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REPORTS OF CASES

ARGUED AND DETERMINED
IN THE

COURT OF APPEALS,

AND IN THE

GENERAL COURT

OF

VIRGINIA.

By BENJAMIN WATKINS LEIGH.

VOLUME I.

Eastern District of Virginia, to wit:

BE IT REMEMBERED, That on the first day of July, in the fifty-fourth year of the Independence of the United States of America, BENJAMIN WATKINS LEIGH, of the said District, for and on behalf of the Commonwealth of Virginia, hath deposited in this office, the title of a book, the right whereof he claims (for the benefit of the said Commonwealth,) as author, in the words following, to wit:

L. S.

"Reports of Cases argued and determined in the Court of Appeals, and in the General Court, of Virginia. By Benjamin Watkins Leigh. Volume I."

In conformity to the act of the Congress of the United States, entitled "an act for the encouragement of learning, by securing the copies of maps, charts and books, to the authors and proprietors of such copies, during the times therein mentioned."

R'D JEFFRIES,
Clerk of the Eastern District of Virginia.

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JUDGES

OF THE

COURT OF APPEALS

FRANCIS T. BROOKE, PRESIDENT.

WILLIAM H. CABELL.
JOHN COALTER.
JOHN W. GREEN.
DABNEY CARR.

JUDGES

OF THE

GENERAL COURT

ROBERT WHITE.
ARCHIBALD STUART.
WILLIAM BROCKENBROUGH.
PETER JOHNSTON.
DANIEL SMITH.
JAMES ALLEN.
WILLIAM A. G. DADE.*
FLEMING SAUNDERS.
WILLIAM DANIEL.
JAMES SEMPLE.
RICHARD E. PARKER.
LEWIS SUMMERS.
ABEL P. UPSHUR.
RICHARD H. FIELD.
JOHN F. MAY.†

Attorney General: JOHN ROBERTSON.

*Died 15th October 1829.

†Appointed 22d May 1829.

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avowry is fatally defective in many of the particulars stated at the bar. This avowry was imperfectly copied from the form in Chitty's Pleadings, framed upon the provisions of the english statute of 11 Geo. II, ch. 19, § 22, which, in cases of distress for rent, greatly relaxed the strictness necessary in avowries by the common law; but we have no such statute, and none which at all affects the rules of the common law applicable to the pleadings in replevin.

The judgment is to be reversed, the demurrer overruled, and the cause sent back, with a direction to award a writ of inquiry as to the damages sustained by the plaintiff.

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377 ***Madden v. Madden's Ex'ors.**

November, 1830.

(Absent BROOKE, P., and COALTER, J.)

Interlocutory Decrees—Appeal.*—Upon appeals from interlocutory decrees in chancery, only so much of the cause is before the appellate court, as the court of chancery has acted upon.

Wills—Construction—Life Estate in Personalty.†—Testator bequeaths, that "all his moveable property after the death of his wife, shall be sold, and the proceeds divided among his five daughters: after all his debts paid, all his moveable property should be at the intire disposal of his wife: on her decease, the same to be disposed of as above mentioned:" HELD, that the wife took only a life estate in such of the moveables as were capable of being used and returned in kind; and, therefore, the wife's gift of a slave to one of her daughters, passed only the wife's life estate therein to the donee.

Same—Same—Same—Liability of Life Tenant for Personalty Consumable in Use†—Quære.—Whether the wife, or her estate after her death, was accountable to the legatees in remainder, for such of the moveables as were consumable in the use, such as grain, or for the proceeds of crops left on hand by the testator, or for money or debts collected?

Mabra Madden the elder, of Frederick, by his last will and testament, inter alia, bequeathed as follows: "I desire the moveable property of every description, after the death of my wife, shall be sold, and the proceeds thereof equally divided among my five daughters, Nancy, Susan, Mary, Jane and Elizabeth: after all my just debts are paid, my desire is, that all my moveable property shall be at the intire disposal of my wife, Jane Madden: on her decease, the same to be disposed of as above mentioned." The testator's widow, Jane Madden, and his son Mabra Madden the younger, were his executors. The moveable property, bequeathed by the above recited clause of his will, appeared, from the inventory and appraisement of his estate, to have consisted of household furniture, farming utensils, stock of horses, cows &c. and one male and one female slave; and it was alleged, that he also left a crop on hand and some debts due him, which were included in the same bequest. The female slave died in childbed, soon after the testator's death, leaving an infant child, a girl, afterwards called Lucinda, then only 378 two or three weeks old *feeble, sickly and unlikely to live; and the testator's widow Mrs. Madden, promised her daughter Nancy, that if she would give her care to this child, and should succeed in rearing it, she would give it to her. Nancy Madden, accordingly, took charge of the child, and by the most humane and constant care, succeeded in rearing it. And, some years afterwards, her mother Mrs. Madden and James Bulger, the husband of her sister Elizabeth, and John Thomas, the husband of her sister Jane, joined in a deed, conveying to Nancy Mad-

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***Interlocutory Decrees—Appeal.**—To the point that, upon an appeal from an interlocutory decree, so much of the cause is before the appellate court as the court below has acted upon, and no more, the principal case is cited in Miller v. Cook, 77 Va. 816; Ballard v. Chewning, 49 W. Va. 508, 39 S. E. Rep. 172.

†**Wills—Construction—Life Estate in Personalty—Liability of Life Tenant.**—Where chattels are given to a person for his life, without any limitation over in remainder, the legatee for life has not absolute property in such chattels, but his estate is accountable to the estate of the testator for such chattels as the legatee, in his lifetime, sold and converted to his use, or his administrator, after his death, sold and converted to the use of such legatee's estate: but such is not the case with such chattels as are consumed in their use (*quæ in usu consumuntur*) in which the legatee for life has an absolute property. Bartlett v. Patton, 33 W. Va. 71, 74, 10 S. E. Rep. 21, 22. In delivering the opinion of the court, JUDGE BRANNON said: "There is no question but a life-estate to one with remainder to another in personalty may be given, as recognized in an infinite number of cases. Houser v. Ruffner, 18 W. Va. 253, and cases cited; Frazer v. Bevill, 11 Gratt. 9, Chisholm v. Starke, 3 Call 25, and cases below. In *Madden v. Madden*, 2 *Leigh* 377, it was held that under the will the wife took an estate for life in such of the moveables as were capable of being used and returned in kind, and a *quære* was left whether the wife or her estate was accountable to the legatees in remainder for such of the moveables as were consumable in their use, such as grain or money or debts." See also, citing the principal case, Bartlett v. Patton, 33 W. Va. 80, 10 S. E. Rep. 24; *foot-note* to Cross v. Cross, 4 Gratt. 258 (containing extract from Bartlett v. Patton, 33 W. Va. 80, 10 S. E. Rep. 24).

In Bartlett v. Patton, 33 W. Va. 75, 10 S. E. Rep. 22, it is said that, in the principal case, JUDGE GREEN leaned strongly against the legatee for life having an absolute property even in specific bequests of articles consumable in their use.

Same—Same—Devise for Life with the Power of Disposal—Effect.—Numerous cases show that where a power of disposal accompanies a bequest or devise of a life estate, whether such estate be given expressly or by implication, the power is limited to such disposition as a tenant for life can make, unless there are other words clearly indicating that a larger power was intended. Miller v. Potterfield, 86 Va. 883, 884, 11 S. E. Rep. 486, citing, among others, the Virginia cases of *Madden v. Madden*, 2 *Leigh* 377; Johns v. Johns, 86 Va. 333, 10 S. E. Rep. 2.

Same—Same—Devise for Life with Absolute Power of Disposal—Effect.—It is settled, that if a testator gives property to a devisee or legatee, to use or dispose of at his pleasure, that is to consume or spend, sell or give away, at his pleasure, such devisee or legatee has the fee simple or absolute property, even though his interest in it be called by the will a life estate; and there be a provision in the will, whereby what remains of the property at the death of a devisee or legatee, is given to another person. Milhollen v. Rice, 13 W. Va. 519, citing, among others, the Virginia cases, Riddick v. Cohoon, 4 Rand. 547; *Madden v. Madden*, 2 *Leigh* 377, 385; Burwell v. Anderson, 3 Leigh 348, 355; Melson v. Cooper, 4 Leigh 408; May v. Joynes, 20 Gratt. 692; Sprinkle v. Hayworth, 26 Gratt. 384. See also, *foot-note* to May v. Joynes, 20 Gratt. 692, collecting many cases in point and discussing this subject at some length.

It was said by JUDGE GREEN in *Madden v. Madden*, 2 *Leigh* 377, in an able review of the cases on the subject, that it was settled law that, *whenever there is an interest given, coupled with an absolute power of disposition in respect to all property of every description, real and personal, the first taker would have an absolute property, and that there was no distinction between a case of a gift for life, with a power of disposition added, and a gift to one indefinitely, with a superadded power to dispose of by deed or by will.* HARRISON, J., delivering the opinion of the court in Farish v. Wayman, 91 Va. 435, 21 S. E. Rep. 810.

But in Milhollen v. Rice, 13 W. Va. 526, JUDGE GREEN, who delivered the opinion of the court, said: "JUDGE GREEN in a dissenting opinion in *Madden v. Madden's Ex'rs*, 2 *Leigh* 380, denied (with some qualifications) that there was an established distinction between a case of a gift for life, with a power of disposition added, and a gift to one indefinitely,

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den, in consideration of her care, trouble and expense in rearing the girl Lucinda, all their right, title and interest in her. Under this title, Nancy Madden claimed and held the girl in possession, till her mother's death, thirteen years after the deed was made.

Upon a bill exhibited in the superiour court of chancery of Winchester, by Nancy Madden against Samuel Madden and John Ripler executors of Mabra Madden the younger, who was surviving executor of his father, the testator Mabra Madden the elder, the executor also of his mother Jane Madden, and James Bulger, and Elizabeth his wife, John Thomas and Jane his wife, Thomas Hunter and Mary his wife, and Thomas Jones and Susan his wife, the following questions of law arose: 1. Whether the will of Mabra Madden the elder, in giving his wife the intire disposal of his moveable property, did not, in effect, give her an absolute estate therein, so that her gift of the female slave in question to Nancy Madden, sufficed to pass a perfect title to the donee? Or, if not, 2. Whether, as Mrs. Madden was an executrix of that testator, her conveying of this slave was effectual to pass the legal title to the donee, leaving the executrix accountable for the value to the legatees in remainder? If neither, 3. Whether, considering the care, trouble and expense, incurred by Nancy Madden, in rearing this slave, she was not entitled to remuneration from the legatees in remainder?

Upon these points the chancellor was of opinion, that the testator's widow Jane Madden, took under his will, only a 379 *life interest in the moveable property and could transfer no more to Nancy Madden, by any deed or gift made by her in her own right; that if the gift could be regarded as made by her in her executorial character, it would be void, since an executor cannot make a valid gift of his testator's property, though his sale to a purchaser for valuable consideration without notice of fraud, it is good; that, therefore, Nancy Madden had no title to or right in the slave Lucinda, except as a legatee in remainder, and as assignee of the right of two others of the legatees; that her care and expense in rearing this slave from her childhood, could give her no claim for remuneration against the legatees in remainder, that being properly a charge against her mother, who, as the owner for life, was bound to take care of and support her; and that the court ought not to impede the sale of this slave by the executors, since she was a subject otherwise indivisible among the legatees in remainder, and since the testator expressly required all the property remaining at the death of his wife to be sold, and the proceeds divided among his five daughters, and the sureties in the administration bond are responsible to the parties, if the executors fail to account for the proceeds. And the chancellor made an interlocutory decree in the cause, grounded on these principles.

He also intimated an opinion on another point (though he did not decide it, or found any part of his decree upon it, because all the parties interested in the point, were not then regularly convented before the court) namely, that the bequest of the moveable property, to the testator's wife for life, so far as it affected articles the use of which consisted in the consumption of them (such as grain) with a power of intire disposal, was, according to the better opinions, absolute, and a limitation of them over in remainder, ineffectual; and though such a bequest of money might not, generally, fall within the same principle, yet the strong language of this will, that after the testator's debts should be paid, all his moveable property should be at the intire disposal of his wife, excluded the 380 notion of her accountability *even for money, or indeed, for any articles except such as were susceptible of being used and returned in kind.

Nancy Madden appealed from the chancellor's interlocutory decree to his court, where the cause was argued by Nicholas for the appellant and Leigh for the appellees, upon the points above stated, and upon other points also presented by the decree, which it is needless to report, because, though they were the grounds on which this court reversed the decree, they depended on the peculiar facts and circumstances of the case, and involved no general principle.

CARR, J. Upon these appeals from interlocutory decrees, so much of the cause only is before the court as the chancellor has acted upon: this, I think, has been the constant course of the court. The chancellor, then, has decided, in the first place, that Nancy Madden had no title to or right in the slave Lucinda, but as a legatee of her father and assignee of other legatees; that Mrs. Madden the testator's widow, took, under his will, not an absolute prop-

with a superadded power to dispose by deed or will. He was apparently misled by the cases of Goodtitle v. Otway, 2 Wills. 6; Beachcraft v. Broome, 4 T. R. 441; Barford v. Street, 16 Ves. 135; Irwin v. Farrer, 19 Ves. 86, which are the only cases he cites to sustain his view.

"All these cases we have examined and commented on. JUDGE GREEN seems however to have entertained this view but a brief time. He concurred in the decision in Burwell Ex'rs v. Anderson's Adm'r, etc., 3 Leigh 356, decided shortly afterwards. JUDGE TUCKER, in delivering the opinion of the court in that case, says: 'A devise to A, to dispose of at his will and pleasure, gives a fee simple: but a devise to a wife for life, and after her decease she to give the same to whom she will, passes but a life estate with a power. When such inconsistent life estate is given, the fee does not pass; for the whole matter rests upon intention.'

"I conclude therefore, as stated by Sir William Grant in Bradley v. Westcott, 13 Ves. 453, and by CHANCELLOR KENT in Jackson v. Robbins, 16 Johns. 588, that the distinction, on which I have been insisting, is perfectly established; and that a devise or gift to A and such persons, as he shall appoint, is a fee simple, or absolute property in A without an appointment; but if it is to him for life, and an unlimited power of appointment is superadded, he has but a life estate. And if the superadded power was, to appoint a specified class of persons, it would *a fortiori* not enlarge his express life estate to a fee simple, or absolute property."

Same—Rule of Construction.—In the principal case, speaking of the will therein construed, CARR, J., said (at page 380): "There are no technical words or forms of expression used in the will. It is, evidently, the production of a plain man, who, though he understood very well what he meant to say, and was able to express himself quite intelligibly, knew nothing of legal forms or legal phrases. To ascertain his meaning, we must not look to treatises on wills, or to adjudged cases, but simply to the words he has used." These words of JUDGE CARR were approved by LEWIS, P., speaking for the court in Miller v. Potterfield, 86 Va. 878, 11 S. E. Rep. 486.

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erty in the slaves included in the moveable property thereby bequeathed, but only a life estate. The inquiry is as to the meaning of the bequest: it is a pure question of intention. There are no technical words or forms of expression used in the will. It is, evidently, the production of a plain man, who, though he understood very well what he meant to say, and was able to express himself quite intelligibly, knew nothing of legal forms or legal phrases. To ascertain his meaning, we must not look to treatises on wills, or to adjudged cases, but simply to the words he has used. There were but two slaves included in this bequest of the moveable property, one a man of trivial value, the other a female (the mother of Lucinda) who died shortly after the testator. If Lucinda was the property of Mrs. Madden, it is because her mother was given to her by the will. "I desire the moveable property of every description, after the death of my wife, shall be sold, and the money divided among my five daughters." This sentence it is impossible to misunderstand, or to have 381 *a doubt about: it expresses the clear will of the testator on two points, 1. that all his personal estate was to be sold for the benefit of his daughters, and 2. that this sale was to take place after the death of his wife. This (as lawyers know) would have given his wife a life estate in the personal property, by implication; but the testator probably had no idea, that a direction to sell after his wife's death, would imply an estate for life to her; and if he did know it, he chose not to rest it on implication, but to give it to her expressly. He therefore adds, "after all my just debts are paid, my desire is, that all my moveable property, shall be at the intire disposal of my wife." Now, is there any thing in this provision, incompatible with the first? If the testator had stopped here, does not every one see his meaning at a glance? At my wife's death this property shall be sold; but till then, she shall have the intire disposal of it. Is there any thing in these words "intire disposal" which, of necessity, and in the teeth of the preceding sentence, vests the absolute property in the wife? They are not technical words, to which a fixed meaning is attached, and that so well known, that we must suppose the testator so used them. They are such words as may well be explained, and their operation either enlarged or restricted, by the context. Thus, the direction being given to sell the property at the wife's death, the intire disposition given her, means the free use and enjoyment, the uncontroled possession and ownership, until her death, but such a possession, ownership and disposal, as may leave the property to be sold at her death. This, I say, would seem to me the plain construction, if the testator had stopped at the sentence giving his wife the intire disposal: but he immediately adds, "On her decease, the same to be disposed of as above mentioned;" thus repeating his favorite wish of a sale and division among his daughters, and making, as he no doubt thought, "assurance doubly sure." Small indeed, would seem to be the worth of language, or the security of wills, if an idea thus clearly expressed, thus solicitously recurred to, and anxiously 382 inculcated, can be *explained away.

It is impossible to suppose, that the testator meant by the gift to the wife, to defeat and destroy the sale directed at her death; and yet he must so have meant, if he meant to give her the intire and absolute interest in the property. Indeed, it is not, I believe, contended that the testator meant to vest in his wife the absolute property, but that he intended to give her a life estate, with an absolute power of disposition, leaving only so much to be sold at her death, as should be undisposed of by her, and that, by consequence, this power of disposal vested in her the absolute interest in the whole, whether disposed of or not, and rendered the direction to sell at her death void, not by force of the testator's intention, but by operation of law. This argument concedes, 1. that the testator intended to give his wife only a life estate; and 2. that he intended a sale of the property left at her death. But, it is said, he meant to give her an absolute power of disposal of the property, and this converts the estate for life into an absolute estate, and destroys the intention to give it for life, and the direction to sell after her death. Thus, while we are looking for intention alone, we suffer one doubtful phrase, "intire disposal," a phrase having nothing technical, no settled meaning, but liable to be enlarged or restricted by the context, to overrule and destroy the settled wish and will of the testator, twice expressed in words as clear as light, viz. that his moveable property of every description should be sold at the death of his wife, and the money divided among his daughters. To such a construction I can never assent. I am clearly of opinion, that the testator meant to give his wife, and has given her, a life estate in the moveable property, with a power of disposal commensurate with that estate; and at her death the property to be sold, and the money divided among his daughters. I agree, therefore, with the chancellor, that the testator's widow Mrs. Madden, had only a life estate in the slaves in question, and could give no more by her deed to the appellant. His other positions, that an executor cannot make a valid gift of his testator's property, and that 383 the appellant can have no claim *to remuneration for her trouble and expense in rearing this slave, against her co-legatees in remainder, seem to me indisputably correct; indeed, they have hardly been contested. And these are the only principles declared, the only points of law decided, by the decree.

GREEN, J. The provisions of the will of Mabra Madden the elder, directing that his moveable property of every description, after the death of his wife, should be sold, and the proceeds divided between his daughters, and that, after the payment of his debts, all his moveable property should be at the intire disposal of his wife, and on her decease the same should be disposed of as before mentioned, are so inconsistent, that they would, if taken literally, utterly destroy each other. Such a construction ought not to be admitted, if by any other,

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consistent with the probable intention of the testator, the provisions can be considered as each modifying the other, without destroying their whole effect.

The judgment of the court below upon this will, was 1. that it gave only a life estate to the widow: 2. that such a gift with a power of disposition of articles, such as grain, the use of which consists in its consumption, is absolute, and a limitation over ineffectual: 3. that although money may not, generally, fall within this principle, yet the strong language of this will, that after the debts were paid, all the testator's moveable property should be at the intire disposal of his wife, excluded the notion of her accountability for money, or for any articles except such as are susceptible of being used and returned in kind. And, upon these principles, the court thought, that neither the widow nor the executors of Mabra Madden were accountable to his daughters, for money received on account of outstanding debts due to the testator, or for the sales of crops on hand or growing at the time of his death. I infer also, from an expression in the decree, "since the testator expressly requires all the property remaining at the death of his wife, to be sold and the proceeds divided amongst his five daughters," 384 *that the court was of opinion, that the power of disposition given to the wife had the effect of restraining the testator's disposition in favor of his daughters, to such of the property only as remained at his wife's death undisposed of by her. And this, I am perfectly convinced, was the real intention of the testator.

The first sentence of his will, on this subject, by directing, that his moveable property of every description, should after the death of his wife be sold, gave her a life estate by implication in the whole: the second modified it, by subjecting the whole to her intire disposition, not with the intention of revoking the former in toto, but only so far as the widow should exercise that power of disposition: and the last was a mere repetition of the first, and modified alike by the second. This construction attributes to the testator a reasonable intention, and one not at all uncommon, to give to a favorite legatee the use of a fund for life, with a power to dispose of as much of it as might be necessary to the occasions of such legatee, to be judged of by the legatee, and with a desire, that so much of it as was not disposed of by the first taker, should go to the persons next in his affections; particularly, when the last are in the same relation to the first taker as to the testator, and likely to be as much in the affections of the first taker as his own. This construction too would leave every clause of the will to have some effect. If, on the contrary it is supposed, that the testator intended a power of disposition given to his wife, only co-extensive with the interest for life previously given, it would render that provision utterly nugatory; for the legatee would have had such a power of disposition as a necessary incident to her interest for life. And if such a construction could be put upon a power given in general terms, it is impossible to apply it to one given in such broad emphatic terms as "the intire disposal:" a power of disposition for life, is not a power of intire disposition. It would be still more extravagant to suppose, that the testator, when he gave the same power, in the same terms, as to all his 385 *personal property, intended, and had in his mind, that it should operate as to some articles, (such as would necessarily be consumed in use, money, debts and the proceeds of crops made for sale and sold) and give his wife an absolute right of property in them, and as to others (such as could be used and returned in specie) only a power of disposition of her interest for life. Whether such is or is not the legal effect of such a power, connected with a life estate, is another question, which will be attended to; but, surely, such an effect could not have been the intention of the testator.

If the court below, as I have supposed, entertained the same opinion which I have expressed as to the construction of the will, that the testator intended to give only a life estate in his personal property to his wife, with a power of absolute disposition over all or any part of it at her pleasure, and that only such part as was not so disposed of should be sold at her death, and disposed of according to his will, then it was wholly unnecessary to go any further, than to inquire whether such a disposition could be legally carried into effect? If it could, then the will of the testator controlled the disposition of the whole alike, without any discrimination. If it could not, because the limitation over in such a case would be void, as being contrary to settled rules of law, the limitation would be wholly frustrated, and the first taker, by virtue of such an absolute power of disposition, would have the absolute property in all, and not a part only of a peculiar description. And this is the settled law (wherever there is an interest given coupled with an absolute power of disposition) in respect to all property of every description, real and personal, as was decided in Riddick v. Cohoon, 4 Rand. 547, upon many authorities there collected. That case and those there cited, are all cases of gifts, indefinite, or expressly in fee; and it may be supposed, that the rule applies only to such cases, and not to those which are limited to an estate for life, either expressly or by implication, especially, as it was said 386 by the master of the *rolls in Bradley v. Westcott, 13 Ves. 452, that there was an established distinction between a case of a gift for life with a power of disposition added, and a gift to one indefinitely with a superadded power to dispose by deed or will. I am satisfied there is no such distinction, except so far as the character of the estate first given, may, in doubtful cases, influence the construction of the will, as to the extent of the power given; but when the will expressly gives a power of absolute disposition, the effect is the same in both cases. Thus, in Goodtitle v. Otway, 2 Wills. 6, a devise to one for life, and after death to her issue, but if none that she should have power to dis-

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pose of the lands at her will and pleasure, it was held, that she had an estate tail with a fee simple upon contingency, and not a mere power to dispose or appoint. And Beachcroft v. Broome, 4 T. R. 441, is to the same effect. It may be said, that there was in those cases, no limitation over upon the failure of the tenant for life to dispose of the subject, and that circumstance makes a difference: but it does not. In Barford v. Street, 16 Ves. 135, the devise was of real and personal estate, in trust to pay the rents, dividends &c. to a married woman for life, and after her death, to convey &c. according to her appointment, with a limitation over in case of her death without making an appointment: the master of the rolls held, that she had an absolute property immediately, and decreed the trustees to convey it absolutely to her in her life time. So, in Irwin v. Farrar, in the Exchequer, 19 Ves. 86, a sum of money was given to trustees to be invested in government securities, the dividends thereof to be paid to a niece of the testatrix for life, and after her decease, to such person or persons, or for such use or uses as she should appoint by will or otherwise, and impowering her to apply the fund, if she chose, to the purchase of an annuity, so that it was purchased and secured, with the approbation of the trustees, and that she should not have power to sell such annuity: it was held, that the legatee had an absolute power of disposition over the whole fund, and decreed, that the 387 trustees should pay over the legacy *to her for her own use, and to be at her own disposal. In the case above stated of Barford v. Street, the estate was limited in express terms, to the life of the first taker; it was vested in trustees; and there was a limitation over, in case she should fail to dispose of it by appointment: and in Irwin v. Farrar, the first taker had no power to dispose of it, according to the literal terms of the will, but by some act to take effect after her death. In our case, there is no limited estate in terms; no trustees are interposed; and the power is immediate and unlimited as to manner, object and subject. The observation of the master of the rolls, in Bradley v. Westcott, in respect to a settled distinction in such cases, between an indefinite interest, and an express life estate, given in the first instance, was made in reference to the effect of that circumstance, in determining the extent of the power. There, the testator gave all his personal property to his wife for life, "to be at her full, free and absolute disposal and disposition, during her natural life, without being in any wise liable to be called to any account of or concerning the amount, value of particulars thereof, by any person or persons whatever," and from and after her decease, he gave a certain specified part thereof, to such persons as his wife by her will duly executed should direct and appoint, and if she should make no such appointment, that part was to fall into the residue, which should remain undisposed of by his wife at the time of her decease; and all the rest, residue and remainder of his said personal estate, which should remain undisposed of by his wife at the time of her decease, he gave to a residuary legatee. The master of the rolls held, that the express estate for life, and power of disposition, for her natural life only, given in the first instance to the wife, were not enlarged by the subsequent declaration exempting her from account &c. nor by the subsequent disposition of the property remaining undisposed of by the wife at her decease; because that would allow an implication from equivocal terms to control an express limitation of the estate and of the power of disposition, to her life only; and, 388 especially, because a power of *appointment in absolute property by her will, was given to the wife, as to a specified part of the property, which contradicted the idea of a general power over the whole: and that the exemption from accountability &c. was also only intended to protect her from any trouble, in that way, during her life only. He admitted, that it was necessary to construe this to be either a mere interest for life (with the greatest power of disposition, which one having such an interest could enjoy) or to be property in the widow: that there was no medium: for he could not say, that she had a life interest, with a power to dispose of the whole, if she thought fit, but that the will shall operate upon what she should leave undisposed of. Upon that construction it would be property, as it would be absolutely uncertain what would be the subject of the residuary bequest. And, consequently, he held that she had only a life estate, even in that over which she had a power of appointment by will; and that her will giving in general terms all her property did not pass it to her legatee. In our case, we have no express estate for life, no express limitation of the power of disposition to the continuance of the life estate, and no particular power to dispose of a specified part of the property, to control, not an implied power to dispose of all, (as in that case) but an express power to that effect, in our case.

If it was the opinion of the chancellor, that the testator intended only to give a power of disposition co-extensive with the interest of the donee for life, and that, in such a case, the law controlled the intention of the testator, in respect to such articles as could be only used by consuming them, because incapable of limitation, and gave the absolute property of such to the donee; and that the existence of the power, though nugatory to all other purposes, would have the effect of enlarging the scope of that rule of law, so as to embrace other articles not necessarily consumed in use, such as money, debts collected, and the proceeds of crops sold: I cannot assent to either of these propositions. As to the last, the intent of the testator was, avowedly, 389 the *same as to his whole moveable property of every description; and if his intention was invalid as to a part, because contrary to a rule of law, and valid as to the rest, it would be because the law itself marks the line of discrimination contrary to the testator's will; and it would be extravagant to say, that the intention of the testator could operate either way,

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beyond the legal line of discrimination. If it could affect any thing beyond that line, it must of necessity affect all alike. As to the first proposition, I do not think that the doctrine is true, that an interest given for life in things quæ ipso usu consumuntur, confers, by operation of law, an absolute property, with or without a power of disposition, which, if connected with such an interest, must operate by its own force, and alike upon all descriptions of property given for life, either extending the life estate to an absolute property in all or none. The master of the rolls, in Randall v. Russell, 3 Meriv. 194, did indeed assert, that a specific bequest of such articles for life (without any express power of disposition) did vest an absolute property in the first taker, but admitted, that in case of a residuary bequest it did not, and that in such a case the limitation over would be valid. In the present case, the bequest was residuary, or of the same nature, being of things of all descriptions in mass, which is the only ground of discrimination between a specific and residuary bequest. It is therefore unnecessary, in this case, to examine the general question at large: but I must be permitted to say, that my opinion, made up on great consideration and given judicially in an important case, with this opinion of the master of the rolls before me, was, and is, that even in the case of a specific bequest of such articles for life with a limitation over, the limitation is good; that the intention of the testator, being in such case most obvious, that the legatee in remainder shall have the benefit of the subject after the death of the first taker, it ought to be carried into effect, if possible. And it may be effectuated by requiring the representative of the first taker, to deliver articles of the same kind and quality, or to pay their 390 *value to the remainderman. This is clearly the civil law, from which the principle of the common law now prevailing was taken, and is intirely just, and no way inconvenient in its execution.

If I am right in supposing, that the intention of the testator was to give a life estate in the whole of his personal property of every description to his wife, with an absolute power of disposition as to all, and that so much thereof as might be left undisposed of by her at her death, should be sold &c. then an absolute property in the whole was vested in her, whether disposed of by her or not, and the limitation over was void, not by force of the testator's intention, but by operation of law; and her conveyance of the slave in question passed an absolute property; for, though it may be that she believed that she only had a life estate, which she intended to pass by the deed, yet as that conveyed, in terms, all her right and title, it passed the absolute property to the grantee. Wiseley v. Findlay, 3 Rand. 361.

Suppose, however, that in such case an absolute property in the whole does not vest in the first taker, by force of a rule of law rendering the limitation over as to the part undisposed of by the first taker void, and that the intention of the testator in respect to the disposition of such part can be legally carried into effect; still the actual disposition of any part by the first taker, would vest an absolute property in the devisee or vendee, as the case might be, and effectually withdraw it from the operation of the will, directing only that such of the property as remains undisposed of by the first taker, shall at her death be sold &c. The gift or sale of the slave in question, when a sickly and motherless infant of three weeks old, by Mrs. Madden to the appellant, in consideration of her taking care of it and preserving its life, was an intire and absolute disposition of it, as was her subsequent conveyance of it by her deed, not as an executrix, but as a legatee for life with an absolute power of disposition. The suggestion, therefore, in the decree under consideration, that an executor cannot 391 give away his testator's *property, has no application to the case; but even an executor would have that power, if the intire disposition was given to him by the will.

CABELL, J. The controversy in this case depends upon the construction of the will of Mabra Madden, the elder; and the question is as to the testator's intention.

It is agreed, on all hands, that he intended his wife to have a life estate in his moveable property: but the controversy is, whether he did or did not intend to give her any other power over the property than that which would necessarily belong to her as mere tenant for life? It is contended, on the one hand, that she had no other interest or power, than as mere tenant for life; on the other, that she had not only a life estate in the property, but the power to dispose absolutely of any part or of the whole thereof, so as to leave nothing for the daughters, except such as she might fail to dispose of.

There is not, in my opinion, any thing in this will, to justify the belief, that the testator intended thus to subject the interests of his daughters to the power of his wife. It is not usual for the father of a large family to pursue such a course; and I think it an unnatural course, unless there be particular circumstances which require it. In a doubtful case, therefore, I should feel no disposition to attribute such an intention to a testator. But, in this case, the testator has expressed himself so strongly as (in my judgment) to leave no doubt of his intention. The solicitude which he has manifested for the interests of his daughters, is at least equal to that which he has shewn for the interest of his wife, though he has provided for them in different ways. To his wife he gives the enjoyment of the property during her life; but, if there be any force in language, he also intended that his daughters should enjoy it after her death. It is somewhat remarkable, that the clauses of the will on which the question arises, commence and end with the declaration, that his daughters are to have, after the death of his wife, 392 *the benefit of all of his moveable property. This is certainly so, as to the first clause; for the expressions there are, that the moveable property of every description, after the death of his beloved

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wife, should be sold, and the proceeds thereof equally divided among the five daughters. The same idea is as strongly expressed in the last clause, where, after having in the intermediate clause declared that all his moveable property should be at the intire disposal of his wife, he immediately adds, "on her death the same shall be disposed of as above mentioned;" that is, sold for the benefit of his daughters. The word "same," in the last clause, refers to the property which in the preceding clause he had put at the intire disposal of his wife; viz: all his moveable property. The testator could not have intended, that his wife should have the power to dispose, absolutely, of all his moveable property, so as to leave none of it for his daughters, and yet intend that his daughters should have it all, after her death. The two intentions are inconsistent with each other. When contradictory expressions occur in wills, it is our duty to reconcile them if we can. As, then, the testator has declared, in the most express and positive terms, that his daughters are to have all his moveable property after his wife's death, and that in the mean time she is to have the intire disposal of it, it seems to me impossible to resist the inference, that, by the terms intire disposal of his wife, he meant no more than that she should have that sort of intire disposal, which is necessary to the full and uncontroled enjoyment of it during her life. I am therefore of opinion, that the wife took only a life estate under the will, and had no right to give away the slave in question. As to the points of law, which have been discussed at the bar, though not decided by the chancellor, I give no opinion on them; because, according to the view which I have taken of the case, some of them can never arise, and because it would be premature to decide the others, before all the parties interested in them shall be brought before the court.

393 *CARR, J., thought the decree right in omnibus; but, the other two judges, holding that it was erroneous upon the points before alluded to, as depending upon the peculiar facts and circumstances of the case, involving no general principle, and therefore not necessary to be noticed in the report, the decree was reversed, and the cause remanded to the court of chancery.

Jacobs v. Hill and Others.

November, 1830.

(Absent COALTER, J.)

Sheriff*—Bond of Deputy†—Construction—How Long Binding on Deputy's Sureties.—A bond is executed to a sheriff, during the first year of his shrievalty, by a deputy sheriff and his sureties, the condition whereof recites, that the sheriff has been commissioned sheriff of N and that the deputy has undertaken the duties of the said office for and during the time the sheriff may continue in office, &c.: HELD, that the contract here recited is a deputation of the office not only for the first but for the second year also of the shrievalty, and the sureties are bound for the conduct of the deputy during both years.

Same—Motion against Deputy and Sureties—Interest.‡—The statute 1 Rev. Code, ch. 78, § 33, giving a summary remedy by motion for a sheriff against his deputy and his sureties, does not authorise the court to allow interest.

Same—Same—Evidence against Sureties—Judgment against Sheriff.§—A motion is made against a sheriff for default of his deputy, upon which the sheriff, with assent of the deputy, but without the knowledge of his sureties, confesses judgment: HELD, the record of this judgment, is admissible

***Sheriffs.**—See generally, monographic *note* on "Sheriffs and Constables" appended to Goode v. Galt, Gilm. 152.

†**Same—Bond of Deputy—Nature of.**—A contract between a sheriff and his deputy is a private affair, and therefore the bond of the deputy is not an official or statutory bond, with condition prescribed by statute, but may contain just such provisions to protect the sheriff, and impose duties, obligations, and liabilities on his agent, the deputy, as may be inserted in it. It is a common-law bond, not a statutory one. Poling v. Maddox, 41 W. Va. 781, 24 S. E. Rep. 1000, citing the principal case to sustain the proposition.

‡**Same—Motion against Deputy and Sureties—Interest.**—The principal case was cited with approval in Willard v. Overseers of Poor, 9 Gratt. 141.

§**Same—Same—Evidence against Sureties—Judgment against Sheriff—Effect.**—Crawford v. Turk, 24 Gratt. 176, was an action of debt, brought by a sheriff against his deputy and the sureties of the deputy, on the official bond of the deputy, to recover the amount of a judgment rendered against the sheriff for the default of the deputy. The question was presented to the court of appeals whether the judgment rendered against the sheriff, the deputy having attended the trial and made full defense to the action, was binding and conclusive upon the sureties of the deputy in the action of the sheriff against the deputy and his sureties. It was held that the judgment was conclusive evidence against the sureties of the deputy as well as against the deputy himself. JUDGE MONCURE, who delivered the opinion of the court, discusses at some length the principal case, Munford v. Overseers, 2 Rand. 313, and Cox v. Thomas, 9 Gratt. 323, and shows that they are not opposed to the view which is taken in the case at bar. Though he seems to approve the proposition laid down in Munford v. Overseers, 2 Rand. 313, that a judgment against a principal in a bond is not conclusive against his sureties, he thinks that the case of a deputy and his sureties, so far as it relates to the effect upon the sureties of a judgment against the deputy, does not come within the purview of the rule governing the case of a principal and his sureties: but that the bond given by a deputy and his sureties is a bond of indemnity, and the case of a deputy and his sureties falls under that class of cases in which those who are not parties to the suit, and do not claim under either of the parties, may be bound by the judgment.

In discussing the decision in the principal case, he says: "It was not necessary to decide, and was not decided in that case that the judgment against the sheriff was not conclusive evidence against the sureties of the deputy, but it was sufficient to decide, as it was decided, that the said judgment was *prima facie* evidence against them. The remark of JUDGE CARR in delivering the opinion of the court, that 'This, we think was ample evidence of the fact, and charged his sureties, unless disproved by them,' was extrajudicial as to the concluding words, 'unless disproved by them,' and seems in that respect to have been made without adverting to the distinction noticed by JUDGE GREEN, as before mentioned. 2 Rand. 318. JUDGE CARR treated the case before him as a case falling under the general rule which governs the case of principal and surety, instead of a case falling under the exceptions, which includes cases of contracts of indemnity and the like. Whether it properly fell under the one or the other, the result of the case would be precisely the same.

"In that case the judgment against the sheriff was by confession, though with the assent of the deputy, and it was therefore contended by the sureties of the deputy, that it did not bind them; there being, as they said, no other evidence of the deputy's default. But the court said the record showed that the motion against the sheriff was for judgment for the amount of the clerk's tickets for fees put into the hands of his deputy, and that upon this motion the deputy assented in open court to the confession of judgment by the sheriff; in other words confessed that he had received the clerk's tickets and had not accounted for them; this, the court thought, 'was ample evidence of the fact, and charged his sureties, unless disproved by them.' Had the judgment been rendered against the sheriff, not by confession, but *in invitum*, and against the utmost resistance of the deputy, the court might have thought the judgment conclusive, not only against the deputy but also against his sureties. In the case now under consideration the judgment against the sheriff was *in invitum*, and

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