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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her husband, except to the slaves of which she is possessed. 2. That the husband of the deceased coparcener should have joined with the surviving coparcener in this action for the slaves. The court adjudged for the plaintiffs. But quære, on which point, or if on both? Cases cited were Bronaugh *v.* Cock, Wyld *v.* his children, Southal *v.* Lucas, Elliot *v.* Washington, Harrison *v.* Valentine. All determined in the General court. It was said at the bar in this case, and not denied, that wherever the feme is entitled to slaves not in possession, if the wife dies before reducing them into possession, the right survives to the husband. But if the feme survives it shall be hers: and that the act of Assembly only intended to give the husband such a right as he would have to the chattels of the wife, that is, a right to reduce them into possession; and that this reconciles the cases. In this case also, Pendleton observed, that the husband surviving might recover, whether he took administration or not; and that if he were to take administration and recover in that right, he would be accountable to no one, the statute of distribution having given the surplus to him as next of kin. But Wythe, said it was the second statute of distribution which did this, and that being made after 4. Ja. 1. was not in force here. Therefore, if he recovered, as administrator, he would by our act of distribution, be accountable to the next of kin.

Blackwell *v.* Wilkinson.

Slaves had been entailed between the years 1705 and 1727, without being annexed to lands, and the question was, whether the entail was good? At a former hearing before twelve judges, the court had been divided, and it came on now to be re-argued.

John Randolph, Attorney General, *pro quer.* I shall consider, 1. Whether slaves were entailable under the act of 1705, c. 23. alone, without being annexed to lands? 2. If they were so, whether the act of 1727. c. 11. can by retrospection affect this case? 1. The legislature, considering the intimacy of connection between slaves and lands, and that the latter in this country could be of but little profit without the former, thought it expedient to declare them real estate. The natural property of land is, that it is fixed and permanent: its legal properties, that it shall descend to heirs in various manners; shall be subject to widows' dowers;

shall not be liable to execution; cannot be aliened but by writing; shall give its proprietor a right of voting at elections; cannot be demanded but by action real, &c. Again the natural properties of personal estate are, that it is moveable and perishable: its legal properties that it shall be distributed among the next of kin equally; shall be liable to execution; may be aliened without writing; shall not give a right to vote; must be demanded by action personal, &c. Slaves, having the natural properties of personal estate, that is, being moveable and perishable, were formerly considered as personal estate; but the legislature thinking it better that they should be considered as real estate, could not indeed give them their natural properties of immobility and permanence, but might give its legal qualities of descent in its various modes, dower, &c. Nor is this transmutation of properties uncommon in the law, it being every day's practice to consider lands as money, and money as lands. The legislature has declared then, in terms the most general, that slaves shall be held real estate; by which their intention is manifested to transfer to them every quality of that estate which it was in their power to transfer, to wit, the legal qualities of descent, dower, &c. To state a similar instance, the properties of a chose in action are, that it cannot be assigned, cannot be devised, nor released but to parties or privies, &c. Had the legislature then enacted, that slaves should be considered as choses in action, would they not without more, have had their capital qualities of being unalienable, indevisable, &c.? Suppose it enacted that slaves should be taken as heir looms: this alone would make them descendible to the heir and unalienable by will, which are the properties of an heir loom. In like manner, had the law declared they should be held as bonds, they would then have been assignable, have gone to executors, and had the other properties of a bond. When an act of parliament declares, that an alien shall be deemed and considered as a native of England, this cannot give him the natural accidents of a birth within England; but it can give him all the legal accidents of a capacity to sue and be sued, to inherit and be inherited, &c. In like manner, an act declaring slaves to be real estate, cannot give them the immobility and permanence of lands; but it can, and does give them, the other adventitious or legal properties which belong to lands. Now these are, that they may be aliened in fee, in tail, for life, years, &c. But it is objected, that the act declaring they shall be held real estate, and shall descend to heirs and widows, &c. particularizing the two properties of descent and dower, has shewn its intention of giving them no others; more especially, as it has afterwards expressly withheld from them almost every other real quality.

Answer. Suppose I should say, every man present is honest, except A. and B.; and that C. and D. (who are present also) are honest. Should I be understood to mean, that nobody present is honest, but C. and D.? No; the naming them particularly might be construed to mean, that they were conspicuously honest, but by no means to contradict the general affirmation which went before. The rule in interpreting statutes is, that 'where the words of an enacting clause are general, and exceptions added, the regulation shall extend to every case not included within the exceptions.' It is commonly said, '*exceptio probat regulam.*' Again, where the words are general, and some particulars happen to be specified, it is always supposed they are but *exempli gratia*. Thus the statute of *circumspecte agatis*, mentions only the Bishop of Norwich, yet it is held that the statute extends to all the clergy. So the statute *de donis* takes notice only of a gift to a man and the heirs of his body, to a man and his wife and the heirs of their bodies, and to a man in frank marriage; yet it was never doubted but that this statute extends to every entail. The statute of limitation bars actions not brought within such a time, but adds a saving for infants, femes covert &c. It is always allowed that, without this saving, they also would have been barred. The conclusion then, is parallel, that the words of the act of 1705, being general, that slaves shall be real estate, and the consequence of their being entailable not being prevented by any of the exceptions, they must be entailable: and also the two properties of descent and dower, must be supposed to have been mentioned *exempli gratia* only. To say that a person is seized of an inheritance, over which he has absolute power, can dispose of it totally, and yet not *sub modo*, is to say that the whole does not include a part. The fourth clause provides, that slaves shall still be liable to execution; the sixth, that the alienation of them need not be recorded; the seventh, that they shall not give a right to vote at an election; the eight, that they may be recovered by action personal. Now, if under the general clause they were to have no other real properties but descent and dower, if they were to remain personal estate in every other respect, where the necessity of adding these provisos? Without these, they would, as personal estate, have been liable to executions, alienable without writing, insufficient to qualify a voter, and recoverable by personal action. The truth is apparent. The legislature were sensible, that by making them real estate, these properties of being not subject to execution, not alienable but of record, qualifying a voter, and demandable by action real only, would be necessary consequences, and therefore have carefully guarded against them. And this, not by altering

the nature of the estate, and making it personal in these particulars, but by admitting it still to be real estate; but real estate liable to executions, alienable without writing, and recoverable by action personal. These provisos shew plainly, that the legislature intended that slaves should have every quality of a real estate in their power to give them, except those particularly provided against. But I shall, secondly, urge that had the act of 1705, never been made, slaves might have been entailed under the statute *de donis*. Here I shall enquire what may be entailed. Tenements incorporeal may be entailed if they concern lands, as offices, dignities, &c. A dukedom, for instance, may be entailed, because, though not really connected with lands, yet it is demandable in a *præcipe*. If the Lord Fairfax should appoint a receiver of his rents, this office might be entailed. An equity of redemption may be entailed; so may charters. There is no estate in England resembling that of slaves, except villeins. Of those there were two kinds, villeins in gross, and villeins regardant. The latter, being connected with land, can throw no light on the present question; but villeins in gross may. These were unconnected with lands, as much as slaves, and were deemed purely personal, as slaves were before 1705. And yet, that a villein in gross might have been entailed, I infer from Co. Lit. 124. a. 'If an executor hath a villein for years, and the villein purchases lands in fee, the executor entereth, he shall have the whole fee simple.' Now it is clear, Lord Coke is speaking of a villein in gross; since a villein regardant can never come under the power of an executor. And if a villein in gross may be possessed in fee, he may in fee tail, which is only a conditional fee. The inconveniences attending entails of slaves are much insisted on: but they are magnified. The estate is as permanent as its proprietor; slaves may possibly last as long as lands; which, though not subject to so many accidents, yet may be destroyed. This argument, it will be said, proves too much, since it would equally support an entail of horses, hogs, &c. Answer. I annex this restriction to it, that the subject should be of distinguished value. It is objected, that the statute *de donis* uses only the word '*tenementa*,' and that slaves not being a tenement, are not within that statute. It must be presumed that the legislature intended, by the act of 1705, to make them tenable, by making them real estate. But, thirdly, suppose them not a tenement, and so not included within the statute *de donis*. Yet, I say, being capable of a disposition in fee, our title is good by the common law. Under that, were three kinds of fees, to wit, simple, conditional and base. The conditional fee, was what we now call a fee tail, and was only perpetuated, not erected by the statute *de donis*.

That statute was the nurse, not the mother, of entails; it leaves them as they were at common law, only taking from the tenant in favor of the issue, that power of alienation which he had formerly possessed after issue born, before the statute *de donis*. Then, a gift in the terms of ours, would have conveyed a conditional fee, which indeed our ancestor might have aliened, but, not having done it, we succeed to the right; from which I conclude slaves were entailable under the act of 1705. If not, yet they were under the statute *de donis;* and if this is against us also, they might be conveyed in conditional fee by the common law. 2. If our title was good in either of these ways, then we say it is not affected by the act of 1727. It is a general observation, that laws are unjust and unreasonable, when by restrospection they attempt to direct those which were prior. They fall heavy on purchasers who understood the former law in the common sense, and who saw not that hidden meaning which the legislature have thought it necessary to unfold by a subsequent law. In criminal cases they have been branded with an infamy well merited; and why should the safety of our property stand on a basis less firm than that of our persons? The civilians say, that a law founded on a law of nature, may be restrospective, because it always existed, and a breach of it was criminal, though not forbidden by any human law: but that an institution, merely arbitrary and political, if restrospective, is injurious, since, before it existed, it could not be broken, nor could any person foresee that such an action would, at a future day, be made criminal. Lord Coke has made the same observation on the act of Gloucester, '*nova constitutio futuris formam imponere debet, et non præteritis.*' 2 Inst. 95. 292. Now the law of 1727, regulating dispositions of slaves, is an arbitrary law, and cannot therefore be restrospective. The act of 1727, is an acknowledgment of the legislature, that that of 1705, is deficient: now what was the deficiency? Why, that too great power of entailing was given by that act; therefore it is declared that slaves shall not be entailed unless annexed to lands. But where the necessity of this, if, under the act of 1705, they were only personal estate and could not be entailed? The 2nd clause says, 'the meaning of the said act is declared to be,' &c. The 3rd clause says, when any person 'shall sell,' &c. The 5th, 'infants may dispose.' 6th, 'no slaves shall be forfeited,' &c. 7th, 'no administrator hath or shall have power, &c. 8th, 'when a mother shall die intestate;' &c. All these expressions shew it was intended to be future: only the 4th clause indeed is retrospective; but we know the history of that clause, and it concerns not the present case. An inconvenience is to be objected, that great numbers of slaves in this colony are now held

under titles similar to that in dispute, and that, if a judgment should be in favor of the plaintiff, many suits will be immediately brought. Answer. These slaves being in possession, part of the issue in tail, part of alienees, whatever judgment be now given it will be equally productive of suits. The objection founded on this fact, that great numbers of slaves were entailed between 1705 and 1727, without being annexed to lands, proves it was the general sense of the people who lived nearest the time of making the act, that slaves might be entailed separately; and '*contemporanea expositio est fortissima in lege*,' says my Lord Coke. 2 Inst. 11. They take their opinion probably from knowing the sentiments of the legislature. In Burwell's case in G. C. the circumstance of the slaves being annexed to lands was, as I can say, from good authority, never taken into consideration in England; they were considered as if they had been entailed separately; and it was expressly declared, that the act of 1727, should not be retrospective. On the whole, I conclude that our title is good, either under the common law, the statute *de donis*, or the act of 1705. And that it could not be injured by the act of 1727, since from the expressions in that act, the intention appears to have been that it should be only future; and, being an arbitrary law, it cannot be retrospective.

Mason, for the plaintiff, argued nearly to the same effect; but such observations only, as were new shall be taken notice of. The slaves in dispute were given to our ancestor in tail, without being annexed to lands, by will dated 1718. The donee in tail devised them, in 1755, to the defendant; against whom we bring this action as issue in tail: this is shortly the case. I insist that our title is good; 1st, under the common law; 2nd, under the statute *de donis;* 3rd, under the act of 1705; and 4th, that it was not impeached by the act of 1727. First, it is a rule that, whensoever any new species of property is introduced, which resembles a property formerly known in the law, the principles of the older are applied to the new. Finch. b. 1. c. 3. max. 24. Thus copyholds are not generally descendible, and so cannot be entailed; but when, by particular customs, they are descendible, all the qualities of other descendible estates are transferred to them: that is, they become entailable, &c. So slaves, though formerly not descendible, yet, when made so by law, immediately assumed the other qualities of descendible estates, that is, they became entailable, &c. Lord Coke, 1 Inst. 20. a. shews what things were not within the statute *de donis;* to wit, an annuity, office of keeper of the hounds, &c. because they do not savor of the realty; but in all these cases, says he, the donee has a fee conditional, as before

the statute, and by grant, or release, may bar his heir. If then the devise in our case, was of a conditional fee, our ancestor not having aliened, the estate has descended on us: but, say they, he has aliened by will. Answer. This is not such an alienation as will bar the issue; for the rule is, that 'an accruing right is preferred to a last will.' Our claim is *per formam doni*, which is paramount that of the defendant by the will; the law therefore here splits an instant as in 1 Inst. 185. between a devisee and one who claims by survivor. A devise of an heir loom is void, for the same reason, so of an heriot. This is not such an alienation then as will bar the issue. Second, our title is good under the statute *de donis*. The word '*tenementum*' there, has been construed to extend to every thing savoring of the realty. An office is said to savor of the realty; much rather then shall a slave, who is exercised in tilling the ground. But, third, the act of 1705, has made them a realty itself; surely then, if an estate, which only savors of the realty, may be entailed; a realty itself may. They object, that the 6th clause, having given a power of alienating by word of mouth only, if it is adjudged that they were entailable, they will be entailable by parol. I answer, that before 22 Car. lands might be aliened by parol; and so might, in like manner, be aliened in tail. But it will be said, in the case of lands, livery of seisin was necessary, which was an act of such notoriety as to publish the alienation sufficiently. I answer, that to transfer the property of slaves, whether in fee or in tail, a delivery is also necessary, as appears in Smith *v.* Smith, 2 Str. 955, where it was ruled that a parole gift without some act of delivery, would not alter the property of chattels. And this delivery of the slaves would have been equally notorious with a livery of seisin of lands. It appears to have been the general opinion, between 1705 and 1727, that slaves might be entailed without lands; and by Finch. b. 1. c. 3. max. 61. '*communis error facit jus?*' Fourth, whether the act of 1727, affects this case? If the intention of the legislature was, that this act should be retrospective; yet being iniquitous, it shall not have that effect. The second section says, 'the design of the act of 1705, was and is,' &c. It is absurd to say what was the design; that must be collected from the words. The legislature might establish a new meaning for the future, but not for cases past. When they have enacted a law, their power ceases, they have done their part, and then the judges are to take it up, and say what was the meaning. There have been two cases determined in the General court resembling this, though not accurately. That of Sheeles *v.* Jones, 1727, in which the act of 1727, was declared not to be retrospective; and Burwell *v.* Johnson, which was the case of an entail of slaves by

will, before 1727, in which the slaves were entailed separately; though there were lands given in another part of the will, with similar limitations.

Wythe, for the defendant. The question is, 1st. Whether before 1727, a slave could be entailed, without being annexed to lands? 2nd. If he could not, whether he might be conveyed in conditional fee? 1st. The doctrine laid down by the counsel for the plaintiff, is, that every inheritable real estate was, by the statute *de donis*, made entailable. If this assertion be true, it follows of consequence that the act of 1705, making slaves a real inheritable estate, did thereby make them entailable; but, if this assertion be not true, and if slaves, though real estate, are yet very different from those estates, which have been adjudged entailable, then that consequence does not follow. And here this previous question becomes necessary, to wit, what estates were entailable under the statute *de donis*. Estates are divided into, 1st. Inheritances; 2nd. Freeholds; and 3rd. Chattels. The first alone are within the statute *de donis*. These were either, of lands, or other things. In the 2 Jac. c. 1. it was adjudged, that the dignity of Count of Westmoreland was entailable, within the statute; because it concerned lands. Nevils case, 7 Co. 61. The office of a steward, bailiff, marshall, a sergeantry, or custody of a church, the Earldom of Shrewsbury, entailable; as appears from the same authority. The reason given was, that they concerned lands: from which I infer, that, had they not concerned lands, they could not have been entailed, nor was it necessary the place should be in England, or even in existence. Albemarle, was not in England. There was no such place as Rivers in those days. Part of the dignity consisted in possession. Lord Holt says that they consisted in dignity, office, and possession. If a baronet was named of a particular place, it was entailable. But it may be observed that the statute *de donis*, having no other effect than to prevent alienations, it was immaterial, as to a dignity, whether it was entailable or not; since, by the common law, it could not be aliened. It appears then, that dignities were not entailable, unless they concerned lands. A warranty might be entailed; so might charters. Copyholds were sometimes held at will only; sometimes were descendible, and were entailable, where the custom had made them so. An advowson might be entailed, so might prædial tithes, which issued out of lands. Seigniories, rents and services were entailable; because by these, the title to the lands was remembered and preserved; and they were to the owner instead of the lands. A common might be entailed, as proceeding from the soil. So might estovers. An use likewise, because, before the statute of uses, it

was an equitable right, and since it is a legal right. An equity of redemption may be entailed, because equity considers the right to the lands to be in the mortgagor, and that the mortgagee has no other title to it than as a pledge for money. A villein in gross was not entailable, nor can any case be produced to prove he was. A villein regardant indeed might, for a reason hereafter to be given. I have here enumerated all the estates capable of being entailed, and they do, I believe, include every inheritable estate, except one, which I shall mention presently. I shall here make three observations. 1st. That the statute *de donis* describes the things which may be entailed by the words, 'lands, manors, and tenements.' 2nd. That whatever may be entailed under the statute besides lands, concerns lands, is annexed to, exerciseable in, or issuing from lands; or in other words nothing can be entailed but what has its foundation in lands. 3rd. In every case of an entail the præcipe is the proper remedy. The tenant in tail is to have an assise. The issue or remainder man is to have a formedon, in both of which, 'manors, lands, or tenements' must be mentioned. A copyholder, tenant in tail, must have a writ of assise in nature of a formedon. Co. Lit. 60. a. *A quare impedit* was the remedy for the patron of a church; in which it is alleged he was seised as of freehold: for tithes the same remedy as for lands or tenements. For rents or services an assise lay, alleging he was seised of freehold. So for a common. There are three instances in which the remedies were of a different nature. 1st. A dignity; the reason was, because the person who bore it, could not be deprived of it, as he might of his lands, &c., and consequently, no remedy was necessary to be given, for it could only come before the court incidentally, or by a petition to the King to call him up to the House of Lords, who thereupon became judges, whether he had a right to be so called. The 2nd. is an action for breach of a covenant annexed to, and running with lands entailed, as of warranty, for instance. The 3rd. An action of detinue for charters. The reason of this is, that not the right to the subject entailed, but only appendages to it, to wit, damages, are recovered. A slave cannot be entailed under the express words of the statute *de donis*. For, 1st. He is not a manor. 2nd. He is not lands. 3rd. He is not a tenement; for this must either be a corporate inheritance, which may be holden of some superior, or it must concern, be annexed to, or exerciseable within some corporate inheritance; this being my Lord Coke's definition of a tenement. Co. Lit. 19. b. Now in the present case, they were not annexed to lands, nor to any corporate inheritance; neither do they, in their nature, concern, or are they exerciseable (for these two expres-

sions are synonymous) within lands, in the sense intended by my Lord Coke. It has been said indeed, that they labor in the ground, and therefore are exercised and exerciseable in it; but this exposition of the word exerciseable is superficial indeed! Lord Coke applies it to offices annexed or confined to a certain spot of land. Now what analogy is there between an office exercised in a certain territory, and a slave exercised in tilling the earth? Not so much as there is between such an office and a spade. The office of the keeper of the hounds is exerciseable in lands; yet not being confined to any particular spot of lands, it is not entailable. So a slave may be exercised in any lands, or no lands: he may be employed in ploughing the earth, or in ploughing the ocean; or set to work in manufactures of various kinds. Lord Coke, further says, things are not entailable, because they do not 'savor' of the realty. But this he explains, *ubi supra*, to mean 'exerciseable.' But, say they, if a thing savoring of the realty is entailable, much rather shall a realty itself. This I shall answer by two observations 1st. That the act of 1705, gives them expressly but two qualities of lands, to wit, descent and dower. 2d. That that act, by making them descendible, according to the manner of lands held in fee simple, did not give them the adventitious or collateral qualities of land. This I shall prove by producing a case of an inheritable realty in England, which is not entailable, viz. a copyhold. The similitude between a copyhold and a slave, is very striking; the former is made real and descendible by custom; the latter by an act of Assembly. Nor does it destroy the resemblance that the one is by law, and the other by custom, for *consuetudo est altera lex*, and the whole common law is founded on custom. Again, of copyholds there can be no dower; neither would there have been of slaves, had not the act expressly mentioned it, this being a collateral quality of lands. Of copyholds there can be no tenancy by the courtesy of England; no more can there of slaves; this being omitted by the act. Copyholds are not assets to charge the heir on the bond of his ancestor; nor would slaves have been, had not the act particularly provided for it. For this see Brown's case. 4. Co. 24. In Heydon's case, 3. Co. 8. it is expressly declared that the statute *de donis* does not extend to copyholds, though real and descendible. The same similitude should be preserved here also, that is, neither should that statute extend to slaves. This instance of a real inheritable estate not entailable, proves the falsity of the general position laid down by the adverse counsel. The rule *exceptio probat regulam* has been much relied on; but it is answered by this observation, that generally the provisos in the act

of 1705, either take from slaves such inherent qualities of a real estate, as would have been the consequence of their being made real estate, or give them such collateral qualities as they would not otherwise have had. By a proviso in this act, an heir inheriting slaves from his father, shall account to his brothers and sisters for a proportion of the value. If the legislature intended to make them entailable, then the heir in tail is bound by this proviso, the words of which are general. But, that they could not intend this, is evident. The ruin of the heir would be its certain consequence, since he could not alien the slaves, to enable him to pay the money, and he might perhaps have no other estate. This act was intended to favor the heir, not to ruin him, by making him a purchaser. The *argumentum ab inconvenienti* can in no case be stronger than in the entailing of slaves. And the inconveniences are so obvious, that the legislature could not but have seen them, and, seeing them, they most surely would have guarded against them, by a proviso, as they have done against others, much less considerable. But the truth is, they did not intend to make them entailable, and therefore no such proviso was thought to be necessary. The inconveniences attending the entailing of lands, have been loudly complained of; but how much greater are those attending entails of slaves! Slaves are transitory and changeable both in the time and place of their existence, and difficult to be traced to the root from which they sprang; and the more so, since having no surname by which different families may be distinguished, no register is sufficient to remove the difficulty. But lands on the other hand are fixed and unalterable. Again, lands cannot be conveyed but by record; but slaves may without record, and even without a deed. The entail of lands, of any value whatever, may be docked in England; and so they may here, if under the value of two hundred pounds sterling: whereas the entail of slaves can never by any method be docked, and these inconveniences will multiply daily, as slaves will be daily multiplying. The case of Burwell and Johnson, is cited against us, because slaves were there adjudged to be entailable under the act of 1705. But in that case lands were devised in the same clause, and by the same words with the slaves, and it was always held, that things annexed to lands might be entailed, as charters, covenants to warrant, &c. But moreover, the thirteenth clause of the act of 1727, confirms the annexations of slaves to lands before that act. 2nd. If it should be adjudged, that they were a fee simple conditional, the inconveniences before complained of will be much increased, because some slaves will then be held in tail, and some in conditional fee. Slaves held under these two different titles will inter-

mix beyond a possibility of investigation. This old doctrine, which has lain neglected since the statute *de donis*, is now, after an interval of five hundred years, brought again into court. It has hitherto been the policy of judges to discourage perpetuities of every kind; but here is an attempt to introduce one in a form, to us, new. 3rd. There is another point in this case on which we rely for success, though the principal question should be determined against us. The act of 1727, says, that where a slave hath been, or shall be conveyed to a feme covert, the property shall vest in the husband. This clause is most clearly retrospective. Now the person under whom Wilkinson claims, and his wife, both survived 1727. In the cases of Jones *v.* Sheeles and Bruer *v.* Smith, it was determined, that the property did not vest in the husband, because in each of those cases the wife was dead before the act of 1727.

Pendleton pro defendant, argued to the same effect. He argued, moreover, that the case of the villein cited by Mr. Attorney, from Co. Lit. must have been of a villein regardant; because he went to the heir; that, if slaves were entailable at all, they were entailable by parol. The consequence of which would be very bad; since a purchaser, could by no industry of his own, be secure in his purchase. That *exceptio probat sed non extendit regulam*; and that the word 'hereafter' in the act of 1727, respects future constructions, not future gifts.

Attorney General, in reply, observed; that the gentlemen on the other side, by an enumeration of what things were capable of being entailed, had endeavored to draw this conclusion; that nothing was so, unless exerciseable in lands. But a dignity may be entailed, though there be no such place in existence as the one named for its support. There is no such place as Rivers; and there might as well be no Albemarle; since that is in Holland, where an English dignity cannot be exercised. The truth is, dignities are entailable, because of their great honor and importance in the state. An office too, they say, is entailable, because confined to a particular spot of ground; but there was no locality in the office of marshal of England. An equity of redemption is a mere equitable title to redeem something forfeited. But admit their position. Slaves are exerciseable in lands, and therefore may be entailed. The case I mentioned of a villein, must have been of a villein in gross; and Lord Coke says, that a tenant in tail, for life, or at will, is entitled to the possessions of a villein. And if the villein in the hands of an executor, was intended a villein in gross, the villein held in tail, for life, or at will, would be so intended also; as we cannot suppose Lord Coke, would have made a transition so

sudden, from a villein in gross, to a villein regardant. But that a villein in gross might be held in fee, appears clearly from Lit. sect. 182. (So likewise from Co. Lit. 124. b. wherein it is said, there may be a tenant by the courtesy of a villein.) An argument has been drawn from the resemblance between a copyhold and slaves, to prove that, though descendible, they are not entailable. But a copyhold is, in the eye of the law, but an estate at will, and cannot, for that reason, be entailed. They were originally the estates given to villeins, who would have been enfranchised by the gift of a larger estate than at will. In process of time they were allowed to be enlarged. If the act of 1705, intended to give slaves only the two properties of descent and dower, it would only have said they shall 'descend to heirs and widows,' and would not have added, that they shall be real estate. Dower was a collateral right, and therefore did not take place in copyholds. But the act of 1705, declares that the proprietor of slaves shall have every right; which must include collateral rights, as well as others. But a right to entail, is not collateral; every right in the proprietor himself, is lineal; but dower, courtesy and rights in other persons, are collateral. It is objected, that if slaves were entailable alone under the act of 1705, the heir must be accountable for a proportion of the value. But this proves too much; since it equally proves that slaves annexed to entailed lands, must be accounted for by the heir; a position which can never be maintained. Besides the act of 1705, says the 'slaves of an intestate;' which shews they were speaking of such persons only as could make a will and dispose of the slaves thereby: for it would be absurd to say that the value of entailed slaves is not divisible, if the last tenant in tail made a will, and is divisible if he made none; when that will could have no kind of effect on the slaves. In Burwell *v.* Johnson, say they, the slaves were annexed to lands: but what was that to the purpose? since, in the act of 1705, not a word of entailing by annexation, is mentioned. It is objected that Blackwell, gave some of the entailed slaves from the heir, but gave him others not entailed, which should be taken as a compensation. If so, go into equity and ask such a decree. The last objection was, that the act of 1727, vested the slaves in the husband, because he survived 1727. Answer. That clause speaks not of entailed slaves, but of those only in which the wife had an absolute right. Blair, W. Nelson, T. Nelson, Corbin, Lee, Tayloe, Fairfax and Page, were of opinion for the defendant, that slaves could never be entailed unless annexed to lands. Byrd, Carter and Burwell were of a different opinion.

ALLEN, *et al.* v. ALLEN, *et al.*

In this case, one question among others was, whether, where a father entitled to a reversion in slaves dies, and afterwards the particular estate (which here was for life) falls in, the heir at law shall be obliged to account to his brothers and sisters for a proportion of their value? And the court determined he should. It was also insisted that some children by a second wife, (whose mother had by a marriage contract reserved a right of appointing her own slaves at her death as she pleased,) should bring into hotchpot whatever they should get under such appointment, or not be entitled to take with the children of the first marriage, a proportionable part of the value of the father's proper slaves. But the court determined that the right of hotchpot, does not take place in dividing the value of slaves.

BRADFORD *v.* BRADFORD.

Appeal.

This was a dispute between two conterminous landholders, with respect to their boundary. The jury found specially, that the line in truth was as the plaintiff below suggested, but that it had been six times processioned according to the line which the defendant below would establish. They recite the proceedings, before the processioners in *hæc verba*, which proceedings mentioned that the plaintiff himself was present at the first processioning, but do not say who was present at those subsequent; and they referred it to the court, whether these processionings were binding on the plaintiff? The court below had adjudged that they were not binding; from which judgment the defendant there appealed.

Wythe, for appellant, admitted the hardship of the case on the side of the appellee, but relied on the words of the act of 1710. c. 13. which comprehend this case; on the importance of the method of processioning towards preserving boundaries in quiet; and on the maxim, that institutions tending to promote public utility, must prevail, though injurious in particular instances. He cited a similar institution among the Romans, by them called Terminalia.

Pendleton for the appellee, cited the words of the act, 'that the