27 S.C.L. 472
Court of Errors of South Carolina.

Mary Bowers et al.
v.
Thos. B. Newman.

May Term, 1842.

1. A free person of colour, by the laws of this *State*, may take and hold, convey by deed, dispose of by will, or transmit to his heirs at law, both real and personal estate.

2. A slave may acquire property, but as he cannot hold, it enures to the master.

3. Freedom, when bestowed upon a slave by will, is usually spoken of as a legacy, which requires the assent of the executor, as other bequests. But should the executor withhold his assent to the legacy of freedom to the slave, the heir at law cannot retain him in slavery- For upon the death of the testator, his right of freedom vests, subject only to be held by the executor liable for the demands of creditors.

4. After the lapse of twenty eight years, the assent of an executor to a legacy of freedom will be presumed, and the claim of creditors satisfied or barred, and the possession of the slave (so bequeathed her freedom,) of a tract of land also devised to her by the testator, and which she held undisturbed and in quietness, is sufficient to give her a title to said land, as a free person of colour, against the heir at law, and all the world.

5. By the Act of 1824, it is enacted, that every "gift of land by devise shall be considered as a gift in fee simple, unless such construction be inconsistent with the will of the testator, expressed or implied." The word "*hereafter*" in the 1st. *part of the sect*. is held to relate to the time of adjudication, in connection with the word "*considered*,'DDD' and not to the date of the devise.

6. Where the testator by his will devises in consecutive clauses, 1. to Judith, then to Barbara, each one half of certain lands containing_____acres, to themselves for life, with the power of disposing, and in default with remainder over. And afterwards by a codicil to said will uses the following language. "I do hereby revoke that part of my will wherein I bequeathed to the within named Judith and Barbara, the three tracts of land between them," and afterwards continues "I bequeath to the said Judith, the place whereon she now lives, adjoining John Newman's land, containing 300 acres, under the *contingencies, limitations and restrictions, mentioned in my said will," and*"I revoke that part of my *said will*, wherein I leave to the said Barbara that land below Silver Bluff, being a part of three tracts of land, and in lieu thereof, I leave her that whole tract adjoining the point, containing upwards of 300 acres, the lowermost part of said land. The land between the two parcels I left to the said Judith and Barbara, I leave to the said Thomas, son of the said Rachel Dupre."

7. It was held that the devise to the said Barbara in the codicil was merely a substitution of one tract of land for another, to be held by her for life only, and subject to the limitations of the original devise to her by the will of the testator.

Before EARLE J. *at Barnwell, Fall Term*, 1838.

***473** The action upon which this special verdict was predicated, was one to try titles to a tract of land-In order properly to understand the case, an abstract of the will of the testator Galphin is also subjoined.

SPECIAL VERDICT.

WE find that George Galphin, by his last will and testament, dated the 6th day of April, 1776, gave her freedom to a colored woman named Barbara, then his slave; and by a subsequent clause, devised to her certain lands (not then in dispute) for the term of her natural life, with remainder over to such issue as she might leave living at her death, to be divided between and among them in such proportions and under such limitations, restrictions and conditions, as she the said Barbara by will or other paper duly executed, should direct and appoint; and in default of such appointment, then to be equally divided.

By a codicil duly executed 14th February, 1778, the testator revoked that part of the will containing the foregoing devise to Barbara, and in lieu thereof devised to her without limitation during life, and also without words of perpetuity or inheritance, the lands now in dispute, and also without the remainder over to her

issue, and without the power of appointment to the said Barbara as to the mode of distribution provided for in the original devise.

We find that the said George Galphin departed this life in 1782, leaving the said will and codicil unrevoked. That the said Barbara, who intermarried with one Wm. Holmes, entered upon the lands devised in the codicil, and continued in possession thereof until they were sold as her property under execution, and she was evicted by action at the suit of the purchaser in 1827.

We find that Barbara Holmes departed this life in 1830, leaving the plaintiffs, *the issue of her marriage with Wm. Holmes*, who was also then dead; and that the said Barbara died intestate, and without having executed otherwise the power of appointment in relation to the said land.

***474** We further find, that the defendant entered and occupied the land since 1830, as the tenant of Darling Peeples, the purchaser at sheriff's sale, who now claims. If the Court shall be of opinion that the plaintiffs are entitled to recover, then we find for the plaintiffs, the lands described in Allen's platt of resurvey, marked with seventy dollars damage. If the court should be of opinion that the plaintiffs are not entitled to recovery, then we find for the defendants. And we refer the court to the entire will of George Galphin, which was in evidence.

(Signed)

JOHN F. PEYTON, Foreman.

ABSTRACT OF GEORGE GALPHIN'S WILL.

The testator first gives freedom, from the time of his death, to all legatees or devisees not then free, and espeaially to Barbara, daughter of Rose. Then having given freedom to two mulatto girls, and one Indian, (daughter of Natechuchy) &c. &c. he leaves in four lengthy clauses, several tracts of land, and also from twelve to twenty slaves, with their children and increase, to Thomas and Martha Galphin, children of Rachael Dupee, and to George and John, sons of Maturney; the lands and slaves being given to each of them under the same restrictions and limitations as in the devise to Barbara. The testator then gives to Judith, daughter of Maturney, one half of three tracts of land, two hundred acres of the ceded lands, with eighteen slaves, their children, & c., under limitations, as in the case of Barbara. He next gives to Barbara, the daughter of Rose, for and during her natural life, without impeachment of waste, the use of the lower half of three tracts of land, which said tracts run from Newman's line down to the point, containing in the whole about thirteen or fourteen hundred acres, with all the improvements thereon, called Silver Bluff. He also leaves her seventeen slaves, and their children, and future increase, & c. And upon the death of the said Barbara, he gives the said lands and slaves unto the child or children of the said Barbara that shall be then living, in such parts and proportions, and for such estate and estates, and at and under such contingencies, limitations and restrictions, as the said Barbara shall by her last will and testament in writing, or other writing by her duly executed, direct, limit and appoint. And for want of such directions, limitation and appointment, he gives and bequeaths the said ***475** lower half of the said three tracts of land, with the slaves, &c., to and amongst all and every the children of the said Barbara, that shall live to come of age or have issue, to be equally divided amongst them, and their respective heirs and assigns forever, as tenants in common, and not as joint tenants. And if but one child of the said Barbara should live to come of age, or have issue, to that child alone, and to his or her heirs and assigns forever. Then after disposing of two slaves and several minor articles, the testator proceeds thus: “Also it is my desire, that in case any of the six Devisees and Legatees herein before mentioned, namely, George, Thomas, John, Judith, Martha and Barbara, happen to die without having issue, or their issue die: That then and whenever a contingency of that kind happens to any of the said devisees, or any of their issue, that the estate, slaves, and issue of slaves herein intended for such devisee or devisees, and issue, shall be shared alike equally by my executors, or the survivors of them, amongst the survivors of the said devisees and legatees: and the land to be shared between the said George, Thomas and John: and the slaves and their issue to be shared equally between the said six devisees and their heirs.” Having made the said Thomas and Martha residuary devisees and legatees, Galphin next provides, that in case the said six devisees and legatees should all die intestate, and without issue, all the estate given to them should go to his sisters and their heirs,

share and share alike. The remaining portions of the will are entirely irrelevant to the matter in dispute.

In the first codicil, the testator revokes that part of his will wherein he bequeaths to Judith and Barbara the three tracts of land between them, and bequeaths to the said Judith the place whereon she now lives, adjoining John Newman's land, containing three hundred acres, under the contingencies, limitations, and restrictions mentioned in the said will. Then having revoked several other parts of his will, he goes on to say: "I revoke that part of my said will wherein I leave to the said Barbara that land below Silver Bluff, being a part of three tracts of land. In lieu thereof, I leave to her that whole tract of land adjoining the point, containing upwards of three hundred acres, the lowermost part of said land. The land between the two parcels I leave to the said Thomas, son of the said Rachael Dupee." In the second codicil, he revokes a legacy of one negro to Barbara; and in the third codicil he gives to the said Barbara five slaves **476* and their children, and future issue, unto the said Barbara, her heirs and assigns forever.

The will is dated 6th April, 1776. The first codicil, February, 1778. The second codicil, March, 1780; and the third, September, 1780. The will and codicil were sworn to before John Ewing Calhoun, of Ninety-six District, in April, 1782.

REPORT OF THE PRESIDING JUDGE.

This was a motion for leave to enter Judgment. Several questions arose.

1st. Whether by the same testament which manumitted her, the woman Barbara could take an estate in the land devised in either of the clauses.

2d. If she could, whether she could legally contract marriage so as to enable her children to take as issue under the first clause recited, the remainder limited to them.

3d. Whether under the codicil revoking that part of the will containing the devise of lands limited over to the plaintiffs, Barbara, if she could take at all, did not take an estate in fee, which passed to the purchaser at sheriff's sale.

On the first question, it seemed to be conceded, that Barbara, at the death of George Galphin, might be legally set free, there being no restriction on the power of manumission. But the doubt was whether, as her freedom was a legacy which could not take effect if there were debts, and might require the assent of the executor, there was at the instant of the death any one in being capable of taking the particular estate so as to carry the remainder. But it seemed not to have struck the Counsel, that if incapable of taking under the will, the particular estate, she could not under the codicil take the estate in fee which he now claims for her. As the opinion of the Court was formed on another point, it seems to be unnecessary to decide that question; nor, according to the view I have taken of the will, is it necessary to decide the question on the validity of the marriage. I hope it will never become necessary to decide that question against the legitimacy of the plaintiffs.

On the third question, I was of opinion that the codicil is a clear unequivocal revocation of the entire clause containing the devise of the particular estate to Barbara for life, with remainder to her issue. That the limitations and restrictions in that clause **477* were not intended to be annexed to the devise in the codicil, and that she took the estate there free from such limitations and restrictions; and although there are no words of perpetuity or inheritance, she took under the codicil an estate in fee, which was liable for her debts, and became vested in the purchaser at sheriff's sale. It was therefore ordered that the Postea be delivered to the defendant, and that he have leave to enter judgment.

The plaintiffs appeal, and move to reverse the decision, and for leave to enter judgment for themselves.

BELLINGER, FOR THE APPELLANTS.

The grounds taken by the defendant's counsel in the court below, and the report of the presiding judge, make it necessary for the appellants to maintain the following positions:-

I. That in this State, free persons of color can take and hold an estate in *real property*.

II. That Barbara Holmes, (the colored woman from whom plaintiffs are descended) could contract marriage with a *white man*, so as to enable the issue to take under Galphin's will, the estate in remainder limited to them.

III. That Barbara Holmes could be a devisee under the *same* will which gave her freedom, and thus could take the particular estate so as to support the remainder.

IV. That if Barbara Holmes could *not* be a devisee under the same will which gave her freedom, this does not defeat the estate in remainder limited to her issue, the plaintiffs.

V. The lands in dispute were not bequeathed to Barbara Holmes *in fee simple*; but were bequeathed to Barbara Holmes *for life*, with remainder to her issue, the plaintiffs. In support of these positions, he argued as follows:

I. That in this State, free persons of color can take and hold an estate in real property.

1. Because it has been decided again and again on circuit, that such persons can take and hold an estate in *personal* property.

And in one case a bill in chancery for the payment of *an annuity* was supported, the objection being made that the complainant was a free person of color.

2. Because in *Rees vs. Parish*, 1 M'Cord Ch. 58, a free mulatto was admitted without objections as a defendant in chancery, and claiming certain negroes.

***478** 3. Because in *Singleton vs. Bremar*, State Rep. 201, no objection of this kind was taken against a deed of a house and lot to a free woman of color, though such an objection (if sustainable) would have been fatal.

4. Because in the *State vs. Mary Hays*, 1 Bail. 275, the court say, “the Acts of the legislature, the decisions of our courts, and the constitution of the State, concur in denying to the mulatto any civil rights beyond those incident to the holding and transmission of property”- which, in connexion with the context, can mean nothing less than this: that *no* act of the legislature, *no* decision of our courts, and *no* part of the constitution, prohibited the mulatto from holding and transmitting property, nor from enjoying the rights incident thereto.

5. Because, it being admitted that such persons can take and hold *personal* property, it is incumbent on the defendant's counsel to show that they are *prohibited* from taking and holding *real estate*.

6. Because, so far as arguments *ab inconvenienti* apply, it is *less objectionable* for such persons to take and hold real estate, than to be allowed to possess and accumulate personal property, and yet be debarred from the chief means of procuring settled and permanent residences.

7. Because, the state of freedom *ex vi termini*, puts such persons in possession of all rights and privileges, from which they are expressly excluded. The defendant's counsel must disable the plaintiffs by the strength of his objection.

8. Because, free persons of color certainly have rights- they are human beings under our government; yet 1st. they are not free white citizens; 2d. they are not Indians; 3d. they are not slaves; and there is no other status or condition to which they can be assigned, unless they be viewed as a class entitled to all the rights and privileges of free white citizens, saving those (many indeed) from which they are excluded by the provisions of the Constitution, by Legislative enactments or adjudicated cases.

9. Because the Constitution and Legislative enactments have imposed various disabilities on these persons, yet in no part of the Constitution and by no Act of the Legislature are they prohibited from taking and holding real property.

10. Because, we cannot suppose all those disabilities and prohibitions to have been needless and superrogatory; they must ***479** have been found necessary; therefore we cannot go *beyond* those disabilities and prohibitions.

11. Because, in Georgia, (a State having similar institutions) express enactments have been found necessary.

An Act 19 Dec. 1818, prohibiting free persons of color from purchasing or acquiring real estate or slaves. Lamar's Digest, p. 815.

This was afterwards repealed, and the prohibition (with some exceptions) removed, as to *real* estate.-A. A. 22d Dec. 1820. Lamar's Digest, p. 820.

12. Because, the whole course of legislation on this subject in South Carolina, has been in the *negative* and not in the *affirmative*-enactments of prohibition, and not of grants. Compare the course of legislation as to slaves, and as to free persons of color, especially in relation to criminal matters.

13. Because, these persons from the earliest times have been *in fact* allowed to take and hold property (both real and personal) within the knowledge, without the prohibition, and therefore with the implied sanction of the Legislature.

14. Because, the Legislature have clearly and unequivocally expressed their sanction. *Vide* A. A. each year imposing taxes on such persons, thereby admitting their right to hold property generally.

So various A. A. as to punishing such persons by fines.-A. A. 1740, P. L. 170.-A. A. 1820, p. 23.-1822, p. 10 and 12.-1823 p. 63.-1833, p. 40.-1834, p. 13 and 15.

Above all, A. A. 1822, p. 10, § 5, imposing a tax on all houses within the limits so guarded, (by the Municipal Guard of Charleston) inhabited by negroes or persons of color, as tenants or owners.

15. Because, the question has been expressly decided by the Appeal Court in the affirmative: *The Real Estate of Mrs. Hardcastle ads. the Escheator of Pineville Academy*. (Original manuscript.) Tried before Judge James, May, 1825.-Elizabeth Hardcastle, *a free woman of color*, died possessed of several tracts of land, which the Escheator of Pineville Academy claimed as escheator; she having left no person that could claim the same by descent or purchase. The claim of the escheator was resisted by persons who represented themselves as next of kin.

On appeal, determined, that by the common law of the State, the *free* descendants of a negro are entitled to hold lands, and ***480** that where the evidence of relationship between the individuals claiming, and the deceased, is satisfactory, they may *take by descent*.

II. That Barbara Holmes (the colored woman from whom plaintiffs are descended) could contract marriage with a white man, so as to enable the issue to take under Galphin's will, the estate in remainder limited to them.

1. Because if it is lawful for free persons of color to take and hold property, (as I have shown) there is removed *one* of the *chief objections* to such marriages.

2. Because, under the civil Law, though Senators, their sons and grandsons, could not marry a manumitted slave, this prohibition was founded on positive law, and did not extend to private men. Vid. Dio. book 16. Adam's Roman Antiq. 442.

3. Because, under the English Common Law, a freeman might marry a Neife, or a villein a freewoman-the issue (contrary to the maxim of the Civil Law) would follow the condition of the father, but the mariage was lawful. 2d Blac. Com. 94. Litt. Sec. 187. "But the spurious issue of a Neife, though by a free father, would be a villein, *quia sequitur conditionem matris, quasi vulgo conceptus*."*Vid.* Bracton, book 1, c. 6, as cited in Hallam, 1st vol. p. 232. (Phia. ed.)

Contra Blackstone and Litt. *ut supra*, as to the status of such spurious issue; but this evidently shows that marriage might exist between such parents.

4. Because, the chief objection against such marriages, the want of civil status in the person of color, has never been recognised under our Laws, in not consonant with the spirit of our institutions, and certainly has no application in cases where the want of status arises from positive prohibitions of a certain and definite character and extent. Law Journal, p. 92.

5. Because, in Pennsylvania, Massachusetts, Virginia, North Carolina and Illinois, *express statutory provisions* have been found necessary, to make such marriages unlawful.

6. Because, the marriage of a *white* man with a *free woman of color*, is not more contrary to law, than the marriage of an *Indian* with a *free woman of color*, or a *white man* with *an Indian*, or citizen with alien. 2d. Kent, 49. (n.)

7. Because no such objection is recognised at common Law. *Vid.* 1 Blac. Com. 433. Kent's Com. part iv. Lec. xxvi.

8. Because, our A. A. 1712, following the Stat. 32 H. 8, C. 38, ***481** declares "all persons to be lawful (that be not prohibited by God's Law) to marry."*Vid.* P. L. 55.

9. Because, if (as I have shown) a state of freedom *ex vi termini*, puts free persons of color in possession of the rights of free white citizens, save those from which they are expressly excluded, then most unquestionably such marriages are lawful, unless the objector can show positive prohibition, which cannot be done.

Hence, I conclude, although such marriages are *revolting*, and justly regarded as *offensive to public decency*, they are not contrary to *existing laws*.

III. That Barbara Holmes could be a devisee under the same will which gave her freedom, and thus could take particular estate so as to support the remainder.

1. It cannot be contended, that the *mode* of manumission was contrary to law. Galphin's will took effect in 1782, eighteen years previous to the A. A. 1800, (2d Faust, 355, 7) prescribing the mode of manumission, and afterwards superseded by A. A. 1820, p. 22, prohibiting emancipation.

2. Nor can it be contended, that there were debts against the estate of Galphin, which could bar the manumission.

3. Nor can it be contended, the executor did not assent to the legacy of freedom. Such assent will be presumed. Toller's Ex'ors. p. 308.

In Lenoir vs. Sylvester, 1 Bailey's Rep. 639, the court decided that *under* the A. A. 1800, (which required various formal proceedings) the mere assent of the executor to a life estate in slaves, was not an assent to freedom, bequeathed to those slaves on the death of the tenant for life. But in this case, Barbara Holmes was in possession of the lands devised, (see the special verdict) and surely *previous* to 1800, if an executor assented that one who had been a slave should hold property under a will, this was an assent to freedom bequeathed by that will, to take effect *eo instanti* the testator died. The substantial objection is, that when the will took effect, Barbara Holmes was *not yet freed*-therefore, being a slave, was incapable of taking the life estate; in other words, it is said the bequest of freedom *took effect*, but not in time. This objection is unsustainable.

1. Because, if no debts existed at the time of Galphin's death to bar the bequest of freedom, then *quoad debts*, the bequest of freedom took effect *eo instanti* the testator died.

2. Because, if the executor did assent, even if there were debts, ***482** they could not, after such assent, affect the bequest of freedom; such assent being *irrevocable* and *being proof of assets*. Toller's Ex'ors. p. 307, 310. State Rep. p. 21.

3. Because, it is questionable whether the doctrine as to the executor's assent, applies with equal strictness to a bequest of freedom, as to a pecuniary legacy. A bequest of freedom *ipso facto* makes the legatee free *eo instanti* the will takes effect, *unless* the executor subsequently takes measures of prevention.

4. Because, even if the assent of the executor be essential, the bequest of freedom to Barbara Holmes, *ipso facto*, gave her an inchoate right, which though requiring the executor's assent to complete it, would yet prevent the devise to her from being void. Before assent, a legatee may dispose of his legacy. Toller, 311.

5. Because, assent of the executor, when given, would have relation to the time of the testator's death, and thus would have made Barbara Holmes capable of being a devisee.

Thus, profits accruing between the testator's death and the assent, go to the legatees. *Vid.* Toller's Ex'ors, p. 311. "Such assent, shall by relation, confirm an intermediate grant by the legatee of his legacy."*Ibid.*

6. Because the objection itself furnishes an answer.

If it be law that Barbara Holmes could not take the devise until assent of executor, Galphin must have known this, and in fact, an inspection of the will shows that Galphin meant "when Barbara Holmes shall be made free, by the assent of my executor to the bequest of freedom, then let her take the devise," &c.

See the doctrine in relation to devisees *in ventre sa mere*, and to other cases where the testator shows that he was aware the devisee could not take immediately. *Vide* Fearne Cont. Rem. 428. Powel's Devises, p. 332.

IV. That if Barbara Holmes could *not* be a devisee under the same will which gave her freedom, this does not defeat the estate in remainder limited to her issue, the plaintiffs.

1. Because in the case of *Fable and others vs. ex'or of Fable*, Feby. 1838, 2d Hill's Ch. 400, it was settled, that if land be conveyed to a slave, his master would be seized of that land; not for himself, but only until office found for the State; and that a bequest to slaves is not void.

Under the authority of this case, even though Barbara Holmes could not take in her own right the life estate devised to her, the estate in remainder would not be defeated.

***483** 2. More particularly, because in the said case of *Fable and Fable*, conveyances, devises, &c. to slaves, (*quoad being void*) are put on the same footing as conveyances, devises, &c. to aliens.

Now an alien can be a devisee, and can take and hold until office found. *Vide* Powel's Devises, p. 316.

Also, if an alien holding a particular estate may, by fine, &c. defeat the remainder, (*Vide* Powel, p. 318; 2d Kent, 61,) surely he can preserve it.

3. Because the case of the *Escheator vs. real estate of Hester Smith*, 4th M'Cord, 452 and 455, taken in connexion with the above case of *Fable and Fable*, fully supports me in saying that no more than Barbara's life estate could have been escheated, because it was all the interest she had in the land; and however *her* interest might have been affected by the laws of escheat, *it* had passed away; and the estate had become legally vested, according to the limitations of the will, in her issue the plaintiffs, who labored under *no disabilities*.

4. Because, if the life estate was void, as being devised to one incapable of taking, be it remembered that this was an *executory devise*, and therefore required no particular estate. *Vide* 2d Blac. Com. 173. 4th Kent, 236.

V. That the lands in dispute were not bequeathed to Barbara Holmes *in fee simple*; but were bequeathed to Barbara Holmes for life, with remainder to her issue, the plaintiffs.

1. This is the debateable ground; for if free persons of color *can not* hold real estate, and if Barbara Holmes could not take *a life estate* under the same will which gave her freedom, the defendant will not forget that he claims the land in right of Barbara Holmes, as devisee in fee simple under Galphin's will.

2. The grand rule of construction-"Devises are to be so construed as if possible to effectuate the entire intention of the testator, if that intention is not opposed to the policy of the law against perpetuities, and to this all other rules of construction are subordinate."*Bedon vs. Bedon*, 2d Bailey, 231.

3. The codicil (the first) devising the lands in dispute, contains no words of perpetuity or inheritance, nor any words indicating an intention to pass a fee. Without waiving the argument that the A. A. 1824, p. 23, cannot affect a will which went into operation in 1782, I undertake to show under the A. A. 1824, that no construction is "consistent with the will of the testator ***484** expressed and implied," but this: That the lands devised in the codicil, are subject to the limitations and restrictions mentioned in the body of the will-that the codicil changed the subject matter, but not the terms of the devise.

1. Because, Galphin expressly devised a life estate, and not a fee-simple, the *words* which he used at that time, conveying no other meaning. The A. A. 1824 *might* change the law, but it could not reach *backwards* through a vista of *forty years*, and make Galphin mean the *contrary* of what he meant and said.

2. Because, an examination of the *whole will* and the codicils, shows that Galphin meant to settle his property on the six devisees, (including Barbara Holmes) with limitations and remainders in favor of each other. This is expressed in the will, and there is nothing to contradict it in the codicils.

3. Because, a comparison of the words and expressions used in the will, with the words and expressions used in the codicil, shows that by the codicil the testator meant merely to *change* the *subject matter* of the devise-to put one tract of land for another.

4th. Because, on inspecting the codicil, we find that the testator, having in the will divided certain tracts of land between *two* of the said (6) six devisees, meant in the

codicil merely to divide those same tracts among *three* of the said six devisees.

5th. Because, the limitations and remainders mentioned in the will are obviously not affected by the codicil as to *five* of the devisees. Therefore, if the defendant's construction be correct, it will follow that Barbara Holmes not only took a fee-simple in the land devised to her, but might have taken *as survivor* to *each and all* of the said five devisees, *none* of whom could have taken as survivor to her. In other words, if the testator meant that Barbara Holmes should take a fee-simple under the codicil, instead of a life estate as in the will, he surely would have altered the clause of survivorship *as to her*.

6th. Because, in the third codicil, which does give Barbara certain property *absolutely*, the words are, "to the said Barbara, *her heirs and assigns forever*."

7th. Because, throughout the will and codicil, the *most minute and particular attention* is paid to words and phrases. Evidently it was drawn by an *expert*. Evidently, if a fee simple had been intended in the codicil, *appropriate words* would have been used.

***485** 8th. Because, throughout the will and codicils, there are not less than twenty-five places in which worde of devise and bequest are used; and wherever the testator obviously meant a feesimple, we find him using words of perpetuity or inheritance-where not a fee, *those words are wanting*.

9th. Because, the very words of the codicil are *conclusive*. The testator does *not* say, "I revoke that part of my will wherein I leave to the said Barbara a life estate in the land below Silver Bluff, and bequeath the land adjoining the point to the said Barbara, *her heirs and assigns forever*." But he says: "I revoke that part of my said will, wherein I *leave* to the said Barbara *that land below Silver Bluff*, and *in lieu thereof, I leave* her that whole tract adjoining the point." He uses the same expression when *referring* to the devise in the will, as when *passing* the devise in the codicil-"Wherein I leave," and "I leave;" also, "in lieu thereof"-as though he had said; "In lieu of the land below Silver Bluff, let Barbara take the land adjoining the point." If so, the land adjoining the Point, (which is the land in dispute) would be subject to the same limitations, as the land originally devised.

Such being the *intention* of the testator, that intention must prevail, and judgment be entered up for the plaintiffs.

Attorneys and Law Firms

Mr. PATTERSON, contra.

1. Barbara was a slave at the time of the death of testator, could not take by devise, and the estate passed to the residuary legatee, or to the heir at law. 1 Bail. 642, *Lenoir vs. Sylvester*. She was clearly a slave. Could she take by descent or purchase? Certainly not. For same reason she could not by devise. Coop. Just. 411; 4 Eq. Rep. 266. *Bynum vs. Bostwick.*

Shep. Touch. 414. If a devisee be incapable of taking at the time, the devise fails. 1 P. Wms. 500; 2 Pow. Dev. 243.

Assent of ex'or. to devise nugatory, for the estate must pass immediately to devisee, and he must be capable of taking *eo instanti*. 1 Blac. Com. 372. Thus the proposition is made out that Barbara could not take.

2. As to construction of the will. If Barbara took the land under the codicil, she took it free from the limitations of the will. 2 Vern. 625. She takes under the former only half the quantity devised in the latter, besides that the words "the whole" are ***486** used in the codicil. If he did not suppose he was revoking the limitations by the codicil, why should he reannex them to the devise to Judith? Co. Lit. 210, a rule of construction of wills.

Jac. L. D. Marriage. 2 Kent's Com. 215, N. A.

In the will these limitations apply to the negroes as well as the lands. Yet in the third codicil, the bequest of the negroes, there to Barbara, is expressly absolute and in fee. *Dunlap vs. Crawford*, 2 Mc'C. Ch. Rep. 171.

Opinion

Curia, per EARLE, J.

Whatever may be said about public policy, and whatever may be the future consequences, it is now a settled point, that a free person of colour, by the laws of this State, may take and hold, convey by deed, dispose of by will, or transmit to his heir at law, both real and personal estate. Barbara Holmes, the ancestor of

the plaintiffs, and under whom the defendant claims, was a slave at the time of the devise in question. The plaintiffs who bring this action to recover the land, must shew a perfect title in themselves. In order to do this, they must shew, 1, that Barbara, although a slave of the testator at his death, could take, and did take, under the will; or 2, that the remainder to the plaintiffs is good, by way of executory devise, although the devise of the life estate to Barbara, may be void as to one incapable of taking; 3, that her marriage with Holmes was a lawful and valid marriage, which rendered the issue legitimate, and capable of taking the remainder limited to them; 4, that the codicil is not a revocation of the will, so far as regards the remainder to the plaintiffs, but that under it Barbara took only a life estate, subject to the same limitations and conditions which are annexed to the devise in the will itself.

Several of these propositions involve points that are not free from difficulty, and on which there might be some diversity of opinion, but as the judgment of the majority of the court has been formed from a construction of the codicil alone, it has been deemed unnecessary to consider any of the other questions raised by the plaintiffs' case, or to express any opinion upon them. If in fact the will, as far as regards the remainder to the plaintiffs, is revoked by the codicil, then it is needless to inquire whether Barbara could take her freedom and the devise by the same instrument; or whether the remainder must take effect by way of executory devise; or to consider the validity of the defendant's marriage with Holmes. The civil status of a person circumstanced ***487** as Barbara was, especially in regard to her capacity to take and hold property, is not easy to define. A slave may acquire property, but as he cannot hold, it enures to the benefit of the owner. At the date of this will there was no restraint on the power of manumission, and Barbara was lawfully made free, exempted from the control, and placed beyond the reach of the heir at law. Freedom, when bestowed upon a slave by will, is usually spoken of as a legacy, which requires the assent of the executor as other bequests. The analogy is not perfect, and I am not sure that some confusion of ideas is not created by the use of the same terms, in reference to subjects which seem to be of different natures. If property be given to a slave the master may seize it presently. But freedom bequeathed to a slave of the testator, is not only inconsistent with any claim of property in the heir at law, but a solemn declaration that he shall not seize or hold him as property. Should the executor withhold his assent to the legacy of freedom to the slave, could the heir at law retain him in slavery? But in this case the testator died in 1782, and Barbara immediately went into the enjoyment of her freedom, and into possession of the land, and so remained until her death in 1830. The assent of the executor may be necessary to the enjoyment of the legacy in possession, but not so to enable it to vest, which I apprehend it did at the instant of the death, subject only to the claim of creditors, and the power of the executor to make her liable for debts. Without this, if a slave can take at all, subject to the right of escheat or to the superior claim of the master, then the devise also vested in Barbara, and as soon as from lapse of time the assent of the executor to the legacy of freedom might be presumed, and the claims of creditors to be satisfied or barred, then her title became absolute and perfect. If twenty years were necessary for this purpose, she had, after the expiration of that term, twenty eight years of quiet and undisturbed possession of the land, which would be sufficient to give her a title, as a free person of colour, against the heir at law, and all the world, unless the plaintiffs are entitled to the remainder they claim, after the determination of what they allege to have been her life estate.

In coming to a conclusion upon the construction of the codicil, we should have no difficulty if we were to confine our attention to the words of the devise. It is a gift of land to Barbara, without words of perpetuity or of limitation. The Act of 1824 ***488** has furnished the rule of interpretation for such a devise. “Every gift of land by devise shall be considered as a gift in fee simple, unless such construction be inconsistant with the will of the testator, expressed or implied.” The word “hereafter,” in the first part of the section, is held to relate to the time of adjudication, in connection with the word ““considered,” and not to the date of the devise. And therefore wills executed before, as well as since the Act, have been construed according to its provisions. *Hall et al. vs. Goodwyn et al.* 4 *M'Cord*, 442; *Dunlap vs. Crawford*, 2 *M'C. Ch. R.* 171. The ground of the argument for the plaintiffs is, that such construction is inconsistent with the will of the testatator, as implied from the context of the instrument, and the views which have been urged upon the court to sustain that ground are ingenious and plausible. Admitting the rule to be that the intention of the testator is the object of inquiry, and when

ascertained is to govern in the construction, yet when the words used are plain and unambiguous, and have a certain and definite legal import, it is not enough for the plaintiffs to make out a case that is plausible or probable. The intention to give the words a different and more limited meaning, must be made clear and manifest. A majority of the court thinks that this has not been done. Without minutely reviewing all the grounds of argument which have been taken for the plaintiffs, I will briefly present the reasons for supposing that the legal interpretation of the words is supported by the apparent intention of the testator; and in doing so I shall notice incidentally some of the arguments of the plaintiff's counsel.

In the will, the testator devises in consecutive clauses, first to Judith, then to Barbara, each one half of certain lands containing 13 or 1400 acres, to themselves for life, with the power of disposing, and in default, with remainder over. The language of the two clauses is identical, except the names of the devisees and the discription of the lands. In the codicil the testator uses the following language. “I do hereby revoke that part of my will wherein I bequeathed to the within named Judith and Barbara the three tracts of land between them.” Had the testator stopped here, and made no further devise in favour of either, can there be a doubt that the original devise, both life estate and remainder, would have been gone? But the testator proceeds in the next paragraph as follows. “I bequeath to the said Judith the place whereon she now lives, adjoining John Newman's land, containing ***489** three hundred acres, *under the contingencies, limitations and restrictions mentioned in my said will*.” Had he afterwards made no provision for Barbara, it is equally clear that the claim of the plaintiffs, to the remainder under the original de vise, would have been extinguished along with the life estate of their mother. The whole of the two clauses in favour of Judith and Barbara, were expressly revoked; and the whole subject matter was striken out of the will. The testator then inserts seven new clauses in the codicil, in four of them revoking so many clauses of the former will, and in the others bequeathing three new legacies. He then proceeds as follows; “I revoke that part of my said will wherein I leave to the said Barbarba that land below Silver Bluff, being a part of three tracts of land, and in lieu thereof, *I leave* her that whole tract adjoining the point, containing upwards of three hundred acres, the lowermost part of the said land. The land between the two parcels I left to the said Judith and Barbara, I leave to the said Thomas, son of the said Rachael Dupee.” Inasmuch as the testator, throughout the will, when he meant a life estate had used the appropriate words of limitation, and in like manner when he meant an estate in fee had used words of perpetuity, it is argued that the devise to Barbara in the codicil by the words, “I leave her that whole tract,” is to be regarded as a mere substitution of one portion of land for another, to be held for life only, and subject to the limitations of the original divise; and that this is plainly implied from the context. As he used words then deemed appropriate to convey a life estate, it is supposed he meant no more. But although words of inheritance previous to 1824, in one of our courts of appeal, were held necessary to create a fee, in the other they were not. And the settled law now is that words of inheritance were not necessary for that purpose, even in 1778; but that the words of the codicil, without more, created a fee. The other ground of implying the intention that the devise in the codicil should be for life and subject to the limitations of the will, would have great force, were it not met by an argument on the other side equally apparent on the face of the will, by which it is neutralised, if not destroyed. As I have shewn, by the first clause of the codicil, the clauses in the will containing the original devises to Judith and Barbara were entirely revoked, in words at least; when the testator proceeded to devise other lands to Judith, to be held on the same ***490** terms and limitation, he considered it necessary to annex words plainly and unequivocally expressing that intention, “under the contingencies, limitations and restrictions mentioned in my said will.” If the subsequent devise to Barbara had followed in immediate juxta position, the argument for the plaintiffs would have been strengthened. But after introducing many clauses on different subjects, he gives her in lieu of the land devised to her in the will, “that whole tract,” &c. without more. If the words of restriction had not been annexed to the divise to Judith in the codicil, she would have taken a fee simple. Because the testator intended that she should not take a fee simple, but only a life estate, he annexed them. If he intended that Barbara should take no more, it was equally necessary to annex the words subjecting her devise to the former limitations. And it is a strange argument to say, that because he omitted the words, he intended to annex the meaning. So likewise of the devise to Thomas, son of Rachel Dupee, of the land between the two

parcels, the words plainly import a fee. Are they, too, to be construed as creating not only a life estate, but as subjecting it to the limitations of the original will? And if so, what limitations? It is more rational to conclude, as the testator seems to have known very well what he was about, and to have understood what words were necessary to convey his meaning, that if he had intended the last devise to Barbara to be for life only, and to subject it to the limitations of the former devise, he would have expressed his intention in unequivocal language. If his object was merely to make an additional provision for Thomas, this would have been easily accomplished by devising him the intermediate tract, without further altering the clause as to the others. It is supposed that the argument for the plaintiffs is much strengthened by this consideration, that the remainders in the will are not affected by the codicil, as to five of the devisees, as to each of whom Barbara might have taken as survivor, although neither could have taken as survivor to her. Besides the land described in the clause of revocation, Barbara, as well as each of the other children, had a devise of certain ceded lands in Georgia. But by the same codicil all these devises of ceded lands are revoked; and the testator bequeaths to each in lieu thereof a legacy of fifty pounds sterling. If then, the other devise to Barbara was wholly revoked by the codicil, she took no land under the will. And it may well be questioned whether ***491** her right of survivorship in regard to the lands, was not gone. But the answer to this suggestion may be found in the fact, that by a subsequent codicil the testator bequeaths to Barbara, her heirs and assigns, five slaves and their issue, in addition to her former legacy under the will. In these the other legatees had no interest as survivors, although her own right in regard to their legacies remained unimpaired. We cannot therefore undertake to say that the testator, on reconsideration, may not have intended in favour of Barbara a more beneficial provision than was made at first. In regard to the negroes he has certainly so intended; and in regard to the lands, as he used words legally importing that intention, we have no sufficient evidence from the context, either in regard to language, arrangement or circumstances, to satisfy us that his intention was otherwise. We are therefore of opinion, that the codicil was an entire revocation of the original devise, under which the plaintiffs claim the remainder; that the limitations in favor of the plaintiffs do not attach to the devise in favor of Barbara in the codicil; and that they cannot recover in this action, whatever may be the estate of Barbara, or howsoever acquired; whether she took under the codicil an estate for life or in fee, or as a free coloured person has acquired title by possession. The motion is refused, and the judgment of the circuit court is affirmed.

GANTT, RICHARDSON and EVANS, Justices, and JOHNSTON and DUNKIN, Chancellors, concurred.

BUTLER, J. having been of counsel in the cause gave no opinion.

The opinion of Chancellor Harper was, by some means, lost or mislaid, so that a copy could not be furnished the reporter, to present with the report of this case. The annexed summary, however, of his opinion, dissenting from a majority of the court, has been very kindly furnished the reporter by his Honor, judge O'NEALL, and will present the points maintained by the chancellor. *Rep.*

HARPER, Ch. maintained, 1st, that a slave could acquire and hold personal property.

2d. That the slave could both take freedom and property, by the same instrument, a will.

3d. That marriage was merely a civil contract, and that, ***492** therefore, it was good and legal between a white person and a free negro.

4th. That the descendants of a free negro, born in lawful wedlock, might take as devisees, under the description of issue, or as heirs.

5th. That the limitation in the will extended to the codicil, and was good, and under it the plaintiffs were entitled to recover.

O'NEALL, J.

I agree with Chancellor Harper in all the conclusions to which he has come; and generally in the reasons which has led him to them. But on the first question made, I do not agree to his reasoning in all respects. That a slave is to be regarded as on the footing of an alien enemy, is not in my judgment correct. Slavery in England, and in many other countries, originated out of that hard condition being imposed on captives taken

in war. But civilization long since wiped off this stain on contests between nation and nation. The captive now is no where, except among savages, regarded as a slave. In this State, the only slaves from captivity were the few Indians who in the early settlement were thus treatcd. The great body of slaves are those who have been acquired by purchase. So far as human beings can be considered as goods and chattels, they have been and must continue to be so regarded.

That that is their legal position is not questioned, but it is supposed that they must have the consideration of men laboring under temporary legal disabilities, in order to keep up the harmony of the law. That there is a great deal of truth in this general position, I freely concede. But I do not think that they can be regarded as laboring under the disability of an alien enemy. For remove the disability, and what must be the legal result? they then stand as all other men possessed of their political, as well as civil rights. To emancipate would be to naturalize a slave, if he is legally to be regarded as an alien enemy. This never can be the result in South Carolina. The negro or his descendnat is not, cannot be, a citizen. The true notion seems to me to be that the negro slave is to be regarded as a being of an inferior caste, not having, and never to have, any political status; but capable of acquiring and holding property by the consent of his master. Every acquisition thus made, is for the master's benefit. For if it either feeds or clothes him, it so far relieves the master from expense on his account. But when we refer to the Act of 1744, ***493** and every Act for the regulation and government of slaves passed since, we find that it was no novelty to the legislators of this State that slaves should own property.

For the present, this general statement of my views on this portion of the subject will be sufficient. Consistently with them, I think that the consent of the master to the possession of property by his slave Barbara until she became free, is sufficiently manifested by his will. There would, however, be much difficulty in saying that she could thus acquire real estate. But my mind is relieved from all difficulty by two considerations. 1st, I hold that her freedom and estate both took effect at the same instant, the death of the testator. For the assent of the executor to the freedom of Barbara, made her free at and from his death. 2d. On looking to the will it will be seen that the executors are made “guardians” of the real and personal estate devised. This constituted them trustees to take and to hold, until all disabilities (if any existed) were removed.

Parallel Citations

27 S.C.L. 472, 1842 WL 2403 (S.C.Err.)

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