

REPORTS

OF

CASES

ARGUED AND DECIDED

IN THE

COURT OF APPEALS

OF

VIRGINIA.

BY DANIEL CALL.

VOLUME IV.

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NOTE BY THE EDITOR.

There is no printed report of the decisions of the first court of appeals, and of those which have been omitted by reporters from that period to the death of Mr. *Pendleton*, although such a work is obviously wanted ; and it is to supply that defect, that the present volume is published : which consists of two parts : the first includes all the important cases determined from the commencement of the first court, to its final dissolution in the year 1789 ; the second contains the unreported cases in the new court of appeals, from that period to the death of judge *Pendleton* in 1803, besides two cases in the general court, and court of admiralty.

descended from his father : And it was held by the lord chancellor, that the terms "*all I am worth,*" without other words to control them, passed the real as well as the personal estate.

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That case contained a mixture of real and personal estate, and is very like the present, as the words "*all I am worth,*" are not more comprehensive than the words "*all my other property.*"

The court is therefore unanimously of opinion that the judgment should be affirmed.

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Devise of slaves to one for life, with power to give them, at his decease, among the children of the two brothers of the testatrix, "*in such manner and proportion as he shall think proper;*" the trustee has full discretion, and may make unequal appointments.

In such case, if the trustee exchange part of the slaves, with a stranger, for a tract of land, of less value, which is conveyed to one of the objects : sells another part with some of his own, without distinguishing what part of the purchase money was for the slaves in the power, but directs his executor to give one of the bonds to one of the objects of the power : and sells a further part to another of the objects, expressing in the deed that it was made partly for money and partly in pursuance of the power, the appointments are all valid.

Cowles and others legatees of *Susanna Cooper* formerly *Susanna Hooker*, filed a bill in the high court of chancery against *Thomas Cowles* and *William Brown* stating, that, by marriage settlement, the property of the said *Susanna Hooker*, the wife of *John Cooper*, was reserved to her use, with the right of disposing of it by her last will. That she died in 1773 ; and, by her will, after some specific bequests, devised several slaves to the said *John Cooper* her husband for life, with power, at his death, to divide them among the children of *Thomas* and *John Cowles* in such manner and

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proportion as he might think proper. That the said *John Cooper*, after the death of his wife, sold some of the said slaves, and bartered others. That, at his instance and prior to the making of his will, *Thomas Cowles, jr.* exchanged four of the slaves with *Brown* for a tract of land; and, to cover the transaction, *Cooper* made a pretended conveyance to *Cowles*; who was to make a title to the purchaser; but that *Cooper* was to receive part of the purchase money. And that *Brown* was executor of *John Cooper*. The bill prays for general relief.

Brown's answer, admitting the marriage settlement and the will of *Susanna Cooper*, states, that *John Cooper*, in conformity thereto, made a distribution in such a manner as he thought proper, as would appear by his will. That the four slaves and the land were exchanged as an accommodation to *Thomas Cowles, jr.*; and that the defendant does not believe that the plaintiffs' interests were affected thereby, as *John Cooper* would not have given them any part of the said four slaves: Nor does he believe that *John Cooper* ever sold any of them, except one woman and her child; which he intended for *Thomas Cowles*; to whom a deed, for them, was given, and, as the money has not been paid, that the latter may either sue for the negroes, or take, according to the oral direction of *Cooper* to the defendant, half of the bond for the purchase money. That the said *John Cooper* had a preference for *Thomas Cowles*; but gave other slaves, besides those mentioned in his will, to some of the plaintiffs.

The answer of *Thomas Cowles, jr.* states, that the testatrix was to have made him compensation by her will, for a tract of land given by him to his brother, at her request; but, having neglected to do so, she desired that it should be done by *John Cooper*, who promised the defendant that he would. That the defendant was not present at, or any way privy to, the will of *John Cooper*; who afterwards proposed the exchange of the said four slaves for the land: which the defendant reluctantly agreed to.

The marriage settlement stipulates with *Thomas Cowles* the trustee, that the property and slaves of *Susanna Hooker* the intended wife remaining after the payment of her debts "shall be and remain to the said *Susanna*, and shall be vested in the said *Thomas Cowles* to and for the separate use of the said *Susanna* to be disposed of, by her, in such manner and to such uses as she shall think fit, and direct, by any writing, deed, or will subscribed by her in the presence of two or more credible witnesses, as fully as if she the said *Susanna*, at the time of executing such writing, deed or will, was a *feme sole*."

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The will of *Susanna Cooper*, attested by three witnesses, devises as follows: "My will is, that my beloved husband *John Cooper* give to my brother *Thomas Cowles's* daughters *Mary Cowles*, *Susanna Cowles*, *Sara Cowles*, and *Elizabeth Cowles* each a young negro girl of the negroes that were made over in marriage articles for my use. And all the other said negroes I give to my beloved husband, requesting, at his decease, he will give the said negroes among the children of my brother *Thomas Cowles* and my brother *John Cowles*, in such manner and proportion as he shall think proper."

The will of *John Cooper*, dated 15th December, 1791, (professing to execute the power,) confirms to *Mary Walker*, (who was one of the daughters of *John Cowles*,) and her husband *William Walker*, the negroes he had put them in possession of some years before: To *Thomas Cowles* son of *John Cowles*, "for his exceeding good behaviour," seven slaves in addition to those he had already put him in possession of: To *Susanna Gaddy*, two slaves, and confirms to her, another put into her possession some years ago: To *Mary Richardson*, one slave, and confirms to her, another put into her possession some years before: To *Edmund Cowles*, two slaves: The remainder he devised "to be equally divided among the nephew and nieces of my wife *Susanna*, to wit, *Thomas*, *Henry*, *James* and *Samuel*, *Sarah* and *Betsey*, sons and daughters of *Thomas Cowles*, *Elizabeth Taylor*, *John*

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Cowles, and the heir of *Susanna Cowles*, son and daughters of *John Cowles*, share and share alike, excepted out of this division, *Jerry*, which I give to *Eliza Taylor*, at the same time she is not excluded out of the general division of the above remainder. To *Sarah* and *Betsey Cowles*, I give and confirm unto them, the negro girls put in their possession some years ago. I should have made a more equal and general division among the negroes which I have right to dispose, which came by my wife *Susanna*, but to some it would be but burthening their conscience to hold them as slaves or they must liberate them, which in my opinion would be a very great disadvantage to the slaves."

There is a deed from *John Cooper* to "*Mary Walker*, daughter of *John Cowles* deceased, and *William Walker*, who is intermarried with the said *Mary*;" which for £ 240, "and in compliance with the request of his late wife, *Susanna Cooper* deceased," conveys to *Walker* and wife, eight slaves, and warrants the title.

John Cooper, by deed, reciting the power, and dated the 22d of December, 1792, gave a negro woman and her increase to *Thomas Cowles*, son of *John Cowles*, as part of his proportion of the slaves of *Susanna Cooper* his wife.

There is a letter from *Thomas Cowles* to *William Brown*, dated 16th February, 1792, saying, "I feel dissatisfied respecting the four negroes that Mr. *Cooper* have left in his will, and bound me to be exchanged with you for land, and you considered it unjust as well as myself, and I have determined to deliver the said negroes up to the legatees, upon considerations you will give me up my obligation. I dont wish to hold any thing that I consider so unjust as that, so hope you will not be a bar to prevent my giving up the said negroes."

The depositions prove, that *John Cooper* took an active part in the bargain for the exchange of the land and negroes between *Thomas Cowles*, jr., and *Brown*: that the land was worth £ 63 : that *Cowles* had said that the suit was for the four negroes which *Cooper* had made him give for the

land; that *Brown* had declared he would give up the said four slaves, if *Cowles* would return the land, or he would buy the slaves: that the value of the negroes was £225; and that *John Cooper* gave *Walker* eight negroes for four, the latter insisting on a warranty, which was given.

The court of chancery being of opinion "that the disposition of *John Cooper* of his defunct wife's slaves was valid," dismissed the bill with costs: and the plaintiffs appealed to the court of appeals.

Call, for the appellants. The appointments to *Thomas Cowles* were void. For there is a confidence, in such cases, that the property will be distributed with some regard to equality; and, consequently, any other distribution is an abuse. If, indeed, the person exercising the power stands in the relation of parent to the objects, and finds that, either from his own bounty, or from other sources, some of them are better provided for than others, he may make such inequalities as may tend to bring them to a level. But that is the only instance in which any very considerable preference is permitted. And the objection is greater, if the fiduciary receives any benefit from the transaction; for that is entirely adverse to the intention of the author of the power. These observations apply with irresistible force to the exchange of the four slaves for the land, as it is proved that the slaves were worth £225, and the land £63 only; so that there was a difference of £162, which went to the benefit of *Cooper*, or of *Brown*, (who had married his niece,) and not to *Thomas Cowles*, who appears, by his answer and letter to *Brown*, to have been forced into the bargain, and probably yielded, at last, through fear that *Cooper* would not make the appointment upon any other terms. The sale of the negroe woman and her child, stands upon no better footing; for no other account of the value and disposition of them is given, than what *Brown* says in his answer, namely, that *Cooper* sold them with some of his

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own, and directed him to pay *Cowles* the moiety of a bond for £ 80 ; which is very unsatisfactory ; and the deed to *Cowles*, after the sale, shews that a shift was thought necessary to bolster up the transaction. The pretended appointment to *Walker* is equally exceptionable ; because the deed says it was for £ 240, as well as in pursuance of the power ; and one of the witnesses proves that the four slaves received by *Cooper*, were equal in value to the eight : so that, instead of an appointment to Mrs. *Walker*, it was in fact a sale of the eight, as *Cooper* kept the four as his own property, and *Walker* insisted on a warranty, which was given. The alledged appointments therefore, instead of being individual and distinct, are confounded with other transactions, which leaves the whole enveloped with darkness, and puts it out of the power of the court to decide upon the motives : a circumstance sufficient, of itself, to destroy them. If it be said that *Cooper* afterwards confirmed them by his will, the answer is, that the will was bottomed on the same motives with the deeds, and is affected in the same manner. The appointments, therefore, being void, they ought to be set aside, and the property divided according to the case of *Morris v. Owen*, 2 Call, 520.

Wickham, contra. *Cooper* had a life estate in the slaves, and that might have regulated the money part of the transactions ; which removes the objection of profit to himself. The mixture of the appointments with other matters, does not vitiate them, as no bad motive for it appears. *Cooper* had full discretion, and was at liberty to exercise the power as he pleased, even upon motives of affection. No inequality appears ; for the number and value of the slaves are not shewn ; but were it otherwise, the reasons assigned by *Cooper* in his will, for the preference, (although he was not bound to assign any,) were sufficient to justify it. If the exchange of the four slaves for the land was unfair, and gave an advantage to *Brown*, that would be for the benefit of *Thomas Cowles*, (who may set it aside,) and not of the

other legatees. But no compulsion is proved, and the probability is, that his dissatisfaction arose afterwards ; for there is nothing to shew that *Cooper* would have altered his will, if he had not consented. The woman and child were probably sold for the bad behaviour of the woman ; and *Cooper* took the burthen of accounting for the value ; which he professed himself willing to do to *Thomas Cowles*, to whom he had given her. Of course, there is nothing improper in that transaction ; and the appellants ought not to be allowed to object the want of information now, as they did not except to the answer, and demand it in the court below. *Walker* has no counsel ; and therefore, as to that part of the case, the decree may be left open.

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Call, in reply. The appointments ought not to have been mixt with any other affairs. For the commixture puts it in the power of the fiduciary so to disguise the transaction, that the guilt, or innocence, of it, can never be made to appear : and therefore, the only safe rule is, by proscribing it altogether, to shut up the avenues to fraud. There was gross inequality ; for ten slaves were given to *Thomas Cowles* ; who was made one of the residuary legatees also, without any proper motive, for the preference, assigned : for his good or bad behaviour to *Cooper* ought not to have entered into the consideration. It is not correct to say, that if the appointments to *Cowles* and *Walker* were fraudulent, the appointees only can take advantage of it : for the fraud vitiates the transactions, and the deeds convey no right, as *Cooper* had not an arbitrary discretion ; but was bound to observe something like equality ; and, as the number and value of the slaves, were known to the appellees, and not to the plaintiffs, the former ought to have produced the proof necessary to justify the conduct of the trustee. There is no evidence that the woman and child were sold on account of the bad qualities of the woman : and the presumption is, that it was to suit the purposes of *Cooper* himself.

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ROANE, Judge, said that, upon a view of the whole case, he was for affirming the decree; but that he did not mean to decide any thing as to the right of persons having power to appoint, to give unequal portions, in general.

FLEMING, Judge, said that, he thought a general power was given; especially as the testatrix did not use the words "*equally to be divided*;" and that upon the whole, he was of opinion, that the decree should be affirmed.

CARRINGTON, Judge, said that, as *Cooper* had a general power to give the slaves among the children, and had given some to each, the decree ought to be affirmed.

LYONS, Judge. Power is given to the husband to distribute the slaves among the nephews and nieces of the testatrix "in such manner and proportion as he shall think proper;" and there is nothing in the will to shew that an equal division was intended. Of course it was left to him to make the appointments according to his own discretion; and then, what right has the court to control the execution? The latitude which has been sometimes taken by chancellors in England, has been reprobated, and a different course is beginning to manifest itself there, 2 *Fonbl. Eq.* 201; which meets with my own approbation. Consequently, as the power was general in the present case, and the husband has given part of the slaves to each of the legatees, without any proof of fraud, I concur, with the rest of the judges, that the decree ought to be affirmed.