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ARGUED AND ADJUDGED

IN THE

COURT OF APPEALS

OF

VIRGINIA.

BY DANIEL CALL.

IN SIX VOLUMES.

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TO WHICH, (THROUGH THE FIRST THREE VOLUMES,) BESIDES THE NOTES OF THE LATE JOSEPH TATE, ESQ., ARE ADDED COPIOUS REFERENCES TO STATUTES AND SUBSEQUENT ADJUDICATIONS ON THE SAME SUBJECTS.

BY LUCIAN MINOR,

COUNSELLOR AT LAW.

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MORRIS ET UX. *v.* OWEN ET UX. AND EDWARDS.
Et e contra.

Saturday, April 18th, 1801.

Testator bequeathed slaves and personal estate to his wife, during widowhood, and then to be divided, at her discretion, amongst his children. The wife gave one of the slaves, in 1774, to one of his children, by parol gift: Held—A good execution of the power as to that slave.

The wife could not, under the power, appoint to the testator's grand-children:*

And the part of the property which was ineffectually appointed, or not appointed at all, remained as part of the residuary estate of the testator, undisposed of by his will; and ought to be divided amongst his children, according to the statute of distributions.†

This was an appeal from a decree of the High Court of Chancery; where Richard Brown Owen and Susanna, his wife, and John Edwards, brought a suit against Henry Morris, and his wife, Mason, who was a daughter of Henry Simmons, deceased; and against the grand-children of the said Henry Simmons, deceased.

The bill states, that Henry Simmons, by his last will, devised as follows: "Item, I leave to my dear and well-beloved wife Susanna, during her widowhood, the plantation whereon I now live, with the lands below the school-house branch; together with the negro slaves here mentioned, Moses, Cupid, Sam, Jemmy, David, Phillis, Phœbe, Palunce, Isaac, Jacob, Amy, with their future increase; likewise all my stock of all kinds, after the legacies hereafter mentioned, and all my household furniture to dispose of among my children as she thinks proper:" And, after other specific legacies: "Item, my intent and meaning is, that my well-beloved wife Susanna Simmons shall enjoy the labor of the slaves given during widowhood, may be during her life, with their future increase, and then to be divided, at her discretion, amongst my children." That Susanna Edwards, one of the testator's children, was living at his death; and that his widow, in pursuance of the

* Testator empowers his widow at her death to dispose of slaves "among his children as she should think proper." If she give all to one, or wholly exclude any, or give any to grand-children; equity will avoid her gift, and distribute the property equally. *Hudson* v. *Hudson's adm'r*, 6 Mun. 352. Acc. *Knight* v. *Yarbrough*, Gilm. 27.

† If the person empowered to distribute or appoint, die without doing so, the subject is one of intestacy, and to be distributed among the testator's next of kin. *Frazier* v. *Frazier's ex'ors*, 2 Leigh, 642.

power, appointed and disposed of one of the said slaves (named
[521] Joan) and her increase to the said Susanna Edwards, to take effect, in possession, after the death of the said widow, who reserved to herself the use of the said slave and increase, during her own life. That the plaintiffs Susanna Owen and John Edwards, are the only children and legal representatives of the said Susanna Edwards, who died intestate.

That the said Susanna Simmons, the widow, afterwards had her will written; and, thereby, in pursuance of her power, devised four of the first mentioned slaves to the plaintiff Susanna and her sister Martha; who is since dead intestate, leaving the plaintiffs Susanna Owen and John Edwards her coheirs. That she, at another time, directed the writer of her said will to insert some other bequests; but expressly desired that just mentioned to be retained unaltered. That the writer, through hurry and mistake, in copying the original draft, left it out. That the will was executed without being read to the testatrix; and, therefore, although admitted to record since her death, is not the last will of the said testatrix: But, if it is, that still the plaintiffs have sustained an injury, through accident. That, of all the children of Henry Simmons the testator, only Mason, the wife of Morris, was alive at the death of the said Susanna Simmons, the widow, who, by her said will, devised sundry of the first mentioned slaves to the said Mason; and others of them to the descendants of the other children of the said Henry Simmons, except the plaintiffs Susanna and John; who were deprived by accident as aforesaid.

That the plaintiffs Susanna and John are entitled to the first appointment of the slave Joan; and to the four intended to be devised, if the said instrument is the last will of the said Susanna Simmons, the widow. Or, if it is not, that then they are entitled, under the statute of distributions, as representing their mother.

[522] The answer of Morris and wife denies the appointment of the slave Joan. Admits the defendants have heard of the said first will being drawn, but not executed, by the said Susanna Simmons. States, that a will was afterwards duly made, and executed by her; which devised one of Joan's children, by the name of Moses, to the plaintiff John. That the defendants have heard the testatrix intended to insert a clause in favor of the complainants, but know nothing of their own knowledge, and call for proof, if the allegation is material. Admits that the defendant Mason was the only child, living at

the testatrix's death; and submits to the decision of the Court. General replication and commissions.

A witness says, that she was present when the will was written: That it was not read to the testatrix; nor did she read it herself.

Another witness speaks to the same effect as the last; and adds, that his father carried the will home: so that the testatrix never saw it afterwards.

A third witness says, that, in 1774, she was called by Mrs. Susanna Simmons to take notice, that she gave Joan, (who was then present,) and her increase, to her daughter Susanna Edwards; reserving her own life therein. That, some time afterwards, Susanna Edwards wished to carry the slave home, but Mrs. Simmons refused, saying that she would never give them out of her own possession during her life.

A fourth witness says, that, in 1791, Mrs. Simmons asked him to write her will; which he did; but, no witnesses being present, she deferred executing of it until another time. That she did not carry a copy of it with her, but the deponent sent it to her a few days afterwards. That, in 1793, Mrs. Simmons sent for him, and told him she wished some alterations in the will; which he found still unexecuted. That the deponent wrote the alterations; but his mind was agitated, on account [523] of his wife, who lay dangerously ill; and he does not recollect that he read over the transcribed copies to the testatrix. That the clauses in the old will were numbered; and he did the same in the new, making them equal, without adverting to the additional bequests; whereby the devise to the complainants was omitted. Recites the clause, and says, that the slaves mentioned in it, he knows were once intended for the plaintiff Susanna, and her sister Martha; although Mrs. Simmons afterwards altered her mind as to Moses, and gave him to the plaintiff John.

A fifth witness says, that after the death of Susanna Edwards, she heard Mrs. Simmons say, she was sorry she had not given Joan to her, while living; as she feared she could not give her to her children, now she was dead.

The will of Susanna Simmons (whereof the defendant Morris was appointed executor,) gives a considerable proportion of the property to the defendant Mason. It also devises some trifles to the plaintiff Susanna, and her sister Martha.

The Chancellor decreed that the parol gift of Joan and her increase to Susanna Edwards was good. And being of opinion that the plaintiffs could not claim her and under the will

too, waived deciding the other points relative to the paper being a will; and, if a will, as to the right of correcting it.

The defendants appealed to this Court; and so did the plaintiffs.

WICKHAM, for the appellants.

The parol appointment, if good, is not sufficiently proved: For, there was a previous altercation between Mrs. Edwards and her mother, at the time of the supposed gift; and after the death of Mrs. Edwards, the mother expressed her concern that she had not given her a slave during her life-time; as she feared she could not now give it to her children.

Besides, in order to make a gift effectual, it should be ac-
[524] companied with a delivery of possession; otherwise, it amounts only to a mere intention, and is liable to be revoked. Want of possession, therefore, defeats the whole act.*

But, if the parol gift were complete in all respects, it was still void, under the act of Assembly, [1758, c. 5, 7 Stat. Larg. 237,] for preventing fraudulent gifts of slaves.

The claim for a provision under the will cannot be supported: for, although it might have been doubtful, whether, if the object of the intended appointment was capable of taking at the time, the Court would not have supplied the defective act, yet that question is not worth discussing in the present case; because the objects were incapable of taking: For grand-children cannot be substituted for children, under such a power as this. *Alexander* v. *Alexander*, 2 Ves. sen. 640; *Adams* v. *Adams et al.* Cowp. 651; *Robinson* v. *Hardcastle*, 2 Bro. C. C. 30, 344. The last case shews that Morris may take the benefit of the devise, and a share of the surplus too.

CALL, contra.

The gift is proved expressly, and the subsequent declarations of Mrs. Simmons did not destroy it; for, it was not in her power to defeat the appointment, when once made.

Possession was not necessary to be delivered; because, the gift was not to take effect, in possession, until after the death of the mother. It was, therefore, a mere gift of a remainder,

[*Black. Com. B. 2, c. 30; *Noble* v. *Smith et al.* 2 Johns R. 52: *Pearson* v. *Pearson*, 7 Johns. R. 26; *Grangiac* v. *Arden*, 10 Johns. R. 293; *Cook* v. *Husted*, 12 Johns. R. 188; *Cottees* v. *Missing*, 1 Maddock's R. 176, 183; *Hooper* v. *Goodwin*, 1 Swanst R. 486; *Irons* v. *Smallpiece*, 2 Barn. and Ald. 551.]

which does not require actual tradition of the property. In this case, possession was, in fact, given, as far as the nature of the thing would admit of; because the slave was present, and the gift was attended with every circumstance which could serve to show a disposing mind.

The statute respecting fraudulent gifts of slaves, [April, 1757, c. 6, 7 Stat. Larg. 118; Sept. 1758, c. 5, Ibid, 237,] has no influence on the question: for the difference is, where an interest passes from the person making the appointment, and where it does not. The first requires the forms of the statute, but the other does not. Pow. on Powers, 84. But here, no interest passed from Mrs. Simmons; because [525] the devise to the children was absolute, and the mother had only a power of controlling it. So that her power was only collateral, and the exercise of it rather tended to divest the rights of the others, than to transfer a new interest to the appointee.

Besides, it is a case not within the policy of the act, which was made to prevent *owners* from making fictitious gifts of their slaves, to the prejudice of creditors and purchasers. But here, Mrs. Simmons was not owner, and therefore the statute did not apply to her: For, neither a creditor nor purchaser could complain of deception with regard to property which she never owned, and with respect to which she was only a third person, exercising a collateral power over an estate which belonged to another person.

The will of Mrs. Simmons was void, because neither written by herself, nor wholly dictated by her at the time, nor read by herself, or to her, after it was written.

But, if the Court should be of opinion that the parol appointment was insufficient, and that the will is good, but the grand-children could not be substituted for children, then the plaintiffs were entitled to their mother's share of the unappointed surplus; which ought to be decreed them.

WICKHAM, in reply.

If there is any question about the validity of the will of Mrs. Simmons, there should be an issue. But there is none, for it was written in her presence, and by her direction. The gift of the remainder of a slave without possession delivered, would not be good. In order to render it effectual, the donor should deliver the slave to the donee, with a stipulation, that the donee should re-deliver it to the donor, for his life. The act of fraudulent gifts does apply to the case: for, if a pur-

chaser were to examine the will of Henry Simmons, and then to see a regular transfer from Mrs. Simmons in writing, [526] he would be led to venture his money; although there might be a secret conveyance by parol, which was unknown to him.

CALL. The statute, neither in words nor intention, embraces a case of this kind; for, it relates to owners only.

PER CUR. The Court is of opinion, That there is no error in so much of the decree, as establishes the verbal gift, made by Susanna Simmons to Susanna Edwards, one of the children of Henry Simmons, of the negro girl Joan, and her increase; and as adjudges the same a good appointment of the said slave to the said Susanna Edwards, pursuant to the power given to the said Susanna Simmons, by the will of her husband Henry Simmons, in the decree and proceedings mentioned; nor as orders the appellant Henry Morris, to deliver to the appellees, and the said David Jackson, the said slave Joan and her increase, and to account for their profits: But, that there is error in so much of the said decree as declares and determines, that the appellants are not entitled to any other part of the estate, which the said Henry Simmons empowered his widow to distribute amongst his children: This Court being of opinion, That so much of that part of the said Henry Simmons's estate, as was not, *by proper act or deed*, distributed by the said Susanna Simmons, to and amongst the children of the said Henry Simmons, in execution of the power aforesaid, remained as part of the residuary estate of the said Henry Simmons, undisposed of by his will;* and ought to be divided amongst all his children, according to the directions of the statute made for the distributions of intestates' estates: That the said Susanna Simmons had no authority, under the power given by the said will, to distribute or appoint any part of the said estate to *grand-children*,† or to any person or persons, other than the children of the said Henry Simmons: That the [527] appellants are entitled to a distributive share of the residuary estate of the said Henry Simmons, their grand-father, in right of their mother, Susanna Edwards, deceased, who was one of the children of the said Henry Simmons; and that, after an account thereof taken, their distributive share or shares thereof should be decreed to them, ac-

[* *Crossling* v. *Crossling*, 2 Cox's R. 396.]

[† *Hudsons* v. *Hudson's* adm'r. et al. 6 Munf. 352, 356; Sugden on Pow. ch. 7, sec. 5 note (*b.*)]

cording to law.* Therefore, so much of the said decree as is before stated to be erroneous, is to be reversed, with costs; but the residue is to be affirmed: and the cause is to be remanded to the High Court of Chancery, for further proceedings to be had therein, according to the principles of this decree.

[* *Hudsons* v. *Hudson's* adm'r. et al. 6 Munf. 352; *Knight* v. *Yarbrough*, Gilmer 27. See on this subject, Mr. Sugden's Practical Treatise of Powers, 555-561, and the cases cited in note (*o*,) 2 Lond. ed.]

RICHARDSON *v.* JOHNSON.

Monday, April 10th, 1801.

A verdict for the plaintiff, against a deceased obligor's executor, set aside, and the defendant allowed to withdraw his plea, and plea different one: The former having been filed by his counsel inadvertently, and in ignorance of the defence presented by the new plea.*

Joint bond, anterior to the act of 1786: the death of one obligor, before that act, discharged his executors.†

Richardson's administrators brought suit, in 1795, against W. Johnson, executor of Richard Johnson, deceased, and declared upon a joint bond, given by Charles Tinsley and the said R. Johnson, to Richardson, in his life-time; dated the 4th of May, 1771, and conditioned for payment by Tinsley only. The defendant plead payment; and the plaintiff took issue. Verdict and judgment for the plaintiff: which were afterwards set aside during the same term; and the defendant withdrawing his former plea, and taking *oyer* of the bond and condition, for plea, said "that the plaintiffs ought not to have their said action against him; because he saith, that the said Richard Johnson departed this life on the day ,

* After a failure of the jury to agree, and the consequent withdrawing of a juror, the declaration may be amended. *Syme* v. *Jude's* ex'rs. 3 Call, 522. The declaration may be amended during the trial of an issue: but if defendant request it, the jury should be discharged, he be allowed to amend his plea or plead anew, and the cause continued. *Tabb* v. *Gregory*, 4 Call, 425.

Amendments allowed by Code of 1849,—to declaration or bill, p. 648, § 14; to any pleadings, at trial, p. 672, § 7; to judgment or decree, p. 681, § 5.

† See the act of 1786, 1 R. C. of 1819, p. 359, § 3; and Code of 1849, p. 582, § 13. The latter expressly extends the liability to joint debtors by *judgment*, *note* or otherwise.

One entitled to judgment for money on motion, may, as to any liable party or his personal representative, move severally against each, or jointly against all, or jointly against any intermediate number. Code of 1849, p. 640, § 6.