REPORTS OF CASES

ARGUED AND ADJUDGED

IN THE

COURT OF APPEALS

OF

VIRGINIA.

BY DANIEL CALL.

IN SIX VOLUMES.

VOL. II.

THIRD EDITION.

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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does not appear what testimony was before the board; and, perhaps, much stronger evidence was adduced by Cobun on the merits, than appears in the present record. For, although he [446] has thought proper to adduce some testimony on the merits, he was not bound to do so; and, therefore, if his testimony were defective, (which it is not,) yet that would not affect his case; because, the judgment is conclusive, and cannot be impeached.

But, for another reason, the decree of the Chancellor is right; namely, that Cobun and Rogers are no parties to the present suit; for, not having passed any deed for their title, and their rights having been drawn into controversy, they ought to have been made parties. *Buck* v. *Copland*, ante. 218, in this Court: which is the stronger in the present case, as their testimony is objected to on the ground of interest; and, they ought certainly to be heard by answer or deposition.

Cur. adv. vult.

LYONS, Judge, delivered the resolution of the Court, that the act of Assembly was conclusive; and, that the decree was to be affirmed.

Decree affirmed.

WALLACE ET UX. *v.* TALIAFERRO ET UX.

[447] *Thursday, November 6th,* 1800.

Construction of the 4 section of the *explanatory act* of 1727, *chap.* 4.

W. R. made his will in May, 1774, and devised to L. W. and C. T. sundry slaves, with the residue of his estate, subject to the payment of his debts and legacies; and appointed J. W. the husband of L. W. and R. T. the husband of C. T. executors; who qualified as such. In August, 1774, J. W. died, before any division of the estate of W. R. was made, and by his last will, bequeathed all his slaves to this daughter and his two sons. As J. W. was, at most, only possessed as executor, and not in right of his wife, her share of the slaves of W. R. survived to herself; and did not pass by the will of J. W.* (LYONS, j., dissenting from four other judges.)

This was an appeal from a decree of the High Court of Chancery, where Taliaferro and wife brought a bill, for relief

* Nearly accordant. *Gregory's* adm'r. v. *Mark's* adm'r. 1 Rand. 355.
But where wife is entitled to slaves in remainder or reversion, expectant on a life estate, and dies before the tenant for life, her husband surviving; he takes the slaves. See *Drummond* v. *Sneed post,* 491; *Dade* v. *Alexander,* 1 Wash. 30; *Wade* v. *Boxley,* 5 Leigh, 442.

against Wallace and wife, stating, that William Rowley made his will on the 11th of May, 1774, and devised to Lettice Wishart and Catharine Taylor, sundry slaves, together with the residue of his estate, subject to the payment of his debts and legacies. That he appointed their husbands John Wishart and Richard Taylor, executors of his said will; and died before the 25th of September, in that year. That the executors qualified; but John Wishart acted principally, and worked the slaves on the testator's lands. That, after the death of the said William Rowley, the said John Wishart made his will, to wit: on the day of in the year 1774, and gave all his slaves to be equally divided between his two sons, William and Sydney, and his daughter the plaintiff; but the enjoyment of the property was to be suspended, until his sons came of age. That Wishart died before the 25th of December, 1774. That after the death of John Wishart, the slaves of Rowley were divided between the defendant Lettice and the said Catharine Taylor, according to the will of the said Rowley. That Lettice Wishart, after the death of the said John Wishart, intermarried with the defendant Michael Wallace, who took possession of all the slaves and other estate, which were allotted to the said Lettice. The bill therefore prays for the plaintiff's proportion of the slaves, and for general relief. [448]

The answer of Michael Wallace denies, that the slaves (except Lydia, who was claimed by his wife, by title paramount,) were ever in possession of John Wishart; but says that Lydia and her issue have been divided by a decree of the Court of Appeals. States that R. Taylor alone acted as executor. That the slaves are not metioned in the will or inventory of Wishart. That the debts and legacies were considerable; and that he has given up property to pay them.

The answer of Lettice Wallace states, that she does not know that John Wishart ever had possession of the slaves; and believes he had not.

The answer of William and Sidney Wishart states, that they have relinquished to Wallace.

Davies, a witness, says, that he lived with Rowley, when he died on the 20th of May, 1774: That Wishart died about August, 1774; but that during his life, the slaves were under his direction. That the legacies were not discharged, at the death of Wishart, but the lands were sold by Taylor and wife, and Wallace and wife, to pay legacies &c. That Wishart took upon himself the active management of the estate. That the widow resided in the mansion-house, and the servants waited on her as usual; but she did not control the property. That

there were about £3000 due the testator; that a good deal of money was collected; that it was not necessary to sell the residuary estate to pay the legacies; and that from conversation with Wishart the deponent believes, he claimed the property devised to his wife.

Rowley, a witness, says, that Wishart was never on the plantation where he resided, after the death of Rowley the testator. Thinks, however, that Taylor was the acting executor, because he attended the appraisement.

The Court of Chancery was of opinion, "That by force of these words, in the act of the General Assembly, passed in the year 1727, [c. 11, § 4, 4 Stat. Larg. 223,] '*Where any slaves shall be bequeathed to any feme covert, the absolute right, property and interest of such slaves is hereby vested in, and shall accrue to, and be vested in the husband of such feme covert,*'* [449] the right of the defendant Lettice Wallace to one moiety of the slaves bequeathed to her, then Lettice Wishart, and to Catharine Taylor, the wife of Richard Taylor, by William Rowley, which bequest is no less efficacious, than it would have been, if thereto, John Wishart the former husband of the defendant Lettice Wallace, who was one of the executors of the said William Rowley, and in whose possession the said slaves appear to have been, and who, by a special assent, or other act, did not shew himself to have taken possession in character of executor, and not in character of the legatary's husband, was perfectly transferred to the defendant Lettice, and consequently, vested in the said John Wishart, and was subject to the bequest thereof, by him to his three children." Therefore, that Court decreed the plaintiffs a third of the slaves which had been allotted the defendant Lettice, upon the division of Rowley's estate.

From which decree, Wallace and wife appealed to this Court.

RANDOLPH, for the appellant,

Contended, 1. That the personal chattels of the wife, not reduced into possession during the coverture, survive to the wife, if she outlive the husband. 2. Black. Com. 433; [*Squib* v. *Wynn*] 1 P. Wms. 378; [*Humphrey* v. *Bullen et ux.*] 1 Atk. 458; Co. Litt. 351; 1 Bac. Abr. 479, [*Gwil ed.*]

2. That the slaves given to the wife and a stranger are, as to this purpose, personal chattels, and do not belong to the

* This act of 1727 is long since repealed. The act of 1792 [1 R. C. of 1819, p. 431, § 47; and Code of 1849, p. 458, § 5] declares slaves to be personal estate.

husband if he dies before the wife, without having had possession of them during the coverture.

The act of 1727, [c. 11, 4 Stat. Larg. 222,] explains that of 1705, [c. 23, 3 Stat. Larg. 333,] and was intended to let slaves remain real property, only in the two cases of descents and entails. In all other instances, they were to be personal estate. Accordingly, the first seven sections, are all explanatory; and particularly, the provision in the § 6, that slaves [450] shall not be forfeited, except in those cases where lands and tenements would be subject to forfeiture, is decisive, that in the contemplation of the Legislature, they were personal estate; and, as such, would have been liable to forfeiture, without the provision. Therefore, when the §4 declares that they shall vest in the husband, the Legislature must be understood to mean, according to the nature of personal estate. This has been the constant course of decision in all the Courts of this country, both before and since the Revolution. *Steger* v. *Mosely*,* [Jno. Randolph's MS. Rep.] and *Bronaugh* v. *Cocke*, [Ibid.] in the old General Court. And *Drummond* v. *Sneed*, [post p. 491,] and *Hoard* v. *Upshaw* in the late Court of Appeals, referred to by the Court, in [*Dade* v. *Alexander*,] 1 Wash. 30. These decisions will be regarded as sacred; because they are the decisions of the Courts of this country, to which slaves are peculiar; and which, consequently, must have its own laws and usages concerning them. Those usages, too, as serving to explain the public opinion on the subject, will be respected by the Court. *Downman* v. *Downman's ex'rs.* 1 Wash. 26; *Granberry's ex'rs.* v. *Granberry*, 1 Wash. 246.

3. That Wishart was not in possession; and consequently, having died before his wife, the slaves survived to her as chattels undisposed of by the husband.

It is doubtful whether he ever was in possession at all; but, if he was, it was as executor. 3 Bac. Abr. 84, [Gwil. ed.] Wentw. Off. Ex. 223. Indeed, as it appears that the legacies were not paid during his life-time, he could not have taken possession in right of his wife; for, it would have been a *devastavit* in case of another person; and what he could not [451] have done in the case of another, he could not do in his own case. Besides, there must be an assent of the executor to the legacy, before the legatee can take possession; but there is nothing which shews that even Wishart, and much less that Taylor, the other executor, ever assented to this devise.

*Which, see *post*, 470.

CALL, contra.

It would be difficult to maintain, on any principle of fair reasoning, that slaves, since the act of 1727, are to be considered as personal property in every instance, but those of descent and entail. The words of the law, according to the plain import of them, do not appear to me to admit of such interpretation: for, the act of 1705, which declares them real property, is the *substratum*, and that of 1727 only operates as exceptions out of it. Otherwise, it would have been easier to have repealed that of 1705 altogether, and to have incorporated those two provisions relative to descents and entails into that of 1727: But, if, according to just construction, this entire reversal of the principle of the act of 1705 cannot be sustained, it would deserve to be very seriously considered, whether the decision of any Court would be paramount to the positive directions of an act of Assembly.

However, it is unnecessary to argue that point at present; because, the decisions referred to establish no more, in their utmost latitude, than that slaves are to be considered as a personal property; and whether they be taken as real or personal property, it will be equally true, that, by virtue of the first sentence in the fourth section of the act of 1827, they vested in, and belong to the husband, absolutely, and without any manner of qualification.

1. Because, the words of the act are sufficient to produce that consequence.

For, by the first sentence of the 4th section, every interest of the wife is transferred to the husband. The words are, [452] "that where any slave or slaves have been, or shall be conveyed, given, or bequeathed, or have, or shall descend to any *feme covert*, the absolute right, property and interest, of such slave or slaves, is hereby vested and shall accrue to, and be vested in, the husband of such *feme covert*:" Which necessarily translates every interest of the wife into the husband; who, *ipso facto*, becomes complete owner of the whole interest, to the utter exclusion of the wife: And this, whether the slaves be considered as real or personal estate. It is impossible, by any other construction, to satisfy the words, *the absolute right, property and interest of such slave or slaves, is hereby vested, and shall accrue to, and be vested in, the husband of such feme covert.* Because, if the whole right and property is vested in the husband, it must belong to him absolutely, and cannot enure to the wife. For, *uno flatu*, that it is given to the wife, it is, by operation of law, transferred to,

and vested in the husband. So that nothing remains in the wife; and the husband may maintain an action in his own name to recover them.

This, which is so plain upon the words of the first sentence, is rendered clearer still, by comparison with the next; which requires actual possession in the case of a *feme sole*, who afterwards marries; a circumstance which plainly shews that the Legislature contemplated a difference in the two cases: that is to say, that the mere gift to a *feme covert* should transfer the estate to the husband, but that an actual possession should be necessary, during the coverture, in the case of a *feme sole*, who afterwards married; for, unless a difference in the interest was intended, it will be extremely difficult to account for the difference in the language.

Therefore, although slaves should be considered as personal property, it will make no difference; for, still, the whole interest vested in, and belonged to the husband, without any possession; in the same manner as if the act had said, that every diamond given to the wife during the coverture, [453] should be vested in, and belong to the husband: which certainly would so essentially transfer the property to the husband, that the wife surviving could have no claim to it.

It is like the statute of the 27 Henry 8, relative to uses: which transfers the possession to the use; and gives complete seisin to the grantee, without any act, to be done on his part, to acquire it. So here, the title is transferred to the husband, without his obtaining actual possession; and the only difference between them is, that the act of Assembly transfers the title only, whereas the act of Parliament transfers the possession: A much more difficult operation.

There could have been no difficulty in the case, if the plain words of the law had been attended to, instead of resorting to a system of artificial reasoning, founded on a supposed resemblance to things to which it bears no analogy. That is to say, the rules with regard to curtesy and possession, in other cases of property belonging to the wife. For, the whole interest being *ipso facto*, transferred to the husband by act of law, he does not stand in need of seisin or possession to complete his title.

In this view of the case, it bears no resemblance to the case of curtesy in real, or possession in the case of personal property. Because seisin and possession constitute part of the right in those cases; but in the other, the gift and coverture only, are requisite.

All which seems perfectly consistent with what was said by the Court, in *Dade* v. *Alexander*, 1 Wash. 30. For, the doctrine there laid down, does not seem to require that the surviving husband should take administration in order to entitle him; but considers him entitled, by virtue of his marital right, independent of the necessity for taking administration: which is not stated by the Court as one of the ingredients of his title.

Perhaps it will be asked, how *Drummond* v. *Sneed* could have been decided upon the ground now taken. The answer is, that it might have been determined consistently with the doctrine contended for, several ways. 1. The life-estate and [454] the remainder might have been considered as forming only one estate; and the life-interest, as being a mere exception out of it. 2. The devise of the remainder, according to the spirit of the 10th section, might have been considered as giving the absolute property; because, there would be no more impropriety in saying, that the remainder should vest in the husband, than that the whole thing should. For, it was the law which would vest it in either instance; and it would be equally competent in both. 3. The Court might have taken the statute by equity; and, considering that the Legislature, having given the slaves to the husband in other instances, probably intended to give remainders also, they might, in conformity to the Legislative will, have considered those cases as embraced within the equity of the act.

But, whatever might have been the ground of the decision in that case, neither that nor any other case has ever decided, that the first sentence in the 4th section did not transfer the whole interest to the husband; and, therefore, the words of the act of Assembly, being plain and unequivocal, must prevail against any artificial reasoning, drawn from the rules of the common law. For, the Legislature having made an express provision for the case, the act of Assembly, and not the precepts of the common law, must give the rule.

However, so far from the case of *Drummond* v. *Sneed*, being repugnant to the doctrine contended for, it seems rather to support it. Because, it appears from the statement of it, as if it must have been decided upon the principles of the first sentence of the 4th section. For, the interest of the wife in the remainder was adjudged to belong to the husband; which is consistent with the words of the act.

[455] 2. But, perhaps under another point of view, if they be considered as personal property, they still belong to the husband. For, there are books which seem to countenance

the idea, that by the rules of the common law, the gift of personal things to the wife, during the coverture, vests them absolutely in the husband. 2 Com. Dig. 82; [*Hodges* v. *Beverley*,] Bunb. 188; 2 Roll. Rep. 134; [Marshall Sergt. argo. in *Rose* v. *Bowler*,] 1 H. Black. 109; [*Howell* v. *Maine*,] 3 Lev. 403.

If this doctrine be correct, then this clause of the act only established two principles, which were rules of the common law before; and the decision in *Drummond* v. *Sneed*, provided for the third case, namely, that of the remainder.

But, the husband was in possession.

1. Upon the proofs in the cause. For some of the witnesses expressly state him to have been the active executor, and to have had the management of the slaves. Added to which, Davies says he understood him as claiming the property devised; which was equivalent to an assent to take.

2. By inference of law, his possession, as executor, was a possession in his own right. Because, as he could not sue himself, the rights were merged. Moor. 54; Rep. T. Finch, 370.

That the debts and legacies were unpaid, makes no difference: 1. Because the merger was *sub modo* only, and contained an exception, as to creditors and legatees. 2. Because a fund greatly more than sufficient was provided for the payment of them; and the witness says it was unnecessary to sell the slaves. So that taking possession of the devised estate would not have been a *devastavit*, as the appellant's counsel supposed; and, as there was no reason for preventing the execution of the possession, a Court of Equity will consider it as done.

This is the more especially true, as the husband had taken all the possession he could; for, the law continued the slaves upon the testator's lands until the crop was finished; and a contrary doctrine would put it out of the power [456] of a man to make a provision for his family, according to the wealth which he might suppose himself to be possessed of. Because, upon a similar pretence of debts and legacies, years might elapse before the devised estate would be considered as having vested in actual possession.

The result of the whole is, that the husband and the other legatee were tenants in common of the devised slaves; and of course, that the husband was completely entitled to the whole interest.

WICKHAM, in reply.

The first point made by the appellee's counsel, has long been considered as at rest. All the decisions have been contrary to

the doctrine he contends for; and rightly too. For, the object of the act of 1705, in making slaves real estate, was only to improve estates, and encourage agriculture. But it was found inconvenient in many respects; and, therefore, the act of 1727 was made; which restores them to personalty in most cases; and particularly in that now under consideration. The whole complexion of the first seven clauses announces this to have been the intention of the Legislature. They are to pass as personal property in conveyances; similar rules for their vesting are established; and they are subject to the rules of personal property in the cases of forfeitures and executions: All which shew the intention of the Legislature, to turn them into personalty; and the intention, and not the mere words of the statute, ought to prevail.

It is not credible, that the Legislature intended that this kind of property should go neither as real nor personal estate, according to the doctrine on the other side. Therefore, Mr. Randolph's interpretation, of the first sentence of the 4th section, is correct; namely, that they are to be considered as vesting in the husband, according to the manner of personal
[457] estate. This seems to have been the principle adopted in *Drummond* v. *Sneed;* and in all the cases before the old General Court: which ought to be considered, as having fixed the law on a basis much too firm to be shaken, at this distance of time, when so many estates are enjoyed under them. In short, slaves are chattels real, and like other chattels real survive to the wife, if not disposed of by the husband during the coverture. This is the spirit of the law; this the true construction of the words; and finally, this is the idea, which has always been adhered to by the Courts; and ought not now to be disturbed.

It is not true, that personal things given to the wife, during the coverture, vest absolutely in the husband; so that, if he die without reducing them to possession, they will belong to his executor, and not to the wife, if she survive him. None of the cases cited afford the least semblance of such a doctrine, (for, as to that in Roll. the husband survived the wife; and 1 H. Black. was only the assertion of counsel,) except that in Bunb. 188. And that is liable to two remarks; first, that it was the mere declaration of the party unsupported by evidence; secondly, that the defendant had received the husband's money from the wife; and, therefore, he was a trustee for the husband, and not for the wife. But, opposed to this case, a great variety of decisions may be adduced. [*Turner* v. *Crane,*] 1 Vern. 170; [*Cheekley* v. *Cheekley,*] 2 Show.

247; [*Coppin* v. ——,] 2 P. Wms. 496; [*Garforth* v. *Bradley*,] 2 Ves. sen. 675; Co. Litt. 351.*

Wishart was not in possession, in right of the devise. The testimony is equivocal, even as to his possession, as executor; but it was absolutely necessary that he should have been possessed in character of legatee; of which there is no proof. So that, if he was possessed at all, it was in character of executor, and then, upon his death, the right survived to the other executor, who had a right to the slaves, for the purposes of the administration; and Wishart's representatives, having no right to the executorship, could not hold with him. Besides, the assent of the executors, to the legacy, was absolutely [458] necessary, before any actual possession could be taken; and there is no proof that any such assent was ever given.

Cur. adv. vult.

ROANE, Judge. This may truly be said to be an important cause. The consequence of a decision either way, may be greater than I can forsee or estimate. Less experienced than my brethren in the laws of this country, and less acquainted with the former adjudications, I am less capable than they to calculate the probable effects, which will flow from our present decision. Their superior lights and more mature experience, better enables them to know what has been the understanding of this country, on the present subject; and what are the beacons, by which our countrymen have governed themselves, in regulating their transactions, relative to the point in question. Sincerely hoping that the present decision may be the least injurious in its consequences, and the least productive of litigation, it gives me great pleasure to believe, that the opinion I now deliver, after the most mature deliberation, best answers that description, and best accords with the general understanding of our fellow-citizens. My own observation on the subject is entirely corroborated by the testimony of some of my brethren, in whose observation, talents and experience, I have the highest confidence.

Yet let me not be supposed to take refuge for the support of my opinion, merely on the general understanding of the people, through a long series of time; my conclusions are derived from a deliberate consideration of the acts of Assembly themselves, taken conjunctly with the principles of the common law; and from a consideration, how far there have been decisions in this country affecting this case, so as to be-

[* And see *Nash* v. *Nash*, 2 Maddock's R. 133, and authorities there cited.]

come fixed rules of property: For, I have ever been of opin-
[459] ion, that such rules ought not to be lightly departed from; and that they cannot be, without producing extensive evils and injustice.

The case has been rightly divided by the counsel into two general questions:

1. Whether a possession of the slaves in dispute was necessary to have been in the father of the appellee Wilhelmina, who was the former husband of one of the appellants, in order to enable the appellees to recover? For, if not, there is an end of the case. But, if otherwise, then,

2. Whether such possession did actually exist in the present case, or not?

The first of these two questions may again be considered, under two points of views: 1. Under our acts of Assembly, and the principles of the common law: 2. Under the decisions in this country.

The acts of Assembly embraced by the first view, are those of 1705, [c. 23, 3 Stat. Larg. 333,] and 1727, [c. 11, 4 Stat. Larg. 222.]

The first of those acts declares, that slaves shall be held, taken and adjudged to be real estate, and not chattels; and shall descend to the heirs and widows of persons dying intestate, according to the manner and custom of lands of inheritance held in fee simple. It further goes to specify certain cases, in which slaves are assimilated to chattels, and which form an exception to the general clause first stated.

Next came the act of 1727, which is entitled, an act to explain and amend the former. Before we go, particularly, into this act, it may be necessary to fix its character. If it were merely an explanatory act, a question might arise, how far a Court cou'd depart from the literal expression, as it was a legislative construction of the words of a former statute; and the ancient doctrine was, that the Court, on such a statute, was tied down to the letter? But, the better opinion seems to be, that such
[460] statute may now receive even an equitable construction, arising therefrom, on a general view of the whole act. 6 Bac. Abr. 388, [Gwil. ed.] But this statute is also an amendatory statute. It changes the old statute, and introduces new principles, such as neither a judicial nor legislative construction could possibly have deduced from the former act. This is so evident to every body, that I need not cite particular examples. This statute of 1727 stands, then, on the same footing, as to its construction, with statutes in general, and the

general rules for construing statutes, properly apply to it. Some of these rules, which I shall presently have occasion to mention, authorize even an equitable construction of a statute, under certain circumstances; but I disclaim a resort to an equitable construction, in the present instance, as wholly unnecessary; and found my opinion, entirely, upon a just view of the legal construction of the whole act, under the influence of the rules of construction before alluded to.

I will now read the title, and the four first sections of the act of 1727; which are as follows:

"*An act to explain and amend the Act,* For declaring the Negro, Mulatto and Indian Slaves, within this Dominion, to be Real Estate; *and part of one other Act, intituled,* An Act for the distribution of Intestates' Estates, declaring Widows' Rights to their deceased Husbands' Estates, and for securing Orphans' Estates.

1. Whereas the act, made in the fourth year of the reign of the late Queen Anne, *declaring the Negro, Mulatto and Indian Slaves, within this Dominion, to be Real Estate,* hath been found by experience very beneficial for the preservation and improvement of estates in this colony, yet many mischiefs have arisen, from the various constructions, and contrary judgments and opinions, which have been made and given thereupon, whereby many people have been involved in law-suits and controversies, which are still like to increase: For remedy whereof, and to the end, the said act may be [461] fully and clearly explained and amended:

2. *Be it enacted by the Lieutenant Governor, Council, and Burgesses, of this present General Assembly, and it is hereby enacted, by the authority of the same,* That the said act shall hereafter be construed, and the true intent and meaning thereof, is hereby declared to be, in the several cases herein-after mentioned, as the same is herein-after expressed and declared, and not otherwise, that is to say:

3. Whenever any person shall, by bargain and sale, *or gift, either with or without deed,* or by his last will and testament in writing, or by any nuncupative will, bargain, sell, give, dispose, or bequeath, any slave or slaves, such bargain, sale, gift, or bequest, shall transfer the absolute property of such slave or slaves to such person or persons to whom the same shall be so sold, given, or bequeathed, in the same manner as if such slave or slaves *were a chattel:* And no remainder of any slave or slaves shall or may be limited by any deed, or the last will and testament in writing, of any person whatsoever, otherwise

than the remainder of a chattel personal, by the rules of the common law, can or may be limited, except in the manner herein-after mentioned and directed.

4. And that where any slave or slaves have been or shall be conveyed, given, or bequeathed, or have or shall descend to any feme covert, the absolute right, property, and interest, of such slave or slaves, is hereby vested, and shall accrue to, and be vested in, the husband of such feme covert. And that where any feme sole is or shall be possessed of any slave or slaves, as of her own proper slave or slaves, the same shall accrue to, and be absolutely vested in, the husband of such feme, when she shall marry."

[462] The contrary constructions and opinions arising under, and the law-suits produced by the act of 1705, are evils intended to be remedied by this act. Two constructions of the 4th clause are now contended for, as relative to the present case: One, which throws negroes into the class of chattels, and subject to the legal rules, doctrines and decisions upon that subject: the other, leaving them neither in the class of real nor personal property, in the respect in question; and, consequently, without any legal doctrines or decisions to govern them. By which of those constructions will the declared object of the Legislature, as above, be best answered? Certainly by the former.

It seemed conceded in the argument, that if this case had stood singly upon the third clause, possession would then have been necessary in the husband, as falling within the general doctrine of chattels personal; but, that what are supposed the emphatical words of the fourth clause, could have been inserted for no purpose, if not to dispense with such possession.

My answer is: 1. That those emphatic words mean nothing more than would have been inferred from the general words of the third clause. 2. That, if they did, yet there was a good reason for inserting them, to answer which, they were inserted; and, therefore, need not be construed to dispense with possession; nor to infringe the doctrine of the common law.

On the first point, I will call to my aid two rules of construction: 1. That words and phrases, whose meaning have been ascertained in a statute, when used in a subsequent statute, are to be used in the same sense. 6 Bac. Abr. 379, [Gwil. ed.] and, clearly, the same inference will follow, as between two clauses of the same statute. 2. That if a statute use a word, the meaning of which is well known at the common law, the word shall be used in the same sense in the statute. 6 Bac. Abr. 383, [Gwil. ed.]

In applying the first rule to the present case, I must observe, that the same words, *absolute property*, are used in the third clause; which, standing singly, would confessedly not dispense with possession, as, thereupon, slaves stand precisely on the footing of chattels, by the common law. Those who may incline to ring the changes on the words *absolute right, property and interest*, in the fourth clause, are reminded, that none of those words are more emphatical, or extensive, than the words used in the third clause above mentioned; and that the word *interest* was most probably inserted therein, to comprehend limited rights of the wife; that is to say, those where she had not the absolute property.

In applying the second rule to this case, I will beg leave to read a passage from 2 Black. Com. 433:

"A sixth method of acquiring property in goods and chattels is by *marriage;* whereby those chattels, which belonged formerly to the wife, are, by act of law, vested in the husband, with the same degree of property, and with the same powers, as the wife, when sole, had over them.

This depends entirely on the notion of an unity of person between the husband and wife; it being held, that they are one person in law; so that the very being and existence of the woman is suspended during the coverture, or entirely merged or incorporated in that of the husband. And hence it follows, that whatever personal property belonged to the wife, before marriage, is by marriage absolutely vested in the husband. In a real estate, he only gains a title to the rents and profits during coverture: for that, depending upon feudal principles, remains entire to the wife after the death of her husband, or to her heirs, if she dies before him; unless, by the birth of a child, he becomes tenant for life by the curtesy. But, in chattel interests, the sole and absolute property vests in the husband, to be disposed of at his pleasure, if he chooses to take possession of them; for, unless he reduces them to possession, by exercising some act of ownership upon them, no property vests in him, but they shall remain to the wife, or to her representatives, after the coverture is determined."

This passage I shall hereafter refer to, as giving the most modern and perspicuous explication of the doc- [464] trine on this subject; at present, I only wish it to be remarked, that the personal property of a wife is said to be absolutely vested in the husband, at the same instant that it is declared, that if he does not reduce it into possession, during the coverture, it shall remain to the wife, if she survives him. Here, then, is a decisive quotation, from an eminent and ac-

curate writer on the common law; shewing, that the words *absolute property in the husband,* are not to be construed as dispensing with possession in the case of chattels.

The third section of the act of 1727, has used the same words in the same sense; and the meaning of the same words in the third section, and in Blackstone's treatise, under the influence of the two rules I have stated; both of which entirely accord with sound reason, and pointedly apply. Let us, then, hear no more of the stress laid upon what are called these emphatical words; especially, in opposition to the general spirit and purpose of the act.

But, I have said, that if these words should even be considered, as being more extensive than I suppose, yet there was a good reason for making them so; and, consequently, they ought to be restricted to answer that end, and not kept up in such enlarged sense, so as, in other respects, to conflict with the other parts of the act, and the doctrines of the common law.

It will here be remarked, that slaves coming by descent, are not declared to be, or to go as chattels by the third clause. They, therefore, are, or at least might have reasonably been supposed, by the Legislature, to remain real estate, as under the act of 1705; being such, the husband, but for this clause, which expressly extends to slaves coming by descent, [465] &c. would only have the same limited interest in such slaves, as descended to his wife during coverture, as he would have had in her lands; viz: the right of receiving their profits. It might, therefore, have been, to enlarge his interest in the slaves coming by descent, beyond what would have been the case, under the general words of the third clause, that these words absolute right, &c. were put in, as being contradistinguished from the limited right, he would otherwise have had in such slaves.

These reasons are conclusive, with me, as to the construction of the act admitting the words to be as extensive as is contended; for a reason is hereby assigned for it; and being thereby justified, we ought there to stop; and not give them, as to other cases, a meaning which they have not in the most approved treatises of the common law; which they have not in another clause of the same act; and which they cannot have, without infringing the reason and symmetry of the common law, and introducing the uncertainty and litigation which it is the declared object of the act to prevent.

Some stress may also be laid on the words *hereby vested, &c.* The answer is, that these words relate to the whole act, and

not to this single clause; and, that in its construction, we are as much bound by the principles of the common law, adopted by the third clause of the act of Assembly, as by the very expressions of the act itself.

Wherefore, then, it is asked, was this 4th clause put in, if, in the present instance, it is to have no greater effect than the general provisions of the third clause would have had without it? The answer is, 1. To take in the case of slaves descending, as above stated: To declare, for greater certainty, the law in this instance. The latter parts of both the third and fourth clauses, relative to remainders, and to the case of *femes sole*, are also put in, for the latter reason, although every thing therein enacted would unquestionably have [466] followed, independent of them, from the general position laid down in the third clause.

It may be contended, that the third clause of the act only relates to the mode of transferring slaves, and declares that that mode, incident to chattels, as contra-distinguished from real estate, shall govern in the case of slaves; but, that its effect stops here, and does not attach to slaves, (when transferred,) all the principles which appertain to chattels. The answer is, that the provision concerning remainders, (over and above the clear construction of the act,) proves the contrary. The provision extends to a principle, relative to personal chattels, posterior to, and independent of the act of transfer. It was intended to conform slaves, in this respect, to the doctrine of remainders of personal chattels; it being then doubted, if not held, that such limitations after a particular estate, were void.

I will here remark, that it has some weight, with me, that the fourth section is not by way of proviso or exception. It does not, therefore, restrain the operation of the third clause. but is additional to it, and is connected with it by the copulative, *and*. And the just rule of construing one part of a statute by another, 6 Bac. Abr. 380, [Gwil. ed.] holds with great force, where one part of an act is continued by, and connected with another by copulative words. It is also a just rule of interpretation, that a statute, continuing another with some additional clauses, must be considered as if the former had been recited therein. 6 Bac. Abr. 382, [Gwil. ed.] I think this rule equally applies to a continuing of an additional clause of the same statute; and if so, the words of the third section, *in the same manner as if such slave or slaves were a chattel*, are to be considered as kept up, and repeated in the fourth section.

I admit, that it is also a rule of construction, that general
[467] words, in one clause of a statute, may be restrained by particular words, in a subsequent clause of the same statute. 6 Bac. Abr. 381, [Gwil. ed.] But, I contend that this restriction must clearly appear to have been intended; which, I have endeavored to shew, is otherwise in the present case.

Another rule of construction is, that where the provision of a statute is general, it is subject to the control and order of the common law; and that the best construction of a statute, in a doubtful case, is to construe it as near to the rule and reason of the common law as may be, and by the course it observes in other cases; for, it is not to be presumed that the Legislature will make any alteration in the common law, except what is expressly declared. 6 Bac. Abr. 383, 384, [Gwil. ed.]

It is also held, that such construction is to be put upon a statute, as may best answer the intention the makers had in view. 6 Bac. Abr. 384, [Gwil. ed.] And, in the present case, the intention was to convert real property into personal in general; and not by throwing slaves out of both classes of property, as in the instance now contended for, to create a new species of property, and thereby promote law-suits, which the act purports to do away. These consequences may also be taken into consideration, supposing the law merely doubtful on this subject, to govern the Court in their construction of the statute. 6 Bac. Abr. 389, [Gwil. ed.]

I will conclude with a rule of construction, which is, that the letter of an act of Parliament may be restrained by an equitable construction, in some cases; in others enlarged; and in others taken contrary to the letter. 6 Bac. Abr. 386, [Gwil. ed.] And, if such be the power of a Court, on a single clause of a statute standing independently, it holds *a fortiori*, where such single clause is not consistent with the body of the act; and where an equitable construction is not required, but only a just legal exposition of the whole statute taken collectively.

[468] These rules of construction, founded in good sense and sanctioned by high authority, are decisive with me, as to the construction of the present law: They are so luminous, and apply so pointedly to the case in question, that I forbear to make a more particular application of them.

But, what good reason exists for giving a husband, surviving his wife, a right to slaves accruing to her during coverture, but of which he was never in possession, more than exists as to

slaves to which a *feme sole* is entitled, who afterwards marries? The reason assigned, in the last case, why a surviving husband cannot recover them, (except in the character of her administrator,) is, that the only method he had to gain possession, during the coverture, was by suing in his wife's right; but, as after her death, he cannot, as husband, bring an action, in her right, therefore he can never, as such, recover the possession. 2 Black. Com. 435. This reason is supposed equally to hold in the case of chattels accruing during the coverture.

I have said, that the passage before read, from Blackstone, contains the best view of the doctrines on this subject; when he speaks, (in page 435,) of personal chattels in possession, he says the husband has the absolute right thereto, not only potentially, but in fact; leaving the inference extremely plain indeed, that the husband, in case of *choses in action*, has the absolute, (although only potential,) right thereto. And, understanding the word *absolute* in this sense, will at once answer some of the cases cited by Mr. Call on the subject. An attempt to cite them in the sense he contended for, would be to impeach the best established principles of the law, and I confess the attempt surprised me. It is true, the passage relied on from Blackstone, relates to chattels owned by the wife at the time of the marriage; but there is no difference as to those accruing during the coverture. This is so plain a point, that I shall not cite authorities to shew it, except to refer to 1 Bac. Abr. 481, [Gwil. ed.] who says, the law gives the husband an absolute power over any personal estate accruing to her, during coverture, by gift, devise, &c. thereby clearly conforming to the doctrine before stated from Blackstone.

I have thus done with my own view of the law relative to this subject. It is fit that some notice be taken [469] of such decisions as have occurred, in this country, affecting the case. On this subject, I beg to be excused from saying much, as my experience does not reach far enough back to know much of the decisions of the old General Court. I had supposed that no question would have been made of the competency of those decisions to fix rules of property in this country; as that Court, although not the dernier resort, was at least as much so as the Court of King's Bench, in England. How far the decisions of that Court, on subjects other than that of fixing rules of property, will bind us, it is not now necessary to say; but, if we reject such rules of property as have been fixed by that Court, and under which our people have regulated their property through a long series of time, the mischief which would ensue is incalculable. I understand,

that no decision, one way or the other, can be shewn to have ever taken place, on the very point now in question. The non-existence of such a case, which must have occurred a thousand times in the space of seventy-three years, is a persuading circumstance, that the general opinion has always been, that slaves, under the first part of the fourth clause, go as chattels, as they evidently do under the third clause; and, as they have often been decided to do, under the latter part of the fourth clause. The opinion of the General Court on such latter part, though not upon the very point now in question, is supposed to have given a principle, which has governed this case, and produced a general acquiescence under it. On no other ground can I possibly account for the non-existence of a decision on the very point now in question.

[470] In the case of *Steger* v. *Mosely*, General Court, October, 1773, MS. Rep. by J. Randolph, 2 vol. page 232; the case under the last part of the fourth section was: Devise to A. for life, and afterwards to B., a feme, who married C. A. dies living B. and C., and then B. dies living her husband, the slaves having never been reduced into possession: The question was, whether they vest in the husband, or go to the heir of the wife, and without argument, (as often before been argued,) determined they go to the husband. Hence to be concluded, that notwithstanding the fourth section of the act of 1727, yet negroes vest in the husband, as a chattel only; if husband survives, they vest in him as administrator of his wife (not being reduced in possession,) *Squib* v. *Wynn*, 1 P. Wms. 378, and if she survives, they go to her, or her representatives. And in *Bronaugh* v. *Cocke*, and *Smyth* v. *Lucas*, (same Reports) the law is said to be settled.

As the husband was not possessed of the slaves in the case of *Steger* v. *Mosely*, and so did not entitle himself, under the words of the fourth clause, if they were real property and not chattels, they would have descended to his wife's heirs. But, this was adjudged otherwise; which could not have been, on any other ground than that they were personal estate, under the third clause of the same act. This principle is supposed to be the one under which the cases of *Drummond* v. *Sneed*, *Hoard* v. *Upshaw*, and *Dade* v. *Alexander*, 1 Wash. 30, have been decided; and this principle of slaves being personal estate, under the act of 1727, although established in cases depending on a different part of the fourth clause, may justly be deemed to operate in the present case; at least as having by analogy furnished a rule of property, in cases like the present.

[471] As to the rectitude of the decision in those cases of *Steger* v. *Mosely*, *Drummond* v. *Sneed*, &c., I have not

formed any opinion, except so far as the construction of the third clause is involved. It is sufficient to induce me to conform thereto, that they have been supposed universally to settle the law upon the subject, and have become a fixed rule of property.

I have now done with the first general question, and conclude that possession was necessary to have been in the father of the appellant Wilhelmina, to enable her to recover; and whether such possession did exist? remains now to be enquired into.

On this point, I am clearly of opinion, from a consideration of the testimony, that if Wishart ever was in possession at all, it was merely as a co-executor. The testimony is very full, to show the other executor to have been the acting person, and consequently to be in possession of the estate; and very slight as it respects the actual possession of Mr. Wishart. But, possession as executor is not sufficient. Possession in his character as husband, and in right of his wife is indispensable. Such possession, if he were a different person from the executor, could not legally be without the executor's assent; but, the law is the same where both characters are united in the same person. In that case, an assent or election to take as devisee, must be expressed or clearly implied.* Otherwise, his possession will be considered as in his character of executor, according to the authority cited by Mr. Randolph: and this general doctrine holds with greater force under our act of Assembly, by which such possession could not legally have been given, until the end of the year.

For these reasons, I think the decree in the present case is erroneous.

FLEMING, Judge. There are two questions in this cause; one of law, and the other of fact. The question of law is, whether by virtue of the act of 1727, the slaves were so vested in Mr. Wishart as to enable him to dispose of them by his last will, without having reduced them into possession, during his life-time? The question of fact is, whether, if it was necessary, that they should be reduced into actual possession, in order to enable him to dispose of them, he did in fact obtain such possession? [472]

Upon the first question, it is to be observed, that by the act of 1705, slaves (except those imported for sale) were converted into real property, to all intents and purposes, under the fol-

[**Blakey* v. *Newby's adm'rs.* 6 Munf. 70.]

lowing restrictions only, that is to say, that they were liable for payment of debts; they did not escheat for want of heirs; sales of them needed not to be recorded; they did not confer a right to vote at the election of Burgesses; they were recoverable by actions personal; and those of intestates were to be appraised, and the value divided amongst the children, to be paid by the heir at law.

Several inconveniences, however, arose from this extensive conversion; and, consequences, not foreseen, at the making of the act, were found to result from it. To remedy which, the Legislature, in the year 1727, resumed the subject, and passed a law to explain and amend that of 1705: In which, after reciting, that although the act of 1705 had been found very beneficial, for the preservation and improvement of estates (which appears to have been the principal object for passing both laws,) yet that many mischiefs had arisen, from the various constructions and contrary judgments and opinions which had been made and entertained upon it, they go on to declare that, "whenever any person shall, by bargain and sale, or gift, either with or without deed, or by his last will and testament in writing, or by any nuncupative will, bargain, sell, give, dispose or bequeath, any slave or slaves; such bargain, sale, gift, or bequest, shall transfer the absolute property of [473] such slave or slaves, to such person or persons to whom the same shall be so sold, given, or bequeathed, in the same manner as if such slave or slaves *were a chattel:* And no remainder of any slave or slaves shall or may be limited by any deed, or the last will and testament in writing of any person whatsoever, otherwise than the remainder of *a chattel personal*, by the rules of the common law, can or may be limited, except in the manner hereinafter mentioned and directed."

This clause clearly renders them personal, as to the forms of conveyances; and the fourth section following immediately afterwards, provides that "where any slave or slaves have been or shall be conveyed, given, or bequeathed, or have, or shall descend to any feme covert, the absolute right, property, and interest of, and in such slave or slaves, is hereby vested in the husband of such feme covert. And that where any feme sole is or shall be possessed of any slave or slaves, as of her own proper slave or slaves, the same shall accrue to, and be absolutely vested in the husband of such feme, when she shall marry." Which makes a further alteration of the property from real to personal, by essentially changing the ownership, where the property has actually come into possession (thereby preventing many of the disputes arising from the notion of

their being real property, under the former act:) and where it has not, by giving the husband an inchoate right, which he may enforce in case he survives, as it had been doubted under the former act, whether he had any right at all. But to complete the scheme of alteration, infants are in the next section enabled to dispose of slaves by will, at the age of eighteen: Thus declaring them to be personal estate, in almost every instance that could be named, but descents, entails and dower. By this string of changes, the law, instead of declaring that they should be considered as real estate, (except in certain enumerated cases,) may now more properly be said to have, in effect, declared, that they should be considered as personal property in all cases, except certain enumerated instances.

This idea receives considerable illustration from the following circumstances, that the Legislature, in pursuit of their great object of preserving and improving estates, in an after-clause of the statute, allow a person by deed or [474] will, to annex slaves and their increase to lands and tenements in fee tail. A provision which would have been unnecessary, if they were to be considered as real estate altogether; and which serves to shew, that in the Legislative belief, they were, by virtue of the preceding clauses, restored to their pristine state of personal property.

Taking them to be personal property, then, and the consequence is, that, by a fixed rule of law, in order to entitle the husband to dispose of them by his will, he must reduce them into possession.

And this leads me to the second question:

There is some clashing in the testimony, relative to the part which Wishart took in the management of the estate; but the account most favorable to the claim of the appellee, only amounts to this, that he qualified as one of the executors in June, in a bad state of health; that he occasionally visited the plantations; was present at the appraisment of the estate; and died in August following, without having ever been heard to claim the legacy, or taking the least notice of it in his will, written after the death of Rowley: which, if it amounted to a possession at all, was a possession as executor, and not in the character of legatee. For, the bequest was of an undivided moiety of forty-six slaves, residing on different plantations, and of which no division had ever been made; nor could well have been, as by law they were to remain on the plantations, to which they respectively belonged, until the last day of December, for the purpose of finishing the crops.

I am consequently of opinion that there was no possession; but that the slaves survived to the wife; and, therefore, that the decree of the High Court of Chancery, ought to be reversed.

CARRINGTON, Judge. The Court is now called upon to decide a question, which I did not expect to have heard discussed, at this time of day; as I had conceived, that the operation of the acts of Assembly, relative thereto, had long since been understood, acknowledged, and acquiesced in.

It will not be necessary for me to enter again into a critical review and examination of all the different laws upon the subject, as that task has already been performed, with great accuracy and ability, by the two Judges who preceded me; and, therefore, it will be sufficient for me to declare my entire approbation of the interpretation which they have put upon the laws; and, that I perfectly concur with them in opinion, that the true effect of the statutes is to render slaves personal property, except in those cases which are particularly enumerated.

But it is a rule of the common law, that although personal chattels aliened to the wife shall go to the husband, yet, in order to perfect his right, and complete his title, he must reduce them into possession. 2 Black. Com. 433. It follows, therefore, that it was indispensably necessary that Wishart should have reduced them into possession, or the right survived to the wife, and this has hitherto, as far as I am informed, been the course of opinion throughout the State.

But it is said, that the case of a wife surviving her husband, not in possession, has never before been decided, and therefore that it is a new case. If it be true that there has been no former decision, it can only be accounted for upon the ground that the question was considered as so well settled and understood by the people, that nobody has ever thought [476] it worth while to stir it: And I am not much disposed to indulge a construction which would put all to sea again, and might disturb the titles of thousands.

The principles, however, have been shewn to have been substantially decided in several cases, in the General Court, under the former Government; and, notwithstanding the authority of those decisions has been questioned, yet, considering that they are founded in a just and reasonable construction of the act; that they were made in perfect conformity with the public opinion; and have ever since been regarded as rules of property, I certainly consider them as entitled to so much respect, as not be departed from in the present case; al-

though I do not consider all the decisions of that Court as binding upon this.

My opinion therefore is, that it was necessary for the appellee to have shewn possession in Wishart; and he himself will, I imagine, hardly be disposed to find fault with me for it, as he appears to have been of the same opinion himself. For, the whole scope of the amended bill goes to shew an assent to the legacy; and by that means to establish, if possible, a possession in the husband. This too appears to have been Wishart's own idea; as he did not attempt to devise them, and every body, who had any connexion with the estate after him, seems to have thought the same way, until the present suit was brought, twenty-one years after the transaction.. It is therefore better to stop the controversy, and not attempt *to move quiet things.*

The Chancellor, however, has assumed in his decree, that Wishart was in possession: an important fact, if true; and therefore necessary to be enquired into. But, what was the possession of which he speaks? At most, (and even that is not free from doubt,) he was only possessed as executor. For the testator died between March and December, and by the law, [Oct. 1748, c. 5, §30, 5 Stat. Larg. 464; c. 104, §53, R. C. ed. 1819,] the slaves were to remain on the lands until the 25th of December, for the purpose of finishing the crop, until which time, the estate could not well be divided; and, in point of fact, it never was divided in Wishart's life-time. So that, if he had any possession at all, it was in his character of executor, and not as owner. [477]

Upon the whole, I think the decree is erroneous, and must be reversed.

LYONS, Judge. In determining the present case, it does not appear, to me, to be important, whether slaves, since the year 1727, are to be considered as real or personal estate; for, in either case, the words of the act of Assembly will, in my opinion, transfer the right to the husband.

The case is the first of the kind which I recollect; and, as far as my knowledge extends, the question has never been decided here before. It is, therefore, open to free discussion; and I am sorry to differ in opinion, from my brethren, concerning it; but, it is my duty to deliver the opinion I have formed, whether that opinion be right or wrong.

The husband appears, to me, to have been the principal object of the Legislative care, throughout the act of 1727: and an absolute transfer to him of the wife's interest, in cases of

this kind, seems to have been particularly contemplated by the fourth section; that is to say, the object of the act was to vest the title exclusively in the husband, without leaving any remnant of right in the wife.

The question, therefore, seems to be, whether the Legislature, intending to vest the title in the husband immediately, and without regard to the rules of the common law, could do so? Or were bound to observe those rules against their own inclination; and what they supposed would be profitable to the country?

[478] There can be no difficulty, I presume, in answering these questions; because, all must agree, that, if the Legislature could transfer, at all, (which will scarcely be denied,) they might do it absolutely, or conditionally, and in whatever manner they thought proper. So that, it is merely a question of intention; and, upon that, I perceive no difficulty.

In deciding the cause, it may not be unimportant to observe, that the common law was as well known in the year 1727, the time of passing the explanatory act, as at this day. The Legislature knew full well the condition upon which a husband obtained an absolute right to the wife's chattels. They knew, that actual possession, during the coverture, was necessary to vest the right in him. That, without it, the chattels survived to the wife, if she outlived him; unless he had assigned them, for a valuable consideration,* during the coverture: and that, if he survived her, he could only take them in character of administrator.

Possessed of this knowledge, the Legislature seem to have been disposed to abrogate the rules of the common law altogether, with regard to slaves; and to establish a new system concerning them. So that, although possession was before essential, in order to vest the property in the husband, it was, in future, to become unnecessary; and the interest was to be transferred to him, by operation of law, without it.

A few observations will evince this:

The professed intention of both the acts, upon this subject, that is to say, those of 1705, and 1727, was the settlement, and preservation of estates, by uniting slaves and lands in a common course of descents; so, that the heir might have the benefit of the labor of the slaves for the improvement of the lands.

[* See *Lord Carteret* v. *Paschal*, 3 P. Wms. 197; *Bates* v. *Dandy*, 2 Atk. 206; *Johnson* v. *Johnson*, 1 Jacob & Walker, 452; *Kenney* v. *Udall*, 5 Johns. Ch. R. 464; and *Haviland* v. *Myers*, 6 Johns. Ch. R. 25, 27.]

That this was the intention of the Legislature, is proved, not only by the preambles to the statutes, but by the eleventh section of the act of 1727, which recites the [479] true design and policy of the former law to have been, to preserve slaves for the use and benefit of the persons to whom lands and tenements should descend, be given, or devised, for the better improvement thereof; and that the same could not be done, according to the custom and method of improving estates in this country, without slaves. This section embraces, almost in terms, the very observations which I have been making; and to my mind establishes, very clearly, that the object of the Legislature was such as I have described it.

This being the principle on which they meant to legislate, it naturally occurred, that as the lands generally belonged to the husband, and not to the wife, the object would be best attained by transferring the title in the slaves to the husband, so that in case of the premature death of the husband, the proprietor of the lands might be enabled to cultivate them to advantage; which was thought of more importance, than preserving occasional rights of the wife, arising from accidental causes. Hence the predilection for the interest of the husband beyond that of the wife.

Thus disposed, the Legislature passed the fourth section of the act of 1727, not in corroboration of the rules of the common law, but in express abrogation of them.

It declares, that "Where any slave or slaves have been or shall be conveyed, given, or bequeathed, or have or shall descend to any feme covert, the absolute right, property, and interest, of such slave or slaves, is hereby vested, and shall accrue to, and be vested in, the husband of such feme covert."

This clause professes to transfer the title and interest in the slaves to the husband, without condition or reser- [480] vation of any kind; and, therefore, if the Legislature had both the inclination and the power to make such a transfer, they certainly have effected it, by the extensive terms which they have used: For, the language is express, that the absolute *right, property and interest*, shall be vested in the husband: that is to say, it shall belong to him, free from all conditions and restraints. For, if the right, property, and interest is vested in him, he must be the complete and exclusive owner.

But, it is said, that only the common law rights were given, or rather revived, by the act. This, however, seems to me to narrow the construction, more than the plain, positive words of the law will admit of, and would render the act useless in many instances. For, if the common law rights only were intended,

a great proportion of the minute provisions and multiplied details of the act, would have been unnecessary; because, it would have been much easier to have declared them personal estate, at once, with the exception of descents, entails, and dower; and to have left it, in all other respects, subject to the operation of the common law, without the aid of statutory regulations; the only object of which would be, to enact the provisions which the common law would have made without: Especially, as by this means, the property would have been liable to known rules, and would not have been perplexed with the difficulties and intricacies which might arise in the construction of a string of statutory provisions.

It appears to me, therefore, that the intention of the Legislature cannot be mistaken: It must have been to enlarge the rights of the husband; to put him in a better situation than he was at common law; and to transfer all the title of the wife to him immediately, and without regard to possession or survivorship: A provision calculated to put an end to all disputes between the survivor and the executors relative [481] to the possession, at the same time that it comported with the preference shewn for the interest of the husband, throughout the act. A preference which ought to be considered in construing the law; because, no rule is better settled, than that the general intention of the Legislature ought to be observed. I conclude, therefore, that the makers of the act intended, that the words, *right, property and interest*, should be understood according to their full and natural import.

But, when all the right and interest of the wife is transferred to the husband, by plain and positive words, what remains to survive to the wife? To contend that she will take the slaves by survivorship, appears to me to be saying, that the right is transferred out of her, and remains in her, at one and the same time: which would be absurd and impossible.

I said that the sentence was clear; and, in my mind, no difficulty can arise upon it. Ask a plain man the meaning of the words, *right, property and interest*, in any thing? The answer would be, the complete title to the thing, without condition, reservation or restraint. Ask a lawyer, what those words would mean in a deed, or will? The answer would be, that they conveyed an unconditional estate. Why, then, should a more limited construction of them take place in the exposition of a statute? I can see no reason for it, and therefore am not disposed to make a distinction.

Either the estate is vested in the husband by the words of the act, or it is not. If it is, how can it be divested, but by

his own deed? And, if it is not, what is to be done with the words of the statute? Their operation is destroyed, and they are reduced to mere dead letters.

To obviate this, however, a construction was attempted at the bar, to read the statute distributively; and, as the gentleman said, according to the nature of the subject: that is to say, that the word *right* should be to the husband as husband, and *property and interest* should be to him as husband according to the common law; although the word common law is not once mentioned in the whole section. This may do credit to the ingenuity of counsel, but can hardly be considered as tenable, by any person, who attentively peruses the statute. For, not only is the supplement unnatural, but it breaks the text, and therefore ought to be rejected. Besides, the words of the act vest the title in the husband absolutely, and without reference to any thing else. Of course, there is no occasion for the supplement, which is altogether calculated to defeat the general object of the law. [482]

Besides, what is there to lead to this supplement? Suppose instead of saying they should be vested in the husband, the act had said they should be vested in the children or a stranger: would any body think of saying, in that case, that the *right*, to the children or stranger, should be to them as children or stranger, and that the *property and interest* should be to them as children or stranger according to the common law? And if any body were to say so, what would he mean by it? Certainly no more, than that the right would be to them as children or stranger, and that the property and interest would go to them in the same manner: For, the expressions would be synonymous, and the addition of the words "according to the common law," would create no distinction.

To conclude my observations upon the words of the clause: The statute has said in plain and distinct terms, that the absolute right should be vested in the husband as a substantive individual character, and not as a person clothed with any particular qualities, or rights, at common law, but that his title shall grow out of the legislative expression itself: And can I, as a Judge, disappoint this declaration of the legislative will, and lay it under restrictions and qualifications, which the Legislature themselves have not thought proper to annex to it? I can only say, that I doubt my authority to do so; and that, as the expression is plain, I think it ought to be adhered to, having no idea that it is in the power of the Court to reject the force of plain words in a statute; for the maxim is, that where there is no ambiguity in the words, there no exposition, contrary to the express words, ought to be made. [483]

From what has been said, it is evident, that it is wholly immaterial, as before observed, whether slaves be considered as real property in general, with certain exceptions of a personal nature, or as personal property in general, with certain exceptions of a real nature. For, either way, the words of the act are peremptory; and vest the title in the husband.

It was said, by Mr. Wickham, however, that if this construction prevailed, a difficulty would follow, as slaves would be transmitted neither as real nor personal estate; and, therefore, would have no rules to regulate the succession to them. But, I see not the supposed inconvenience; for, the succession in all other instances, is regulated according to the real or personal quality, which they assume; and with respect to the cases enumerated in this section, the act itself regulates the disposition, and declares the person who is to take, in conformity to the avowed object of the Legislature.

As to the case of *Drummond* v. *Sneed*, it was a question of a different kind, arising upon another part of the clause, not well penned, and which, from the words, *as of her own proper slave or slaves*, looks as if it had been introduced merely to prevent the dower slaves of a wife, from being transferred to the second husband.

I had no difficulty in that case; for I thought the husband entitled several ways. For instance, as the object was merely to
[484] prevent the transfer of the dower slaves, I thought the word *possessed* might be construed *entitled;* and then it would be in the same situation with the provisions of the first sentence. Or, if that would not do, that the possession of the tenant for life might be considered as the possession of him in remainder; and then the literal expression of the act would be satisfied. By both of which modes, all the parts of the section would be made to harmonize together; and the object of the Legislature would be attained. The Judges, however, differed in opinion concerning the case. Some of them thought, that as the wife was not possessed during the coverture, the husband had no right under the act, or at common law. Others thought he had a common law right surviving to him: For myself, as I thought him clearly entitled some way, it was matter of indifference to me, whether it was held that he had the right under the statute or at common law, provided it was held that he had it at all. Therefore, I concurred in the certificate, that the decree of the County Court should be affirmed; but I did not consider the present question, as having been decided at that time. On the contrary, I thought it still open; and reserved for future discussion.

Of course, I cannot agree that that case forms a precedent for this.

The view which I have taken of the subject, renders it unnecessary to consider the other points made in the cause by the counsel for the appellees; because, according to my opinion, the act of Assembly vested all the right, property and interest of the wife in the husband absolutely; and in the same manner, as if the slaves had been devised to him immediately.

Of course, I think, that by virtue of the devise to his wife, the testator John Wishart, was entitled to a moiety of the slaves, and that they passed by his will to the plaintiff Wilhelmina and her two brothers. Therefore, I am for affirming the decree.

PENDLETON, President. It is clear, that slaves were considered as personal estate till 1705; when an act was made, declaring them real estate, and *not chattels.* [485] Cases, however, are put, as exceptions, in which the converse is to be the rule; that is to say, in which they shall be deemed chattels and not real estate, or in other words, that they shall return to their original nature.

No dispute arose that I know of, on any of these exceptions: But upon the sixth section, doubts were entertained, whether it was confined to mere sales? or was extended to other alienations, by deed or will, or by marriage, an alienation of all the wife's personal property?

The words are: "*Provided also*, That no person, selling or alienating any such slave, shall be obliged to cause such sale or alienation to be recorded, as is required by law to be done, upon the alienation of other real estate: But, that the said sale or alienation may be made in the same manner as might have been done before the making of this act."

Had this clause any other meaning, than to dispense with recording sales? If confined to that, it would have made it still necessary on a purchase of slaves to have had a deed, in writing, indented and sealed; but the latter part of the clause restored them to the mode of transferring chattels. So that payment of money, and transmutation of possession, passed the property without any writing.*

This, however, occasioned the various disputes, which produced the explanatory act of 1727.

Although the rules of construction allow us to reject some words, supply others, or transpose them, so as to make the act

[*See *Givens* et al. v. *Manns*, 6 Munf. 191, 200; *Lanfear* v. *Sumner*, 17 Mass. R. 110.]

consist with the design of the Legislature, yet it is said that mere explanatory statutes cannot be explained. Why? Is
[486] not the explained will of the Legislature to be pursued, as much as their original will, although terms may be used which might import a contrary will?

I proceed to shew, that it was the intention of the act of 1727, that in the case of these alienations by marriage or otherwise, slaves should be considered as chattels; and the husband be vested with the same interest, (neither more nor less) in his wife's slaves, as in her personal estate. Let it be remembered, that the Legislature are explaining the sixth section of the act of 1705, where it is declared that alienations shall be made in the same manner, as before that act. The third section is explicit, that in the case of sales or gifts with or without deed, or by will, written or nuncupative, the absolute property should pass: But how? In the same *manner* as a *chattel.*

Having thus in the third section declared their intention to restore the slaves to their personal nature in those kinds of alienations, they proceed, in the fourth section, to the other kind by marriage; and although they do not repeat the words, *in the same manner as if such slaves were chattels*, probably thinking it unnecessary, as they had once declared the principle, yet I will read the clause with those words interposed, in each case of the *feme covert* and *sole.*

It will then stand thus, "and that where any slave or slaves, have been or shall be conveyed, given or bequeathed, or have or shall descend to any feme covert, the absolute right, property and interest of such slave or slaves, is hereby vested, and shall accrue to, and be vested in the husband of such feme covert, *in the same manner, as if such slaves were chattels;* and that where any feme sole is, or shall be possessed of any slave or slaves, as of her own proper slave or slaves, the same shall accrue to, and be absolutely vested in the husband of such feme, when she shall marry, *in the same manner, as if such slaves were chattels.*"

[487] Which removes all difficulty, and will give a meaning to those imperious words *absolutely vest;* that is, in contra-distinction to the limited interest which the husband has in the wife's real estate.

The doubts which gave rise to the several cases of *Wild, Elliot* v. *Washington; Southall* v. *Lucas*, and *Steger* v. *Mosely*, respected remainder of slaves, which vested an interest transmissible in the wife during her coverture; but, as there was no right to the possession, as the tenant for life survived

the wife, the husbands, after the death of the wives, claimed the slaves. The great objection to this claim, under this clause, was, that the property was to vest in the husband of a *feme sole*, at the time the title commenced, in such slaves, of which she was possessed at the time of the marriage; and this occasioned great difficulty. The clause in both parts, viewed as applicable to every supposable case, was easily soluble, by the principle, that slaves were, in these instances, to be considered as chattels, making the marital rights of the husband the same in both: And this principle, I ever understood to be established, by the Court; and have considered it as a fixed rule of property, tending to quiet disputes.

But, it is said, the case of the wife surviving, and the husband not in possession, has never been decided, and is a new case, open for discussion on the act. Does any gentleman suppose this a new case, in fact? and that Mrs. Wishart was the first *feme* who survived her husband, with her slaves in this predicament, because Mr. Taliaferro is the first who has brought on the question for discussion? I believe the reason of there being no precedent is, that it was never doubted, that if the husband was not in possession, and the wife survived, the right was hers: and that in both the cases mentioned in the clause; for, there is no difference.

Yet, there is no direct decision on the point: It was collaterally decided, however, in *Harrison and wife* v. *Valentine*. Mrs. Harrison, when *sole*, was entitled to slaves which [488] then lived with her mother; who, upon one of them, a woman misbehaving, sold her to Valentine, just before the daughter married. Harrison, some years after the marriage, brought detinue, in the names of himself and wife, to recover the woman and her children from Valentine; who pleaded the act of limitations. More than five years had elapsed from the marriage, but Mrs. Harrison was an infant at the sale, and the suit was within time, after her coming of age. It was insisted for Valentine, that the act vested the right in the husband on his marriage; that he had improperly joined the wife; and that her infancy did not prevent his being barred. It was answered, that the act only vested it as a chattel: That it was still the wife's personal interest, which would survive to her, if not reduced into possession during the coverture: and, therefore, that she was properly made a party; and that the true question was, whether she was barred? The Court was of opinion in favor of the plaintiffs, and gave judgment against Valentine; deciding, in fact, that the right would survive to the wife, if not reduced to possession in the husband's lifetime. The very case now before the Court.

I believe there is no instance of a husband suing, under either part of this clause, in his own name, for his wife's slaves, without joining her, except *Bronaugh* v. *Cocke*. And there the omission was made an objection.

But, it is said, that there is no decision on the case, of slaves coming to a *feme* when *covert*. I recollect none, unless *Jones* v. *Shield* was such; which I do not remember distinctly.

I know, that Jones claimed under the first, Shield, the second; but failed here, as well as in England: This case happened before 1727; which might make a difference in the minds of some; although none in mine. Because, I think the sixth section, of the act of 1705, puts the case on the same footing, as the act of 1727.

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A doubt was stated, whether the decisions of the old General Court were authority; since, although it was our Supreme Court, yet an appeal lay to the King in Council. I would ask the gentleman, if it was ever objected to the authority of the decisions in Westminster Hall, that an appeal lay to the Lords? Where there was an appeal, and the sentence changed, the opinion of the Lords gave the rule; but, in other instances, that of the Courts did. Probably some such idea, as the present, produced the cases of *Drummond* v. *Sneed*, and *Hoard* v. *Upshaw*, to discover if the Revolution had produced any change in the legal sentiment. Fortunately for the peace of the country, the experiment failed; and the point was left at rest. I imagine some young gentlemen of the bar, not old enough to know the practice of the country, nor acquainted with the former decisions, advised this suit, on reading the clause, and being impressed with the force of the strong expressions.

As to the practice, I can truly say, that in my long experience, I do not recollect an instance, where the slaves of a *feme covert*, or *sole*, when the right came to her, if they were not taken possession of by the husband, during the coverture, and she survived, were not yielded to her. We find that the Chancellor, whose opposition to the old decisions is well known, considering the principle to be settled, that slaves vested only as far as personal estate, has founded his decree upon Wishart's possession: In which, however, I think he is mistaken: The contradiction in the testimony, is about an immaterial fact, Some say, that Taylor was the principal acting executor, and that Wishart acted but little: and others, that Wishart was the principal acting executor. There is no doubt, but both acted as executors; and neither of them had any other possession than as executors.

But, all this would be a fruitless enquiry, if Mr. Call had been right in his opinion, that in case "of a legacy of a personal chattel to a *feme covert*, the right is immediately vested in the husband, whether he gets possession of it, or not." A position so contrary to every idea I had possessed on the subject, that it surprised me. On revising his cases, I do not discover the smallest reason to doubt, but that they prove a contrary doctrine. They lay down the general position, that such a legacy devised to the wife vests in the husband; but immediately explain how it vests; that is, subject to the conditions of his reducing it into possession, or making a disposition thereof, in his life-time, or surviving his wife; otherwise, that it will survive to the wife.

Upon the whole, I am of opinion, that the right to the slaves survived to the wife in this case; and am happy to find, that this is the opinion of the Court: since, I am satisfied, it will tend to confirm long practice; and preserve the peace of the country; which would have been disturbed by a contrary judgment.

The decree was as follows:

"The Court is of opinion, that the interest of the slaves, devised by the will of William Rowley to Lettice Wishart, vested in her husband John Wishart, in the same manner as if they had been chattels, and not otherwise, so as to become his property, provided they were reduced into possession during the coverture, or that he survived his wife; but, if neither happened, the interest survived to his wife. That the said John Wishart, during his life-time, had none other possession of the said slaves, than as co-executor with Richard Taylor, they being, with the other slaves of the testator, continued on his plantations, under the direction of the executors, for finishing the crops, according to the directions of [491] the act of Assembly, until after the death of the said Wishart; and no act appears to have been done by him, testifying his election to hold the said slaves, in right of his wife, and not as executor; and, therefore, that the right survived to the said Lettice; and that the decree aforesaid is erroneous: Therefore, it is decreed and ordered, that the same be reversed, &c.; and this Court, proceeding to make such decree as the said High Court of Chancery should have pronounced, it is further decreed and ordered, that the bill of the appellees be dismissed, &c."*

[* See *Gregory's* adm'r. v. *Marks's* adm'r. 1 Rand. 355; *Baker* v. *Hall*, 12 Ves. jun 497; *Wall* v. *Tomlinson*, 16 Ves. jun. 413.]