed to this Court.

WICKHAM, for the appellants.

If the plaintiffs were entitled to their freedom, it was either by the common law, or by statute; and either [324] way, they could have asserted it at common law. Consequently, their remedy was at common law, and they ought not to have resorted to the Court of Chancery.

It will be said, that the legatees are trustees; and, therefore, that the Court of Equity had jurisdiction upon the ground of a trust. But the history of uses, which were invented to avoid the statutes of mortmain, shews, that a Court of Equity, only exercises jurisdiction where the beneficial interest is in one person, and the legal in another. Now, it cannot be said, that the legatees have the legal estate, and, that the beneficial interest, that is, the labor of the slaves, is in the slaves them-

selves. Of course, it is not a case which consists with the nature and foundation of trusts.

Perhaps it will be said, that several may join in one suit here; and that, that circumstance will give the jurisdiction. But that will not alter the case; because several may sue at law also. *Coleman* v. *Dick* and *Pat*, 1 Wash. 233. Therefore, the Court of Chancery ought not to have sustained its jurisdiction, but the decree is erroneous, upon that ground.

Then, as to the right of the plaintiffs to have their freedom. It may be proper to premise, that, although it may be true that liberty is to be favored, the rights of property are as sacred as those of liberty; and, therefore, that this cause should be decided on the same principles of law, that other causes are.

Emancipation of slaves was prohibited by the act of Assembly in 1748, p. 262, edit. 1769, [c. 38, § 26, 6 Stat. Larg. 112.] Which act was in force at the time of making this will; and, therefore, the condition, annexed to the bequests, is void.

There is a distinction in law, which is well known, between conditions precedent and subsequent. The first must [325] be performed, before any estate at all vests; but, it is otherwise as to the latter, because then, the condition may happen to destroy the estate which has already vested. In our case the condition was precedent, and it remains to consider, whether the title, depending on it, could ever take effect?

This condition was contrary to the nature of the estate, for it tended to bar the alienation of the property, and therefore was void. Shep. Touch. 129; 1 Co. 83; 1 Inst. 223. During all the period, between the death of the testator and the happening of the contingency, it was wholly uncertain, whether the law would pass, or not; and, consequently, the condition operated as a bar of alienation, for that time; which the authorities declare will render it void. For, it is, in effect, but a devise of the slaves in absolute property, with a condition, that the devisee shall not alien. In Co. Litt. 224, it is said, that a privilege, inseparable from the estate, cannot be restrained; and the right of alienation is a privilege inseparable from the right of property.

But, the condition is void, upon another ground; namely, that it was illegal and contrary to the act of Assembly; which having forbid emancipation, every attempt to effect it, was repugnant to the act, and therefore void.

If it be said, that the act only respected absolute and not conditional emancipations, the answer is, that the latter is comprehended in the former, for every lesser is contained in the greater. So, that this was an attempt at emancipation, which was void on account of its repugnancy to the law.

Perhaps it will be said, that the law permitted manumission at the time, when the emancipation took effect in point of operation, although there was no such law at the death of the testator; and, therefore, that the case is out of the meaning of the act of 1748. But, this is not so; for, [326] there is no limitation, for the happening of the event; and the question is not, whether subsequent events can make it lawful? but, whether the devise was good upon the face of the will? for, posterior events could not make it good, if it were not so at its creation; that is, at the death of the testator. This is evinced in the common cases of remainders of personal estate, where the events may actually take place, within the limits allowed by law, but the remainders will, nevertheless, be void, because too remote in their creation. This principle was adhered to, by the Court in the case of *Carter* v. *Tyler*, 1 Call, 165, in which it was clearly held, that posterior events would not alter the construction from what it ought to have been, at the death of the testator.

Thus then it appears, that during all the period between the death of the testator and the passing of the act of Assembly, the legatees had property, to which there was a repugnant and illegal condition annexed; which was consequently fruitless and void.

By the act of Assembly in 1782, for emancipation of slaves, there is nothing which either manumits the plaintiffs in terms, or obliges the legatees to do it; for, the act has certain prescribed terms, and the present case is not within any of them: But, the plaintiffs must shew, that they are within the requistes of the act; and this they cannot do.

It is a rule, that all acts upon the same subject shall be construed as one act; because, the whole are only parts of the same system. Therefore, this act of Assembly and that of 1748, are to be taken as one law. It will then be correct to say in the language of 1748, that it is generally true, that there shall be no emancipation; but, that there may be certain specified emancipations, according to the act of 1782. So, that the provisions of the act of 1748, will still be [327] the general principle; and those of the act of 1782, will only operate as exceptions out of that of 1748. Therefore, any case which is not strictly within the terms of the act of 1782,

will come within the operation of that of 1748. Thus, if a man were to attempt to emancipate his slave by parol, this, not being within the terms of the act of 1782, would be void by that of 1748.

Besides, the act of 1782 is prospective, and not retrospective. It was not intended to embrace any prior case.

Again, the act is permissive, and not compulsory. So that the proprietor may do it or not, as he pleases; for, there is no obligation upon him, and, therefore, the legatees may refuse.

But, the act of Assembly imposes certain conditions upon the owner who emancipates; such as the maintenance of the young and aged slaves. Now, this the proprietor may do or not, as he pleases, and no person can complain if he will not. But, the construction made by the Court of Chancery, upon this will, would go to compel the legatees to give this security; for, it cannot be dispensed with, if they are emancipated; or else the helpless and aged will be thrown as a burthen upon the public, contrary to the intention and express provisions of the act of Assembly.

The Court cannot compel the administrators to emancipate. No person but the proprietor can do it by law, and, for the reasons already given, the Court cannot force him to do it.

The decree of the Court of Chancery does not follow the testator's intention. He intended to erect the slaves into a distinct kind of property; that is to say, they were to be slaves till thirty, and freemen afterwards; but, this idea is not pursued by the decree, which has not only changed the law, but the will too. For, a mother having children be-
[328] fore thirty, those children will be subject to the term of slavery too. The word *hereafter* takes in all future generations.

As the decree of the Court of Chancery is clearly wrong, how will the Court mould another? Must it be, that the plaintiffs and their progeny, to all generations, shall, in succession, be entitled to freedom at thirty? This would be to allow the testator to create a new species of property, subject to rules unknown to the law. But, this is what no man can do.

The whole amount, therefore, is, that the testator has wished to do what the law will not permit him to do; and, consequently, the attempt is void.

Upon principles of convenience, the construction of the plaintiffs ought not to prevail. For, suppose Logan had contracted debts, between the death of the testator and the passing of the law, ought the creditors, who had trusted him on a

fair presumption that no law of emancipation would pass, to lose their debts?

The will of Jonathan Pleasants ought to receive the same construction.

With respect to the account of profits, who are to repay the expenses of those that were chargeable? It could scarcely have been intended by the testator, that this burthen should be borne by the legatees.

But, the general idea of the country, and the practice in the Courts of Law, are opposed to such a demand; and, therefore, damages are never given, in actions of this kind, by the juries who decide them.

RANDOLPH, on the same side. By the act of 1727, § 3, [c. 9, 4 Stat. Larg. 223,] slaves can only be conveyed as chattels; and, as such a limitation of a chattel would be too remote, and therefore void, it follows, that this is so likewise. The act of 1748, instead of curtailing, rather extended the power of emancipation. For, prior to that law, a man could not manumit his slave. [329]

WARDEN, for the appellee.

This was the case of a trust which gave the Court of Chancery jurisdiction. The nature or kind of the trust does not make any difference, in this respect. Saund. Trusts, 14, 18.

This was a trust to perform a certain act, when the trustee should be enabled to do it: which trust was not inconsistent with law; and the act of 1782, having enabled the legatees to do it, their conscience is affected, and, consequently, they are bound to perform it.

The application to the Court of Chancery, therefore, in order to compel an observance of this equitable obligation, was proper.

The act of 1748 has not the effect which is contended for by the other side. It does not *ipso facto* make void the deed of emancipation. On the contrary, the right of the proprietor is extinguished thereby; although, the freedom of the slaves is liable to determine, by the officers of government exercising the powers given by the act of Assembly, and selling the slave: which not having been done in this case, and the act of 1748 being now repealed, it follows, that the devise, which at first was effectual to pass the testator's right continues to be effectual.

The decree pursues the intention of the testator; which was, that all above thirty should have their freedom.

The plaintiffs have a right to the profits of their labor. The decree, therefore, as to this point, is right; especially, as it only directs the commissioner to enquire which of them are
[330] entitled to their freedom and to profits. This, in effect, is no more than instituting an enquiry, which of them came up to the cases contemplated by the testator.

The notion of the *perpetuity*, contended for by Mr. Wickham, is without foundation. Because, from a fair construction of the devise, the contingency was confined to a reasonable period.

MARSHALL, on the same side. As to the point of jurisdiction, there can be no question, but that the ordinary principles, founded on the general doctrines of trusts, apply; and the rather, perhaps, because, being a suit for freedom, the forms of proceeding will not be so strictly adhered to, as in other cases. This was decided in the case of *Coleman* v. *Dick* and *Pat*, cited by Mr. Wickham. But it was clearly a trust; and, therefore, upon that ground, the Court of Chancery properly sustained its jurisdiction. Besides, the difficulty of deciding the nature of the case, as whether freedom was actually given, so as that there might be a common law remedy? Or, whether it was not rather in the nature of a contract to be enforced in equity upon the happening of the events? Whether the property was in the heir or administrator? and which of them should perform the act? All these circumstances rendered the resort to the Court of Chancery proper.

As to the question upon the right to freedom. The right of the testator clearly passed by the will. That was irrevocable; although the slaves would not have enjoyed their freedom, had the officers of government chosen to exert their powers, and sold them as the act directed. But, as the act of 1748 was repealed, without this being done on the part of the officers of government, if they had the power in the case, the right of the *paupers* to their liberty continues.

The question then is, whether the condition shall be performed?

[331] If not, it must be, either because it is against law, or because it is an attempt to create a *perpetuity*.

As to the first, there is nothing *malum in se*, in it; and, therefore, it is not void upon any principle of morality: neither is it void, upon the ground of statutory prohibition. Before the act of 1748, every person, who pleased, might have emancipated his slave; and that statute does not say that the testator may not give his slave liberty, when the law shall

permit. The old rule of devises to a child in *ventre sa mere*, is, in principle, not unlike this case. For, according to that rule, an executory devise to such a child, by words *de præsenti*, was void; but, it was otherwise, where the devise was future. So, here an immediate emancipation was liable to be defeated by the statute; but, a future one, like this, was not.

The great question, therefore, is as to the *perpetuity*. Now, a perpetuity is a condition which may run forever, or to an unreasonable time. But this does not. For, the will relates to several subjects; and, therefore, may be construed severally.

For instance, as to those born, the devise is to be confined to a life in being; and, for this purpose, it may be taken distributively: so as to make the contingency, with regard to them, fall within a life in being, or a reasonable period afterwards. Thus, where a mother was born at the death of the testator, the most remote limitation would be a life in being, and thirty years afterwards: which is a period not denied by any book. For, the authorities are all *affirmatively*, that it may depend on a life in being, and twenty-one years afterwards; and not *negatively*, that it shall not depend on a longer time than a life in being, and twenty-one years afterwards. Therefore, as to the mothers born at the testator's death, the bequest is good, upon the soundest principles of law.

The mothers born after the testator's death may perhaps form a class of different cases; but that very circumstance shews, that the account directed by the Court was proper. [332]

The act of 1782 operated a clear repeal of that of 1748; and, therefore, the only impediment which could be supposed to exist, is removed.

If justice requires it, the Court may compel the administrators to emancipate; and the legatees, by taking the legacy, bound themselves to perform the trust. Of course, they may be compelled to a specific performance of it. For, if the testator was himself in that situation, he would be decreed to perform; and, in principle, there is no difference.

With respect to the argument of inconvenience, from Logan's having contracted debts, if that were the case, the plain answer would be, that the creditors having trusted a contingent estate, must be subject to the contingency.

RANDOLPH, in reply.

Upon the question of jurisdiction, this was a plain legal question; and if the plaintiffs had any right, they might have asserted it at law. The nature of the subject did not alter the

case; nor did the qualities of the parties, as combining the rights of the heir and trustee. In a case concerning lands, such an argument would not prevail. You cannot, in equity, join different rights in one suit; and if you do, it is cause of demurrer. The *paupers* might all have united in one suit at law. Besides, numbers alone cannot give jurisdiction to the Court of Chancery. If it be said, that, being a legacy, it was properly sued for in equity, the answer is, that the executor has assented, and, consequently, that the remedy at law was sustainable. It follows, therefore, that the Court of Chancery had not jurisdiction.

The law of 1727 declares, that slaves shall pass as chattels; and it is most clear, that such a limitation of a mere chattel would be void, as tending to a perpetuity.

[333] It is said that the act of 1748, only prohibits immediate, and not future emancipations; but this is not correct; and before that act, it was not lawful to emancipate.

That statute was an existing prohibition, at the time of making this will; and, if a chattel had been devised upon such condition, that such a law should pass, the bequest would have been void. For, it would have been a condition contrary to law, and therefore void. 2 Black. Com. 160.

Executory devises must take effect within a limited time or not at all. Thirty years is too long, and never has been allowed. If it were, you might go on to any extent. The period of a life, or lives, in being, and twenty-one years afterwards, is the fixed rule; insomuch, that it has now become a canon of property; and to alter it, would be to shake titles, and unsettle property.

In the present case, the devise is not to take effect within that period, and therefore, the limitation is too remote. A law was first to pass; and when that should be, was wholly uncertain. The posterior event did not alter the nature of the case in its origin; it must be decided, by the will, at the testator's death; at which time it would have been determined to be void, on account of the remoteness of the contingency.

Upon the whole, the devise is contrary to the policy of the law, as tending to create a *perpetuity*, and annexing conditions contrary to the genius and spirit of the acts of Assembly. It is therefore void; and of course the decree is erroneous, upon the general ground.

But, at any rate, the account of profits is contrary to practice, and the equity of this case in particular; because the defence was reasonable, and therefore, the defendants justifiable in making it.

Cur. adv. vult.

ROANE, Judge. This is a bill brought by R. Pleasants the heir and executor of John Pleasants, deceased, claiming title on behalf of the negroes, who were the property of the said Pleasants, at the time of his death, and their descendants. [334]

This claim is founded upon the will of the said John Pleasants, dated the 11th of August, 1771; and which has this general clause, "My further desire is respecting my poor slaves, all of them as I shall die possessed with, shall be free if they chuse it, *when they arrive to* 30 *years of age, and the laws of the land will admit them to be free*, without their being transported out of the country, I say all my slaves now born, or hereafter to be born, whilst their mothers are in the service of me or my heirs, to be free *at the age of* 30 *years* as above mentioned, to be adjudged of by my trustees their age."

He then gives his son Robert the plaintiff, eight negroes, "On condition he allows them to be free at the age of 30 years, if the laws of the land will admit of it." And then, devises the residue of the slaves to various persons, under conditions similar to that last mentioned, in the devise to his son Robert.

The will of Jonathan Pleasants (who was a legatee under the will of John Pleasants of one-third of his negroes on the same condition) dated the 5th of May, 1776, has a general clause respecting the freedom of his negroes, as also particular conditions annexed to each bequest, in substance similar to those before stated, to be contained in the will of John.

As, however, it does not appear, as well as I recollect, that Jonathan Pleasants had any slaves, other than those derived from his father, as aforesaid, and entitled to the benefit of his will, the will of Jonathan may be thrown out of the present case. But, if it were otherwise, I do not think it would make any material alteration in any estate, or in the decision, which I think ought now to be given. [335]

After a demurrer by some of the defendants, for that the bill contained no matter of equity, but that the matter of it was proper for the cognizance of a Court of Law, and answers, (which it is not now necessary to specify particularly,) the Chancellor, on a hearing, over-ruled the demurrer, and decreed in favor of the plaintiffs; directing an account, also, to be taken of their profits. It is here to be remarked, that the cause with respect to the answers, does not appear to have been matured and regularly set for hearing; but as all parties were willing to try it, upon the general question, which most

probably did not, at all, depend upon the particular answers, and more especially, one which, involving liberty, did not admit of delay, and cannot be drawn into precedent, as applicable, on the point, to other cases, the decision given in that case, as upon the general question, was not premature; and the decision, under the restrictions now contemplated as to subordinate questions, can produce no injury to any of the parties.

In considering the general question, growing out of the will of Robert Pleasants, as before stated, I will first consider slaves as a species of property recognized and guaranteed by the laws of this country, and to be considered, with respect to a limitation over, by the act of 1727, [c. 9, 4 Stat. Larg. 223,] on the same footing with other chattels.

I will also consider, in the first place, the claim of the appellees to their freedom, only, as that of ordinary remaindermen, claiming property in them, and endeavor to test it by the rules of the common law, relative to ordinary cases of limitations of personal chattels. And if their claim will be sustained on this foundation, and by analogy to ordinary remainders of chattels, every argument will hold, with increased
[336] force, when the case is considered in its true point of view, as one which involves human liberty.

The doctrines of the common law, relative to perpetuities as to estates of inheritance, hold *a fortiori* as to terms for years and personal chattels. If it be contrary to the policy of that law, to render unalienable, for a long space of time, real estates of inheritance, on reasons of public inconvenience and injury to trade and commerce, these reasons apply, with much more force, as to interests of short duration in lands and personal chattels; not only, because the latter are better adapted to the purposes of trade than the former, but also, because of their transitory and perishable nature.

This observation goes to fortify what is so fully established by the books, as to render citation unnecessary; namely, that the policy and reason of the law leans, at least, as strong against perpetuities in personal as in real estates.

The utmost limits allowed by law for the vesting of an executory devise (or as *Fearne* has it, as applicable to personal chattels, *an executory bequest,*) is the term of a life or lives, in being, and twenty-one years after. This limitation, then, has become a fixed canon of property, and ought not be lightly departed from: And the true distinction is, where the event must happen, if at all, within those limits, the executory de-

vise is good; and on the happening of the contingency, the estate will become absolute, in the remainder-man.

Thus, a limitation to one, *in esse*, in fee or in tail, after a dying without issue, is not good, because the contingency, *the dying without issue*, is too remote. But such a limitation to one, *in esse*, for life, is good; because the contingency must happen, if at all, so as to vest the estate, within a life in being, viz: that of the remainder-man; that is to say, the limitation in remainder for life restrains the previous disposition, in the same manner, as if it had been expressly [337] limited to the remainder-man, on the event of dying without issue, in his life-time.

This case seems directly parallel with the case before us, the happening of the contingency here; *i. e.* the passing a law to authorize emancipation, standing simply, is too remote, as it may not happen within 1,000 years: But, when the testator goes on further, and means the benefit of it to persons *in esse*, (for they are the objects of his bounty, and unless it happened within their lives, it might as well, as to them, not happen at all,) this restrains the happening of the contingency, as in the case before put; and makes the executory devise good, at least as to all who are within the legal limits.

Nay, the doctrine is carried so far, as to terms for years and personal estates, (for it is otherwise with regard to estates of inheritance, in favor of the heir,) that Courts are inclined to lay hold of any words, in the will, to restrain the general words, "leaving issue," to mean *leaving issue at his death;* and thus to support the remainder. As, in the case of *Keily* v. *Fowler*, Fearne on Rem. 369, where those words were so restrained, in case where the estate was to return back to the executors, in the event of dying *without leaving issue*, and to be distributed by them, and £50 were given them for their personal trouble. Here the words were so restrained, in order to reconcile the limitation to the devisee, with the nature of the trust reposed in the executors, and to be executed by themselves, *in their lives.*

The construction, in this case, must be, as it would have been at the instant of the testator's death. *Doe* v. *Fonnereau* [Dougl. 487.] And, (the event put out of the question, at present, and leaving, for an after-consideration, the circumstances of the contingency having actually happened, and its effects upon the case,) as upon the will itself, the estate, limited on the contingency, (if I may so express it,) [338] that is to say, the right of freedom was good, if the contingency happened within the legal limits, in favor of such as

might be *in esse* to enjoy it, and void, if it happened beyond those limits.

This brings us to the consideration, whether the limitation can be sustained, as on the construction of the will itself, as to such as might be *in esse* during such limits, although it may be void as to such as might be born in a remote generation?

And I have no doubt but it may.

I have no doubt, but that the limitation, as upon the will itself, may be construed *distributively*, so as to be efficacious as to some of the plaintiffs, although it might be void as to future claimants; that is to say, such as claim beyond the legal limits, in the event of the contingency's happening sooner or later, as the case may be. In the case of *Forth* v. *Chapman*, 1 P. Wm. 663, there was a limitation of freehold and lease-hold lands in the same manner, to wit: "If the first devisee die, without issue." These last words, *die without issue*, were construed, under the distinction before taken, to be tied up to mean *issue living at the death*, as to the lease-hold land, and consequently the limitation was held good; but, as to the free-hold lands, they were not considered as being so restrained, and they received the same construction by the Ld. Chancellor as if they had been twice repeated.

To come now to the case before us, as it really is. The contingency has happened within the limits. The effect is, that the limitation over has thenceforth become vested, in interest, in all the appellees, then *in esse;* and vested in possession, as to all, then, or as they might become thirty years of age. As to all the slaves, then *in esse*, but under thirty years of
[339] age, their right to freedom was complete, but they were postponed as to the time of enjoyment. They were in the case of persons bound to service for a term of years, who who have a general right to freedom, but there is an exception, out of it, by contract or otherwise.

What then, after the passing of the act, is the condition of the children born of mothers, so postponed in the enjoyment of their freedom? Are they, at their birth, entitled to freedom? Or, are they too, to be postponed, until the age of thirty? The condition of the mothers of such children, is, that of free persons, held to service, for a term of years; such children are not the children of slaves. They never were the property of the testator or legatees, and he or they can no more restrain their right to freedom, than they can that of other persons born free. The power of the testator in this respect, has yielded to the great principle of natural law, which is also a principle of our muncipal law, that the children of a

free mother are themselves also free. The conditions of the will then, as applicable to such children, if indeed it was intended, or can be construed to apply to them, is void, as being contrary to law; it being an attempt to detain in slavery persons that are born free. Considering the mothers of such children, by analogy to other persons held to service, it will be found, that a particular law was here necessary; the power of the Legislature alone, was competent to subject the children of mulatto mothers, held to service till the age of thirty-one, to serve till the ages respectively of twenty-one and eighteen. But this case goes further, and is an attempt, by an individual, to hold to service, till the age of thirty, persons, who, following the condition of their mothers, are born free.

The view of the subject I have now taken, (which will sustain the claim of the plaintiff, by referring to the ordinary doctrine of limitations of personal chattels,) will supersede the necessity of a very delicate and important enquiry: namely, whether the doctrine of perpetuities is applicable to cases in which human liberty is challenged? [340]

It is clear, that the restraints, rightly imposed on the alienation of inheritances, to prevent perpetuities, are founded principally, if not solely, on considerations of public policy and convenience: That those restraints have gradually been extended to terms for years and chattel interests, and that the utmost tolerable limits in such cases, have not been settled till after much investigation, and a considerable lapse of time. It is also clear, that neither the particular species of property now in question, nor the case of a remainder-man, (if I may so express it,) claiming his own liberty, were in the contemplation of the Judges, who established the doctrine on this subject; which, therefore, may not apply. But, this is an extensive question, and if it were necessary to be now decided (but it is not,) it would be proper to weigh the policy of authorizing or encouraging emancipation, (a policy, which has certainly received in many instances, and partly by the act of 1782, the countenance of the Legislature, at least from the era of our independence, and must always be dear to every friend of liberty and the human race,) against those secondary considerations of public policy and convenience; which appear to have supported and established the doctrine of the law, on the subject of perpetuities, as relative to ordinary kinds of property.

But it is said, the act of 1782, authorizing emancipation, is prospective in its operation, and does not take in the present case. In answer to this, I am of opinion, that the accept-

ance of the negroes in question, on the condition stated in the will, created an inchoate contract to emancipate, on the part of the devisees; which, on the passing of the act, became essentially complete: That an emancipation ought, therefore, [341] to have been made; that the devisees were, thereafter, trustees, for the purpose of making such emancipation; and that the plaintiffs are right, in coming into a Court of Equity, to enforce the fulfilment of that trust: And this is one answer to the objection on the score of jurisdiction.

It is said, too, that as the will speaks of an unqualified emancipation, (without respect to bond and security, to prevent aged and infirm slaves from being chargeable to the public,) and, as the act of 1782 has required that such security should be given, an act authorizing emancipation, in the sense contemplated by the will, has not yet passed; and, therefore, the condition imposed upon the legatees is not obligatory.

In answer to this, I am opinion that the testator cannot reasonably be supposed to have contemplated an act of emancipation, making no provision to prevent the persons liberated from being chargeable to the public. That, therefore, the act, as contemplated, has substantially taken place; and, that a Court of Equity may carry the contract into execution, if in no other manner, at least by throwing the burthen of the indemnity, required by the act of 1782, upon the slaves themselves, and making it a *lien* upon the liberty granted them; and such an arrangement, it is evident, would place the holders in the same, and no worse condition, than if an unqualified act in favor of emancipation had actually passed. The necessity of making such an arrangement in this case, shews the propriety of applying to a Court of Equity; because, no other Court has adequate power: Which is another answer to the want of jurisdiction.

In what manner the arrangement should be made, in this case, so as to comply with the act of 1782, requiring an indemnification against aged and infirm slaves becoming chargeable to the public, is a subject upon which I have had considerable [342] difficulty. But, I am fully persuaded, that the powers of a Court of Equity, which regards the substance of things more than forms, are competent thereto; and I now beg leave to refer to the *projet* of a decree, which I shall take the liberty of stating, presently, as containing the result of my deliberations on the subject.

Another ground, upon which the jurisdiction of the Court of Equity is sustainable, in the present case, is, that it involves

the rights of a great number of claimants.* So that the joint suit prevents a great deal of litigation and expense; besides, involving in the same common fate, those who stand on one common title. Whereas, if separate suits were brought, it might turn out, either upon general or special verdicts, that persons having the same rights, nay, even children of the same mother, might one be adjudged to be free, and another a slave. An enormity which the joint proceeding is wisely calculated to prevent.

With respect to the slaves claimed by Elizabeth Pleasants and by Teasdale, paramount to the will of J. Pleasants, my opinion, in the present case, does not extend to them, so far as the title thereto is claimed paramount to that will; but, such title ought to be considered as still open, if desired, for discussion and decision.

With respect to the debts of the original testator, if any, the original slaves and their descendants are clearly liable. But, whether they are liable to the debts of the devisees accepting them, or their right to freedom is lost by a *bona fide* sale, if any such has taken place, are questions which I also consider as open for the decision of the Chancellor, if required. It would seem to me, however, as at present advised, that if the limitation was good, by the rules of law, the right thereby created would not yield, either to the claim of creditors or purchasers. But, on this point, I give no decided opinion.

I have now gone through, or touched upon such points in the case as appeared to me necessary to be noticed. There is yet one part of the Chancellor's decree which I could have wished had not been made. I mean the reference to a commissioner to ascertain the profits of the slaves. We [343] have no precedents, either of the Courts of England or this country, to guide us. In the former country, indeed, no such case could occur, because slavery is not there tolerated; and, in this country, I believe no instance can be produced of profits being adjudged to a person held in slavery, on recovering his liberty. Among a thousand cases of palpable violations of freedom, no jury has been found to award, and no Court has yet sanctioned a recovery of the profits of labor, during the time of detention. Yet, it must be admitted, that juries are often excellent Chancellors. But, this is not a palpable violation of freedom. To say the least, it is a very nice question, whether these plaintiffs be entitled to freedom or not. And, ought the Court, in such a doubtful case, to award that which

[*Mitford's Plead. 117, 3 Lond. ed.]

the whole equity of the country, flowing through a thousand channels, has not yet awarded in a single instance? It seems to be a solecism, to award ordinary profits to recompense the privation of liberty; which, if it is to be recompensed, the power of money cannot accomplish.

But, what with me is decisive on this point, is this, that as, in my opinion, all the children born of the female negroes in question, since the passage of the act of 1782, are, and were thenceforth entitled to freedom by birth, the burthen of rearing such persons, during their infancy, (which must be borne by the legatees,) will form perhaps not an unreasonable set-off against the profits of those who were capable of gaining profit by their labor.

I have thus endeavored to make known the grounds upon which my opinion is founded. I entirely concur in the result of the Chancellor's decree, except in the particulars in which I have already stated my opinion to be different. As [344] it is the policy of the country to authorize and permit emancipation, I rejoice to be an humble organ of the law in decreeing liberty to the numerous appellees now before the Court. And this, upon grounds, as I suppose, of strict legal right, and not upon such grounds as, if sanctioned by the decision of this Court, might agitate and convulse the Commonwealth to its centre.

The general outlines and substance of the decree which I think should be made in this case, are as follows:

That whensoever, and as soon as the appellee, Robert Pleasants, or any other responsible person or persons, shall, under the direction of the High Court of Chancery, enter into bond with sufficient securities, in such Court or Courts, under such penalty or penalties as the said High Court of Chancery shall direct, with condition to indemnify and save the public harmless, with respect to all such of the slaves in question as were *in esse* at the time of the passage of the act of 1782, authorizing emancipation, and shall be deemed to fall within the provisions of that act, relative to old age and infirmity, with an exception, however, with respect to such indemnity, as to such of the said slaves as may be under the age of thirty, and may be deemed infirm, for the period or periods of time it may respectively require them to accomplish the said age of thirty years, and during which they will remain, at the proper charge of the legatees or holders under the will or wills in question. Or, whensoever, and as soon as the Legislature of this Commonwealth shall, if it ever shall, remit the indemnity above supposed necessary to be given. And when, in addition, in

either case, it shall appear to the satisfaction of the said High Court of Chancery, either that there are no legal and subsisting debts of the said John Pleasants, the testator, or that being so, a sufficient fund has been raised, by the common labor of the said slaves, to discharge the said [345] debts; which, in that event, saving the right of the legatees, as aforesaid, the said Robert Pleasants, or any other trustee to be appointed by the said Court, is authorized to do; and if it shall be found that the testator, Jonathan Pleasants, possessed, at his death, any slave or slaves other than those derived under the will of the said John, and now in question, then a like provision to be extended to them, in respect of his the said Jonathan's proper debts, if any; it shall be the duty of the said High Court of Chancery to emancipate and set free the said slaves, respectively; subject, nevertheless, to the rights of the legatees, and those claiming under them, to their labor, until they shall severally have attained the age of thirty years, in like manner, and to all intents and purposes, as if they had been respectively emancipated, conformably to the said act. But, if such indemnity be given or remitted, as the case may be, within a reasonable time, to be adjudged of by the said Court, it shall, in that event, be lawful for the said Robert Pleasants, or any other trustee or trustees, to be appointed by the said Court, to possess the whole of the said slaves (subject as aforesaid) in trust, to raise a sufficient fund to answer or procure the said indemnity, and satisfy the debts, if any, as is aforesaid; and as soon as those purposes are accomplished, in the opinion of the said Court, it shall have power, and is hereby directed, to manumit the said slaves, subject, as is aforesaid, in the manner above directed; adopting and pursuing, in either case, such measures as are provided by the said act of 1782, as far as may be, for preserving the evidences of their title to freedom. Provided, that nothing herein contained shall be construed to extend to any of the slaves in question born since the passage of the act of 1782, and who are entitled to freedom by birth, and not by emancipation. Nor to the paramount titles set up by Elizabeth Pleasants and Daniel Teasdale, to a part of the said slaves. Nor to [346] the question, whether the said slaves are liable to pay the debts of the original legatees, or those who claim under them. Nor, if sold to bona fide purchasers, whether such sale be valid to bar the right of liberty now asserted. Nor to bar or affect the title or titles of any person or persons whatever, other than the said testator or testators, as the case may be, and those claiming under them, respectively. All which ques-

tions ought to be considered as open and undecided as if the present decision had never been made.

CARRINGTON, Judge. I concur with the decree of the Chancellor, so far as it goes to overrule the demurrers of two of the appellants. For, it was unquestionably a proper subject for the interposition of a Court of Equity, and strictly within its jurisdiction. I am also of opinion with the Chancellor, that the plaintiff, neither as heir at law, executor, nor trustee, could proceed, at law, as for a condition broken; he having parted with his powers, by his own assent and distribution of the slaves amongst the legatees.

But I differ widely from the Chancellor with respect to the exercise of his jurisdiction. Perhaps I do not understand the principles and reasoning upon which he founds his decree; but, the result is, clearly, contrary to both Law and Equity.

It is contrary to law, because he has not preserved the principles of the only law giving owners power to emancipate: It is contrary to equity, because it either fixes on the public, a certain expense, or leaves a number of these people to starve, for want of subsistence.

Until the year 1748, every owner of a slave had a right to emancipate him, upon the principle of having a right to dispose of his own property as he pleased; but the Legislature, conceiving that inconveniences arose therefrom, passed a law to prevent the manumission of slaves, except for meritorious services, to be judged of by the Executive. [347] Which law remained unaltered until the year 1782, when the act passed allowing emancipation, upon condition that the public is indemnified against loss and expense. This is still the law, and ought to have been attended to by the Chancellor in forming his decree.

I perceive no difficulty in ascertaining the meaning and intention of both the testators; who discover a strong desire to emancipate their slaves immediately on their deaths. But, as the then existing laws would not permit, they did all they could towards effecting it, by directing that it should be done as soon as the laws would authorize it; and in the mean time making temporary devises of them amongst their children and friends, with a positive condition annexed, that the different devisees should liberate them as soon as by law it should be allowable, on their respectively attaining to the age of thirty years: Which period was probably fixed upon with a view to the labor of the slaves affording some compensation for the trouble and expense of taking care of the aged or infirm, and rearing the children.

The question, then, is, whether these devises are sustainable? I hold that they are, and not liable to the rule respecting chattel interests, limited on more remote contingencies than the law allows: For, the subjects of the devises are different, inasmuch as in the devise of chattels, property only is concerned; but, liberty is devised in this case: both sacred rights, indeed, but the rules of limitation not necessarily the same with regard to them.

In point of fact, the contingency actually happened, within a very small space of time; for, within six years from the date of Jonathan Pleasants's will, a law was passed enabling owners to emancipate their slaves.

But, by this law, the owner, who would manumit his slaves, must give security to indemnify the public [348] against the expense of supporting such as are aged, infirm, or infants: a provision which the decree has not attended to, although it certainly ought not to be overlooked. But I do not think that the holders, in the present case, should be compelled to give it themselves. On the contrary, I think the emancipation should be upon the condition, that the present friend of the appellees, or some other person or persons, will procure the security required by law: which will be consistent with the conduct of the Legislature in two recent instances; namely, in the case of Mayo's slaves, in which the executors were, by an order of the Court of Chancery, founded on the law of 1787, [c. 73, 12 Stat. Larg. 611,] for emancipating those slaves, directed to reserve funds enough for the purpose. The other case was that of Moorman's slaves; in which case the act of Assembly, [c. 74, 12 Stat. Larg. 613,] for emancipating of them, directs, in so many words, that the executor, or some other person, should be bound to indemnify the public.

Having mentioned my opinion upon the general question concerning emancipation, I shall now state what I conceive to be the periods at which the appellees will be respectively entitled to their freedom, upon the conditions just explained. I think they are to be emancipated in the following order, that is to say; all those *now* above the age of thirty years, immediately, and the increase of mothers above the age of thirty, at the term of the birth of the child, are also to be emancipated immediately: but those born of mothers not thirty years of age at the birth of the child, are not to be liberated until they arrive at the age of thirty; and the same rules are to be observed with respect to their progeny, born during the servitude of the mothers: which seems to me to satisfy the meaning of the testators.

The decree for profits is, I think, new and unprecedented.
[349] Besides, the account, (when the deductions for the trouble and expense of taking care of the aged and infirm, and for rearing of the children, are made,) would probably yield very little. Under every point of view, therefore, I am against that account, and think the decree should be corrected in that respect likewise.

Some other alterations are wanting still. For all the defendants have not been fully heard. Two demurred, and as to them the cause was properly heard. But, the cause was not in a proper situation to be heard as to Elizabeth Pleasants; and, in the case of Ned, there was no answer, nor the bill taken for confessed, after the proper previous steps. Therefore, I think, that, as to those parties, the cause should go back to the Court of Chancery, in order, that the proper proceedings may be had therein with respect to them; so that they may have an opportunity of supporting their titles, if they can do so.

Besides, no attention has been paid to creditors.

Although it may not be the case, yet it is possible, that John and Jonathan Pleasants owed debts, which are still unpaid. If there be any such creditors, their rights should be secured.

The holders of the slaves may owe debts; and it is expressly said to have been the case of Logan. Perhaps too, some of them may have been mortgaged, or sold to innocent purchasers, upon the faith of possession; and apparent ownership in the legatees. Now, although I will not say, at present, whether the debts and contracts of the legatees, ought or ought not to affect the slaves, because the case is not before me, yet the door should not be shut to enquiry, and such creditors and purchasers excluded from shewing, if they can, that they have an equitable lien.

Upon the whole, I think the decree should be reversed; and a new one entered, conformably to the opinion, which I have delivered.

[350] PENDLETON, President. On mature consideration, I am of opinion, that the suit in Chancery cannot be sustained upon the ground of the appellee's claim as heir at law to take the slaves for the condition broken, it being the practice of that Court to relieve against forfeitures and not to aid or enforce them. Neither will his claim, as executor, have that effect; because, having long since assented to the several legacies and bequests of these people, he had fully executed

his power over the subject. At the same time, these characters furnish a commendable reason for his stating the case of these paupers to the Court; and it ought to be heard and decided upon, without a rigid attention to strict legal forms, since it can be done, without material injury to the other parties.

And upon a view of the case, I am of opinion, that the paupers are not legally emancipated under the wills of the testators and the several acts of Assembly; but if they are entitled to relief, at all, it is on the ground of a trust created by the wills, that their manumission should take place, upon a contingent event, which it is alleged has essentially happened, but requires an act to be done by the possessors, who refuse to perform it, and a Court of Equity can, alone, enforce the execution of the trust, or make the necessary arrangements therein; and therefore, that there is no error in so much of the decree, as over-rules the demurrers of the appellants Mary Logan, Isaac Pleasants and Samuel Pleasants, jr., for want of jurisdiction.

But, as the cause was only set for hearing on the demurrers, and not on the answers and exhibits, it would seem, that, regularly, that Court could not, in that state of the proceedings, have proceeded to a hearing and decree upon the merits: Nevertheless, upon the principle before stated, of not adhering to strict form, in this pauper case where essential justice can be done, (since the answers of these three defendants put their defence upon the wills and acts of Assembly, [351] without alleging any facts to influence their construction, and the counsel, on both sides, have argued the merits at large,) the Court have, in this case, for convenience, without meaning to fix a precedent, considered and determined the general question; leaving, however, the claims of Elizabeth Pleasants and Daniel Teasdale to part of the paupers, under titles paramount to the will of John Pleasants, and the question, how far those in the possession of Mary Logan, shall be liable to the debts of her husband, open for discussion in the Court of Chancery, upon proper statements of the facts, and exhibits relative thereto; which they are to be at liberty to introduce in that Court.

Although the testators, at the time of making their respective wills, had not power to manumit, and if they had devised them upon condition that the devisees should emancipate them immediately, the condition, being unlawful, would have been void, and the property vested; yet a condition, that they should become free when the law would permit it, was not of that sort.

To consider this freedom in the light of a limitation of the remainder of a chattel, upon a contingent event, it would seem to assimilate to the case of such remainder, limited over upon a general *dying without issue*, and therefore, void; since the Legislative permission might never be given; might be afforded one hundred years after; or at an earlier period. And the will in the other case, is allowed to be the rule of judgment, unaltered by the event, although the *dying without issue* shall happen in a reasonable time; all being involved in one fate. But I am of opinion, that it would be too rigid to apply that rule, with all its consequences, to the present case; and that a reasonable principle ought to be adopted, to suit its peculiar circumstances; which is, that, if the event happens whilst the
[352] slaves remain in the possession of the family, without change by the intervention of creditors or purchasers, (since the contending parties would be those whose interests had been contemplated by the testators,) the bequest ought to take place: But, that the case of such intervening claims, not being in the view of the testators, it ought to be considered, how far they should in equity prevent the devise of the manumission from taking effect. So far, therefore, as concerns the family, I should have had no difficulty, in decreeing in favor of the paupers, if the wills had directed a general emancipation, when permitted, and the Legislature had permitted it without any condition annexed to it.

The difficulty arises from the testator's not having directed a general manumission, when permitted by law; but a limited one, directing all future generations of these people, born whilst their mothers were under thirty, to serve to that age; founded no doubt, upon a consideration of the interest of his family, and that of the slaves.

On this middle state, the Legislature have not declared their will; except in a case which assimilates to this, namely, that of mulattoes, the descendants of a free white woman by a negro; all of whom, born whilst the mother was under thirty-one years of age, were to serve to that age in all generations, by an act passed at an early period, and continued in force until 1764,* when it was repealed; which is not conclusive, as to their will, upon the present subject. On the other hand, the Legislature have permitted a voluntary unlimited emancipation, but annexed a condition, that the person liberating shall support and maintain all such, as in the judgment of the Court

[* See acts of April, 1691, Oct. 16, 3 Stat. Larg. 87, and of May, 1723, c. 4, § 22, 4 Stat. Larg. 133; of Nov. 1753, c. 7, § 4, 6 Stat. Larg. 357; Oct. 1765, c. 24, § 3, 8 Stat. Larg. 134.]

are not of sound mind or body, or above forty-five, or males under the age of twenty-one, and females under eighteen; to be levied upon him, or his estate, by order of the Court in case of neglect or refusal. On these terms the testators have not declared their minds, whether they would, or would not, have compelled the devisees to emancipate, subject to them. [353]

Under this difficulty, the Court endeavored to model a decree, to effect the purpose of the paupers, without essentially violating the wills or the laws; and, was of opinion, that the limited manumission, according to the modifications in the wills of the testators, could alone take place and be decreed; and would have found no difficulty in making such a decree from the silence of the Legislature on such a state of servitude, (since it might in future act upon the subject, and either continue or discontinue it,) but had insuperable difficulty upon the terms imposed by the law, which may be important. The person empowered to emancipate, had an opportunity of judging whether he would do the act upon that condition. In the present case, the devisees, the legal proprietors, oppose the manumission, and the question is, whether they shall be compelled, under the wills, to do the act, be subject to new hardships, not imposed on them by the wills, and on which no person can say what would have been the decision, had the testators contemplated the subject.

On Moorman's will, an act passed in 1787, reciting his will in 1778, by which he devised certain slaves by name, to each of the different legatees to enjoy their labor; the males to twenty-one, the females to eighteen, and then all to be free; except some devised to his wife, which she was to have for life, and then they were to be free; and except another parcel, who were to be immediately free. The act divides them into four classes:

1. Those who were between twenty-one and forty-five.

2. Those devised to the mother, then dead; which two classes were to be immediately free, as if born so; and their increase were also to be free.

3. All under twenty-one and eighteen were to be free when they attained those ages, and the increase of those to be free at a future period, were to be free with the parents. [354]

4. Those above forty-five to be free when Johnson, the executor, or any other, should enter into bonds, with approved security, to the County Court, with condition that they should not become chargeable to the public. This was, in spirit, pur-

sued by a majority of the Court; and a decree has been formed to the following effect:

"The Court is of opinion that there is no error in so much of the decree of the said High Court of Chancery as overruleth the demurrers of the appellants, Mary Pleasants, Isaac Pleasants and Samuel Pleasants, junior, for want of jurisdiction in the said Court, but that there is error in some of the principles on which the decree, upon the merits, is founded, and part of the reasoning thereupon is not approved by this Court: Therefore, it is decreed and ordered that so much of the said decree as over-ruleth the said demurrers, be affirmed, and that the residue of the said decree be reversed. And this Court, proceeding to make such decree as the said High Court of Chancery should have pronounced, is of opinion, that although the testators, at the time of making their respective wills, had not power to manumit, and if they had devised them upon condition that the devisees should emancipate them immediately, the condition, being unlawful, would have been void, and the property vested; yet, the condition, that they should become free when the law would permit it, was not of that sort. That to apply the rule respecting the limitation of the remainder of a chattel upon too remote a contingency, with all its consequences, to the present case, would be too rigid, but that a reasonable principle ought to be adopted to suit its peculiar circumstances; which is this, that if the event [355] happens whilst the slaves remain in the possession of the family, without change by the intervention of creditors or purchasers, since the contending parties would be those whose interest had been contemplated by the testators, the bequest ought to take place; but, that the case of such intervening claims not being in the view of the testators, it ought to be considered how far they should, in equity, prevent the devise of the manumission from taking effect. So far, therefore, as concerns the family, the Court would have had no difficulty in decreeing in favor of the paupers, if the wills had directed a general emancipation, when permitted by law, and the Legislature had permitted it, without any condition annexed; but, a difficulty arises from the testator's not having directed a general manumission, when allowed by law, but a limited one, directing that all future generations of these people, born whilst their mothers were under thirty, should serve to that age; founded, no doubt, upon considerations of the interest of his family, and that of the slaves: on which middle state the Legislature have not declared their will; and, on the other hand, the Legislature have permitted an unlimited eman-

cipation, but annexed a condition imposing upon the person liberating, certain terms for the sake of the community, of which the persons making voluntary manumissions might judge whether they would do the act upon these terms, and use their pleasure, and on these terms the testators have not declared their minds, whether they would or would not have compelled the devisees, against their inclination, to emancipate subject to them. Under this difficulty, the Court endeavored to model a decree, to effect the purpose of the paupers, without essentially violating the wills; and is of opinion, that the limited manumission, according to the modifications in the wills of the testators, can alone take place and be decreed, and that the terms for securing the public against the maintenance of the aged or infirm, cannot be equitably imposed upon the devisees. It is, therefore, further decreed and ordered, [356] that all the slaves of which the testators were possessed, as their property, at the time of their respective deaths, not subjected to the claims of the creditors or purchasers before stated, and who are now above the age of forty-five years, and their increase born after their respective mothers had attained the age of thirty years, (so soon as Robert Pleasants, the executor, the several trustees, or any other person, shall, in the Courts of the several counties in which the said slaves respectively reside, enter into bonds, with approved sureties, payable to the Justices then sitting in each Court, and their successors, with condition that the said slaves shall not become chargeable to the public, or enter into one such bond for the whole, in the General Court,) and all such as are now above thirty, and under the age of forty-five years, immediately shall be emancipated and set free, to all intents and purposes, in like manner as if they had been born free, and that all who are now under the age of thirty, and whose mothers had not attained that age at their birth; and all their future descendants, born whilst their mothers are in such service, do serve their several owners until they shall respectively attain the age of thirty years, and then be in like manner free; and when their freedom shall severally take effect according to this decree, there shall be delivered to each of them, by their respective masters or mistresses, a certificate, written or printed, attesting their freedom, in such form as shall be directed by the said High Court of Chancery. That no account ought to be taken of profits, it being unusual in such cases, and less reasonable in this very difficult one. And the cause is remanded to the said High Court of Chancery for a state to be taken of the present condition of the several persons, and their rights ascer-

tained, according to the principles of this decree; also, for further proceedings to be had respecting the claims of Elizabeth Pleasants and Daniel Teasdale, to part of the slaves, under titles paramount to the will of John Pleasants, and the claim of the creditors of Charles Logan, upon proper state-
[357] ments of the facts and exhibits relative thereto; which they are to be at liberty to introduce into the said Court."*

[*See *Maria et al.* v. *Surbaugh*, 2 Rand. 228-246, in which this case is remarked on, and the subject elaborately considered by GREEN, J. The point decided was, that where a testator bequeaths a female slave, on condition that she shall be free at a certain age, and before that period arrives, she has issue, such issue are slaves.]

BRAXTON *v.* ANDREWS.

Wednesday, May 15th, 1799.

If the appellant dies, and no person will administer on his estate, so that the Court orders the Sergeant to take possession of it, no *scire facias* to revive the appeal lies against the Sergeant.

Braxton appealed from the Court of Chancery, to this Court; and then died. As no person would take administration on his estate, it was committed by the Hustings Court, to the Sergeant of the city, agreeable to the act of Assembly. Rev. Cod. 176, §61.

A *scire facias* was moved for against the Sergeant, to revive the appeal.

The Court thought it was a case not provided for, by the act of Assembly. And nothing was taken by the motion.*

N. B. The cause lay over for several terms; and, at length, was finally abated.

[*See acts of Mar. 3, 1819, c. 104, §67, R. C. 390, and Feb. 1819, c. 128, §38, R. C. 497.] And Code of 1849, p. 656, §3; authorizing a *scire facias* to revive, "in *any* stage of any case."