REPORTS OF CASES

DETERMINED IN THE

GENERAL COURT

OF

VIRGINIA.

FROM 1730, TO 1740;

AND

FROM 1768, TO 1772.

By THOMAS JEFFERSON.

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are afterwards brought here by land, of which there were formerly great numbers.

The court adjudged that neither of the acts of 1684 or 1691, repealed that of 1682, but that it was repealed by the act of 1705.

Carter *v.* Webb, *ex'r. of Cocke.*

The late Secretary Carter, by his last will and testament, devised to his wife the use of certain lands, slaves and stocks, during her life, with remainder to his son Charles Carter, the plaintiff. Mrs. Carter intermarried with Mr. Cocke, and many years after, died in the month of June 1771. Mr. Cocke died also in the month of August of the same year. Though he had freely used of the stock, both by consuming and selling, yet he left it improved and increased to a very great degree. His executor, Mr. Webb, permitted Mr. Carter, the remainder man, to enter on such parts of the land as were not then under culture, and to employ the slaves (whenever they were not engaged in finishing the crop then growing) in making preparations for a succeeding crop; under this agreement, however, that Mr. Carter should pay a stipulated hire for such services of the slaves, if the General court should decree the defendant entitled thereto. The plaintiff insisted that in this particular case, he was entitled to immediate possession of the lands themselves, and whatever was growing on them; and lastly, that he was entitled to the whole stock, however increased, and was not obliged to accept so much thereof only, as was equal to what the testator had left. To determine these several rights, a friendly bill and answer was this day put in, and argued by Pendleton and J. Randolph, Attorney General, for the plaintiff, and George Wythe for the defendant.

Pendleton.—There are three questions in this case.

I. Whether the slaves in possession of a tenant for life are, under the act of 1748, c. 5. to be continued on the plantations till the 25th. of December, for the benefit of the decedents representatives?

II. If they are, Whether it be not solely for the purpose of finishing the crop, so that the executor may not charge the remainder man hire for their services, when not engaged in finishing it?

III. Whether, where the use of stock is bequeathed, the legatee is entitled to the whole improved stock, or shall be compelled to accept stock of equal value.

1. He admits that by the common law 'he who sows shall reap.' But the common law does not oblige the remainder man to find reapers; so that nothing in the common law will affect this question; but it arises, and must be determined, on the act of 1748, solely.

He premises that the general words of a law are restrained, or its particular words enlarged, to answer the intention of the legislature.

To discover the intention he considers, 1st. the subject matter on which that act was to work, which the act itself describes to be the estate of the deceased, and not those things wherein his interest was limited to expire with his life. The law having in the first twenty-three clauses, established the rules for probate of wills and granting administration of estates, proceeds to point out the executor's or administrator's duty. Section 24, he is to make an inventory of 'the estate to him committed.' Now if these slaves are to be committed to him to employ till December, he must make an inventory of them; which is neither agreeable to law or practice.

Section 25, the court is to appoint appraisers of 'the testator's or intestate's slaves,' not of those which had ceased to be his.

Sections 26, 27, 28, still speak of the testator's estate, goods, chattels, &c.

Section 29. No executor or administrator shall sell any 'slaves of his testator or intestate' but where there is a deficiency of personal assets. Every clause hitherto has in view only the slaves which may be called the testator's, at the time when the inventory is made, appraisers appointed, sale thereof made, or in general, which may be called his after he is dead; and not those in which he had ceased to have an interest. We must therefore suppose their object was the same, (viz. the testator's proper slaves) in the succeeding clause (30th), which directs that 'where any person shall die between the 1st. day of March and the 25th. day of December, the slaves which such person was possessed of, at the time of his death, shall be continued on the plantations occupied by the deceased till the 25th. day of December, for the making and finishing a crop,' &c. And the rather, because the next clause (31st.) directs that all the slaves of the deceased person shall be delivered up, after the 25th of December. The legislature still confining their ideas to such slaves as were the testator's on the 25th. of December, and surely they mean that the same slaves shall be continued on the plantations, which they in the next clause direct to be delivered up at the end of the year. So again in

Section 32, they say the executor shall not be liable for any slave dying before December the 25th, 'though such slave be in-

ventoried and appraised,' which shews they are speaking of those slaves only which are to be inventoried and appraised, and it had before confined the inventory and appraisement to the testator's or intestate's slaves; that is, the slaves which are his at the time of the inventory or appraisement made. The legislature, I say, in the preceding and subsequent clauses, having plainly under their contemplation only those slaves which were the testator's after his death, must be understood as speaking of the same in the intermediate clause.' The words 'where any person possessed of slaves,' &c. are indeed very general, but I before observed that general words of a law are always restrained within the apparent intention of the legislature. That the word 'possession' must be restricted in some degree, in the present case, is evident; for if taken in its full latitude it would extend to the slaves of strangers, which should happen to be in his possession. The only question then is, how far it is to be restrained? I answer till it squares with the meaning of the legislature. 2nd. What their meaning was, when they used it in this act, may be collected, not only from the subject matter described in these particular instances, but also from the sense in which they use it in other acts. Thus the slave act of 1727, sect. 4, gives all the slaves to which a feme covert has a right, or of which a feme sole is 'possessed,' to her husband. Yet the court have ever considered the word 'possession,' here, as commensurate with the word 'right' used before, and given slaves to, or withheld them from the husband uniformly, whether the feme were sole or covert. Thus if a feme sole have right to slaves, though she be not possessed of them, they have been given to the husband: so where she happens to have the possession, but not the right to them, at the time of intermarriage, the latitude of the word 'possession' is restrained to right only. The 5th. section of the same act allows an infant of eighteen years to bequeath any slave 'whereof he shall be possessed;' yet the court have ever considered the word 'possession' here as synonymous to 'right' or 'title,' and allowed such infant to bequeath slaves to which he had right or title, though not in possession of them. So that this word 'possession,' whenever applied by our legislature to slaves, corresponds to the word 'seisin' as applied to lands, that is, it includes the two ideas of possession and of property, or right.

3rd. The intention of the legislature may be also discovered from the persons they had in view. They meant to interpose only among legatees, and to prevent them from ruining the family by taking their slaves before the crop was saved.

From all which he concludes the legislature, when they directed that the slaves of which a person is possessed, at the time of

his death, shall be continued on his plantations till the 25th of December, meant only that his own proper slaves should be so continued, notwithstanding any bequests thereof to legatees in his will; and did not mean to continue slaves to which his title had ceased, to the prejudice of a remainder man, whose paramount title had now sprung up.

II. He urges that if they are to be kept on the plantations, it is for the sole purpose of finishing the crop, and not to hire out. The words of the law are express that they shall be continued on the plantation 'for the making and finishing a crop of tobacco, corn, or other grain.' And as the finishing the crop will not engage the whole of their time, it would be most unreasonable that they should not, when not so engaged, be employed in making preparations for a succeeding crop for the heir or remainder man. It is known that such preparations must be made almost in the summer of the preceding, for the crop which is to be made in the subsequent, year. More especially in parts of the country where, as in the present instance, wheat is the principle article of cultivation. This grain should be put into the ground five months before the slaves are to be delivered up, and the ploughing of the ground must be still earlier than this.

Suppose these slaves, instead of being given to the same remainder man who was to have the lands, had been given to distant legatees, the legatee could confessedly have made no demand of hire for services performed at vacant intervals; and surely the executor cannot have any greater right than the legatee.

III. As to the increase of the stock, it may be observed that Mr. Cocke has had the free use thereof. They have manured his lands, fed him with their milk, clothed him with their fleeces; they have been slaughtered for his table, &c. sold to fill his purse, and what more could he ask? He has killed freely, eaten freely, sold freely; can he make any other uses? The use is what was given. They have had that use most liberally; what remains then must go to Mr. Carter. The individual cattle which were given by the testator have long ago been dead, so that if the remainder man has no title to the increase, he has title to nothing. That the original stock would be dead, the testator must have foreseen. But he foresaw, at the same time, that a representative would be living, to wit, their increase. This increase then is what he must have meant for his son, when he gave him the cattle after a devise of the use of them to his widow.

Nor can it be thought that a return of stock *pari numero*, is what the testator intended. Cows, horses, &c. differ greatly in value, and an equal number may be chosen from a large stock who shall

not be worth one fourth of the original. And it is therefore concluded, that after the liberal use of the stocks which the legatee for life has made, the increase should go to the devisee over.

Wythe, for the defendant.—He includes Pendleton's 1st. and 2nd. questions under one, viz.

I. Whether the representative of Mrs. Cocke is entitled to the labor of the slaves till December the 25th?

II. Who is entitled to the increase of the stock?

I. To determine the 1st. he enquires into the nature of, and right to emblements, because he thinks our act of Assembly has put the profits of slaves on a similar footing.

Emblements are not by the common law, considered as fixed to the freehold like trees, shrubs, &c. but, even while growing are considered as chattels personal, as much as if they were actually severed. Thus Swinb. Part. vi. § 7 (3.) 'emblements or corn growing on the ground ought to be put into the inventory.' And Bro. Emblements. pl. 5. 'if a man leases to two for life, one dies, the lessor enters and leaves to W, who sows the land, the other first lessee enters on him and takes the goods, *et bene.* 46 E. 3. 32.' Again ib. pl. 9. 'It is admitted that where a parson dies after the first day of May, where the land is sown, and then another parson is made, and then the emblements are severed, the executor of the first parson shall have the tenths, and not the present parson; and where a man sows the land, and dies before severance, the executor shall have the emblements and not the heir. 21. H. 6. 30.' ib. pl. 26. 'If a tenant in dower sows the land, and takes a husband, who makes his executor, and dies before severance of the corn, the feme shall have the emblements, and not the executor of the husband; *et contra*, if the baron sows the land, and dies before severance, there the executors of the baron shall have the emblements. The reason seems, that he who bore the labor and cost of the emblements shall have them.' So Swinb. *Part vii. § 10. (8.) says that a bequest of bona mobila, will pass the emblements. From which he concludes that the emblements or unsevered crop, follow the person of the sower, wherever the determinination of his interest or term is uncertain. And this rule is founded in policy and justice. In policy, because to declare that 'he who sows shall reap,' is a great encouragement to put the earth into culture; in justice, because the sower hath laid out his labor on the lands when he had right to do so; his interest therein is become equal to that of the owner of the soil, because commonly the crop growing is worth as much as the land on which

* He delivers it as the better opinion, though controverted.

it grows; and is therefore not to be set aside, by the small injury of a temporary detention of the lands from the heir.

He then proceeds to consider the several acts of Assembly which have been made.

Act 1711, c. 2. s. 17. was the first. It enacts that where any person shall die 'whilst his crop, &c. is in the ground unfinished,' the slaves 'employed in the said crop at the time of such decease' shall be continued on the plantations till December the 25th, and shall then be delivered up. The legislature, by this act, intended to put the profits of slaves employed in cultivating the earth, on the same footing as emblements; and he admits that under this law, if there had been no crop in the ground, the heir might immediately have taken possession.

The act of 1730, c. 8. s. 10. 11. is the first which gives the tenant a greater interest both in the lands and slaves, than he had at the common law. For at the common law, he was entitled to nothing but what was actually in the ground. But this act fixes a period, viz. the first of March,* and if the person dies after that, entitles him not only to what is in the ground, but also to 'make and finish a crop.' On the first of March there is no Indian corn, or oats in the ground, no tobacco planted in hills; so that before this act he was entitled only to the articles of wheat, rye, and the tobacco plants as they would grow in the plant patches. Yet preparations are at this time made for the other articles of Indian corn, oats, and tobacco. And the legislature therefore gives him the benefit of these, or any other necessary preparations. And the same principles of justice and policy, are the basis of this law.

The act of 1748, c. 5. s. 30. does not alter that of 1730, but sect. 31. obliges the executor to deliver the slaves clothed, which the other acts had omitted.

So that these acts being made on the principles and plan of the common law, with respect to emblements, only that they are still more liberal to the tenant, it should be expected they would entitle every person to their benefit, who was entitled to emblements at the common law, as Mrs. Cocke was. And in fact the words of the act are sufficiently extensive. 'Where any person dies, the slaves he was possessed of, shall be continued on the plantations 'occupied,' &c. If then Mrs. Cocke was a 'person,' if she was pos-

* But this period only determines who is entitled to the additional benefits of this new act. For the common law as to emblements, and the act of 1711 as to the profits of slaves, seem to me not repealed. So that if a person dies before the first of March, he is clearly entitled to his emblements under the common law, and I see not what bars his right to keep the slaves till December the 25th, under the act of 1711. This act of 1730. is merely affirmative.

sessed,' and if she 'occupied' the plantations, her representative is entitled to keep possession.

Objected that the word 'possession' when applied to slaves, corresponds with 'seisin' when applied to lands.

Answer. The instances adduced do not prove this. The words of the act of 1727, c. 11. s. 4. are 'where any feme sole is possessed of any slave as of her own proper slave,' &c. So that the legislature cautiously restrict the word 'possessed,' which they knew would have been too extensive, to a possession as of her own property. So the next clause (5th) says an infant may dispose 'of the absolute property' of the slaves whereof he is possessed, which he could not do, if the absolute property was not in him, but in a stranger.

Objected that sect. 31. of this law of 1748, calls them 'the slaves of the deceased person,' and from thence it is inferred that the 30th section must have under view, also, 'the slaves of the deceased person.' Whereas, those in which his interest has ceased cannot with propriety be called his slaves.

Answer. The legislators were not speaking with a critical regard to propriety, or they would not have called any slaves 'the slaves of a deceased' person. There can be no property where there is no proprietor. But all they meant was that the slaves which were his (whether for life or in fee) while living, shall be continued in the possession of his representative.

Then if the slaves are to be continued in the possession of the executor, no question can be made, how they are to be employed, and for whose benefit? For the benefit of the estate, without doubt. And who is to judge of the mode of employment which may produce the greatest benefit? The heir or executor? To determine that they shall be employed in nothing but 'finishing the crop,' and that at vacant intervals they shall work for the heir, would introduce perpetual confusion and dispute. Is the heir to go on the plantation, to count the hills of tobacco and corn; to say 'so many slaves, if well looked after, will finish this crop, I will take the rest;' or 'the whole slaves will finish it at such and such times, I will take them at the intervals?' And who is to judge of the time necessary for finishing, or the degree of diligence with which the slaves are overlooked? The heir? Impossible! The executor? Will it be said, no? Then who is to interpose between them? Must application be made always to a court of justice? Then there must be a lawsuit whenever there is a death in the country. The truth is, the finishing the crop was the principal purpose of continuing the slaves with the executor; but if any little additional benefit can be made by their labor at vacant intervals, it is less in-

jurious to give him that also, than it would be inconvenient to subject them to two masters.

II. As to the right to the increase of the stock. At the common law, we know there was no such thing as a limitation of a chattel. 1 P. W. 6. 1. Abr. Eg. 360. pl. 4. However, with the assistance of a distinction between the *use* and the *property*, limitations were at length introduced. The first, or temporary legatee, being supposed to have only an use, while the property passed immediately to the devisee over. This distinction was introduced from the civil law into our ecclesiastical courts, where testamentary causes are determined, and determined according to the civil law; and thence into our court of chancery, the judge of which, used generally to be a clergyman. And according to the rules of the civil law have these cases been determined. Now Justinian Lib. 11. tit. IV. defines an usufruct to be '*jus alienis rebus utendi, salva rerum substantia.*' But this could only be of things permanent in their nature. What then was their law with respect to things the use of which is to consume them? Justinian ubi supra, § 2, lays it down. 'Constituitur autem usufructus non tantum in fundo et aedibus, verum etiam in servis, et jumentis, et cæteris rebus; exceptis iis quæ ipso usu consumuntur: nam hae res neque naturali ratione, neque civili, recipiunt usumfructum: quo in numero sunt vinum, oleum, frumentum, vestimenta: quibus proxima est pecunia numerata: namque ipso usu, assidua permutatione, quodammodo extinguitur. Sed utilitatis causa senatus censuit, posse etiam earum rerum usumfructum constitui, ut tamen eo nomine haeredi utiliter caveatur: itaque, si pecuniae usufructus legatus sit, ita datur legatario, ut ejus fiat; et legatarius satis det haeredi de tanta pecunia restituenda, si morietur, aut capite minuetur, ceterae quoque res ita traduntur legatario, ut ejus fiant: sed, aestimatis his, satis datur, ut, si moriatur, aut capite minuatur, tanta pecunia restituatur, quanti hae fuerint aestimatae. Ergo senatus non fecit quidem earum rerum usumfructum (nec enim poterat) sed per cautionem quasi-usufructum constituit.' So that if the thing were permanent in its nature, it was capable of an usufruct, and was to be restored specifically; if it was consumable by use, it could then only support a quasi-usufruct, and security was given for a restitution of its value. Thus where a man gives the use of corn, wine, &c. to one for life, and then gives the corn, wine, &c. to another, he cannot be understood literally to give an usufruct, but a quasi-usufruct, and to mean that an equal quantity shall be restored to the remainder man. So of money, the same guineas are not to be returned, but as many. It is so understood in common speech. When we speak of lending wine,

corn, &c. we expect not the same, but an equal quantity returned. The question then is, whether the stock, in the present case, was of the permanent, or consumable kind. 1. Abr. Eg. 361. pl. 8. A farmer bequeathed his stock (which consisted of corn, hay, cattle, &c.) to his wife for life, and then to another. The Master of the Rolls said the devise was good, but if any of the cattle were worn in using them, the wife was not answerable; and if any were sold as useless, she was only to answer the value at the time of the sale. Hayle *v.* Burrodale, 1702. But the cattle here spoken of, must have been of the draught, not the proletarian kind. Stocks in the general, consisting of horses, black cattle, sheep, hogs, are surely of the consumable kind. The principal use of some, and the sole use of others, is to supply us with food. So says Justinian. Lib. 2. Tit. 1. § 37. 'In pecudum fructu etiam foetus est, sicuti lac, pilus, et lana: itaque agni, haedi et vituli, et equuli, et suculi, statim naturali jure dominii fructuarii sunt.' Cicero defin. Lib. 1. c. 4. et, ib. § 38. 'Sed si gregis usumfructum quis habeat, in locum demortuorum capitum ex foetu fructuarius submittere debet.' If then in case of any mortality the usufructuary is to sustain the loss, he ought in reason to have the gain. 'Qui sentit onus sentire debet et commodum.' And it is the more reasonable in this case, because the increase is produced, in great measure, by the care and expense of the usufructuary. Suppose Mr. Carter had called on Mrs. Cocke for security, (for this the chancellors in conformity with the civil law as above cited, have determined he might do) the security would have been to restore an equal quantity only. If then the stock had diminished, still an equal quantity must have been returned, and surely if it is increased, the same equal quantity will fulfill the undertaking of the security; and he concluded that the increased value should go to the executor.

Randolph, attorney general, in his reply to Wythe's 2nd point, said, that as Mr. Carter might have demanded security of Mrs. Cocke at first for an equal quantity, so when that quantity was increased he might have required additional security. And that if the stock had diminished without any default in Mrs. Cocke, she would not have been bound to reparation. He said that the use of the stocks and of the slaves were given to her by the same clause and words of the will; and that she might as well demand the issue of the slaves* as of the stocks.

The court determined that the slaves should be continued on

* Justinian Lib. 2. Tit. 1. § 37. cited above, subjoins these words immediately to those; 'partus vero ancillae in fructu non est; itaque ad dominum proprietatis pertinet, absurdum enim videbatur, hominem in fructu esse; cum omnis fructus rerum natura gratia hominis comparaverit.'

the plantation till the 25th of December, but that this was solely for the purpose of finishing the crop, and therefore, that Mr. Carter should not pay hire for the services of the slaves at leisure times. And they decreed Mr. Carter entitled to the increased value of the stock.

Smith *v.* Griffin.

Chancery.

The testator had by will, after some other legacies to his wife of about £100 value, bequeathed to her 'one fourth part of his *personal estate.*' The persons to whom the other three fourths were given, of whom the heir at law was one, had divided with the widow the *slaves* as well as personal estate, and had signed the deed of partition. Afterwards, the widow dying, the heir at law brought his bill for the *slaves* allotted her, insisting that by the devise of *personal estate, slaves* did not pass. But the court dismissed the bill; two of the judges, the Secretary T. Nelson and Page, declaring their opinions in favor of the defendant, were founded on the partition made between the heir and widow, and that, had the question been simply, whether *slaves* would pass by a devise of *personal estate,* they should have determined it in the negative: in which they were not contradicted by the other judges. Present T. Nelson, Lee, Byrd, Burwell, Fairfax, Page and Wormley.

Henndon *et al.* v. Carr.

Chancery.

William Carr the testator, having a wife and several children, viz. William, the defendant, his eldest son and heir at law, and others, plaintiffs, and being seised and possessed of an estate in lands, slaves and personal chattels, by will, dated August 2, 1760, after giving several specific legacies, bequeathed the residuum of his estate in these words; 'all the rest of my estate, both real and personal, not herein particularly mentioned, to be equally divided